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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS–FV–12–0044; FV12–948–2 FR]

Irish Potatoes Grown in Colorado; Reestablishment of Membership on the Colorado Potato Administrative Committee, Area No. 2

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule reestablishes the membership on the Colorado Potato Administrative Committee, Area No. 2 (Committee). The Committee locally administers the marketing order regulating the handling of Irish potatoes grown in Colorado. This action modifies the Committee membership structure by amending the position allocated to a producer from Conejos County. Beginning with the 2013–2014 term of office, the designated Committee position will be allocated to an eligible producer operating in either Conejos or Costilla County. This action is expected to improve Committee representation for producers from this sub-region of the production area.

DATES: *Effective Date:* May 24, 2013.

FOR FURTHER INFORMATION CONTACT: Sue Coleman, Marketing Specialist, or Gary Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or Email: *Sue.Coleman@ams.usda.gov* or *GaryD.Olson@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Jeffrey.Smutny@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule reestablishes the membership structure of the Committee. This action modifies the current Committee membership structure by amending the position currently allocated to a producer from Conejos County. Beginning with the 2013–2014 term of office, the designated Committee position will be allocated to an eligible producer operating in either Conejos or Costilla County. This action is expected to improve Committee representation for producers from this sub-region of the production area. This change was unanimously recommended by the Committee at a meeting held on July 19, 2012.

Section 948.4 of the order divides the State of Colorado into three areas of regulation for marketing order purposes. These areas include: Area No. 1, commonly known as the Western Slope; Area No. 2, commonly known as San Luis Valley; and, Area No. 3, which consists of the remaining producing areas within the State of Colorado not included in the definition of Area No. 1 or Area No. 2. Currently, the order only regulates the handling of potatoes produced in Area No. 2 and Area No. 3. Regulation for Area No. 1 has been suspended.

Section 948.50 of the order establishes committees as administrative agencies for each of the areas set forth under § 948.4. The reestablishment of areas, subdivisions of areas, the distribution of representation among the subdivision of areas, or among marketing organizations within the areas is authorized under § 948.53. Such reestablishment is made by the Secretary upon the recommendation of the affected area committee. In recommending any such changes, the area committee shall consider, among other things, the relative production and the geographic locations of producing sections as they would affect the efficiency of administration of the order.

Section 948.150(a) of the order's administrative rules prescribes the Area No. 2 Committee membership, as reestablished under previous rulemaking actions, with nine producer members and five handler members. The nine producer positions are designated to represent various sub-regions of the production area. Currently, § 948.150(a)(3) specifically allocates one of those producer positions to a producer from Conejos County.

At its meeting on July 19, 2012, the Committee unanimously recommended modifying the Committee membership structure by amending the position allocated to a producer from Conejos County. The Committee acknowledged that the position has been increasingly hard to fill as the number of potato producers located in Conejos County eligible to serve on the Committee has declined. The Committee attributed the decrease in the number of producers to a number of issues in that area,

including competition from alternative crops and industry consolidation.

The Committee believes that allocating the position specified in § 948.150(a)(3) to a producer from either Conejos or Costilla County, instead of just from Conejos County, will increase the pool of potential Committee participants from that general sub-region of the production area. Conejos County and Costilla County adjoin each other on the southern boundary of the production area and share similar climates, soils, production resources, and marketing opportunities. Producers from either of the two counties will be able to adequately represent this sub-region of the production area on the Committee. Currently, producers from Costilla County are represented on the Committee by the position allocated in § 948.150(a)(5), which represents all other counties in Area No. 2 that do not have representation specified in § 948.150(a)(1) through (4). This change is expected to increase the pool of potential participants eligible to serve on the Committee and to improve representation for producers from both Conejos and Costilla Counties. This action was unanimously recommended by the full Committee.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA)(5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 80 handlers of Colorado Area No. 2 potatoes subject to regulation under the order and approximately 180 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

During the 2010–2011 marketing year, the most recent full marketing year for which statistics are available, 15,583,512 hundredweight of Colorado Area No. 2 potatoes were inspected under the order and sold into the fresh market. Based on an estimated average f.o.b. price of $12.75 per hundredweight, the Committee estimates that 71 Area No. 2 handlers, or about 89 percent, had annual receipts of less than $7,000,000. In view of the foregoing, the majority of Colorado Area No. 2 potato handlers may be classified as small entities.

In addition, based on information provided by the National Agricultural Statistics Service, the average producer price for Colorado fall potatoes for 2010–2011 was $9.37 per hundredweight. The average annual fresh potato revenue for each of the 180 Colorado Area No. 2 potato producers is therefore calculated to be approximately $811,208. Consequently, on average, many of the Area No. 2 Colorado potato producers may not be classified as small entities.

This final rule reestablishes the Area No. 2 Committee membership structure currently prescribed under § 948.150(a) of the order by amending the position allocated to a producer from Conejos County (§ 948.150(a)(3)). Beginning with the 2013–2014 term of office, the designated Committee position will be allocated to an eligible producer operating in either Conejos or Costilla County. Authority for this action is contained in §§ 948.50 and 948.53.

At the meeting, the Committee discussed the impact of this change on handlers and producers. This action is expected to improve Committee representation for producers from this general sub-region of the production area. Further, the modification is not anticipated to have any financial or regulatory impact on the area's potato producers or handlers. Lastly, the benefits resulting from this action are equally available to all handlers and producers regardless of their size.

The Committee discussed alternatives to this change including taking no immediate action, reviewing the issue in the future, and redesignating the Committee position to be an at-large position that could be filled by producers from across the entire production area.

The Committee believes that representation on the Committee by producers from each of the sub-regions of the production area is important for the efficient administration of the order. The Committee also feels that the declining trend in the number of producers in Conejos County is not likely to be self-reversing. As such, the Committee determined that there would not be any benefit to delaying corrective action to resolve this Committee representation issue and readdressing it in the future. In addition, the Committee determined that changing the position designated to a producer from Conejos County into an at-large position could jeopardize the representation for producers from that southern sub-region. As such, the Committee concluded that neither of the above options would be sufficiently responsive to the current situation and that modifying the membership structure as recommended is the best course of action to take at this time.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0178. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

Further, the Committee's meeting was widely publicized throughout the Colorado potato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the July 19, 2012, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on February 11, 2013 (78 FR 9629). An internet link to the proposed rule was published in a monthly industry newsletter distributed to growers, handlers, and other interested persons. Finally, the proposed rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending April 12, 2013, was provided to allow interested persons to respond to

the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this action, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this final rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because the 2013–2014 term of office will begin on June 1, 2013. Further, handlers are aware of this action, which was recommended at a public meeting. Also, a 60-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

■ 1. The authority citation for 7 CFR part 948 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 948.150, paragraph (a)(3) is revised to read as follows:

§ 948.150 Reestablishment of committee membership.

* * * * *

(a) * * *

(3) One (1) producer from either Conejos or Costilla County.

* * * * *

Dated: May 17, 2013.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2013–12240 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–02–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2013–0009]

RIN 3170–AA37

Amendments to the 2013 Escrows Final Rule under the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing clarifying and technical amendments to a final rule issued by the Bureau on January 10, 2013, which, among other things, lengthens the time for which a mandatory escrow account established for a higher-priced mortgage loan (HPML) must be maintained. The rule also established an exemption from the escrow requirement for certain creditors that operate predominantly in ''rural'' or ''underserved'' areas. The amendments clarify the determination method for the ''rural'' and ''underserved'' designations and keep in place certain existing protections for HPMLs until other similar provisions take effect in January 2014.

DATES: This rule is effective on June 1, 2013, except for the addition of § 1026.35(e), which will be effective from June 1, 2013 through January 9, 2014.

FOR FURTHER INFORMATION CONTACT: Whitney Patross, Attorney; Joseph Devlin and Richard Arculin, Counsels; Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rule

In January 2013, the Bureau issued several final rules concerning mortgage markets in the United States pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376 (2010) (2013 Title XIV Final Rules). One of these rules was Escrow Requirements Under the Truth in Lending Act (Regulation Z) (2013 Escrows Final Rule),[1] issued on January 10.[2] The rule expanded on an existing Regulation Z requirement that creditors maintain escrow accounts for HPMLs[3] and created an exemption for certain loans made by certain creditors that operate predominantly in ''rural'' or ''underserved'' areas. Three other of the 2013 Title XIV Final Rules also contain provisions affecting certain loans made in ''rural'' or ''underserved'' areas.

This final rule now makes certain clarifying and technical amendments to the provisions adopted in the 2013 Escrows Final Rule, including clarification of how to determine whether a county is considered ''rural'' or ''underserved'' for the application of the escrows requirement and the other Dodd-Frank Act regulations.[4] Specifically, the Bureau is clarifying how a county's ''rural'' and ''underserved'' status may be determined based on currently applicable Urban Influence Codes (UICs) established by the United States Department of Agriculture, Economic Research Service (USDA–ERS) (for ''rural'') or based on Home Mortgage Disclosure Act (HMDA) data (for

[1] 78 FR 4726 (Jan. 22, 2013).

[2] The other rules include: Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z) (2013 ATR Final Rule), 78 FR 6407 (Jan. 30, 2013); High-Cost Mortgages and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X) (2013 HOEPA Final Rule), 78 FR 6855 (Jan. 31, 2013); Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations under the Equal Credit Opportunity Act (Regulation B) (2013 ECOA Appraisals Final Rule), 78 FR 7215 (Jan. 31, 2013); Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (2013 RESPA Servicing Final Rule), 78 FR 10695 (Feb. 14, 2013); Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) (2013 TILA Servicing Final Rule), 78 FR 10901 (Feb. 14, 2013); Appraisals for Higher-Priced Mortgage Loans (issued jointly with other agencies) (2013 Interagency Appraisals Final Rule), 78 FR 10367 (Feb. 13, 2013); and Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z) (2013 Loan Originator Final Rule), 78 FR 11279 (Feb. 15, 2013). On the same day that the Bureau issued the 2013 ATR Final Rule, it also issued a proposal to amend some aspects of it (2013 ATR Concurrent Proposal), 78 FR 6621 (Jan. 30, 2013).

[3] The Bureau has received questions regarding the timing of the establishment of escrow accounts under § 1026.35. The Bureau understands that escrow accounts are arranged before consummation of a loan, and funded at consummation. Such procedures are in compliance with the regulation. In addition, the Bureau has received questions about loan modifications and would like to point out that the escrow requirement for HPMLs does not apply to modifications to existing loans, only refinances. For guidance on which changes to existing loans will be treated as refinances under Regulation Z, see 12 CFR 1026.20(a) and associated commentary.

[4] The specific provisions that rely on the ''rural'' and ''underserved'' definitions are as follows: (1) the § 1026.35(b)(2)(iii) exemption to the 2013 Escrows Final Rule's escrow requirement for higher-priced mortgage loans; (2) the § 1026.43(f) allowance for balloon-payment qualified mortgages; (3) the § 1026.32(d)(1)(ii)(C) exemption from the balloon-payment prohibition on high-cost mortgages for balloon-payment qualified mortgages; and (4) the § 1026.35(c)(4)(vii)(H) exemption from the § 1026.35(c)(4)(i) HPML second appraisal requirement for credit transactions used to acquire property located in a rural county.

''underserved'') and providing illustrations of the rule to facilitate compliance.

In association with the issuance of this final rule providing clarifying amendments to the 2013 Escrows Final Rule, the Bureau is posting on its public Web site a final list of rural and underserved counties, for use with mortgages consummated from June 1, 2013, through December 31, 2013. The final list is identical to the preliminary list posted on the Bureau's public Web site on March 12, 2013. The Bureau will post the list for use in 2014 when the relevant data become available.

In addition, the final rule restores certain existing Regulation Z requirements related to the consumer's ability to repay and prepayment penalties for HPMLs. The scope of these protections is being expanded under the Dodd-Frank Act through the 2013 Title XIV Final Rules to apply to most mortgage transactions, rather than just HPMLs. For this reason, the 2013 Escrows Final Rule removed the regulatory text providing these protections solely to HPMLs. That final rule, however, takes effect on June 1, 2013, whereas the new ability-to-repay and prepayment penalty provisions do not take effect until January 10, 2014. To prevent any interruption in applicable protections, this final rule establishes a temporary provision to ensure the protections remain in place for HPMLs until the expanded provisions take effect in January 2014.

In addition, the Bureau is making some technical corrections to enhance clarity.

II. Background

A. Title XIV Rulemakings under the Dodd-Frank Act and the 2013 Escrows Final Rule

In response to an unprecedented cycle of expansion and contraction in the mortgage market that sparked the most severe U.S. recession since the Great Depression, Congress passed the Dodd-Frank Act, which was signed into law on July 21, 2010. In the Dodd-Frank Act, Congress established the Bureau and, under sections 1061 and 1100A, generally consolidated the rulemaking authority for Federal consumer financial laws, including the Truth in Lending Act (TILA), in the Bureau.[5] At the same time, Congress significantly amended the statutory requirements governing mortgages with the intent to restrict the practices that contributed to and exacerbated the crisis. In January 2013, the Bureau issued the 2013 Title XIV Final Rules as described above. The 2013 Escrows Final Rule,[6] issued on January 10, was one of these rules. Among the other 2013 Title XIV Final Rules issued in January were the 2013 ATR Final Rule, 2013 HOEPA Final Rule, and 2013 Interagency Appraisals Final Rule.

B. Implementation Plan for New Mortgage Rules

On February 13, 2013, the Bureau announced an initiative to support implementation of the new mortgage rules (Implementation Plan),[7] under which the Bureau would work with the mortgage industry to ensure that the 2013 Title XIV Final Rules could be implemented accurately and expeditiously. The Implementation Plan included: (1) Coordination with other agencies; (2) publication of plain-language guides to the new rules; (3) publication of additional interpretive guidance and other updates regarding the new rules as needed; (4) publication of readiness guides for the new rules; and (5) education of consumers on the new rules.

This is the first final rule in connection with our planned issuances to clarify and provide additional guidance regarding the 2013 Title XIV Final Rules. Priority for this first set of updates was given to the 2013 Escrows Final Rule because its effective date is June 1, 2013, and certainty regarding compliance is a matter of some urgency. The Bureau has since issued a proposal concerning certain provisions of the ability-to-repay and servicing rules that take effect in January 2014,[8] and a proposal to seek comment on whether to delay the June 1 implementation of a provision concerning the financing of credit insurance pending resolution of various interpretive issues under the statute and regulation.[9] Other guidance and updates will be issued as needed.

III. Legal Authority

The Bureau is issuing this final rule pursuant to its authority under TILA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board of Governors of the Federal Reserve System (Board). The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.''[10] TILA, title X of the Dodd-Frank Act, and certain subtitles and provisions of title XIV of the Dodd-Frank Act are Federal consumer financial laws.[11] Accordingly, the Bureau has authority to issue regulations pursuant to TILA, title X, and the enumerated subtitles and provisions of title XIV.

The Bureau is amending the changes made to Regulation Z by the 2013 Escrows Final Rule.[12] This final rule relies on the broad rulemaking authority specifically granted to the Bureau by TILA section 105(a) and title X of the Dodd-Frank Act, as well as the exemption authority in TILA section 129D(c). Additionally, because this rule re-introduces language from a 2008 final rule of the Board amending Regulation Z (2008 HOEPA Final Rule),[13] this rule relies on the authority used in connection with that rule including TILA section 129(p).

IV. Section-by-Section Analysis

Section 1026.35 Requirements for Higher-Priced Mortgage Loans

35(b) Escrow Accounts

35(b)(1)

The Bureau proposed a technical correction to § 1026.35(b)(1) to update a citation. The Bureau did not receive comments on this correction, and adopts it as proposed.

35(b)(2) Exemptions

Overview

Four of the Bureau's January 2013 mortgage rules included provisions that provide for special treatment under various Regulation Z requirements for

[5] Sections 1011 and 1021 of the Dodd-Frank Act, in title X, the ''Consumer Financial Protection Act,'' Public Law 111–203, sections 1001–1100H, codified at 12 U.S.C. 5491 and 5511. The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603. Section 1029 of the Dodd-Frank Act excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

[6] 78 FR 4726 (Jan. 22, 2013).

[7] Consumer Financial Protection Bureau Lays Out Implementation Plan for New Mortgage Rules. Press Release. Feb. 13, 2013.

[8] 78 FR 25638 (May 2, 2013).

[9] 78 FR 27308 (May 10, 2013).

[10] 12 U.S.C. 5581(a)(1).

[11] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA), Dodd-Frank section 1400(b), 12 U.S.C. 5481 note (designating certain subtitles and provisions of title XIV of the Dodd-Frank Act as ''enumerated consumer laws'').

[12] 78 FR 4726 (Jan. 22, 2013).

[13] 73 FR 44522 (July 30, 2008).

certain credit transactions in connection with ''rural'' or ''underserved'' areas: (1) § 1026.35(b)(2)(iii) provides an exemption to the 2013 Escrows Final Rule's escrow requirement for HPMLs; (2) § 1026.43(f) provides an allowance to originate balloon-payment qualified mortgages under the 2013 ATR Final Rule; (3) § 1026.32(d)(1)(ii)(C) provides an exemption from the balloon payment prohibition on high-cost mortgages under the 2013 HOEPA Final Rule for balloon-payment qualified mortgages; and (4) § 1026.35(c)(4)(vii)(H) provides an exemption from a requirement to obtain a second appraisal for certain HPMLs under the 2013 Interagency Appraisals Final Rule. These provisions rely on the criteria for ''rural'' and/or ''underserved'' counties set forth in § 1026.35(b)(2)(iv)(A) and (B), respectively, adopted in the 2013 Escrows Final Rule, which takes effect on June 1, 2013. Two of the special provisions for creditors operating predominantly in ''rural'' or ''underserved'' areas were set forth in the Dodd-Frank Act amendments to TILA, but the terms were not defined by statute. TILA section 129D, as added and amended by Dodd-Frank Act sections 1461 and 1462 and implemented by § 1026.35(b), generally requires that creditors establish escrow accounts for HPMLs secured by a first lien on a consumer's principal dwelling, but the statute also authorizes the Bureau to exempt from this requirement transactions by a creditor that, among other criteria, ''operates predominantly in rural or underserved areas.'' TILA section 129D(c)(1). Similarly, the ability-to-repay provisions in Dodd-Frank Act section 1412 contain a set of criteria with regard to certain balloon-payment mortgages originated and held in portfolio by certain creditors that operate predominantly in rural or underserved areas, allowing those loans to be considered qualified mortgages. *See* TILA section 129C(b)(2)(E), 15 U.S.C. 1639c(b)(2)(E). In the 2013 Escrows and ATR Final Rules, the Bureau implemented the HPML escrows requirement and the section 1412 balloon-payment qualified mortgage provision through §§ 1026.35(b)(2)(iii) and 1026.43(f), respectively. In addition, the Bureau adopted an exemption to the general prohibition of balloon payments for high-cost mortgages when those mortgages meet the criteria for balloon-payment qualified mortgages set forth in § 1026.43(f), as part of the 2013 HOEPA Final Rule, in § 1026.32(d)(1)(ii)(C). Finally, the Bureau and other Federal agencies adopted § 1026.35(c)(4)(vii)(H), which provides an exemption from a requirement to obtain a second appraisal for certain HPMLs under the 2013 Interagency Appraisals Final Rule for credit transactions used to acquire property in rural counties.

Through the 2013 Escrows Final Rule, the Bureau adopted § 1026.35(b)(2)(iv)(A) and (B) to define ''rural'' and ''underserved'' respectively for the purposes of the four rules discussed above that contain special provisions that use one or both of those terms. The 2013 Escrows Final Rule also provided comment 35(b)(2)(iv)–1 to clarify further the criteria for ''rural'' and ''underserved'' counties, and provided that the Bureau will annually update on its public Web site a list of counties that meet the definitions of rural and underserved in § 1026.35(b)(2)(iv). In advance of the rule's June 1, 2013, effective date, the Bureau proposed to amend § 1026.35(b)(2)(iv) and comment 35(b)(2)(iv)–1 to clarify how to determine whether a county is rural or underserved for the purposes of these provisions.

Comments

The Bureau received several comments discussing the overall regulatory scheme regarding how ''rural'' and ''underserved'' should be defined. Most of these comments argued for an expanded scope for the ''rural'' and ''underserved'' definitions. One industry trade association suggested that the rural definition should include all non-metropolitan counties, as well as communities with populations of less than 50,000. Other commenters suggested that the Bureau should use Census Bureau data differently, and one suggested that any place not within one of the Census Bureau's ''Urbanized Areas,'' which contain 50,000 or more people, be considered rural. A credit union association suggested that credit unions with ''rural'' community charters should be exempt, and that only those creditors with a physical presence in an underserved area should be considered in relation to the underserved exemption. Some commenters felt that the rule was too confusing, making compliance difficult.[14] One credit union was concerned about the impact the escrows rule would have on mobile home lending. One commenter stated that, although the clarification presented in the proposal was welcome, there is still too much confusion regarding the escrows rule, and that its effective date should be postponed to January 2014. In addition, two commenters suggested that the Bureau apply exemptions based solely on the size of a creditor, regardless of location.

Although the Bureau has examined these comments, the proposed rule presented only very limited changes and clarifications to the 2013 Final Escrows Rule, and solicited comments on those narrow issues. Broader concerns such as those expressed by the foregoing commenters about preserving consumers' access to credit will be addressed in the Bureau's final rule under the 2013 ATR Concurrent Proposal, which the Bureau expects to issue shortly. The specific provisions included in the proposal are discussed below, along with comments responsive to those issues.

35(b)(2)(iii)

The Proposal

The Bureau proposed modifications to § 1026.35(b)(2)(iii) and comment 35(b)(2)(iii)–1.i for clarification purposes and for consistency with other provisions. As adopted in January, § 1026.35(b)(2)(iii) and its commentary stated that the Bureau would designate or determine which counties are rural or underserved for the purposes of the special provisions of the four rules discussed above. However, that was not the Bureau's intent. Rather, the Bureau intended to require determinations of ''rural'' or ''underserved'' status to be made by creditors as prescribed by § 1026.35(b)(2)(iv)(A) and (B), but also intended for the Bureau to apply both tests to each U.S. county and publish an annual list of counties that satisfy either test for a given calendar year, which creditors may rely upon as a safe harbor. Therefore, the Bureau proposed modifications to § 1026.35(b)(2)(iii)(A) and comment 35(b)(2)(iii)–1.i for the purposes of clarification and consistency with these provisions.

Comments and Final Rule

All the comments the Bureau received on this specific provision supported the proposed change. For the reasons stated above, the provision is adopted as proposed.

35(b)(2)(iv)(A)

The Proposal

As adopted in January 2013, § 1026.35(b)(2)(iv)(A) defines ''rural''

[14] The Bureau notes that it has now posted the official list of rural and underserved counties on its public Web site for use with mortgages consummated from June 1, 2013, through December 31, 2013. The final, official list is identical to the preliminary list posted on the Bureau's public Web site on March 12, 2013. Creditors may rely as a safe harbor for compliance with the relevant regulations on the official lists of rural and underserved counties posted by the Bureau. The official list for use in 2014 will be posted when the necessary data become available.

based on currently applicable UICs established by the USDA–ERS. The UICs are based on the definitions of ''metropolitan statistical area'' and ''micropolitan statistical area'' as developed by the Office of Management and Budget (OMB), along with other factors reviewed by the ERS that place counties into twelve separately defined UICs depending, in part, on the size of the largest city and town in the county. Based on these definitions, § 1026.35(b)(2)(iv)(A) as adopted states that a county is ''rural'' during a calendar year if it is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area, as those terms are defined by OMB and applied under currently applicable UICs.

As adopted, comment 35(b)(2)(iv)–1.i explained that, for the purposes of the provision, the terms ''metropolitan statistical areas'' and ''micropolitan statistical areas adjacent to a metropolitan statistical area'' are given the same meanings used by USDA–ERS for the purposes of determining UICs. The USDA–ERS considers micropolitan counties as ''adjacent'' to a metropolitan statistical area for this purpose if they abut a metropolitan statistical area and have at least 2% of employed persons commuting to work in the core of the metropolitan statistical area.[15] It was thus implicit in this comment that ''adjacent'' is given the same meaning used by the USDA–ERS for the purposes of § 1026.35(b)(2)(iv)(A).

Nevertheless, the Bureau believed that additional commentary explaining the meaning of ''adjacent'' more directly would be useful to facilitate compliance with § 1026.35(b)(2)(iv) and the provisions that rely on it. Accordingly, the Bureau proposed to amend comment 35(b)(2)(iv)–1.i to state expressly that ''adjacent'' entails physical contiguity with a metropolitan statistical area where certain minimum commuting standards are also met, as defined by the USDA–ERS. The Bureau believed that this would be consistent with USDA–ERS's use of ''adjacent'' and better explain the rule for compliance purposes.

Similarly, the Bureau proposed language to specify under § 1026.35(b)(2)(iv)(A) how ''rural'' status should be determined for a county that does not have a currently applicable UIC because it was created after the USDA–ERS last categorized counties by UIC. Because the USDA–ERS only updates UICs decennially based on the most recent census, it is possible that new counties may be created that will not have a designated UIC until after the next census. In such instances, clarification was needed to explain how ''rural'' status would be determined. The Bureau thus proposed to amend comment 35(b)(2)(iv)–1.i to address this issue and explain that any such county is considered ''rural'' for the purposes of § 1026.35(b)(2)(iv) only if all counties from which the new county's land was taken were themselves rural under the rule.

The Bureau also proposed comment 35(b)(2)(iv)–2.i to provide an example of how ''rural'' status would be determined. In addition, the Bureau proposed small technical changes to the rule provision and commentary to enhance clarity.

Comments

One industry commenter supported generally the clarifications provided in the rule. Other industry commenters chose to neither support nor oppose the ''adjacent'' clarification, and asked that there be more analysis of the impact of excluding counties from the rural definition if they are ''adjacent'' to a metropolitan area.

Industry commenters opposed the proposed method for determining the status of a new county, arguing that a new county should be considered rural if 50% of its land is taken from counties that were previously considered rural.

Final Rule

The Bureau is adopting the provisions as proposed. The definition of ''adjacent'' was already implicit in the 2013 Escrows Final Rule, and the Bureau's earlier impact analyses already accounted for that definition. The present rule's guidance provision merely clarifies what was adopted then.

The Bureau considered the suggestion to allow rural status for new counties if at least 50% of the counties' land comes from previously rural counties, but was concerned that making such determinations would be burdensome and inexact for compliance purposes and incongruent with the rule's overall rural designations. Accordingly, the Bureau is adopting the clarification as proposed.

35(b)(2)(iv)(B)

The Proposal

Section 1026.35(b)(2)(iii)(A) creates an exemption from the HPML escrow requirement for transactions by creditors operating in rural or underserved counties, if they meet certain criteria involving the loans they originated *during the preceding calendar year.* Thus, the availability of the rural or underserved exemption always follows a year after the origination activity that makes a creditor eligible for the exemption.

As adopted by the 2013 Escrows Final Rule, § 1026.35(b)(2)(iv)(B) stated that a county would be ''underserved'' during a calendar year if, ''according to Home Mortgage Disclosure Act (HMDA) data for that year,'' no more than two creditors extended covered transactions, as defined in § 1026.43(b)(1), secured by a first lien, five or more times in the county. However, HMDA data typically are released for a given calendar year during the third quarter of each subsequent calendar year. It is thus not generally possible for creditors to make determinations concerning whether a county was underserved during the preceding calendar year based on that preceding year's HMDA data, because such data likely will not be available until late in the following year. In wording § 1026.35(b)(2)(iv)(B) as it did, the Bureau did not intend to require the use of HMDA data that would not be available at the time the determination of a county's ''underserved'' status was made; the Bureau's intent was to provide for the use of the most recent HMDA data available at the time of the determination.

The Bureau therefore proposed to amend § 1026.35(b)(2)(iv)(B) to clarify that a county is considered ''underserved'' during a given calendar year based on HMDA data for ''the preceding calendar year'' as opposed to ''that calendar year.'' This look-back feature coordinates with the look-back feature in the exemption itself at § 1026.35(b)(2)(iii)(A), so that a creditor would rely on the underserved status of a county based on HMDA data from two years previous to the use of the exemption, which are the most recent data available for use as the Bureau intended. The Bureau also proposed to amend comment 35(b)(2)(iv)–1.ii to conform to this change, and to add comment 35(b)(2)(iv)–2.ii to provide an example.

Comments and Final Rule

The only commenter to reference this provision, an industry trade group, supported it. For the reasons stated above, the provision is adopted as proposed.

1026.35(e) Repayment Ability, Prepayment Penalties

The Proposal

The Bureau proposed language in § 1026.35(e) to keep in place existing requirements contained in § 1026.35(b)

[15] *See http://www.ers.usda.gov/data-products/urban-influence-codes/documentation.aspx.*

concerning assessment of consumers' ability to repay an HPML and limitations on prepayment penalties for HPMLs. These provisions were originally adopted by the Board in 2008,[16] and will be supplanted by the Bureau's new rules implementing similar Dodd-Frank requirements in § 1026.43 on January 10, 2014.

The 2013 Escrows Final Rule inadvertently removed the existing language of § 1026.35(b) between June 1, 2013, and the January 10, 2014, effective date for the ability-to-repay and prepayment penalty provisions in § 1026.43. The Bureau proposed restoring this language at § 1026.35(e) and keeping it in effect during that intervening period. The Bureau also proposed updating existing cross-references to the § 1026.35(b) HPML provisions.

Comments and Final Rule

The industry groups specifically commenting on this provision supported the proposal. To maintain consumer protections and avoid disruptions in the market, the provision is adopted as proposed.

V. Effective Date

This rule is effective June 1, 2013. Section 1026.35(e) of this rule is a temporary provision and will be effective from June 1, 2013, through January 9, 2014. Section 553(d) of the Administrative Procedure Act generally requires publication of a final rule not less than 30 days before its effective date, except for (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule. 5 U.S.C. 553(d). At minimum, the Bureau believes the amendments fall under the third exception to section 553(d). The Bureau finds that there is good cause to make the amendments effective on June 1, 2013, because doing so will ease compliance and reduce disruption in the market, and ensure that the protections of the rule are uninterrupted. Moreover, the final list of counties prepared using this rule is identical to the preliminary list, which was posted along with the proposal on the Bureau's public Web site on March 12, 2013. In addition, the effective date for the 2013 Escrows Final Rule, which this rule amends, is June 1, 2013, and failure to make this rule effective on the same day would make compliance more difficult and create more disruption in the market, not less. Therefore, the Bureau believes that the benefits from making this rule effective on June 1 outweigh providing additional time to comply with this rule.

VI. Section 1022(b)(2) of the Dodd-Frank Act

A. Overview

In developing the final rule, the Bureau has considered its potential benefits, costs, and impacts.[17] The Bureau requested comment on its preliminary analysis as well as submissions of additional data that could inform the Bureau's analysis. The Bureau has consulted, or offered to consult with, the prudential regulators, SEC, HUD, FHFA, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The final rule clarifies how to determine whether a county is considered ''rural'' or ''underserved'' for the application of the special provisions adopted in certain of the 2013 Title XIV Final Rules.[18] These changes do not have a material impact on consumers or covered persons. Nevertheless, two commenters requested that the Bureau analyze the impact of excluding counties from the rural definition if they are ''adjacent'' to a metropolitan area. However, the scope of the related clarification was limited to specifying that ''adjacent'' is given the same meaning used by the USDA–ERS for the purposes of § 1026.35(b)(2)(iv)(A), which was implicit in the 2013 Escrows Final Rule. The impacts of the stated definitions are discussed in the various 2013 Title XIV Final Rules and the final list of rural and underserved counties for use during 2013 is being posted at the Bureau's public Web site along with publication of this notice.

Other provisions of the rule are related to underwriting and features of HPMLs. As described above, existing Regulation Z contains requirements related to the consumer's ability to repay and prepayment penalties for HPMLs. The scope of these protections is being expanded in connection with the Dodd-Frank Act title XIV rulemakings to apply to most mortgage transactions, rather than just HPMLs. For this reason, the 2013 Escrows Final Rule removed the regulatory text providing these protections solely to HPMLs. That final rule, however, takes effect on June 1, 2013, whereas the new ability-to-repay and prepayment penalty provisions do not take effect until January 10, 2014. Without the correction provided by this final rule, the final rules issued in January would have inadvertently created an interruption in applicable protections for certain consumers obtaining HPMLs effective June 1, 2013, and a corresponding interruption of the requirements for lenders. This rule will establish a temporary provision to ensure the protections remain in place for HPMLs until the expanded provisions take effect in January 2014. Because the avoided interruption was inadvertent, the Bureau's 1022 analyses in the 2013 Title XIV Final Rules considered the impact of the protections at issue in this rule as if they were remaining in place, which they now are.

B. Potential Benefits and Costs to Consumers and Covered Persons

Compared to the baseline established by the issuance of the final rules in January 2013, this final rule will provide consumers who obtain HPMLs from June 1, 2013, through and including January 9, 2014, the benefit of the existing protections under Regulation Z regarding ability to repay and prepayment penalties.[19] These provisions are designed to limit consumers' exposure to collateral-based lending, potentially harmful prepayment penalties, and other harms. The price of HPMLs may be slightly higher than they would be in the absence of these protections; however, these effects are likely to be minimal.

[16] 73 FR 44522 (July 30, 2008).

[17] Section 1022(b)(2)(A) of the Dodd-Frank Act, 12 U.S.C. 5521(b)(2), directs the Bureau, when prescribing a rule under the Federal consumer financial laws, to consider the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on insured depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) of the Dodd-Frank Act directs the Bureau to consult with appropriate prudential regulators or other Federal agencies regarding consistency with prudential, market, or systemic objectives that those agencies administer.

[18] The special provisions that rely on the ''rural'' and ''underserved'' definitions are as follows: (1) the § 1026.35(b)(2)(iii) exemption to the 2013 Escrows Final Rule's escrow requirement for higher-priced mortgage loans; (2) the § 1026.43(f) allowance for balloon-payment qualified mortgages; (3) the § 1026.32(d)(1)(ii)(C) exemption from the balloon payment prohibition on high-cost mortgages for balloon-payment qualified mortgages; and (4) the § 1026.35(c)(4)(vii)(H) exemption from the § 1026.35(c)(4)(i) HPML second appraisal requirement for credit transactions used to acquire property located in a rural county.

[19] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline.

Compared to the same baseline, covered persons issuing such mortgages during this time period will incur any costs related to the ability-to-pay requirements and the restrictions on certain prepayment penalties. These costs will include the costs of documenting and verifying the consumer's ability to repay and some expected litigation-related costs. As noted above, the evidence to date is that these costs are quite limited. The 2013 ATR Final Rule and the Board's earlier 2008 HOEPA Final Rule discuss these costs and benefits in greater detail. This rule simply extends these impacts from June 1, 2013, through and including January 9, 2014. The Bureau also believes that the rule will benefit both consumers and covered persons in limiting unnecessary and possibly disruptive changes in the regulatory regime.

The final rule may have a small differential impact on depository institutions and credit unions with $10 billion or less in total assets as described in Section 1026. To the extent that HPMLs comprise a larger percentage of originations at these institutions, the relative increase in costs may be higher relative to other lenders.

The final rule will also have some differential impacts on consumers in rural areas. In these areas, a greater fraction of loans are HPMLs. For this reason, to the extent that these added protections lead to additional lender costs, interest rates may be slightly higher on average; however, rural consumers will derive greater benefit from the proposed provisions than non-rural consumers.

Given the small changes implemented in this rule, the Bureau does not believe that the final rule will meaningfully reduce consumers' access to credit.

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[20] These analyses must ''describe the impact of the proposed rule on small entities.''[21] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities,[22] or if the agency considers a series of closely related rules as one rule for purposes of complying with the IRFA or FRFA requirements.[23] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[24]

This rulemaking is part of a series of rules that have revised and expanded the regulatory requirements for entities that offer HPMLs. In January 2013, the Bureau adopted the 2013 Escrows Final Rule and 2013 ATR Final Rule, along with other related rules mentioned above. Section VIII of the supplementary information to each of these rules set forth the Bureau's analyses and determinations under the RFA with respect to those rules. See 78 FR 4749, 78 FR 6575. The Bureau also notes because the potential interruption in applicable protections created by the issuance of the final rules in January was inadvertent, its regulatory flexibility analyses considered the impact of the protections at issue in this rule remaining in place for HPMLs until the expanded provisions take effect in January 2014. Because these rules qualify as ''a series of closely related rules,'' for purposes of the RFA, the Bureau relies on those analyses and determines that it has met or exceeded the IRFA and FRFA requirements.

In the alternative, the Bureau also concludes that the final rule will not have a significant impact on a substantial number of small entities. The rule will establish a temporary provision to ensure the protections remain in place for HPMLs until the expanded provisions take effect in January 2014. Since the new requirements and liabilities that will take effect in January 2014 as applied to HPMLs are very similar in nature to those that exist under the pre-existing regulations, the gap absent the rule's correction would have been short-lived and would have affected only the higher-priced mortgage loan market. It is therefore very unlikely that, absent this correction, covered persons would have altered their behavior substantially in the intervening period.

The rule also clarifies how to determine whether a county is considered ''rural'' or ''underserved'' for the application of the special provisions adopted in certain of the 2013 Title XIV Final Rules.[25] These changes will not have a material impact on small entities.[26]

For these reasons, the Bureau affirms that this final rule will not have a significant impact on a substantial number of small entities.

VIII. Paperwork Reduction Act

This final rule will amend 12 CFR part 1026 (Regulation Z), which implements the Truth in Lending Act (TILA). Regulation Z currently contains collections of information approved by OMB. The Bureau's OMB control number for Regulation Z is 3170–0015. However, the Bureau has determined that this rule will not materially alter these collections of information nor impose any new recordkeeping, reporting, or disclosure requirements on the public that would constitute collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Mortgages, Recordkeeping requirements, Reporting, Truth in lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

[20] 5 U.S.C. 601 *et. seq.*

[21] 5 U.S.C. 603(a). For purposes of assessing the impacts of the rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[22] 5 U.S.C. 605(b).

[23] 5 U.S.C. 605(c).

[24] 5 U.S.C. 609.

[25] The special provisions that rely on the ''rural'' and ''underserved'' definitions are as follows: (1) The § 1026.35(b)(2)(iii) exemption to the 2013 Escrows Final Rule's escrow requirement for higher-priced mortgage loans; (2) the § 1026.43(f) allowance for balloon-payment qualified mortgages; (3) the § 1026.32(d)(1)(ii)(C) exemption from the balloon payment prohibition on high-cost mortgages for balloon-payment qualified mortgages; and (4) the § 1026.35(c)(4)(vii)(H) exemption from the § 1026.35(c)(4)(i) HPML second appraisal requirement for credit transactions used to acquire property located in a rural county.

[26] One commenter suggested that the RFA analysis omitted a consideration of the costs of compliance for this rule and the related 2013 Title XIV Final Rules more broadly. As noted, a discussion of the compliance costs for small entities under the RFA was included with the publication of the 2013 Title XIV Final Rules: This rule only clarifies or makes minor technical amendments to existing rules and does not impose the burdens noted by the commenter.

Authority: 12 U.S.C. 2601; 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart C—Closed-End Credit

■ 2. Section 1026.23 is amended by revising paragraph (a)(3)(ii) to read as follows:

§ 1026.23 Right of rescission.

(a) * * *

(3) * * *

(ii) For purposes of this paragraph (a)(3), the term ''material disclosures'' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 1026.32(c) and (d) and 1026.35(e)(2).

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 3. Section 1026.34 is amended by revising paragraph (a)(4)(i) to read as follows:

§ 1026.34 Prohibited acts or practices in connection with high-cost mortgages.

(a) * * *

(4) * * *

(i) *Mortgage-related obligations.* For purposes of this paragraph (a)(4), mortgage-related obligations are expected property taxes, premiums for mortgage-related insurance required by the creditor as set forth in § 1026.35(b), and similar expenses.

* * * * *

■ 4. Section 1026.35, as amended by the final rule published on January 22, 2013, 78 FR 4726, effective June 1, 2013, is further amended by revising the last sentence of paragraph (b)(1), revising paragraphs (b)(2)(iii)(A), and (b)(iv)(A) and (B), and adding paragraph (e) to read as follows:

§ 1026.35 Requirements for higher-priced mortgage loans.

* * * * *

(b) * * *

(1) For purposes of this paragraph (b), the term ''escrow account'' has the same meaning as under Regulation X (12 CFR 1024.17(b)), as amended.

(2) * * *

(iii) * * *

(A) During the preceding calendar year, the creditor extended more than 50 percent of its total covered transactions, as defined by § 1026.43(b)(1), secured by a first lien, on properties that are located in counties that are either ''rural'' or ''underserved,'' as set forth in paragraph (b)(2)(iv) of this section;

* * * * *

(iv) * * *

(A) A county is ''rural'' during a calendar year if it is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget and as they are applied under currently applicable Urban Influence Codes (UICs), established by the United States Department of Agriculture's Economic Research Service (USDA–ERS). A creditor may rely as a safe harbor on the list of counties published by the Bureau to determine whether a county qualifies as ''rural'' for a particular calendar year.

(B) A county is ''underserved'' during a calendar year if, according to Home Mortgage Disclosure Act (HMDA) data for the preceding calendar year, no more than two creditors extended covered transactions, as defined in § 1026.43(b)(1), secured by a first lien, five or more times in the county. A creditor may rely as a safe harbor on the list of counties published by the Bureau to determine whether a county qualifies as ''underserved'' for a particular calendar year.

* * * * *

(e) *Repayment ability, prepayment penalties.* Higher-priced mortgage loans are subject to the following restrictions:

(1) *Repayment ability.* A creditor shall not extend credit based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation as provided in § 1026.34(a)(4).

(2) *Prepayment penalties.* A loan may not include a penalty described by § 1026.32(d)(6) unless:

(i) The penalty is otherwise permitted by law, including § 1026.32(d)(7) if the loan is a mortgage transaction described in § 1026.32(a); and

(ii) Under the terms of the loan:

(A) The penalty will not apply after the two-year period following consummation;

(B) The penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor; and

(C) The amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.

(3) *Sunset of requirements on repayment ability and prepayment penalties.* The requirements described in this paragraph (e) shall expire at 11:59 p.m. on January 9, 2014.

■ 5. In Supplement I to Part 1026—Official Interpretations:

■ A. Under *Section 1026.32—Requirements for Certain Closed-End Home Mortgages,* under *Paragraph 32(d) Limitations,* paragraph 1 is revised.

■ B. Under *Section 1026.34—Prohibited Acts or Practices in Connection with High-Cost Mortgages:*

■ i. Under *Paragraph 34(a)(4) Repayment ability for high-cost mortgages,* paragraph 1 is revised.

■ ii. Under *Paragraph 34(a)(4)(i) Mortgage-Related Obligations,* paragraph 1 is revised.

■ C. Under *Section 1026.35—Requirements for Higher-Priced Mortgage Loans,* as amended by the final rule published on January 22, 2013, 78 FR 4726, effective June 1, 2013, is further amended:

■ i. Under *Paragraph 35(b)(2)(iii),* paragraphs 1 and i are revised.

■ ii. Under *Paragraph 35(b)(2)(iv),* paragraph 1 is revised and paragraph 2 is added.

■ iii. The headings *35(e) Rules for Higher-Priced Mortgage Loans* and *Paragraph 35(e)(2)(ii)(C),* and paragraphs 1 and 2 are added.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

§ 1026.32—Requirements for Certain Closed-End Home Mortgages

* * * * *

Paragraph 32(d) Limitations

1. *Additional prohibitions applicable under other sections.* Section 1026.34 sets forth certain prohibitions in connection with mortgage credit subject to § 1026.32, in addition to the limitations in § 1026.32(d). Further, § 1026.35 prohibits certain practices in connection with transactions that meet the coverage test in § 1026.35(a). Because the coverage test in § 1026.35(a) is generally broader than the coverage test in § 1026.32(a), most § 1026.32 mortgage loans are also subject to the prohibitions set forth in § 1026.35 (such as escrows), in addition to the limitations in § 1026.32(d).

* * * * *

§ 1026.34—Prohibited Acts or Practices in Connection with High-Cost Mortgages

* * * * *

Paragraph 34(a)(4) Repayment Ability for High-Cost Mortgages

1. *Application of repayment ability rule.* The § 1026.34(a)(4) prohibition against making loans without regard to consumers' repayment ability applies to mortgage loans described in § 1026.32(a). In addition, the § 1026.34(a)(4) prohibition applies to higher-

priced mortgage loans described in § 1026.35(a). *See* § 1026.35(e)(1).

* * * * *

Paragraph 34(a)(4)(i) Mortgage-Related Obligations

1. *Mortgage-related obligations.* A creditor must include in its repayment ability analysis the expected property taxes and premiums for mortgage-related insurance required by the creditor as set forth in § 1026.35(b), as well as similar mortgage-related expenses. Similar mortgage-related expenses include homeowners' association dues and condominium or cooperative fees.

* * * * *

§ 1026.35—Requirements for Higher-Priced Mortgage Loans

* * * * *

Paragraph 35(b)(2)(iii)

1. *Requirements for exemption.* Under § 1026.35(b)(2)(iii), except as provided in § 1026.35(b)(2)(v), a creditor need not establish an escrow account for taxes and insurance for a higher-priced mortgage loan, provided the following four conditions are satisfied when the higher-priced mortgage loan is consummated:

i. During the preceding calendar year, more than 50 percent of the creditor's total first-lien covered transactions, as defined in § 1026.43(b)(1), are secured by properties located in counties that are either ''rural'' or ''underserved,'' as set forth in § 1026.35(b)(2)(iv). Pursuant to that section, a creditor may rely as a safe harbor on a list of counties published by the Bureau to determine whether counties in the United States are rural or underserved for a particular calendar year. Thus, for example, if a creditor originated 90 covered transactions, as defined by § 1026.43(b)(1), secured by a first lien, during 2013, the creditor meets this condition for an exemption in 2014 if at least 46 of those transactions are secured by first liens on properties that are located in such counties.

* * * * *

Paragraph 35(b)(2)(iv)

1. *Requirements for ''rural'' or ''underserved'' status.* A county is considered to be ''rural'' or ''underserved'' for purposes of § 1026.35(b)(2)(iii)(A) if it satisfies either of the two tests in § 1026.35(b)(2)(iv). The Bureau applies both tests to each county in the United States. If a county satisfies either test, the Bureau will include the county on a published list of ''rural'' or ''underserved'' counties for a particular calendar year. To facilitate compliance with appraisal requirements in § 1026.35(c), the Bureau will also create a list of only those counties that are ''rural'' but excluding those that are only ''underserved.'' The Bureau will post on its public Web site the applicable lists for each calendar year by the end of that year, thus permitting creditors to ascertain the availability to them of the exemption during the following year. For 2012, however, the list will be published before June 1, 2013. A creditor may rely as a safe harbor, pursuant to section 130(f) of the Truth in Lending Act, on the lists of counties published by the Bureau to determine whether a county qualifies as ''rural'' or ''underserved'' for a particular calendar year. A creditor's originations of covered transactions, as defined by § 1026.43(b)(1), secured by a first lien, in such counties during that year are considered in determining whether the creditor satisfies the condition in § 1026.35(b)(2)(iii)(A) and therefore will be eligible for the exemption during the following calendar year.

i. Under § 1026.35(b)(2)(iv)(A), a county is rural during a calendar year if it is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area. These areas are defined by the Office of Management and Budget and applied under currently applicable Urban Influence Codes (UICs), established by the United States Department of Agriculture's Economic Research Service (USDA–ERS). Accordingly, for purposes of § 1026.35(b)(2)(iv)(A), ''adjacent'' has the meaning applied by the USDA–ERS in determining a county's UIC; as so applied, ''adjacent'' entails a county not only being physically contiguous with a metropolitan statistical area but also meeting certain minimum population commuting patterns. Specifically, a county is ''rural'' if the USDA–ERS categorizes the county under UIC 4, 6, 7, 8, 9, 10, 11, or 12. Descriptions of UICs are available on the USDA–ERS Web site at *http://www.ers.usda.gov/data-products/urban-influence-codes/documentation.aspx.* A county for which there is no currently applicable UIC (because the county has been created since the USDA–ERS last categorized counties) is rural only if all counties from which the new county's land was taken are themselves rural under currently applicable UICs.

ii. Under § 1026.35(b)(2)(iv)(B), a county is underserved during a calendar year if, according to Home Mortgage Disclosure Act (HMDA) data for the preceding calendar year, no more than two creditors extended covered transactions, as defined in § 1026.43(b)(1), secured by a first lien, five or more times in the county. Specifically, a county is ''underserved'' if, in the applicable calendar year's public HMDA aggregate dataset, no more than two creditors have reported five or more first-lien covered transactions with HMDA geocoding that places the properties in that county. For purposes of this determination, because only covered transactions are counted, all first-lien originations (and only first-lien originations) reported in the HMDA data are counted except those for which the owner-occupancy status is reported as ''Not owner-occupied'' (HMDA code 2), the property type is reported as ''Multifamily'' (HMDA code 3), the applicant's or co-applicant's race is reported as ''Not applicable'' (HMDA code 7), or the applicant's or co-applicant's sex is reported as ''Not applicable'' (HMDA code 4). The most recent HMDA data are available at *http://www.ffiec.gov/hmda.*

2. *Examples.* i. A county is considered ''rural'' for a given calendar year based on the most recent available UIC designations, which are updated by the USDA–ERS once every ten years. As an example, assume a creditor makes first-lien covered transactions in County X during calendar year 2014, and the most recent UIC designations have been published in the second quarter of 2013. To determine ''rural'' status for County X during calendar year 2014, the creditor will use the 2013 UIC designations. However, to determine ''rural'' status for County X during 2012 or 2013, the creditor would use the UIC designations last published in 2003.

ii. A county is considered ''underserved'' for a given calendar year based on the most recent available HMDA data. For example, assume a creditor makes first-lien covered transactions in County Y during calendar year 2013, and the most recent HMDA data is for calendar year 2012, published in the third quarter of 2013. To determine ''underserved'' status for County Y in calendar year 2013 for the purposes of qualifying for the ''rural or underserved'' exemption in calendar year 2014, the creditor will use the 2012 HMDA data.

* * * * *

35(e) Rules for Higher-Priced Mortgage Loans

Paragraph 35(e)(2)(ii)(C)

1. *Payment change.* Section 1026.35(e)(2) provides that a loan subject to this section may not have a penalty described by § 1026.32(d)(6) unless certain conditions are met. Section 1026.35(e)(2)(ii)(C) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. For examples showing whether a prepayment penalty is permitted or prohibited in connection with particular payment changes, see comment 32(d)(7)(iv)–1. Those examples, however, include a condition that § 1026.35(e)(2) does not include: The condition that, at consummation, the consumer's total monthly debt payments may not exceed 50 percent of the consumer's monthly gross income. For guidance about circumstances in which payment changes are not considered payment changes for purposes of this section, see comment 32(d)(7)(iv)–2.

2. *Negative amortization.* Section 1026.32(d)(2) provides that a loan described in § 1026.32(a) may not have a payment schedule with regular periodic payments that cause the principal balance to increase. Therefore, the commentary to § 1026.32(d)(7)(iv) does not include examples of payment changes in connection with negative amortization. The following examples show whether, under § 1026.35(e)(2), prepayment penalties are permitted or prohibited in connection with particular payment changes, when a loan agreement permits negative amortization:

i. Initial payments for a variable-rate transaction consummated on January 1, 2010, are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014, and the creditor does not have the right to change scheduled payments prior to that date even if negative amortization occurs. A prepayment penalty is permitted with this mortgage transaction provided that the other § 1026.35(e)(2) conditions are met, that is: Provided that the prepayment penalty is

permitted by other applicable law, the penalty expires on or before December 31, 2011, and the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014, but the creditor has the right to change scheduled payments prior to that date if negative amortization occurs. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

Dated: May 16, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–12125 Filed 5–22–13; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM12–22–000; Order No. 779]

Reliability Standards for Geomagnetic Disturbances

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: Under section 215 of the Federal Power Act, the Federal Energy Regulatory Commission (Commission) directs the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization, to submit to the Commission for approval proposed Reliability Standards that address the impact of geomagnetic disturbances (GMD) on the reliable operation of the Bulk-Power System. The Commission directs NERC to implement the directive in two stages. In the first stage, NERC must submit, within six months of the effective date of this Final Rule, one or more Reliability Standards that require owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System. In the second stage, NERC must submit, within 18 months of the effective date of this Final Rule, one or more Reliability Standards that require owners and operators of the Bulk-Power System to conduct initial and on-going assessments of the potential impact of benchmark GMD events on Bulk-Power System equipment and the Bulk-Power System as a whole. The Second Stage GMD Reliability Standards must identify benchmark GMD events that specify what severity GMD events a responsible entity must assess for potential impacts on the Bulk-Power System. If the assessments identify potential impacts from benchmark GMD events, the Reliability Standards should require owners and operators to develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. The development of this plan cannot be limited to considering operational procedures or enhanced training alone, but will, subject to the potential impacts of the benchmark GMD events identified in the assessments, contain strategies for protecting against the potential impact of GMDs based on factors such as the age, condition, technical specifications, system configuration, or location of specific equipment. These strategies could, for example, include automatically blocking geomagnetically induced currents from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, isolating certain equipment that is not cost effective to retrofit, or a combination thereof.

DATES: This rule will become effective July 22, 2013.

FOR FURTHER INFORMATION CONTACT:

Regis Binder (Technical Information), Office of Electric Reliability, Division of Reliability Standards and Security, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (301) 665–1601, *Regis.Binder@ferc.gov.*

Matthew Vlissides (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8408, *Matthew.Vlissides@ferc.gov.*

SUPPLEMENTARY INFORMATION:

143 FERC ¶ 61,147

United States of America

Federal Energy Regulatory Commission

Before Commissioners:
Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony Clark.

Final Rule

Issued May 16, 2013.

1. Pursuant to section 215(d)(5) of the Federal Power Act (FPA),[1] the Commission directs the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), to submit for approval Reliability Standards (GMD Reliability Standards) that address the risks posed by geomagnetic disturbances (GMD) to the reliable operation of the Bulk-Power System.

2. The Commission directs NERC to implement the directive in two stages. In the first stage, NERC must submit, within six months of the effective date of this Final Rule, one or more Reliability Standards that require owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System. In the second stage, NERC must submit, within 18 months of the effective date of this Final Rule, one or more Reliability Standards that require owners and operators of the Bulk-Power System to conduct initial and on-going assessments of the potential impact of benchmark GMD events on Bulk-Power System equipment and the Bulk-Power System as a whole. The Second Stage GMD Reliability Standards must identify ''benchmark GMD events'' that specify what severity GMD events a responsible entity must assess for potential impacts on the Bulk-Power System. The benchmark GMD events must be technically justified because the benchmark GMD events will define the scope of the Second Stage GMD Reliability Standards (i.e., responsible entities should not be required to assess GMD events more severe than the benchmark GMD events). If the assessments identify potential impacts from benchmark GMD events, the Reliability Standards should require owners and operators to develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. The plan cannot be limited to considering operational procedures or enhanced training alone. Rather, the plan must, subject to the potential impacts of the benchmark GMD events identified in the assessments, contain strategies for protecting against the potential impact

[1] 16 U.S.C. 824o(d)(5) (2006).

of GMDs based on factors such as the age, condition, technical specifications, system configuration, or location of specific equipment. These strategies could, for example, include automatically blocking geomagnetically induced currents (GICs) from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, isolating certain equipment that is not cost effective to retrofit, or a combination thereof. The Reliability Standards should include Requirements whose goal is to prevent instability, uncontrolled separation, or cascading failures of the Bulk-Power System when confronted with a benchmark GMD event. Given that the scientific understanding of GMDs is still evolving, we recognize that Reliability Standards cannot be expected to protect against all GMD-induced outages.

3. We take this action based on the potentially severe, wide-spread impact on the reliable operation of the Bulk-Power System that can be caused by GMD events and the absence of existing Reliability Standards to address GMD events. We are not directing the ERO to include any specific Requirements in the GMD Reliability Standards nor are we pre-judging what the ERO eventually submits for approval. Instead, in this Final Rule, we identify issues that should be considered in the NERC standards development process. We expect NERC to explain how the proposed GMD Reliability Standards address these issues when the Reliability Standards are submitted for Commission approval.

I. Background

A. Section 215 and Mandatory Reliability Standards

4. Section 215 of the FPA requires the Commission to certify an ERO to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval.[2] Once approved, the Reliability Standards may be enforced in the United States by the ERO, subject to Commission oversight, or by the Commission independently.

5. Pursuant to FPA section 215(d)(5), the Commission has the authority, upon its own motion or upon complaint, to order the ERO to submit to the Commission a proposed Reliability Standard or a modification to a Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Reliability Standard appropriate to carry out section 215 of the FPA.[3]

B. Geomagnetic Disturbances

6. A GMD, caused by solar events, results in distortions to the earth's magnetic field, can be of varying intensity, and has in the past impacted the operation of pipelines, communications systems, and electric power systems.[4] The interaction of the earth's magnetic field and solar events can cause low frequency GICs to flow along the surface of the earth and in the oceans. Reliability issues arise when GICs enter the Bulk-Power System from the earth. Because many Bulk-Power System transformers are grounded, the GIC appears as electrical current to the Bulk-Power System and flows through the ground connection and conductors, such as transformers and transmission lines.[5] GICs can cause ''half-cycle saturation'' of high-voltage Bulk-Power System transformers, which can lead to increased consumption of reactive power and creation of disruptive harmonics that can cause the sudden collapse of the Bulk-Power System.[6] Further, half-cycle saturation from GICs can potentially damage Bulk-Power System transformers because of overheating.[7]

C. Studies of GMD Events on the Bulk-Power System

7. The impact of GMDs on the Bulk-Power System has been evaluated in several government-sponsored studies and NERC reports. The EMP Commission issued reports assessing the threat to the United States from Electromagnetic Pulse (EMP) attack in 2004 and 2008, which also addressed the effects of geomagnetic storms on the electric power infrastructure.[8] The National Research Council of the National Academies issued a report addressing the impact of severe space weather events in 2008.[9] The Oak Ridge National Laboratory issued a series of reports on the effects of electromagnetic pulses on the Bulk-Power System in January 2010.[10] NERC issued the HILF Report on high-impact, low-frequency risks to the Bulk-Power System in June 2010.[11]

8. In November 2010, NERC endorsed the creation of a GMD Task Force to ''develop a technical white paper describing the evaluation of scenarios of potential GMD impacts, identifying key bulk power system parameters under those scenario conditions, and evaluating potential reliability implications of these incidents.'' [12] The NERC GMD Task Force was formed in early 2011.[13] In February 2012, the NERC GMD Task Force issued the NERC Interim GMD Report evaluating the effects of GMDs on the Bulk-Power System.

9. The Commission held a Technical Conference on April 30, 2012 to discuss the risks posed by GMDs to the reliable operation of the Bulk-Power System.[14] Several panelists indicated at the Technical Conference that severe GMD events could potentially compromise the reliable operation of the Bulk-Power System, with some noting as an example the GMD-induced disruption of the Hydro-Québec grid in 1989.[15] Some

[2] 16 U.S.C. 824o (2006).

[3] 16 U.S.C. 824o(d)(5); 18 CFR 39.5(f) (2012).

[4] Oak Ridge National Laboratory, Electric Utility Industry Experience with Geomagnetic Disturbances at xiii (1991), available at *http://www.ornl.gov/~webworks/cpr/v823/rpt/51089.pdf.*

[5] North American Electric Reliability Corp., *2012 Special Reliability Assessment Interim Report: Effects of Geomagnetic Disturbances on the Bulk Power System* at ii (February 2012) (*NERC Interim GMD Report*), available at *http://www.nerc.com/files/2012GMD.pdf.*

[6] *Id.* at iii–iv.

[7] *Id.*

[8] These reports are accessible at the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack Web site at *http://www.empcommission.org/.*

[9] National Research Council of the National Academies, Severe Space Weather Events—Understanding Societal and Economic Impacts: A Workshop Report at 4 (2008) (NAS Workshop Report), available at *http://www.nap.edu/catalog/12507.html.*

[10] Oak Ridge National Laboratory, *FERC EMP–GIC Metatech Reports 319–324* (January 2010) (collectively, *Oak Ridge Study*), available at *http://www.ornl.gov/sci/ees/etsd/pes/ferc_emp_gic.shtml.*

[11] The HILF Report was prepared by NERC, Department of Energy, and a steering committee comprised of industry and risk experts and was approved by the NERC Board of Trustees on May 17, 2010. North American Electric Reliability Corp., *High-Impact, Low-Frequency Event Risk to the North American Bulk Power System,* at 2 (June 2010) (HILF Report), available at *http://www.nerc.com/files/HILF.pdf.*

[12] NERC, Board of Trustees Minutes, Exhibit J, at 1 (Nov. 4, 2010), available at *http://www.nerc.com/docs/docs/bot/BOT-1110m-open-complete.pdf.*

[13] NERC Comments at 2 n.4.

[14] Written statements presented at the Technical Conference, post-Technical Conference comments, and Technical Conference transcript are accessible through the Commission's eLibrary document retrieval system in Docket No. AD12–13–000.

[15] NOPR, 141 FERC ¶ 61,045 at P 3 (citing Statement of Scott Pugh, U.S. Department of Homeland Security at 2 (citing 1989 Hydro-Québec blackout); Statement of Frank Koza, PJM Interconnection, L.L.C. at 1 (''The combination of half-cycle transformer saturation and increased reactive power consumption can lead to voltage collapse and blackouts if not properly managed.''); Statement of John Kappenman at 8 (''The bulk power system is the nation's most important critical infrastructure and unlike other threats, a severe geomagnetic storms [sic] can impose a near simultaneous nationwide crippling threat to this vital infrastructure.''); Statement of Gerry Cauley, NERC at 1 (''Previous examples, such as the 1989 event in Hydro Québec demonstrate that severe solar storms represent a serious risk that can challenge the reliability of the bulk power system.'')).

commenters, however, expressed concern with developing Reliability Standards to address GMD events at this time.[16]

D. Notice of Proposed Rulemaking

10. On October 18, 2012, the Commission issued a Notice of Proposed Rulemaking (NOPR) pursuant to FPA section 215(d) proposing to direct that NERC submit to the Commission for approval proposed Reliability Standards that address the risks posed by GMDs to the reliable operation of the Bulk-Power System.[17] The NOPR stated that the proposal was based on government-sponsored studies and NERC studies indicating that GMD events can have an adverse, wide-area impact on the reliable operation of the Bulk-Power System.[18] The NOPR stated that GMD vulnerabilities are not adequately addressed in the Reliability Standards and that this constitutes a reliability gap because GMD events can cause the Bulk-Power System to collapse suddenly and can potentially damage equipment on the Bulk-Power System.

11. The NOPR proposed to direct NERC to develop GMD Reliability Standards in two stages. Regarding the first stage, NERC would submit one or more proposed Reliability Standards that require owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System. The NOPR proposed that NERC would submit these First Stage GMD Reliability Standards within 90 days of the effective date of a final rule in this proceeding. The NOPR, while not proposing to direct a specific implementation plan, encouraged a 90-day implementation period following Commission approval of the First Stage GMD Reliability Standards.

12. The NOPR proposed to accept aspects of the ''Initial Actions'' plan set forth in NERC's May 21, 2012 post-Technical Conference comments, in which NERC stated that it would ''identify facilities most at-risk from severe geomagnetic disturbance'' and ''conduct wide-area geomagnetic disturbance vulnerability assessment.'' [19] In the NOPR, the Commission stated that it agreed with NERC that critical Bulk-Power System facilities should be evaluated for GMD vulnerability and, as part of the ''Initial Actions,'' special attention should be given to Bulk-Power System facilities that provide service to critical and priority loads. The NOPR proposed that NERC would conduct these ''Initial Actions'' simultaneously with the development of the First Stage GMD Reliability Standards.

13. Regarding the second stage, the NOPR proposed that, within six months of the effective date of a final rule in this proceeding, NERC would file one or more proposed Reliability Standards that require owners and operators of the Bulk-Power System to conduct initial and on-going assessments of the potential impact of GMDs on Bulk-Power System equipment and the Bulk-Power System as a whole. The NOPR stated that, based on those assessments, the Reliability Standards would require owners and operators to develop and implement a plan so that instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, will not occur as a result of a GMD. The NOPR stated that the plan could not be limited to operational procedures or enhanced training alone, but should, subject to the needs identified in the assessments, contain strategies for protecting against the potential impact of GMDs based on factors such as the age, condition, technical specifications, or location of specific equipment. The NOPR further stated that these strategies could include automatically blocking GICs from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, and isolating certain equipment that is not cost effective to retrofit. Without proposing a specific implementation period, the NOPR stated that the Second Stage GMD Reliability Standards would likely need to be implemented in phases, focusing first on the most critical Bulk-Power System assets.

14. In response to the NOPR, interested entities filed 62 comments. We address below the issues raised in the comments.[20] The Appendix to this Final Rule lists the entities that filed comments to the NOPR.[21]

II. Discussion

15. As discussed below, the Commission finds that the existing Reliability Standards do not adequately address the risks posed by GMDs to the reliable operation of the Bulk-Power System. In its NOPR comments, NERC states that ''[a]s a high-impact, low-frequency event, GMDs pose a unique threat to Bulk-Power System reliability, and NERC is committed to working with stakeholders and the Commission to address these challenges consistent with its responsibilities as the ERO.'' [22] Accordingly, pursuant to section 215(d)(5) of the FPA, the Commission directs the ERO to develop and submit for approval Reliability Standards that address the potentially severe, wide-spread impact of GMD events on the reliable operation of the Bulk-Power System.[23]

16. We issue this directive recognizing, as we did in the NOPR, that there is an ongoing debate as to the likely effect of GMDs on the reliable operation of the Bulk-Power System. As discussed below, the NOPR comments reflect these differing views, with some comments supporting the NERC Interim GMD Report's conclusion that the worst-case GMD scenario is ''voltage instability and subsequent voltage collapse,'' [24] while other comments endorse the Oak Ridge Study's conclusion that a severe GMD event could put Bulk-Power System transformers at risk for failure or permanent damage.[25] As we stated in the NOPR, and affirm here, ''[w]hile the conclusions of these reports differ significantly, our proposed action is warranted by even the lesser

[16] *See, e.g.,* Statement of Steven Naumann, EEI at 5 (''Until [system-wide] studies are completed, it is premature to determine whether NERC should advance development of mandatory requirements to address GMD related-issues.'').

[17] *Reliability Standards for Geomagnetic Disturbances,* Notice of Proposed Rulemaking, 77 FR 64,935 (Oct. 24, 2012), 141 FERC ¶ 61,045 (2012) (NOPR).

[18] NOPR, 141 FERC ¶ 61,045 at P 2 (citing *NERC Interim GMD Report* at 85; *HILF Report* at 68; *Oak Ridge Study*).

[19] NERC May 21, 2012 Comments at 8–9.

[20] Some comments raised issues not addressed in the NOPR, including cost recovery for compliance with the GMD Reliability Standards; the risks posed to the Bulk-Power System by electromagnetic pulses; the organization and conduct of the NERC GMD Task Force; terrorism; and cybersecurity. Issues outside the scope of the NOPR are not addressed in this Final Rule. However, nothing precludes entities from seeking cost recovery if needed.

[21] A document submitted by the Nuclear Regulatory Commission (NRC) was erroneously included in the Commission's eLibrary system in this rulemaking docket and was subsequently removed. The NRC document did not influence the determinations in this Final Rule.

[22] NERC Comments at 3.

[23] We do not necessarily require NERC to develop and submit entirely new Reliability Standards. NERC could develop and submit revisions to existing Reliability Standards. In addition, as stated in the NOPR, facilities and equipment falling outside of our jurisdiction would not be subject to the proposed GMD Reliability Standards. NOPR, 141 FERC ¶ 61,045 at P 27 n.49.

[24] NERC Interim GMD Report at 69.

[25] Oak Ridge National Laboratory, *Electromagnetic Pulse: Effects on the U.S. Power Grid: Meta–R–319* at page 1–14, Tables 4–1, 4–2, 4–3 (discussing at-risk transformers) (January 2010) (*Oak Ridge Study 319 Report*), *available at http://www.ornl.gov/sci/ees/etsd/pes/pubs/ferc_Meta-R-319.pdf.*

consequence of a projected widespread blackout without long-term, significant damage to the Bulk-Power System. Taking steps to prevent such blackouts is consistent with maintaining the reliable operation of the Bulk-Power System.'' [26]

17. In directing the ERO to submit Reliability Standards that address the potential impact of GMD events on the reliable operation of the Bulk-Power System, we are not directing NERC to include specific Requirements or otherwise pre-judging what the ERO eventually proposes. In addition, we are not directing the ERO to develop GMD Reliability Standards that are ''one-size-fits-all,'' a concern expressed in the comments.[27] Instead, in this final rule we identify issues that should be considered in the NERC standards development process. We expect NERC to develop GMD Reliability Standards that address these issues and, when these Reliability Standards are submitted to the Commission for approval, to explain in the accompanying petition how the issues are addressed in the proposed GMD Reliability Standards.[28]

18. Because of concerns raised in the comments regarding the proposed schedule for developing and submitting the GMD Reliability Standards, we adjust the schedule in the NOPR to allow more time. Accordingly, we set a six-month deadline from the effective date of this Final Rule for NERC to submit the First Stage GMD Reliability Standards and suggest a six-month implementation period for the First Stage GMD Reliability Standards following Commission approval. We set an 18-month deadline from the effective date of this Final Rule for NERC to submit the Second Stage GMD Reliability Standards, and direct NERC to propose an implementation period.

19. Below we address the comments regarding: (1) The Commission's authority to direct the ERO to develop and submit GMD Reliability Standards under FPA section 215(d)(5); (2) the content of the First Stage GMD Reliability Standards and the schedule for submitting and implementing the Reliability Standards; (3) the ''Initial Actions'' GMD vulnerability assessments; and (4) the content of the Second Stage GMD Reliability Standards and the schedule for submitting and implementing those Reliability Standards.

A. Commission Authority To Direct the ERO To Develop GMD Reliability Standards Under FPA Section 215(d)(5) NOPR

20. The NOPR stated that GMD vulnerabilities are not adequately addressed in the existing Reliability Standards.[29] The NOPR stated that this constitutes a reliability gap because GMD events can cause the Bulk-Power System to collapse suddenly and can potentially damage the Bulk-Power System.[30] In order to carry out section 215 of the FPA, the NOPR proposed to direct NERC to develop and submit for approval Reliability Standards that address the potentially severe, wide-spread impact of GMD events on the reliable operation of the Bulk-Power System.

Comments

21. NERC states that it ''supports the Commission's exercise of its authority pursuant to Section 215(d)(5) in the NOPR and the due weight given to NERC's technical expertise with respect to the content of the proposed Reliability Standards. The NOPR explicitly does not propose to require NERC or owners or operators of the Bulk-Power System to adopt any particular operational procedures or a particular solution in the second stage Reliability Standards to address GMDs. NERC submits that this approach is consistent with Section 215(d)(2) of the Federal Power Act.'' [31]

22. ELCON states that the NOPR does not establish why the GMD Reliability Standards are ''appropriate to carry out [section 215],'' as required under FPA section 215(d)(5).[32] ELCON states that the ''NOPR does not give sufficient recognition to the key unresolved technical issues, including the lack of consensus about the nature and potential impacts of GMD events and the absence of tools for modeling or addressing the effects of geomagnetic induced currents.'' [33] Accordingly, ELCON states that ''a final rule would not be supportable as an exercise of the Commission's authority under Section 215(d)(5).'' [34] The Trade Associations state that ''[w]hile FERC has authority under Section 215(d)(5) to direct the ERO to develop a mandatory standard on a specific matter, the specific matter that is the subject of this NOPR, GIC levels caused by strong GMD events, does not have a strong scientific or technical consensus upon which to develop standards.'' [35] NARUC states that the NOPR ''does not provide sufficient cost benefit or technical evidence to justify a directive to NERC to set GMD Reliability Standards at this time.'' [36] Other commenters, without explicitly addressing the Commission's authority to direct the ERO to develop GMD Reliability Standards, state that there is an insufficient technical basis for the NERC standards development process.[37]

Commission Determination

23. The Commission finds that the directives in this Final Rule are a valid exercise of the Commission's authority under FPA section 215(d)(5). The plain language of the statute authorizes the Commission to order the development of a Reliability Standard that ''addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.'' [38]

24. We determine that addressing the specific matter of GMDs and their impact on the reliable operation of the Bulk-Power System is appropriate to carry out FPA section 215. As the NOPR stated, while there is an ongoing debate as to how a severe GMD event will most likely impact the Bulk-Power System, there is a general consensus that GMD events can cause wide-spread blackouts due to voltage instability and subsequent voltage collapse, thus disrupting the reliable operation of the Bulk-Power System.[39]

[26] NOPR, 141 FERC ¶ 61,045 at P 5 (citing 16 U.S.C. 824o(a)(4)).

[27] *See, e.g.,* NERC Comments at 4; EIS Comments at 3; Bonneville Comments at 3; NV Energy Comments at 4. Rather than adopt a ''one-size-fits-all'' approach, the NOPR stated that the Oak Ridge Study identified several variables that determine the severity of GMD events, including: (1) Location and strength of the underlying solar event; (2) ground conductivity in the affected locations (i.e., the geology of the location); (3) orientation of the transmission lines; (4) length of transmission lines; and (5) grid construction. NOPR at P 14 (citing *Oak Ridge Study 319 Report* at page 2–5).

[28] In its comments, NERC encourages the Commission to permit Commission staff to actively participate in the NERC standards development process. NERC Comments at 8. Consistent with the Commission's current practice, Commission staff will participate as an observer in the development of the GMD Reliability Standards.

[29] NOPR, 141 FERC ¶ 61,045 at P 4 (citing NERC Reliability Standard IRO–005–3a (Reliability Coordination—Current Day Operations), Requirement R3, as the only existing Requirement that discusses GMDs).

[30] NOPR, 141 FERC ¶ 61,045 at PP 4–5.

[31] NERC Comments at 7.

[32] 16 U.S.C. 824o(d)(5) (''The Commission, upon its own motion or complaint may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.'').

[33] ELCON Comments at 4–5.

[34] *Id.* at 5.

[35] Trade Associations Comments at 25.

[36] NARUC Comments at 3.

[37] *See, e.g.,* Duke Comments at 2–4; CenterPoint Comments at 3.

[38] 16 U.S.C. 824o(d)(5).

[39] *See, e.g.,* Trade Associations Comments at 51 (''The 1989 Hydro Quebec Blackout, is often used in the ORNL/Metatech Report to assert that wide

25. FPA section 215 defines ''reliability standard'' as a ''requirement . . . to provide for reliable operation of the bulk-power system.'' [40] FPA section 215 defines ''reliable operation'' to mean ''operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.'' [41] Because there is a general consensus that GMD events can cause ''voltage instability and subsequent voltage collapse,'' thus affecting the reliable operation of the Bulk-Power System, the Commission finds that GMDs are valid subject matter for Reliability Standards development. In addition, as the Trade Associations' comments acknowledge, the Reliability Standards currently do not expressly require responsible entities to mitigate the risks posed by GMDs to the Bulk-Power System.[42] Therefore, we believe that it is appropriate to direct NERC to submit new or modified Reliability Standards that address GMDs pursuant to FPA section 215(d)(5).

26. We reject the assertion that a lack of technical or scientific consensus regarding some issues associated with GMDs deprives the Commission of the statutory authority to order the development of revised or new Reliability Standards. While the Commission must have a reasonable basis for its actions, section 215(d)(5) does not require the Commission to certify the existence of a consensus before it can require the ERO to develop a Reliability Standard. Instead, the statute specifically vests the Commission with the discretion to determine when a new Reliability Standard is necessary.[43] In any event, the lack of consensus in this case pertains to the most likely impact of a severe GMD event and the appropriate measures to take in mitigation. There is general agreement that GMD events can cause wide-spread blackouts due to voltage instability and subsequent voltage collapse, thus disrupting the reliable operation of the Bulk-Power System.[44] In fact, such blackouts have occurred.[45] Requiring Reliability Standards to protect against these risks is well within the Commission's authority. Moreover, the NERC standards development process will be the vehicle for working through the technical complexities associated with addressing the risks of GMD events on the Bulk-Power System.[46] This is consistent with the NERC Standards Process Manual, which states that the NERC standards development process is designed to ''build and document consensus for each Reliability Standard, both with regard to the need and justification for the Reliability Standard and the content of the Reliability Standard.'' [47]

27. Some comments contend that the NOPR proposed to direct NERC to develop GMD Reliability Standards containing overly prescriptive Requirements in too short an amount of time.[48] Moreover, those comments state that the NOPR relied on underlying studies that, the comments assert, are flawed or unreliable.[49] However, as NERC recognizes in its NOPR comments, the NOPR explicitly stated that it was not directing the ERO to include any specific Requirements or otherwise pre-judging what the ERO eventually submits for approval.[50] In this Final Rule, we direct the ERO to consider issues in the NERC standards development process, but we do not direct the content of the Reliability Standards or pre-judge what NERC ultimately proposes. As for the timing of the submission and implementation of the GMD Reliability Standards, we address that concern by modifying the schedule in the NOPR to give NERC more time to develop and submit the Reliability Standards. With respect to the commenters' criticism of the studies cited in the NOPR, we recognize the divergent views.[51] However, as stated above, our directive to develop GMD Reliability Standards is justified even under the conclusion in the NERC GMD Interim Report, with which the Trade Associations ''strongly agree,'' that a GMD event could result in ''voltage instability and subsequent voltage collapse.'' [52]

28. Finally, while we disagree that FPA section 215(d)(5) (the specific subsection we rely on in this proceeding) requires a particular cost-benefit showing in order to direct the development of revised or new Reliability Standards, the Commission is cognizant of the potential costs of GMD Reliability Standards. As we explain and clarify in this final rule, the Commission is not directing the content of the GMD Reliability Standards that must be submitted, and with respect to the Second Stage GMD Reliability Standards, is not mandating the use of any particular technologies (such as automatic blocking) to address the potential impact of benchmark GMD events. We expect that NERC and industry will consider the costs and benefits of particular mitigation measures as NERC develops the

spread collapse and permanent equipment damage is a likely outcome of a severe GMD event. Although the Trade Associations agree that both are potential risks of a severe GMD event, the Trade Association find the conclusions of the GMD Task Force, which states that 'the most likely worst-case system impacts from a severe GMD event and corresponding GIC flow is voltage instability caused by a significant loss of reactive power support,' to be more credible and based on the scientific facts.''); PJM Comments at 3 (''[T]here is no question that severe space weather has the potential to create serious problems for the Bulk-Power System.''); ITC Comments at 2 (''ITC believes that the risk to the bulk power system from GMD is a significant concern that should be addressed.'').

[40] 16 U.S.C. 824o(a)(3).

[41] *Id.* at 824o(a)(4).

[42] Trade Associations Comments at 25 (''[T]he Trade Associations acknowledge that NERC Reliability Standards do not expressly require steps for mitigating the effects of GMD events.'').

[43] 16 U.S.C. 824o(d)(5); *see also Transmission Relay Loadability Reliability Standard,* 134 FERC ¶ 61,127, at P 25 (2011) (explaining that under section 215(d)(5) ''the Commission, and not just the ERO, has the responsibility and authority to identify 'specific matters' that it considers appropriate to carry out section 215. Section 215 establishes a paradigm by which both the Commission and the ERO are responsible for identifying reliability gaps—the ERO through its Reliability Standards development process, where it can independently identify areas of concern and develop Standards to address them; and the Commission through its review of proposed Reliability Standards and authority to direct modifications or new Standards that address specific issues necessary to effectuate the purposes of section 215.'').

[44] *See supra* n.39.

[45] *See* NERC Interim GMD Report at i (citing 1989 Hydro-Québec blackout).

[46] The NERC GMD Task Force has already developed operational procedure templates for certain functional entities. *See* NERC GMD Task Force Geomagnetic Disturbance Operating Procedure Template: Transmission Operator, *available at http://www.nerc.com/docs/pc/gmdtf/Template_TOP.pdf;* NERC GMD Task Force Geomagnetic Disturbance Operating Procedure Template: Generator Operator, *available at http://www.nerc.com/docs/pc/gmdtf/Template_GOP.pdf.* We expect that the NERC standards development process will consider the NERC GMD Task Force's work as a resource.

[47] NERC Rules of Procedure, Appendix 3A (Standards Process Manual) (Effective January 31, 2012) at 4.

[48] *See, e.g.,* ELCON Comments at 7–14; CenterPoint Comments at 2.

[49] *See, e.g.,* Trade Associations Comments at 19.

[50] NOPR, 141 FERC ¶ 61,045 at P 17.

[51] While some commenters criticize the Oak Ridge Study's conclusions regarding the possible damaging effects of GMDs to Bulk-Power System components, the NOPR stated that the NERC-approved HILF Report also found that ''[t]ransformers experience excessive levels of internal heating brought on by stray flux when GICs cause the transformer's magnetic core to saturate, forcing magnetic flux to flow outside the normal core steel magnetic circuit. Previous well documented cases have noted heating failures that caused melting and burn-through of large-amperage copper windings and leads in these transformers (Figure 9).'' NOPR, 141 FERC ¶ 61,045 at 13 n.33 (citing *HILF Report* at 70).

[52] NERC Interim GMD Report at 69; Trade Associations Comments at 17–18.

technically-justified Second Stage GMD Reliability Standards.

B. First Stage GMD Reliability Standards

29. As discussed below, the Commission directs that, within six months of the effective date of this Final Rule, NERC submit for approval one or more Reliability Standards that require owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System. We address below the comments regarding the content of the First Stage GMD Reliability Standards and the schedule for submitting and implementing the First Stage GMD Reliability Standards.

1. Content of First Stage GMD Reliability Standards NOPR

30. The NOPR proposed to direct NERC to submit one or more Reliability Standards requiring owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System. The NOPR stated that the proposed Reliability Standards should not necessarily specify what operational procedures must be adopted, but the ERO should give owners and operators of the Bulk-Power System guidance as to what procedures have been or are expected to be effective in mitigating the effects of GMDs consistent with the reliable operation of the Bulk-Power System. The NOPR also stated that the proposed Reliability Standards should address the coordination of operational procedures among responsible entities across regions. The NOPR further stated that, because there is potential for equipment damage resulting from a GMD event, the proposed Reliability Standards should also address operational procedures for restoring GMD-impacted portions of the Bulk-Power System that take into account the potential for equipment that is damaged or out-of-service for an extended period of time. The NOPR also proposed that, following implementation, NERC would provide periodic reports assessing the effectiveness of operational procedures in mitigating the effects of GMD events and periodically review the required operational procedures and recommend to owners and operators that they incorporate lessons-learned and new research findings.

Comments

31. NERC and several commenters generally support the development of Reliability Standards requiring owners and operators to develop and implement operational procedures to address GMDs.[53] Some commenters state that certain entities have already implemented operational procedures to address GMDs, and some commenters stress the importance of combining operational procedures with monitoring and situational awareness.[54] Other commenters express concern with relying on operational procedures alone to address GMDs.[55]

32. NERC states that it supports the development of operational procedures because ''[t]raining and education programs on the nature of the threat [of GMDs] will allow Bulk-Power System Operators to more rapidly identify areas for improvement and take actions when necessary.'' [56] NERC states, however, that its ability to assess and report on the effectiveness of operational procedures is constrained because of the limitations with monitoring and forecasting GMD events. NERC states that, if the Commission requires NERC to submit periodic reports, as proposed in the NOPR, the reports should be submitted no more frequently than annually and, in part to conserve ERO resources, that the reporting obligation should expire upon implementation of the Second Stage GMD Reliability Standards. NERC also states that the emergence of new forecasting capabilities is vital to improving early warning and understanding of potential GMD effects and will directly impact the development of operational procedures. NERC states that relying on the ''K-Index,'' [57] which NERC describes as the most familiar means of characterizing the severity of geomagnetic storms, is problematic because of the associated ''uncertainties and inaccuracies.'' NERC states that the K-Index ''cannot be used as an automatic triggering event for specific required actions because operational procedures need flexibility to account for actual operating conditions and the ability to adjust accordingly.'' [58]

33. Commenters that oppose Reliability Standards requiring the development and implementation of operational procedures state that Reliability Standards are premature because the science of GMDs is not fully understood and more study is needed before Reliability Standards can be developed.[59] Accordingly, commenters state that the NERC GMD Task Force should be allowed to finish its work, which includes evaluating the need for GMD Reliability Standards, before the Commission directs NERC to develop Reliability Standards. Commenters also state that requiring operational procedures prematurely (e.g., before responsible entities have conducted GMD vulnerability assessments) may harm reliability because operational procedures can have unintended consequences that adversely affect the Bulk-Power System.[60]

34. Some commenters opposed to requiring operational procedures state that they could support the use of operational procedures under certain conditions. The Trade Associations state that they could support requiring operational procedures if the Commission determines that they are necessary.[61] Dominion states that it could support, as an interim step, having NERC gather current industry practices regarding GMD operational procedures and issue a best practices operating guideline within 90 days.[62] SPP Parties state that the Commission should encourage NERC to issue, before the next solar peak in June 2013, a ''reliability guideline'' to assist owners and operators of Bulk-Power System facilities to address GMD threats to the Bulk-Power System.[63]

[53] *See, e.g.,* NERC Comments at 9; Joint ISOs/RTOs Comments at 4; PJM Comments at 3; APS Comments at 3; Exelon Comments at 4; Bonneville Comments at 3; ITC Comments at 6; PPL Companies Comments at 2; Pa PUC Comments at 3; SCE Comments at 3–4; and IESO Comments at 6.

[54] *See, e.g.,* IESO Comments at 6; Exelon Comments 4–5.

[55] *See, e.g.,* Comments of Congressman Franks at 1–2; IESO Comments at 8–9; and EIS Comments at 5.

[56] NERC Comments at 9.

[57] ''K index'' is defined as ''a 3-hourly quasi-logarithmic local index of geomagnetic activity relative to an assumed quiet-day curve for the recording site. Range is from 0 (quiet) to 9 (severely disturbed).'' Space Weather Prediction Center, *Glossary of Solar-Terrestrial Terms, available at http://www.swpc.noaa.gov/info/glossary.html#k.*

[58] NERC Comments at 11.

[59] *See, e.g.,* Trade Associations Comments at 4–5; NARUC Comments at 5–6; ELCON Comments at 2; SPP Parties Comments at 3; CenterPoint Comments at 5; Dominion Comments at 4; Duke Comments at 2–3; and KCP&L Comments at 2.

[60] CenterPoint Comments at 7.

[61] Trade Associations Comments at 5–6 (''If the Commission finds it must direct NERC to develop a standard or standards to address the impact of GMDs on the [Bulk-Power System], the Trade Associations support the Commission's stage one proposal to require NERC to file one or more standards which would require grid owners and operators to develop and implement operations procedures that would mitigate GMD effects.'').

[62] Dominion Comments at 4.

[63] SPP Parties Comments at 4. As discussed below, the NERC GMD Task Force provided guidance to registered entities in the NERC Interim GMD Report by identifying possible operational procedures in response to GMD events. NERC Interim GMD Report at 80–81. In addition, NERC issued an Industry Advisory Alert on May 10, 2011 entitled ''Preparing for Geo-Magnetic Disturbances.'' NERC, Industry Advisory: Preparing

35. Commenters generally agree that operational procedures, if required, should be developed by responsible entities and not by NERC, although some commenters state that NERC could develop best practices to assist responsible entities.[64] Commenters state that the Reliability Standards should not have Requirements that treat responsible entities the same (''one-size-fits-all'') because responsible entities, due to geography, geology or other variables, may be more or less likely to experience the effects of GMDs. Commenters state that the operational procedures should be developed by responsible entities based on factors such as the entity's geographic location and the structural make-up of the entity's Bulk-Power System components. Commenters also state that operational procedures should not have the unintended effect of adversely impacting the Bulk-Power System. Commenters further state that the Reliability Standards should be clear as to which functional entities are responsible for compliance and that the assignment of responsibilities should be consistent with NERC's functional model.

Commission Determination

36. The Commission directs NERC to submit, within six months of the effective date of this Final Rule, one or more Reliability Standards requiring owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System. As we stated in the NOPR, ''operational procedures, while not a complete solution, constitute[] an important first step to addressing the GMD reliability gap because they can be implemented relatively quickly.'' [65] Operational procedures may help alleviate abnormal system conditions due to transformer absorption of reactive power during GMD events, helping to stabilize system voltage swings, and may potentially isolate some equipment from being damaged or misoperated.

37. It is not premature for NERC to begin developing Reliability Standards requiring owners and operators of the Bulk-Power System to develop and implement operational procedures. The comments reflect that some entities have implemented operational procedures to mitigate the impacts of GMDs.[66] In addition, the NERC Interim GMD Report identifies examples of operational procedures to mitigate GMD events including: reduction of equipment loading (e.g., by starting off-line generation), unloading the reactive load of operating generation, reductions of system voltage, and system and/or equipment isolation through reconfiguration of the transmission system.[67] In addition, the NERC GMD Task Force has developed operational procedure templates for certain functional entities. Given the work of the NERC GMD Task Force and recognizing that some operational procedures are already in place, we conclude that it is not premature for NERC to develop Reliability Standards that require operational procedures.

38. The Commission is not directing NERC to develop Reliability Standards that include specific operational procedures. Instead, as proposed in the NOPR, the Reliability Standards should include a mechanism that requires responsible entities to develop and implement operational procedures because owners and operators of the Bulk-Power System are most familiar with their own equipment and system configurations. In addition, we do not expect that owners and operators of the Bulk-Power System will necessarily develop and implement the same operational procedures. Instead, the Reliability Standards, rather than include ''one-size-fits-all'' Requirements, should allow responsible entities to tailor their operational procedures based on the responsible entity's assessment of entity-specific factors, such as geography, geology, and system topology, identified in the Reliability Standards. In addition, as we stated in the NOPR, the coordination of operational procedures across regions is an important issue that should be considered in the NERC standards development process.[68] The coordination of operational procedures across regions and data sharing might be overseen by planning coordinators or another functional entity with a wide-area perspective.[69] The NERC standards development process, as stated in the NOPR, should also consider operational procedures for restoring GMD-impacted portions of the Bulk-Power System that take into account the potential for damaged equipment that could be de-rated or out-of-service for an extended period of time.

39. While responsible entities will develop and implement operational procedures, NERC can support their efforts, for example, by identifying and sharing operational procedures found to be the most effective. NERC should also periodically survey the responsible entities' operational procedures, offer recommendations based on lessons-learned and new research findings, and re-evaluate whether modification to the Reliability Standards is warranted. Based on these surveys, NERC should produce periodic reports assessing the effectiveness of operational procedures. We take no position in this Final Rule on the content, frequency, or duration of such surveys, recommendations, or reports because we believe that those issues, in the first instance, should be addressed as part of the NERC standards development process.

40. We take no position in this Final Rule with respect to NERC's concerns regarding overreliance on the K-Index to trigger operational procedures. Technical issues regarding the development and implementation of operational procedures should be, in the first instance, considered in the NERC standards development process. Likewise, we take no position in this Final Rule on which functional entities should be responsible under the Reliability Standards because we believe that those issues, in the first instance, should be addressed as part of the NERC standards development process.

2. Schedule for Submitting and Implementing First Stage GMD Reliability Standards

NOPR

41. The NOPR proposed that NERC submit the First Stage GMD Reliability Standards to the Commission for

for Geo-Magnetic Disturbance (May 10, 2011), *available at http://www.nerc.com/fileUploads/File/Events%20Analysis/A-2011-05-10-01_GMD_FINAL.pdf.*

[64] NERC Comments at 6; AEP Comments at 4–5; ELCON Comments at 13; SPP Parties Comments at 5; IESO Comments at 11; Consumers Comments at 4; and Duke Comments at 5.

[65] NOPR, 141 FERC ¶ 61,045 at P 18 n.38 (citing NERC Interim GMD Report at 79 (''Operating procedures are the quickest way to put in place actions that can mitigate the adverse effects of GIC on system reliability . . . Both system operating and transmission owner organizations need to have appropriate procedures and training in place.'')).

[66] *See, e.g.,* IESO Comments at 5; Exelon Comments at 5; CEA Comments at 6–7; Dominion Comments at 5; Trade Associations Comments at 26.

[67] NERC Interim GMD Report at 80–81.

[68] NOPR, 141 FERC ¶ 61,045 at 20 (citing NERC Interim GMD Report at 79 (''The [operating] procedures of these organizations need to be coordinated with each other and with their neighboring organizations.'')).

[69] In NERC's May 21, 2012 post-Technical Conference comments, NERC stated that planning coordinators will conduct the wide-area analyses as part of the ''Initial Actions'' assessments, discussed below. NERC May 21, 2012 Comments at 9. LADWP proposes that reliability coordinators coordinate these efforts. LADWP Comments at 5.

approval within 90 days of the effective date of a final rule in this proceeding. The NOPR also proposed a suggested 90-day implementation period following Commission approval of the First Stage GMD Reliability Standards.

Comments

42. NERC states that ''[w]hile the implementation plan proposed for the completion of the first stage Reliability Standards is aggressive, NERC is committed to meeting whatever implementation targets are established by the Commission.'' [70] Other commenters support adoption of the proposed 90-day filing deadline for the First Stage GMD Reliability Standards.[71]

43. Other commenters state that the proposed 90-day deadline for filing the First Stage GMD Reliability Standards does not allow enough time to develop a Reliability Standard using the NERC standards development process.[72] ITC proposes a six-month deadline for developing and submitting the First Stage GMD Reliability Standards and a six-month implementation period following Commission approval. LADWP suggests an eight-month deadline for submitting the First Stage GMD Reliability Standards and a six-month implementation period. Joint ISOs/RTOs propose a one-year deadline for developing and submitting the First Stage GMD Reliability Standards, with the Commission directing NERC to develop an implementation schedule once NERC has a better idea of the degree of coordination that will be needed between the different functional entities. CenterPoint states that ''two years of study and review are needed to develop GMD Reliability Standards'' and proposes ''a region-based phased implementation schedule.'' [73] Exelon recommends having the ERO propose a filing deadline.[74] The Trade Associations recommend that the Commission not suggest an implementation period, but the Trade Associations state that it is their preliminary view that operational procedures could be implemented in six months.[75]

Commission Determination

44. We support the prompt development of mandatory and enforceable Reliability Standards that require owners and operators to implement operational procedures to afford some level of protection to the Bulk-Power System against GMD events. In its comments, NERC commits to meeting the 90-day deadline proposed in the NOPR. However, based on the concerns raised in other comments, we modify the schedule in the NOPR and direct NERC to submit proposed First Stage GMD Reliability Standards within six months of the effective date of this Final Rule.

45. While a six-month deadline may not be as long as some commenters propose, it strikes a balance by affording NERC a reasonable amount of time to develop the Reliability Standards and having Reliability Standards in place in the near term. As we stated in the NOPR, the Commission expects that NERC and owners and operators of the Bulk-Power System will draw on industry's experience with existing operational procedures to expedite the NERC standards development process. This should help establish the First Stage GMD Reliability Standards quickly to afford some level of protection to the Bulk-Power System against GMD events.

46. With respect to the suggested 90-day implementation period proposed in the NOPR, we modify the proposal and suggest a six-month implementation period. Given our expectation that the Reliability Standards proposed by NERC will require responsible entities to develop and implement operational procedures and to coordinate such efforts, it is appropriate to afford more time for implementation. We take no position in this Final R ule on the details of the implementation plan. The details of the implementation plan should be addressed, in the first instance, in the NERC standards development process.

C. ''Initial Actions'' GMD Vulnerability Assessments NOPR

47. The NOPR proposed to accept aspects of the ''Initial Actions'' detailed in NERC's May 21, 2012 post-Technical Conference comments. The NOPR stated that NERC proposed to ''identify facilities most at-risk from severe geomagnetic disturbance'' and ''conduct wide-area geomagnetic disturbance vulnerability assessment.'' [76] The NOPR agreed with NERC that critical Bulk-Power System facilities should be evaluated for GMD vulnerability and, as part of the ''Initial Actions,'' that special attention should be given to Bulk-Power System facilities that provide service to critical and priority loads.[77] The NOPR proposed that NERC would conduct these ''Initial Actions'' in parallel with the development and implementation of the First Stage GMD Reliability Standards.

Comments

48. NERC states that it agrees that an assessment is necessary to identify and classify the at-risk population of transformers, and NERC clarifies that asset owners will conduct the ''Initial Actions'' assessments. The Trade Associations agree that owners and operators of the Bulk-Power System should perform individual assessments, while planning authorities should perform system-wide assessments.

49. The Trade Associations support identification of at-risk facilities but caution that the assessment will require new tools, including improved modeling of GICs; improvements in area and regional power flow modeling; and benchmarking of models against actual GICs. Bonneville also states that, while an assessment needs to be done, the tools and models required to perform such an assessment currently do not exist. Bonneville anticipates the availability of ''adequate tools for use in developing limited assessments of risk indexed against the magnitude of GIC flow through individual transformers and possibly even reactive demand under GIC condition by the end of 2013.'' [78]

50. Duke states that the ''Initial Actions'' assessments should identify critical Bulk-Power System facilities but that ''[e]xpanding the effort to include identification and protection for all critical and priority loads is too extensive an activity to be completed simultaneously with the first stage GMD Reliability Standards.'' [79] Exelon states that the NOPR defines critical facilities in a confusing manner because the NOPR references ''critical and priority'' loads, which Exelon states generally relate to the distribution system and not to specific Bulk-Power System facilities. Exelon states that NERC has set out a methodology for determining what equipment it considers critical and a methodology to identify ''at-risk'' equipment based on peer-reviewed research. Exelon recommends that NERC and responsible entities rely on their technical expertise to define what

[70] NERC Comments at 9.

[71] *See, e.g.,* SENS Comments at 4; Foundation Comments at 19.

[72] *See, e.g.,* ITC Comments at 3; LADWP Comments at 8–9; Joint ISOs/RTOs Comments at 14; Consumers Energy Comments at 2–3; AEP Comments at 4.

[73] CenterPoint Comments at 16–17.

[74] Exelon Comments at 14.

[75] Trade Associations Comments at 22.

[76] NERC May 21, 2012 Comments at 8–9.

[77] NOPR, 141 FERC ¶ 61,045 at P 22 (citing NERC, *Severe Impact Resilience: Considerations and Recommendations* at 26 (Accepted by NERC Board of Trustees on May 9, 2012), *available at http://www.nerc.com/docs/oc/sirtf/SIRTF_Final_May_9_2012-Board_Accepted.pdf.*).

[78] Bonneville Comments at 5.

[79] Duke Comments at 5–6.

is critical equipment. Exelon also states that the time frames in the NOPR for completing the ''Initial Actions'' assessments is unrealistic because Exelon believes that the NOPR proposed to require completion of the assessments 90 days after the Commission approves the First Stage GMD Reliability Standards.[80] CenterPoint states that vulnerability assessments should be made on a ''regional basis'' with the regions most vulnerable to GMDs assessed first.

Commission Determination

51. The Commission accepts the proposal in NERC's May 21, 2012 post-Technical Conference comments and directs NERC to ''identify facilities most at-risk from severe geomagnetic disturbance'' and ''conduct wide-area geomagnetic disturbance vulnerability assessment'' as well as give special attention to those Bulk-Power System facilities that provide service to critical and priority loads.[81] As noted in NERC's comments, owners and operators of the Bulk-Power System, as opposed to NERC, will perform the assessments and special attention will be given to evaluating critical transformers (e.g., step-up transformers at large generating facilities).[82] We agree with the Trade Associations that system-wide assessments could be conducted by planning authorities, or another functional entity with a wide-area perspective, in coordination with owners and operators of the Bulk-Power System.[83] NERC should oversee these efforts and provide responsible entities with a methodology for identifying ''at-risk'' Bulk-Power System components and ''critical and priority loads'' that need to be analyzed in the ''Initial Actions.''

52. Some commenters state that tools do not exist for conducting the ''Initial Actions'' assessments. As a result, the commenters assert that the schedule for completing the ''Initial Actions'' assessments is unrealistic because the commenters believe that the NOPR proposed to require the completion of such assessments by the filing date or implementation date of the First Stage GMD Reliability Standards. We clarify that the ''Initial Actions'' assessments do no need to be completed by the filing date or implementation date of the First Stage GMD Reliability Standards. The NOPR only proposed that the ''Initial Actions'' assessments should *begin* immediately (i.e., simultaneous with the development of the First Stage GMD Reliability Standards). Thus, the ''Initial Actions'' assessments provide a head start for analyzing the most at-risk and critical facilities before the Second Stage GMD Reliability Standards become effective and could be used to assist in performing the GMD vulnerability assessments required in the Second Stage GMD Reliability Standards. Further, to the extent that owners and operators of the Bulk-Power System have already begun to identify facilities most at-risk from severe GMD events, those assessments should help to inform the ''Initial Actions'' assessments required by this final rule.

53. In NERC's May 21, 2012 post Technical Conference comments, NERC stated that all of its proposed ''Initial Actions'' would take 18–24 months to complete.[84] The June 2012 GMD Task Force Phase 2 Scope and Project Plan estimated that ''improve[d] tools for industry planners to develop GMD mitigation strategies'' would be completed within 12–36 months, depending on the task, and ''improve[d] tools for system operators to manage GMD impacts'' would be completed within 12–24 months.[85] Adjusting the deadline for submission of the Second Stage GMD Reliability Standards to 18 months allows time to identify facilities most at-risk from severe geomagnetic disturbance and to conduct wide-area geomagnetic disturbance vulnerability assessment, with special attention being given to those Bulk-Power System facilities that provide service to critical and priority loads, before the effective date of the Second Stage GMD Reliability Standards.[86]

D. Second Stage GMD Reliability Standards

54. As discussed below, the Commission adopts the NOPR proposal, with modifications, to direct NERC to submit Second Stage GMD Reliability Standards. We direct NERC to submit for approval, one or more Reliability Standards that require owners and operators of the Bulk-Power System to conduct initial and on-going assessments of the potential impact of benchmark GMD events on Bulk-Power System equipment and the Bulk-Power System as a whole. The Second Stage GMD Reliability Standard must identify what severity GMD events (i.e., benchmark GMD events) that responsible entities will have to assess for potential impacts on the Bulk-Power System. If the assessments identify potential impacts from benchmark GMD events, owners and operators must develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. Owners and operators of the Bulk-Power System cannot limit their plans to considering operational procedures or enhanced training alone, but must, subject to the vulnerabilities identified in the assessments, contain strategies for protecting against the potential impact of the benchmark GMD events based on factors such as the age, condition, technical specifications, system configuration, or location of specific equipment. These strategies could, for example, include automatically blocking GICs from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, and isolating certain equipment that is not cost effective to retrofit, or a combination thereof. These Reliability Standards should be submitted within 18 months of the effective date of this Final Rule.

55. In the discussion below, we address the comments on the GMD vulnerability assessments, the plans for addressing identified vulnerabilities, and the schedule for submitting and implementing the Second Stage GMD Reliability Standards.

1. GMD Vulnerability Assessments

NOPR

56. The NOPR proposed to direct NERC to file one or more Reliability

[80] Exelon Comments at 7 n.20.

[81] NERC Comments at 8–9 (''As the first step in identifying the risk of geomagnetic disturbance to the bulk power system, NERC intends to complete a system-wide vulnerability assessment . . . special attention will be given to the evaluation of critical transformers, such as generator step-up units at large generating facilities . . . a high level review will be conducted to identify and classify the at-risk population based on existing peer-reviewed research. This assessment will be based on a high level screening approach that will include transformer design, condition, geology and geomagnetic location.'').

[82] The NERC Rules of Procedure permit NERC to seek such information from registered entities. NERC Rules of Procedures, Section 1601 (effective January 31, 2012) (''Within the United States, NERC and Regional Entities may request data or information that is necessary to meet their obligations under Section 215 of the Federal Power Act, as authorized by Section 39.2(d) of the Commission's regulations, 18 C.F.R. § 39.2(d).'').

[83] The accuracy of wide-area assessments will depend on the data provided by owners and operators of the Bulk-Power System.

[84] NERC May 21, 2012 Comments at 8.

[85] NERC, GMD Task Force Phase 2 Scope and Project Plan (June 2012), *available at http://www.nerc.com/docs/pc/gmdtf/GMD_Phase_2_Project_Plan_APPROVED.pdf.*

[86] The rulemaking following submission of the Second Stage GMD Reliability Standards 18 months from the effective date of this Final Rule is likely to take several months, and a multi-phased implementation period is likely to follow the effective date of a final rule approving the Second Stage GMD Reliability Standards.

Standards that require owners and operators of the Bulk-Power System to conduct initial and on-going assessments of the potential impact of GMDs on Bulk-Power System equipment and the Bulk-Power System as a whole. The NOPR stated that the Reliability Standards would require owners and operators to develop and implement plans based on the needs identified in the assessments.

57. The NOPR proposed to direct the ERO to consider the following parameters as it develops the Second Stage GMD Reliability Standards.

58. First, the Commission proposed that the Reliability Standards should contain uniform evaluation criteria for owners and operators to follow when conducting their assessments.

59. Second, the NOPR stated that the assessments should, through studies and simulations, evaluate the primary and secondary effects of GICs on Bulk-Power System transformers, including the effects of GICs originating from and passing to other regions.[87]

60. Third, the NOPR asserted that the assessments should evaluate the effects of GICs on other Bulk-Power System equipment, system operations, and system stability, including the anticipated loss of critical or vulnerable devices or elements resulting from GIC-related issues.[88]

61. Fourth, in conjunction with assessments by owners and operators of their own Bulk-Power System components, the Commission stated that wide-area or Regional assessments of GIC impacts should be performed. The NOPR noted that a severe GMD event can cause simultaneous stresses at multiple locations on the Bulk-Power System, potentially resulting in a multiple-outage event.[89] In predicting GIC flows, it is necessary to take into consideration the network topology as an integrated whole (i.e., on a wide-area basis).[90]

62. Fifth, the NOPR proposed that the assessments should be periodically updated, taking into account new facilities, modifications to existing facilities, and new information, including new research on GMDs, to determine whether there are resulting changes in GMD impacts that require modifications to Bulk-Power System mitigation schemes.

Comments

63. NERC and several commenters generally support requiring GMD vulnerability assessments.[91] NERC states that it supports the NOPR's approach of requiring owners and operators of the Bulk-Power System to conduct vulnerability assessments to determine how critical or vulnerable Bulk-Power System components react to simulated GICs of varying intensities. NERC also states that it appreciates the NOPR's recognition of the need to incorporate new information and research given that the science of GMDs is still evolving.

64. Many commenters that oppose the Second Stage GMD Reliability Standards at this time state that available methods of performing vulnerability assessments are crude and unrefined.[92] For example, the Trade Associations state that using existing tools ''would be asking industry to make assessments . . . and apply solutions at a point when these tools are incapable of doing so without creating risks to reliability that could be greater than any known risk resulting from a severe GMD event.'' [93] Commenters state that assessments should only be required after the necessary tools and methodologies have been developed and validated and the NERC GMD Task Force has completed its work.

65. Some commenters state that requiring all owners and operators to base their vulnerability assessments on uniform evaluation criteria would not be realistic due to the widely varying geology and geomagnetic latitudes within which the Bulk-Power System is planned and operated.

66. Some commenters state that the Commission should specify the severity of the GMD to assess and plan, although the commenters do not agree on a specific severity.[94] ITC states that it ''believes that there should be a clear engineering benchmark for transmission owner and operators to plan for GMD in a prudent fashion (e.g., a 1 in 100 year GMD event).'' [95] EIS states that, because the science of GMDs is inexact, an event twice as large as the largest expected GMD should be used as a safety margin.[96] Other commenters state that establishing a benchmark GMD event is problematic because there is no consensus storm scenario.

Commission Determination

67. We direct NERC, within 18 months of the effective date of this final rule, to submit for approval one or more Reliability Standards that require owners and operators of the Bulk-Power System to conduct initial and on-going vulnerability assessments of the potential impact of benchmark GMD events on Bulk-Power System equipment and the Bulk-Power System as a whole. We agree with commenters that the Second Stage GMD Reliability Standards should specify what severity GMD events (i.e., benchmark GMD events) responsible entities must assess for potential impacts on the Bulk-Power System. However, the Commission declines to specify the severity of the storm or otherwise define the characteristics of these benchmark GMD events in this Final Rule. Rather, NERC, through its standards development process, should identify the benchmark GMD events that responsible entities would have to assess.[97] Each responsible entity under the Second Stage GMD Reliability Standards would then be required to assess its vulnerability to the benchmark GMD events consistent with the five assessment parameters identified in the NOPR and adopted in this Final Rule.[98] The NERC standards development process should consider tasking planning coordinators, or another functional entity with a wide-area perspective, to coordinate assessments across Regions under the Second Stage GMD Reliability Standards to ensure consistency and regional effectiveness.

68. The comments that oppose requiring assessments stress that there is a substantial amount of work being done by the NERC GMD Task Force and industry to develop and validate tools, models, and data to perform the vulnerability assessments. We recognize that the tools for assessing GMD vulnerabilities are not fully mature. To address this concern, NERC should

[87] The NOPR described damage to Bulk-Power System components as a primary effect of GICs and production of harmonics that are not present during normal Bulk-Power System operation and increased transformer absorption of reactive power as secondary effects of GICs. NOPR, 141 FERC ¶ 61,045 at P 13.

[88] The Oak Ridge Study assessment included GMD modeling, simulation and review of storm impacts, power grid GIC flows and reactive power demands, transformer heating and risk of potential damage to transformers. *See generally Oak Ridge Study 319 Report.*

[89] *Oak Ridge Study 319 Report* at pages A1–1, A1–2.

[90] *Id.* at page 1–17.

[91] *See, e.g.,* NERC Comments at 14 Joint ISOs/RTOs Comments at 19; PJM Comments at 3; Pa PUC Comments at 3–4; AEP Comments at 2.

[92] *See, e.g.,* Trade Associations Comments at 30; Exelon Comments at 8.

[93] Trade Associations Comments at 4.

[94] *See, e.g.,* CEA Comments at 4–5; ITC Comments at 4.

[95] ITC Comments at 4.

[96] EIS Comments at 4.

[97] Similar work is already being done in Phase 2 of the NERC GMD Task Force Plan. The GMD Task Force Phase 2 Scope and Project Plan states that the NERC GMD Task Force will ''refine and improve a set of defined reference storms (most severe occurrence in a 100-year time horizon) and support ongoing research to identify the maximum theoretical GMD.'' GMD Task Force Phase 2 Scope and Project Plan at 5.

[98] NOPR, 141 FERC ¶ 61,045 at PP 28–32.

consider developing Reliability Standards that can incorporate improvements in the scientific understanding of GMDs. When developing the Second Stage GMD Reliability Standards implementation schedule, NERC should consider the availability of validated tools, models, and data necessary to comply with the Requirements.

69. Some tools currently exist and others are expected to be available when the Second Stage GMD Reliability Standards become effective. For example, NERC states in its comments that, while only one component of developing a comprehensive understanding of the effects of GMDs on the Bulk-Power System, NERC and the Electric Power Research Institute have developed a vulnerability assessment tool that calculates expected GIC levels and has released the tool in an open-source code.[99] In addition, NERC stated in its May 12, 2012 post-Technical Conference comments that NERC expects to complete several ''Mid-Term Actions'' within 12 to 36 months relating to the development of GMD assessment tools. These ''Mid-Term Actions'' include: (1) Refining probabilistic geomagnetic disturbance storm scenarios; (2) performing comprehensive tests of transformers to GIC; (3) increasing GIC monitoring locations across North America; and (4) developing analytical tools for system planners and operators to reliably manage geomagnetic disturbance impacts.[100] The 18-month deadline to submit the Second Stage GMD Reliability Standards (i.e., early-2015) falls within NERC's 12 to 36 month window for completion of the ''Mid-Term Actions.'' Moreover, it is likely that the implementation date of the Second Stage GMD Reliability Standards will be after the completion of the ''Mid-Term Actions.'' As a result, responsible entities will likely have additional tools available to conduct GMD vulnerability assessments once the Second Stage GMD Reliability Standards become effective. In any event, as we explain above, NERC should consider the availability of validated tools, models, and data as it develops an implementation schedule for the Second Stage GMD Reliability Standards.

70. In response to commenters who note that entities may have different vulnerabilities to GMD events based on their geographic location and geology, we emphasize that the vulnerability assessments in the Second Stage GMD Reliability Standards should not assume that all owners and operators of the Bulk-Power System are the same. However, we disagree with commenters that it is not realistic to base vulnerability assessments on uniform evaluation criteria.[101] We clarify that the NOPR did not intend to require responsible entities to use uniform values when assessing their GMD vulnerabilities. Instead, the vulnerability assessments would be based on uniform criteria (e.g., geographic location and geology) but the values for such criteria would be entity-specific.

71. In drafting the Second Stage GMD Reliability Standards, NERC should identify what severity GMD events (i.e., benchmark GMD events) responsible entities will have to assess, and NERC should technically support its choice. The benchmark GMD events should be based on factors that may include, but are not limited to, varying severity of the GMD (i.e., the rate of change in the GMDs magnetic fields), duration, geographic footprint of the GMD, how the GMD's intensity varies with latitude, system configuration, and the orientation of the magnetic fields produced by the GMD.[102] We recognize that there is currently no consensus on benchmark GMD events, and the Commission does not identify specific benchmark GMD events for NERC to adopt. Instead, this issue should be considered in the NERC standards development process so that any benchmark GMD events proposed by NERC have a strong technical basis.

2. Plans To Address Identified GMD Vulnerabilities NOPR

72. The NOPR proposed to direct the ERO to develop Reliability Standards that require owners and operators of the Bulk-Power System to develop and implement a plan, based on the results of the GMD vulnerability assessments, so that instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, will not occur as a result of a GMD. The NOPR did not propose to require a particular solution in the Second Stage GMD Reliability Standards to address identified vulnerabilities. However, the NOPR stated that it expected that some assessments will demonstrate that automatic blocking is necessary in some instances.

73. The NOPR stated that automatic blocking measures address the two major concerns with relying exclusively on operational procedures to mitigate GMDs (i.e., the short period of time to react to a GMD event and operational procedures may not prevent damage to Bulk-Power System equipment). The NOPR stated that automatic blocking can prevent the flow of GICs through power transformers and the Bulk-Power System.[103] The NOPR further stated that eliminating GICs in transformers prevents transformer core saturation and, thus, mitigates or prevents the effects of GMDs on the Bulk-Power System (i.e., transformer overheating, reactive power absorption, and harmonic generation). The NOPR did not propose to direct the ERO to require a particular automatic blocking technology, where blocking is deemed necessary. Instead, the Commission proposed to direct the ERO to identify in the Reliability Standards what would constitute appropriate automatic blocking measures. In defining what is an appropriate blocking measure, the NOPR stated that the ERO should address: (1) Its feasibility and effectiveness; and (2) its ability to operate without adversely impacting the reliable operation of the Bulk-Power System. The NOPR also proposed that the Reliability Standards should include a means by which the ERO can verify that selected blocking measures are appropriate.

74. The NOPR stated that, while not a means for blocking GICs, another possible option is to improve the ''withstand'' capability of Bulk-Power System components, which refers to a component's ability to withstand stresses imposed by GICs before suffering damage.[104] The NOPR stated that the ERO should consider whether the reliability goals of the proposed Reliability Standards can be achieved by a combination of automatic protection measures, including, for example, some combination of automatic blocking and improved ''withstand'' capability.

[99] NERC Comments at 13. As noted at the April 30, 2012 Technical Conference, John Kappenman stated that his investigations are based on mathematical models regarding the impacts of GMDs on the Bulk-Power System. *See, e.g.,* April 30, 2012 Prepared Testimony of John G. Kappenman at 1.

[100] NERC May 12, 2012 Comments at 10–12.

[101] NOPR, 141 FERC ¶ 61,045 at P 27.

[102] NERC Interim GMD Report at 82 (''The first step is to develop a handful of scenarios and the associated probability of each (e.g., severe storm—once in 100 years; serious storm once in 10 years).''). The Commission recognizes that this is not an exhaustive list and additional factors may be added as new information becomes available.

[103] NOPR, 141 FERC ¶ 61,045 at P 34 (citing NERC Interim GMD Report at 73).

[104] NOPR, 141 FERC ¶ 61,045 at P 36 (citing NERC Interim GMD Report at 67).

Comments

75. NERC states that the Second Stage GMD Reliability Standards should be technology-neutral and should not require dedicated blocking devices or other specific equipment. NERC further states that it is currently unable to verify whether a specific blocking device is appropriate.

76. A majority of commenters state that blocking devices need further study and that the Commission should clarify that the Second Stage GMD Reliability Standards will not require responsible entities to install blocking devices or require installation of any particular type of mitigation.[105] Bonneville, for example, states that the ''capability to perform studies that include transformer thermal models needed for developing appropriate mitigation plans and blocking strategies will likely not be available for use until the end of the 2014 at the earliest.'' [106] Commenters also express concern with the statement in the NOPR that plans for addressing GMD vulnerabilities cannot be limited to operational procedures or enhanced training alone because the commenters understand this language to require the installation of automatic blocking devices. PJM requests that the Reliability Standards explicitly state that equipment owners, not system operators, are the responsible entities.[107]

77. Some commenters state that the Second Stage GMD Reliability Standard should not require responsible entities to implement a plan that prevents cascading failures but instead support a Reliability Standard that allows NERC to determine the appropriate mix between prevention and timely restoration of the Bulk-Power System. Commenters also express concern with the language in the NOPR that, under the Second Stage GMD Reliability Standards, responsible entities would be required to ''develop and implement a plan so that instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, will not occur as a result of a GMD.'' Commenters state that such a standard imposes strict liability on responsible entities and is inconsistent with the unpredictable and uncontrolled nature of GMD events.

78. Other commenters express support for hardening elements of the Bulk-Power System as an option to protect against GMD events.[108] Some of these commenters state that operational procedures alone do not prevent the flow of GICs through Bulk-Power System elements; instead, operational procedures are intended to prevent the Bulk-Power System from collapsing, which exposes equipment to GICs for longer periods. EIS states that a combination of operational procedures and hardware is needed to protect the Bulk-Power System. Foundation states that relying on operational procedures alone, based on warnings from space weather observations, renders the Advanced Composition Explorer satellite, which gives details about an approaching GMD, a single point of failure in protecting the Bulk-Power System. Commenters also state that the benefits afforded by operational procedures are unpredictable because the state of the Bulk-Power System (e.g., load, available generation, unplanned equipment outages) at the time of a GMD event cannot be known in advance.

Commission Determination

79. We direct NERC, within 18 months of the effective date of this Final Rule, to submit for approval one or more Reliability Standards that, assuming the assessments identify potential impacts from a benchmark GMD event, require owners and operators of the Bulk-Power System to develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. Owners and operators of the Bulk-Power System cannot limit their plans to considering operational procedures or enhanced training, but must, subject to the vulnerabilities identified in the assessments, contain strategies for protecting against the potential impact of any benchmark GMD event based on factors such as the age, condition, technical specifications, system configuration, or location of specific equipment. These strategies could, for example, include automatically blocking GICs from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, and isolating certain equipment that is not cost effective to retrofit, or a combination thereof.

80. A major concern raised in the comments is that the NOPR proposed to require responsible entities to utilize automatic blocking devices. However, the NOPR explicitly stated that it did not propose to require a particular solution in the Second Stage GMD Reliability Standards to address GMD vulnerabilities. The NOPR only stated that it expected that some assessments will demonstrate that automatic blocking is necessary in some instances. While the NOPR proposed to provide guidance with respect to the use and evaluation of automatic blocking devices, the NOPR did not propose to require the use of automatic blocking devices.

81. In this Final Rule, we do not direct the ERO to develop Reliability Standards that require the use of automatic blocking devices or any specific technology. We agree with NERC that the Reliability Standards should be technology-neutral.[109] Instead, the Second Stage GMD Reliability Standards should require owners and operators of the Bulk-Power System to develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. In the NOPR, we identified a non-exhaustive list of possible automatic measures for doing so, including automatically blocking GICs from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, and isolating certain equipment that is not cost effective to retrofit.

82. As with the First Stage GMD Reliability Standards, the responsible entities should perform vulnerability assessments of their own systems and develop the plans for mitigating any identified vulnerabilities. We take no position in this Final Rule on which functional entities should be responsible for compliance under the Second Stage GMD Reliability Standards. However, the NERC standards development process should consider tasking planning coordinators, or another functional entity with a wide-area perspective, to coordinate mitigation plans across Regions under the Second Stage GMD Reliability Standards to ensure consistency and regional effectiveness. We clarify that if a responsible entity performs the required GMD vulnerability assessments and finds no potential GMD impacts, no

[105] *See, e.g.,* Trade Associations Comments at 32; Joint ISOs/RTOs Comments at 18; Bonneville Comments at 7; Exelon Comments at 11–12.

[106] Bonneville Comments at 6.

[107] PJM Comments at 4–5.

[108] *See, e.g.,* Pa PUC Comments at 4; Bonneville Comments at 7.

[109] NERC Comments at 4.

plan is required under the Second Stage GMD Reliability Standards.[110]

83. The NOPR stated that if a responsible entity identifies GMD vulnerabilities, then the plan cannot be limited to operational procedures or enhanced training alone. Some commenters interpreted this to mean that a responsible entity could never rely on operational procedures alone. We clarify that if the GMD vulnerability assessments in the Second Stage GMD Reliability Standards identify potential GMD impacts, while the development of the required mitigation plan cannot be limited to considering operational procedures or enhanced training alone, operational procedures and enhanced training may be sufficient if that is verified by the vulnerability assessments.

84. The Second Stage GMD Reliability Standards should not impose ''strict liability'' on responsible entities for failure to ensure the reliable operation of the Bulk-Power System in the face of a GMD event of unforeseen severity, as some commenters fear. The NOPR proposed to require owners and operators to develop and implement a plan so that instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, will not occur as a result of a GMD.[111] While this language is taken directly from the definition of ''reliable operation'' in FPA section 215(a)(4), and similar language is found in the Requirements of other Reliability Standards, we clarify that owners and operators should be required to develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. The goal of the NERC standards development process should be to propose Reliability Standards that ensure the reliable operation of the Bulk-Power System in response to identified benchmark GMD events.[112] Identifying robust and technically justified benchmark GMD events in the Reliability Standards, that the Bulk-Power System is required to withstand (i.e., continue ''reliable operation''), addresses the concern that responsible entities might otherwise be required to prevent instability, uncontrolled separation, or cascading failures of the Bulk-Power System when confronted with GMD events of unforeseen severity. In addition, the Reliability Standards should include Requirements whose goal is to prevent instability, uncontrolled separation, or cascading failures of the Bulk-Power System when confronted with a benchmark GMD event. Given that the scientific understanding of GMDs is still evolving, we recognize that Reliability Standards cannot be expected to protect against all GMD-induced outages.

85. In the NOPR, we proposed to direct the ERO to identify what would constitute appropriate automatic blocking measures. The NOPR stated that, in defining what is an appropriate blocking measure, the ERO should address: (1) Feasibility and effectiveness; and (2) ability to operate without adversely impacting the reliable operation of the Bulk-Power System. The comments reflect that certain entities have implemented automatic blocking measures, but the comments also reflect concerns with the unintended effects of automatic blocking measures and the uncertainties surrounding automatic blocking measures.[113] We do not require the use of automatic blocking measures in the Second Stage GMD Reliability Standards. However, given that some responsible entities have or may choose automatic blocking measures, the NERC standards development process should consider how to verify that selected blocking measures are effective and consistent with the reliable operation of the Bulk-Power System.

86. The NOPR stated that another possible mitigation option is to improve the ''withstand'' capability of Bulk-Power System components. The NOPR stated that the ''withstand'' capability refers to a component's ability to withstand stresses imposed by GICs before suffering damage. While responsible entities will decide how to mitigate GMD vulnerabilities on their systems, the NERC standards development process should consider how the reliability goals of the proposed Reliability Standards can be achieved by a combination of automatic measures including, for example, some combination of blocking, improved ''withstand'' capability, instituting specification requirements for new equipment, inventory management, and isolating certain equipment that is not cost effective to retrofit. As with the First Stage GMD Reliability Standards, NERC can identify and disseminate to responsible entities the measures or the combination of measures adequate to maintain the reliable operation of the Bulk-Power System against the potential GMD impacts identified in the assessments.

3. Schedule for Submitting and Implementing Second Stage GMD Reliability Standards

NOPR

87. The NOPR proposed a six-month deadline to submit the Second Stage GMD Reliability Standards to the Commission. However, the NOPR did not propose to direct or suggest an implementation schedule for the Second Stage GMD Reliability Standards. Instead, the NOPR stated that the Reliability Standards would likely require an extended, multi-phase implementation period given the time needed to conduct the required assessments and the time and cost of installing any required automatic protection measures. The NOPR stated that it would be appropriate for the Second Stage GMD Reliability Standards to include an implementation schedule that requires owners and operators of the Bulk-Power System to prioritize implementation so that components considered vital to the reliable operation of the Bulk-Power System are protected in the earliest phase of the implementation plan.

Comments

88. NERC states that ''[w]hile the implementation proposed for the completion of the second stage Reliability Standards is aggressive, NERC is committed to meeting whatever implementation targets are established by the Commission in the final rule.''[114] Other commenters support adoption of the proposed six-month filing deadline for the Second Stage GMD Reliability Standards.[115]

89. Some commenters, including those supporting the Second Stage GMD Reliability Standards, express concern with the six-month deadline proposed in the NOPR because six months does not allow enough time to address the complex issues raised by the proposed

[110] NOPR, 141 FERC ¶ 61,045 at P 16 n.37.

[111] 16 U.S.C. 824o(a)(4) (''The term 'reliable operation' means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.'').

[112] *See, e.g.,* Reliability Standard TOP–004–2, Requirement R2 (''Each Transmission Operator shall operate so that instability, uncontrolled separation, or cascading outages will not occur as a result of the most severe single contingency.'').

[113] CEA Comments at 10; Bonneville Comments at 7; Dominion Comments at 7; CenterPoint Comments at 12–13; Exelon Comments at 11–12.

[114] NERC Comments at 13.

[115] *See, e.g.,* Foundation Comments at 19.

Reliability Standards.[116] Joint ISOs/RTOs propose a one-year development and filing deadline.[117] Idaho Power proposes an 18-month deadline for submitting the Reliability Standards and a three-year, multi-phased implementation period.[118] Exelon recommends that NERC should propose a filing deadline.[119]

90. Commenters opposing the Second Stage GMD Reliability Standards state that the development of Second Stage GMD Reliability Standards should be delayed given the need for further research into GMDs and the continuing work of the NERC GMD Task Force.

Commission Determination

91. In its comments, NERC commits to meeting the six-month submission deadline proposed in the NOPR. However, based on the concerns raised in the comments, we modify the schedule in the NOPR and direct NERC to submit the proposed Second Stage GMD Reliability Standards within 18 months of the effective date of this Final Rule. While NERC should propose an implementation plan, we do not direct or suggest a specific implementation plan. As stated in the NOPR, in a proposed implementation plan, we expect that NERC will consider a multi-phased approach that requires owners and operators of the Bulk-Power System to prioritize implementation so that components considered vital to the reliable operation of the Bulk-Power System are protected first. We also expect, as discussed above, that the implementation plan will take into account the availability of validated tools, models, and data that are necessary for responsible entities to perform the required GMD vulnerability assessments.

III. Information Collection Statement

92. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Paperwork Reduction Act (PRA) requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons, or contained in a rule of general applicability.

93. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the PRA. The Commission solicited comments on the Commission's need for this information, whether the information will have practical utility, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. The Commission received no comments on the burden and cost information contained in the NOPR.

94. The Public Reporting Burden and cost related to the proposed rule in Docket RM12–22–000 are covered by, and already included in, the existing FERC–725, Certification of Electric Reliability Organization; Procedures for Electric Reliability (OMB Control No. 1902–0225). FERC–725 includes the ERO's overall responsibility for developing Reliability Standards, such as the Reliability Standards for Geomagnetic Disturbances.

95. Internal review: The Commission has reviewed the proposed changes and has determined that the changes are necessary to ensure the reliability and integrity of the Nation's Bulk-Power System.

96. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: *DataClearance@ferc.gov,* Phone: (202) 502–8663, fax: (202) 273–0873]. Comments on the requirements of this rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at *oira_submission@omb.eop.gov.* Please reference OMB Control No. 1902–0225, FERC–725 and the docket number of this proposed rulemaking in your submission.

IV. Environmental Analysis

97. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[120] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[121] The actions proposed here fall within this categorical exclusion in the Commission's regulations.[122]

V. Regulatory Flexibility Act

98. The Regulatory Flexibility Act of 1980 (RFA)[123] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[124] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[125]

99. The NOPR stated that, by proposing only to direct NERC, the Commission-certified ERO, to develop GMD Reliability Standards, the proposal would not have a significant or substantial impact on entities other than NERC. The NOPR stated that the ERO develops and files with the Commission for approval Reliability Standards affecting the Bulk-Power System, which represents: (a) a total electricity demand of 830 gigawatts (830,000 megawatts) and (b) more than $1 trillion worth of assets. Therefore, the NOPR certified

[116] *See, e.g.,* LADWP Comments at 5; Joint ISOs/RTOs Comments 24–25.

[117] Joint ISOs/RTOs Comments at 24.

[118] Idaho Power Comments at 2.

[119] Exelon Comments at 14.

[120] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

[121] 18 CFR 380.4(a)(2)(ii).

[122] Only one commenter, SENS, addressed the NOPR's Environmental Analysis proposal. SENS requested that the Commission ''include an environmental impact assessment of GMD-induced power outage on the approximately 104 nuclear power plants in the United States *if the proposed rules are not enacted.*'' SENS Comments at 5 (emphasis in original). The request in this comment is moot in light of the Commission's directive in this Final Rule that the ERO develop and submit for approval proposed GMD Reliability Standards.

[123] 5 U.S.C. 601–612.

[124] 13 CFR 121.101.

[125] 13 CFR 121.201, Sector 22, Utilities & n.1.

that the proposal will not have a significant economic impact on a substantial number of small entities. The NOPR further stated that any Reliability Standards proposed by NERC in compliance with this rulemaking will be considered by the Commission in future proceedings and that, as part of any future proceedings, the Commission will make determinations pertaining to the Regulatory Flexibility Act based on the content of the Reliability Standards proposed by NERC.

100. The Commission received one comment addressing the Regulatory Flexibility Act certification in the NOPR.

Comments

101. APPA, NRECA, and TAPS state that the GMD Reliability Standards could result in significant adverse regulatory impacts on many small utilities. APPA, NRECA and TAPS state that, while it might be premature for the Commission to engage in a full RFA analysis at this stage, putting off an RFA analysis will make it more difficult to perform an analysis in the future. APPA, NRECA and TAPS state that the Commission should at least gather the necessary facts in the comment phase of this rulemaking so that it can develop a record on the universe of small entities that could be affected by NERC Reliability Standards addressing GMDs and possible ways to mitigate any adverse impacts of such Reliability Standards. APPA, NRECA and TAPS encourage the Commission to host a ''technical conference, convene[] a panel of small utility representatives, or undertake some other comparable outreach effort to solicit information from the small entities that may be affected by the contemplated GMD reliability standards.'' [126]

Commission Determination

102. The Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. We affirm the reasoning in the NOPR that, in only directing the ERO to develop and submit for approval GMD Reliability Standards, this Final Rule only applies to NERC, which, as discussed above, is not a small entity. APPA, NRECA and TAPS concede that it would be premature to conduct a full Regulatory Flexibility Analysis at this time, but they state that it could be more difficult to conduct such an analysis in the future. We disagree because the Commission cannot assess the economic impact on small entities of the GMD Reliability Standards at this time since they have not been developed or submitted for approval by NERC. Such an analysis, at this time, would be purely speculative. As we stated in the NOPR, the GMD Reliability Standards proposed by NERC in compliance with this Final Rule will be considered by the Commission in future rulemakings. As part of those rulemakings, the Commission will make determinations pertaining to the Regulatory Flexibility Act based on the content of the Reliability Standards proposed by NERC. While the Commission declines to conduct the types of outreach suggested by APPA, NRECA, and TAPS at this time, APPA, NRECA and TAPS should participate in the standards development process as NERC develops the Reliability Standards required by this Final Rule to ensure that their views are taken into account. In addition, the Commission welcomes any informal discussions on these issues as NERC develops the Reliability Standards required by this final rule.

VI. Document Availability

103. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

104. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

105. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

VII. Effective Date and Congressional Notification

106. These regulations are effective July 22, 2013. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Appendix—Commenters

Abbreviation	Commenter
Alcoa	Alcoa Inc. and Alcoa Power Generating Inc.
AFS	Advanced Fusion Systems.
AEP	American Electric Power Service Corporation.
APS	Arizona Public Service Company.
Ayers	Cynthia E. Ayers.
George Baker	George H. Baker III, Ph.D.
Joel Baker	Joel E. Baker.
Bequette	William Bequette.
Bowen	Dwane M. Bowen.
Boyd	David A. Boyd.
Bonneville	Bonneville Power Administration.
CEA	Canadian Electricity Association.
CenterPoint	CenterPoint Energy Houston Electric, LLC.
Clinic	Samuelson-Glushko Technology Law and Policy Clinic, University of Colorado Law School.
Congressman Franks	Congressman Trent Franks.

[126] APPA, NRECA, and TAPS Comments at 6.

Abbreviation	Commenter
Consumers Energy	Consumers Energy Company.
Dominion	Dominion Resources Services, Inc.
Duke	Duke Energy Corporation.
EEI	Edison Electric Institute.
EIS	Electric Infrastructure Security Council.
ELCON	Electricity Consumers Resource Council.
Emprimus	Emprimus LLC.
EPSA	Electric Power Supply Association.
Exelon	Exelon Corporation.
Foundation	Foundation for Resilient Societies.
FPL	Florida Power & Light Company.
Frauman	Roger Frauman.
Greenhill	John Greenhill.
Idaho Power	Idaho Power Company.
IESO	Independent Electricity Operator and Hydro One Networks, Inc.
ITC	International Transmission Company.
Joint ISOs/RTOs	Alberta Electric System Operator, California Independent System Operator, Electric Reliability Council of Texas, Independent Electricity System Operator of Ontario, Inc., ISO New England Inc., Midwest Independent Transmission System Operator, Inc., New York Independent System Operator, Inc., and Southwest Power Pool (SPP).
Johnson	Amanda Johnson.
Kappenman	John Kappenman, Storm Analysis Consultants.
KCP&L	Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company.
Koenig	Roger L. Koenig, Michigan State University.
Kristen	Steven F. Kristen.
LADWP	City of Los Angeles Department of Water and Power.
Leggett	Nickolaus Leggett.
Lloyd's	Lloyd's.
Lund	John Curtis Lund.
Manto	Charles L. Manto.
Mitsubishi Electric	Mitsubishi Electric Power Products, Inc.
NARUC	National Association of Regulatory Utility Commissioners.
NERC	North American Electric Reliability Corporation.
NV Energy	Nevada Power Company and Sierra Pacific Power Company.
Pa PUC	Pennsylvania Public Utility Commission.
Phoenix	Phoenix Electric Corp.
PJM	PJM Interconnection, L.L.C.
PPL Companies	Louisville Gas and Electric Company and Kentucky Utilities Company, Lower Mount Bethel Energy, LLC, PPL Brunner Island, LLC, PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Ironwood, LLC, PPL Martins Creek, LLC, PPL Montana, LLC, PPL Montour, LLC, and PPL Susquehanna LLC.
Orquin	Alberto Ramirez Orquin, Ph.D.
Ruckriegle	Heidi Ruckriegle.
SCE	Southern California Edison.
SDG&E	San Diego Gas & Electric.
SENS	Stored Energy Systems LLC.
SmartSenseCom	SmartSenseCom, Inc.
SPP Parties	AEP, City of Coffeyville, Kansas, City of Independence, Missouri, Oklahoma Municipal Power Authority, SPP, Southwester Power Administration, Westar Energy, Inc., and Western Farmers Electric Cooperative.
Stolov	Jerome J. Stolov.
TAPS	Transmission Access Policy Study Group.
Trade Associations	American Public Power Association (APPA), Edison Electric Institute, Large Public Power Council, National Rural Electric Cooperative Association (NRECA).
Wallenmeyer	William Wallenmeyer.

[FR Doc. 2013–12141 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0163]

RIN 1625–AA00

Safety Zone; 2013 Fish Festival Fireworks, Lake Erie, Vermilion, OH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Erie, Vermilion, OH. This safety zone is intended to restrict vessels from a portion of Lake Erie during the 2013 Fish Festival Fireworks display. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with a fireworks display.

DATES: This rule is effective from 9:30 p.m. until 11 p.m. on June 14, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0163]. To view documents

mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LT Christopher Mercurio, Chief of Waterways Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.* If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule

A. Regulatory History and 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 doing so would be impracticable and contrary to the public interest. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect spectators and vessels from the hazards associated with a maritime fireworks display, which are discussed further below.

Under 5 U.S.C. 553(d)(3), The Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

Between 10 p.m. and 10:30 p.m. on June 14, 2013, a fireworks display will be held on Lake Erie near the outer break wall of the Vermilion River, Vermilion, OH. The Captain of the Port Buffalo has determined that fireworks launched proximate to a gathering of watercraft pose a significant risk to public safety and property. Such hazards include premature and accidental detonations, dangerous projectiles, and falling or burning debris.

C. Discussion of the Final Rule

With the aforementioned hazards in mind, the Captain of the Port Buffalo has determined that this temporary safety zone is necessary to ensure the safety of spectators and vessels during the 2013 Fish Festival Fireworks. This zone will be effective and enforced from 9:30 p.m. until 11 p.m. on June 14, 2013. This zone will encompass all waters of Lake Erie, Vermilion, OH within a 560 foot radius of position 41°25′44″ N and 82°21′54″ W (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be relatively small and enforced for relatively short time. Also, the safety zone is designed to minimize its impact on navigable waters. Furthermore, the safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. 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 might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Lake Erie on the evening of June 14, 2013.

This 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 90 minutes late in the day. Traffic may be allowed to pass through the zone with the permission of the Captain of the Port. The Captain of the Port can be reached via VHF channel 16. Before the activation of the zone, we would issue local Broadcast Notice to Mariners.

3. Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees

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

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

12. Technical Standards

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

13. 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 determined that 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 involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination 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 record keeping 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. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 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.T09–0163 to read as follows:

§ 165.T09–0163 Safety Zone; 2013 Fish Festival Fireworks, Lake Erie, Vermilion, OH.

(a) *Location.* This zone will encompass all waters of Lake Erie, Vermilion, OH within a 560 foot radius of position 41°25′44″ N and 82°21′54″ W (NAD 83).

(b) *Effective and Enforcement Period.* This regulation is effective and will be enforced on June 14, 2013 from 9:30 p.m. until 11:00 p.m.

(c) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: May 3, 2013.

S.M. Wischmann,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2013–12235 Filed 5–22–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0313]

RIN 1625–AA00

Safety Zone; Bay Village Independence Day Fireworks, Lake Erie, Bay Village, OH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Erie, Bay Village, OH. This safety zone is intended to restrict vessels from a portion of Lake Erie during the Bay Village Independence Day Fireworks display. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with a fireworks display.

DATES: This rule is effective from 9:30 p.m. until 10:50 p.m. on July 4, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0313]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LT Christopher Mercurio, Chief of Waterways Management, U.S. Coast Guard Sector Buffalo; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil*. If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule

A. Regulatory History and 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 doing so would be impracticable and contrary to the public interest. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect spectators and vessels from the hazards associated with a maritime fireworks display, which are discussed further below.

Under 5 U.S.C. 553(d)(3), The Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

Between 10 p.m. and 10:20 p.m. on July 4, 2013, a fireworks display will be held on Lake Erie near Cahoon Memorial Park, Bay Village, OH. The Captain of the Port Buffalo has determined that fireworks launched proximate to a gathering of watercraft pose a significant risk to public safety and property. Such hazards include premature and accidental detonations, dangerous projectiles, and falling or burning debris.

C. Discussion of the Final Rule

With the aforementioned hazards in mind, the Captain of the Port Buffalo has determined that this temporary safety zone is necessary to ensure the safety of spectators and vessels during the Bay Village Independence Day Fireworks. This zone will be effective and enforced from 9:30 p.m. until 10:50 p.m. on July 4, 2013. This zone will encompass all waters of Lake Erie, Bay Village, OH within a 560 foot radius of position 41°29′23.93″ N and 81°55′44.56″ W (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be relatively small and enforced for relatively short time. Also, the safety zone is designed to minimize its impact on navigable waters. Furthermore, the safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. 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 might be small entities: the owners or operators of vessels intending

to transit or anchor in a portion of Lake Erie on the evening of July 4, 2013.

This 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 80 minutes late in the day. Traffic may be allowed to pass through the zone with the permission of the Captain of the Port. The Captain of the Port can be reached via VHF channel 16. Before the activation of the zone, we would issue local Broadcast Notice to Mariners.

3. Assistance for Small Entities

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

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

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

12. Technical Standards

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

13. 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 determined that 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 involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination 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 record keeping 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. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 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.T09–0313 to read as follows:

§ 165.T09–0313 Safety Zone; Bay Village Independence Day Fireworks, Lake Erie, Bay Village, OH.

(a) *Location.* This zone will encompass all waters of Lake Erie, Bay Village, OH within a 560 foot radius of position 41°29′23.93″ N and 81°55′44.56″ W (NAD 83).

(b) *Effective and Enforcement Period.* This regulation is effective and will be enforced on July 4, 2013 from 9:30 p.m. until 10:50 p.m.

(c) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: May 3, 2013.

S. M. Wischmann,

Captain, U. S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2013–12232 Filed 5–22–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO58

Copayments for Medications in 2013

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, without change, an interim final rule amending the Department of Veterans Affairs (VA) medical regulations to freeze the copayments required for certain medications provided by VA until December 31, 2013. Under that rule, the copayment amounts for all enrolled veterans were maintained at the same rates as they were in 2012, which were $8 for veterans in priority groups 2–6 and $9 for veterans in priority groups 7 and 8. On January 1, 2014, the copayment amounts may increase based on the prescription drug component of the Medical Consumer Price Index (CPI–P).

DATES: *Effective Date:* This rule is effective on May 23, 2013.

FOR FURTHER INFORMATION CONTACT: Kristin Cunningham, Director, Business Policy, Chief Business Office, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 31, 2012, VA published in the **Federal Register** (77 FR 76865) an interim final rule that froze copayments required for certain medications provided by VA until December 31, 2013.

Under 38 U.S.C. 1722A(a), VA must require veterans to pay a $2 copayment for each 30-day supply of medication furnished on an outpatient basis for the treatment of a non-service-connected disability or condition unless a veteran has a service-connected disability rated 50 percent or more, is a former prisoner of war, or has an annual income at or below the maximum annual rate of VA pension that would be payable if the veteran were eligible for pension. Under 38 U.S.C. 1722A(b), VA ''may,'' by regulation, increase that copayment amount and establish a maximum annual copayment amount (a ''cap''). We have consistently interpreted section 1722A(b) to mean that VA has discretion to determine the appropriate copayment amount and annual cap amount for medication furnished on an outpatient basis for covered treatment, provided that any decision by VA to increase the copayment amount or annual cap amount is the subject of a rulemaking proceeding. We have implemented this statute in 38 CFR 17.110.

Under 38 CFR 17.110(b)(1), veterans are obligated to pay VA a copayment for each 30-day or less supply of medication provided by VA on an outpatient basis (other than medication administered during treatment). Under the regulation as amended by the interim final rule published on December 31, 2012, 77 FR 76865, for the period from July 1, 2010, through December 31, 2013, the copayment amount for veterans in priority categories 2 through 6 of VA's health care system is $8. 38 CFR 17.110(b)(1)(ii). Thereafter, the copayment amount for all affected veterans will be established using a formula based on the prescription drug component of the CPI–P, set forth in 38 CFR 17.110(b)(1)(iv). For veterans in priority categories 7 and 8, the copayment amount from July 1, 2010, through December 31, 2011, was $9. 38 CFR 17.110(b)(1)(iii). After December 31, 2011, copayments for veterans in priority categories 7 and 8 were subject to the regulatory formula; however, that formula did not trigger an increase in the copayment amount, so it remains $9.

Current § 17.110(b)(2) also includes a ''cap'' on the total amount of copayments in a calendar year for a veteran enrolled in one of VA's health care enrollment system priority categories 2 through 6. As a result of the interim final rule, the annual cap is set at $960 through December 31, 2013. Thereafter, the cap is to increase ''by $120 for each $1 increase in the copayment amount'' applicable to veterans enrolled in one of VA's health care enrollment system priority categories 2 through 6.

VA invited interested persons to submit comments on the interim final rule on or before March 1, 2013, and we received one comment. The commenter suggested that VA should not charge veterans a medication copayment. No changes are made based on this comment. With certain statutory exceptions set forth in 38 CFR 17.110(c), the provisions of 38 U.S.C. 1722A require veterans to pay a copayment for each 30-day or less supply of medication furnished on an outpatient basis for the treatment of a non-service-connected disability or condition. VA has no authority to exempt veterans from this statutory requirement.

At the end of calendar year 2013, unless additional rulemaking is initiated, VA will once again use the CPI–P methodology in § 17.110(b)(1)(iv) to determine whether to increase copayments and calculate any mandated increase in the copayment amount for veterans in priority categories 2 through 8. At that time, the CPI–P as of September 30, 2013, will be divided by the index as of September 30, 2001, which was 304.8. The ratio will then be multiplied by the original copayment amount of $7. The copayment amount of the new calendar year will be rounded down to the whole dollar amount. As mandated by current § 17.110(b)(2), the annual cap will be calculated by increasing the cap by $120 for each $1 increase in the copayment amount. Any change in the copayment amount and cap, along with the associated calculations explaining the basis for the increase, will be published in a **Federal Register** notice.

Therefore, based on the rationale set forth here and in the interim final rule, VA is adopting the provisions of the interim final rule as a final rule with no changes.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Secretary of Veterans Affairs concluded that there was good cause to dispense with the opportunity for advance notice and opportunity for public comment and good cause to publish this rule with an immediate effective date. The Secretary found that it was impracticable and contrary to the public interest to delay this rule for the purpose of soliciting advance public comment or to have a delayed effective date. Increasing the copayment amount on January 1, 2013, might have caused a significant financial hardship for some veterans.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule will temporarily freeze the copayments that certain veterans are required to pay for prescription drugs furnished by VA. This final rule affects individuals and has no impact on small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this rule are as follows: 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, approved this document on May 14, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Dated: May 20, 2013.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

PART 17—MEDICAL

Based on the rationale set forth in the interim final rule published in the **Federal Register** at 77 FR 76865 on December 31, 2012, and in this document, VA is adopting the provisions of the interim final rule as a final rule with no changes.

[FR Doc. 2013–12252 Filed 5–22–13; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0728; FRL–9799–2]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). This action was proposed in the **Federal Register** on February 4, 2013 and concerns volatile organic compound (VOC) emissions from municipal solid waste landfills and dairies. We are approving local rules that regulate these emission sources under the Clean Air Act (CAA or the Act).

DATES: These rules will be effective on June 24, 2013.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2012–0728 for this action. Generally, documents in the docket for this action are available electronically at *http://*

www.regulations.gov or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105–3901. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Nancy Levin, EPA Region IX, (415) 942–3848, *levin.nancy@epa.gov.*

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

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Statutory and Executive Order Reviews

I. Proposed Action

On February 13, 2013 (78 FR 7703), EPA proposed to approve the following rules into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD	1150.1	Control of Gaseous Emissions from Municipal Solid Waste Landfills	04/01/11	09/27/11
SCAQMD	1127	Emissions Reductions from Livestock Waste	08/06/04	10/05/06

We proposed to approve these rules because we determined that they complied with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no adverse comments on this proposal.

III. EPA Action

No comments were submitted that change our assessment of the rule as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving these rules into the California SIP.

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Volatile organic compounds.

Dated: March 27, 2013.

Alexis Strauss,

Acting Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(347)(i)(B)(*2*) and (c)(404)(i)(A)(*4*)to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(347) * * *

(i) * * *

(B) * * *

(*2*) Rule 1127, ''Emissions Reductions from Livestock Waste,'' adopted on August 6, 2004.

* * * * *

(404) * * *

(i) * * *

(A) * * *

(*4*) Rule 1150.1, ''Control of Gaseous Emissions from Municipal Solid Waste Landfills,'' amended on April 1, 2011.

* * * * *

[FR Doc. 2013–12208 Filed 5–22–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2012–0540; FRL–9805–5]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Air Quality Standards Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a revision to the Illinois state implementation plan (SIP) to reflect current National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter (PM). EPA is approving a revision to add new incorporations by reference associated with current ozone, lead, and particulate matter NAAQS into the Illinois SIP. EPA is also approving revisions that amend typographical errors in the Illinois SIP.

DATES: This direct final rule will be effective July 22, 2013, unless EPA receives adverse comments by June 24, 2013. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2012–0540, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-Mail: blakley.pamela@epa.gov.*

3. *Fax:* (312) 692–2450.

4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2012–0540. 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 email. 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 email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, 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 *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 Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Anthony Maietta, Environmental Protection Specialist, at (312) 353–8777 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Anthony Maietta, Environmental Protection Specialist, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8777, *maietta.anthony@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. Background
II. Contents of Illinois' Submittal
III. What action is EPA taking?
IV. Statutory and Executive Order Reviews

I. Background

Today's action updates the Illinois SIP to reflect current ozone and PM NAAQS promulgated by EPA. On July 18, 1997 (62 FR 38856), EPA published a final rule that established NAAQS for ozone measured as a daily maximum eight hour concentration of 0.08 parts per million (ppm), based on the three year average of the fourth highest daily eight hour value recorded during each calendar year. The eight hour NAAQS replaced the one hour ozone NAAQS, however, the one hour ozone designations and classifications were retained to comply with anti-backsliding obligations. On April 30, 2004 (69 FR 23951), EPA published the first phase of its final rule to implement the eight hour ozone NAAQS and revoke the one hour ozone NAAQS. At the same time, EPA also published eight hour ozone designations for all areas of the country (69 FR 23858, April 30, 2004). On August 3, 2005 (70 FR 44470), EPA published a final rule that revoked the one hour ozone NAAQS. On July 11, 2007 (72 FR 37818), EPA proposed to strengthen the NAAQS for ozone by revising the level of the eight hour standard to a level within the range of 0.070 to 0.075 ppm daily maximum eight hour concentration, based on the three year average of fourth highest daily eight hour value recorded during each calendar year. On March 27, 2008,

EPA published a final rule that revised the NAAQS for ozone (73 FR 16436). In that action, EPA established both the primary and secondary eight hour ozone NAAQS to be 0.075 ppm, expressed in three decimal places.

On November 12, 2008, EPA published a final rule (73 FR 66964) that updated the primary and secondary NAAQS for lead to be 0.15 micrograms per cubic meter (μg/m³). The rule also revised the averaging time for lead to be a rolling three month period with a maximum form that is evaluated over a three year period. Finally, the rule revised data handling procedures, including ambient air monitoring and reporting requirements.

On July 18, 1997 (62 FR 38652), EPA published a final rule that added NAAQS for particulate matter of 2.5 microns or less in diameter ($PM_{2.5}$) by revising the annual $PM_{2.5}$ standard to 15 μg/m³, based on the 3-year average of annual arithmetic mean $PM_{2.5}$ concentrations at each monitor in an area, and by revising the one hour $PM_{2.5}$ standard to 65 μg/m³ based on the three year average of the 98th percentile of 24 hour $PM_{2.5}$ concentrations at each monitor in an area. On October 17, 2006 (71 FR 61143), EPA revised the 24 hour $PM_{2.5}$ standard to 35 μg/m³, based on the three year average of the 98th percentile of 24 hour $PM_{2.5}$ concentrations at each monitor in an area. In the same notice, EPA revoked the annual NAAQS for PM of 10 microns or less in diameter (PM_{10}).

On June 20, 2012, the Illinois Environmental Protection Agency (IEPA) submitted a request for EPA to approve revisions to its SIP that amend part 243 of title 35 of the Illinois Administrative Code (35 IAC part 243) to reflect current ozone and PM NAAQS, and to correct typographical errors. The submittal also requests that EPA approve corrections to 35 IAC part 217.388 and 35 IAC part 233.305, based on comments received during public hearings held by IEPA for the amendments to 35 IAC part 243.

II. Contents of Illinois' Submittal

The contents of Illinois' submittal are discussed in detail in our technical support document (TSD) contained in the docket for this rulemaking. To read the TSD, follow the instructions for viewing the docket at the beginning of this notice.

In summary, Illinois' submittal requests that EPA approve amendments to 35 IAC parts 217, 223, and 243 into the Illinois SIP. Illinois revised 35 IAC part 243 by updating the definitions of ozone and particulate matter NAAQS to match the current NAAQS for these pollutants. The revision to 35 IAC part 243 also updates incorporations by reference to match current techniques, methods, reference methods, and interpretations of NAAQS for criteria pollutants. The amendments to 35 IAC part 243 are approvable.

The amendments to 35 IAC parts 217 and 223 contained in the June 20, 2012, submittal have been amended further and submitted to EPA in subsequent submittals, which we have acted on. For this reason EPA is taking no action on these parts of 35 IAC parts 217 and 233 at this time.

III. What action is EPA taking?

EPA is approving into the Illinois SIP amendments and additions to the following sections of 35 IAC part 243 contained in the June 20, 2012, submittal: sections 243.101, 243.104, 243.107, 243.108, 243.120, 243.122, 243.125, and 243.126. EPA is taking no action on amendments to 35 IAC parts 217 and 223.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective July 22, 2013 without further notice unless we receive relevant adverse written comments by June 24, 2013. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective July 22, 2013.

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 12, 2013.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. Section 52.720 is amended by adding paragraph (c)(195) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *

(195) On June 20, 2012, Illinois submitted an amendment to its State Implementation Plan at 35 Illinois Administrative Code part 243, which updates National Ambient Air Quality Standards for ozone, lead, and particulate matter while correcting various errors in the plan.

(i) *Incorporation by reference.* Illinois Administrative Code; Title 35: Environmental Protection; Subtitle B: Air Pollution; Chapter I: Pollution Control Board; Subchapter l: Air Quality Standards And Episodes; Part 243: Air Quality Standards; Sections 243.101 Definitions, 243.104 Nondegradation, 243.107 Reference Conditions, 243.108 Incorporations by Reference, 243.120 PM_{10} and $PM_{2.5}$, 243.122 Sulfur Oxides (Sulfur Dioxide), 243.125 8-Hour Ozone, and 243.126 Lead; effective October 25, 2011.

[FR Doc. 2013–12203 Filed 5–22–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket Nos. FWS–R1–ES–2012–0017; FWS–R1–ES–2013–0012; 4500030113]

RIN 1018–AX72
RIN 1018–AZ54

Endangered and Threatened Wildlife and Plants; Threatened Status and Designation of Critical Habitat for Eriogonum codium (Umtanum Desert Buckwheat) and Physaria douglasii subsp. tuplashensis (White Bluffs Bladderpod)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rules; delay of effective dates.

SUMMARY: This document temporarily delays for 6 months the effective date of two rules to conserve *Eriogonum codium* (Umtanum desert buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod). Both rules had an effective date of May 23, 2013. We are taking this action to allow time for us to accept and consider additional public comments on the rules.

DATES: The effective dates for the final rules published April 23, 2013, at 78 FR 23983 and 78 FR 24007, are delayed until November 22, 2013.

ADDRESSES: You may obtain copies of these rules and related materials at *http://www.regulations.gov* in Dockets FWS–R1–ES–2012–0017 (for the listing rule) and FWS–R1–ES–2013–0012 (for the critical habitat rule).

FOR FURTHER INFORMATION CONTACT: Ken Berg, Manager, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive, Suite 102, Lacey, Washington 98503–1263, by telephone (360) 753–9440, or by facsimile (360) 753–9405. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: Under the authority of the Endangered Species Act (Act) (16 U.S.C. 1531 et seq.), the U.S. Fish and Wildlife Service issued the following two rules on April 23, 2013: ''Endangered and Threatened Wildlife and Plants; Threatened Status for *Eriogonum codium* (Umtanum Desert Buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs Bladderpod)'' (78 FR 23983) and ''Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Eriogonum codium* (Umtanum Desert Buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs Bladderpod)'' (78 FR 24007). The listing final rule implements the Federal protections provided by the Act for these species. The critical habitat final rule conserves both species' habitat under the Act. Both rules had an effective date of May 23, 2013.

We now delay for 6 months the effective date of the rules. The delay in effective date is necessary to allow us time to follow proper procedure in accordance with 16 U.S.C. 1533(b)(5). We are taking this action to allow time for us to accept and consider additional public comments on the rules. To the extent that 5 U.S.C. 553 applies to this action, this action is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. 553(b)(A).

Dated: May 20, 2013.

Rachel Jacobsen,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–12380 Filed 5–22–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 130104011–3456–02]

RIN 0648–BC87

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2013–2014

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to implement limits on fishing effort by U.S. purse seine vessels in the U.S. exclusive economic zone (EEZ) and on the high seas, restrictions on the use of fish aggregating devices (FADs), and requirements for U.S. purse seine vessels to carry observers. This action is necessary for the United States to implement provisions of a conservation and management measure adopted by the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) to satisfy the international obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), to which it is a Contracting Party.

DATES: This rule is effective June 24, 2013.

ADDRESSES: Copies of supporting documents prepared for this final rule, including the regulatory impact review (RIR) and the Environmental Assessment (EA), as well as the proposed rule, are available via the Federal e-Rulemaking Portal, at *www.regulations.gov* (search for Docket ID NOAA–NMFS–2013–0043). Those documents, and the small entity compliance guide prepared for this final rule, are also available from NMFS at the following address: Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700. The initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) prepared under the authority of the Regulatory Flexibility Act (RFA) are included in the proposed rule and this final rule, respectively.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS PIRO, 808–944–2219.

SUPPLEMENTARY INFORMATION:

Background

On March 7, 2013, NMFS published a proposed rule in the **Federal Register** (78 FR 14755) to revise regulations at 50 CFR part 300, subpart O, to implement a decision of the WCPFC. The proposed rule was open to public comment through April 8, 2013. On March 25, 2013, NMFS published a correction to the proposed rule (78 FR 17919) regarding the address in the Federal e-Rulemaking Portal through which comments on the proposed rule could be submitted electronically.

This final rule is issued under the authority of the WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The authority to promulgate regulations has been delegated to NMFS.

This final rule implements for U.S. fishing vessels the purse seine-related provisions of WCPFC Conservation and Management Measure (CMM) 2012–01, ''Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean.'' The preamble to the proposed rule includes detailed background information, including on the Convention and the WCPFC, the provisions of CMM 2012–01 being implemented in this rule, and the bases for the proposed regulations, which is not repeated here.

New Requirements

(1) Fishing Effort Limits

This final rule establishes a limit of 2,588 fishing days, for each of calendar years 2013 and 2014, that may be used by U.S. purse seine vessels in an area called the Effort Limit Area for Purse Seine, or ELAPS. The ELAPS includes all areas of the high seas and U.S. EEZ within the Convention Area between the latitudes of 20° North and 20° South (but not the U.S. territorial sea). Once NMFS determines during either of 2013 or 2014 that, based on available information, the limit is expected to be reached by a specific future date, NMFS will issue a notice in the **Federal Register** announcing the closure of the U.S. purse seine fishery in the ELAPS starting on that specific future date. Upon any closure, it will be prohibited to use a U.S. purse seine vessel to fish in the ELAPS through the end of the calendar year. NMFS will publish the notice at least seven calendar days before the effective date of the closure to provide fishermen advance notice of the closure.

(2) FAD Restrictions

This final rule establishes FAD prohibition periods from July 1 through October 31 in 2013 and in 2014. During these periods it is prohibited for U.S. fishing vessels to set purse seines on or near FADs or to engage in specific other FAD-related activities in the Convention Area between the latitudes of 20° North and 20° South.

A FAD is defined to mean any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water. The definition of FAD does not include a vessel.

The specific activities that are prohibited in the applicable area during the FAD prohibition periods are:

(1) Setting a purse seine around a FAD or within one nautical mile of a FAD.

(2) Setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel.

(3) Deploying a FAD into the water.

(4) Repairing, cleaning, maintaining, or otherwise servicing a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that: (i) A FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety, and (ii) a FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

(5) Doing any of the following from a purse seine vessel or any associated skiffs, other watercraft or equipment, except in emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage: (i) Submerging lights under water; (ii) suspending or hanging lights over the side of the purse seine vessel, skiff, watercraft or equipment, or (iii) directing or using lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew.

(3) Observer Requirements

This final rule requires that U.S. purse seine vessels carry WCPFC observers on all fishing trips in the Convention Area in 2013 and 2014, except fishing trips that occur entirely outside the area bounded by 20° North and 20° South latitude or entirely within waters of a single foreign nation. A WCPFC observer is any observer authorized by the WCPFC to undertake duties as part of the WCPFC's Regional Observer Programme. Currently, observers deployed as part of the Pacific Islands Forum Fisheries Agency's observer program and observers deployed as part of the NMFS observer program qualify as WCPFC observers.

Although this final rule does not require U.S. purse seine vessels to carry observers when fishing exclusively in water under the jurisdiction of a single foreign nation, in that situation, the foreign nation might have its own observer requirements that apply to the U.S. vessel. Furthermore, U.S. regulations at 50 CFR 300.214 require that if a U.S. fishing vessel with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required is used for fishing for highly migratory species in the Convention Area in areas under the jurisdiction of a WCPFC member other than the United States, the owner and operator of the vessel must ensure that the vessel is operated in compliance with the applicable laws of that member, including any laws related to carrying observers.

(4) Other

In addition to establishing the three sets of requirements described above, this final rule revises paragraph (c) of 50 CFR 300.223, which relates to areas closed to purse seine fishing. The requirements in that paragraph expired on December 31, 2012. This final rule removes the contents of that paragraph and reserves the paragraph. Because the requirements in that paragraph have expired, this revision is merely of a housekeeping nature.

Comments and Responses

NMFS received four sets of comments on the proposed rule and supporting documents. The comments are summarized below, followed by responses from NMFS.

Comment 1: The proposed rule is extremely necessary to maintain the health of the Pacific fisheries, particularly tuna fisheries. Tuna is a prize catch and is being overfished at an alarming rate. The measures proposed by the Commission will be vital in maintaining the health of the Pacific Ocean ecosystems.

The FAD and purse seine measures are articulated well; they will not only provide protection for the tuna populations, but for the marine ecosystems of the WCPO as a whole. Treating vessels as FADs will help control rates of overfishing.

The rule would be more effective if it applied to the territorial seas, as the previous WCPFC measures did, so that the measures would apply as widely as possible.

The fishing limits and FAD restrictions passed by the WCPFC implemented in this regulation are measures that promote sustainability and protection of fish populations. However, because the regulations apply only to a specific area of the Pacific Ocean, it is necessary to ensure coordination with fisheries in the remaining areas of the Pacific.

The agency should continue to monitor the success of the limits and restrictions, as the FAD restrictions apply only from July through October; depending on when vessels undertake their voyages, these restrictions may not provide much protection to schools of tuna.

The limited geographical application of the observer requirements may encourage fishermen to take trips outside the applicable areas so as not to have to comply with the requirements.

To the extent possible, NOAA should survey and observe the tuna populations in the WCPO to ensure maximum sustainable yields, especially since the proposed rule notes that it is unlikely the fishing limits will be reached.

The proposed rule's note of the possibility of increased tuna prices should the fishery have to close from reaching the effort limit is premature and misplaced. Overfishing creates higher prices because of permanent scarcity, as indicated by the record amounts that have been paid for tuna. NOAA's primary concern should be the protection and conservation of the fisheries. Ensuring the United States' full compliance with the Commission's regulations strengthens and legitimizes global efforts to protect marine ecosystems.

Response: With respect to the necessity for, and importance of, the proposed rule, NMFS acknowledges the comments.

NMFS implemented previous WCPFC measures so that they applied in the territorial seas of the United States and of other nations. However, the purse seine-related provisions of CMM 2012–01 are specifically limited to EEZs and the high seas. Therefore, in order to be consistent with CMM 2012–01, this rule does not apply in the territorial seas of the United States or of other nations.

With respect to the need to coordinate with fisheries in areas of the Pacific other than the WCPO, the objective of the rule is the domestic implementation of a decision of the WCPFC, which applies only in the WCPO. Management of tuna stocks in other areas of the Pacific is under the purview of other regional fisheries management organizations (RFMOs), including the Inter-American Tropical Tuna Commission and the Commission for the Conservation of Southern Bluefin Tuna. Coordination with other fisheries, which, for example, could occur among those RFMOs and their members, is outside the scope of this rule.

On monitoring the success of the limits and restrictions, NMFS intends to undertake appropriate enforcement and other activities to monitor and help ensure compliance with the regulations. Monitoring success with respect to the objectives of CMM 2012–01 and the Convention is more appropriately undertaken on the international level, such as by the WCPFC.

On purse seine vessels avoiding the observer requirements by fishing outside the applicable areas, NMFS acknowledges the possibility, but notes that this behavior does not seem to have occurred during the last few years when similar observer requirements were in place.

On surveying and observing tuna populations to ensure maximum sustainable yield, assessments of the three tuna stocks are typically undertaken by the WCPFC and its science providers. The WCPFC then uses the assessment results in formulating management measures to achieve specific objectives, which might or might not be to achieve maximum sustainable yield. NOAA personnel contribute to these efforts of the WCPFC and its science providers.

With respect to the possibility of a fishery closure having effects on tuna prices, NMFS understands the comment to mean that the focus of the rulemaking should be on protecting and conserving fisheries and ensuring full compliance by the United States with the WCPFC's decisions. NMFS acknowledges the comment, but believes that analysis and consideration of the proposed rule's effects on fish prices, among other economic effects, is necessary. For example, analysis of price effects might be important in the context of analyzing the economic effects of the proposed rule on small entities, as required under the RFA, and on the nation as a whole, as required under Executive Order 12866.

Comment 2: The proposed rule needs to be reevaluated because it has inconsistencies and overlaps with other regulations. It is a lackluster and second-tiered approach to conservation; the United States government and industry can do better.

First, combining the high seas and U.S. EEZ into one area, the ELAPS, for the purpose of the fishing effort limits mixes apples and oranges—any U.S. flagged vessel can fish on the high seas, but only vessels originally constructed in the United States can fish in the U.S. EEZ. The U.S. EEZ is already limited by requirements at 46 U.S.C. 12113, which limit fishing effort in the U.S. EEZ, and is therefore a contradiction to the Duplicating, Overlapping, and Conflicting Federal Regulations section of the proposed rule in the IRFA. The United States should be leading the charge of true, enforceable and transparent regulations for the good of the fishery instead of constraining the U.S. fleet with regulations that are disregarded by the other distant water fleets operating in the area. This will drive the U.S. boats out and give the United States a limited say in conservation. Instead of endorsing a second-rate plan of limiting days and methods with quotas (or days), the U.S. government should be limiting the number of vessels and pushing for a full closure.

Second, with a full closure, which has been done with success in the EPO, the entire fishery, including all species, is given a chance to recuperate in a transparent and enforceable way instead of having several different regulations for each species. The United States should not be jumping on the FAD closure bandwagon, which is unenforceable, and definitely not transparent, as other fleets fish year-round on FADs regardless of the FAD closure while the U.S. fleet follows the FAD closure, which is at the wrong time of year and should be at the end and beginning of the years.

Response: NMFS understands that some of these comments relate not to the proposed rule, *per se,* but rather to the positions and role of the United States in the WCPFC. The response provided here is limited to the comments that relate directly to the proposed rule.

With respect to combining the effort limits for the high seas and U.S. EEZ, as described in the IRFA, the EA, and the RIR prepared for the rule, NMFS considered an alternative in which the two areas would not be combined for the purpose of the fishing effort limits. As explained in the IRFA, NMFS does not prefer that alternative in part because the separation of the two areas would provide less operational flexibility for affected purse seine vessels. NMFS recognizes that only vessels with fishery endorsements would benefit directly from that operational flexibility, since only such vessels are permitted to fish in the U.S. EEZ. NMFS acknowledges that the fishing effort limits in this rule are similar to the laws and regulations that govern fishery endorsements (including regulations at 46 CFR 67.21) in that both govern the use of U.S. vessels in the U.S. EEZ for fishing. NMFS agrees that the fishery endorsement regulations at 46 CFR 67.21 can be construed to overlap with the fishing effort limits established in this rule. However, the two regulations do not conflict with or duplicate each other, and NMFS does not believe that the possible overlap in the regulations is in itself a reason to reevaluate the proposed combination of the two areas for the purpose of the fishing effort limit. Nonetheless, NMFS has further analyzed the proposal to combine the two areas for the purpose of the fishing effort limits (see additional discussion in the FRFA, below), but continues to believe that limits applicable in a single area will give the U.S. purse seine fleet as a whole greater opportunity to take full advantage of the available fishing days. Thus, NMFS has not made any change from the proposed rule.

With respect to the possibility of limiting vessel numbers, such a requirement would be outside the scope of this rulemaking, which is to implement the purse seine-related provisions of CMM 2012–01.

NMFS understands the comment regarding a full closure to mean the establishment of a seasonal closure on all purse seine fishing instead of the proposed FAD restrictions during certain periods of each year. NMFS acknowledges the commenter's views on the advantages of a seasonal closure on all purse seine fishing. However, CMM 2012–01 does not prescribe seasonal closures on all purse seine fishing; rather, it includes specific restrictions on the use of FADs. Consequently, in this rule NMFS is implementing the FAD restrictions called for in CMM 2012–01 to meet the United States' international obligations as a Member of the WCPFC.

Regarding the time of year during which the FAD restrictions will apply, the July–October period is mandated under CMM 2012–01, so establishing FAD prohibitions periods at other times of the year instead of July–October would fail to satisfy U.S. obligations under the Convention.

Comment 3: One commenter supports the no-action alternative, on the basis that there are many items that are still being discussed and are a work in progress. Although the elements of the proposed rule seem simple, they have a lot of details, which, if not written and applied correctly, can have adverse effects.

The U.S. vessels have been following diligently the substance of WCPFC ideals without the regulations. The United States was one of the few countries that complied with the high seas pocket and FAD closures when CMM 2008–01 was put into effect.

One should be very careful about limiting the number of fishing days, internationally or otherwise, so as not to put the U.S. vessels at a disadvantage.

Although observers are necessary, the obligations of vessel managers and the rights of observers must be defined so that vessels are not jeopardized by claims from untrained or inexperienced observers.

Instead of more regulations for U.S. vessels, what is needed at this time is more enforcement for foreign vessels that conduct illegal activities.

Response: NMFS notes that certain aspects of this comment might pertain to the positions of the United States in the WCPFC, which is outside the scope of this rule. The response provided here is limited to the aspects of the comment that relate directly to the proposed rule.

Although CMM 2012–01 can be considered a work-in-progress in that it calls for the WCPFC to develop a multi-year management for 2014–2017, it also includes specific provisions for 2013 that WCPFC members, including the United States, became obligated to implement upon the effective date of the CMM, in February 2013. Consequently, the no-action alternative would not satisfy the obligations of the United States under the Convention, and NMFS has rejected it for that reason.

NMFS recognizes the possibility of adverse effects resulting from the rule. NMFS assessed the likely effects of the proposed rule—both adverse and positive—in the EA, IRFA, and RIR prepared for the rule. NMFS considered the results of those assessments, along with comments received on those assessments and on the proposed rule, in preparing this final rule.

NMFS recognizes that if the United States imposes WCPFC-mandated requirements on its vessels, such as limits on fishing effort, but other members of the WCPFC do not do the same for their vessels, U.S. fishing vessels can be put at a disadvantage relative to the fishing vessels of other members. However, in order to satisfy the obligations of the United States as a member of the WCPFC, NMFS must implement the WCPFC-mandated fishing effort limits for U.S. purse seine vessels. NMFS also notes that the United States, as a member of the WCPFC, is contributing to the development of the WCPFC's compliance monitoring scheme, with the aim of improving compliance with WCPFC decisions by all its members.

In response to the comment regarding observers, NMFS notes that only WCPFC observers, meaning observers authorized by the WCPFC to undertake duties as part of the WCPFC's Regional Observer Programme, can be used to satisfy the observer requirements of this rule. NMFS also notes that regulations at 50 CFR 300.215 specify the obligations of vessel operators and crew members with respect to accommodating and protecting the safety and interests of WCPFC observers.

The comment regarding enforcement of foreign vessels is acknowledged, but it is outside the scope of this rule, which applies only to U.S. vessels.

Comment 4: The regulations governing the use of FADs in 2009 (final rule published August 4, 2009; 74 FR 38544; hereafter, ''2009 rule'') resulted in a number of alleged violations, in particular with respect to whether the purse seine vessel itself and its workboats could be considered FADs. Unfortunately for those who had to try to figure out how to comply with the regulations, the WCPFC used two different definitions of what constituted a FAD in CMM 2008–01 and then amended that measure and the definition of FAD in CMM 2009–01, which also addressed, for the first time, the use of lights that might be used either to try to aggregate fish or to move aggregated fish. The 2009 rule did not address the use of lights.

Once again, the agency is not being very precise with regard to a question raised by the vessel operators during the 2009 rulemaking: That is, may the vessel catch fish that have aggregated under the vessel overnight? Although the proposed rule claims that the use of lights to aggregate or move fish was already prohibited under the 2009 rule, that statement is clearly misleading. If that statement were true, the agency would be prohibiting the use of any light that might shine, directly or indirectly, into the water overnight. Instead, the agency is being more precise about the use of certain kinds of lights, not just all lights, during these fish-under-boat sets.

It appears that the agency is trying to rectify the uncertainty caused by the 2009 FAD regulations in at least two ways, changing the definition of a FAD to exclude vessels and specifying what kind of lights may be used and how they are used. These clarifications will be helpful but not unless the agency makes an effort to educate the international observers who serve on these vessels, because NOAA's regulations differ from the applicable WCPFC CMMs. It also removes the absurdity in the 2009 rule whereby a vessel purposefully used to aggregate fish became a FAD under the regulations and could then no longer be serviced or maintained.

Finally, it would be helpful if the agency stated that one of the purposes of these changes in the 2013 FAD regulations is to make clear that U.S. flag vessels may harvest fish found under the purse seine vessel in the morning so long as the use of lights is circumscribed as set forth in the regulations. The agency should be placing its priority on obtaining compliance through clear directives and not on obtaining penalties from vague rules.

Response: With respect to the comment that the WCPFC used two different definitions for FAD and then amended the definition of FAD, NMFS notes that the United States is obligated to implement WCPFC decisions through domestic regulations, and U.S. vessels are obligated to comply with those U.S. regulations, not WCPFC decisions. U.S. regulations to implement the original FAD restrictions adopted by the WCPFC were first issued in the 2009 rule, and NMFS extended them in 2011 (interim rule published December 30, 2011; 76 FR 82180). Those regulations included a single definition for a FAD, and that definition has not been modified until now, with the issuance of this final rule.

In response to the question as to whether vessels may catch fish that have aggregated under the vessel overnight, this final rule makes clear (as did the proposed rule): The rule explicitly prohibits setting a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel. In other words, a vessel may not set on fish that have aggregated under that vessel or any other vessel overnight, regardless of whether any effort was made to aggregate those fish. This is a change relative to the 2009 rule, which allowed vessels to set on fish that naturally aggregated under a vessel overnight, so long as the vessel was not used for the purpose of aggregating fish. In addition to this new prohibition, the proposed rule would—and this final rule does—amplify the prohibitions established in the 2009 rule by explicitly prohibiting the use of lights in specific manners that are known to be used to aggregate fish.

NMFS notes the comment regarding the need to educate the international observers who serve on these vessels. These observers have been authorized by the WCPFC to undertake vessel observer duties as part of the WCPFC's Regional Observer Programme, and as such, have been trained to collect specific types of information in accordance with the requirements and standards of WCPFC Regional Observer Programme. U.S. enforcement agencies make use of that information, where relevant and as appropriate, to enforce U.S. laws and regulations. NMFS further notes that observers do not make any final determinations as to whether or not violations occurred on board a vessel, and all decisions regarding charging of violations is the responsibility of the NOAA Office of General Counsel.

In response to the final portion of this comment, NMFS reiterates that under this final rule, U.S. vessels may not set a purse seine to capture fish that have aggregated under the purse seine vessel in the morning even if the use of lights is circumscribed as set forth in the final rule. This is a change from the regulations established in the 2009 rule.

Changes From the Proposed Rule

In the proposed rule and this final rule, existing paragraph (b) in 50 CFR 300.223, ''Use of fish aggregating devices,'' is expanded to prohibit setting a purse seine in a manner intended to capture fish that have aggregated in association with a vessel and amplified to explicitly prohibit the use of lights in specified manners. However, NMFS inadvertently did not include in the proposed rule corresponding changes to paragraph (w) in 50 CFR 300.222, ''Prohibitions.'' Thus, a change has been made in this final rule to revise 50 CFR

300.222(w) so that it corresponds to the activities prohibited under 50 CFR 300.223(b).

In the proposed rule, the proposed revisions to the existing regulations for the observer requirements, at 50 CFR 300.223(e), were not properly numbered in sequence and some of the cross references among paragraphs were incorrect. The numbering of the relevant paragraphs and the numbering of the paragraphs referred to within those paragraphs, as well as the instructions for revising the regulations, have been corrected in this final rule. Specifically, what was the introductory text of paragraph (e) in the proposed regulations has been redesignated as paragraph (e)(1). What were paragraphs (e)(1) and (e)(2) in the proposed regulations have been redesignated as (e)(1)(i) and (e)(1)(ii), respectively. Existing paragraphs (e)(3) and (e)(4), which relate to requirements to carry and accommodate WCPFC observers under 50 CFR 300.215 and other applicable regulations and which the proposed rule would not have revised, have been redesignated as (e)(2) and (e)(3), respectively, and revised so that they refer to paragraph (e)(1) of 50 CFR 300.223 and its two subparagraphs.

No other changes from the proposed rule have been made.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

Executive Order 12866

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

Regulatory Flexibility Act (RFA)

A FRFA was prepared. The FRFA incorporates the IRFA prepared for the proposed rule. The analysis in the IRFA is not repeated here in its entirety.

A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble of the proposed rule and in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule, above. The analysis follows:

There would be no disproportionate economic impacts between small and large entities operating purse seine vessels as a result of this final rule. Furthermore, there would be no disproportionate economic impacts based on vessel size, gear, or homeport.

Significant Issues Raised by Public Comments in Response to the IRFA

NMFS received three comments related to the IRFA. See Comments 1, 2, and 3 on the proposed rule, and NMFS' responses, above.

Description of Small Entities to Which the Rule Will Apply

The final rule will apply to owners and operators of U.S. purse seine vessels used for fishing in the Convention Area. The number of affected vessels is the number licensed under the South Pacific Tuna Treaty (SPTT). The current number of licensed vessels is 40, which is the maximum number of licenses available under the SPTT (excluding the five joint-venture licenses available under the SPTT, none of which have ever been applied for or issued). Based on limited financial information available on the purse seine fleet, including the fleet's total landings in 2010 and average cannery prices for tuna species in that year, most or all of the businesses that operate vessels in the fleet are large entities as defined by the RFA. However, it is possible that one or a few of these fish harvesting businesses meet the criteria for small entities (*i.e.,* they are independently owned and operated and not dominant in their fields of operation, and have annual receipts of no more than $4.0 million); therefore, the purse seine fleet is included in this analysis.

Recordkeeping, Reporting, and Other Compliance Requirements

The final rule will not establish any new reporting or recordkeeping requirements within the meaning of the Paperwork Reduction Act. The classes of small entities subject to the requirements and the types of professional skills necessary to fulfill each of the requirements are described in the IRFA.

Steps Taken To Minimize the Significant Economic Impacts on Small Entities

NMFS identified and considered several alternatives to the proposed rule, including the no-action alternative. The action alternatives are limited to the ways in which the fishing effort limits and the FAD restrictions would be implemented; no alternatives other than the no-action alternative were identified for the proposed observer requirements.

(1) Fishing Effort Limits: As discussed in the IRFA, NMFS considered in detail two alternatives to the proposed fleet-wide limit of 2,588 fishing days per year in the ELAPS. The first alternative would establish separate fleet-wide annual fishing effort limits in the U.S. EEZ (27 fishing days per year) and the high seas (433 fishing days per year) in the Convention Area. NMFS does not prefer this alternative because the limits would be much more constraining than the proposed limits, and their separation into two areas would provide less operational flexibility for affected purse seine vessels (specifically, as noted in NMFS' response to Comment 2 on the proposed rule, above, for those vessels with fishery endorsements). A variation of this alternative, not discussed in the IRFA, would be to establish separate limits in the two areas, but to formulate the number of available fishing days in each area so that the sum of the two limits is 2,588 fishing days per year. This variation could be advantageous for vessels with fishery endorsements (depending on the spatial distribution of fishing effort in a given year), but that advantage would be offset by the reduced operational flexibility for those vessels. NMFS does not see a significant advantage of this variation for affected entities, and rejects it in favor of the proposed fishing effort limits because the latter would afford greater operational flexibility for affected vessels, at least for vessels with fishery endorsements.

The second alternative would be less restrictive than the proposed rule's limits. As described in the IRFA, it would establish a limit of 3,943 fishing days per year in the ELAPS. This alternative would be less constraining and thus less costly to affected entities than the proposed rule's limit, but it is rejected because it would depart from the effort limits established for 2009–2012. A limit of 2,588 fishing days per year in the ELAPS is consistent with the precedent set by the 2009 rule, and affected entities have already been exposed to the impacts of these limits for the past four years. The alternative of 3,943 fishing days per year would also be less conservative in that it would have the potential for greater adverse effects on fish stocks and other living marine resources.

In the RFA analysis for the 2009 rule, NMFS considered an alternative that would allocate the fishing effort limits among individual purse seine vessels in some manner. Given the complexity of setting up an individual allocation scheme, which would require considering which entities are to receive allocations, the criteria for making allocations, and whether and how the allocations would be transferable, as well as a mechanism to reliably monitor the fishing effort of the individual entities, NMFS does not believe it feasible to develop an individual allocation scheme for this rule. As a

result, NMFS has not considered the option in depth, and rejects it. NMFS notes, however, that as found in the RFA analysis for the 2009 rule, this alternative would likely alleviate any adverse impacts of the race-to-fish that might occur as a result of establishing the competitive fishing effort limits as in the proposed rule. Those impacts, however, would be expected to be minor.

The alternative of taking no action at all is rejected because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

(2) FAD Restrictions: NMFS considered one alternative to the proposed FAD restrictions. This alternative would be the same as the proposed rule's restrictions except that it would not be prohibited to set on fish that have aggregated in association with a vessel (provided that the vessel is not used in a manner to aggregate fish). This would be less restrictive and thus presumably less costly to affected purse seine fishing businesses than the proposed rule's requirements. Historically, the number of these sets has been relatively small, averaging about four per year for the entire fleet from 1997 through 2010, according to data recorded by vessel operators in logbooks (examination by NMFS of observer data from selected years indicates a somewhat higher number than the number reported by vessel operators, so vessel logbook data might underestimate the actual number, but the number is still small in comparison to FAD sets). Therefore, the degree of relief in compliance costs of allowing these sets for four months each year would be expected to be relatively small. NMFS believes that this alternative would not serve CMM 2012–01's objective of reducing the tuna stocks' fishing mortality rates through seasonal prohibitions on the use of FADs as well as would the proposed rule's FAD restrictions. For that reason, this alternative is rejected.

The alternative of taking no action at all is rejected because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide has been prepared. The guide will be sent to permit and license holders in the affected fisheries. The guide and this final rule will also be available at *www.fpir.noaa.gov* and by request from NMFS PIRO (see **ADDRESSES**).

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: May 16, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, Performing the functions and duties of the Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 *et seq.*

■ 2. In § 300.211, the definitions of ''Effort Limit Area for Purse Seine or ELAPS'', and ''Fish aggregating device'', or ''FAD'', are revised to read as follows:

§ 300.211 Definitions.

* * * * *

Effort Limit Area for Purse Seine, or *ELAPS,* means, within the area between 20° N. latitude and 20° S. latitude, areas within the Convention Area that either are high seas or within the EEZ.

Fish aggregating device, or *FAD,* means any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water. The definition of FAD does not include a vessel.

* * * * *

■ 3. In § 300.222, paragraph (w) is revised to read as follows:

§ 300.222 Prohibitions.

* * * * *

(w) Set a purse seine around, near or in association with a FAD or a vessel, deploy or service a FAD, or use lights in contravention of § 300.223(b).

* * * * *

■ 4. In § 300.223, the introductory text, paragraph (a) introductory text and paragraph (a)(1), and paragraph (b) are revised, paragraph (c) is removed and reserved, and paragraph (e) is revised to read as follows:

§ 300.223 Purse seine fishing restrictions.

None of the requirements of this section apply in the territorial seas or archipelagic waters of the United States or any other nation, as defined by the domestic laws and regulations of that nation and recognized by the United States. All dates used in this section are in Universal Coordinated Time, also known as UTC; for example: the year 2013 starts at 00:00 on January 1, 2013 UTC and ends at 24:00 on December 31, 2013 UTC; and July 1, 2013, begins at 00:00 UTC and ends at 24:00 UTC.

(a) *Fishing effort limits.* This paragraph establishes limits on the number of fishing days that fishing vessels of the United States equipped with purse seine gear may collectively spend in the ELAPS.

(1) For each of the calendar years 2013 and 2014 there is a limit of 2,588 fishing days.

* * * * *

(b) *Use of fish aggregating devices.* From July 1 through October 31, 2013, and from July 1 through October 31, 2014, owners, operators, and crew of fishing vessels of the United States shall not do any of the activities described below in the Convention Area in the area between 20° N. latitude and 20° S. latitude:

(1) Set a purse seine around a FAD or within one nautical mile of a FAD.

(2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel.

(3) Deploy a FAD into the water.

(4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that:

(i) A FAD may be inspected and handled as needed to identify the FAD,

identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and

(ii) A FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

(5) From a purse seine vessel or any associated skiffs, other watercraft or equipment, do any of the following, except in emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage:

(i) Submerge lights under water;

(ii) Suspend or hang lights over the side of the purse seine vessel, skiff, watercraft or equipment, or;

(iii) Direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew.

* * * * *

(e) *Observer coverage.* (1) Until 24:00 UTC on December 31, 2014, a fishing vessel of the United States may not be used to fish with purse seine gear in the Convention Area without a WCPFC observer on board. This requirement does not apply to fishing trips that meet either of the following conditions:

(i) The portion of the fishing trip within the Convention Area takes place entirely within areas under jurisdiction of a single nation other than the United States.

(ii) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

(2) Owners, operators, and crew of fishing vessels subject to paragraph (e)(1) of this section must accommodate WCPFC observers in accordance with the provisions of § 300.215(c).

(3) Meeting either of the conditions in paragraphs (e)(1)(i) and (e)(1)(ii) of this section does not exempt a fishing vessel from having to carry and accommodate a WCPFC observer pursuant to § 300.215 or other applicable regulations.

* * * * *

[FR Doc. 2013–12198 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 0907271173–0629–03]

RIN 0648–XC672

Snapper-Grouper Fishery of the South Atlantic; 2013 Recreational Accountability Measure and Closure for South Atlantic Snowy Grouper

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for the recreational sector of snowy grouper in the South Atlantic for the 2013 fishing year through this temporary rule. Average recreational landings from 2010–2012 exceeded the recreational annual catch limit (ACL) for snowy grouper. To account for this overage, this rule reduces the length of the 2013 recreational fishing season. Therefore, NMFS closes the recreational sector for snowy grouper on May 31, 2013. This closure is necessary to protect the snowy grouper resource.

DATES: This rule is effective 12:01 a.m., local time, May 31, 2013, until 12:01 a.m., local time, January 1, 2014.

FOR FURTHER INFORMATION CONTACT: Catherine Hayslip, telephone: 727–824–5305, email: *Catherine.Hayslip@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic, which includes snowy grouper, is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The recreational ACL for snowy grouper is 523 fish. In accordance with regulations at 50 CFR 622.193(b)(2), if the recreational ACL is exceeded, the Assistant Administrator, NMFS (AA) will file a notification with the Office of the Federal Register to reduce the length of the following fishing season by the amount necessary to ensure landings do not exceed the recreational ACL in the following fishing year. Additionally, the most recent 3-year running average of recreational landings is compared to the recreational ACL. For the 2013 fishing year, the average of 2010–2012 recreational landings is compared to the recreational ACL. Average landings from 2010–2012 exceeded the 2012 ACL by 882 fish on average. Therefore, this temporary rule implements the post-season AM to reduce the fishing season for the recreational snowy grouper component of the snapper-grouper fishery in 2013. As a result, the recreational sector for snowy grouper will be closed effective 12:01 a.m., local time May 31, 2013.

During the closure, the bag and possession limit for snowy grouper in or from the South Atlantic exclusive economic zone is zero. The recreational sector for snowy grouper will reopen on January 1, 2014, the beginning of the 2014 recreational fishing season.

Classification

The Regional Administrator, Southeast Region, NMFS, (RA) has determined this temporary rule is necessary for the conservation and management of the South Atlantic snowy grouper component of the South Atlantic snapper-grouper fishery and is consistent with the Magnuson-Stevens Act, the FMP, and other applicable laws.

This action is taken under 50 CFR 622.193(b)(2) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive the requirements to provide prior notice and opportunity for public comment on this temporary rule. Such procedures are unnecessary because the AMs established by Amendment 17B to the FMP (75 FR 82280, December 30, 2010) and located at 50 CFR 622.193(b)(2) have already been subject to notice and comment and authorize the AA to file a notification with the Office of the Federal Register to reduce the duration of the recreational fishing season the following fishing year if an ACL overage occurs. All that remains is to notify the public of the reduced recreational fishing season for snowy grouper for the 2013 fishing year. Additionally, there is a need to immediately notify the public of the reduced recreational fishing season for snowy grouper for the 2013 fishing year, to prevent snowy grouper recreational harvest from further exceeding the ACL, which will help protect the South Atlantic snowy

grouper resource. Also, providing prior notice and opportunity for public comment on this action would be contrary to the public interest because many of those affected by the length of the recreational fishing season, particularly charter vessel and headboat operations, book trips for clients in advance and, therefore need as much time as possible to adjust business plans to account for the reduced recreational fishing season.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: May 20, 2013.

Emily H. Menashes,

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

[FR Doc. 2013–12321 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 130108020–3409–01]

RIN 0648–XC686

Fisheries Off West Coast States; Modifications of the West Coast Commercial Salmon Fisheries; Inseason Action #3

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

ACTION: Modification of fishing seasons and landing and possession limits; request for comments.

SUMMARY: NOAA Fisheries announces one inseason action in the ocean salmon fisheries. This inseason action modified the commercial fisheries in the area from Oregon/California Border to Humboldt South Jetty (California Klamath Management Zone).

DATES: This inseason action is effective May 10, 2013 and remains in effect until June 1, 2013. Comments will be accepted through June 7, 2013.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2012–0248, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0248,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA, 98115–6349.
- *Fax:* 206–526–6736, Attn: Peggy Mundy.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323.

SUPPLEMENTARY INFORMATION:

Background

In the 2013 annual management measures for ocean salmon fisheries (78 FR 25865, May 3, 2013), NMFS announced the commercial and recreational fisheries in the area from the U.S./Canada Border to the U.S./Mexico Border, beginning May 1, 2013, and 2014 salmon seasons opening earlier than May 1, 2014.

NMFS is authorized to implement inseason management actions to modify fishing seasons and quotas as necessary to provide fishing opportunity while meeting management objectives for the affected species (50 CFR 660.409). Inseason actions in the salmon fishery may be taken directly by NMFS (50 CFR 660.409(a)—Fixed inseason management provisions) or upon consultation with the Pacific Fishery Management Council (Council) and the appropriate State Directors (50 CFR 660.409(b)—Flexible inseason management provisions). Automatic season closure, a fixed inseason management provision, is allowed when the Regional Administrator (RA) projects a quota to be reached on or by a certain date (50 CFR 660.409(a)(1)).

Management of the salmon fisheries is generally divided into two geographic areas: north of Cape Falcon (U.S./Canada Border to Cape Falcon, Oregon) and south of Cape Falcon (Cape Falcon, Oregon to the U.S./Mexico Border). The inseason action in this document applies south of Cape Falcon.

Inseason Action

Inseason Action #3

Representatives of the California Department of Fish and Wildlife (CDFW) contacted the RA on May 8, 2013, requesting an inseason consultation to discuss managing the quota in the commercial salmon fishery in the area from Oregon/California Border to Humboldt South Jetty, known as the California Klamath Management Zone (CA–KMZ). The quota for this fishery in the month of May was 3,000 Chinook salmon. The RA scheduled the consultation for May 10, 2013 and notified the Council. On May 9, CDFW provided updated information on catch-to-date and effort in the fishery. Based on the updated information, the RA projected that the quota for the May fishery was likely to be reached on Friday, May 10; therefore, the RA took inseason action on May 9 to implement automatic closure of this fishery on Friday, May 10, 2013.

Inseason action #3 closed the commercial salmon fisheries in the CA–KMZ effective 12 p.m. (noon), Friday, May 10, 2013, due to projected attainment of quota. This action was taken to avoid exceeding the quota for the fishery, while providing sufficient time for NMFS and CDFW to notify the public of the closure. On May 9, 2013, CDFW recommended this action and the RA concurred. This inseason action remains in effect until June 1, 2013. This inseason action is authorized by 50 CFR 660.409(a)(1).

All other restrictions and regulations remain in effect as announced for the 2013 Ocean Salmon Fisheries and 2014 fisheries opening prior to May 1, 2014 (78 FR 25865, May 3, 2013).

The RA determined that the best available information indicated that catch and effort projections supported the above inseason action recommended by the State of California. The state manages the fisheries in state waters adjacent to the areas of the U.S. exclusive economic zone in accordance with these Federal actions. As provided by the inseason notice procedures of 50 CFR 660.411, actual notice of the described regulatory action was given, prior to the date the action was effective, by telephone hotline number 206–526–6667 and 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF–FM and 2182 kHz.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds that good cause exists for this notification to be issued without affording prior notice and opportunity for public comment under 5 U.S.C. 553(b)(B) because such notification would be impracticable. As previously noted, actual notice of the regulatory actions was provided to fishers through telephone hotline and radio notification. These actions comply with the requirements of the annual management measures for ocean salmon fisheries (78 FR 25865, May 3, 2013), the West Coast Salmon Fishery Management Plan (Salmon FMP), and regulations implementing the Salmon FMP, 50 CFR 660.409 and 660.411. Prior notice and opportunity for public comment was impracticable because NMFS and the state agency had insufficient time to provide for prior notice and the opportunity for public comment between the time the catch and effort projections were developed and fisheries impacts calculated, and the time the fishery modifications had to be implemented in order to ensure that fisheries are managed based on the best available scientific information, thus allowing fishers access to the available fish at the time the fish were available while ensuring that quotas are not exceeded. The AA also finds good cause to waive the 30-day delay in effectiveness required under 5 U.S.C. 553(d)(3), as a delay in effectiveness of these actions would allow fishing at levels inconsistent with the goals of the Salmon FMP and the current management measures.

This action is authorized by 50 CFR 660.409 and 660.411 and is exempt from review under Executive Order 12866.

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

Dated: May 20, 2013.

Emily H. Menashes,

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

[FR Doc. 2013–12320 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 100
Thursday, May 23, 2013

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 915

[Doc. No. AMS–FV–12–0067; FV13–915–1 PR]

Avocados Grown in South Florida; Change in Minimum Grade Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule invites comments on an increase to the minimum grade requirements currently prescribed under the Florida avocado marketing order (order). The order regulates the handling of avocados grown in South Florida, and is administered locally by the Avocado Administrative Committee (Committee). This action would increase the current minimum grade requirement from a U.S. No. 2 to a U.S. Combination grade for avocados shipped to destinations outside the production area. Increasing the minimum grade requirement would align marketing order regulations with current industry practices to the benefit of growers, handlers, and consumers.

DATES: Comments must be received by June 24, 2013.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov.* All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this proposal will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–7893, or Email: *Doris.Jamieson@ams.usda.gov* or *Christian.Nissen@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Jeffrey.Smutny@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Order No. 915, as amended (7 CFR part 915), regulating the handling of avocados grown in South Florida, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on revisions to the minimum grade requirements currently prescribed under the order. This proposal would increase the current minimum grade requirement from a U.S. No. 2 to a U.S. Combination grade for avocados shipped to destinations outside the production area and was recommended by the Committee at a meeting on October 10, 2012.

Section 915.51 of the order provides, in part, authority to issue regulations establishing specific grade requirements for avocados. Section 915.52 of the order provides authority for the modification, suspension or termination of established regulations.

Section 915.306 of the order's container and pack regulations prescribe grade, pack, and container marking requirements for Florida avocados. Paragraph (a)(1) of that section prescribes, in part, that no handler shall handle any variety of avocados grown in the production area unless such avocados grade at least U.S. No. 2.

While marketing order regulations specify a minimum grade requirement of a U.S. No. 2, it is standard industry practice to ship avocados to destinations outside the production area at the higher grade of a U.S. Combination, especially at the beginning of the season. The minimum requirement for a U.S. Combination grade provides that at least 60 percent of the fruit in the pack must meet the U.S. No. 1 grade and the remaining fruit must meet at least a U.S. No. 2 grade. Handlers have voluntarily shipped the higher grade fruit in order to get the best price for growers and to provide quality fruit to consumers.

During the first four months of the 2012–13 season, shipments of U.S. No. 2 grade fruit were 13 percent higher than shipments during the comparable period of the previous season. Buyers were reluctant to pay a higher price for the better grade fruit when they could purchase the lower grade fruit for less. This negatively affected the price of the U.S. Combination grade fruit and resulted in the loss of sales of the higher grade fruit.

During several meetings, Committee members expressed concern that

shipments of the U.S. No. 2 grade fruit may continue to increase and further impact price. Further, the Florida avocado industry has established a reputation for providing consumers with high quality fruit and the Committee believes shipping U.S. No. 2 grade fruit outside the production area could lower that standard.

As the majority of handlers are currently shipping at the higher grade, it is not anticipated that this change would reduce overall shipments. Even though there was an increase in shipments of U.S. No. 2 grade fruit to destinations outside the production area during the 2012–13 season, Committee data indicates total shipments of U.S. No. 2 grade fruit represented only about one percent of total shipments this season, which were over 1.1 million 55-pound bushel containers.

Consequently, the Committee recommended increasing the minimum grade requirement to a U.S. Combination for avocados shipped to destinations outside the production area. Fruit shipped within the production area would continue to be required to meet the current minimum grade of a U.S. No. 2, which would provide an outlet for U.S. No. 2 grade not utilized in the U.S. Combination pack. This proposal would align marketing order regulations with current industry practices to the benefit of growers, handlers, and consumers. This proposal would help maintain the industry's reputation for providing consumers with high quality avocados from Florida, while continuing to provide handlers with an outlet for their U.S. No. 2 fruit.

One member of the Committee voted against the recommendation. He stated the minimum grade requirement should be increased, but only during the beginning of the season when domestic production was minimal. He believed that when imports begin arriving in October, the minimum grade should revert back to a U.S. No. 2 in order for the Florida avocado industry to compete with imported fruit. However, the majority of the Committee agreed the quality of the fruit was the most important issue and shipping the lower grade fruit lowered that high standard established by the Florida avocado industry. Other members of the Committee also commented that they believe increasing the minimum grade for Florida avocados would cause imported fruit quality to improve in order to match the higher quality standard set by the Florida avocado industry.

Section 8e of the Act provides that when certain domestically produced commodities, including avocados, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. The changes proposed in this rule would apply only to shipments outside the production area. The current, less restrictive regulations would continue to apply to shipments within the production area and to imported avocadoes. A clarification will be made to the import regulation in a separate action.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 30 handlers of Florida avocados subject to regulation under the order and approximately 300 producers of avocados in the production area. Small agricultural service firms, which include avocado handlers, are defined by the Small Business Administration (SBA) as those whose annual receipts are less than $7,000,000, and small agricultural producers are defined as those having annual receipts less than $750,000 (13 CFR 121.201).

According to Committee data and information from the National Agricultural Statistical Service, the average price for Florida avocados during the 2011–12 season was approximately $20.79 per 55-pound bushel container and total shipments were slightly higher than 1.2 million 55-pound bushels. Using the average price and shipment information provided by the Committee, the majority of avocado handlers could be considered small businesses under SBA's definition. In addition, based on avocado production, producer prices, and the total number of Florida avocado producers, the average annual producer revenue is less than $750,000. Consequently, the majority of avocado handlers and producers may be classified as small entities.

This proposal would increase the minimum grade requirements currently prescribed for Florida avocados under § 915.306 of the order. This proposed change would increase the minimum grade from a U.S. No. 2 to a U.S. Combination grade for avocados shipped to destinations outside the production area and would align marketing order regulations to current industry practices. This proposal was recommended by the Committee at a meeting on October 10, 2012. Authority for this action is provided in §§ 915.51 and 915.52 of the order.

Any additional costs that would be associated with this change are anticipated to be minimal. The order does require that all containers be marked with the grade of fruit in the container. However, the vast majority of handlers are currently shipping at the higher grade requirement, and marking their containers accordingly. Further, any containers pre-stamped with a U.S. No. 2 that a handler may already have could be used in the production area.

As previously stated, the volume of U.S. No. 2 grade Florida avocados shipped during a season represents less than one percent of total annual shipments. In addition, the U.S. Combination grade requires that at least 60 percent of the fruit in the pack be a U.S. No. 1 grade and the remaining fruit must meet a U.S. No. 2 grade. Consequently, U.S. No. 2 fruit can be utilized in the U.S. Combination pack. Further, if this rule is implemented, U.S. No. 2 grade avocados could still be shipped to destinations within the production area. Therefore, implementation of this proposed rule is not expected to impact the overall volume of U.S. No. 2 fruit being utilized as adequate uses for such fruit would continue to exist.

Increasing the minimum grade requirement would align marketing order requirements with current industry practices. Consumers would benefit as a result of the higher quality pack available in the marketplace. It would also build consumer confidence and improve grower returns. The benefits of this proposed rule are not expected to be disproportionately greater or less for small handlers or growers than for large entities.

The Committee considered alternatives to this recommended change. The Committee discussed increasing the minimum grade to U.S. Combination grade during the early part of the season and then reverting back to the minimum grade requirement of a U.S. No. 2 in October when imported fruit typically begins arriving in the U.S. There was concern that having the higher grade requirements in effect when imports begin arriving would

make it difficult for the domestic industry to compete. However, the Committee agreed the quality of the fruit was the most important issue and shipping the lower grade fruit lowered that high standard established by the Florida avocado industry. Also, Committee members stated that they believe increasing the minimum grade for Florida avocados shipped outside the production area for the entire season would result in improved quality of both domestic and imported avocados, as imports would likely strive to match the quality standards set by the Florida avocado industry. Therefore, this alternative was rejected.

The Committee also considered changing the minimum grade requirements for all Florida avocados handled, regardless of market destination. However, maintaining the current minimum grade requirement for avocados shipped to destinations within the production area provides an outlet for U.S. No. 2 grade fruit not utilized in the higher grade packs. Therefore, the Committee also rejected this alternative.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would increase the minimum grade requirement under the Florida avocado marketing order. Accordingly, this action would not impose any additional reporting or recordkeeping requirements on either small or large Florida avocado handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

In addition, the Committee's meeting was widely publicized throughout the Florida avocado industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 10, 2012, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so this change would be in place by May when handlers begin shipping. This would also give handlers advanced notice of the increased grade requirement before the season begins. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 915

Avocados, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 915 is proposed to be amended as follows:

PART 915—AVOCADOS GROWN IN SOUTH FLORIDA

■ 1. The authority citation for 7 CFR part 915 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 915.306, paragraph (a)(1) is revised to read as follows:

§ 915.306 Florida avocado grade, pack and container marking regulation.

(a) * * *

(1) Such avocados grade at least U.S. Combination, except that avocadoes handled to destinations within the production area grade U.S. No. 2 and except further that such avocados may be placed in containers with avocados of dissimilar varietal characteristics.

* * * * *

Dated: May 17, 2013.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2013–12239 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1267, 1269, and 1270

RIN 2590–AA40

Removal of References to Credit Ratings in Certain Regulations Governing the Federal Home Loan Banks

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requires Federal agencies to review regulations that require the use of an assessment of the credit-worthiness of a security or money market instrument and any references to, or requirements in, such regulations regarding credit ratings issued by credit rating organizations registered with the Securities and Exchange Commission (SEC) as nationally recognized statistical rating organizations (NRSROs), and to remove such references or requirements. To implement this provision, the Federal Housing Finance Agency (FHFA) is proposing to remove a number of references and requirements in certain safety and soundness regulations affecting the Federal Home Loan Banks (Banks) and to adopt new provisions that would require the Banks to apply internal analytic standards and criteria to determine the credit quality of a security or obligation, subject to FHFA oversight and review through the examination and supervisory process. FHFA will undertake separate rulemakings to remove NRSRO references and requirements contained in the capital regulations applicable to the Banks and in the regulations governing the Banks' acquired member asset (AMA) programs.

DATES: Comments on the proposed rule must be received on or before July 22, 2013.

ADDRESSES: You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590–AA40 by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comments to the *Federal eRulemaking Portal,* please also send it by email to FHFA at *RegComments@FHFA.gov* to ensure timely receipt by the agency. Please include "RIN 2590–AA40" in the subject line of the message.

• *Email:* Comments to Alfred M. Pollard, General Counsel may be sent by email to *RegComments@FHFA.gov.* Please include ''RIN 2590–AA40'' in the subject line of the message.

• *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA40, Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

• *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA40, Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Amy Bogdon, Associate Director for Regulatory Policy and Programs, *Amy.Bogdon@FHFA.gov,* 202–649–3320, Division of Federal Home Loan Bank Regulation, Federal Housing Finance Agency; or Thomas E. Joseph, Associate General Counsel, *Thomas.Joseph@FHFA.gov,* 202–649–3076 (these are not toll-free numbers), Office of General Counsel (OGC), Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the Notice of Proposed Rulemaking (NPR), and will develop final regulations after taking all comments into consideration. Copies of all comments will be posted without change, including any personal information you may provide such as your name and address (mailing or email) and telephone numbers, on the internet Web site at *https://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at 202–649–3804.

II. Background

A. Dodd-Frank Act Provisions

Section 939A of the Dodd-Frank Act requires federal agencies to: (i) Review regulations that require the use of an assessment of the creditworthiness of a security or money market instrument; and (ii) to the extent those regulations contain any references to, or requirements regarding credit ratings, remove such references or requirements. *See* section 939A, Public Law 111–203, 124 Stat. 1887 (July 21, 2010). In place of such credit-rating based requirements, agencies are instructed to substitute appropriate standards for determining creditworthiness. The new law further provides that, to the extent feasible, an agency should adopt a uniform standard of creditworthiness for use in its regulations, taking into account the entities regulated by it and the purposes for which such regulated entities would rely on the creditworthiness standard.

B. The Bank System

The twelve Banks are wholesale financial institutions organized under the Federal Home Loan Bank Act (Bank Act).[1] The Banks are cooperatives; only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.[2] Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential credit through its member institutions.[3] Any eligible institution (generally a federally insured depository institution or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.[4]

As government-sponsored enterprises, the Banks are granted certain privileges under federal law. In light of those privileges, the Banks typically can borrow funds at spreads over the rates on U.S. Treasury securities of comparable maturity lower than most other entities. The Banks pass along a portion of their funding advantage to their members—and ultimately to consumers—by providing advances and other financial services at rates that would not otherwise be available to their members. Consolidated obligations (COs), consisting of bonds and discount notes, are the principal funding source for the Banks. The Bank System's Office of Finance (OF) issues all COs on behalf of the twelve Banks. Although each Bank is primarily liable for the portion of COs corresponding to the proceeds received by that Bank, each Bank is also jointly and severally liable with the other eleven Banks for the payment of principal and interest on all COs.[5]

C. Advance Notice of Proposed Rulemaking

On January 31, 2011, FHFA published an advance notice of proposed rulemaking (ANPR) in which it solicited comments from the public on potential alternatives to the use of NRSRO credit ratings in its regulations applicable to the Banks, as well as in its regulations applicable to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (collectively, the Enterprises).[6] Prior to issuing the ANPR, FHFA also had issued a proposed rule on Bank liabilities and COs, which, among other things, would have combined and re-designated a number of existing regulations as new part 1270 of the FHFA rules.[7] In the preamble for the proposed rule on Bank Liabilities, FHFA asked for comments on implementing section 939A of the Dodd-Frank Act with regard to certain provisions addressed in that rulemaking but did not propose specific amendments related to section 939A at that time. FHFA ultimately decided to adopt the Bank Liability Rule without amending those provisions that referenced credit ratings but noted that it would propose changes to those provisions as part of a future rulemaking.[8] It also stated that it would consider relevant comments made on the part 1270 rules, along with the comments received on the ANPR, as part of such rulemaking.

FHFA received nine comment letters on the ANPR. It also received five comment letters on the proposed Bank Liability Rule, all but one of which addressed issues related to the implementation of section 939A of the

[1] *See* 12 U.S.C. 1423, 1432(a).

[2] *See* 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

[3] *See* 12 U.S.C. 1427.

[4] *See* 12 U.S.C. 1424; 12 CFR part 1263.

[5] *See* 12 U.S.C. 1431(c); 12 CFR 1270.10.

[6] *See* Advance Notice of Proposed Rulemaking, Alternatives to Use of Credit Ratings in Regulations Governing the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks, 76 FR 5292 (Jan. 31, 2011).

[7] *See* Proposed Rule: Federal Home Loan Bank Liabilities, 75 FR 68534, 68536–38 (Nov. 8, 2010) (Bank Liability Rule).

[8] *See* Final Rule: Federal Home Loan Bank Liabilities, 76 FR 18366, 18368 (Apr. 4, 2011) (adopting 12 CFR part 1270).

Dodd-Frank Act.[9] These comments generally supported an approach to implementing section 939A of the Dodd-Frank Act that would allow the Banks and the Enterprises flexibility to develop internal processes and procedures for measuring, monitoring, and controlling the credit risk of specific assets and obligations. Many of the comments also stated that the Dodd-Frank Act did not prohibit use of NRSRO or other third party credit analytics as part of any internal process as long as such use was not mandated by FHFA and the entity undertook its own analysis of the appropriateness of any rating or third party analytics. A number of commenters believed that any proposed new credit standards should not be unduly burdensome or costly to implement and should recognize difference in risk profiles among different counterparties, assets or obligations. The comments received are discussed in more detail below to the extent that they are relevant to the specific provisions being addressed in this notice of proposed rulemaking.

While the ANPR addressed all FHFA regulations that referenced or otherwise applied requirements based on credit ratings, this proposed rulemaking only addresses Bank safety and soundness regulations that reference or contain requirements based on credit ratings found in parts 1267 (Federal Home Loan Bank Investments), 1269 (Standby Letters of Credit), and 1270 (Liabilities) of the FHFA regulations. FHFA intends to undertake separate rulemakings to remove references to and requirements based on NRSRO credit ratings in the Bank AMA regulations as well as to revise and remove NRSRO rating related references and requirements in the Bank capital and related rules found at part 932 of the former Federal Housing Finance Board regulations.[10]

Finally, FHFA has determined not to amend part 1273 of its regulations to remove references to NRSROs found in § 1273.6(d) of its rules.[11] As FHFA noted in the ANPR, this provision assigns to OF the responsibility to manage the Bank System's relationship with NRSROs, if NRSRO ratings are considered necessary or desirable in connection with the issuance and sale of COs.[12] The provision does not prohibit any action or mandate any particular action be taken by the Banks or OF based on NRSRO ratings. Therefore, FHFA believes this provision is outside the scope of the requirements in section 939A of the Dodd-Frank Act and need not be changed.[13]

D. Actions of Other Regulators

In formulating this proposed rule, FHFA also considered actions taken by other regulators to implement section 939A of Dodd-Frank with respect to similar regulations, including actions by SEC, the Commodity Futures Trading Commission (CFTC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board (FRB).

The FHFA recognizes, as have the other federal regulatory agencies, that existing references to credit ratings generally serve several regulatory purposes including those related to capital adequacy, investment acceptability, risk assessment, and disclosure. Agencies that have proposed or finalized regulations in line with the requirements of section 939A of the Dodd-Frank Act have taken one or more of the following actions: (i) Removed and not replaced references to credit ratings; (ii) prohibited certain high risk activities altogether; (iii) established new definitions for minimum credit standards with an emphasis on repayment capacity and risk of default; (iv) replaced creditworthiness standards that previously referenced credit ratings with standards that evaluate other common credit criteria; (v) eliminated any undue reliance on third-party credit ratings; and/or (vi) re-emphasized and promoted sound and effective governance, (credit) risk management, due diligence, and documentation practices.

The final rules that the NCUA, FDIC, and OCC adopted regarding investments are most relevant to this rulemaking.[14] In their rulemakings, the FDIC and OCC redefined an ''investment grade'' security as one where the issuer has an adequate capacity to meet all financial commitments under the security for the projected life of the security. To meet this new standard, national banks and federal and state savings associations must determine that the risk of default by the obligor is low and that the full and timely repayment of principal and interest is expected. Both agencies also published guidance to assist their regulated institutions in complying with the new regulations.[15] Similarly, the NCUA replaced minimum rating requirements with a requirement that the federal credit union or corporate credit union conduct and document a credit analysis demonstrating that the issuer of the security has a certain, specified capacity to meet its financial commitments. For regulations pertaining to counterparty transactions, the NCUA's final rule replaced minimum rating requirements with a requirement that the credit union conduct a credit analysis of the counterparty based on a standard approved by the credit union's board of directors.

E. Considerations of Differences Between the Banks and the Enterprises

When promulgating regulations relating to the Banks, section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), as amended by section 1201 of HERA, requires the Director of FHFA (Director) to consider the differences between the Banks and the Enterprises with respect

[9] In addition, FHFA staff met with an outside party who provided comments concerning certain minimum credit rating requirements for insurance companies in the AMA regulation.

[10] *See* 12 CFR part 955 (AMA rules); 12 CFR part 932 (Bank capital and related rules). Effective July 30, 2008, the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654, created FHFA as a new independent agency of the Federal Government, and transferred to FHFA the supervisory and oversight responsibilities of the Office of Federal Housing Enterprise Oversight (OFHEO) over the Enterprises, and the supervisory and oversight responsibilities of the Federal Housing Finance Board over the Banks and the OF. *See id.* at section 1101, 122 Stat. 2661–62. The Enterprises, the Banks, and the OF continue to operate under regulations promulgated by OFHEO and the Finance Board until FHFA issues regulations that supersede those regulations. *See id.* at sections 1302, 1312, 122 Stat. 2795, 2798.

[11] 12 CFR 1273.6(d).

[12] *See* 76 FR at 5295.

[13] No commenters disagreed with FHFA's statement in the ANPR that § 1273.6(d) appeared outside the scope of section 939A of the Dodd-Frank Act.

FHFA is not undertaking as part of these Bank-related rulemakings the removal of specific references to NRSRO ratings in safety and soundness or capital regulations applicable to the Enterprises. As FHFA noted in the ANPR, the references to NRSRO ratings in the Enterprise safety and soundness regulations do not require the Enterprises to take or refrain from specific actions based on those ratings and therefore appear outside the scope of section 939A of the Dodd-Frank Act. *See* 76 FR at 5294. FHFA also noted that the Enterprise statutory and regulatory capital requirements, including those regulatory requirements that referenced NRSRO ratings, were not binding on the Enterprises for the duration of the current conservatorships, although FHFA recognized that it might have to develop and adopt new risk-based capital requirements for the Enterprises or their successors in a post-conservatorship environment. *Id.*

[14] *See* Final Rule: Alternatives to the Use of Credit Ratings, 77 FR 74103 (Dec. 13, 2012) (NCUA); Final Rule: Permissible Investments for Federal and State Savings Associations: Corporate Debt Securities, 77 FR 43151 (Jul. 24, 2012) (FDIC); and Final Rule: Alternatives to the Use of External Credit Ratings in the Regulations of the OCC, 77 FR 35253 (Jun. 13, 2012) (OCC).

[15] *See* Guidance on Due Diligence Requirements for Savings Associations in Determining Whether a Corporate Debt Security Is Eligible for Investment, 77 FR 43155 (Jul. 24, 2012) (FDIC); and Guidance on Due Diligence Requirements in Determining Whether Securities Are Eligible for Investment, 77 FR 35259 (Jun. 13, 2012) (OCC).

to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability.[16] The Director also may consider any other differences that are deemed appropriate. The changes proposed in this rulemaking apply exclusively to the Banks. FHFA, in preparing this proposed rule, considered the differences between the Banks and the Enterprises as they relate to the above factors. FHFA, however, requests comments from the public about whether these differences should result in any revisions to the proposed rules.

III. Proposed Amendments to Parts 1267, 1269, and 1270 of the FHFA Regulations

As noted in the ANPR and above, a number of requirements in FHFA regulations impose limits on Bank activity or investments or otherwise require the Banks to take certain actions based on NRSRO credit ratings. To remove these requirements, FHFA is proposing to require the Banks to base determinations about the appropriateness of specific investments or activities on their own documented analyses of credit and other risks. FHFA has a long standing expectation that Banks apply, demonstrate and document appropriate risk management in the assumption and extension of credit risk. The analyses required will be subject to FHFA oversight and review through the examination and supervisory process. FHFA's expectations with respect to appropriate standards for assessing creditworthiness under this proposal are described in more detail below.

A. Part 1267 Rules—Investments

A number of provisions in the investment regulation limit Bank investments by reference to the rating issued by an NRSRO for a particular instrument. First, the Banks are prohibited from investing in any debt instrument that is rated below investment grade by an NRSRO at the time the investment is made.[17] Another provision, which sets forth exceptions to a general prohibition on a Bank's investment in mortgages or other whole loans, specifically allows for investment in marketable direct obligations of state, local, or tribal government units or agencies, having at least the second highest credit rating from an NRSRO where the purchase would generate customized terms, necessary liquidity, or favorable pricing for the issuer's funding of housing or community lending.[18]

To remove references to NRSRO credit ratings from these provisions, FHFA is proposing to add a new defined term ''investment quality'' to § 1267.1 of its rules while removing the current definitions for ''investment grade'' and ''NRSRO'' from that provision. FHFA would then substitute the term ''investment quality'' for the two references to ''investment grade'' in § 1267.3(a) and for the reference to ''second highest credit rating from an NRSRO'' in § 1267.3(a)(4)(iii).

Under the proposed rule, ''investment quality'' would be defined as a determination made by a Bank that there is adequate financial backing for any security or obligation so that full and timely payment of principal and interest is expected, and there is only minimal risk that such timely payment would not occur because of adverse changes in financial or economic conditions over the life of the instrument. This Bank determination must be based on well documented internal analysis that would include consideration of the sources for repayment on a particular security or obligation.

FHFA believes that the proposed definition would allow Banks to build upon their current internal credit risk assessment and management practices and provide flexibility to consider differences in credit quality of different investments—considerations which were supported by many commenters to the ANPR. By requiring the Banks to consider sources of repayment for a particular instrument, the proposed definition also would allow the Banks to consider guarantees or other credit enhancements when determining the credit quality of a particular investment. FHFA emphasizes that under the proposed definition a Bank must document its analysis as to the credit quality of a particular instrument so FHFA would be able to review these decisions as part of its supervisory and examination process and thereby help ensure consistency and rigor in the analysis across all Banks.

Factors the Banks may consider in evaluating the creditworthiness of a security or other obligation include, but are not limited to, internal or external credit risk assessments, including scenario analysis; security or asset-class related research; credit analysis of cash flow and debt service projections; credit spreads for like financial instruments; loss distributions, default rates, and other statistics; relevant market data, for example, bid-ask spreads, most recent sales price, and historical price volatility, trading volume, implied market rating, and size, depth and concentration level of the market for the investment; local and regional economic conditions; legal or other contractual implications to credit and repayment risk; underwriting, performance measures and triggers; and other financial instrument covenants and considerations. FHFA notes that some commenters to the ANPR believed that FHFA should not eliminate references to credit ratings in its rules but should instead adopt specific standards that would help ensure an NRSRO would be independent from an issuer of a security or would meet other specific qualifications. Other commenters believed that any proposal should not prevent the Banks from using NRSRO ratings as part of any credit analysis. While FHFA believes that mandating any use or reliance on NRSRO credit ratings in the investment regulation would be inconsistent with the Dodd-Frank Act provisions, the proposed definition of ''investment quality'' would not prevent a Bank from using NRSRO ratings or other third party analytics in its credit determination so long as the Bank does not rely principally on such rating or third party analysis. Instead, FHFA expects that such determination will be driven primarily by the Bank's own internal analysis of market and other external data and relevant financial information, including the size and complexity of the financial instrument and the Bank's own risk appetite and risk assessment framework. This approach is consistent with the existing FHFA supervisory expectation that the Banks have in place appropriate credit risk management and due diligence review processes.

Under the new language proposed for § 1267.3(a), a Bank would need to make its determination concerning the credit quality of a debt instrument prior to purchasing such instrument. If the Bank determined that the instrument did not meet its criteria to be considered ''investment quality'' consistent with the proposed definition of that term discussed above the Bank would be prohibited from purchasing the debt instrument. If the Bank determined that the instrument is ''investment quality,'' the Bank would be permitted to purchase it.

As part of its risk management and monitoring process, FHFA expects a Bank to periodically update its analysis with regard to any debt instruments

[16] *See* 12 U.S.C. 4513 (*as amended by* section 1201 Pub. L. 110–289, 122 Stat. 2782–83).

[17] *See* 12 CFR 1267.3(a)(3).

[18] *See* 12 CFR 1267.3(a)(4)(iii).

purchased to determine whether they continue to meet criteria to be considered ''investment quality'' as well as to meet other safety, soundness, and business objectives. The Bank would also be expected to develop appropriate strategies to respond to a decline in the credit quality of its investments, consistent with then-current market and financial conditions and considerations. Under proposed § 1267.(3)(a)(ii), however, the Bank would not be required to sell a debt instrument if subsequent analysis indicated the instrument became less than ''investment quality'' after the initial purchase. This approach is consistent with current § 1267.3(a), which provides that a Bank cannot buy debt instruments that are rated less than investment grade by an NRSRO at the time of purchase, but that the Bank does not have to sell any such instrument if it is downgraded to below investment grade after acquisition. FHFA is proposing no other changes to current § 1267.3(a) beyond replacing the current references to ''investment grade'' with references to ''investment quality.''

Similarly, under proposed § 1267.3(a)(4)(iii), a Bank would be permitted to purchase a marketable direct obligation of a state, local or tribal government agency or unit, as an exception to the general prohibition on the purchases of mortgages or interest in mortgages, only after determining that the obligation would meet the ''investment quality'' criteria (as well as meeting all the other conditions set forth in the provision).[19] As with the debt investments, a Bank would be expected to periodically update its credit analysis to determine whether the obligation in question continues to meet the ''investment quality'' criteria. The ''investment quality'' standard would replace the current requirement that the instrument have ''the second highest rating from an NRSRO.'' No other change to the provision is being proposed.

The proposed change may appear to extend somewhat the ability of the Banks to invest in certain marketable direct obligations of a state, local or tribal government agencies or units as such investments would not be limited to instruments rated by an NRSRO in the second highest rating category or better. Before making a purchase, however, a Bank would first need to determine, based on rigorous analysis, that there will be sufficient financial backing so that full and timely repayment of principal and interest on such obligations is expected, and only minimal risk that adverse changes would alter this likelihood. FHFA believes that requiring the Banks to undertake this affirmative analysis should help ensure that the proposed change would not alter substantially the risk a Bank may face from this class of investments and could help improve the quality of a Bank's investment decisions in this area. FHFA also believes that it would be complex and unduly burdensome to develop and apply a standard that would more closely approximate the current requirement than that proposed.

Finally, FHFA proposes to remove current § 1267.5 because it no longer applies to any Bank. This provision establishes interim capital requirements for investments, but by its terms applies only to those Banks that have not yet converted to the capital stock structure mandated by the Gramm-Leach-Bliley Act[20] (GLB Act) and are not subject to the more rigorous risk-based and leverage capital requirements mandated by the GLB Act and implemented by the capital regulations found at 12 CFR part 932. Because all Banks have now converted to the GLB Act capital stock structure, none remain subject to the requirements of § 1267.5,[21] and FHFA proposes to delete it from its regulations.

B. Part 1269 Rules—Standby Letters of Credit

Section 1269.2(c)(2) of FHFA regulations provides that a standby letter of credit issued or confirmed by a Bank on behalf of a member to assist the member in facilitating residential housing finance or community lending may be collateralized by obligations of a state or local government unit or agency, if the obligation is rated investment grade by an NRSRO.[22] FHFA proposes to eliminate this reference to an NRSRO investment grade rating in § 1269.2(c)(2) and replace it with a requirement that the obligation of the state or local government unit or agency have a readily ascertainable value, can be reliably discounted to account for liquidation and other risks, and can be liquidated in due course. FHFA also proposes to remove the current definitions for ''investment grade'' and ''NRSRO'' from § 1269.1.[23]

FHFA considered replacing the investment grade rating requirement in § 1269.2(c)(2) with the same ''investment quality'' standard that is being proposed in the part 1267 Investment Regulations. However, FHFA believes that it would not be realistic and would be unnecessarily onerous for a Bank to perform the same type of in- depth credit analysis, as discussed above, for a security that will be accepted as collateral as for one in which the Bank intends to invest. This is especially true given that the amounts of likely collateral covered by this requirement are not large. Instead, FHFA is proposing a standard that is more appropriate for collateral and is similar to one already applied in other FHFA collateral regulations.[24] FHFA also believes the proposed standard is consistent with the original intent of the investment grade requirement in this regulation, given that the rating was meant to serve as a proxy for securities that had ''an established secondary market . . . [that] . . . can be easily valued and, if necessary, liquidated by a [Bank].''[25]

Under the new language proposed for § 1269.2(c)(2), a Bank would be expected to incorporate criteria into its collateral policies to assure that any state or local government obligation accepted as collateral for a standby letter of credit under this provision would have a readily ascertainable value, can be reliably discounted to account for liquidation and other risks, and can be liquidated by the Bank in due course. FHFA also would expect the Bank to meet other requirements applicable to collateral more generally, including having a policy and procedures in place to ensure that the Bank accurately values the collateral and applies realistic haircuts that reflect the market for the instrument and existing economic conditions.

C. Part 1270 Rules—Liabilities

Part 1270 contains a number of provisions that reference NRSRO credit ratings or require the Banks to seek a rating from an NRSRO. First, § 1270.4(b)(6)[26] references assets that have been assigned a rating or assessment by an NRSRO that is equivalent to, or higher than, the rating or assessment assigned by the NRSRO to outstanding COs. This provision is

[19] Specifically, the Bank's purchase of the marketable direct obligation of a state, local or tribal government unit or agency would have to provide the issuer the customized terms, necessary liquidity, or favorable pricing required to generate needed funding for housing or community lending. These conditions are being carried over from the current rule without change as part of the proposed amendments.

[20] Public Law 106–102, 133 Stat. 1338 (1999).

[21] *See* 76 FR at 5295, n.5.

[22] *See* 12 CFR 1269.2(c)(2).

[23] 12 CFR 1269.1.

[24] *See* 12 CFR 1266.7(a)(4).

[25] Proposed Rule: Federal Home Loan Bank Standby Letters of Credit, 63 FR 25726, 25729 (May 8, 1998).

[26] 12 CFR 1270.4(b)(6).

contained in the ''negative pledge requirement,'' which states that a Bank must maintain certain specific assets free of any lien or pledge in an amount equal to the Bank's pro rata share of total outstanding COs. FHFA proposes to remove § 1270.4(b)(6) because the provision does not appear to expand the type of assets that can be used to fulfill negative pledge requirement beyond those already identified in paragraphs (b)(1) through (b)(5) of the regulation.

The negative pledge requirement was first adopted in 1946. It has been amended only once to any significant degree, in 1992, at which time the Finance Board added the provisions currently found at § 1270.4(b)(5) and at § 1270.4(b)(6) of FHFA regulations.[27] While § 1270.4(b)(6) allows certain securities to be used to fulfill the negative pledge requirement based on their NRSRO rating based on their NRSRO ratings, § 1270.4(b)(5) allows a Bank to rely on investments authorized under section 16(a) of the Bank Act[28] to fulfill this requirement. Among the investment authorized by section 16(a) of the Bank Act are ''such securities as fiduciary and trust funds may be invested in under the laws of the State in which the . . . Bank is located.'' The type of securities that would be included within the broad authority provided by this ''fiduciary'' language would appear to include the assets that are also authorized for use in meeting the negative pledge requirement by § 1270.4(b)(6). Moreover, FHFA is not aware of any asset that the Banks currently use to fulfill the negative pledge requirement that would be exclusively authorized by § 1270.4(b)(6). Nor did the Finance Board, in adding current § 1270.4(b)(6), indicate any specific instrument or class of instruments that would be covered by the provision.[29] Thus, FHFA is proposing to delete this provision as duplicative and unnecessary.

FHFA considered replacing the current reference to NRSRO credit ratings in § 1270.4(b)(6) with a requirement that a Bank determine that a security has a level of credit risk that is equivalent to or less than that of outstanding COs before the security can be used to fulfill the negative pledge requirement. Under this alternative approach, the determination would have been based on credit standards collectively developed by the Banks in consultation with OF. Use of a collectively developed standard would be warranted in this case because all Banks are jointly and severally liable on outstanding COs, and FHFA believed that each Bank would have a strong interest in seeing that the other Banks maintain the conservative risk profile of assets used to fulfill the negative pledge requirement. FHFA viewed this alternative approach as overly complex, however, especially in light of the fact that § 1270.4(b)(6) appears not to expand the pool of assets already authorized for use to meet the negative pledge requirement elsewhere in the regulation.

Nevertheless, FHFA specifically requests comments on whether § 1270.4(b)(6) should be removed as proposed or if there would be benefits to amending rather than deleting the provision. If commenters believe the provision should be amended, FHFA requests comments on the alternative approach described above, which would require the Banks to collectively develop a credit standard in consultation with OF to replace use of NRSRO ratings and on whether such an approach would be overly complex to implement.

In addition to the references in § 1270.4(b)(6), §§ 1270.5(b) and (c)[30] require Banks collectively to maintain the highest NRSRO rating for COs and each Bank individually to maintain a rating of at least the second highest from an NRSRO. These requirements were adopted as a means of enhancing protections afforded holders of COs by requiring Banks either collectively or individually to take actions to maintain the required ratings.[31] The Finance Board believed that these requirements provided more effective on-going protections to bond holders than the provision that they replaced, which had required a written statement from a rating agency or an investment bank that a change in the leverage limit applicable to the Banks would not adversely affect the ratings or creditworthiness of COs, prior to the change becoming effective.[32]

FHFA proposes to delete current § 1270.5(b) and (c) and replace them with new § 1270.5. This new requirement would provide that the Banks, individually and collectively, should operate in such manner and take any actions necessary, including reducing leverage, to ensure that COs maintain the highest level of acceptance by financial markets and are generally perceived by investors as presenting a very low level of credit risk. FHFA believes that the proposed provision captures the intent of the current rules and helps protect holders of COs while upholding the spirit of the Dodd-Frank Act requirements by not mandating through regulation that NRSROs effectively provide an imprimatur of Bank actions through the rating process.[33] Nothing in the language as proposed, however, would prohibit the Banks collectively from seeking NRSRO ratings for COs or an individual Bank from maintaining an individual NRSRO rating if such ratings were found to be desirable or helpful for either business or other reasons.

FHFA also is proposing to delete current § 1270.5(a) of its regulations because no Bank remains subject to it.[34] This provision established leverage requirements which were applicable only to Banks that had not yet converted to the capital stock structure mandated by the GLB Act and had not become subject to the part 932 capital requirements. As already discussed, all Banks have now converted to the GLB Act capital stock structure and are subject to the part 932 capital requirements. Therefore § 1270.5(a) no longer applies to any Bank and can be removed from FHFA regulations. The proposed amendments also would delete the definition of ''NRSRO'' from § 1270.1, given that the term would no longer be used in part 1270 if the other proposed changes are adopted.

D. Phase-In Period

In comments to the ANPR, the Banks requested that FHFA provide a phase-in period of no less than one year for any amendments that would implement section 939A of the Dodd-Frank Act. FHFA disagrees and believes that a phase-in period of one year or more is too long, especially as the Banks should be able to leverage their current governance, risk selection, and credit risk management policies, processes, and practices to meet the proposed requirements. Nevertheless, FHFA may consider a delayed implementation date for any final requirements, and requests

[27] *See* Proposed Rule: Leverage Ratio on Consolidated Federal Home Loan Bank Debt, 57 FR 20061, 20062 (May 11, 1992); Final Rule: Leverage Ratio on Consolidated Federal Home Loan Bank Debt, 57 FR 62183, 62185 (Dec. 30, 1992).

[28] 12 U.S.C. 1436(a).

[29] *See* 57 FR at 20062, and 57 FR at 62185.

[30] 12 CFR 1270.5(b) and (c).

[31] *See* Final Rule: Office of Finance; Authority of Federal Home Loan Banks to Issue Consolidated Obligations, 65 FR 36290, 36294 (June 7, 2000).

[32] *Id.*

[33] In comments to the ANPR, the Banks stated that because the individual Bank rating requirement in § 1270.5(c) did not involve the rating of a security or a money market instrument, it was outside the scope of section 939A of the Dodd-Frank Act. FHFA disagrees and believes that requiring the Banks to maintain a specific credit rating from an NRSRO would be a violation of the spirit of the Dodd-Frank provision by requiring the Banks to rely on NRSROs to review and essentially opine on Bank actions.

[34] 12 CFR 1270.5(a).

comments on what time frame may be necessary for the Banks to implement the proposal. FHFA further requests that any comments on this issue specifically identify and describe the actions that would need to be taken to implement these proposed amendments.

IV. Paperwork Reduction Act

The proposed rule amendments do not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

V. Regulatory Flexibility Act

The proposed rule amendments apply only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). *See* 5 U.S.C. 601(6). Therefore in accordance with section 605(b) of the RFA, FHFA certifies that this proposed rule, if promulgated as a final rule, will not have significant economic impact on a substantial number of small entities.

List of Subjects

12 CFR Parts 1267 and 1269

Community development, Credit, Federal home loan bank, Housing, Reporting and recordkeeping requirements.

12 CFR Part 1270

Accounting, Federal home loan banks, Government securities.

Accordingly, for reasons stated in the preamble and under authority in 12 U.S.C. 4511, 4513, and 4526, FHFA proposes to amend chapter XII of title 12 of the Code of Federal Regulations as follows:

PART 1267—FEDERAL HOME LOAN BANK INVESTMENTS

■ 1. The authority citation for part 1267 continues to read as follows:

Authority: 12 U.S.C. 1429, 1430, 1430b, 1431, 1436, 4511, 4513, 4526.

■ 2. Amend § 1267.1 by removing the definitions for ''Investment grade'' and ''NRSRO'' and adding in correct alphabetical order a definition for ''Investment quality'' to read as follows:

§ 1267.1 Definitions.

* * * * *

Investment quality means a determination made by the Bank with respect to a security or obligation that based on documented analysis, including consideration of the sources for repayment on the security or obligation:

(1) There is adequate financial backing so that full and timely payment of principal and interest on such security or obligation is expected; and

(2) There is minimal risk that that timely payment of principal or interest would not occur because of adverse changes in economic and financial conditions during the projected life of the security or obligation.

* * * * *

■ 3. Amend § 1267.3 by revising paragraphs (a)(3) and (a)(4) to read as follows:

§ 1267.3 Prohibited investments and prudential rules.

(a) * * *

(3) Debt instruments that are not investment quality, except:

(i) Investments described in § 1265.3(e) of this chapter; and

(ii) Debt instruments that a Bank determined became less than investment quality because of developments or events that occurred after acquisition of the instrument by the Bank;

(4) Whole mortgages or other whole loans, or interests in mortgages or loans, except:

(i) Acquired member assets;

(ii) Investments described in § 1265.3(e) of this chapter;

(iii) Marketable direct obligations of state, local, or Tribal government units or agencies, that are investment quality, where the purchase of such obligations by the Bank provides to the issuer the customized terms, necessary liquidity, or favorable pricing required to generate needed funding for housing or community lending;

(iv) Mortgage-backed securities, or asset-backed securities collateralized by manufactured housing loans or home equity loans, that meet the definition of the term ''securities'' under 15 U.S.C. 77b(a)(1) and are not otherwise prohibited under paragraphs (a)(5) through (a)(7) of this section, and

(v) Loans held or acquired pursuant to section 12(b) of the Bank Act (12 U.S.C. 1432(b)). * * *

* * * * *

§ 1267.5 [Removed]

■ 4. Remove § 1267.5.

PART 1269—STANDBY LETTERS OF CREDIT

■ 5. The authority citation for part 1269 continues to read as follows:

Authority: 12 U.S.C. 1429, 1430, 1430b, 1431, 4511, 4513, 4526.

§ 1269.1 [Amended]

■ 6. Amend § 1269.1 by removing the definitions for ''Investment grade'' and ''NRSRO.''

■ 7. Amend § 1269.2 by revising paragraph (c)(2) to read as follows:

§ 1269.2 Standby letters of credit on behalf of members.

* * * * *

(c) * * *

(2) A standby letter of credit issued or confirmed on behalf of a member for a purpose described in paragraphs (a)(1) or (a)(2) of this section may, in addition to the collateral described in paragraph (c)(1) of this section, be secured by obligations of state or local government units or agencies, where such obligations have a readily ascertainable value, can be reliably discounted to account for liquidation and other risks, and can be liquidated in due course.

PART 1270—LIABILITIES

■ 8. The authority citation for part 1270 continues to read as follows:

Authority: 12 U.S.C. 1431, 1432, 1435, 4511, 4512, 4513, 4526.

§ 1270.1 Definitions.

■ 9. Amend § 1270.1 by removing the definition of ''NRSRO.''

■ 10. Amend § 1270.4 by revising paragraph (b) to read as follows:

§ 1270.4 Issuance of consolidated obligations.

* * * * *

(b) *Negative pledge requirement.* Each Bank shall at all times maintain assets described in paragraphs (b)(1) through (b)(5) of this section free from any lien or pledge, in an amount at least equal to a *pro rata* share of the total amount of currently outstanding consolidated obligations and equal to such Bank's participation in all such consolidated obligations outstanding, provided that any assets that are subject to a lien or pledge for the benefit of the holders of any issue of consolidated obligations shall be treated as if they were assets free from any lien or pledge for purposes of compliance with this paragraph (b). Eligible assets are:

(1) Cash;

(2) Obligations of or fully guaranteed by the United States;

(3) Secured advances;

(4) Mortgages as to which one or more Banks have any guaranty or insurance, or commitment therefor, by the United States or any agency thereof; and

(5) Investments described in section 16(a) of the Bank Act (12 U.S.C. 1436(a)).

■ 11. Amend § 1270.5 by revising this section in its entirety to read as follows:

§ 1270.5 Bank operations.

The Banks, individually and collectively, shall operate in such manner and take any actions necessary, including without limitation reducing leverage, to ensure that consolidated obligations maintain a high level of acceptance by financial markets and are generally perceived by investors as presenting a low level of credit risk.

Dated: May 17, 2013.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2013–12333 Filed 5–22–13; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0450; Directorate Identifier 2013–CE–010–AD]

RIN 2120–AA64

Airworthiness Directives; Alexander Schleicher GmbH & Co. Segelflugzeugbau Sailplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Alexander Schleicher GmbH & Co. Segelflugzeugbau Models AS–K13, Ka2B, Ka 6, Ka 6 B, Ka 6 BR, Ka 6 C, Ka 6 CR, K7, K8, and K 8 B sailplanes that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as misalignment of the automatic elevator control connection. We are issuing this proposed AD to require actions to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by July 8, 2013.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Alexander Schleicher GmbH & Co Segelflugzeugbau, Straße 1 D—36163 Poppenhausen, Germany; phone: ++49 (0) 6658/89–0; fax: ++49 (0) 6658/89–40; email: *info@alexander-schleicher.de;* Internet: *http://www.alexander-schleicher.de/.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0450; Directorate Identifier 2013–CE–010–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because 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 we receive about this proposed AD.

Discussion

On March 5, 1964, we issued AD 64–07–05, Amendment 701 (29 FR 3227, March 11, 1964). That AD required actions intended to address an unsafe condition on some of the products listed above.

Since we issued AD 64–07–05, Amendment 701 (29 FR 3227, March 11, 1964) the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued a new AD to add additional sailplane models to the applicability and to add additional inspections of the elevator control connection. Alexander Schleicher GmbH & Co. Segelflugzeugbau has also issued revised service information to address the unsafe condition.

The EASA has issued AD No. 2013–0091, dated April 12, 2013 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> A recent report has been received concerning a problem with the elevator control during take-off of an ASK 13 sailplane. The results of the technical investigation revealed a misalignment in the automatic elevator control connection, presumably caused by an incorrect repair or damage at the tail-plane-area. In addition, similar elevator connection failure during early 1960's which led to the issuance of LBA LTM 4/62. However, LTM, 4/62 did not apply to ASK 13 and ASK 18 sailplanes coming later into production.
>
> This condition, if not detected and corrected, could lead to failure of the automatic elevator control connection, possibly resulting in loss of control of the sailplane.
>
> To address this unsafe condition, Alexander Schleicher GmbH issued a Technical Note (TN) (Ka 6 TN–Nr. 26; K 7 TN–Nr. 24; K 8 TN–Nr. 30; ASK 13 TN–Nr. 19; ASK 18 TN–Nr. 9) providing instructions for elevator control inspection and replacement and EASA issued AD 2012–0246 to require accomplishment of those instructions.
>
> Since that AD was issued, Alexander Schleicher GmbH issued a revision of TN (Ka 6 TN–Nr. 26; K 7 TN–Nr. 24; K 8 TN–Nr. 30; ASK 13 TN–Nr. 19, ASK 18 TN–Nr. 9), dated 08 January 2013 to re-introduce a pushrod support modification for K 7 and K 8 sailplanes, previously required by LBA LTM 4/62, but no longer required by EASA AD 2012–0246, which superseded the LBA LTM.
>
> For the reasons described above, this AD retains the requirements of EASA AD 2012–0246, which is superseded, and additionally requires, for K 7 and K 8 sailplanes, verification of embodiment of pushrod support modification, and depending on finding, pushrod support modification.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Alexander Schleicher GmbH & Co. Segelflugzeugbau has issued Technical Note for Ka 2 and Ka 2b—TM–Nr. 13, Ka 6—TM–Nr. 26, K 7—TM–Nr. 24, K 8—TM–Nr. 30, ASK 13—TM–Nr. 19, ASK 18—TM–Nr. 9, Revision 1, dated January 8, 2013. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

The service information issued by Alexander Schleicher GmbH & Co. Segelflugzeugbau referenced above contains German to English translation. On the document we received it cites the use of ''TM,'' which is an abbreviation for Technische Mitteilung. The English translation for Technische Mitteilung is Technical Note. EASA used the English translation in referencing the document from Alexander Schleicher GmbH & Co. Segelflugzeugbau, as stated in the Discussion section above.

For enforceability purposes, we will cite references to the Alexander Schleicher GmbH & Co. Segelflugzeugbau service information as it appears on the document.

FAA's Determination and Requirements of the Proposed AD

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

Costs of Compliance

We estimate that this proposed AD will affect 127 products of U.S. registry. We also estimate that it would take about .5 work-hour per product to comply with the new inspection requirements of this proposed AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the initial inspection proposed in this AD on U.S. operators to be $5,397.50, or $42.50 per product.

We have no way of determining the number of repetitive inspections an owner/operator will incur over the life of the sailplane.

In addition, we estimate that any necessary follow-on actions would take about 1 work-hour and require parts costing $119, for a cost of $204 per product. We have no way of determining the number of products that may need these actions.

We also estimate that it will take about 2 work-hours per product to comply with actions retained from AD 64–07–05, Amendment 701 (29 FR 3227, March 11, 1964) for Models Ka2B, Ka 6, Ka 6 B, Ka 6 BR, Ka 6 C, Ka 6 CR, K7, K8, and K 8 B sailplanes in this proposed AD, which affects 112 products of U.S. registry, and may require parts costing $103, for a cost of $273 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 701 (29 FR 3227, March 11, 1964), and adding the following new AD:

Alexander Schleicher GmbH & Co. Segelflugzeugbau: Docket No. FAA–2013–0450; Directorate Identifier 2013–CE–010–AD.

(a) Comments Due Date

We must receive comments by July 8, 2013.

(b) Affected ADs

This AD supersedes AD 64–07–05, Amendment 701 (29 FR 3227; March 11, 1964).

(c) Applicability

This AD applies to Alexander Schleicher GmbH & Co. Segelflugzeugbau Models AS –K13, Ka2B, Ka 6, Ka 6 B, Ka 6 BR, Ka 6 C, Ka 6 CR, K7, K8, and K 8 B sailplanes, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 27: Flight Controls.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as misalignment of the automatic elevator control connection. The European Aviation Safety Agency (EASA) has issued a new AD to add additional sailplane models to the applicability and to add additional inspections of the elevator control connection. Alexander Schleicher GmbH & Co. Segelflugzeugbau has also issued revised service information to address the unsafe condition. We are issuing this AD to prevent failure of the automatic elevator control connection, which could result in loss of control.

(f) Actions and Compliance Retained From AD 64–07–05, Amendment 701 (29 FR 3227, March 1, 1964)

Unless already done, do the following actions specified in paragraphs (f)(1), (f)(2), and (f)(3) of this AD.

(1) *For Models Ka2B, Ka 6, Ka 6 B, Ka 6 BR, Ka 6 C, Ka 6 CR, K7, K8, and K 8 B:* Unless already done, within the next 10 hours time–in–service (TIS) after April 13, 1964 (the effective date retained from AD 64–07–05, Amendment 701 (29 FR 3227, March 1, 1964)), inspect the automatic elevator control rod for conformity following Alexander Schleicher Automatic Elevator Connection document, dated December 5, 1961.

(2) *For Models Ka2B, Ka 6, Ka 6 B, Ka 6 BR, Ka 6 C, Ka 6 CR, K7, K8, and K 8 B:* If any discrepancy is found during the inspection required in paragraph (f)(1) of this AD, before further flight, make any necessary repairs or modification following Civil Aeronautics Manual (CAM) 18, dated February 11, 1936, which can be found at the following Web site: *http://ntl1.specialcollection.net/scripts/ws.dll?websearch&site=dot_cams.*

(3) *For Models Ka2B, K7, K8 and K 8 B:* Unless already done, within the next 10 hours TIS after April 13, 1964 (the effective date retained from AD 64–07–05, Amendment 701 (29 FR 3227, March 1, 1964)), install an additional push pull rod support. For Models Ka2B, follow Alexander Schleicher Modification No. 7, dated July 4, 1962. For Models K7, follow Alexander Schleicher Modification No. 8, dated November 23, 1961. For Models K8, follow Alexander Schleicher Modification No. 7, dated November 24, 1961.

(g) New Actions and Compliance

Unless already done, do the following actions specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) *For all models:* Within 90 days after the effective date of this AD and repetitively thereafter at intervals not to exceed 12 months, inspect the elevator control rod in the tailplane following the Action section in Alexander Schleicher Technical Note for Ka 2 and Ka 2b–TM–Nr. 13, Ka 6–TM–Nr. 26, K 7–TM–Nr. 24, K 8–TM–Nr. 30, ASK 13–TM–Nr. 19, ASK 18–TM–Nr. 9, Revision 1, dated January 8, 2013.

(2) *For all models:* During any inspection required in paragraph (g)(1) of this AD, if any bend and/or misaligned elevator control connection is detected, before further flight after the inspection, replace the elevator control connection with a serviceable part. Do the replacement following the Action section in Alexander Schleicher Technical Note for Ka 2 and Ka 2b–TM–Nr. 13, Ka 6–TM–Nr. 26, K 7–TM–Nr. 24, K 8–TM–Nr. 30, ASK 13–TM–Nr. 19, ASK 18–TM–Nr. 9, Revision 1, dated January 8, 2013.

(h) Credit for Actions Done Following Previous Service Information

This AD provides credit for the initial inspection required in paragraph (g)(1) of this AD and any necessary replacement required in paragraph (g)(2) of this AD if already done before the effective date of this AD following the Action sections in Alexander Schleicher Technical Note for Ka 2 and Ka 2b–TM–Nr. 13, Ka 6–TM–Nr. 26, K 7–TM–Nr. 24, K 8–TM–Nr. 30, ASK 13–TM–Nr. 19, ASK 18–TM–Nr. 9, dated August 30, 2012.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.* Before using any approved AMOC on any sailplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(j) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2013–0091, dated April 12, 2013; Alexander Schleicher Automatic Elevator Connection document, dated December 5, 1961; Civil Aeronautics Manual (CAM) 18, dated February 11, 1936; Alexander Schleicher Modification No. 7 Glider Ka 2 and Ka 2B, L–140 and L–203, dated July 4, 1962; Alexander Schleicher Modification No. 8 Glider K 7 L–211 (US 7G3), dated November 23, 1961; Alexander Schleicher Modification No. 7 Glider K 8 L–216 (US 7G4), dated November 24, 1961; Alexander Schleicher Technische Mitteilungt für Technical Note for Ka 2 and Ka 2b–TM–Nr. 13, Ka 6–TM–Nr. 26, K 7–TM–Nr. 24, K 8–TM–Nr. 30, ASK 13–TM–Nr. 19, ASK 18–TM–Nr. 9, dated August 30, 2012; and Alexander Schleicher Technische Mitteilungt für Technical Note for Ka 2 and Ka 2b–TM–Nr. 13, Ka 6–TM–Nr. 26, K 7–TM–Nr. 24, K 8–TM–Nr. 30, ASK 13–TM–Nr. 19, ASK 18–TM–Nr. 9, Revision 1, dated January 8, 2013, for related information. For service information related to this AD, contact Alexander Schleicher GmbH & Co Segelflugzeugbau, Straße 1 D–36163 Poppenhausen, Germany; phone: ++49 (0) 6658/89–0, fax: +49 (0) 6658/89–40, email: *info@alexander-schleicher.de;* Internet: *http://www.alexander-schleicher.de.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on May 17, 2013.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–12308 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0446; Directorate Identifier 2010–SW–007–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter Deutschland GmbH Model Helicopters

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Eurocopter Deutschland GmbH (Eurocopter) Model EC135 P1, P2, P2+, T1, T2, and T2+ helicopters to require inspecting each linear transducer bearing (bearing) for freedom of movement. This proposed AD would also require replacing the bearing if there is binding or rough turning or if there is chafing or damage on the lower side of the floor. Also, this proposed AD would require modifying and re-identifying a certain rod. This proposed AD is prompted by an incident involving limited control of a tail rotor because of the binding of a bearing. The proposed actions are intended to detect and replace each bearing subject to binding, which could lead to subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by July 22, 2013.

ADDRESSES: You may send comments by any of the following methods:

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic evaluation, any comments

received, and other information. The street address for the Docket Operations Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052, telephone (972) 641–0000 or (800) 232–0323, fax (972) 641–3775, or at *http://www.eurocopter.com/techpub*. You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *matthew.fuller@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2006–0318 R1, dated October 27, 2006, to correct an unsafe condition for all Eurocopter Model EC 135 helicopters. EASA advises of an incident in which impaired control of an EC 135 tail rotor was detected. EASA states that according to examinations, the bearing of the linear transducer was subject to binding, which limited the control range.

FAA's Determination

These helicopters have been approved by the aviation authority of Germany and are approved for operation in the United States. Pursuant to our bilateral agreement with Germany, EASA, its technical representative, has notified us of the unsafe condition described in its AD. We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Related Service Information

Eurocopter has issued Alert Service Bulletin EC135–67A–012, Revision 1, dated October 18, 2006 (ASB), which specifies inspecting the bearing of the linear transducer for freedom of movement and the lower side of the floor for chafing or damage. If there is binding, the ASB specifies replacing the bearing. If there is chafing or damage on the floor, the ASB specifies replacing the bearing and repairing the floor. The ASB also specifies modifying and reidentifying a certain rod. EASA classified this ASB as mandatory and issued EASA AD 2006–0318 R1, dated October 27, 2006, to ensure the continued airworthiness of these helicopters.

Proposed AD Requirements

This proposed AD would require, at specified intervals, inspecting each bearing for freedom of movement. If there is binding or rough turning, this proposed AD would require, before further flight, replacing the bearing or if there is chafing or damage on the lower side of the floor, replacing the bearing and repairing the floor, and, thereafter, installing a Teflon strip. This proposed AD would also require modifying the rod and re-identifying the rod and lever with a new part number.

Differences Between This Proposed AD and the EASA AD

This proposed AD does not refer to the compliance date of October 31, 2006, because that date has passed; instead we propose compliance within 100 hours TIS. The proposed AD would not require contacting Eurocopter customer support. This proposed AD would require modifying each rod within 100 hours TIS, rather than within 800 hours TIS as specified in the EASA AD.

Costs of Compliance

We estimate that this proposed AD would affect 214 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD: It would take about 10 work-hours to inspect the bearing for freedom of movement at an average labor rate of $85 per work hour. No parts or materials are required for the inspection. Based on these estimates, the cost would be $850 per helicopter or $181,900 for the fleet of all U.S.-registered helicopters. If necessary, replacing the bearing would require 3 additional work-hours, and parts would cost $50. Repairing the floor would require 3 additional work hours and minimal cost for materials.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Eurocopter Deutschland GmbH: Docket No. FAA–2013–0446; Directorate Identifier 2010–SW–007–AD.

(a) Applicability

This AD applies to Model EC135 P1, P2, P2+, T1, T2, and T2+ helicopters, with bearing, part number (P/N) LN9367GE6N2; rod, P/N L671M5040205; lever, P/N L671M5040101; and floor, P/N L533M1014101, L533M1014102, L533M1014103, L533M1014104, L533M1014105 or L533M1014106, installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as limited control of a tail rotor because of the binding of a bearing. This condition could result in subsequent loss of control of the helicopter.

(c) Compliance

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

(d) Required Actions

(1) Within 100 hours time-in-service (TIS) and thereafter at intervals not to exceed 800 hours TIS, inspect each bearing for freedom of movement by turning and tilting the bearing as depicted in Figure 2 of Eurocopter Alert Service Bulletin No. EC135–67A–012, Revision 1, dated October 18, 2006 (ASB). During any inspection:

(i) If there is binding or rough turning, before further flight, replace the bearing with an airworthy bearing.

(ii) If there is chafing on the lower side of the floor that does not extend through the panel outer layer, before further flight, replace the bearing with an airworthy bearing.

(iii) If there is damage on the lower side of the floor in the area of the assembly opening that extends through the panel outer layer (revealing an open honeycomb cell or layer), before further flight, replace the bearing with an airworthy bearing and repair the floor.

(2) After performing the actions in (d)(1)(i) through (iii) of this AD, before further flight, install a Teflon strip and identify the floor by following the Accomplishment Instructions, paragraphs 3.E.(1) through 3.E.(4), of the ASB.

(3) Within 100 hours TIS, modify and re-identify the rod as depicted in Figure 1 of the ASB and by following the Accomplishment Instructions, paragraphs 3.H.(1) through 3.H.(3)(f), of the ASB.

(e) Alternative Methods of Compliance (AMOC)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *matthew.fuller@faa.gov.*

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

(f) Additional Information

(1) For service information identified in this AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052, telephone (972) 641–0000 or (800) 232–0323, fax (972) 641–3775, or at *http://www.eurocopter.com/techpub.* You may review copies of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(2) The subject of this AD is addressed in European Aviation Safety Agency AD No. 2006–0318 R1, dated October 27, 2006.

(g) Subject

The Joint Aircraft System/Component (JASC) Code is 6720: Tail Rotor Control System.

Issued In Fort Worth, Texas, on May 14, 2013.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–12309 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0262; Directorate Identifier 2013–NE–13–AD]

RIN 2120–AA64

Airworthiness Directives; Hamilton Standard Division and Hamilton Sundstrand Corporation Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Hamilton Standard Division model 6/5500/F and 24PF and Hamilton Sundstrand Corporation model 14RF, 14SF, 247F, and 568F series propellers. This proposed AD was prompted by the amount of corrosion detected during major inspections (MIs). This proposed AD would require incorporating inspections, based on a calendar time, into the propeller maintenance schedule. We are proposing this AD to prevent corrosion that could result in propeller failure and loss of airplane control.

DATES: We must receive comments on this proposed AD by July 22, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Hamilton Sundstrand Corporation, One Hamilton Road, Mail Stop 1A–3–C63, Windsor Locks, CT 06096–1010; or Hamilton Standard Division, One Hamilton Road, United Technologies Corporation, Mail Stop 1A–3–C63, Windsor Locks, CT 06096–1010; phone: 877–808–7575; fax: 860–660–0372; email: *tech.solutions@hs.utc.com;* Internet: *http://myhs.hamiltonsundstrand.com.*

You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England

Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7761; fax: 781–238–7170; email: *michael.schwetz@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0262; Directorate Identifier 2013–NE–13–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received reports about increased corrosion detected during MIs of Hamilton Standard Division model 6/5500/F and 24PF and Hamilton Sundstrand Corporation model 14RF, 14SF, 247F, and 568F series propellers. The propellers were found to accumulate fewer flight hours per year as they aged. The longer time between MIs contributes to an increased potential for corrosion to accumulate to critical limits. Hamilton Sundstrand developed, and we approved, six Airworthiness Limitations Sections (ALSs) of the applicable maintenance manuals to date. Each ALS establishes the new compliance times for MIs of the blades and hubs by adding a calendar time limit for the inspection. This condition, if not corrected, could result in propeller failure and loss of airplane control.

Relevant Service Information

We reviewed the Hamilton Sundstrand ALS in Maintenance Manual P5185, Revision 13, dated December 13, 2011; P5206, Revision 9, dated February 22, 2013; P5186, Revision 12, dated January 20, 2012; P5207, Revision 2, dated June 28, 2012; P5188, Revision 10, dated January 14, 2013; and P5189, Revision 8, dated March 26, 2013. The ALS in these maintenance manuals lists the MIs for the associated propellers and prescribe a seven-year calendar time limit interval for MI of propeller blades and hubs.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require incorporating a seven-year calendar time limit, between MIs of propeller blades and hubs, into the propeller maintenance schedule, within 45 days after the effective date of the AD.

Differences Between the Proposed AD and the Service Information

The updated maintenance manuals require that an MI of the blades and hubs be performed at the published flight hours or no later than seven years since the date since installation (DSI). The DSI will begin at initial installation after the most recent MI or initial installation after production. This proposed AD would require that the Hamilton Sunstrand propeller models, with an approved update to the maintenance manual ALS, have 45 days after the effective date of the AD to incorporate the seven-year calendar time limit. These models/manuals are: 14RF–9/P5186, 14RF–21/P5189, 14SF–5/P5188, 14SF–7/P5185, 14SF–11E/P5207, and 568F–1/P5206. This proposed AD would also require that the Hamilton Sundstrand and Hamilton Standard propeller models, without approved updates to the maintenance manual ALS, incorporate the seven-year calendar time limit into the propeller maintenance schedule within one year after the effective date of the AD. These models/manuals are: Hamilton Standard 24PF/61–12–01 and 6/5500/F/P5190, and Hamilton Sundstrand 14RF–19/P5199, 14RF–37/P5209, 14SF–11/P5196, 14SF–15/P5197, 14SF–23/P5197, 14SF–17/P5198, 14SF–19/P5198, 247F–1/P4202, 247F–1E/P5204, 247F–3/P5205, 568F–1/P5214, 568F–5/P5203, and 568F–7/P5211.

Costs of Compliance

We estimate that this proposed AD would affect about 1,044 propeller/hub combinations installed on airplanes of U.S. registry. We also estimate that it would take about 160 hours per propeller to perform one MI. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $14,198,400.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Hamilton Standard Division and Hamilton Sundstrand Corporation: Docket No. FAA–2013–0262; Directorate Identifier 2013–NE–13–AD.

(a) Comments Due Date

We must receive comments by July 22, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Hamilton Standard Division 6/5500/F and 24PF and Hamilton Sundstrand Corporation 14RF, 14SF, 247F, and 568F series propellers.

(d) Unsafe Condition

This AD was prompted by the amount of corrosion detected during major inspections (MI). We are issuing this AD to prevent corrosion that could result in propeller failure and loss of airplane control.

(e) Compliance

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

(f) MI for Blades and Hubs That Have an Updated Airworthiness Limitations Section (ALS)

For Hamilton Sundstrand Corporation propeller models 14RF–9, 14RF–21, 14SF–5, 14SF–7, 14SF–11E, and 568F–1, that have an approved update to the ALS, within 45 days after the effective date of this AD, perform an MI on the blades and hubs no later than seven years since the date since installation (DSI). The DSI will begin at initial installation after the most recent MI or initial installation after production. Guidance on the inspections can be found in the applicable Hamilton Sundstrand Corporation models/manuals 14RF–9/P5186, revision 12, January 20, 2012; 14RF–21/P5189, revision 8, March 26, 2013; 14SF–5/P5188, revision 10, dated January 14, 2013; 14SF–7/P5185, revision 13, dated December 13, 2011; 14SF–11E/P5207, revision 2, dated June 28, 2012; and 568F–1/P5206 revision 9, dated February 22, 2013.

(g) MI for Blades and Hubs That Do Not Have an Updated ALS

For Hamilton Standard Division model 6/5500/F and 24PF and Hamilton Sundstrand Corporation model 14RF–19, 14RF–37, 14SF–11, 14SF–15, 14SF–23, 14SF–17, 14SF–19, 247F–1, 247F–1E, 247F–3, 568F–1, 568F–5, 568F–7 propellers, that do not have an approved update to the ALS, within one year after the effective date of this AD, perform an MI on the blades and hubs no later than seven years since the DSI. The DSI will begin at initial installation after the most recent MI or initial installation after production. Guidance on the inspections can be found in the applicable models/manuals for Hamilton Standard Division 6/5500/F/P5190 and 24PF/61–12–01, and Hamilton Sundstrand Corporation 14RF–19/P5199, 14RF–37/P5209, 14SF–11/P5196, 14SF–15/P5197, 14SF–23/P5197, 14SF–17/P5198, 14SF–19/P5198, 247F–1/P4202, 247F–1E/P5204, 247F–3/P5205, 568F–1/P5214, 568F–5/P5203, and 568F–7/P5211 propellers.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Boston Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(i) Related Information

(1) For more information about this AD, contact Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7761; fax: 781–238–7170; email: *michael.schwetz@faa.gov.*

(2) For service information identified in this AD, contact Hamilton Sundstrand Corporation, One Hamilton Road, Mail Stop 1A–3–C63, Windsor Locks, CT 06096–1010; or Hamilton Standard Division, United Technologies Corporation, One Hamilton Road, Mail Stop 1A–3–C63, Windsor Locks, CT 06096–1010; phone: 877–808–7575; fax: 860–660–0372; email: *tech.solutions@hs.utc.com;* Internet: *http://myhs.hamiltonsundstrand.com.*

(3) You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on May 17, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–12260 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1175; Airspace Docket No. 12–AAL–11]

Proposed Amendment of Class E Airspace; Point Thomson, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the airspace at Point Thomson, AK by establishing Class E Airspace at Point Thomson Airstrip Airport, Point Thomson, AK. This will accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at the airport. The FAA is proposing this action to enhance the safety and management of aircraft operations at the airport.

DATES: Comments must be received on or before July 8, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2012–1175; Airspace Docket No. 12–AAL–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

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

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1175 and Airspace Docket No. 12–AAL–11) and be submitted in triplicate

to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2012–1175 and Airspace Docket No. 12–AAL–11''. The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRM's

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E Airspace extending upward from 700 feet above the surface at Point Thomson Airstrip Airport, Point Thomson, AK. Controlled airspace is necessary to accommodate aircraft using the new RNAV (GPS) standard instrument approach procedures at Point Thomson Airstrip Airport, and would enhance the safety and management of instrument flight rules operations at the airport.

Class E Airspace designations are published in paragraph 6005, of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR part 71.1. The Class E Airspace designation listed in this document will be published subsequently in this Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify controlled airspace at Point Thomson Airstrip Airport, Point Thomson, AK.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9 W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 201 is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AAL AK E5 Point Thomson, AK [Modify]

Point Thomson 3 Heliport, AK
(Lat. 70°10′17″ N., long. 146°15′31″ W)
Point Thomson Airstrip Airport, AK
(Lat. 70°08′10″ N., long. 146°17′24″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the Point Thomson 3 Heliport, and that airspace within an 8.9-mile radius of Point Thomson, Airstrip Airport.

Issued in Seattle, Washington, on May 9, 2013.

Clark Desing,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2013–12311 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Chapter I

Notice of Intent To Request Public Comments

AGENCY: Federal Trade Commission.

ACTION: Notice of intent to request public comments.

SUMMARY: As part of its ongoing, systematic review of all Federal Trade Commission rules and guides, the Commission announces a modified ten-year regulatory review schedule. No Commission determination on the need for, or the substance of, the rules and guides listed below should be inferred from the notice of intent to publish requests for comments.

DATES: Effective May 23, 2013.

FOR FURTHER INFORMATION CONTACT: Further details about particular rules or guides may be obtained from the contact person listed below for the rule or guide.

SUPPLEMENTARY INFORMATION: To ensure that its rules and industry guides remain relevant and are not unduly burdensome, the Commission reviews them on a ten-year schedule. Each year the Commission publishes its review schedule, with adjustments made in response to public input, changes in the marketplace, and resource demands.

When the Commission reviews a rule or guide, it publishes a notice in the **Federal Register** seeking public comment on the continuing need for the rule or guide as well as the rule's or guide's costs and benefits to consumers and businesses. Based on this feedback, the Commission may modify or repeal the rule or guide to address public concerns or changed conditions, or to reduce undue regulatory burden.

The Commission posts information about its review schedule on its Web site [1] to facilitate comment about rules and guides. This Web site provides links in one location to **Federal Register** notices requesting comments, comment forms, and comments for rules and guides that are currently under review. The Web site also contains a continuously updated review schedule, a list of rules and guides previously eliminated in the regulatory review process, and the Commission's regulatory review plan.

Modified Ten-Year Schedule for Review of FTC Rules and Guides

For 2013, the Commission intends to initiate reviews of, and solicit public comments on, the following rules:

(1) *Telemarketing Sales Rule,* 16 CFR Part 310. Agency Contact: Karen S. Hobbs, (202) 326–3587, Federal Trade Commission, Bureau of Consumer Protection, Division of Marketing Practices, 600 Pennsylvania Ave. NW., Washington, DC 20580.

(2) *Regulations under Section 4 of the Fair Packaging and Labeling Act,* 16 CFR Part 500. Agency Contact: Stephen C. Ecklund, (202) 326–2841, Federal Trade Commission, Bureau of Consumer Protection, Division of Enforcement, 600 Pennsylvania Ave. NW., Washington, DC 20580.

(3) *Exemptions from Requirements and Prohibitions under Part 500,* 16 CFR Part 501. Agency Contact: Stephen C. Ecklund.

(4) *Regulations under Section 5(c) of the Fair Packaging and Labeling Act,* 16 CFR Part 502. Agency Contact: Stephen C. Ecklund.

(5) *Statements of General Policy or Interpretation [under the Fair Packaging and Labeling Act*], 16 CFR Part 503. Agency Contact: Stephen C. Ecklund.

The Commission is currently reviewing 22 of the 65 rules and guides within its jurisdiction. Due to the large number of rules and guides under review, the Commission is postponing review of the Preservation of Consumers' Claims and Defenses [Holder in Due Course Rule], 16 CFR Part 433, from 2013 as previously scheduled until 2014.

A copy of the Commission's modified regulatory review schedule for 2013 through 2023 is appended. The Commission, in its discretion, may modify or reorder the schedule in the future to incorporate new rules, or to respond to external factors (such as changes in the law) or other considerations.

Authority: 15 U.S.C. 41–58.

By direction of the Commission.

Donald S. Clark,

Secretary.

Appendix

REGULATORY REVIEW MODIFIED TEN-YEAR SCHEDULE

16 CFR Part	Topic	Year to review
20	Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry	Currently Under Review.
23	Guides for the Jewelry, Precious Metals, and Pewter Industries	Currently Under Review.
239	Guides for the Advertising of Warranties and Guarantees	Currently Under Review.
240	Guides for Advertising Allowances and Other Merchandising Payments and Services [Fred Meyer Guides].	Currently Under Review.
254	Guides for Private Vocational and Distance Education Schools	Currently Under Review.
259	Guide Concerning Fuel Economy Advertising for New Automobiles	Currently Under Review.
300	Rules and Regulations under the Wool Products Labeling Act of 1939	Currently Under Review.
301	Rules and Regulations under Fur Products Labeling Act	Currently Under Review.
303	Rules and Regulations under the Textile Fiber Products Identification Act	Currently Under Review.
305	Appliance Labeling Rule	Currently Under Review.
306	Automotive Fuel Ratings, Certification and Posting	Currently Under Review.
308	Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 [Pay Per Call Rule].	Currently Under Review.
423	Care Labeling of Textile Wearing Apparel and Certain Piece Goods	Currently Under Review.
424	Retail Food Store Advertising and Marketing Practices [Unavailability Rule]	Currently Under Review.
425	Use of Prenotification Negative Option Plans	Currently Under Review.
429	Rule Concerning the Cooling-Off Period for Sales Made at Homes or at Certain Other Locations.	Currently Under Review.
435	Mail or Telephone Order Merchandise	Currently Under Review.
455	Used Motor Vehicle Trade Regulation Rule	Currently Under Review.
700	Interpretations of Magnuson-Moss Warranty Act	Currently Under Review.
701	Disclosure of Written Consumer Product Warranty Terms and Conditions	Currently Under Review.
702	Pre-Sale Availability of Written Warranty Terms	Currently Under Review.
703	Informal Dispute Settlement Procedures	Currently Under Review.
310	Telemarketing Sales Rule	2013.
500	Regulations under Section 4 of the Fair Packaging and Labeling Act	2013.
501	Exemptions from Requirements and Prohibitions under Part 500	2013.
502	Regulations under Section 5(c) of the Fair Packaging and Labeling Act	2013.

[1] *http://www.ftc.gov/ftc/regreview/index.shtml.*

REGULATORY REVIEW MODIFIED TEN-YEAR SCHEDULE—Continued

16 CFR Part	Topic	Year to review
503	Statements of General Policy or Interpretation [under the Fair Packaging and Labeling Act].	2013.
304	Rules and Regulations under the Hobby Protection Act	2014.
314	Standards for Safeguarding Customer Information	2014.
433	Preservation of Consumers' Claims and Defenses [Holder in Due Course Rule]	2014.
315	Contact Lens Rule	2015.
316	CAN–SPAM Rule	2015.
456	Ophthalmic Practice Rules (Eyeglass Rule)	2015.
460	Labeling and Advertising of Home Insulation	2016.
682	Disposal of Consumer Report Information and Records	2016.
233	Guides Against Deceptive Pricing	2017.
238	Guides Against Bait Advertising	2017.
251	Guide Concerning Use of the Word ''Free'' and Similar Representations	2017.
410	Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets.	2017.
18	Guides for the Nursery Industry	2018.
311	Test Procedures and Labeling Standards for Recycled Oil	2018.
436	Disclosure Requirements and Prohibitions Concerning Franchising	2018.
681	Identity Theft [Red Flag] Rules	2018.
24	Guides for Select Leather and Imitation Leather Products	2019.
453	Funeral Industry Practices	2019.
14	Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements.	2020.
255	Guides Concerning Use of Endorsements and Testimonials in Advertising	2020.
313	Privacy of Consumer Financial Information	2020.
317	Prohibition of Energy Market Manipulation Rule	2020.
318	Health Breach Notification Rule	2020.
432	Power Output Claims for Amplifiers Utilized in Home Entertainment Products	2020.
444	Credit Practices	2020.
640	Duties of Creditors Regarding Risk-Based Pricing	2020.
641	Duties of Users of Consumer Reports Regarding Address Discrepancies	2020.
642	Prescreen Opt-Out Notice	2020.
660	Duties of Furnishers of Information to Consumer Reporting Agencies	2020.
680	Affiliate Marketing	2020.
698	Model Forms and Disclosures	2020.
801	[Hart-Scott-Rodino Antitrust Improvements Act] Coverage Rules	2020.
802	[Hart-Scott-Rodino Antitrust Improvements Act] Exemption Rules	2020.
803	[Hart-Scott-Rodino Antitrust Improvements Act] Transmittal Rules	2020.
437	Disclosure Requirements and Prohibitions Concerning Business Opportunities	2021.
260	Guides for the Use of Environmental Marketing Claims	2022.
312	Childrens' Online Privacy Protection Rule	2022.
309	Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles	2023.

[FR Doc. 2013–12231 Filed 5–22–13; 8:45 am]

BILLING CODE 6750–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, and 249

[Release No. 34–69491; File Nos. S7–27–10, S7–32–10, S7–34–10, S7–35–10, S7–43–10, S7–03–11, S7–06–11, S7–08–11, S7–25–11, S7–40–11, S7–05–12, S7–08–12]

RIN 3235–AK74, 3235–AK77, 3235–AK80, 3235–AK79, 3235–AK88, 3235–AK91, 3235–AK93, 3235–AL13, 3235–AL10, 3235–AL05, 3235–AL12

Reopening of Comment Periods for Certain Proposed Rulemaking Releases and Policy Statements Applicable to Security-Based Swaps

AGENCY: Securities and Exchange Commission.

ACTION: Reopening of comment periods.

SUMMARY: The Securities and Exchange Commission (''Commission'') is reopening the comment periods for its outstanding rulemaking releases, published in the **Federal Register** and listed herein, that concern security-based swaps (''SB swaps'') and SB swap market participants and were proposed pursuant to certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act''), among other provisions (together, the ''Proposed Rules''). The Commission is also reopening the comment period for its Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps adopted pursuant to the Exchange Act and the Dodd-Frank Act,

published in the **Federal Register** on June 14, 2012 (the ''Policy Statement''). The reopening of these comment periods is intended to allow interested persons additional time to analyze and comment upon the Proposed Rules and the Policy Statement in light of the Commission's proposal of substantially all of the rules required to be adopted by Title VII of the Dodd-Frank Act, its proposal of rules and interpretations addressing the application of the SB swap provisions of Title VII of the Dodd-Frank Act to cross-border SB swap transactions and non-U.S. persons that act in capacities regulated under the Dodd-Frank Act (the ''Cross-Border Proposed Rules''), and the Commodity Futures Trading Commission's (the ''CFTC'') adoption of substantially all of the rulemakings establishing the new regulatory framework for swaps. All comments received to date on the Proposed Rules and the Policy Statement will be considered and need not be resubmitted.

DATES: For the Proposed Rules and the Policy Statement, the comment periods are reopened until July 22, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an email to *rule-comments@sec.gov.* Please include the file number for the specific action being commented upon on the subject line; or
- Use the Federal Rulemaking portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to the file number for the specific action being commented upon. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on the Commission's Internet Web site (*http://www.sec.gov*). Comments also are available for Web site viewing and printing at the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: With respect to this release, Ann Parker McKeehan, Special Counsel, at (202) 551–5797, or Jason Williams, Attorney-Adviser, at (202) 551–5763, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549. With respect to a particular action discussed herein, the Commission staff member listed in the action.

SUPPLEMENTARY INFORMATION:

I. Background

Subtitle B of Title VII of the Dodd-Frank Act [1] (''Title VII'') amends the Securities Act of 1933 (''Securities Act'') [2] and the Exchange Act [3] to substantially expand the regulation of the SB swap market with a goal of establishing a new regulatory framework within which this market can evolve in a more transparent, efficient, fair, accessible, and competitive manner.[4] Under the Dodd-Frank Act, regulatory authority over derivatives is divided between the Commission and the CFTC, with the Commission having authority over SB swaps, the CFTC having authority over swaps, which represent the overwhelming majority of the overall market for derivatives subject to the Dodd-Frank Act, and the Commission and the CFTC jointly regulating mixed swaps.[5]

The Title VII amendments to the Exchange Act generally require, among other things: (1) The registration and comprehensive oversight of security-based swap dealers and major security-based swap participants; [6] (2) the reporting of SB swaps to a registered security-based swap data repository (''SDR''), or to the Commission (if the SB swap is uncleared and no SDR will accept the SB swap), and dissemination of SB swap information to the public; [7] (3) the clearing of SB swaps at a registered clearing agency (or a clearing agency that is exempt from registration) if the Commission makes a determination that such SB swaps are required to be cleared, unless an exception from the mandatory clearing requirement applies; [8] and (4) if an SB swap is subject to the clearing requirement, the execution of the SB swap transaction on an exchange, on a security-based swap execution facility (''SB SEF'') registered under the Exchange Act,[9] or on an SB SEF that has been exempted from registration by the Commission under the Exchange Act,[10] unless no SB SEF or exchange makes such SB swap available for trading.[11]

The Commission has proposed substantially all of the rules required to be adopted by Title VII.[12] The Commission also has adopted the following rules:

- Joint rules with the CFTC that further define the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant;'' [13]

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] 15 U.S.C. 77a *et seq.*

[3] 15 U.S.C. 78a *et seq.*

[4] *See generally* Subtitle B of Title VII.

[5] Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System, shall further define the terms ''swap'' and ''security-based swap,'' among others. These terms are defined in sections 721 and 761 of the Dodd-Frank Act and the Commission and the CFTC have adopted further definitions of these terms in a joint rulemaking. *See Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Security-Based Swap Agreement Recordkeeping,* Release No. 33–9338 (July 18, 2012); 77 FR 48208 (Aug. 13, 2012) (''Product Definitions Rules'').

[6] *See* section 15F of the Exchange Act, 15 U.S.C. 78o–10.

[7] *See* section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75) (defining the term ''security-based swap data repository''); section 13(m) of the Exchange Act (regarding public availability of SB swap data); section 13(n) of the Exchange Act (regarding requirements related to SDRs); and section 13A of the Exchange Act (regarding reporting and recordkeeping requirements for certain SB swaps). *See also Security-Based Swap Data Repository Registration, Duties, and Core Principles,* Release No. 34–63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010); corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011); and *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Release No. 34–63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010).

[8] *See* section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1). *See also Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations,* Release No. 34–63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010).

[9] 15 U.S.C. 78c–4.

[10] *Id.* at 78c–4(e).

[11] *See* section 3C(g) of the Exchange Act, 15 U.S.C. 78c–3(g) and section 3C(h) of the Exchange Act, 15 U.S.C. 78c–3(h). *See also* section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(77) (defining the term ''security-based swap execution facility''). *See also Registration and Regulation of Security-Based Swap Execution Facilities,* Release No. 34–63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011).

[12] The Commission has not yet proposed rules regarding the reporting and recordkeeping requirements to which security-based swap dealers and major security-based swap participants will be subject pursuant to Exchange Act section 15F(f). 15 U.S.C. 78o–10(f).

[13] *See Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap*

Continued

• Rules that establish the procedure by which clearing agencies submit SB swaps for a determination as to whether those instruments should be subject to mandatory clearing; [14]

• Joint rules with the CFTC that further define the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement'' and regarding the regulation of mixed swaps and SB swap agreement recordkeeping; [15] and

• Rules that establish standards for how registered clearing agencies should manage their risks and run their operations.[16]

Most recently, the Commission has proposed the Cross-Border Proposed Rules, which address the treatment of cross-border SB swap transactions and non-U.S. persons acting in capacities regulated under Title VII.[17] While the Commission may propose additional rules pertaining to SB swaps that are not mandated by Title VII, SB swap market participants and other members of the public now have a substantially complete picture of the Commission's proposed regulatory framework for SB swaps. Additionally, the CFTC has adopted nearly all of the rules establishing the swaps regulatory regime.[18]

II. Reopening of Comment Periods

In light of the substantially complete picture of the proposed SB swap regulatory regime and the CFTC's adoption of many of the rulemakings creating the swaps regulatory regime, the Commission is reopening the comment period of the Proposed Rules and the Policy Statement until July 22, 2013 to provide the public with an additional opportunity to analyze and comment upon the proposed SB swap regulatory framework, either in part or as a whole. Commenters may submit, and the Commission will consider, comments on any aspect of the Proposed Rules and the Policy Statement. In addition to the questions raised in the Proposed Rules and the Policy Statement, the Commission specifically seeks comments on the following:

• The economic consequences and effects, including costs and benefits, of the Proposed Rules, either individually or as a whole, including any related quantitative or qualitative information. Please specify whether such information includes the costs and benefits of systems, policies, or procedures already implemented to comply with the CFTC's adoption of final rules and interpretive orders pertaining to Title VII (together, the ''CFTC Rules'');

• The overall framework and approach to implementation detailed in the Proposed Rules and the Policy Statement;

• The relationship of the Proposed Rules to any parallel requirements of other authorities, including the CFTC and relevant foreign regulatory authorities;

• With respect to the CFTC Rules, whether and to what extent the Commission in adopting its own rules should emphasize consistency with the CFTC Rules versus adopting rules that are more tailored to the SB swap market, with inclusion of any specific examples where consistency or tailoring of a particular rule or rule set is more critically important; and

• Whether there are any areas where additional rules or interpretations should be proposed or formal guidance provided and if so, why.

The comment periods for the following actions are being reopened until July 22, 2013: [19]

Date published in the **Federal Register**	Title and release number of rulemaking	Date closed
10/26/2010	Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC (Release No. 34–63107, File No. S7–27–10) and Reopening of Comment Period (Release No. 34–64018).	4/29/2011
11/8/2010	Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps (Release No. 34–63236, File No. S7–32–10).	12/23/2010
12/2/2010	Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information (Release No. 34–63346, File No. S7–34–10).	1/18/2011
12/10/2010	Security-Based Swap Data Repository Registration, Duties, and Core Principles (Release No. 34–63347, File No. S7–35–10).	1/24/2011
12/21/2010	End-User Exception to Mandatory Clearing of Security-Based Swaps (Release No. 34–63556, File No. S7–43–10).	2/4/2011
1/21/2011	Trade Acknowledgement and Verification of Security-Based Swap Transactions (Release No. 34–63727, File No. S7–03–11).	2/22/2011
2/28/2011	Registration and Regulation of Security-Based Swap Execution Facilities (Release No. 34–63825, File No. S7–06–11).	4/4/2011
3/16/2011	Clearing Agency Standards for Operation and Governance (Release No. 34–64017, File No. S7–08–11), other than those portions adopted by the Clearing Agency Standards (Release No. 34–68080).	4/29/2011
7/18/2011	Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants (Release No. 34–64766, File No. S7–25–11).	8/29/2011
10/24/2011	Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants (Release No. 34–65543, File No. S7–40–11).	12/19/2011

Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'', Release No. 34–66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (''Entity Definitions Rules'').

[14] *See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations,* Release No. 34–67286 (June 28, 2012), 77 FR 41602 (July 13, 2012) (''Clearing Procedures Rules'').

[15] *See* Product Definitions Rules, *supra* note 5.

[16] *See Clearing Agency Standards,* Release No. 34–68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012) (''Clearing Agency Standards'').

[17] *See Cross-Border Application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,* Release No. 34–_____ (____, 2013).

[18] CFTC Chairman Gary Gensler has noted that the CFTC has ''largely completed the swaps market rulemaking, with 80 percent behind us. . . .'' Gary Gensler, Chairman, Commodity Futures Trading Comm'n, Opening Remarks at CFTC Public Roundtable on ''Futurization of Swaps'' (Jan. 31, 2013) (transcript available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-130*).

[19] The comment periods for the Entity Definitions Rules, the Clearing Procedures Rules, the Product Definitions Rules, and the Clearing Agency Standards are not being reopened given that, as noted in Section I above, these rules have been adopted by the Commission.

Date published in the Federal Register	Title and release number of rulemaking	Date closed
6/14/2012	Statement of General Policy on the Sequencing of the Compliance Rules Applicable to the Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Release No. 34–67177, File No. S7–05–12).	8/13/2012
11/23/2012	Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers (Release No. 34–68071, File No. S7–08–12) and Extension of Comment Period (Release No. 34–68660).	2/22/2013

All comments received to date on the Proposed Rules and the Policy Statement will be considered and need not be resubmitted.

Dated: May 1, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–10836 Filed 5–7–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 242 and 249

[Release No. 34–69606; File No. S7–01–13]

RIN 3235–AL43

Regulation Systems Compliance and Integrity

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule, form, and rule amendment; extension of comment period.

SUMMARY: On March 25, 2013, the Securities and Exchange Commission (''Commission'') published in the **Federal Register** a proposed rule, Regulation Systems Compliance and Integrity (''Regulation SCI'') under the Securities Exchange Act of 1934, for public comment. Proposed Regulation SCI would apply to certain self-regulatory organizations (including registered clearing agencies), alternative trading systems (''ATSs''), plan processors, and exempt clearing agencies subject to the Commission's Automation Review Policy (collectively, ''SCI entities''), and would require these SCI entities to comply with requirements with respect to their automated systems that support the performance of their regulated activities. The Commission is extending the time period in which to provide the Commission with comments.

DATES: The comment period for the proposed rule published March 25, 2013 (78 FR 18084), is extended. Comments should be received on or before July 8, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–01–13 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–01–13. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed*). Comments will also be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Heidi Pilpel, Special Counsel, Office of Market Supervision, at (202) 551–5666, Sara Hawkins, Special Counsel, Office of Market Supervision, at (202) 551–5523, Jonathan Balcom, Special Counsel, Office of Market Supervision, at (202) 551–5737, Yue Ding, Attorney, Office of Market Supervision, at (202) 551–5842, Dhawal Sharma, Attorney, Office of Market Supervision, at (202) 551–5779, Elizabeth C. Badawy, Senior Accountant, Office of Market Supervision, at (202) 551–5612, and Gordon Fuller, Senior Special Counsel, Office of Market Operations, at (202) 551–5686, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: On March 7, 2013, the Commission voted to propose Regulation SCI and solicit comment on a proposed rule and form, as well as an amendment to Regulation ATS,[1] that would require SCI entities to comply with requirements with respect to their automated systems that support the performance of their regulated activities. The Commission originally requested that comments on this proposal be received by May 24, 2013. The Commission has recently received requests to extend the comment period and believes that extending the comment period is appropriate in order to give the public additional time to comment on the matters addressed by the release.[2] This extension will allow for 105 days of comment, which the Commission believes should provide the public with sufficient additional time to consider thoroughly the matters addressed by proposed Regulation SCI and to submit comprehensive responses to the proposal which would benefit the Commission in its consideration of the final rules. Therefore, the Commission is extending the public comment period for 45 days, until Monday, July 8, 2013.

By the Commission.

Dated: May 20, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–12289 Filed 5–22–13; 8:45 am]

BILLING CODE 8011–01–P

[1] *See* Securities Exchange Act Release No. 69077 (March 8, 2013), 78 FR 18084 (March 25, 2013).

[2] *See* Letters from Theodore R. Lazo, Managing Director & Associate General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated April 25, 2013; Manisha Kimmel, Executive Director, Financial Information Forum, to Elizabeth M. Murphy, Secretary, Commission, dated May 7, 2013; and David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute, dated May 15, 2013.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket Nos. RM12–1–000 and RM13–9–000]

Transmission Planning Reliability Standards

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On April 19, 2012, the Commission issued a Notice of Proposed Rulemaking (NOPR) that proposed to remand proposed Reliability Standard TPL–001–2, submitted by the North American Electric Reliability Corporation (NERC). Proposed Reliability Standard TPL–001–2 includes a provision that would allow a transmission planner to plan for non-consequential load loss following a single contingency provided that the plan is documented and vetted in an open and transparent stakeholder process. The Commission explained in the NOPR that the proposed Reliability Standard does not meet the statutory criteria for approval because the provision pertaining to planned non-consequential load loss is vague and unenforceable.

On February 28, 2013, NERC submitted proposed Reliability Standard TPL–001–4, which further modifies the planned non-consequential load loss provision. The Commission believes that the proposed modifications satisfy the concerns set forth in the NOPR. Accordingly, the Commission supplements the NOPR by proposing to approve Reliability Standard TPL–001–4, which supersedes proposed Reliability Standard TPL–001–2.

DATES: Comments are due June 24, 2013.

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

- *Agency Web site: http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Eugene Blick (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8066, *Eugene.Blick@ferc.gov.*

Robert T. Stroh (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8473, *Robert.Stroh@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Supplemental Notice of Proposed Rulemaking

(Issued May 16, 2013)

1. On April 19, 2012, the Commission issued a Notice of Proposed Rulemaking (NOPR) that proposed to remand proposed Reliability Standard TPL–001–2, submitted by the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization.[1] Proposed Transmission Planning (TPL) Reliability Standard TPL–001–2 includes a provision that would allow a transmission planner to plan for non-consequential load loss following a single contingency provided that the plan is documented and vetted in an open and transparent stakeholder process. The Commission explained in the NOPR that the proposed Reliability Standard does not meet the statutory criteria for approval because the provision pertaining to planned non-consequential load loss is vague and unenforceable.

2. On February 28, 2013, NERC submitted proposed Reliability Standard TPL–001–4, which further modifies the planned load loss provision.[2] The Commission believes that the proposed modifications satisfy the concerns set forth in the NOPR. Accordingly, pursuant to section 215 of the Federal Power Act (FPA), the Commission supplements the NOPR by proposing to approve proposed Reliability Standard TPL–001–4, which supersedes the proposed Reliability Standard TPL–001–2.[3]

I. Background

A. Regulatory History

3. In Order No. 693, the Commission accepted the Version 0 TPL Reliability Standards.[4] Further, pursuant to FPA section 215(d)(5), the Commission directed NERC to develop modifications to TPL–001–0 through TPL–004–0 through the Reliability Standards development process. In addition, the Commission neither approved nor remanded two other planning Reliability Standards, TPL–005–0 and TPL–006–0, as these two Reliability Standards applied only to regional reliability organizations. With regard to Reliability Standard TPL–002–0b, Table 1, footnote 'b,' which pertains to loss of non-consequential load, the Commission directed NERC to clarify footnote 'b' regarding the loss of non-consequential load for a single contingency event.[5] In a March 18, 2010 order, the Commission directed NERC to submit a modification to footnote 'b' responsive to the Commission's directive in Order No. 693 by June 30, 2010.[6] In a June 11, 2010 order, the Commission extended the compliance deadline until March 31, 2011.[7]

Remand of Footnote 'b'—Version 1 (RM11–18–000)

4. On March 31, 2011, NERC submitted proposed Reliability Standard TPL–002–1 (Version 1), which proposed to modify Table 1, footnote 'b' to permit planned non-consequential load loss when documented and subject to an open stakeholder process.[8] In Order No. 762, the Commission remanded to NERC the proposed modification to footnote 'b,' concluding that the proposed revisions did not meet the Commission's Order No. 693 directives, nor did the revisions achieve an equally

[1] *Transmission Planning Reliability Standards,* Notice of Proposed Rulemaking, 139 FERC ¶ 61,059 (April 19, 2012) (Docket No. RM12–1–000).

[2] NERC states that the Version 4 standard, i.e., TPL–001–4, modifies the pending consolidated standard, TPL–001–2. NERC also submitted, alternatively, a group of four TPL standards (TPL–001–3, TPL–002–2b, TPL–003–2a, and TPL–004–2, collectively, the Version 3 TPL standards) that would modify ''footnote b'' of the currently-effective TPL standards, ''[i]n the event the Commission does not approve the Consolidated TPL Standards.'' NERC Petition at 4. Because we propose to approve TPL–001–4 in this supplemental NOPR, references throughout this NOPR are to the Version 4 standard.

[3] 16 U.S.C. 824o (2006).

[4] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at PP 1840, 1845, *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007). The currently-effective versions of the TPL Reliability Standards are as follows: TPL–001–0.1, TPL–002–0b, TPL–003–0a, and TPL–004–0.

[5] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1792.

[6] *Mandatory Reliability Standards for the Bulk Power System,* 130 FERC ¶ 61,200 (2010).

[7] *Mandatory Reliability Standards for the Bulk Power System,* 131 FERC ¶ 61,231 (2010).

[8] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1794. Non-consequential load loss includes the removal, by any means, of any planned firm load that is not directly served by the elements that are removed from service as a result of the contingency. Currently-effective footnote 'b' deals with both consequential load loss and non-consequential load loss. NERC's proposed footnote 'b' characterized both types of load loss as ''firm demand.'' The focus of this Supplemental NOPR is NERC's proposed treatment of non-consequential load loss or planned interruption of ''firm demand.''

effective and efficient alternative.[9] The Commission stated that the proposal did not adequately clarify or define the circumstances in which an entity can use planned non-consequential load loss as a mitigation plan to meet Table 1 performance requirements for single contingency events. The Commission also stated that the procedural and substantive parameters of NERC's proposal were too undefined to provide assurances that the process will be effective in determining when it is appropriate to plan for non-consequential load loss, does not contain NERC-defined criteria on circumstances to determine when an exception for planned non-consequential load loss is permissible, and could result in inconsistent results in implementation. Accordingly, the Commission remanded the filing to NERC, directing NERC to revise footnote 'b' to address the Commission's concerns described in Order No. 762. Additionally, in Order No. 762, the Commission directed NERC to ''identify the specific instances of any planned interruptions of firm demand under footnote 'b' and how frequently the provision has been used.'' [10]

Proposed Remand of TPL–001–2—Version 2 (RM12–1–000)

5. On October 19, 2011, NERC submitted a petition seeking approval of a revised and consolidated TPL Reliability Standard that combined the four currently-effective TPL Standards into a single standard, TPL–001–2 (Version 2).[11] The Version 2 standard includes language similar to NERC's Version 1 March 31, 2011, proposal to revise and clarify footnote 'b' of Table 1. In developing Version 2, NERC slightly modified the proposed footnote 'b' in Version 1 and divided footnote 'b' in Version 1 into two footnotes in Version 2, Steady State & Stability Performance Footnotes 9 and 12.[12] However, the concerns the Commission raised with respect to the Version 1 footnote 'b' remained in footnote 12 of Version 2. Footnote 12 in Version 2 was in all material respects the same as the portion of footnote 'b' in Version 1 that was the subject of remand in Order No. 762.

6. On the same day that the Commission issued Order No. 762, it issued a NOPR in Docket No. RM12–1–000, stating that, notwithstanding that proposed Version 2 included specific improvements over the currently-effective Transmission Planning Reliability Standards, footnote 12 ''allow[s] for transmission planners to plan for non-consequential load loss following a single contingency without adequate safeguards [and] undermines the potential benefits the proposed Reliability Standard may provide.'' [13] Thus, the Commission stated that, pursuant to section 215(d)(4), its concerns regarding the stakeholder process set forth in footnote 12 required a proposal to remand the entire Reliability Standard. The Commission added, however, that ''resolution of this one matter will allow the industry, NERC and the Commission to go forward with the consideration of other improvements contained in proposed [Version 2].'' [14]

7. In addition, the NOPR asked for comment on various aspects of the consolidated Version 2 TPL Standard, including planned maintenance outages, assessment of backup or redundant protection systems, and single line to ground faults. Comments on the NOPR were due by July 20, 2012. Nine entities submitted comments.

B. Proposed Reliability Standard TPL–001–4—Version 4 (RM13–9–000)

8. On February 28, 2013, NERC submitted proposed Reliability Standard TPL–001–4 (Version 4) in response to the Commission's remand in Order No. 762 and concerns identified in the Commission's NOPR issued in Docket No. RM12–1–000.[15] NERC states that modified footnote 12 provides specific parameters for the permissible use of planned non-consequential load loss to address bulk electric system performance issues, including: (1) Firm limitations on the maximum amount of load that an entity may plan to shed, (2) safeguards to ensure against inconsistent results and arbitrary determinations that allow for the planned non-consequential load loss, and (3) a more specifically defined, open and transparent, verifiable, and enforceable stakeholder process.

9. Proposed footnote 12 as modified provides:

> An objective of the planning process is to minimize the likelihood and magnitude of Non-Consequential Load Loss following planning events. In limited circumstances, Non-Consequential Load Loss may be needed throughout the planning horizon to ensure that BES performance requirements are met. However, when Non-Consequential Load Loss is utilized under footnote 12 within the Near-Term Transmission Planning Horizon to address BES performance requirements, such interruption is limited to circumstances where the Non-Consequential Load Loss meets the conditions shown in Attachment 1. In no case can the planned Non-Consequential Load Loss under footnote 12 exceed 75 MW for US registered entities. The amount of planned Non-Consequential Load Loss for a non-US Registered Entity should be implemented in a manner that is consistent with, or under the direction of, the applicable governmental authority or its agency in the non-US jurisdiction.

10. New Attachment 1 to TPL–001–4, referenced in footnote 12, has three sections: (I) Stakeholder process, (II) information for inclusion in the stakeholder process, and (III) instances for which regulatory review of planned non-consequential load loss under footnote 12 is required. Section I describes five criteria that apply to the open and transparent stakeholder process that an entity must implement when it seeks to use footnote 12: (1) Meetings must be open to affected stakeholders including applicable regulatory authorities, (2) advance meeting notice requirements, (3) information regarding the intended purpose and scope of the planned non-consequential load loss must be made available to participants in accordance with section II of Attachment 1, (4) procedures for stakeholders to submit written questions and receive written responses, and (5) a dispute resolution process. Section I provides that an entity does not have to repeat the stakeholder process for a specific application of footnote 12 with respect to subsequent planning assessments unless conditions have materially changed for that specific application.[16]

[9] *Transmission Planning Reliability Standards,* Order No. 762, 139 FERC ¶ 61,060 (2012).

[10] Order No. 762, 139 FERC ¶ 61,060 at P 20.

[11] NERC's October 2011 petition sought approval of Reliability Standard TPL–001–2, the associated implementation plan and Violation Risk Factors (VRFs) and Violation Severity Levels (VSLs), as well as five new definitions to be added to the NERC Glossary of Terms (Version 2). NERC also requested approval to retire four currently-effective TPL Reliability Standards: TPL–001–1, TPL–002–1b, TPL–003–1a; and TPL–004–1. In addition, NERC requested to withdraw two pending Reliability Standards: TPL–005–0 and TPL–006–0.1.

[12] NERC Petition at 12. NERC's proposal in Docket No. RM11–18–000, Table 1, footnote 'b' referred to planned load shed as planned ''interruption of Firm Demand.'' In footnote 12, NERC has changed the term from ''interruption of Firm Demand'' to utilization of ''Non-Consequential Load Loss.''

[13] NOPR, 139 FERC ¶ 61,059 at P 55.

[14] *Id.* at P 3.

[15] Reliability Standard TPL–001–4 is not attached to the Supplemental NOPR. The complete text of Reliability Standard TPL–001–4 is available on the Commission's eLibrary document retrieval system in Docket No. RM13–9–000 and is posted on the ERO's Web site, *available at: http://www.nerc.com.*

[16] NERC explains that this language was intentionally included to be consistent with Requirement R2.6 of the Version 4 TPL Reliability Standard, which allows for past studies to be used to support planning assessments if they meet certain conditions, including for steady state, short circuit, or stability analysis, when no material changes occur to the system. NERC Petition at 16.

NERC explains that this approach builds in flexibility and allows entities to use operating judgment in determining what constitutes a ''material change'' (e.g., thereby allowing the entity to take into account regional and operating differences).[17]

11. Section II of Attachment 1 specifies eight categories of information that entities must provide to stakeholders, including estimated amount, frequency and duration of planned non-consequential load loss under footnote 12. An entity must also provide information on alternatives considered and future plans to alleviate the need for planned non-consequential load loss. NERC states that it developed this information to ensure that an entity adequately demonstrates to stakeholders why and how the entity selected the planned non-consequential load loss alternative as the best planning choice, while allowing stakeholders to see all of the variables the entity used in selecting the load shed alternative.

12. Section III of Attachment 1 describes the process for planned non-consequential load loss greater than 25 MW. Specifically, NERC states that planned non-consequential load loss between 25 MW and 75 MW, or any planned non-consequential load loss at the 300 kV level or above would receive greater scrutiny by regulatory authorities and the ERO.[18] Where these parameters apply, ''the Transmission Planner or Planning Coordinator must ensure that applicable regulatory authorities or governing bodies responsible for retail electric service issues do not object to the use of Non-Consequential Load Loss under footnote 12.'' [19] Further, ''[o]nce assurance has been received that the applicable regulatory authorities . . . responsible for retail electric service issues do not object . . . the Planning Coordinator or Transmission Planner must submit the information [in Section II of Attachment 1] to the ERO for a determination of whether there are any Adverse Reliability Impacts'' caused by the responsible entity's request to use footnote 12.[20] According to NERC, this provision provides safeguards against arbitrary or inconsistent determinations, and also ''preserves, to the extent practicable, the role of Retail Regulators,'' while allowing ERO review for possible Adverse Reliability Impacts.[21]

13. NERC states that the combination of numerical limitations and other considerations, such as costs and alternatives, guards against a determination based solely on a quantitative threshold becoming an acceptable *de facto* interpretation of planned non-consequential load loss. According to NERC, the procedures in footnote 12 would enable acceptable, but limited, circumstances of planned non-consequential load loss after a thorough stakeholder review and approval and, in some cases, ERO review.

14. NERC states that, because footnote 12 differs from footnote 'b' included in the currently-effective TPL Reliability Standards, data do not yet exist on the frequency of instances of planned non-consequential load loss under the new footnote 12. Consequently, NERC states that it will monitor the use of footnote 12 and will report the results of this monitoring after the first two years of the footnote's implementation.[22]

Implementation Schedule

15. NERC requests that requirements R1 and R7 of the Version 4 Reliability Standard as well as the definitions become effective, i.e., subject to compliance, on the first day of the first calendar quarter, twelve months after applicable regulatory approval. In addition, except as indicated below, NERC requests that Requirements R2 through R6 and Requirement R8 including Table 1—Steady State & Stability Performance Planning Events, Table 1—Steady State & Stability Performance Extreme Events, Table 1—Steady State & Stability Performance Footnotes (Planning Events & Extreme Events) and Attachment 1 become effective and subject to compliance on the first day of the first calendar quarter, 24 months after applicable regulatory approval.

16. NERC also proposes that, for 84 calendar months beginning the first day of the first calendar quarter following applicable regulatory approval, corrective action plans applying to specific categories of contingencies and events identified in TPL–001–4, Table 1 are allowed to include non-consequential load loss and curtailment of firm transmission service (in accordance with Requirement R2, Part 2.7.3) that would not otherwise be permitted by the requirements of the Version 4 Reliability Standard. Further, NERC states that Requirement R2, Part 2.7.3 addresses situations that are beyond the control of the planner that prevent the implementation of a corrective action plan in the required timeframe.

17. NERC also requests approval to retire currently-effective TPL Reliability Standards, TPL–001–0.1, TPL–002–0b, TPL–003–0a and TPL–004–0, because their requirements are consolidated into the proposed TPL Reliability Standard TPL–001–4. In addition, NERC requests to withdraw two pending TPL Reliability Standards, TPL–005–0 and TPL–006–0.1, because NERC has transferred the requirements to sections 803 and 804 of NERC's Rules of Procedure. NERC proposes to retire TPL Reliability Standards TPL–001–0.1, TPL–002–0b, TPL–003–0a, and TPL–004–0 on midnight of the day immediately prior to the effective date of TPL–001–4. However, during the 24-month implementation period, all aspects of the currently-effective TPL Reliability Standards, TPL–001–0.1 through TPL–004–0 will remain in effect for compliance monitoring. NERC states that the 24 month period is to allow entities to develop, perform and/or validate new or modified studies necessary to implement and meet Reliability Standard TPL–001–4. NERC explains that the specified effective dates allow sufficient time for proper assessment of the available options necessary to create a viable corrective action plan that is compliant with the new TPL Reliability Standard.

II. Discussion

18. Pursuant to section 215(d) of the FPA, we propose to approve NERC's proposed Reliability Standard TPL–001–4 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. NERC's proposal

[17] NERC Petition at 17. NERC adds that the proposed Requirement R8 of the Version 4 TPL Reliability Standard includes an additional safeguard to monitoring of planning assessments by requiring that relevant entities share planning assessments with adjacent planning coordinators, transmission planners, or other entities that demonstrate a reliability related need. NERC explains that Requirement R8 of the Version 4 Reliability Standard provides a system of checks and balances on an entity's planning assessments from neighboring entities in the overall transmission planning process of which the proposed footnote is one aspect.

[18] NERC Petition at 17–19 and Exhibit F. NERC states that the 300 kV voltage level is based on the previously submitted Extra High Voltage (''EHV'') level that had been proposed in Version 2. NERC also explains that it derived the 75 MW limit from information received in response to an industry data request to identify the specific instances of planned non-consequential load loss under footnote b and how frequently the load loss provision has been used. The maximum non-consequential load loss was approximately 75 MW, and the average was approximately 25 MW.

[19] NERC Petition, Exhibit A, proposed Reliability Standard TPL–001–4, Attachment I, section 3.

[20] NERC Petition, Exhibit A, proposed Reliability Standard TPL–001–4, Attachment I, section 3. NERC defines ''Adverse Reliability Impact'' as ''[t]he impact of an event that results in frequency-related instability; unplanned tripping of load or generation; or uncontrolled separation or cascading outages that affects a widespread area of the Interconnection.'' NERC Glossary at 4.

[21] NERC Petition at 19.

[22] NERC Petition at 11.

differs from the Commission directives on this matter.[23] Nonetheless, we believe that NERC's proposal adequately addresses the underlying reliability concerns raised in Order No. 693, Order No. 762 and the NOPR in Docket No. RM12–1–000 and, thus, is an equally effective and efficient alternative to address the Commission's directives.

19. In particular, we believe that proposed footnote 12 would improve reliability by providing a blend of specific quantitative and qualitative parameters for the permissible use of planned non-consequential load loss to address bulk electric system performance issues. In addition, it appears that the stakeholder process is adequately defined and includes specific criteria and guidelines that a responsible entity must follow before it may use planned non-consequential load loss to meet Reliability Standard TPL–001–4 performance requirements for a single contingency event. Further, NERC's proposal provides reasonable safeguards, including an ERO review process, to protect against adverse reliability impacts that could otherwise result from planned non-consequential load loss.

20. NERC states that it plans to monitor the use of footnote 12 and report the results of this monitoring after the first two years of implementation.[24] Consistent with NERC's petition, we propose to direct that NERC submit a report on the use of footnote 12, due at the end of the first calendar quarter after the first two years of implementation of footnote 12 (as determined pursuant to NERC's implementation plan). The report should provide an analysis of the use of footnote 12, including but not limited to information on the duration, frequency and magnitude of planned non-consequential load loss, and typical (and if significant, atypical) scenarios where entities plan for non-consequential load loss. The report should also address the effectiveness of the stakeholder process and the use and effectiveness of the local regulatory review and NERC review.

21. Further, we propose to approve NERC's implementation schedule. Pursuant to NERC's implementation schedule, footnote 12 and the stakeholder process (Attachment 1) are effective on the first day of the first quarter 24 months after applicable regulatory approval and that entities may use Requirement R2, Part 2.7.3 to include non-consequential load loss in corrective action plans up to 84 months beginning the first day of the first quarter 84 months after applicable regulatory approval. In other words, entities that plan to shed non-consequential load must follow the footnote 12 and Attachment 1 procedures beginning on the first day of the first quarter 24 months after applicable regulatory approval. In addition, the 84 month period allows planners to include planned non-consequential load loss in their corrective action plans, if needed, for certain categories of contingencies to mitigate a system performance issue, e.g., if a plan calls for the construction of a transmission line. Within 84 months the corrective action plan for the transmission line, for example, is expected to be in service, but in the meantime the planner is permitted non-consequential load loss during the construction of the line.[25] Under these circumstances, a planner must develop a valid corrective action plan that mitigates the system performance issue within the expected 84 months. We also propose to approve the retirement of the currently-effective TPL Reliability Standards as proposed by NERC.

22. The Commission seeks comment on NERC's footnote 12 proposal. After receipt of comments, the Commission will issue a final rule that addresses the consolidated transmission planning standard, TPL–004–1. This Final Rule would address the modified footnote 12 (and related Attachment 1) and comments received in response to this Supplemental NOPR. In addition, the Final Rule would address other aspects of the consolidated TPL standard, including the matters raised in the April 2012 NOPR in Docket RM12–1–000 (as modified by the Supplemental NOPR) and comments received in response to the April 2012 NOPR.

III. Information Collection Statement

23. The following collection of information contained in this Notice of Proposed Rulemaking is subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.[26] OMB's regulations require approval of certain information collection requirements imposed by agency rules.[27] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

24. We solicit comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. Specifically, the Commission asks that any revised burden or cost estimates submitted by commenters be supported by sufficient detail to understand how the estimates are generated.

25. The Commission proposes to approve Reliability Standard TPL–001–4 and retire four currently-effective TPL Reliability Standards, TPL–001 through TPL–004. In Order No. 693, the Commission directed NERC to develop modifications to TPL–001–0 through TPL–004–0 through NERC's Reliability Standards development process. Rather than creating entirely new TPL requirements, the revised Reliability Standard TPL–001–4 consolidates and improves the overall quality of the currently-effective TPL Reliability Standards governing transmission system planning of the bulk electric system. Thus, this proposed rulemaking does not impose entirely new burdens on the effected entities. For example, the currently-effective and revised TPL Reliability Standards both require that transmission planners and planning coordinators prepare annual planning assessments for near-term and long-term planning horizons and evaluate system performance for various categories of contingencies ranging from normal operations through extreme events.

26. The proposed Reliability Standard TPL–001–4 includes several new obligations for transmission planners and planning coordinators. For example, they must identify joint responsibilities and conduct system modeling enhancements as required by Reliability Standard TPL–001–4, Requirements R1 and R7. Proposed Reliability Standard TPL–001–4 also includes the footnote 12 stakeholder process. Based on the results of NERC's data request (NERC Petition, Exhibit F), there have been approximately 80 instances of planned non-consequential load loss under the currently-effective TPL Reliability Standards. The vast majority of these indicate a plan to

[23] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1792; *Mandatory Reliability Standards for the Bulk Power System,* 131 FERC ¶ 61,231 at P 21.

[24] NERC Petition at 11.

[25] Requirement R2, Part 2.7.3 addresses situations that are beyond the control of the planner that prevent the implementation of a corrective action plan in the required timeframe.

[26] 44 U.S.C. 3507(d) (2006).

[27] 5 CFR 1320.11 (2012).

mitigate the planned non-consequential load loss within a 5 year period, and approximately 75 percent of the approximately 80 instances have planned non-consequential load loss less than 25 MW. The Commission does not expect the instances of planned non-consequential load loss to materially change from the existing number. Therefore, the Commission estimates 16 annual uses (80 instances divided by a 5 year period) of Attachment 1 with 12 of those instances (approximately 75 percent of the estimated annual total) using sections I and II of Attachment 1 and 4 instances using sections I, II and III of Attachment 1 of Reliability Standard TPL–001–4.

27. *Public Reporting Burden:* The burden and cost estimates below are based on the increase in the reporting and recordkeeping burden imposed by the proposed Reliability Standards. Our estimates are based on the NERC Compliance Registry as of February 28, 2013, which indicate that NERC has registered 183 transmission planners and planning coordinators.

Improved requirement[28]	Year	Number and type of entity[29] (1)	Number of annual responses per entity (2)	Average number of paperwork hours per response (3)	Total burden hours (1)*(2)*(3)
Identification of Joint Responsibilities and System Modeling Enhancements[30].	Year 1	183 Transmission Planners and Planning Coordinators.	1 response	9 (5 engineer hours and 4 record keeping hours).	1,647
	Year 2 and Year 3.	183 Transmission Planners and Planning Coordinators.	1 response	5 (3 engineer hours and 2 record keeping hours).	915
New Assessments, Simulations, Studies, Modeling Enhancements and associate Documentation[31].	Year 2	183 Transmission Planners and Planning Coordinators.	1 response	145 (84 engineer hours, 61 record keeping hours).	26,535
	Year 3	183 Transmission Planners and Planning Coordinators.	1 response	84 (45 engineer hours, 39 record keeping hours).	15,372
Attachment 1 stakeholder process.	Year 3	1 Transmission Planner and Planning Coordinator.	12 responses to Attachment 1, sections I and II.	63 (40 engineer hours, 17 record keeping hours, 6 legal hours).	756
	Year 3	1 Transmission Planner and Planning Coordinator.	4 responses to Attachment 1, Sections I, II, and III.	68 (40 engineer hours, 20 record keeping hours, 8 legal hours).	272

Costs to Comply with Paperwork Requirements:

- Year 1: $77,592.
- Year 2: $1,312,659.
- Year 3 and ongoing: $820,149.

28. Year 1 costs include the implementation of those improved requirements that become effective on the first day of the first calendar quarter, 12 months after applicable regulatory approval, which include requirements such as coordination between entities and incremental system modeling enhancements. Year 2 costs include a portion of year 1 reoccurring costs plus the implementation of the remaining improved requirements that become effective on the first day of the first calendar quarter, 24 months after applicable regulatory approval, which include requirements such as sensitivity studies for steady state and stability analysis, implementation of a spare equipment strategy, short circuit studies, an expansion of contingencies and extreme events, and all associated system modeling enhancements and documentation. Year 3 costs include a portion of year 2 reoccurring costs plus an estimated cost for Attachment 1 stakeholder process, if needed.

29. For the burden categories above, the loaded (salary plus benefits) costs are: $60/hour for an engineer; $31/hour for recordkeeping; and $128/hour for legal.[32] The estimated breakdown of annual cost is as follows:

- Year 1
  - Identification of Joint Responsibilities and System Modeling Enhancements: 183 entities * [(5 hours/response * $60/hour) + (4 hours/response * $31/hour)] = $77,592.
- Year 2
  - Identification of Joint Responsibilities and System Modeling Enhancements: 183 entities * [(3 hours/response * $60/hour) +
  - (2 hours/response * $31/hour)] = $44,286.
  - New Assessments, Simulations, Studies, Modeling Enhancements and associated Documentation: 183 entities * [(84 hours/response * $60/hour) + (61 hours/response * $31/hour)] = $1,268,373.
- Year 3
  - Identification of Joint Responsibilities and System Modeling Enhancements: 183 entities * [(3 hours/response * $60/hour) +
  - (2 hours/response * $31/hour)] = $44,286.
  - New Assessments, Simulations, Studies, Modeling Enhancements and associated Documentation: 183 entities * [(45 hours/response * $60/hour) + (39 hours/response *

[28] Each requirement identifies a reliability improvement by proposed Reliability Standard TPL–001–4.

[29] NERC registered transmission planners and planning coordinators responsible for the improved requirement. Further, if a single entity is registered as both a transmission planner and planning coordinator, that entity is counted as one unique entity.

[30] The Commission estimates a reduction in burden hours from year 1 to year 2 because year 1 represents a portion of one-time tasks not repeated in subsequent years.

[31] The Commission estimates a reduction in burden hours from year 2 to year 3 because year 2 represents a portion of one-time tasks not repeated in subsequent years.

[32] Labor rates from Bureau of Labor Statistics (BLS) (*http://bls.gov/oes/current/naics2_22.htm*). Loaded costs are BLS rates divided by 0.703 and rounded to the nearest dollar (*http://www.bls.gov/news.release/ecec.nr0.htm*).

$31/hour)] = $715,347.

○ Implementation of footnote 12 and the stakeholder process: {12 responses * [(40 hours/response * $60/hour) + (17 hours/response * $31/hour) + (6 hours/response * $128/hour)]} + {4 responses * [(40 hours/response * $60/hr) + (20 hours/response * $31/hour) + (8 hours/response * $128/hour)]} = $60,516.

The Commission seeks comment on the costs to comply with the paperwork requirements.

Title: FERC–725A, Mandatory Reliability Standards for the Bulk Power System

Action: Proposed Collection of Information

OMB Control No: 1902–0244

Respondents: Business or other for profit, and not for profit institutions.

Frequency of Responses: Annually and one-time.

Necessity of the Information: The proposed Reliability Standard TPL–001–4, if adopted, would implement the Congressional mandate of the Energy Policy Act of 2005 to develop mandatory and enforceable Reliability Standards to better ensure the reliability of the nation's Bulk-Power System. Specifically, the proposal would ensure that planning coordinators and transmission planners establish transmission system planning performance requirements within the planning horizon to develop a bulk electric system that will operate reliability and meet specified performance requirements over a broad spectrum of system conditions to meet present and future system needs.

Internal review: The Commission has reviewed the revised Reliability Standard TPL–001–4 and made a determination that its action is necessary to implement section 215 of the FPA. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

30. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, Office of the Executive Director, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, email: *DataClearance@ferc.gov,* phone: (202) 502–8663, fax: (202) 273–0873].

31. Comments concerning the information collections proposed in this NOPR and the associated burden estimates, should be sent to the Commission in this docket and may also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at the following email address: *oira_submission@omb.eop.gov.* Please reference OMB Control Number 1902–0244 and the docket numbers of this Notice of Proposed Rulemaking (Docket Nos. RM12–1–000 and RM13–9–000) in your submission.

IV. Environmental Analysis

32. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[33] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[34] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

V. Regulatory Flexibility Act Analysis

33. The Regulatory Flexibility Act of 1980 (RFA)[35] generally requires a description and analysis of Proposed Rules that will have significant economic impact on a substantial number of small entities. As discussed above, proposed Reliability Standard TPL–001–4 would apply to 183 transmission planners and planning coordinators identified in the NERC Compliance Registry. Comparison of the NERC Compliance Registry with data submitted to the Energy Information Administration on Form EIA–861 indicates that, of the 183 registered transmission planners and planning coordinators registered by NERC, 41 may qualify as small entities.[36]

34. The Commission estimates that, on average, each of the 41 small entities affected will have an estimated cost of $1,324 in Year 1, $16,953 in Year 2 and $11,471 in Year 3 (without Attachment 1). In addition, based on the results of NERC's data request approximately 10 percent of all registered transmission planners and planning coordinators used planned non-consequential load loss under the currently-effective TPL Standards. The Commission estimates that approximately 4 of the 41 small entities would use the stakeholder process set forth in Attachment 1. The total estimated cost per response for each of these 4 small entities in Year 3 is approximately $19,500 if Attachment 1, sections I and II are used, or $20,000 if Attachment 1, sections I, II and III are used. These figures are based on information collection costs plus additional costs for compliance.

35. The Commission does not consider this to be a significant economic impact for small entities because it should not represent a significant percentage of the operating budget. Accordingly, the Commission certifies that this Proposed Rule will not have a significant economic impact on a substantial number of small entities. The Commission seeks comment on this certification.

VI. Comment Procedures

36. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due June 24, 2013. Comments must refer to Docket Nos. RM12–1–000 and RM13–9–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

37. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

38. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington DC, 20426.

39. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document

[33] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[34] 18 CFR 380.4(a)(2)(ii).

[35] 5 U.S.C. 601–12.

[36] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act (SBA), which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 15 U.S.C. 632 (2006). According to the Small Business Administration, an electric utility is defined as ''small'' if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

40. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

41. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

42. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

(Issued May 16, 2013)

Norris, Commissioner, *concurring:*

Ensuring the reliability of the electric grid is one of the essential jobs we have here at the Commission. There also must be a balance between protecting the reliability and security of the electric grid and recognizing the real world costs that consumers and local communities will have to bear with each reliability standard that NERC proposes and the Commission approves. That balance may be difficult to achieve, but I view it as part of our statutory responsibility to ensure that mandatory reliability standards are ''just, reasonable, not unduly discriminatory or preferential, and in the public interest.'' [37]

I agreed with the Commission's April 19, 2012 decision to remand NERC's proposed Transmission Planning Reliability Standard footnote 'b' (now renamed footnote 12) because it was vague, potentially unenforceable, and lacked adequate safeguards to determine when planning to shed firm load would be permitted. However, I wrote separately because the order failed to recognize that this issue is both an economic and reliability issue, and therefore must balance those two concerns.

NERC has submitted another change to its proposed reliability standard, which again modifies the planned consequential load loss provision. I am very encouraged by NERC's latest submittal and the Commission's proposal to accept it. NERC's proposal goes a long way towards empowering local communities to consider the economic tradeoffs between incurring costs to avoid shedding firm load versus planning to shed firm load, while still ensuring that the decision-making process is more open and transparent and building in a safeguard for NERC to review decisions for possible adverse reliability impacts. While consumers and local communities should be able to make decisions about an acceptable level of local reliability versus the economic tradeoffs for achieving that level of reliability, I agree that there must be a check to ensure that those decisions do not affect their neighbors and the bulk electric system. I believe this proposal is a step in the right direction, but will carefully consider any comments that entities file regarding the proposed modification.

For these reasons, I respectfully concur.

John R. Norris,

Commissioner.

[FR Doc. 2013–12139 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

[37] *See* 16 U.S.C. 824o(d)(2).

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 261 and 291

RIN 0596–AC95

Paleontological Resources Preservation

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed rule; request for comment.

SUMMARY: The U.S. Department of Agriculture (USDA) is proposing to implement regulations under the Omnibus Public Land Management Act of 2009 paleontological resources preservation subtitle (the Act). This proposed rule would provide for the preservation, management, and protection of paleontological resources on Federal lands, and insure that these resources are available for current and future generations to enjoy as part of America's national heritage. The rule would address the management, collection, and curation of paleontological resources from Federal lands including management using scientific principles and expertise, collecting of resources with and without a permit, curation in an approved repository, maintaining confidentiality of specific locality data, and authorizing penalties for illegal collecting, sale, damaging, or otherwise altering or defacing paleontological resources.

DATES: Comments must be received in writing by July 22, 2013.

ADDRESSES: Written comments concerning this notice should be addressed to USDA Forest Service, Michael Fracasso, M&GM, 740 Simms Street, Golden, CO 80401. Comments may also be made by the electronic process available at the Federal e-Rulemaking portal at *http://www.regulations.gov.* All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Office of Minerals and Geology Management, Forest Service, MGM, Room 500–RPC, 1601 N. Kent St., Arlington, Virginia between the hours of 8:30 a.m. and 4:30 p.m. Visitors are encouraged to call ahead to 703–605–4545 to facilitate entrance to the building.

Comments concerning the information collection requirements contained in this action should reference OMB No. 0596–0082, the docket number, date, and page number of this issue of the **Federal Register**. Comments should be sent to the address listed in the above paragraph.

FOR FURTHER INFORMATION CONTACT: For information on the substance of the proposed rule, please contact Michael Fracasso, Forest Service, at 303–275–5130, or *mfracasso@fs.fed.us.* Individuals who use telecommunications devices 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 Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Need for the Proposed Rule

The Paleontological Resources Preservation subtitle of the Omnibus Public Land Management Act, 16 U.S.C.

470aaa to aaa–11 (the Act), requires the USDA and the U.S. Department of the Interior (DOI) to issue implementation regulations. In accordance with 16 U.S.C. 470aaa–1 of the Act, these regulations would serve to manage and protect paleontological resources on Federal land using scientific principles and expertise.

In FY 1999, the Interior Appropriations Subcommittee requested that the DOI, the Forest Service, and the Smithsonian Institution prepare a report on fossil resource management on public lands (see S. Rep. 105–227, at 60 (1998)). The request directed the agencies to analyze (1) the need for a unified Federal policy for the collection, storage, and preservation of fossils; (2) the need for standards that would maximize the availability of fossils for scientific study; and (3) the effectiveness of current methods for storing and preserving fossils collected from public lands. During the course of preparing the report, the agencies held a public meeting and gathered public input. The DOI report to Congress, ''Assessment of Fossil Management of Federal and Indian Lands,'' was published in May 2000. The Paleontological Resources Preservation Act (PRPA) was introduced in the 107th Congress after the report was released. The PRPA was modeled after the Archaeological Resources Protection Act (ARPA) and emphasized the recommendations and guiding principles in the May 2000 report. The legislation was reintroduced in subsequent Congresses through the 111th Congress when it was combined with other natural resources legislation in an omnibus bill that became law on March 30, 2009 (the Act).

The Act requires that implementation be coordinated between the Secretaries of Agriculture and Interior (Secretaries) (16 U.S.C. 470aaa–1). Accordingly, the USDA and the DOI formed an interagency coordination team (ICT) in April 2009 to draft the proposed regulations. Members of the ICT included program leads for paleontology, archaeology, and regulatory specialists from the Forest Service, DOI Bureau of Land Management (BLM), National Park Service (NPS), Bureau of Reclamation (BOR), and Fish and Wildlife Service (FWS).

Section by Section Explanation of the Proposed Rule

Part 291—Paleontological Resources Preservation

This part would contain regulations on the management, protection, and preservation of paleontological resources on Forest Service land using scientific principles and expertise, including the collection of paleontological resources with and without a permit, curation of paleontological resources in approved repositories, confidentiality of paleontological locality information, and criminal and civil penalties.

Section 291.1 Purpose

The proposed regulations would provide for the preservation, management, and protection of paleontological resources on Forest Service lands. Legislative history [1] of the Act demonstrates that it was enacted to preserve these resources for current and future generations because paleontological resources are nonrenewable and are an irreplaceable part of America's natural heritage.

This section would clarify that the Secretary of Agriculture (Secretary) will manage and protect paleontological resources on Forest Service land using scientific principles and expertise. This section would clarify that science, rather than other values, will be the primary management tool for paleontological resources on Forest Service lands. The regulations would provide for the coordinated management of paleontological resources and promote research, public education, and public awareness.

Section 291.2 Authorities

Section 291.2 would cite the Paleontological Resources Preservation subtitle of the Omnibus Public Land Management Act (the Act) under which the proposed regulations are promulgated.

Section 291.3 Exceptions

Section 291.3 would address the scope of the regulations, based on 16 U.S.C. 470aaa–10 of the Act.

This section would state that the regulations would not invalidate, modify, or impose any additional restrictions or permitting requirements for activities permitted under the general mining laws, the mineral or geothermal leasing laws, laws providing for minerals materials disposal, or laws and authorities relating to reclamation and multiple uses of Federal land. The USDA would continue to use other applicable laws and regulations as the authority for such restrictions or requirements. The USDA would be authorized to cite the Act or these proposed regulations as needed for the protection of paleontological resources when planning, managing, regulating, or permitting various activities on the Forest Service lands covered by the Act.

Section 291.3(c) would state that Indian lands, as defined in these regulations, are exempt from the scope of the regulations.

Section 291.3(e) would state that the proposed regulations would not apply to, or require a permit for, casual collecting of a rock, mineral, or fossil that is not protected under the Act and the proposed regulations. Such rocks, minerals, and fossils are covered by other laws, regulations, and policies.

Section 291.3(f) would state that the proposed regulations would not affect any land other than Federal land or affect the lawful recovery, collection, or sale of paleontological resources from land other than Federal land. ''Federal land'' would be defined in the Act and the regulations as lands that are controlled or administered by the Secretary, except Indian land. In some circumstances, the Secretary may administer lands that are not owned by the United States. Such lands fall within the definition of Federal land within these regulations, and therefore, would be subject to the Act and these regulations.

Section 291.3(g) would state that members of the general public do not obtain any rights or privileges from the Act or the proposed regulations and cannot sue the U.S. Government to enforce its provisions.

Section 291.4 Preservation of Existing Authorities

Section 291.4 would be based on 16 U.S.C. 470aaa–10(5) of the Act. This section would preserve the Forest Service's existing legal and regulatory authorities for managing and protecting paleontological resources in addition to protecting such resources under the Act or the proposed regulations.

Section 291.5 Definitions

Section 291.5 would contain the definitions and terms as defined in the Act or used in these proposed regulations. This section would include six terms defined by 16 U.S.C. 470aaa of the Act: *casual collecting, Federal land, Indian land, paleontological resource, Secretary,* and *State.* In addition, this section would define the terms *reasonable amount, common invertebrate and plant paleontological resources,* and *negligible disturbance.* 16 U.S.C. 470aaa of the Act required the

[1] S. 2727: 148 Cong. Rec. S. 6708–6709 (2002) (Statement of Sen. Akaka); S. 546: S. Rep. 108–93 (2003); S. 263: S. Rep. 109–36 (2005); S. 320: 153 Cong. Rec. S. 691–693 (2007) (Statement of Sen. Akaka) and S. Rep. 110–18 (2007); H.R. 554: H. Rep. 110–670, Part 1; and S. 22: 155 Cong. Rec. S. 426 (2009) (Statement of Sen. Akaka).

Secretary to define those terms in the implementing regulations. Lastly, this section would define terms used in the proposed regulations that may not be broadly understood or that may be defined differently elsewhere, in order to clarify their meaning for these proposed regulations.

1. The term *Act* means Title VI, Subtitle D of the Omnibus Public Land Management Act on Paleontological Resources Preservation (16 U.S.C. 470aaa through 470aaa–11).

2. The term *associated records* would delineate the types of information that are required by 16 U.S.C. 470aaa–4 of the Act to be deposited in an approved repository.

3. The term *authorized officer* means the person or persons to whom authority has been delegated by the Secretary to take action under the Act.

4. The term *casual collecting* would restate the definition contained in 16 U.S.C. 470aaa of the Act. To be considered *casual collecting,* the activity would mean all of the following: Collecting of a reasonable amount of common invertebrate or plant paleontological resources for non-commercial personal use, either by surface collection or the use of non-powered hand tools, resulting in only negligible disturbance to the Earth's surface and other resources.

5. The term *collection,* as used in Sections 291.21 through 291.26 of the proposed regulations, would mean paleontological resources and any associated records resulting from excavation or removal from Federal lands under a permit.

6. The term *common invertebrate and plant paleontological resources* would clarify the types of paleontological resources that may be casually collected in accordance with the Act and the proposed regulations. The proposed definition would incorporate the plain meaning of common, which means plentiful and not rare or unique. The proposed definition would also incorporate a geographical factor of wide-spread distribution, which means that the resource is distributed over a relatively large geographical area. The proposed definition would also clarify that not all invertebrate and plant paleontological resources are common; some are not common because of their context or other characteristics and, therefore, are not eligible for casual collection. The determination of whether invertebrate and plant fossils are common or not common will be made by the authorized officer using scientific principles and methods in accordance with section 291.9(c).

7. The term *consumptive analysis* would mean the alteration, removal, or destruction of a paleontological specimen, or parts thereof, from a collection for scientific research.

8. The terms *curatorial services* and *curation* would specify the minimal professional museum and archival standards employed in the long-term management and preservation of a collection.

9. The term *Federal land* would restate the definition contained in 16 U.S.C. 470aaa of the Act, would mean land controlled by the Secretary except for Indian land as defined in 16 U.S.C. 470aaa.

10. The term *fossil* would mean any remains, traces, or imprints of organisms that have been fossilized or preserved in or on the Earth's crust. In informal usage, the term *fossil* tends to be used interchangeably with the term *paleontological resource.* However, under 16 U.S.C. 470aaa of the Act and these proposed regulations, a *fossil* may not necessarily be a *paleontological resource.* Remains, traces, or imprints of organisms (i.e., *fossils*) are only considered *paleontological resources* under the Act and the proposed regulations if they are: (1) Fossilized, (2) of paleontological interest, and (3) provide information about the history of life on earth. Therefore, paleontological resources are fossils that have paleontological interest and provide information about the history of life on earth. An example of a fossil that may not be a paleontological resource because it lacks paleontological interest and provides negligible information about the history of life on earth would be an isolated, unidentifiable fragment of an otherwise common invertebrate fossil that was eroded from its native geologic occurrence and subsequently found in a stream bed far from its point of origin.

11. The term *fossilized* as used in the definition of *paleontological resources* would mean preserved by natural processes, such as burial in accumulated sediments, preservation in ice or amber, replacement by minerals, or alteration by chemical processes such as permineralization whereby minerals are deposited in the pore spaces of the hard parts of an organism's remains. This definition would be adapted from the definition of fossilization in the American Geological Institute's Glossary of Geology (Fifth Edition, 2005, ISBN 0–922152–76–4).

12. The term *Indian land* would restate the definition contained in Section 16 U.S.C. 470aaa of the Act.

13. The term *negligible disturbance* as used in the definition of *casual collecting* would clarify that casual collection of common invertebrate and plant fossils may only result in little or no change to the land surface and have minimal or no effect on other resources such as cultural resources and protected or endangered species. Disturbance caused by powered and/or large non-powered hand tools would exceed the ''negligible'' threshold and would no longer be casual collection.

14. The term *non-commercial personal use* as used in the definition of *casual collecting* would clarify the types of use allowed under casual collection, and would mean uses other than for purchase, sale, financial gain, or research. Common invertebrate and plant paleontological resources collected for research purposes is not personal use and would need to be authorized under a permit in accordance with Sections 291.13 through 291.20. Exchange of common invertebrate and plant paleontological resources among casual collectors would be permissible as long as such resources were collected in accordance with the Act and the proposed regulations.

15. The term *non-powered hand tools* as used in the definition of *casual collecting* would clarify the types of tools that can be used for the casual collecting of common invertebrate and plant paleontological resources, and would mean small tools that can be readily carried by hand, such as geologic hammers, trowels, or sieves, but not large tools such as full sized-shovels or pick axes. Larger tools are more likely to create disturbance that is greater than ''negligible.'' The tools must not be powered by a motor, engine, or other power source.

16. The proposed definition of the terms *paleontological locality, location,* and *site* would mean a geographic area where a paleontological resource is found. Localities, locations, and sites may be as small as a single point on the ground or as large as the area of an outcrop of a formation in which paleontological resources are found. The term *paleontological site* would be used interchangeably with *paleontological locality* or *location. Site* as used in the Act and these regulations does not mean an ''archaeological site'' as used in the Archaeological Resources Protection Act and its regulations.

17. The term *paleontological resource* would restate the definition contained in 16 U.S.C. 470aaa of the Act. All remains, traces, or imprints of organisms are *paleontological resources* when they are (1) Fossilized, (2) of paleontological interest, and (3) provide information about the history of life on

earth. The term *paleontological resources* as used in the Act and the proposed regulations would not include any materials associated with an archaeological resource as defined in the Archaeological Resources Protection Act or any cultural items as defined in the Native American Graves Protection and Repatriation Act.

18. The term *reasonable amount* as used in the definition of *casual collecting* would quantify the maximum amount of common invertebrate and plant paleontological resources that could be removed from Federal lands. A person may remove up to one gallon of material in volume or 25 pounds in weight, and up to five specimens of each type of fossil per calendar year. If the fossil specimens are contained within rock slabs, the reasonable amount would be limited to a slab that can be hand-carried by one person without the aid of mechanical devices. The authorized officer may modify the amount that is reasonable in order to preserve fossil-bearing locations that may be at risk of being depleted, thereby preserving paleontological resources in accordance with the Act.

19. The term *repository* would identify the types of facilities into which collected paleontological resources would be deposited as required by 16 U.S.C. 470aaa–4 of the Act.

20. The term *repository agreement* would mean a formal written agreement between the authorized officer and an approved repository official containing the terms, conditions, and standards by which the repository would agree to provide curatorial services for collections.

21. The term *repository official* would identify any officer, employee, or agent who is authorized by the repository to take certain actions on behalf of the repository, including the acceptance of collections and providing long-term curatorial services for collections.

22. The term *Secretary* as used in these proposed regulations and defined in 16 U.S.C. 470aaa of the Act would mean the Secretary of Agriculture.

23. The term *State* would restate the definition contained in 16 U.S.C. 470aaa of the Act.

Section 291.6 Confidentiality of Information—General

Paragraph 291.6(a) would implement the confidentiality provision contained at 16 U.S.C. 470aaa–8 of the Act. This provision constitutes a statutory exemption from the disclosure requirements of 5 U.S.C. 552 (Freedom of Information Act) and other laws. For example, information about the nature and specific location of paleontological resources on National Forest System lands in an inventory document, scientific report, repository records, National Environmental Policy Act documents, or interpretive information, or information contained in existing agency documents and records such as prior permits, may be withheld from disclosure or release to non-agency personnel, unless the authorized officer determines in writing that disclosure would (1) Further the purposes of the Act and the proposed regulations, (2) not create risk of harm to or theft or destruction of the resource or the site containing the resource, and (3) be in accordance with other applicable laws. This section would not limit the Forest Service's authority to release information concerning the general location of paleontological resources.

Paragraph 291.6(b) would clarify that certain sharing of information concerning the nature and specific location of a paleontological resource does not constitute a disclosure or a release of that information. The Forest Service may wish to share information with certain non-agency personnel for scientific, educational, or resource management purposes, without waiving the statutory exemption from disclosure provided by the Act. In such situations, the authorized officer may share this information only with recipients who sign a confidentiality agreement in which the recipient agrees not to share the information with anyone else.

Section 291.7 Public Awareness and Education

Section 291.7 would restate the provision in 16 U.S.C. 470aaa–2 of the Act for establishing a public awareness and education program about the significance of paleontological resources on Federal lands.

Section 291.8 Area Closures

Section 291.8 would implement 16 U.S.C. 470aaa–3(e) of the Act providing for restricting access to or closing areas to the collection of paleontological resources in order to protect paleontological or other resources or to provide for public safety. Closure of an area to non-collecting activities would continue to be authorized under separate authorities where appropriate.

Section 291.9 Determination of Paleontological Resources

Section 291.9 would only apply to National Forest System lands administered by the Forest Service. Because of the Forest Service's multiple use mandates, there may be situations where a determination of what is or is not a paleontological resource would be necessary to avoid resource or land-use conflicts such as under the 1897 Organic Act or the Multiple Use Sustained Yield Act.

Paragraph 291.9(a) would state that all paleontological resources from Forest Service administered lands are to be managed, protected, and preserved under the proposed regulations, unless a determination is made that they are not paleontological resources in accordance with paragraph 291.9(b).

Paragraphs 291.9(b) and 291.9(c) would provide the authorized officer with a process to determine whether certain fossils should or should not be managed as paleontological resources as defined under the Act or the proposed regulations. Not all fossils are paleontological resources, as explained earlier in this preamble in the discussion of paragraph 291.5 (10) of these proposed regulations. This determination would be based on scientific principles and methods, would be documented in writing, be prepared by a qualified paleontologist, and would provide the necessary framework to adhere to the savings provisions at 16 U.S.C. 470aaa–10 while satisfying the mandate at 16 U.S.C. 470aaa–1 that requires management using scientific principles and expertise. Such determinations may change over time as new information comes to light about the fossil. Fossils associated with an archaeological resource as defined in the Archaeological Resources Protection Act or any cultural items as defined in the Native American Graves Protection and Repatriation Act are considered to be heritage resources and are not paleontological resources.

Paragraph 291.9(d) would affirm that mineral resources on National Forest System land, such as coal, oil, natural gas, and other economic minerals which are subject to the existing mining and mineral laws, are not paleontological resources. Petrified wood as defined at 30 U.S.C. 611 means ''agatized, opalized, petrified, or silicified wood or any material formed by the replacement of wood by silica or other matter,'' and is a mineral material. However, in accordance with paragraph 291.9(a), the authorized officer may determine that an occurrence of petrified wood is a paleontological resource and should be protected and preserved accordingly. Microfossils that occur on National Forest System lands, such as conodonts and invertebrates that are individually too small to be studied without a microscope, are not considered paleontological resources for the purposes of the Act. Vertebrate fossils, including microvertebrate fossils, are

always considered paleontological resources. Geological and soil units, including, but not limited to, limestones, diatomite, chalk beds, and fossil soils (i.e. paleosols) that are intrinsically composed of fossil remains, but may be considered to be mineral materials or fossil soils, are not paleontological resources under the Act or the proposed regulations.

Section 291.10 Collecting

Section 291.10 would restate Section 16 U.S.C. 470aaa–3(a)(1) and (2) of the Act, which directs that a paleontological resource may only be collected from lands administered by the Forest Service in accordance with a permit issued by the authorized officer under these proposed regulations, except for casual collecting.

Section 291.11 Casual Collecting on National Forest System Lands

Section 291.11 would restate 16 U.S.C. 470aaa–3(a)(2) of the Act that allows for casual collecting without a permit on certain Federal lands. Casual collecting, as defined in Section 291.5, would be allowed on National Forest System lands where such collection is consistent with the laws governing the management of those lands and these proposed regulations. National Forest System lands would generally be considered open to casual collection unless otherwise closed to such casual collection as described in Section 291.12. Paragraphs 291.11(d) and (e) would state that the authorized officer can use the process in paragraph 291.9(c) to make a determination that certain invertebrate or plant fossils are not common, and therefore, cannot be casually collected and must be collected under a permit. Paragraph 291.11(d) would provide the authorized officer with the ability to protect invertebrate and plant fossils when they are not common.

Paragraph 291.11(e) would clarify that it is the responsibility of the collecting public to ensure that areas in which they are proposing to casually collect common invertebrate or plant fossils have not been closed to casual collection for reasons as described in Section 291.12. Information regarding area closures would generally be available from the local district office. Paragraph 291.11(f) would clarify that paleontological resources collected from Forest Service land in accordance with the casual collection provisions of Section 291.11 cannot be sold.

Section 291.12 National Forest System Lands Closed to Casual Collection

Paragraphs 291.12(a) and (b) would clarify that casual collecting is prohibited on National Forest System lands that are closed to casual collecting under these regulations, other statutes, Executive orders, regulations, and land use plans. In addition, paragraph 291.12(b) clarifies that NFS lands that were closed to casual collecting prior to the Act remain closed to casual collecting.

Section 291.13 Permits

Paragraph 291.13(a) would restate 16 U.S.C. 470aaa–3(b)(1 through 4) of the Act which are the criteria for issuing permits for the collection of paleontological resources from Federal lands.

Paragraph 291.13(b) would clarify that issuance of a permit is within the discretion of the authorized officer.

At present, Forest Service permits for paleontological resource activities such as collection and resource inventory surveys are issued as special use authorizations. Current paleontological resource permitting practices do not preclude development of paleontology-specific use permits as authorized under the Act which would be issued and administered by the Forest Service Minerals and Geology Management program apart from the special uses program. Development of such a paleontology-specific permit to authorize collection of paleontological resources is associated with the proposed information collection which is described in this preamble in the section titled *Controlling Paperwork Burdens on the Public.*

Section 291.14 Application Process

Section 291.14 would set forth the information that must be submitted by permit applicants to the authorized officer for the proposed collection of paleontological resources. The Forest Service may require additional information in order to support an application for a permit.

Section 291.15 Application Qualifications and Eligibility

Paragraph 291.15(a) would clarify what information is needed from an applicant to demonstrate, to the satisfaction of the authorized officer, that the applicant is qualified to carry out the proposed permitted activity. These qualifications are important to ensure that the collection would be carried out in a professional and responsible manner.

Paragraph 291.15(b) would clarify that the information submitted by an applicant must demonstrate that the proposed activity is eligible for a permit, in accordance with 16 U.S.C. 470aaa–3(b)(2)–(4) of the Act.

Section 291.16 Terms and Conditions

Paragraphs 291.16(a), (b) and (c) would restate 16 U.S.C. 470aaa–3 (c)(1) through (3) of the Act in specifying requirements for the issuance of a permit for the collection of paleontological resources. The permittee would acknowledge that paleontological resources collected from Federal lands under a permit remain property of the United States; that the paleontological resources collected, along with associated records, would be preserved for the public in an approved repository to be made available for scientific research and public education; and that specific locality data would be kept confidential.

Paragraphs 291.16(d) through (r) would establish requirements to ensure that all permitted activities would comply with and further the purposes of the Act, the proposed regulations, any additional stipulations, and other Forest Service contract authorities and requirements.

Paragraph 291.16(r) would provide for the incorporation of additional permit stipulations, as may be appropriate, that were not otherwise listed in paragraphs 291.16(a) through (q). Examples of such additional stipulations would include, but not be limited to, reclamation plans and posting of reclamation bonds. The addition of permit terms, conditions, or stipulations requiring a reclamation plan or bond, or both, to ensure reclamation of surface disturbance associated with paleontological resource collections would be at the discretion of the authorized officer under these regulations, and such requirements would be based on conditions specific to the authorized activity.

Section 291.17 Permit Reports

Section 291.17 would list the information that will be necessary for permittees to include in the reports required under a permit to conduct paleontological activities. This information is required in order to address 16 U.S.C. 470aaa–1 which states that the Secretary shall manage paleontological resources using scientific principles and expertise.

Section 291.18 Modification of Permits

Section 291.18 would provide the framework for the modification of permits, in accordance with 16 U.S.C. 470aaa–3(d) of the Act. Examples of a permittee's request for permit modification would include, but would

not be limited to: Changes to the persons listed on the permit, changes to the scope of work (including, but not limited to, geographic area, analysis or collecting techniques, or geologic strata), change of the designated approved repository, or changes to the permit timelines. Modification of a permit would be discretionary on the part of the authorized officer (see paragraph 291.13(b)). Notifications regarding modifications would be in writing.

Section 291.19 Suspension and Revocation of Permits

Paragraphs 291.19(a) and (b) would provide for the suspension or revocation of permits in accordance with 16 U.S.C. 470aaa–3 (d)(1) and (2) of the Act. Suspensions would address a variety of management issues that may or may not be due to any fault of the permittee. For example, the authorized officer would be able to suspend a permit if conditions relating to other resources have changed. The authorized officer would also be able to suspend a permit for any violation of a term or condition of the permit, such as exceeding the approved scope of work.

A permit may also be suspended if permittee becomes ineligible to hold a permit. Examples of ineligibility include, but are not limited to, situations where the permittee is responsible for resource damage, if the approved repository is no longer available, or if the permittee provided false information to the authorized officer as part of the application for the permit.

A suspended permit may be revoked if the permittee fails to correct the reason(s) for the suspension in accordance with the notification by the authorized officer. Permits that are suspended for reasons other than the permittee's conduct (for example, resource management closures, wildfires, and so forth) will not be revoked. Such circumstances will result in continued permit suspension until the situation is corrected, or in some cases, the permit may be modified.

Section 291.20 Appeals

Section 291.20 would clarify that a permittee may appeal the denial or revocation of a permit in accordance with 36 CFR Part 251. Procedures for appealing a permit revocation or denial are set forth in 36 CFR Part 251.

Section 291.21 Curation of Paleontological Resources

Section 291.21 would clarify that paleontological resources from Federal lands collected under a permit issued under these regulations must be deposited in an approved repository. Collections made from Federal lands before the effective date of these regulations would be covered under the terms of the original collection permit or agreement. Such instruments remain in effect and the collections remain Federal property. Repositories are encouraged to work with the Forest Service to ensure that the care of pre-existing collections meet the minimum requirements of these regulations.

Section 291.22 Becoming an Approved Repository

Section 291.22 would state the requirements for becoming an approved repository. Paragraph 291.22(a) would state that the repository must meet the minimum standards in Section 291.23 and agree to certain terms and conditions. Paragraph 291.22(b) would state that the authorized officer and the repository official may enter into a formal curation agreement in accordance with Section 291.26. Paragraph 291.22 (c) would explain that the repository must agree to periodic inventories and inspections as described in Section 291.25. Paragraph 291.22(d) would clarify that the authorized officer in consultation with the repository official will make a determination of the content of the collection to be curated based on scientific principles and expertise. Paragraph 291.22(e) would explain that a repository that has been approved by one Federal agency may be considered approved by other Federal agencies. For example, a repository approved by the Forest Service may be considered approved by the Bureau of Land Management and vice versa.

Section 291.23 Minimum requirements of Approval of a Repository

Section 291.23 would state the minimum requirements that a repository must meet in order to be approved to provide long-term curatorial services for Federal paleontological collections. It is important to establish such requirements in these proposed regulations, rather than rely on standards contained in internal agency policy and guidance documents such as Department of the Interior Departmental Manual Part 411, in order to (1) Promote consistency between the Departments, (2) eliminate subjectivity in approving repositories, and (3) provide sufficient information to repositories seeking to become approved under the Act and the proposed regulations.

Section 291.24 Standards for Access and Use of Collections

Section 291.24 of the proposed regulations would provide repositories with consistent standards for access to and use of Federal collections in accordance with 16 U.S.C. 470aaa–3(c)(2) of the Act, which states that paleontological resources will be preserved for the public in approved repositories and be made available for scientific research and public education. This section would also addresses loans and reproductions, which increase the use and accessibility of paleontological resources consistent with professional and educational practices.

Paragraph 291.24(f) would clarify when repositories must obtain approval from the authorized officer before allowing certain uses that may subject the specimens to damage. These uses would include reproductions and consumptive analysis of specimens. Reproductions would include molding and casting, computerized axial tomography (CAT) scans, and three-dimensional (3–D) rendering. Reproductions help expand use and accessibility of collections for exhibition, research, education, and interpretation. Producing a mold and then a cast of a specimen will allow an exact duplicate upon which research and exhibition can take place without further damaging the original specimen. Paragraph 291.24(f)(2) would clarify that the approved repository may only allow consumptive analysis of specimens if the authorized officer, in consultation with an agency paleontologist, has determined that the potential gain in scientific or interpretive information outweighs the potential loss of the paleontological resource. Consumptive analysis would generally be limited to specimens that are not unique or fragile, or to a sample of specimens drawn from a larger collection of similar specimens.

Section 291.25 Conducting Inspections and Inventories of Collections

Section 291.25 would clarify the responsibilities of the authorized officer and the repository for inspections and inventories of Federal paleontological collections as required by the Federal Property and Administrative Services Act (40 U.S.C. 541 et seq) and its implementing regulations (41 CFR Parts 101 and 102) and guidance which require periodic inspections. The responsibilities of the repositories for the stewardship of Federal paleontological collections would be clarified by citing these authorities in the proposed regulations. It is important for repositories to know that after a

Federal paleontological collection is placed in an approved repository, the authorized officer still retains the ultimate responsibility to ensure that the collection is adequately accounted for and maintained on behalf of the Federal government.

Section 291.26 Repository Agreements

Paragraph 291.26(a) would clarify that the authorized officer may, on behalf of the agency, enter into agreements with approved repositories. Such agreements would define curation responsibilities of the approved repositories and promote consistency in collections management.

Paragraph 291.26(b) would specify the terms and conditions that would be included in a repository agreement, as appropriate. These terms and conditions would be consistent with those that are required for repository agreements for Federal archeological resource collections at 36 CFR Part 79, but have been modified to be relevant for paleontological collections. It is important to include these terms and conditions in the proposed regulations to ensure consistency between the Departments, to provide adequate notice to current and potential repositories, and to provide standard treatment of paleontological resources originating from lands controlled or administered by the agency.

Paragraph 291.26(b)(8) would protect the confidentiality of specific paleontological locality data in collections.

Section 291.27 Prohibited Acts

Paragraph 291.27(a) would restate the prohibited acts contained in 16 U.S.C. 470aaa–5(a) of the Act.

Paragraph 291.27(b) would implement the false labeling prohibition contained in 16 U.S.C. 470aaa–5 (b) of the Act. The authorized officer would have discretion to consider whether false labeling was inadvertent in evaluating whether to seek penalties for instances of false labeling,

Section 291.28 Civil Penalty

Section 291.28 would provide that a person who violates any prohibition contained in these proposed regulations or in a permit issued under these proposed regulations may be assessed a penalty by the authorized officer, after the person is given notice and opportunity for a hearing with respect to the violation. For purposes of these proposed regulations, each violation is considered a separate offense.

The civil penalty provisions in the proposed regulations were modeled after the civil penalty regulations promulgated pursuant to the Archaeological Resources Protection Act, 16 U.S.C. 470aa–mm.

Section 291.29 Amount of Civil Penalty

Paragraph 291.29(a) would set forth the factors to be used by the authorized officer in determining the amount of the penalty, including the scientific or fair market value, whichever is greater, of the paleontological resource involved; the cost of response to and restoration and repair of the resource and the paleontological site involved; and other factors considered relevant by the authorized officer in the written response submitted under section 291.30. Paragraph 291.29(b) would also clarify that repeated violations could result in the doubling of the penalties. Such doubling may occur only after a conviction or an otherwise proven violation. Paragraph 291.29(c) would provide that the amount of any penalty assessed under this Section for any one violation would not exceed an amount equal to double the cost of response to and restoration and repair of resources and paleontological site damage plus double the scientific or fair market value of resources destroyed or not recovered, in accordance with 16 U.S.C. 470aaa–6(a)(3) and (a)(4) of the Act. This paragraph is intended to ensure that response costs may be included in the determination of penalty amounts. Paragraph 291.29(d) would provide that scientific and fair market values and the cost of response to and restoration and repair of the resource and the paleontological site involved are to be determined as described under Sections 291.37, 291.38, and 291.39.

Section 291.30 Civil Penalty Process

16 U.S.C. 470aaa–6(a) of the Act requires that any person assessed a penalty under the Act be given notice and opportunity for a hearing with respect to the violation. Section 291.30 would describe the process by which a civil penalty notice of violation is served on the person or party believed to be subject to a civil penalty, and the deadline and options for the person or party served with the notice to respond. Paragraph 291.30(a) would describe the contents of the civil penalty notice of violation that would be served on the person believed to be subject to a civil penalty, including a statement of facts in regard to the violation, the legal citation of that part of the Act or regulations that was violated, the amount of the proposed penalty, and the notice of the right to a hearing or judicial relief of the final administrative decision. This paragraph would require delivery by certified mail (return receipt requested) of these documents, rather than personal delivery as allowed by other regulations, in order to simplify compliance with the timeline required by this section. Paragraph 291.30(b) would explain that the recipient of the notice of violation has 45 calendar days to respond in accordance with this section. Paragraph 291.30(c) would describe the procedures which the authorized officer would use to assess the final amount of the penalty. Paragraph 291.30(d) would describe the factors that the authorized officer may consider in offering to modify or remit a penalty. Paragraph 291.30(e) would explain that after the authorized officer has determined the final amount of the civil penalty, a written notice of the assessed amount would be served to the recipient of the notice of violation. The notice of assessment would be served by some type of verifiable delivery, such as by certified mail, return receipt requested. Paragraph 291.30(f) would explain the procedures of how the recipient of a notice of violation or a notice of assessment would file for a hearing. A request for a hearing must be in writing, must include a copy of the notice, and must be sent by certified mail, return receipt requested. The request for a hearing must be filed within 45 calendar days of the mailing of the notice and failure to file a request within the timeframe would be considered a waiver of the right to a hearing. Paragraph 291.30(g) would explain what constitutes the final administrative decision of the civil penalty amount. Under a notice of violation, the final administrative decision is when the recipient agrees to the amount of the proposed civil penalty. Under a notice of assessment, when a recipient has not requested a hearing within the 45 calendar day timeframe, the amount of the civil penalty in the notice of assessment is the final administrative decision. Under a notice of assessment, when a recipient has filed a timely request for a hearing, the decision resulting from the hearing is the final administrative decision. Paragraph 291.30(h) would explain that the person who has been assessed a civil penalty has 45 calendar days after the final administrative decision is issued to make the payment unless a timely request was filed with the U.S. District Court as provided in section 291.32. Paragraph 291.30(i) would explain that assessment of a civil penalty under this section is not deemed a waiver of the right for the Federal government to pursue other available legal or administrative remedies.

Section 291.31 Civil Penalties Hearing Procedures

Title 16 U.S.C. 470aaa–6(c) of the Act requires that hearings for civil penalty proceedings be conducted in accordance with 5 U.S.C. 554 of the Administrative Procedures Act (APA). Section 291.31 describes the procedures by which civil penalty hearings shall be conducted.

Paragraph 291.31(a) would explain that the recipient of a notice of violation or assessment may file a written request for a hearing in the office specified in the notice. The recipient would need to enclose a copy of the notice with the request. The person requesting a hearing would be able to state their preference as to the place and date for a hearing, but any such requested locations must be situated within the United States and be reasonable to be considered. In all cases, the agency will retain discretion to decide the location of the hearing. Paragraph 291.31(b) would explain that upon receipt of the request for a hearing, the hearing office would assign an administrative law judge. Notification of the assignment of the judge would be given to all the parties involved, and from then on, all documentation for the proceedings must be filed with the administrative law judge and copies sent to the other party. Paragraph 291.31(c) would contain the procedures for appearances and practice before the administrative law judge. This paragraph would address the appearance by the respondent, that is, the recipient of the notice who has filed for a hearing, either in person, by representative, or by legal counsel. If the respondent or their representative fails to appear, the administrative law judge would determine if the failure to appear is without good cause. A failure to appear without good cause would be considered a waiver of the respondent's right to a hearing and the respondent's consent to the decision made at the hearing by the administrative law judge. Paragraph 291.31(d) would provide the details of the administration and the outcome of the hearing. This paragraph would declare that the administrative law judge has the authority of law to preside over the parties and the proceeding and to make decisions in accordance with the APA. This paragraph would explain what constitutes the final record for the proceedings and for the decision made by the administrative law judge for the final assessment of the civil penalty, would declare that the administrative law judge's decision is the final administrative decision of the agency, and would be effective 30 calendar days after the date of the decision.

Section 291.32 Petition for Judicial Review; Collection of Unpaid Assessments

16 U.S.C. 470aaa–6(b)(1) of the Act provides for petitions to the U.S. District Court for judicial review of decisions of a final assessment of civil penalties. Paragraph 291.32(a) would provide notice to the public about this right by restating the Act's provisions regarding judicial review of the final agency decision assessing a penalty under Sections 291.28 through 291.31, and describe the court's standard of review of the final agency decision. The respondent would have 30 calendar days from the date the agency decision was issued to file the petition. Paragraph 291.32(b) would clarify the provisions in 16 U.S.C. 470aaa–6(b)(2) of the Act that address the failure to pay a penalty assessed under sections 291.28 through 291.31. Failure to pay an assessed penalty within 30 calendar days of the issuance of the final agency decision would be considered a debt to the U.S. Government; the Secretary would be authorized to request the Attorney General to institute a civil action to collect the penalty, and the court would prohibit review of the validity, amount, and appropriateness of such penalty. If the Secretary does not institute a civil action, the bureau would be able to recover the assessed penalties by using other available collection methods such as Treasury offset.

Section 291.33 Use of Recovered Amounts

Section 291.33 would implement the authority conveyed in 16 U.S.C. 470aaa–6(d) of the Act for the agencies to use collected penalties or restitution for certain purposes without further authorization or appropriations. The proposed regulation would allow the authorized officer to use collected penalties or restitution without further appropriation to protect, restore, or repair the paleontological resources and sites that were the subject of the action, and to protect, monitor, and study the resources and sites, and/or provide educational materials to the public about paleontological resources and sites, and/or provide for the payment of rewards. These categories are not listed in priority order.

Section 291.34 Criminal Penalties

Paragraph 291.34(a) would restate the penalties provided for by 16 U.S.C. 470aaa–5(c) of the Act. This section would not preclude the Forest Service from using other laws or regulations in addition to or in lieu of the Act as the basis for charging violators. Violations of the prohibitions in the Act and in the regulations would be subject to criminal as well as civil penalties.

Paragraph 291.34(b) would clarify that the determination of the values and the cost of response, restoration, and repair would be determined in accordance with Sections 291.37, 291.38, and 291.39.

Section 291.35 Multiple Offenses

Section 291.35 would restate the penalties for multiple offenses provided for by 16 U.S.C. 470aaa–5(d) of the Act. This section would clarify that in the case of a second or subsequent violation by the same person, the amount of the penalty assessed may be doubled. Such doubling may occur only after a conviction or an otherwise proven violation.

Section 291.36 General Exception

Section 291.36 would restate the exemption of 16 U.S.C. 470aaa–5(e) of the Act for any person with respect to any paleontological resource which was in the lawful possession of such person prior to the date of enactment of the Act.

Section 291.37 Scientific or Paleontological Value

Section 291.37 would specify the factors and costs that may be considered in determining the scientific value of a paleontological resource, and would clarify that the terms *scientific value* as used in 16 U.S.C. 470aaa–6(a)(2) of the Act and *paleontological value* as used in 16 U.S.C. 470aaa–5(c) of the Act are the same value and are interchangeable for the purposes of these proposed regulations. Costs such as the preparation of a research design would be based on what it would have cost, prior to the violation, to conduct this research appropriately and in a way that would preserve the scientific and educational value of the paleontological resource. The calculation of this value using these types of costs would be the best method to reflect the loss of contextual information related to the stratigraphy and geology of the paleontological resource while it was still *in-situ.*

Section 291.38 Fair Market or Commercial Value

Section 291.38 would specify the factors and costs to be included in determining the fair market value of a paleontological resource, and would clarify that the terms *fair market value* as used in 16 U.S.C. 470aaa–6(a)(2) of the Act and *commercial value* as used in 16 U.S.C. 470aaa–5(c) of the Act are the same value and are interchangeable

for the purposes of these proposed regulations. Fair market value of paleontological resources would be established through the standard professional methods of using comparable sales information, advertisements for comparable resources, appraisals, pricing of comparable resources, or other information, regardless of whether or not such information, advertisements, appraisals, or pricing would be from legal or illegal markets. For example, the information, advertisements, appraisals or pricing that would be used to establish fair market value could come from paleontological resources excavated legally or illegally from State, private, non-Federal lands, or from paleontological resources excavated illegally from Federal lands. In cases where there would be no comparable fair market value, the value of the paleontological resources would be determined by scientific value or the cost of response, restoration, and repair.

Section 291.39 Cost of Response, Restoration and Repair

Section 291.39 would clarify that, for purposes of these regulations, the cost of response, restoration, and repair of paleontological resources involved in a violation would be the sum of the costs incurred for response, investigation, assessment, emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair.

Section 291.40 Rewards

Section 291.40 would provide that rewards would be determined and paid at the discretion of the authorized officer (see 16 U.S.C. 470aaa–7(a)). This section does not preclude agencies using other authorities and fund sources such as State funds to offer rewards for information that may lead to a conviction or finding.

Section 291.41 Forfeiture

16 U.S.C. 470aaa–7(b) of the Act provides for the forfeiture of paleontological resources for violations under 16 U.S.C. 470aaa–5 or aaa–6 of the Act. However, the Act did not provide the procedures for conducting either the criminal or the civil forfeiture of these resources. Forfeiture regulations and proceedings are very complex; therefore, rather than developing new forfeiture regulations that are only applicable to paleontological resources, this section proposes to use agreements with other agencies to conduct forfeiture proceedings as required by Civil Asset Forfeiture Reform Act (18 U.S.C. 983) or other applicable forfeiture statutes.

Paragraph 291.41(a) would explain that all paleontological resources found in possession of a person with respect to a violation of Sections 291.28 through 291.36 of these proposed regulations would be subject to forfeiture proceedings in accordance with the Civil Asset Forfeiture Reform Act or other applicable forfeiture regulations. The Department would be authorized to enter into cooperative agreements with other agencies that have forfeiture regulations in place for the initiation of forfeiture actions.

Paragraph 291.41(b) would explain that the Federal government holds seized resources until the case is adjudicated, and would provide for the transfer of administration of seized paleontological resources. However, before paleontological resources seized in a criminal or civil case can be transferred administratively, the proceedings under paragraph 291.41(a) must be followed. Once the resources are deemed to be forfeited, their administration may be transferred to an institution in accordance with 16 U.S.C. 470aaa–7(c) of the Act. Such transfer would not mean that the Federal government is transferring ownership; it would only be transferring administration of the resources.

Amendments to Title 36 Code of Federal Regulation Part 261—Prohibitions, Sections 261.2 (Definitions) and 261.9 (Property)

The definition of *paleontological resource* contained in Section 261.2 would be removed because it is inconsistent with the term *paleontological resource* as defined in 16 U.S.C. 470aaa of the Act and in Section 291.5 of the proposed regulations.

Paragraph 261.9(i) would be removed because it is inconsistent with 16 U.S.C. 470aaa–5 of the Act and Section 291.27(a)(3) of the proposed regulations, which prohibit the sale or purchase of paleontological resources from Federal land.

Regulatory Certifications

Regulatory Planning and Review

This proposed rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this proposed rule is not significant for purposes of E.O. 12866. This proposed rule would not have an annual effect of $100 million or more on the economy, nor would it adversely affect productivity, competition, jobs, the environment, public health and safety, or State and local governments. This proposed rule would not interfere with any action taken or planned by another agency, nor would it raise new legal or policy issues. Finally, this proposed rule would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this proposed rule is not subject to OMB review under E.O. 12866.

Proper Consideration of Small Entities

The proposed rule has also been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.). The proposed rule for Paleontological Resources Preservation will not have a significant economic impact on a substantial number of small entities as defined by E.O. 13272 and the SBREFA, based on the following considerations:

The proposed rule would not impose additional restrictions or permitting requirements, beyond what is already practiced or required under existing regulations, that would invalidate, modify, or adversely affect the ability to conduct current or future activities (for example, mining, timber harvesting, grazing, recreation) on NFS lands as permitted under applicable laws other than the Act. The proposed rule would prohibit collection of paleontological resources for commercial purposes; however, this prohibition is consistent with past and current agency practices (as guided by broad provisions in the Organic Administration Act of 1897 and the American Antiquities Act of 1906) on National Forests and Grasslands and is, therefore, not a new restriction. Special use authorization for commercial collection of paleontological resources is permitted under 36 CFR 261.9(i); however, the Agency is aware of only one special use permit in the past that involved sale of paleontological resources, and that permit was not renewed. The proposed rule includes removal of 36 CFR 261.9(i) as a conforming change necessitated by the Act, which does not allow the collection of paleontological resources for commercial purposes. Casual collection of paleontological resources, as defined in the Act, by customers of some special use permit holders (for example, outfitters and guides) is currently allowed under specific conditions, and the proposed rule would continue to allow this activity as

long as the activity is consistent with the conditions for casual collection as set forth in the proposed rule. The proposed rule would encourage scientific and educational use of paleontological resources by preserving the resources, promoting public awareness, and allowing for casual collection, thereby helping to maintain opportunities for small non-profit organizations to benefit from continued access to these resources on NFS lands. The proposed regulations provide for permitted collection of vertebrate and other paleontological resources not subject to the casual collection exemption, consistent with past Forest Service practices, thereby maintaining opportunities for organizations (for example, academic, paleontological resource assessment contractors) to collect paleontological resources for non-commercial research and paleontological resource assessment purposes.

It is not possible to specifically identify the population of small entities that may be involved with activities that may include casual collection of paleontological resources on NFS lands because there is no Forest Service special use code to track this activity.

The minimum requirements on small entities imposed by this proposed rule associated with authorization by permit to collect paleontological resources are necessary to protect the public interest and federal property, not administratively burdensome or costly to meet, and are within the capabilities of small entities to perform. The proposed rule would not materially alter the budgetary impact of entitlements, user fees, loan programs, or the rights and obligations of program participants. It does not compel the expenditure of $100 million or more by any State, local, or Tribal government, or anyone in the private sector. Under these circumstances, the Forest Service has determined that this action will not have a significant economic impact on a substantial number of small entities. Based on the evidence presented above, a regulatory flexibility analysis is not required for this rule.

Environmental Impact

The Forest Service has determined that this proposed rule falls under the categorical exclusion provided in Forest Service regulations on National Environmental Policy Act procedures. Such procedures exclude from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish service wide administrative procedures, program processes, or instructions'' 36 CFR 220.6(d)(2); 73 FR 43084 (July 24, 2008). This proposed rule outlines the programmatic implementation of the Act, and as such, has no direct effect on Forest Service decisions for land management activities.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Forest Service has assessed the effects of this proposed rule on State, local, and Tribal governments and the private sector. This proposed rule would not compel the expenditure of $100 million or more by any State, local, or Tribal governments, or anyone in the private sector. Therefore, a statement under section 202 of that act is not required.

No Takings Implementations

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that this rule would not pose the risk of a taking of constitutionally protected private property. It proposes to implement new regulations that would reflect the new statutory authority for managing, preserving, and protecting paleontological resources on Federal lands and that reflect prior policies, procedures, and practices for the collection and curation of paleontological resources on Federal land.

Federalism

The Forest Service has considered this proposed rule under the requirements of Executive Order 13132, Federalism, and has determined that the proposed rule conforms with the federalism principles set out in this E.O. The proposed rule would not impose any compliance costs on the States other than those imposed by statute, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed rule would not apply to paleontological resources managed by States or local governments or State or local governmental entities. Therefore, the Forest Service has determined that no further assessment of federalism implications is necessary. Based on comments received on this proposed rule, the Forest Service will consider if any additional consultations will be needed with the State and local governments prior to adopting a final rule.

Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Forest Service has not identified any State or local laws or regulations that are in conflict with this proposed rule or that would impede full implementation of this proposed rule. Nevertheless, in the event that such a conflict was to be identified, the proposed rule would preempt the State or local laws or regulations found to be in conflict. However, in that case, no retroactive effect would be given to this rule, and the Forest Service would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Consultation and Coordination With Indian Tribal Governments

This proposed rule has been reviewed under Executive Order 13175 of November 6, 2000, Consultation and Coordination With Indian Tribal Governments. It has been determined that this proposed rule would not have Tribal implications as defined by E.O. 13175, and therefore, advance consultation with Tribes is not required. Nonetheless, Tribal consultation was initiated on March 7, 2011. Tribal consultation was accomplished through local and regional consultation processes in coordination with the Washington Office of the Forest Service. Input from three Tribes was received during the initial 120-day period. Consultation will continue during the 60-day public comment period.

Energy Effects

This proposed rule has been reviewed under Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this proposed rule does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

In accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the Forest Service is requesting an approval of a new information collection. Upon approval, this information will be incorporated into 0596–0082, Special Uses Administration. The proposed information collection has been published at 77 FR 31298, May 25, 2012.

Title: Paleontological Resources Preservation.

OMB Number: 0596—NEW.

Expiration Date of Approval: 3 years from approval date.

Type of Request: New information collection.

Abstract: The purpose of the Paleontological Resources Preservation proposed rule is to establish regulations to implement a paleontological resources preservation program on Forest Service lands in which paleontological resources are managed and protected using scientific principles and expertise, in accordance with the Act. The Act at 16 U.S.C. 470aaa–3 and 4 authorizes the Secretary to issue permits for the collection of paleontological resources from public lands and enter into agreements with approved repositories. The information required by this proposed rule is necessary to issue permits, enter into agreements, and identify the repository institutions which house and curate paleontological resources that are collected under permit and which remain Federal property. The information requirements will be used to help the Forest Service in the following areas:

(1) To determine that the applicant is qualified and eligible to receive a permit under the proposed rule,

(2) To determine if a proposal to collect paleontological resources meets the qualifications established in the law and regulations,

(3) To evaluate the impacts of a proposal in order to comply with environmental laws,

(4) To describe and document the scientific and geological context from which paleontological resources were collected,

(5) To identify and inventory paleontological resources that have been collected, and

(6) To ensure that paleontological resources that have been collected, which remain Federal property, are properly curated in an approved repository.

Qualified paleontologists are the only entities eligible to be issued paleontological resource collection permits, and are, therefore, the only entities from which information will be collected.

The information would be collected from respondents in the form of a permit application, and a report on authorized activities following completion of the permitted project. Permit applications are anticipated to require an average of 5.5 hours to complete, and permit reports are anticipated to require an average of 13 hours to complete, based on a limited survey of current permit holders. The information collection required for a paleontological resource collection permit application and report of permitted activity under this proposed rule will be submitted to OMB as a new collection.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 100.

Estimated Total Annual Burden on Respondents: 925 hours.

Comments: Comments are invited 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

List of Subjects

36 CFR Part 261

Law enforcement, National forests

36 CFR Part 291

Casual collecting, Collection, Confidentiality, Curation, Education, Fair market value, Fossil, Geology, Museums, National forests, Natural resources, Paleontological resources, Paleontology, Penalties, Permits, Prohibited acts, Prohibitions, Public awareness, Public education, Public lands, Recreation, Recreation areas, Reporting and recordkeeping requirements, Repository, Research, Scientific value.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend part 261 and part 291 of Title 36 of the Code of Federal Regulations as follows:

PART 261—PROHIBITIONS

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 7 U.S.C. 1011(f); 16 U.S.C., 472, 551, 620(f), 1133(c)–(d)(1), 1246(i).

§ 261.2 [Amended]

■ 2. Remove the definition for *paleontological resource* in § 261.2.

§ 261.9 [Amended]

■ 3. Remove current paragraph 261.9(i) and redesignate paragraph 261.9 (j) as 261.9(i)

■ 4. Add part 291 to read as follows:

PART 291—PALEONTOLOGICAL RESOURCES PRESERVATION

Sec.

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291.2 Authorities.
291.3 Exceptions.
291.4 Preservation of existing authorities.
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291.12 National Forest System Lands closed to casual collection.
291.13 Permits.
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291.15 Application qualifications and eligibility.
291.16 Terms and conditions.
291.17 Content of paleontological reports and/or museum agreements.
291.18 Modification or cancellation of permits.
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291.21 Curation of paleontological resources.
291.22 Becoming an approved repository.
291.23 Minimum requirements of approval of a repository.
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291.33 Use of recovered amounts.
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Authority: 16 U.S.C. 470aaa through 16 U.S.C. 470aaa-11.

§ 291.1 Purpose.

(a) The regulations in this part implement provisions of the Paleontological Resources Preservation Act, 16 U.S.C. 470aaa through 16 U.S.C. 470aaa-11 (hereinafter referred to as the Act), which provides for the

management and protection of paleontological resources on Federal lands and encourages the scientific, educational and where appropriate, the casual collection of these resources. Paleontological resources are nonrenewable, and are an accessible and irreplaceable part of America's natural heritage.

(b) The Secretary shall manage, protect, and preserve paleontological resources on Federal land using scientific principles and expertise. These regulations provide for coordinated management of paleontological resources and encourage scientific and educational use by promoting public awareness, providing for collection under permit, setting curation standards, establishing civil and criminal penalties, clarifying that paleontological resources cannot be collected from Federal lands for commercial purposes, and by allowing the casual collection of some of these resources on certain lands and under specific conditions.

(c) To the extent possible, the Secretary of Agriculture and the Secretary of the Interior will coordinate in the implementation of the Act.

§ 291.2 Authorities.

The regulations in this part are promulgated pursuant to the Omnibus Public Lands Act, Title VI, subtitle D on Paleontological Resources Preservation, 16 U.S.C. 470aaa through 16 U.S.C. 470aaa-11, which requires the Secretary to issue such regulations as are appropriate to carry out the Act.

§ 291.3 Exceptions.

The regulations in this part do not:

(a) invalidate, modify, or impose any additional restrictions or permitting requirements on any activities permitted at any time under the general mining laws, the mineral or geothermal leasing laws, laws providing for mineral materials disposal, or laws providing for the management or regulation of the activities authorized by the aforementioned laws including but not limited to the Federal Land Policy and Management Act (43 U.S.C. 1701–1784), the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201–1358), and the Organic Administration Act (16 U.S.C. 478, 482, 551);

(b) Invalidate, modify, or impose any additional restrictions or permitting requirements on any activities permitted at any time under existing laws and authorities relating to reclamation and multiple uses of National Forest System lands;

(c) Apply to Indian lands;

(d) Apply to any materials associated with an archaeological resource (site), as defined in 16 U.S.C. 470, or any cultural items defined in 16 U.S.C. 30001.

(e) Apply to, or require a permit for, casual collecting of a rock, mineral, or invertebrate or plant fossil that is not protected under the Act;

(f) Affect any land other than National Forest System lands, or affect the lawful recovery, collection, or sale of paleontological resources from land other than National Forest System lands; or

(g) Create any right, privilege, benefit, or entitlement for any person who is not an officer or employee of the United States acting in that capacity. No person who is not an officer or employee of the United States acting in that capacity shall have standing to file any civil action in a court of the United States to enforce any provision or amendment made by this subtitle.

§ 291.4 Preservation of existing authorities.

The regulations in this part do not alter or diminish the authority of the Forest Service under any other law to manage, preserve, and protect paleontological resources on National Forest System lands in addition to the protection provided under the Act or this part.

§ 291.5 Definitions.

Act means Title VI, Subtitle D of the Omnibus Public Land Management Act on Paleontological Resources Preservation (16 U.S.C. 470aaa through 470aaa–11).

Associated records means original records (or copies thereof) that document the efforts to locate, evaluate, record, study, preserve, or recover paleontological resources, including but not limited to paper and electronic documents such as:

(a) *Primary records* relating to the identification, evaluation, documentation, study, preservation, context, or recovery of a paleontological resource, regardless of format;

(b) *Public records* including, but not limited to, land status records, agency reports, publications, court documents, agreements; and

(c) *Administrative records and reports* generated by the permitting process and pertaining to the survey, excavation, or other study of the resource.

Authorized officer means the person or persons to whom authority has been delegated by the Secretary to take action under the Act.

Casual collecting means the collecting of a reasonable amount of common invertebrate and plant paleontological resources for non-commercial personal use, either by surface collection or the use of non-powered hand tools, resulting in only negligible disturbance to the Earth's surface and other resources.

Common invertebrate and plant paleontological resources are invertebrate or plant fossils that are of ordinary occurrence and wide-spread distribution. Not all invertebrate and plant paleontological resources are common.

Collection means all paleontological resources resulting from excavation or removal from National Forest System lands as well as any associated records resulting from excavation or removal from Federal lands under a permit.

Consumptive analysis means the alteration, removal, or destruction of a paleontological specimen, or parts thereof, from a collection for scientific research.

Curatorial services and curation mean those activities pertinent to management and preservation of a collection over the long term according to professional museum and archival practices, including at a minimum:

(a) Accessioning, cataloging, labeling, and inventorying a collection;

(b) Identifying, evaluating, and documenting a collection;

(c) Storing and maintaining a collection using appropriate methods and containers, and under appropriate environmental conditions and physical security controls;

(d) Periodically inspecting a collection and taking such actions as may be necessary to preserve it;

(e) Providing access and facilities to study a collection;

(f) Handling, cleaning, sorting, and stabilizing a collection in such a manner as to preserve it, and

(g) Lending a collection, or parts thereof, for scientific, educational or preservation purposes.

Federal land means land controlled or administered by the Secretary except for Indian land as defined in 16 U.S.C. 470aaa.

Fossil means any fossilized remains, traces, or imprints of organisms, preserved in or on the Earth's crust.

Fossilized means preserved by natural processes, including, but not limited to burial in accumulated sediments, preservation in ice or amber, or replacement by minerals, or alteration by chemical processes such as permineralization whereby minerals are deposited in the pore spaces of the hard parts of an organism's remains, which may or may not alter the original organic content.

Indian land means land of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States.

National Forest System lands means those lands in a nationally significant system of federally owned units of forest, range, and related lands consisting of national forests, purchase units, national grasslands, land utilization project areas, experimental forest areas, experimental range areas, designated experimental areas, other land areas, water areas, and interests in lands that are administered by the Forest Service, U.S. Department of Agriculture, or designated for administration through the Forest Service.

Negligible disturbance means little or no change to the surface of the land and causing minimal or no effect on other resources. The authorized officer has discretion to determine what constitutes negligible disturbance.

Non-commercial personal use means uses other than for purchase, sale, financial gain, or research.

Non-powered hand tools mean small tools that do not use or are not operated by a motor, engine, or other power source. These tools are limited to small tools that can be easily carried by hand such as geologic hammers, trowels, or sieves, but not large tools such as full-sized shovels or pick axes.

Paleontological locality, location, and *site* mean a geographic area where a paleontological resource is found. Localities, locations, and sites may be relatively large or small.

Paleontological resource means any fossilized remains, traces, or imprints of organisms, preserved in or on the earth's crust, that are of paleontological interest, and that provide information about the history of life on earth. The term does not include (a) any materials associated with an archaeological resource (as defined in § 3(1) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470bb(1)); or (b) any cultural item (as defined in § 2 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001)).

Paleontological site is used interchangeably with paleontological locality or location, but is never intended to be synonymous with ''archaeological site.''

Reasonable amount means a maximum per calendar year of one gallon by volume or 25 pounds by weight, and generally includes not more than five specimens of any one fossil kind. For rock slabs containing fossils, the amount is limited to a slab that can be hand-carried by one person with minimal effort without the aid of mechanical devices. The authorized officer may modify the amount that is reasonable or establish a period of time for collection as needed on a case-by-case basis to preserve fossil-bearing locations.

Repository means a facility, such as a museum, paleontological research center, laboratory, or an educational or storage facility managed by a university, college, museum, other educational or scientific institution, or a Federal, State or local government agency that is capable of providing professional curatorial services on a long-term basis.

Repository agreement means a formal written agreement between the authorized officer and the repository official in which the parties agree on how the repository will provide curatorial services for collections.

Repository official means any officer, employee, or agent officially representing the repository that is providing curatorial services for a collection that is subject to this Part.

Secretary means the Secretary of Agriculture with respect to National Forest System lands controlled or administered by the Secretary of Agriculture.

State means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

§ 291.6 Confidentiality of Information—General.

(a) Information concerning the nature and specific location of a paleontological resource is exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552), unless the authorized officer has made a written determination that disclosure would:

(1) Further the purposes of the Act and this Part;

(2) Not create risk of harm to or theft or destruction of the resource or the site containing the resource; and

(3) Be in accordance with other applicable laws.

(b) Sharing Protected Information Does Not Constitute a Disclosure. The authorized officer may share information concerning the nature and specific location of a paleontological resource with non-agency personnel for scientific, educational, or resource management purposes, but only after the recipient of the information signs a confidentiality agreement in which the recipient agrees not to share the information with anyone not authorized to receive the information.

§ 291.7 Public awareness and education.

The Chief of the Forest Service will establish a program to increase public awareness about the significance of paleontological resources on National Forest System lands.

§ 291.8 Area closures.

(a) In order to protect paleontological or other resources or to provide for public safety, the authorized officer may restrict access to or close areas to the collection of paleontological resources.

(b) The regulations in this part do not preclude the use of other authorities that provide for area closures.

§ 291.9 Determination of paleontological resources.

(a) All paleontological resources on National Forest System lands will be managed, protected, and preserved in accordance with the regulations in this Part unless the authorized officer determines that such resources are not paleontological resources in accordance with paragraph (b) of this section.

(b) Using scientific principles and expertise, the authorized officer may determine that certain paleontological resources do or do not meet the definition of ''paleontological resource'' as set forth in these regulations, and therefore, whether or not such resources are covered by the Act or this Part.

(c) Determinations as described above in paragraph (b) of this section are subject to the following conditions:

(1) A recommendation for determination must be in writing and be prepared by a paleontologist with demonstrated subject matter expertise in the specific group of paleontological resources under consideration.

(2) An agency paleontologist will review the basis for the determination and make a recommendation to the authorized officer concerning the determination.

(3) The authorized officer will make the final determination based upon the recommendation of an agency paleontologist and will ensure that the basis for the determination is documented, and that the determination is made available to the public.

(4) Any determination made pursuant to this section will in no way affect the authorized officer's obligations under the Act or other applicable laws or regulations to manage, protect, or preserve all paleontological resources.

(d) On National Forest System lands, the following are not paleontological resources for purposes of the Act or this part:

(1) Mineral resources, including coal, oil, natural gas, and other economic minerals that are subject to the existing mining and mineral laws;

(2) Petrified wood as defined at 30 U.S.C. 611 and managed under 36 CFR 228.62 unless determined under (b) of this subsection to be a paleontological resource;

(3) Microfossils, including conodonts and invertebrate fossils, but not including vertebrate fossils, that are individually too small to be studied without a microscope;

(4) Geological and soil units, including, but not limited to, limestones, diatomites, chalk beds, and fossil soils (i.e. paleosols).

§ 291.10 Collecting.

A paleontological resource may only be collected from National Forest System lands in accordance with the casual collecting provisions in §§ 291.11 and 291.12, or in accordance with a permit issued by the authorized officer as identified in § 291.13.

§ 291.11 Casual collecting on National Forest System lands.

(a) Casual collecting is allowed without a permit on National Forest System lands where such collection is consistent with the laws governing the management of those lands, the land management plans, and where the lands in question are not closed to casual collection.

(b) National Forest System lands are open to casual collection unless otherwise closed, as described in § 291.12.

(c) Research activities do not constitute casual collection, and therefore, research involving the collecting of common invertebrate and plant paleontological resources requires a permit.

(d) Using scientific principles and expertise, the authorized officer may determine that certain invertebrate and plant paleontological resources do or do not meet the definition of ''common invertebrate and plant paleontological resources'' as set forth in these regulations, and thus, whether such resources can be casually collected or must be collected under permit.

(e) Determinations as described above in paragraph (d) of this section are subject to the conditions as stated in § 291.9(c)(1) through (4).

(f) It is the responsibility of the collecting public to ensure that they are casually collecting in an area that is open to casual collection, and that the materials they collect are subject to casual collection.

(g) Paleontological resources collected on Forest Service lands, including common invertebrate and plant paleontological resources subject to casual collecting, cannot be sold. Sale of these paleontological resources is a violation of 16 U.S.C. 470aaa–5(a)(3) of the Act and Paragraph 291.27(a)(3) of these regulations and may subject the violator to civil and criminal penalties.

§ 291.12 National Forest System lands closed to casual collection.

(a) Casual collecting is not allowed in

(1) National Monuments within the National Forest System; and

(2) Other National Forest System lands closed to casual collecting in accordance with this Part, other statues, executive orders, regulations, or land use plans.

(b) Existing closures of certain areas to casual collecting, authorized under separate authority, remain closed under these regulations.

§ 291.13 Permits.

(a) The authorized officer may issue a permit for the collection of a paleontological resource pursuant to an application if the authorized officer determines that:

(1) The applicant is qualified to carry out the permitted activity;

(2) The permitted activity is undertaken for the purpose of furthering paleontological knowledge;

(3) The permitted activity is consistent with any management plan applicable to the National Forest System lands concerned; and

(4) The proposed methods of collection will not threaten significant natural or cultural resources pursuant to 16 U.S.C. 470aaa Sec. 6304(b)(4)).

(5) Collected materials will not be sold or otherwise used for commercial purposes.

(b) Permits may be issued at the authorized officer's discretion to applicants that provide a complete application, as provided in § 291.14, and meet qualification and eligibility requirements in § 291.15.

§ 291.14 Application process.

Applicants for permits must provide the following records and information to the authorized officer in support of an application.

(a) The name, titles, academic or professional affiliations, and business contact information of the applicant and all persons who would be named on the permit;

(b) The applicant's current resume, curriculum vita, or other documents that support an applicant's qualifications;

(c) A detailed scope of work or research plan for the proposed activity. This must include maps, field methods, associated records, estimated time and duration of field season, proposed field party size, and specific information regarding storage, stabilization, and curatorial arrangements for collected specimens and data;

(d) Information regarding previous or currently held Federal paleontological permits including the issuing agency, permit number, and name of the authorized officer;

(e) Identification of a proposed repository for collected specimens, including written verification that the proposed repository agrees to receive the collection of paleontological resources and associated records and acknowledges that all costs will be borne by the applicant and/or approved repository, unless otherwise addressed in a separate written document; and

(f) Other records or information identified by the authorized officer as necessary to support an application for a permit.

§ 291.15 Application qualifications and eligibility.

(a) *Qualified Applicant.* The information submitted by applicants under § 291.14 must demonstrate qualifications for carrying out the proposed activities, as follows:

(1) The applicant has a graduate degree in paleontology or a related field of study with a major emphasis in paleontology from an accredited institution, or can demonstrate training and experience necessary to undertake the proposed activities; and

(2) The applicant has experience in collecting, analyzing, summarizing, and reporting paleontological data and experience in planning, equipping, staffing, organizing, and supervising field crews on projects similar to the type, nature and scope of work proposed in the application; and

(3) The applicant meets any additional qualifications required by the authorized officer.

(b) *Eligibility.* The information submitted by applicants under § 291.14 must demonstrate that the proposed work is eligible for a permit in accordance with § 291.13(a)(2–4).

§ 291.16 Terms and conditions.

The collection of paleontological resources pursuant to a permit must be conducted in accordance with the following terms and conditions:

(a) All paleontological resources that are collected from National Forest System lands under permit will remain the property of the United States.

(b) The collection will be preserved in an approved repository to be made available for scientific research and public education.

(c) Specific locality data will not be released by the permittee or repository

unless authorized in accordance with Subpart A § 291.6 of this Part.

(d) The permittee recognizes that the area within the scope of the permit may be subject to other authorized uses.

(e) The permittee must conform to all applicable Federal, State, and local laws.

(f) The permittee must assume responsibility for all work conducted under the permit and the actions of all persons conducting this work.

(g) The permit cannot be transferred.

(h) The permittee cannot modify the permit without the approval of the authorized officer.

(i) The permittee must comply with all timelines established in the permit, and must request modification of the permit if those timelines cannot be met.

(j) The permittee or other persons named on the permit must be on site at all times when field work is in progress and will have a copy of the signed permit on hand.

(k) The permittee will comply with any vehicle or access restrictions, safety or environmental restrictions, or local safety conditions or restrictions.

(l) The permittee will report suspected resource damage or theft of paleontological or other resources to the authorized officer in a timely manner after learning of such damage or theft.

(m) The permittee will acknowledge the Forest Service in any report, publication, paper, news article, film, television program, or other media resulting from work performed under the permit.

(n) The permittee will comply with the timeline established in the permit for providing a complete list to the authorized officer of specimens collected and the current location of the specimens.

(o) The permittee will provide scheduled reports to the authorized officer within the timeline established in the permit.

(p) The permittee will be responsible for all costs for the proposed activity, including fieldwork, preparation, identification, cataloging, and storage of collections, unless otherwise arranged through a specific agreement.

(q) The permittee will comply with the tasks required by the authorized officer, even in the event of permit expiration, suspension, or revocation.

(r) Additional stipulations, terms, and conditions as required by the authorized officer and/or the agency may be appended.

§ 291.17 Content of paleontological reports and/or museum agreements.

Permit reports must contain the following information as appropriate:

(a) Permittee(s)' name, title, affiliation, and professional contact information;

(b) Permit number;

(c) Date of report;

(d) Project name, number, or reference;

(e) Description of project, methodology, or summary of research scope of work;

(f) Dates of field work;

(g) Name(s) of people who performed field work;

(h) Description of work performed or accomplished and a summary of results and discoveries;

(i) Summary of regional or local geology and/or paleontology including context, geography, stratigraphy, and geological unit;

(j) Identification of potential impacts to paleontological resources by proposed land use action;

(k) Mitigation recommendations to address potential paleontological resource impacts;

(l) Relevant literature citations;

(m) Relevant associated records, including anything that aids in explaining, clarifying, or understanding the findings;

(n) Listing of collected paleontological resources, including field numbers and field identifications that are referenced to specific localities;

(o) Repository name, identifying acronym, and address;

(p) Repository official name, title, and contact information;

(q) Approved repository accession and catalog number(s);

(r) Assigned locality numbers;

(s) Administrative area (State, county, ranger district, forest, and so forth);

(t) Map name, source, size, edition, projection, datum, and/or other mapping information;

(u) Geographic location, survey data, and/or related metadata;

(v) Paleontological taxa collected, observed, or in a repository;

(w) Resource identifications, condition, location, and quantity; and

(x) Recommendations or information for the approved repository regarding the condition or care of collected resources or associated records.

§ 291.18 Modification or cancellation of permits.

The authorized officer may modify a permit, consistent with applicable laws and policies, when:

(a) The authorized officer determines that there are management, administrative, or safety reasons to modify a permit; or

(b) A permittee requests a modification in writing.

§ 291.19 Suspension and revocation of permits.

(a) The authorized officer may suspend or revoke a permit issued under this section;

(1) For resource, safety or other management considerations; or

(2) When there is a violation of term or condition of a permit issued under this section.

(b) The permit shall be revoked if any person working under the authority of the permit is convicted of a violation under section 16 U.S.C. 470aaa Sec. 6306 or is assessed a civil penalty under 16 U.S.C. 470aaa Sec. 6307.

(c) Suspensions, modifications, and revocations shall be administered in accordance with the procedures set forth in 36 CFR part 251.

§ 291.20 Appeals.

A permittee may appeal the denial or revocation of a permit in accordance with 36 CFR part 251. Pending the appeal, the decision of the authorized officer remains in effect unless determined otherwise in accordance with 36 CFR Part 251 Subpart C.

§ 291.21 Curation of paleontological resources.

Collections from National Forest System lands made under a permit issued according to this Part will be deposited in an approved repository. The curation of paleontological resources collected from Federal land before the effective date of these regulations is covered under the terms of the original collection permit and/or agreement. Such collections remain Federal property unless otherwise transferred or disposed of in a Forest Service agreement.

§ 291.22 Becoming an approved repository.

(a) A repository identified during the permit application process in § 291.14 must be approved to receive collections by the authorized officer as follows:

(1) A repository must meet the minimum requirements in § 291.23 in order to be approved.

(2) A repository must agree in writing that collections:

(i) Remain the property of the Federal government,

(ii) Will be preserved for the public in accordance with § 291.24,

(iii) Will be made available for scientific research and public education, and

(iv) That specific locality data will not be released except in accordance with § 291.6.

(b) The authorized officer and the repository official may enter into a

formal agreement that explains the responsibilities of the parties for the curation of the collection in accordance with § 291.26.

(c) The repository must agree in writing to periodic inventory and inspection of the collections as described in § 291.25.

(d) Prior to depositing the collection, the authorized officer in consultation with the repository official will determine the content of the collection to be curated based on scientific principles and expertise. A copy of the final catalog will be provided by the repository to the authorized officer.

(e) A repository approved by a Federal agency or bureau may be considered an approved repository by the Forest Service.

§ 291.23 Minimum requirements of approval of a repository.

The authorized officer will determine whether a facility should be an approved repository based on whether the repository has:

(a) The capability to provide adequate curatorial services as defined in Section 291.5;

(b) A scope of collections statement or similar policy that identifies paleontological resources as part of its scope of collections;

(c) A current collections management plan, including but not limited to policies for documentation, loans, and access; and

(d) Staff with primary responsibility for managing and preserving the collections that have training or experience in the curation of paleontological resources.

§ 291.24 Standards for access and use of collections.

(a) The repository will make collections available for scientific research and public education or as otherwise provided in a repository agreement.

(b) The repository may provide access to specific locality data and associated records when consistent with an approval under § 291.22 or an agreement under § 291.26.

(c) The repository may loan specimens after entering into a signed loan agreement with the borrowing institution. The loan agreement must specify the terms and conditions of the loan and that the repository is responsible for care and maintenance of the loaned specimens.

(d) The repository must maintain administrative records of all scientific and educational uses of the collection.

(e) The repository may charge reasonable fees to cover costs for access to and use of collections, including handling, packing, shipping, and insuring paleontological resources, photocopying associated records and other occasional costs not associated with ongoing curatorial services.

(f) The following uses of the collection will require written approval from the authorized officer unless specified in the approval in § 291.22 or an agreement under § 291.26:

(1) Prior to reproducing a paleontological resource, the repository will notify and obtain approval from the authorized officer. Reproductions include, but are not limited to, molding and casting, computerized axial tomography (CAT) scans, and three-dimensional (3–D) rendering.

(2) The repository may only allow consumptive analysis of specimens if the authorized officer has determined, in consultation with an agency paleontologist, that the potential gain in scientific or interpretive information outweighs the potential loss of the paleontological resource and provides the repository with written authorization for such use.

§ 291.25 Conducting inspections and inventories of collections.

(a) The repository and the authorized officer must ensure that inspections and inventories of collections are in accordance with the Federal Property and Administrative Services Act (40 U.S.C. 541 *et seq*), its implementing regulations (41 CFR Parts 101 and 102), any agency-specific regulations on the management of Federal property, and any agency-specific statutes and regulations on the management of museum collections.

(b) The frequency and methods for conducting and documenting inspections and inventories will be appropriate to the nature and content of the collection.

(c) When two or more Federal agencies deposit collections in the same repository, they may enter into an interagency agreement consistent with the Single Audit Act (31 U.S.C. 75) for inspections and inventories.

§ 291.26 Repository agreements.

(a) The authorized officer may enter into an agreement with Federal and non-Federal repositories regarding the curation of paleontological resources and their associated records.

(b) An agreement will contain the following, as appropriate, including but not limited to:

(1) A statement (updated as necessary) that identifies the collection or group of collections provided to the repository;

(2) A statement that identifies the Federal ownership and the agency that administers the collection;

(3) A statement of work to be performed by the repository;

(4) A statement of the responsibilities of the authorized officer and the repository official for the long-term care of the collection;

(5) A statement that collections are available for scientific and educational uses consistent with § 291.22;

(6) Any special procedures and restrictions for curatorial services and collection management, including loans;

(7) Provisions for consumptive analyses of paleontological specimens;

(8) Any special procedures and/or restrictions on the disclosure of specific locality data;

(9) A statement that all proceeds derived from any use of the collections will be used for their support;

(10) A statement that all exhibits, publications, and studies of Federal specimens will credit the agency that administers the collection;

(11) A statement that copies of any publications or reports resulting from study of the collection are to be provided to the agency;

(12) Specification of the frequency and methods for periodic inventories;

(13) A statement that accession, catalog, and inventory information will be made available to the authorized officer or their staff

(14) A statement that no employee of the repository will sell or financially encumber the collection;

(15) A statement that, in the event the repository can no longer provide care for a collection under the terms of the agreement, the repository official will notify the authorized officer in writing;

(16) A statement that the terminating party is responsible for the transfer of collections to another approved repository, including costs;

(17) The term of the repository agreement and procedures for modification, cancellation, suspension, extension, and termination of the agreement; and

(18) Any additional terms and conditions as needed.

§ 291.27 Prohibited acts.

(a) A person may not:

(1) Excavate, remove, damage, or otherwise alter or deface or attempt to excavate, remove, damage, or otherwise alter or deface any paleontological resources located on National Forest System lands unless such activity is conducted in accordance with the Act and this Part;

(2) Exchange, transport, export, receive, or offer to exchange, transport,

export, or receive any paleontological resource if the person knew or should have known such resource to have been excavated or removed from National Forest System lands in violation of any provisions, rule, regulation, law, ordinance, or permit in effect under Federal law, including this Act and this Part; or

(3) Sell or purchase or offer to sell or purchase any paleontological resource if the person knew or should have known such resource to have been excavated, removed, sold, purchased, exchanged, transported, or received from National Forest System lands.

(b) A person may not make or submit any false record, account, or label for, or any false identification of, any paleontological resource excavated or removed from National Forest System lands.

§ 291.28 Civil penalty.

(a) A person who violates any prohibition contained in this Part or permit issued under this Part may be assessed a penalty by the authorized officer after the person is given notice and opportunity for a hearing with respect to the violation, as provided in § 291.30 and § 291.31.

(b) Each violation is considered a separate offense.

§ 291.29 Amount of civil penalty.

(a) The amount of such penalty assessed under § 291.28 shall be determined by taking into account:

(1) The scientific or fair market value, whichever is greater, of the paleontological resource involved, as determined by the authorized officer, and

(2) The cost of response to and restoration and repair of the resource and the paleontological site involved, and

(3) Any other factors under Subpart G §§ 291.37 through 39 considered relevant by the authorized officer in assessing the penalty.

(b) *Multiple Offenses.*

(1) In the case of subsequent or repeated violations by the same person, the amount of a penalty assessed under § 291.28(a) may be doubled.

(c) *Maximum Amount of Penalty.* The amount of any penalty assessed for any one violation shall not exceed an amount equal to double the cost of response to and restoration and repair of resources and paleontological site damage plus double the scientific or fair market value of resources destroyed or not recovered.

(d) Scientific and fair market values and the cost of response to and restoration and repair are determined as described in §§ 291.37 through 39.

§ 291.30 Civil Penalty process.

(a) *Notice of violation.* The authorized officer shall serve a notice of violation by certified mail (return receipt requested) or other type of verifiable delivery upon any person believed to be subject to a civil penalty. The authorized officer shall include in the notice:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the section(s) of this Part or to a permit issued pursuant to this Part allegedly violated;

(3) The penalty proposed;

(4) Notification of the right to request a hearing in accordance with paragraph (f) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(b) *Response to notice of violation.* The person served with a notice of violation shall have 45 calendar days from the date of mailing in which to respond. During this time the person may:

(1) Accept the proposed penalty, either in writing or by payment. Acceptance of the proposed penalty will be deemed a waiver of the right to request a hearing as described in paragraph (f) in this section.

(2) Seek informal discussions with the authorized officer;

(3) File a written response. This written response must be filed with the authorized officer within 45 calendar days of the date of mailing of the notice of violation, and must be signed by the person served with the notice of violation. If the person is a corporation, the written response must be signed by an officer authorized to sign such documents. The written response will set forth in full the legal or factual basis for the requested relief.

(4) Request a hearing in accordance with paragraph (f) of this section.

(c) *Assessment of penalty.*

(1) The authorized officer shall assess a civil penalty upon completion of the 45 calendar day response period, informal discussions, or review of the written response, whichever is later.

(2) The authorized officer shall take into consideration all available information, including information provided under paragraph (b) of this section or furnished upon further request by the authorized officer.

(3) If the facts warrant a conclusion that no violation has occurred, the authorized officer shall notify the person served with the notice of violation that no violation has occurred and no penalty will be assessed.

(4) Where the facts warrant a conclusion that a violation has occurred, the authorized officer shall determine a penalty amount in accordance with § 291.29.

(d) *Penalty modification and remittance.* The authorized officer may offer to modify or remit the penalty. Modification or remittance may be based upon any or all of the following factors:

(1) Agreement by the person being assessed a civil penalty to return to the authorized officer paleontological resources removed from National Forest System lands;

(2) Agreement by the person being assessed a civil penalty to assist the authorized officer in activity to preserve, restore, or otherwise contribute to the protection and study of paleontological resources on National Forest System lands;

(3) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this Part;

(4) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(5) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

(e) *Notice of assessment.* The authorized officer shall serve a written notice of assessment upon the person served with a notice of violation. The notice of assessment establishes the penalty amount assessed by the authorized officer and is served by certified mail (return receipt requested), or other type of verifiable delivery. The authorized officer shall include in the notice of assessment:

(1) The facts and conclusions from which it was determined that a violation did occur;

(2) The basis for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(f) *Hearings.*

(1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (b)(1) of this section, the person served with a notice of assessment may file a written request for a hearing with the hearing office specified in the notice. The person shall enclose with the request for hearing a copy of the notice of assessment, and shall deliver the

request for hearing by certified mail (return receipt requested), as specified in the notice of assessment.

(2) Failure to deliver a written request for a hearing within 45 calendar days of the date of mailing of the notice of assessment shall be deemed a waiver of the right to a hearing.

(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with §§ 291.28 through 33, and shall not be limited by the amount assessed by the authorized officer under § 291.29(a) or any offer of mitigation or remission made by the authorized officer.

(g) *Final administrative decision.*

(1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (b)(1) of this section, the notice of violation shall constitute the final administrative decision;

(2) Where the person served with a notice of assessment has not requested a hearing within 45 calendar days of the date of mailing of the notice of assessment, the notice of assessment shall constitute the final administrative decision;

(3) Where the person served with a notice of assessment has filed a timely request for a hearing, the decision resulting from the hearing shall constitute the final administrative decision.

(h) *Payment of penalty.* The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a U.S. District Court as provided in § 291.32.

(i) *Other remedies not waived.* Assessment of a penalty under this section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

§ 291.31 Civil penalties hearing procedures.

(a) *Requests for hearings.* Any person wishing to request a hearing on a notice of assessment of civil penalty may file a written dated request for a hearing with the hearing office specified in the notice. The person shall enclose a copy of the notice of violation and the notice of assessment. The request shall state the relief sought, the basis for challenging the facts used for assessing the penalty, and the person's preference as to the place and date for a hearing. A copy of the request shall be served upon the USDA Office of the General Counsel by certified mail, at the addresses specified in the notice of assessment. Hearings shall be conducted in accordance with 5 U.S.C. 554.

(b) *Commencement of hearing procedures.* Upon receipt of a request for a hearing, the hearing office shall assign an administrative law judge to the case. Notice of assignment shall be given promptly to the parties, and thereafter, all pleadings, papers, and other documents in the proceeding shall be filed directly with the administrative law judge, with copies served on the opposing party.

(c) *Appearance and practice.*

(1) The respondent may appear in person, by representative, or by counsel, and may participate fully in the proceedings. If respondent fails to appear and the administrative law judge determines such failure is without good cause, the administrative law judge may, in his/her discretion, determine that such failure shall constitute a waiver of the right to a hearing and consent to the making of a decision on the record made at the hearing.

(2) Departmental counsel shall represent the agency in the proceedings. Upon notice to the authorized officer of the assignment of an administrative law judge to the case, said counsel shall enter his/her appearance on behalf of the agency and shall file all petitions and correspondence exchanges by the agency and the respondent which shall become part of the hearing record. Thereafter, service upon the agency shall be made to Departmental counsel.

(d) *Hearing administration.*

(1) The administrative law judge shall have all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions in accordance with 5 U.S.C. 554–557.

(2) The transcript of testimony; the exhibits; and all papers, documents and requests filed in the proceedings shall constitute the record for decision. The administrative law judge shall render a written decision upon the record, which shall set forth his/her findings of fact and conclusions of law, and the reasons and basis therefore, and an assessment of a penalty, if any.

(3) The administrative law judge's decision shall become effective 30 calendar days from the date of this decision.

§ 291.32 Petition for judicial review; collection of unpaid assessments.

(a) *Judicial review.* Any person against whom a final administrative decision is issued assessing a penalty may file a petition for judicial review of the decision in the U.S. District Court for the District of Columbia or in the district in which the violation is alleged to have occurred within the 30 calendar day period beginning on the date the decision was issued. Upon notice of such filing, the Secretary shall promptly file such a certified copy of the record on which the decision was issued. The court shall hear the action on the record made before the Secretary and shall sustain the action if it is supported by substantial evidence on the record considered as a whole. Judicial review is limited by the requirement to exhaust administrative remedies under 7 U.S.C. 6912(e).

(b) *Failure to pay.* Failure to pay a penalty assessed is a debt to the U.S. Government. If any person fails to pay a penalty within 30 calendar days (i) after the final administrative decision and the person has not filed a petition for judicial review of the decision in accordance with paragraph (a); or (ii) after a court in an action brought in § 291.32(a) has entered a final judgment upholding the assessment of the penalty, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which the person if found, resides, or transacts business, to collect the penalty (plus interest at currently prevailing rates from the date of the final decision or the date of the final judgment, as the case may be). The district court shall have jurisdiction to hear and decide any such action. In such action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty shall be required to pay, in addition to such amount and interest, attorney's fees and costs for collection proceedings. This section does not preclude the use of other collection methods such as Treasury offset, where appropriate.

§ 291.33 Use of recovered amounts.

Penalties and/or restitution collected shall be available to the authorized officer and without further appropriation may be used only as follows:

(a) To protect, restore, or repair the paleontological resources and sites which were the subject of the action, and to protect, monitor, and study the resources and sites; and/or

(b) To provide educational materials to the public about paleontological resources, sites, and their protection; and/or

(c) To provide for the payment of rewards as provided in § 291.40.

§ 291.34 Criminal penalties.

(a) A person who knowingly violates or counsels, procures, solicits, or employs another person to violate § 291.27 shall, upon conviction, be fined in accordance with Title 18, United States Code, or imprisoned not more than 5 years, or both; but if the sum of the commercial and paleontological value of the paleontological resources involved and the cost of restoration and repair of such resources does not exceed $500, such person shall be fined in accordance with Title 18, United States Code, or imprisoned not more than 2 years, or both.

(b) Paleontological and commercial values and the cost of restoration and repair are determined under §§ 291.37 through 39 of this Part.

§ 291.35 Multiple offenses.

In the case of subsequent or repeat violations by the same person, the amount of the monetary penalty assessed may be doubled.

§ 291.36 General exception.

The provisions in §§ 291.28 through 35 do not apply to any person with respect to any paleontological resource which was in the lawful possession of such person prior to the date of enactment of the Act.

§ 291.37 Scientific or paleontological value.

The scientific value of any paleontological resource involved in a violation of the prohibitions contained in this Part or conditions of a permit issued pursuant to this Part shall be the value of the information associated with the paleontological resource. The term ''scientific value'' can be used interchangeably with the term ''paleontological value.'' This value shall be determined in terms of the costs of the retrieval of the scientific and educational information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports or educational materials or displays as would be necessary to realize the information potential.

§ 291.38 Fair market or commercial value.

The fair market value of any paleontological resource involved in a violation of the prohibitions contained in this Part or conditions of a permit issued pursuant to this Part shall be the commercial value of the resources, determined using the condition of the paleontological resource prior to the violation, to the extent that its prior condition can be ascertained. The term ''fair market value'' can be used interchangeably with the term ''commercial value.'' Fair market value of paleontological resources can be established through the use of comparable sales or pricing information, advertisements for comparable resources, appraisals, or other information on legal or illegal markets.

§ 291.39 Cost of response, restoration, and repair.

The cost of response, restoration, and repair of paleontological resources involved in a violation of prohibitions contained in this Part or conditions of a permit issued pursuant to this Part, shall be the sum of the costs incurred for response, investigation, assessment, emergency restoration, or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include but need not be limited to the costs of:

(a) Reconstruction of the paleontological resource;

(b) Stabilization and/or salvage of the paleontological resource;

(c) Ground contour reconstruction and surface stabilization;

(d) Research necessary to carry out reconstruction or stabilization;

(e) Physical barriers or other protective devices or signs, necessitated by the disturbance of the paleontological resource, to protect it from further disturbance;

(f) Examination and analysis of the paleontological resource including recording remaining paleontological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

(g) Storage, preparation, and curation;

(h) Site monitoring; and

(i) Preparation of reports relating to any of the above activities.

§ 291.40 Rewards.

(a) The authorized officer may, at his or her discretion, pay from penalties collected under §§ 291.28 through 36, or from appropriated funds, an amount up to half of the penalties collected to any person who furnishes information which leads to a finding of the civil violation(s) or to the criminal conviction(s).

(b) If several persons provided the information, the amount may be divided at the discretion of the authorized officer among the persons.

(c) No officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of their official duties shall be eligible for payment.

§ 291.41 Forfeiture.

(a) *Forfeiture.* All paleontological resources with respect to which a violation under §§ 291.28 through 36 occurred and which are in the possession of any person, are subject to forfeiture proceedings. All forfeitures will be initiated pursuant to cooperative agreements with agencies having law enforcement authority and forfeiture regulations in place.

(b) *Transfer of Administration of Forfeited Resources.* The administration of forfeited resources may be transferred to Federal or non-Federal institutions to be used for scientific or educational purposes, in furtherance of the purposes of the Act.

Dated: May 15, 2013.

Mary Wagner,

Associate Chief, Forest Service.

[FR Doc. 2013–12173; Filed 5–22–13; 8:45 am]

BILLING CODE 3410–11–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1192

[Docket No. ATBCB–2013–0001]

RIN 3014–AA40

Rail Vehicles Access Advisory Committee

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of establishment; appointment of members.

SUMMARY: We, the Architectural and Transportation Barriers Compliance Board (Access Board), have decided to establish an advisory committee to advise us on revising and updating our accessibility guidelines for transportation vehicles that operate on fixed guideway systems (e.g., rapid rail, light rail, commuter rail, intercity rail, and high speed rail).

DATES: A notice of the first meeting will be published in the **Federal Register** after consulting with the committee members.

ADDRESSES: Committee meetings will be held at the Access Board's conference room, 1331 F Street NW., Suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Paul Beatty, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance

Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111. Telephone: (202) 272–0012 (Voice) or (202) 272–0072 (TTY). Email address: *rvaac@access-board.gov*.

SUPPLEMENTARY INFORMATION: In this notice, ''we,'' ''us'' and ''our'' refer to the Architectural and Transportation Barriers Compliance Board (Access Board).

In February 2013, we published a notice of intent to establish an advisory committee to make recommendations to the Board on matters associated with revising and updating our accessibility guidelines issued pursuant to the Americans with Disabilities Act for transportation vehicles that operate on fixed guideway systems (e.g., rapid rail, light rail, commuter rail, intercity rail, and high speed rail). See 78 FR 10581 (February 14, 2013).

For the reasons stated in the notice of intent, we have determined that establishing the Rail Vehicles Access Advisory Committee (committee) is necessary and in the public interest. We have appointed the following 23 organizations as members to the Committee:

- Alstom Transportation
- American Council of the Blind
- Association of Programs for Rural Independent Living
- Bombardier Transportation
- California Department of Transportation, Division of Rail
- Center for Inclusive Design and Environmental Access
- Community Transportation Association of America
- Disability Rights Education & Defense Fund
- Hearing Access Program
- International Centre for Accessible Transportation
- Maryland Transit Administration
- Metra & Northeast Illinois Regional Commuter Railroad Corporation
- National Association of the Deaf
- National Association of Railroad Passengers
- National Council on Independent Living
- National Disability Rights Network
- National Railroad Passenger Corporation (Amtrak)
- Parsons Brinckerhoff
- RailPlan International
- Ricon Corporation
- South West Transit Association
- Talgo, Inc.
- United Spinal Association

The Federal Railroad Administration will serve as an ex officio member.

We regret being unable to accommodate all requests for membership on the committee. It was necessary to limit membership to maintain balance among members representing different interests such as transportation vehicle manufacturers, transportation providers which operate fixed guideway systems, disability organizations, and other stakeholder organizations affected by the guidelines. The committee membership identified above provides representation for the interests affected by the issues to be discussed.

Additional committee members may be added to achieve balance of points of view among committee membership. Additional committee members may only be added during the first meeting of the committee. A three-quarters vote of the committee and concurrence by the Chairperson of the Access Board is required.

A notice of the first meeting dates will be published in the **Federal Register** after consulting with the committee members. Decisions with respect to future meetings will be made at the first meeting and from time to time thereafter. Meetings will be held at the Access Board's offices, 1331 F Street NW., Suite 800, Washington, DC 20004.

Committee meetings will be open to the public and interested persons can attend the meetings and communicate their views. Members of the public will have opportunities to address the committee on issues of interest to them during public comment periods scheduled on each day of the meeting. Members of groups or individuals who are not members of the committee may also have the opportunity to participate in subcommittees of the committee if subcommittees are formed.

The meetings will be accessible to persons with disabilities. An assistive listening system, Communication Access Realtime Translation (CART), and sign language interpreters will be provided. Persons attending the meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see *www.access-board.gov/about/policies/fragrance.htm* for more information).

Karen L. Braitmayer,

Chair.

[FR Doc. 2013–12310 Filed 5–22–13; 8:45 am]

BILLING CODE 8150–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2012–0540; FRL–9805–4]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Air Quality Standards Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Illinois State Implementation Plan (SIP) to reflect current national ambient air quality standards (NAAQS) for ozone, lead, and particulate matter. EPA is proposing to approve a revision to add new incorporations by reference associated with current ozone, lead, and particulate matter NAAQS into the Illinois SIP. EPA is also proposing to approve revisions that amend typographical errors in the Illinois SIP.

DATES: Comments must be received on or before June 24, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2012–0540, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Anthony Maietta, Environmental Protection Specialist, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard,

Chicago, Illinois 60604, (312) 353–8777, *maietta.anthony@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: April 12, 2013.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2013–12204 Filed 5–22–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2009–0810; FRL–9816–4]

Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards; Prevention of Significant Deterioration Requirements for $PM_{2.5}$ Increments and Major and Minor Source Baseline Dates; Colorado

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plan (SIP) submissions from the State of Colorado to demonstrate that the SIP meets the infrastructure requirements of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for particulate matter less than or equal to 2.5 micrometers (μm) in diameter ($PM_{2.5}$) on July 18, 1997 and on October 17, 2006. The CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIP to ensure that they meet the requirements of the ''infrastructure elements'' necessary to implement the new or revised NAAQS. Colorado submitted certifications of its infrastructure SIP for the 1997 and the 2006 $PM_{2.5}$ NAAQS on April 4, 2008 and on June 4, 2010, respectively. Colorado also submitted revisions to Regulation 3 of the Air Quality Control Commission permitting requirements for the Prevention of Significant Deterioration (PSD) program on May 11, 2012 and May 13, 2013 that incorporate the required elements of the 2008 $PM_{2.5}$ Implementation Rule and the 2010 $PM_{2.5}$ Increment Rule. EPA proposes to approve portions of these two SIP revisions that bring Colorado's PSD regulations up to date for regulated pollutants. EPA does not propose to act on the portions of the submission for the 2006 $PM_{2.5}$ NAAQS that are intended to meet requirements related to interstate transport of air pollution. EPA will act on the remainder of the submissions in a separate action.

DATES: Written comments must be received on or before June 24, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2009–0810, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: ayala.kathy@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2009–0810. 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 email. 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 email comment directly to EPA, without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, 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 section I, General Information, 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 Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Kathy Ayala, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado

80202–1129, (303) 312–6142, *ayala.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
(ii) The initials *APCD* mean or refer to the Air Pollution Control Division.
(iii) The initials *APENs* mean or refer to Air Pollution Emission Notices.
(iv) The initials *APPCA* mean or refer to the Air Pollution Prevention and Control Act.
(v) The initials *AQCC* mean or refer to the Air Quality Control Commission.
(vi) The initials *CBI* mean or refer to confidential business information.
(vii) The initials *CFC* mean or refer to chlorofluorocarbons.
(viii) The initials *CRS* mean or refer to Colorado Revised Statutes.
(ix) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.
(x) The initials *FIP* mean or refer to a Federal Implementation Plan.
(xi) The initials *GHG* mean or refer to greenhouse gases.
(xii) The initials *NAAQS* mean or refer to national ambient air quality standards.
(xiii) The initials NO_X mean or refer to nitrogen oxides.
(xiv) The initials *NNSR* mean or refer to nonattainment new source review.
(xv) The initials *NSR* mean or refer to new source review.
(xvi) The initials *PM* mean or refer to particulate matter.
(xvii) The initials $PM_{2.5}$ mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers (fine particulate matter).
(xviii) The initials PM_{10} mean or refer to particulate matter with an aerodynamic diameter of less than 10 micrometers (course particulate matter).
(xix) The initials *ppm* mean or refer to parts per million.
(xx) The initials *PSD* mean or refer to Prevention of Significant Deterioration.
(xxi) The initials *SIL* mean or refer to Significant Impact Levels.
(xxii) The initials *SIP* mean or refer to State Implementation Plan.
(xxiii) The initials *SSM* mean or refer to start-up, shutdown, or malfunction.
(xxiv) The initials *SMC* mean or refer to Significant Monitoring Concentrations.
(xxv) The initials *VOC* mean or refer to volatile organic compounds.

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I. General Information

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

1. *Submitting Confidential Business Information (CBI).* Do not submit CBI to EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a 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:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register**, date, and page number);
- Follow directions and organize your comments;
- 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; and
- Make sure to submit your comments by the comment period deadline identified.

II. Background

On July 18, 1997, EPA promulgated new NAAQS for $PM_{2.5}$. Two new $PM_{2.5}$ standards were added, set at 15 μg/m³, based on the three-year average of annual arithmetic mean $PM_{2.5}$ concentration from single or multiple community-oriented monitors, and 65 μg/m³, based on the three-year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each population-oriented monitor within an area. In addition, the 24-hour $PM_{2.5}$ standard was revised to be based on the 99th percentile of 24-hour PM_{10} concentration at each monitor within an area (62 FR 38652).

On October 17, 2006 EPA promulgated a revised NAAQS for $PM_{2.5}$, tightening the level of the 24-hour $PM_{2.5}$ standard to 35 μg/m³ and retaining the level of the annual $PM_{2.5}$ standard at 15 μg/m³. EPA also retained the 24-hour PM_{10} and revoked the annual PM_{10} standard (71 FR 61144). By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several ''infrastructure elements,'' listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 and 2006 $PM_{2.5}$ NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS.

III. What is the scope of this rulemaking?

This rulemaking will not cover four substantive issues that are not integral to acting on a state's infrastructure SIP submission: (1) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions (''SSM''); (2) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions

limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''); (3) existing provisions for minor source new source review (NSR) programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (''minor source NSR''); and (4) existing provisions for prevention of significant deterioration (PSD) programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (''NSR Reform''). Instead, EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found in EPA's July 13, 2011, final rule entitled, ''Infrastructure SIP Requirements for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' in the section entitled, ''What is the scope of this final rulemaking?'' (*see* 76 FR 41075 at 41076–41079).

IV. What infrastructure elements are required under sections 110(a)(1) and (2)?

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements the SIP must contain or satisfy. These infrastructure elements include requirements such as modeling, monitoring, and emissions inventories, which are designed to assure attainment and maintenance of the NAAQS. The elements that are the subject of this action are listed below.

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D): Interstate transport.
- 110(a)(2)(E): Adequate resources and authority, conflict of interest, and oversight of local governments and regional agencies.
- 110(a)(2)(F): Stationary source monitoring and reporting.
- 110(a)(2)(G): Emergency powers.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

A detailed discussion of each of these elements is contained in the next section.

We will act separately on element 110(a)(2)(D), which pertains to interstate transport of pollutants.

Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) and are therefore not addressed in this action. These elements relate to part D of Title I of the CAA, and submissions to satisfy them are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the same time nonattainment area plan requirements are due under section 172. The two elements are: (1) section 110(a)(2)(C) to the extent it refers to permit programs (known as ''nonattainment new source review (NSR)'') required under part D, and (2) section 110(a)(2)(I), pertaining to the nonattainment planning requirements of part D. As a result, this action does not address infrastructure elements related to the nonattainment NSR portion of section 110(a)(2)(C) or related to 110(a)(2)(I).

V. How did Colorado address the infrastructure elements of sections 110(a)(1) and (2)?

1. *Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.

a. *Colorado's response to this requirement:* Enforceable limitations and control measures are detailed in the various Air Quality Control Commission (AQCC) regulations for all sources of criteria pollutants as well as hazardous air pollutants, volatile organic compounds (VOCs), chlorofluorocarbons (CFCs), smoke and odors. A summary of the regulations which the State submitted as relevant to this element can be found within the State's certification documents dated April 4, 2008 and June 4, 2010 which are included in the docket prepared for public review.

b. *EPA analysis:* Colorado's SIP meets the requirements of CAA section 110(a)(2)(A), subject to the following clarifications. First, EPA does not consider SIP requirements triggered by the nonattainment area mandates in part D of Title I of the CAA to be governed by the submission deadline of section 110(a)(1). Nevertheless, Colorado has included some SIP provisions originally submitted in response to part D requirements in its certification for the infrastructure requirements of section 110(a)(2). In general, those provisions addressed ozone non-attainment in the Denver metropolitan area and are not relevant to implementation of the 1997 or 2006 $PM_{2.5}$ NAAQS. Colorado also referenced SIP provisions that are relevant, such as limits on emissions of particulate matter in Regulation 1, woodburning controls in Regulation 4, and the State's minor NSR and PSD programs in Regulation 3. We propose to find these provisions adequately address the requirements of element (A), again subject to the clarifications made in this notice.

Second, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. A number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109, November 24, 1987), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

Finally, in this action, EPA is also not proposing to approve or disapprove any existing state provision with regard to excess emissions during startup, shutdown, or malfunction (SSM) or operations at a facility. A number of states have SSM provisions which are contrary to the CAA and existing EPA guidance [1] and the Agency is addressing such state regulations separately (78 FR 12460, February 22, 2013).

2. *Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to ''(i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.''

a. *Colorado's response to this requirement:* The provisions for episode monitoring, data compilation and

[1] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, Memorandum to EPA Air Division Directors, ''State Implementation Plans (SIPs): Policy Regarding Emissions During Malfunctions, Startup, and Shutdown.'' (Sept. 20, 1999).

reporting, public availability of information, and annual network reviews are found in the statewide monitoring SIP which was approved by EPA on July 9, 1980 (45 FR 46073) and August 11, 1980 (45 FR 53147). The State has since revised the monitoring SIP to include all new federal requirements. The revised SIP includes a commitment to operate a particulate monitoring network in accordance with EPA regulations (40 CFR 58.20 and appendices A through G). The AQCC adopted monitoring SIP revisions on March 18, 1993.

As part of the monitoring SIP, Colorado submits a Colorado Annual Network Monitoring Plan (ANMP) each year for EPA approval. The ANMP details monitoring locations for all criteria pollutants, including $PM_{2.5}$, and lists the quality assurance accuracy audits and precision check methods performed for each monitor. The Colorado APCD periodically submits a Quality Management Plan and a Quality Assurance Project Plan to EPA Region 8. These plans cover procedures to monitor, analyze data and report data to an EPA central database. The State of Colorado has an approved monitoring SIP, a plan and authority for monitoring, and the ability to properly handle all related data.

b. *EPA analysis:* Colorado's air monitoring programs and data systems meet the requirements of CAA section 110(a)(2)(B) for the 1997 and 2006 $PM_{2.5}$ NAAQS. The Colorado 2011 ANMP was approved by EPA Region 8 on September 20, 2011.

3. *Program for enforcement of control measures:* Section 110(a)(2)(C) requires SIPs to include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program as required in parts C and D.

a. *Colorado's response to this requirement:* Colorado has an approved SIP regulating the construction and modification of stationary sources as necessary to assure the NAAQS are achieved (AQCC Regulation 3), including a permit program as required in parts C and D of the federal CAA. Colorado has an approved SIP which provides for the enforcement of the control measures required by CAA section 110(a)(2)(C).

Many of the AQCC regulations address in some manner the programs for enforcement of control measures. Some of these AQCC regulations and other relevant Colorado-specific programs that are in the SIP are described below.

Regulation 1, Particulates, Smokes, Carbon Monoxide, and Sulfur Dioxides—Regulation 1 sets forth emissions limitations, equipment requirements, and work practices (abatement and control measures) intended to control the emissions of particulates, smoke, and sulfur oxides from new and existing stationary sources. Control measures specified in this regulation are designed to limit emissions into the atmosphere and thereby minimize the ambient concentrations of particulates and sulfur dioxides.

Regulation 3, Stationary Source Permitting and Air Pollution Emission Notice Requirements—Regulation 3 provides for a procedural permitting program and requires air pollution sources to file Air Pollution Emissions Notices (APENs). The regulation also requires new or modified sources of air pollution, with certain exemptions, to obtain preconstruction permits.

Regulation 3 has been revised to incorporate $PM_{2.5}$ emissions, requiring major sources in the State to be subject to PSD and NSR permitting thresholds for $PM_{2.5}$ at the same level as PM_{10}. On May 11, 2012, Colorado submitted a revision to incorporate the 2008 $PM_{2.5}$ Implementation rule (73 FR 28321, May 16, 2008) and the 2010 $PM_{2.5}$ Increment rule (75 FR 64864, October 20, 2010). Specifically, the AQCC adopted revisions to incorporate significant emission rates for $PM_{2.5}$ emissions, including $PM_{2.5}$ precursors (sulfur dioxide and nitrogen oxides, and condensable particulate matter), $PM_{2.5}$ increments, the definitions of major and minor source baseline dates and baseline area.

Regulation 3 also was revised in 2008 to address ozone formation in the Denver Metro Area/North Front Range Ozone nonattainment area. Specifically, the AQCC adopted revisions to control and reduce ozone precursor emissions. The revisions are part of the federally-enforceable SIP to help Colorado make progress toward eventual compliance with the 2008 ozone NAAQS.

Regulation 4, Woodburning Controls—Regulation 4 requires new woodstove and fireplace inserts to meet the federal certification requirements in specified areas of Colorado.

Regulation 7, Volatile Organic Compound Control—Regulation 7 controls the emissions of VOCs, primarily in the Denver-metro area. It sets standards and mandates control for specific types of VOC sources. In 2008 Regulation 7 was revised to increase control requirements for oil and gas condensate tanks, glycol dehydrators, and reciprocating internal combustion engines. These revisions were made as part of the State's Ozone SIP.

Regulation 11, Motor Vehicle Inspection—Regulation 11 requires automobile emission inspection and maintenance programs to be implemented in specified areas of the state for gasoline powered on-road vehicles. These programs apply to businesses, industry, and the general public. In addition, the State's Automobile Inspection and Readjustment (AIR) program's purpose is to reduce motor vehicle related pollution through the inspection and emissions related repair of automobiles. The program as defined in Regulation 11, works in specific areas of the state, and requires motor vehicles to meet emission standards through periodic inspection and, as necessary, repair.

Regulation 16, Street Sanding and Sweeping—Regulation 16 sets specification standards for street sanding material and street sweeping practices in the area covered by the AIR program and Denver-metro particulate attainment/maintenance area.

Common Provisions Regulation—The Colorado APCD may require owners and operators of stationary air pollution sources to install, maintain, and use instrumentation to monitor and record emission data as a basis for periodic reports to the Division under the provisions of the AQCC Common Provisions regulation.

b. *EPA analysis:* To generally meet the requirements of section 110(a)(2)(C), the State is required to have SIP-approved PSD, nonattainment NSR, and minor NSR permitting programs adequate to implement the 1997 and 2006 $PM_{2.5}$ NAAQS. As explained above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the Act. EPA is evaluating the State's PSD program as required by part C of the Act, and the State's minor NSR program as required by 110(a)(2)(C).

PSD Requirements

Colorado has a SIP-approved PSD program that meets the general requirements of part C of the Act (51 FR 31125). To satisfy the particular requirements of section 110(a)(2)(C), states should have a PSD program that applies to all regulated NSR pollutants, including greenhouse gases (GHGs). See 40 CFR 51.166(b)(48) and (b)(49). The PSD program should reflect current requirements for these pollutants. In particular, for three pollutants—ozone, $PM_{2.5}$, and GHGs—there are additional

regulatory requirements (set out in portions of 40 CFR 51.166) that we consider in evaluating Colorado's PSD program.

On January 9, 2012 (77 FR 1027), we approved a revision to the Colorado PSD program that addressed the PSD requirements of the Phase 2 Ozone Implementation Rule promulgated in 2005 (70 FR 71612). As a result, the approved Colorado PSD program meets current requirements for ozone.

We evaluate PSD Requirements for GHGs. In EPA's rule, ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans'' (''PSD SIP Narrowing Rule''), (75 FR 82536, December 30, 2010), EPA withdrew its previous approval of Colorado's PSD program to the extent that it applied PSD permitting to GHG emissions increases from GHG-emitting sources below thresholds set in EPA's June 3, 2010 ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule'' (''Tailoring Rule''), 75 FR 31514. EPA withdrew its approval on the basis that the State lacked sufficient resources to issue PSD permits to such sources at the statutory thresholds in effect in the previously-approved PSD program. After the PSD SIP Narrowing Rule, the portion of Colorado's PSD SIP from which EPA withdrew its approval had the status of having been submitted to EPA but not yet acted upon. In its April 4, 2008 and June 4, 2010 infrastructure certifications, Colorado relied upon its PSD program as approved at that date—which was before December 30, 2010, the effective date of the PSD SIP Narrowing Rule—to satisfy the requirements of infrastructure element 110(a)(2)(C). In a letter dated May 10, 2011, the State clarified its certifications to make clear that the State relies only on the portion of the PSD program that remains approved after the PSD SIP Narrowing Rule issued on December 30, 2010, and for which the State has sufficient resources to implement. As a result, Colorado's PSD program as approved in the SIP meets current requirements for GHGs.

Finally, we evaluate the PSD program with respect to current requirements for $PM_{2.5}$. In particular, on May 16, 2008, EPA promulgated the rule, ''Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) and on October 20, 2010 EPA promulgated the rule, ''Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (75 FR 64864). EPA regards adoption of these $PM_{2.5}$ rules as a necessary requirement when assessing a PSD program for the purposes of element (C).

On January 4, 2013,the U.S. Court of Appeals, in *Natural Resources Defense Council v. EPA,* 706 F.3d 428 (DC Cir.), issued a judgment that remanded the EPA's 2007 and 2008 rules implementing the 1997 $PM_{2.5}$ NAAQS. The Court ordered the EPA to ''repromulgate these rules pursuant to Subpart 4 consistent with this opinion.'' *Id.* at 437. Subpart 4 of part D, Title 1 of the CAA establishes additional provisions for particulate matter nonattainment areas.

The 2008 implementation rule addressed by the court decision, ''Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' (73 FR 28321, May 16, 2008), promulgated New Source Review (NSR) requirements for implementation of $PM_{2.5}$ in nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). As the requirements of subpart 4 only pertain to nonattainment areas, the EPA does not consider the portions of the 2008 Implementation rule that address requirements for $PM_{2.5}$ attainment and unclassifiable areas to be affected by the Court's opinion. Moreover, the EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 Implementation rule in order to comply with the Court's decision. Accordingly, the EPA's approval of Colorado's infrastructure SIP as to elements (C) or (J) with respect to the PSD requirements promulgated by the 2008 Implementation rule does not conflict with the Court's opinion.

The Court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 Implementation rule also does not affect the EPA's action on the present infrastructure action. The EPA interprets the Act to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due 3 years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subpart 2 through 5 under part D, extending as far as 10 years following designations for some elements.

The second PSD requirement for $PM_{2.5}$ is contained in EPA's October 20, 2010 rule, ''Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (75 FR 64864). EPA regards adoption of the $PM_{2.5}$ increments as a necessary requirement when assessing a PSD program for the purposes of element (C).

On May 11, 2012, the State submitted revisions to Regulation 3 that adopted all elements of the 2008 Implementation Rule and the 2010 $PM_{2.5}$ Increment Rule. However, the submittal contained a definition of Major Source Baseline Date which was inconsistent with 40 CFR 51.166(b)(14)(i). On May 13, 2013, the State submitted revisions to Regulation 3 which incorporate the definition of Major Source Baseline Date which was consistent with 40 CFR 51.166(b)(14)(i). These submitted revisions make Colorado's PSD program up to date with respect to current requirements for $PM_{2.5}$. We propose to approve the necessary portions of Colorado's May 11, 2012 and May 13, 2013 submissions to reflect the 2008 $PM_{2.5}$ Implementation Rule and the 2010 $PM_{2.5}$ Increment Rule; specifically 40 CFR part 166, paragraphs (b)(14)(i), (ii), (iii), (b)(15)(i), (ii), (b)(23)(i), (b)(49)(i), (vi), and paragraph (c)(1). Specifically, EPA is proposing to approve revisions to: Part D, sections II.A.5.a and b, II.A.23.a and b, II.A.25.a.(i), (a).(ii), (a).(iii), and (b).(i), II.A.38.c and g, II.A.42.a. and X.A.1. as submitted on May 11, 2012, and revisions to II.A.23.c, as submitted on May 13, 2013. We are not proposing to act on any other portions of the May 11, 2012 submittal, including the adoption of significant impact levels (SILs) and significant monitoring concentrations (SMCs) for $PM_{2.5}$.

With these revisions, Colorado's SIP-approved PSD program will meet current requirements for $PM_{2.5}$. As a result, EPA is proposing to approve Colorado's infrastructure SIP for the 1997 and 2006 $PM_{2.5}$ NAAQS with respect to the requirement in section 110(a)(2)(C) to include a permit program in the SIP as required by part C of the Act.

Minor NSR

The State has a SIP-approved minor NSR program, adopted under section 110(a)(2)(C) of the Act. The minor NSR program is found in Section II of the Colorado SIP, and was originally approved by EPA as Section 2 of the SIP (*see* 68 FR 37744, June 25, 2003). Since approval of the minor NSR program, the State and EPA have relied on the program to assure that new and

modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Colorado's infrastructure SIP for the 1997 and 2006 $PM_{2.5}$ NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. A number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

4. *Interstate Transport:* Section 110(a)(2)(D)(i) is subdivided into four ''prongs,'' two under 110(a)(2)(D)(i)(I) and two under 110(a)(2)(D)(i)(II). The two prongs under 110(a)(2)(D)(i)(I) require SIPs to contain adequate provisions to prohibit emissions that (prong 1) contribute significantly to nonattainment in any other state with respect to any such national primary or secondary NAAQS, and (prong 2) interfere with maintenance by any other state with respect to the same NAAQS. The two prongs under 110(a)(2)(D)(i)(II) require SIPs to contain adequate provisions to prohibit emissions that interfere with measures required to be included in the applicable implementation plan for any other state under part C (prong 3) to prevent significant deterioration of air quality or (prong 4) to protect visibility. As noted, we are not acting on the requirements of section 110(a)(2)(D)(i) in this proposed rulemaking.

5. *Interstate and International transport provisions:* Section 110(a)(2)(D)(ii) requires that each SIP shall contain adequate provisions insuring compliance with applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement). As noted, we are not acting on the requirements of section 110(a)(2)(D)(ii) in this proposed rulemaking.

6. *Adequate resources and authority:* Section 110(a)(2)(E)(i) requires states to provide necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of federal or state law from carrying out the SIP or portion thereof). Section 110(a)(2)(E)(iii) requires states to ''provide necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any [SIP] provision, the State has responsibility for ensuring adequate implementation of such [SIP] provision.''

a. *Colorado's response to this requirement:* There are no state or federal provisions prohibiting the implementation of any provision of the Colorado SIP. In general, Colorado provides the necessary assurances that funding, personnel, and authority exist and that the State of Colorado has responsibility for implementing local provisions. The AQCC adopted all of the regulatory provisions in the SIP pursuant to authority delegated to it by statute. The AQCC's general authority to adopt the rules and regulations necessary to implement the SIP is set out in the Colorado Air Pollution Prevention and Control Act (APPCA) section 25–7–105 of the Colorado Revised Statutes (CRS). The authority for the APCS to administer and enforce the program is set out at 25–7–111 CRS. Additional authority to regulate air pollution and implement provisions in the SIP is set out elsewhere in the Colorado APPCA, Article 7 of Title 25. In addition, the AQCC and the APCD have the authority delegated to them in sections 42–4–301 to 42–4–316, CRS (concerning motor vehicle emissions) and 42–4–414 (concerning emissions from diesel-powered vehicles).

The AQCC's authority includes the authority to regulate particulate emissions, regardless of size (CRS section 25–7–109(2)(b)).

The Colorado APCD has staff and an annual budget to operate its six programs (Stationary Sources, Mobile Sources, Indoor Air, Technical Service, Planning and Policy, and Administrative Services). As of June 30, 2009, the APCD employed 159 people and had a budget of $19.7 million for fiscal year 2009.

Of the total budget, 17 percent was derived from federal grants, 32 percent from mobile source fees, 47 percent from stationary source fees, and 4 percent from other cash sources.

Relationships with other agencies responsible for carrying out State activities—The Colorado APCD contracts with local governments in two distinct ways: (1) Colorado grants monies to local health departments to endow them as agents of the State to provide inspections of some local stationary sources, asbestos abatement jobs, and CFC sources. Some local health departments also operate gaseous and particulate monitors under contract for the State. These efforts must comply with federal and state regulations; and (2) Colorado grants monies to local governments to help pay for their support of SIP elements via public and private partnerships, education and informal campaigns. Most of these agencies create their own work plan that consists of programs they believe will help enhance air quality in their communities in accordance with SIP directives.

Colorado has adopted specific regulations for local attainment/maintenance areas to assure these areas meet requirements of the SIP. These regulations include the Colorado AQCC SIP-specific regulations, 5 CCR 1001–20. These regulations provide the necessary authority for the Colorado APCD to adequately enforce the provisions of the SIP elements in local attainment/maintenance areas.

b. *EPA Analysis:* Colorado's SIP meets the requirements of sections 110(a)(2)(E)(i) and (E)(iii) for the 1997 and 2006 $PM_{2.5}$ NAAQS. The State cites the Colorado Revised Statutes, specifically the APPCA Sections 25–7–105, 25–7–111, 42–4–301 to 42–4–316, 42–4–414 and Article 7 of Title 25 to demonstrate that the APCD and AQCC have adequate authority to carry out Colorado's SIP obligations with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS and to revise its SIP as necessary. The State received Sections 103 and 105 grant funds through its Performance Partnership Grant along with required state matching funds to provide funding necessary to carry out Colorado's SIP requirements. The regulations cited by Colorado also provide the necessary assurances that the State has responsibility for adequate implementation of SIP provisions by local governments.

7. *State boards:* Section 110(a)(2)(E)(ii) requires that the State comply with the requirements respecting State boards under section 128.

a. *Colorado's response to this requirement:* Section 128 of the CAA indicates Colorado's SIP must contain

requirements that anybody approving permits or enforcement orders under the CAA must have a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement actions.

The AQCC Procedural Rules, section 1.11.0, state that ''The Commission shall have at least a majority of members who represent the public interest and do not derive a significant portion of their income from persons subject to permits or enforcement orders under this article or under the federal act. The members of the Commission shall disclose any potential conflicts of interest that arise during their terms of membership to the other Commissioners in a public meeting of the Commission.''

b. *EPA Analysis:* On April 10, 2012 (77 FR 21453) EPA approved the Procedural Rules, Section 1.11.0, as adopted by the AQCC on January 16, 1998, into the SIP as meeting the requirements of section 128 of the Act. Section 1.11.0 specifies certain requirements regarding the composition of the AQCC and disclosure by its members of potential conflicts of interest. Details on how this portion of the Procedural Rules meets the requirements of section 128 are provided in our January 4, 2012 proposal notice (77 FR 235). In our April 10, 2012 action, we correspondingly approved Colorado's infrastructure SIP for the 1997 ozone NAAQS for element (E)(ii). Colorado's SIP continues to meet the requirements of section 110(a)(2)(E)(ii), and we propose to approve the infrastructure SIP for the 1997 and 2006 $PM_{2.5}$ NAAQS for this element.

8. *Stationary source monitoring system:* Section 110(a)(2)(F) requires:

(i) The installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) Periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) Correlation of such reports by the state agency with any emission limitations or standards established pursuant to [the Act], which reports shall be available at reasonable times for public inspection.

a. *Colorado's response to this requirement:* Colorado AQCC Regulations 1, 3, and 6 address the issue of stationary source monitoring. Colorado Regulation 1 sets forth emission limitations, equipment requirements, and work practices (abatement and control measures) intended to control the emissions of particulates, smoke, and sulfur dioxides from new and existing stationary sources. Colorado Regulation 3 requires stationary sources to report their emissions on a regular basis through APENs. This air pollutant inventory program is described in the APPCA Section 25–7–114.1 (CRS) and in Colorado Regulation 3, Part I.VIII that allows for record keeping of air pollutants. Colorado Regulation 6 sets standards of performance for monitoring and new stationary sources in the state and establishes monitoring system requirements.

The Colorado APCD may require owners and operators of stationary air pollution sources to install, maintain, and use instrumentation to monitor and record emission data as a basis for periodic reports to the APCD under the provisions of the AQCC Common Provisions regulation.

b. *EPA Analysis:* The regulations cited by Colorado, including APEN reporting requirements and requirements in Regulation 3, Part I.VIII, meet the requirements of section 110(a)(2)(F) for the 1997 and 2006 $PM_{2.5}$ NAAQS.

9. *Emergency powers:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

a. *Colorado's response to this requirement:* The State has the authority to implement emergency powers similar to section 303 of the CAA. First, the EPA-approved ''Denver Emergency Episode Plan'' addresses ozone, particulate matter (PM_{10}), and carbon monoxide for the Denver-metro region and requires the State to implement protective measures when air quality exceeds defined thresholds. Additionally, the APPCA Sections 25–7–112 and 25–7–113, which have various sections similar to 42 U.S.C. 7603, generally describe Colorado's authority regarding Emergency Episodes. For example, 25–7–112(2) provides the Governor the authority to implement emergency provisions through an order to the Colorado APCD.

As described in EPA's September 25, 2009 guidance, areas that have had a $PM_{2.5}$ exceedance greater than 140.4 μg/m³ should have an emergency episode plan. If no such concentration was recorded since 2006, the State can rely on its general emergency authorities. Colorado has never had such a $PM_{2.5}$ level and thus an emergency episode plan for $PM_{2.5}$ is not necessary. Nevertheless, the State certifies it has the appropriate emergency powers to address $PM_{2.5}$ episodes, as described above.

Additionally, the State implements EPA's air quality index system and typically issues alerts and advisories to the public when any pollutant is expected to or exceeds an AQI value of 100. If $PM_{2.5}$ concentrations are expected to or actually exceed EPA's recommended index value thresholds of 201 (alert), 301 (warning), 350.5 (significant harm), or 401 (emergency), the State can invoke emergency powers.

b. *EPA analysis:* Colorado Pollution Prevention and Control Act Sections 25–7–112 and 25–7–113 provide APCD with general emergency authority comparable to that in section 303 of the Act. In our 2009 guidance for infrastructure requirements for the 2006 $PM_{2.5}$ NAAQS, we suggested that states that had monitored and recorded 24-hour $PM_{2.5}$ levels greater than 140.4 μg/m³, using the most recent three years of data, should develop emergency episode plans for the areas with the monitored values. We also suggested that, if these levels had not been exceeded, states could certify that they had adequate general emergency authority to address $PM_{2.5}$ episodes. In this rulemaking, we view these suggestions as still appropriate in assessing Colorado's SIP for this element. Colorado has not monitored any values above the 140.4 μg/m³ level for $PM_{2.5}$ for the past three years (e.g., 2009, 2010, and 2011). Since this level was not exceeded in any area of the state and the State has demonstrated that it has appropriate general emergency powers to address $PM_{2.5}$ related episodes, no specific emergency episode plans are necessary at this time. The SIP therefore meets the requirements of section 110(a)(2)(G) for the 1997 and 2006 $PM_{2.5}$ NAAQS.

10. *Future SIP revisions:* Section 110(a)(2)(H) requires that SIPs provide for revision of such plan:

(i) From time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) Except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the [SIP] is substantially inadequate to attain the [NAAQS] which it implements or to otherwise comply with any additional requirements under this [Act].

a. *Colorado's response to this requirement:* The State of Colorado has the ability and authority to address and

revise the SIP due to changes in the NAAQS or due to findings of inadequacies.

The Colorado AQCC has the authority and duty to adopt and revise a SIP as necessary to comply with the federal requirements. Colorado APPCA section 25–7–105(1)(a)(I) (CRS) directs the Colorado AQCC to promulgate rules and regulations as related to a comprehensive SIP which will assure attainment and maintenance of the NAAQS and which will prevent significant deterioration or air quality in the State of Colorado.

Colorado APPCA section 25–7–109 (CRS) also gives the Colorado AQCC the authority to promulgate emission control regulations.

b. *EPA analysis:* Colorado's statutory provision at Colorado APPCA Section 25–7–105(1)(a)(I) gives the AQCC sufficient authority to meet the requirements of 110(a)(2)(H).

11. *Consultation with government officials, public notification, PSD and visibility protection:* Section 110(a)(2)(J) requires that each SIP ''meet the applicable requirements of section 121 of this title (relating to consultation), section 127 of this title (relating to public notification), and part C of this subchapter (relating to [PSD] of air quality and visibility protection).''

a. *Colorado's response to this requirement: Consultation*—Engineering and meteorological consultation is provided by the State to local agencies. The State assists local agencies in planning air management programs for their respective areas. The Colorado AQCC holds public meetings and hearings on all SIP revisions in accordance with the AQCC Procedural Rules. Public comment is solicited and accepted at Colorado AQCC meetings and hearings.

Colorado's Transportation Conformity Rule, Regulation 10, specifies consultation procedures for SIP revisions in Section IV.F.

Also, as part of the State of Colorado's Visibility SIP, the APCD consults with the Federal Land Managers and other states as necessary and required.

Public notification—Colorado notifies the public of instances or of areas in which any national primary ambient air quality standard is exceeded. Included in this notification are public awareness announcements regarding health hazards and manners in which the public can participate in regulatory and other efforts to improve Colorado's air quality. Not only does the State provide after-the-fact information about readings in excess of the NAAQS, the Denver PM_{10} SIP provides for advance warnings to the public that the NAAQS may be exceeded whenever meteorological conditions make it possible or likely for ambient concentrations to exceed the NAAQS.

The Colorado APCD prepares a daily public notification in the form of an Air Pollution Advisory for a nine-county Denver-Boulder metropolitan and North Front Range area and the communities of Fort Collins and Greeley. The advisory is posted on the APCD Web site and includes details of the day's air quality and visibility, a forecast of the coming day's air quality, residential burning restrictions, and voluntary motor vehicle driving reduction requests during the winter high pollution season. The advisory includes links to an open burning forecast and other important information such as the day's Air Quality Index, the health effects of specific pollutants, and measures that can be taken by the public to reduce exposure. While not part of Colorado's SIP, the advisories are part of an ongoing commitment by the State to inform and educate citizens about air quality.

Other Colorado communities also maintain and operate daily air quality forecasts, including Mesa County on the Western Slope and El Paso County in the Colorado Springs area.

The State has developed Natural Events Action Plans that include public notification and education elements. While not a formal part of the State SIP, the plans include provisions to notify the public about actions to take during imminent blowing dust and wildfire events that could lead to high levels of particulate matter.

Prevention of Significant Deterioration—Colorado AQCC Regulation 3 (Stationary Source Permitting and Air Pollution Emission Notice Requirements), Regulation 6 (Standards of Performance for New Stationary Sources), and Colorado's Long Term Strategy for Visibility Protection adequately address PSD and Visibility Protection. For example, new major stationary sources or major modifications are restricted in their emissions in order to protect the PSD increment under Colorado AQCC Regulation 3. PSD and visibility analyses are also required by NSR regulations of Colorado. Colorado is required to review new major stationary sources and major modifications prior to construction to assess potential impacts on visibility in any Class I Area. Colorado AQCC Regulation 3.XI.E, ''New Source Review'' (Appendix D) describes the applicant's demonstration that the proposed source will not have an adverse effect on visibility in Class I areas.

Visibility—For $PM_{2.5}$, Colorado's visibility program contains adequate provisions that are either in the SIP or submitted for inclusion into the SIP to prohibit any source or other type of emission activity in the State from emitting air pollutants in amounts that will interfere with measures required to be included in the applicable implementation plan of another state to protect visibility. Colorado's implementation plan also adheres to the direction set forth in EPA's applicable guidance interpreting this section of the CAA.

The plan submitted to EPA on March 31, 2010 demonstrates that there is a significant downward trend in Colorado's visibility impairing emissions, visibility in surrounding Mandatory Class I Areas is improving over time, and regional modeling indicates Colorado has a small contribution to out-of-state haze. Thus, air pollution sources and other types of emission activity within the State of Colorado do not interfere with measures required to be included in the applicable implementation plan of another state to protect visibility.

b. *EPA Analysis:* The State has demonstrated that it has the authority and rules in place to provide a process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal Land Manager having authority over federal land to which the SIP applies, consistent with the requirements of CAA section 121. Furthermore, EPA previously approved Colorado's SIP submission to meet the requirements of CAA section 127 (45 FR 53147, August 11, 1980).

Colorado's SIP regulations for its PSD program were federally-approved and made part of the SIP on September 2, 1986 (51 FR 31125). EPA has further evaluated the State's SIP-approved PSD program in section V.3, element 110(a)(2)(C) of this proposed action. As explained in that section, we propose to approve Colorado' s infrastructure SIPs for the 1997 and 2006 $PM_{2.5}$ NAAQS with respect to the requirement in element (C) to have a permit program as required by Part C of the Act. We correspondingly propose to approve the infrastructure SIPs for the 1997 and 2006 $PM_{2.5}$ NAAQS with respect to the requirement in element (J) that the SIP meet the applicable requirements of Part C with respect to PSD.

Finally, with regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the act. In

the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus we find that there is no new visibility obligation ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. In conclusion, the Colorado SIP meets the requirements of section 110(a)(2)(J) for the 1997 and 2006 $PM_{2.5}$ NAAQS with respect to the requirements of sections 121 and 127 of the Act, and also meets the requirements of section 110(a)(2)(J) for the 1997 and 2006 $PM_{2.5}$ NAAQS.

12. *Air quality and modeling/data:* Section 110(a)(2)(K) requires that each SIP provide for:

(i) The performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a [NAAQS], and

(ii) The submission, upon request, of data related to such air quality modeling to the Administrator.

a. *Colorado's response to this requirement:* Colorado has the authority and resources to model for criteria pollutants, including $PM_{2.5}$. Air quality modeling is done for SIP revisions and for transportation conformity. Colorado Regulation 3 (Stationary Source Permitting and Air Pollution Emission Notice Requirements) requires stationary sources to predict the effect of air pollutants in attainment areas. Regulation 3 also details the State of Colorado's program regarding permitting as related to air quality modeling and data handling in predicting the effect of emissions of a pollutant with an established NAAQS. Regulatory requirements for Air Quality Related Values as related to modeling are described within Colorado Regulation 3, Part B, subsection X and XI. A permit modification for purposes of the acid rain portion of a permit are governed by regulations promulgated under Title VI of the federal act, found in 40 CFR Part 72 as described under Colorado Regulation 3, Part C, subsection X.K.

The Modeling, Meteorology, and Emission Inventory Unit within the Colorado APCD performs and reviews air quality impact analyses for a variety of programs, including SIP revisions, transportation conformity determinations, stationary source permitting, environmental impact statements, and hazardous waste site audits. The analyses include modeling, meteorological analysis, and emission inventory development for mobile sources and area stationary sources such as woodburning. The Unit also performs air quality forecasting for the Denver-metro area High Pollution Season, open burning, and for special air quality studies. Additional information regarding these programs and authority is provided below. Some of these programs are found in the SIP. For example, both Colorado AQCC Regulation 4 (Woodburning) and the Denver PM_{10} SIP address state air quality modeling programs.

PSD and Increment Consumption—Colorado's PSD program includes a requirement that the State periodically assess the adequacy of its plan to prevent significant deterioration of air quality. This is presented in Regulation 3, Part B, section VII. In addition, Regulation 3, Part A, section VIII, ''Technical Modeling and Monitoring Requirements'' states that all estimates of ambient concentrations required under Regulation 3 shall be based on the applicable air quality models, data bases, and other requirements generally approved by EPA and specifically approved by the APCD.

SIP Development—Modeling is performed in the development and revision of SIPs, as needed, to ensure specific areas of the State will maintain or re-attain compliance with the NAAQS in light of development and increased population and traffic.

Permits—The primary Colorado regulation for air quality permits is Colorado AQCC Regulation 3. Certain new/modified air pollution sources are subject to the regulatory modeling requirements in Regulation 3. Regulation 3, Part A, subsection VIII describes Colorado's technical modeling and monitoring requirements. Modeling is often required to obtain a construction permit. While modeling is not required to obtain an operating permit, it may be required if the operating permit is modified (in Regulation 3, Part C, subsection X—Minor Permit Modification Procedures). Operating permits may also be subject to modeling if the application is for a combined construction/operating permit (Regulation 3, Part C, subsection III.C.12.d).

b. *EPA Analysis:* Colorado's SIP meets the requirements of CAA section 110(a)(2)(K) for the 1997 and 2006 $PM_{2.5}$ NAAQS. In particular, Colorado's Regulation 3 Part A.VIII requires estimates of ambient air concentrations be based on applicable air quality models approved by EPA. Final approval for Regulation 3 Part A.VIII became effective February 20, 1997 (62 FR 2910). As a result, the SIP provides for such air quality modeling as the Administrator has prescribed.

13. *Permitting fees:* Section 110(a)(2)(L) requires SIPs to:

Require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this act, a fee sufficient to cover—

(i) The reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) If the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under [title] V * * *

a. *Colorado's response to this requirement:* The State of Colorado requires the owner or operator of a major stationary source to pay the Colorado APCD any fee necessary to cover the reasonable costs of reviewing and acting upon any permit application. The collection of fees is described in Colorado AQCC Regulation 3. Specifically, Regulations 3, Part A.VI describes how each applicant required to obtain a permit must pay a fee, including the cost of permit review and relevant actions. Also, stationary source owners or operators must pay an annual fee based on total emissions. The funds are used by the State to administer programs for the control of air pollution from stationary sources.

b. *EPA Analysis:* Colorado's approved title V operating permit program meets the requirements of CAA section 111(a)(2)(L) for the 1997 and 2006 $PM_{2.5}$ NAAQS. Final approval of the title V operating permit program became effective October 16, 2000 (65 FR 49919). Interim approval of Colorado's title V operating permit program became effective February 23, 1995 (60 FR 4563). As discussed in the proposed interim approval of the title V program (59 FR 52123, October 14, 1994), the State demonstrated that the fees collected were sufficient to administer the program. In addition, as described by Colorado, the State collects fees that cover the cost of review of permits for major stationary sources.

14. *Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

a. *Colorado's response to this requirement:* Colorado AQCC Regulation 10, ''Transportation Conformity,'' defines the criteria the Colorado AQCC uses for transportation

conformity determinations to develop SIP revisions in non-attainment areas. Interagency consultation requirements are detailed in Regulation 10, and meet the federal requirements under 40 CFR 51.390, as published at 62 FR 43780 (August 15, 1997). Colorado AQCC Regulation 3 also provides for consultation and participation by local entities. Local governments receive notice and have the opportunity to comment on and participate in construction permit review procedures and operating permit application procedures.

The Colorado AQCC holds a public hearing before adopting any regulatory revisions to the SIP. Local political subdivisions may participate in the hearing.

b. *EPA Analysis:* Colorado's submittal meets the requirements of CAA section 110(a)(2)(M) for the 1997 and 2006 $PM_{2.5}$ NAAQS.

VI. What action is EPA taking?

In this action, EPA is proposing to approve the following infrastructure elements for the 1997 and 2006 $PM_{2.5}$ NAAQS: (A), (B), (C) with respect to minor NSR requirements, (E), (F), (G), (H), (J) with respect to the requirements of sections 121 and 127 of the Act, (K), (L), and (M). EPA proposes to approve infrastructure elements (C) and (J) with respect to PSD requirements for the 1997 and 2006 $PM_{2.5}$ NAAQS. EPA is also proposing to approve revisions to Regulation 3 submitted by Colorado on May 11, 2012, and May 13, 2013, which incorporate the requirements of the 2008 $PM_{2.5}$ Implementation Rule and the 2010 $PM_{2.5}$ Increment Rule; specifically, revisions to: Regulation 3, Part D, sections II.A.5.a and b, II.A.23.a and b, II.A.25.a.(i), (a).(ii), (a).(iii), and (b).(i), II.A.38.c and g, II.A.42.a. and X.A.1. as submitted on May 11, 2012, and revisions to II.A.23.c, as submitted on May 13, 2013. EPA is taking no action at this time on infrastructure element (D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS.

VII. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999); is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 13, 2013.

Howard M. Cantor,

Acting Regional Administrator, Region 8.

[FR Doc. 2013–12215 Filed 5–22–13; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2012–0017; FWS–R1–ES–2013–0012; 4500030113]

RIN 1018–AX72; 1018–AZ54

Endangered and Threatened Wildlife and Plants; Threatened Status and Designation of Critical Habitat for Eriogonum codium (Umtanum Desert Buckwheat) and Physaria douglasii subsp. tuplashensis (White Bluffs Bladderpod)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on our May 15, 2012, proposed listing and designation of critical habitat for the *Eriogonum codium* (Umtanum desert buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod) under the Endangered Species Act of 1973, as amended (Act). We are reopening the comment period to allow all interested parties an opportunity to comment on the proposed rules and to follow proper procedure in accordance with 16 U.S.C. section 1533(b)(5). Comments previously submitted on the proposed rules need not be resubmitted, as they will be fully considered in our determinations on these rulemaking actions.

DATES: The comment period for the proposed rule published May 15, 2012 (77 FR 28704), is reopened. We will consider all comments received or postmarked on or before July 22, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Document availability:* You may obtain copies of the proposed rule on the Internet at *http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0017, or by mail from the Washington Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Comment submission: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Submit comments on the proposed listing rule to FWS–R1–ES–2012–0017. Submit comments on the proposed critical habitat rule to FWS–R1–ES–2013–0012.

(2) *By hard copy:*

Submit comments on the proposed listing rule by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2012–0017; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Submit comments on the proposed critical habitat rule by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2013–0012; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Ken Berg, Manager, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive, Suite 102, Lacey, Washington 98503–1263, by telephone (360) 753–9440, or by facsimile (360) 753–9405. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed listing and designation of critical habitat for the *Eriogonum codium* (Umtanum desert buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod) that was published in the **Federal Register** on May 15, 2012 (77 FR 28704). We will consider information and recommendations from all interested parties.

As to the proposed listing determination, we are particularly interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations.

(3) Any information on the biological or ecological requirements of the species, and ongoing conservation measures for the species and their habitats.

(4) Current or planned activities in the areas occupied by these species and possible impacts of these activities on these species.

As to the proposed critical habitat determination, we are particularly interested in comments concerning:

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act, including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(6) Specific information on:

(a) The amount and distribution of the species' habitat;

(b) What areas occupied by the species at the time of listing that contain features essential for the conservation of the species we should include in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential to the conservation of the species and why.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(9) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (77 FR 28704) during the initial comment period from May 15, 2012, to July 16, 2012, please do not resubmit them. We have incorporated them into the public record as part of the original comment period, and we will fully consider them in our final determinations.

You may submit your comments and materials concerning the proposed rules by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0017 for the proposed listing action and at Docket No. FWS–R1–ES–2013–0012 for the proposed critical habitat designation, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

On May 15, 2012, we published a proposed rule to list *Eriogonum codium* (Umtanum desert buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs bladderpod) as threatened and to designate critical habitat for these species (77 FR 28704). We proposed to designate a total of approximately 344 acres (139 hectares) of critical habitat for *Eriogonum codium* in Benton County, Washington, and approximately 2,861 acres (1,158 hectares) of critical habitat for *Physaria douglasii* subsp. *tuplashensis* in Franklin County, Washington. That proposal had a 60-day comment period, ending July 16, 2012.

On April 23, 2013, we published final rules for these proposed actions. We published the final listing rule under Docket No. FWS–R1–ES–2012–0017 (78 FR 23984) and the final critical habitat rule under Docket No. FWS–R1–ES–2013–0012 (78 FR 24008). The provisions of the final rules did not change from what was proposed. Both final rules had an effective date of May 23, 2013.

Elsewhere in today's **Federal Register**, we are publishing a document to delay the effective date of those rules for 6 months—until November 22, 2013. We are delaying the effective date of the final rules and reopening the comment period on the proposed rules to allow us time to follow proper procedure in accordance with 16 U.S.C. section 1533(b)(5). If, after review of any comments received during this reopened comment period, we determine that we should revise the final rules, we will announce this decision and our course of action in a document published in the **Federal Register**.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 20, 2013.

Rachel Jacobsen,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–12379 Filed 5–22–13; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 78, No. 100

Thursday, May 23, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 17, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by June 24, 2013 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725–17th Street, NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal Plant and Health Inspection Service

Title: 7 CFR 340; Introduction of Organisms and Products Altered or Produced Through Genetic Engineering.

OMB Control Number: 0579–0085.

Summary of Collection: The Animal and Plant Health Inspection Service (APHIS) is charged with preventing the introduction of plant pest into the United States or their dissemination within the United States. The statutory requirements for the information collection activity are found in the Plant Pest Act (PPA). The regulations in 7 CFR Part 340 implement the provisions of the PPA by providing the information necessary to establish conditions for proposed introductions of certain genetically engineered organisms and products which present a risk of plant pest introduction. APHIS will collect information using several APHIS forms.

Need and Use of the Information: APHIS will collect the information through a notification procedure or a permit requirement to ensure that certain genetically engineered organisms, when imported, moved interstate, or released into the environment, will not present a risk of plant pest introduction. The information collected through the petition process is used to determine whether a genetically engineered organism will pose a risk to agriculture or the environment if grown in the absence of regulations by APHIS. The information is also provided to State departments of agriculture for review, and made available to the public and private sectors on the Internet to ensure that all sectors are kept informed concerning any potential risks posed through the use of genetic engineering technology.

Description of Respondents: Business or other for profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 121.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 3,308.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–12243 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 17, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725—17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received by June 24, 2013. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to

the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: 7 CFR 1940–G, Environmental Program.

OMB Control Number: 0575–0094.

Summary of Collection: The National Environmental Policy Act (NEPA) requires Federal agencies prior to the approval of proposed actions to consider the potential environmental impacts of these actions. Consequently, for the agencies to comply with NEPA, it is necessary to have information on the types of environmental resources on site or in the vicinity that might impact the proposed action. Also, information is required on the nature of the project selected by the applicant.

Need and Use of the Information: The agency will collect environmental data using form RD 1940–20, *Request for Environmental Information.* Having all activities and environmental information on the proposed project site will enable the Agency official to determine the magnitude of the potential environmental impacts and whether the project is controversial for environmental reasons. The agency's failure to collect the environmental information would result in a violation of NEPA. Thus, the agency would have no basis to support a decision regarding the need for an environmental impact statement.

Description of Respondents: Farms; Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 1,684.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 12,470.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–12244 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS–TM–13–0015; TM–13–01]

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget, for an extension of and revision to the currently approved information collection, Federal-State Marketing Improvement Program (FSMIP).

DATES: Comments on this notice must be received by July 22, 2013 to be assured of consideration.

Additional Information or Comments: Contact Janise Zygmont, Staff Officer, Federal-State Marketing Improvement Program, Transportation and Marketing Program, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 4549–S, Washington, DC 20250, telephone: 202–720–5024; fax: 202–690–1144.

SUPPLEMENTARY INFORMATION: FSMIP is authorized under Section 204(b) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*). FSMIP provides matching grants on a competitive basis to enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system.

Title: Federal-State Marketing Improvement Program (FSMIP)

OMB Number: 0581–0240.

Type of Request: Extension and revision of a currently approved information collection.

Expiration Date of Approval: December 31, 2013.

Abstract: The primary objective of FSMIP is to enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible entities under this program include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies.

AMS has established Application Guidelines that contain full details about FSMIP and the application process. The guidelines are available from the FSMIP Staff Officer by calling 202/720–5024, faxing-202/690–1144, or emailing to *janise.zygmont@ams.usda.gov.* This information is also available at the FSMIP Web site: *www.ams.usda.gov/FSMIP.* FSMIP applicants must complete Form SF–424, ''Application for Federal Assistance,'' (approved under OMB #4040–0004), and Form SF–424B, ''Assurances Non-Construction Program,'' (approved under OMB #0348–0040) for each application. The Project Narrative and Other Required Elements are also required for each application. Form SF–424A, ''Budget Information—Non-Construction Programs,'' (approved under OMB #4040–0006) was previously required for each application, but starting in fiscal year 2013, this form is no longer required.

AMS needs to receive the information contained in this collection of information to select the projects that will best meet and fulfill FSMIP program objectives. The selection process is competitive and AMS must ensure that limited funds are used for the intended purpose.

Estimate of Burden: The public reporting burden for FSMIP applicants to apply for a grant, and for FSMIP grantees to complete all requirements in the post-award period is estimated to average 10.50 hours per response. This public reporting burden also includes an estimate of the burden for non-federal proposal reviewers to complete a Conflict of Interest/Confidentiality Statement and to complete evaluations of assigned proposals using a Proposal Score Sheet for Reviewers.

Respondents: State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies.

Estimated Number of Respondents: 80.

Estimated Total Annual Responses: 520.

Estimated Number of Responses per Respondent: 6.5.

Estimated Total Annual Burden on Respondents: 5,462 hours.

After applications have been reviewed and final awards announced, grantees must read the Grant Terms and Conditions and sign the AMS–33 Agreement Face Sheet to certify compliance with applicable Federal regulations. The Grant Terms and Conditions outline responsibilities of both parties with regard to the grant. The Grant Terms and Conditions replace the following forms that were approved under the previous collection: AD–1047, Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions; AD–1048, Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions; and AD–1049,

Certification Regarding Drug-Free Workplace Requirements (Grants) Alternative 1-for Grantees Other Than Individuals.

The AMS–33 Agreement Face Sheet replaces the Grant Agreement that was approved under the previous collection. The information will be used to affirm the award amount, time frame, objectives and work plan agreed upon by the grantee and USDA/AMS.

Standard Form 270, Request for Advance or Reimbursement (approved under OMB #0348–0004), is completed whenever the grantee requests an advance or reimbursement of grant funds. The information will be used to keep track of grant disbursements and the level of matching funds expended by the grantee during the grant period. We expect that grantees will submit a total of three SF–270 forms annually.

Progress Reports are required at the midpoint of projects approved for one year and at six-month intervals for projects of longer duration. Progress Reports should (1) briefly summarize activities performed and milestones achieved for each objective or sub-element of the narrative; (2) note unexpected delays or impediments as well as favorable or unusual developments; (3) outline work to be performed during the succeeding period; and (4) indicate the amount of grant and matching funds expended to date. We expect that grantees will submit a total of two Progress Reports during the grant period.

Not later than 90 days following the ending date of the grant the grantee must submit Standard Form 425, Federal Financial Report (approved under OMB #0348–0061), to document the final financial status of the grant project and to indicate that the one-to-one matching requirement has been met. The grantee must also submit a Final Report of results and accomplishments within 90 days following the grant ending date. The Final Report will include:

- An outline of the issue or problem.
- A description of how the issue or problem was approached via the project.
- A description of the contribution of public or private agency cooperators.
- A description of results, conclusions and lessons learned.
- A summary of current or future benefits to be derived from the project.
- Additional information available (publications, Web sites).
- Recommendations for future research needed, if applicable.
- A description of the project beneficiaries.
- The contact person for the project with telephone number and email address.

This collection adds two items relating to the grant review process: A Conflict of Interest/Confidentiality Statement and a Proposal Score Sheet for Reviewers. Upon receipt of an application, the FSMIP Staff Officer ensures that all components of the application are present. The FSMIP Staff Officer also ensures that the $1 for $1 required match is met. Each proposal is then assigned to several subject matter specialists from AMS and elsewhere in USDA to evaluate and score. Reviewers from other Federal agencies and the university community may be sought depending on the subject matter and scope of the proposals. All reviewers sign a Conflict of Interest/Confidentiality Statement before beginning their proposal reviews.

Proposals are numerically scored on several criteria by individual reviewers. These scores are used to make recommendations for funding. Reviewers use the Proposal Score Sheet for Reviewers to report their scores and comments about the strengths and weaknesses of each proposal they have been assigned to review.

Estimate of Burden: The public reporting burden for reading and signing the Conflict of Interest/Confidentiality Statement, for reviewing six proposals, and for completing the Proposal Score Sheet for Reviewers is estimated to average 1.93 hours per response.

Respondents: Non-federal proposal reviewers.

Estimated Number of Respondents: 20.

Estimated Total Annual Responses: 140.

Estimated Number of Responses per Respondent: 7.

Estimated Total Annual Burden on Respondents: 270 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Janise Zygmont, FSMIP Staff Officer, USDA, AMS, 1400 Independence Avenue SW., Room 4549–S, Washington, DC 20250, telephone: 202–720–5024; fax: 202–690–1144. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: May 17, 2013.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2013–12237 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities; Proposed Collection; Comment Request: Supplemental Nutrition Assistance Program Regulations, Quality Control

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on the proposed information collection for the Supplemental Nutrition Assistance Program's Regulations, Part 275—Quality Control. Specifically, the burden associated with the collection of information for the sampling plan, arbitration process and the good cause process. This is a revision of a currently approved collection, OMB No. 0584–0303.

DATES: Written comments must be submitted on or before July 22, 2013.

ADDRESSES: 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, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical or other technological

collection techniques or other forms of information technology.

Comments may be sent to Patrick Lucrezio, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 822, Alexandria, VA 22302. Comments may also be submitted via email to *SNAPHQ-Web@fns.usda.gov*. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Patrick Lucrezio at 703–305–2498.

SUPPLEMENTARY INFORMATION:

Title: Supplemental Nutrition Assistance Program's (SNAP) Quality Control Regulations, Part 275.

OMB Number: 0584–0303.

Expiration Date: December 31, 2013.

Type of Request: Revision of a currently approved collection.

Abstract: There are three components of the Quality Control (QC) system that are covered in this proposed information collection. They are: (1) The sampling plan; (2) the arbitration process; and (3) the good cause process. Each State is required to develop a sampling plan that demonstrates the integrity of its case selection procedures. The QC system is designed to measure each State agency's payment error rate based on a statistically valid sample of SNAP cases. A State agency's payment error rate represents the proportion of cases that were reported through a QC review as being ineligible, overissued and underissued SNAP benefits.

The QC system contains procedures for resolving differences in review findings between State agencies and FNS. This is referred to as the arbitration process. The QC system also contains procedures that provide relief for State agencies from all or a part of a QC liability when a State agency can demonstrate that a part or all of an excessive error rate was due to an unusual event that had an uncontrollable impact on the State agency's payment error rate. This is referred to as the good cause process.

The approved burden for the QC system includes the burden for the QC sampling plan, the arbitration process and the good cause process. The annual reporting burden associated with the QC sampling plan remains at 265 hours. We estimate the annual reporting burdens associated with arbitration and good cause processes to total 792 and 320 hours, respectively. The decrease in the proposed burden from the currently approved 936 to 792 hours for the arbitration process is due to a decrease in the estimated number of responses per State agency from 2.6 to 2.2. These decreases are a result of State agencies less frequently disagreeing with FNS' findings. The proposed annual reporting burden for the good cause process has increased from 160 hours to 320 hours due to an increase in the number of states using the good cause rule from 1 to 2 per year. The total reporting burden for the QC system is, therefore, 1,377 hours, a decrease of 144 hours from the previously approved burden.

The proposed annual recordkeeping burden associated with the QC sampling plan remains at 1.25 hours per year. The proposed annual recordkeeping burdens associated with arbitration has decreased from 0.92 to 0.7788 hour and the good cause process has increased to 0.0472 hour. The recordkeeping burden for the arbitration process was due to the decrease in estimated number of responses per State from 2.6 to 2.2. The recordkeeping burden for the good cause process has increased from 0.0236 to 0.0472 hour due to an additional State's use of the rule. The total burden for recordkeeping has decreased from 2.19 hours to 2.076 hours. As a result, the total annual burden for the QC system, as proposed by this notice, increased from 1,363 hours to 1,379.076 hours; a total increase of 16.076 hours. We are requesting a three-year approval from OMB for this information collection.

Affected public	Requirement	Estimated # of respondents	Responses annually per respondent	Total annual responses (col. bxc)	Estimated avg. # of hours per response	Estimated total hours (col. dxe)
Reporting Burden						
State Agencies	Sampling Plan	53	1	53	5	265
State Agencies	Arbitration Process	15	2.2	33	24	792
State Agencies	Good Cause Process	2	1	2	160	320
Grand Total Reporting		53		88		1,377
Recordkeeping Burden						
State Agencies	Sampling Plan	53	1	53	0.0236	1.25
State Agencies	Arbitration Process	15	2.2	33	0.0236	0.7788
State Agencies	Good Cause Process	2	1	2	0.0236	0.0472
Grand Total Record-keeping.		53		88		2.076

Affected public	Requirement	Total annual responses for reporting & recordkeeping	Estimated total reporting rec-ordkeeping hours
Overall Reporting and Recordkeeping Burden			
State Agencies	Sampling Plan	106	266.25
State Agencies	Arbitration Process	99	792.7788
State Agencies	Good Cause Process	4	320.0472
OVERALL TOTAL BURDEN		209	1,379.08

The Combined Quality Control System's Estimated Burden (includes the burdens associated with the Sampling Plan, Arbitration, and Good Cause): (Reporting 1,377 + Recordkeeping Burden Hour) = 1,379.076 hours.

Dated: May 14, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–12245 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities; Proposed Collection; Comment Request: Information Collection for the Child and Adult Care Food Program

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on the Agency's proposed information collection for the Child and Adult Care Food Program (CACFP). This collection is a revision of a currently approved information collection.

DATES: Written comments must be received on or before July 22, 2013.

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

Comments may be sent to Jon Garcia, Program Analysis and Monitoring Branch, Child Nutrition Division, 3101 Park Center Drive, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Jon Garcia, Program Analysis and Monitoring Branch, Child Nutrition Division, 3101 Park Center Drive, Alexandria, VA 22302.

SUPPLEMENTARY INFORMATION:

Title: Information Collection for the Child and Adult Care Food Program.

OMB Number: 0584–0055.

Expiration Date: August 31, 2013.

Type of Request: Revision of a currently approved collection.

Abstract: Section 17 of the Richard B. Russell National School Lunch Act (NSLA), as amended, (42 U.S.C. 1766), authorizes the CACFP to provide cash reimbursement and commodity assistance, on a per meal basis, for food service to children in nonresidential child care centers and family day care homes, and to eligible adults in nonresidential adult day care centers. The U.S. Department of Agriculture, through the Food and Nutrition Service, has established application, monitoring and reporting requirements to manage the CACFP effectively. The purpose of this submission to OMB is to obtain approval to continue the discussed information collection. States and service institutions participating in the CACFP will submit to FNS account and record information reflecting their efforts to comply with statutory and regulatory Program requirements. In accordance with 7 CFR 226.7(d), State agencies must submit a monthly Report of the Child and Adult Care Food Program (FNS–44) in order to receive federal reimbursement for meals served to eligible participants. However FNS–44 is no longer included in this revision as the information is being collected under separate collection (0584–0078). Examples of data collected and reported with this collection include, but are not limited to: applications and supporting documents; records of enrollment; records supporting the free and reduced price eligibility determinations; daily records indicating numbers of program participants in attendance and the number of meals served by type and category; and receipts, invoices and other records of CACFP costs and documentation of non-profit operation of food service.

This is a revision of a currently approved collection. This revision made many program adjustments to reporting and record keeping burden hours. These adjustments included: Recalculation of time required to complete existing program tasks in light of advanced technology and process simplification (e.g., application and renewal processes now computerized and completed on line; claims processing now electronic; memos and regulatory updates posted on State agency Web sites; etc.); transfer of certain burden tasks to different collection (e.g., burden associated with Federal/State agreement now collected under State Administrative Expense Funds); reclassification as administrative of tasks previously deemed reporting; and corrections to certain burden tasks (previous burden included administrative burden by error) since last renewal. These changes translated to reduction of number of respondents and reduction in the amount of time it takes to complete a particular task (estimated number of hours per response) and resulted in overall burden change since last renewal. Current OMB inventory for this collection consists of 7,032,960 hours. As a result of program adjustments and reevaluation of existing program tasks, program burden was significantly reduced by 4,799,115 hours since last renewal. The average burden per response and the annual burden hours for reporting and recordkeeping are explained below and summarized in the charts which follow.

Affected Public: 56 State agencies, 20,398 Institutions, 166,585 facilities (includes 127,977, family day care homes and 38,608 sponsored center facilities) and 2,178,065 individuals and households.

Estimated Number of Respondents: 2,552,143.

Estimated Number of Responses per Respondent: 2.138.

Estimated Total Annual Responses: 5,456,645.

Estimate Time per Response: 0.409355 hrs.

Estimated Total Annual Burden: 2,233,706 hrs.

Current OMB Inventory for Part 226: 7,032,960 hrs.

Difference (change in burden with this renewal): (4,799,115) hrs.

Refer to the table below for estimated total annual burden.

Affected public	Estimate number of respondents	Number of responses per respondent	Total annual responses	Estimate total hours per response	Estimate total burden
Reporting					
State Agencies	56	583.160714	32,657	0.196	6,405
Sponsor/Institution	20,398	26.740661	545,698	1.096	597,080
Facility	166,585	12	1,999,020	0.442	883,686
Individual/Household	2,178,065	1	2,178,065	0.083	180,779
Total Estimated Reporting Burden	2,365,104		4,755,440		1,668,951
Recordkeeping					
State Agencies	56	6	336	0.916667	308
Sponsor/Institution	20,398	9.8595	201,114	0.321668	64,692
Facility	166,585	3	499,755	1	499,755
Total Estimated Recordkeeping Burden	187,039		701,205		564,755

TOTAL OF REPORTING AND RECORDKEEPING CACFP

	Estimate number of respondents	Number of responses per respondent	Total annual responses	Estimate total hours per response	Estimate total burden
Reporting	2,365,104	2.01	4,755,440	0.351	1,668,951
Recordkeeping	187,039	3.749	701,205	0.805	564,755
Total	2,552,143	2.138064	5,456,645	.409	2,233,706

Dated: May 15, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–12275 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Forestry Research Advisory Council

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Forestry Research Advisory Council will meet in Washington, DC, June 13 and 14, 2013. The Council is required by Section 1441 of the Agriculture and Food Act of 1981 to provide advice to the Secretary of Agriculture on accomplishing efficiently the purposes of the Act of October 10, 1962 (16 U.S.C. 582a, et seq.), commonly known as the McIntire-Stennis Act of 1962. The Council also provides advice relative to the Forest Service research program, authorized by the Forest and Rangeland Renewable Resources Research Act of 1978 (Pub. L. 95–307, 92 Stat. 353, as amended; 16 U.S.C. 1600 (note)). The meeting is open to the public.

DATES: The meeting will be held June 13 and 14, 2013, from 8:00 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be held at the Forest Service International Programs office located at 1 Thomas Circle, Suite 400, Washington, DC. Written comments concerning this meeting should be addressed to Daina Apple, Designated Federal Officer, Forestry Research Advisory Council, USDA Forest Service Research and Development, Mail Stop 1120, 1400 Independence Ave. SW., Washington DC 20250–1120, by May 31, 2013. Comments may also be sent via fascimile to 703–605–5133. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 1620 North Kent Street, RPC–4th floor, Rosslyn, VA. Visitors are encouraged to call ahead at 202–205–1665 to facilitate entry into the USDA Forest Service building.

FOR FURTHER INFORMATION CONTACT: Daina Apple, Forest Service Office of the Deputy Chief for Research and Development, 202–205–1665. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Council will be discussing current and emerging forestry and natural resource research issues, and discussion is limited to Forest Service, National Institute of Food and Agriculture staff and Council members; however, persons who wish to bring forestry research matters to the attention of the Council may file written statements with the Council staff before or after the meeting.

Meeting Accommodations: If you require sign language interpreting, assistive listening devices or other reasonable accommodation, please request this in advance of the meeting by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodations requests are managed on a case-by-case basis.

Dated: May 17, 2013.

Jimmy L. Reaves,

Deputy Chief, Research and Development.

[FR Doc. 2013–12246 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

White Pine-Nye Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of two meetings.

SUMMARY: The White Pine-Nye Resource Advisory Committee will meet in Eureka, Nevada. The Committee is authorized under the Secure Rural Schools and Community Self-Determination Act of 2000 (the Act) (Pub. L. 110–343) and operates in compliance with the Federal Advisory Committee Act (FACA) (Pub. L. 92–463). The purpose of the Committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. The meetings are open to the public. The purpose of the meetings is to review approved projects and determine the extent of funding.

DATES: The meetings will be held Wednesday, June 26, 2013, at 9:00 a.m. (PST) and Monday, August 19, 2013, at 9:00 a.m. (PST).

ADDRESSES: The meetings will be held at the Eureka County Annex, 701 S. Main Street, Eureka, Nevada 89316. Written comments may be submitted as described under Supplementary Information. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Tonopah Ranger District Office, 1400 S. Erie Main Street, Tonopah, Nevada. Please call ahead to 775–482–6286 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Linda Bernardi, RAC Coordinator, Tonopah Ranger District, 1400 S. Erie Main Street, P.O. Box 3940, Tonopah, Nevada 89049, 775–482–6286, email *lebernardi@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The following business will be conducted: Review and approve previous meeting's minutes and business expenses. Review previously approved projects and determine availability and extent of funding, and public comment. More information including the full agenda may be previewed at: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf.* Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by Tuesday, June 18, 2013 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Tonopah Ranger District, P.O. Box 3940, Tonopah, Nevada 89049, or by email to *lebernardi@fs.fed.us,* or via facsimile to 775–482–3053. A summary of the meeting will be posted at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf,* within 21 days of the meeting.

Meeting Accommodations: If you require sign language interpreting, assistive listening devices or other reasonable accommodation please request this in advance of the meeting by contacting the person listed in the section titled, **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case-by-case basis.

Dated: May 16, 2013.

William A. Dunkelberger,

Forest Supervisor.

[FR Doc. 2013–12263 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Business—Cooperative Service

Inviting Applications for Rural Cooperative Development Grants

AGENCY: Rural Business—Cooperative Service, USDA.

ACTION: Notice of Funding Availability (NOFA).

SUMMARY: USDA announces the availability of grants through the Rural Cooperative Development Grant (RCDG) Program for Fiscal Year (FY) 2013. Nonprofit corporations and institutions of higher education may apply. Approximately $6.5 million is available. Applications are limited to one per applicant for a maximum of $200,000 and matching funds are required. The grant period is limited to a one-year timeframe.

DATES: Complete applications must be submitted on paper or electronically according to the following deadlines:

Paper applications must be postmarked and mailed, shipped, or sent overnight no later than July 15, 2013, to be eligible for FY 2013 grant funding. You may also hand carry your application to one of our field offices, but it must be received by close of business on the deadline date. Late applications are not eligible for FY 2013 grant funding.

Electronic copies must be received by *http://www.grants.gov* no later than midnight eastern time July 10, 2013, to be eligible for FY 2013 grant funding. Please review the Grants.gov Web site at *http://grants.gov/applicants/organization_registration.jsp* for instructions on the process of registering your organization as soon as possible to ensure you are able to meet the electronic application deadline.

If you do not meet the deadline for submitting an electronic application, you may hand carry or submit a paper application by the deadline as discussed above. Late applications will not be eligible for FY 2013 grant funding.

ADDRESSES: You should contact a USDA Rural Development State Office (State Office) if you have questions. You are encouraged to contact your State Office well in advance of the application deadline to discuss your project and ask any questions about the application process. Program guidance as well as application and matching funds templates may be obtained at *http://www.rurdev.usda.gov/bcp_rcdg.html.* If you want to submit an electronic application, follow the instructions for the RCDG funding announcement located at *http://www.grants.gov.* If you want to submit a paper application, send it to the State Office located in the State where you are headquartered. If you are headquartered in Washington, DC please contact the Office of the Deputy Administrator, Cooperative Programs, Rural Business-Cooperative Service, at (202) 720–7558 for guidance on where to submit your application. Contact information for State Offices can be found at *http://www.rurdev.usda.gov/StateOfficeAddresses.html.*

FOR FURTHER INFORMATION CONTACT: Office of the Deputy Administrator, Cooperative Programs, Rural Business-Cooperative Service, United States Department of Agriculture, 1400 Independence Avenue SW., Mail Stop–3250, Room 4016—South, Washington, DC 20250–3250, (202) 720–7558.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Business-Cooperative Service.

Funding Opportunity Title: Rural Cooperative Development Grants.

Announcement Type: Initial funding request.

Catalog of Federal Domestic Assistance Number: 10.771.

Date: Application Deadline. You must submit your complete application by July 15, 2013, or it will not be considered for FY 2013 grant funding.

I. Funding Opportunity Description

The primary objective of the RCDG program is to improve the economic condition of rural areas through cooperative development. Grant funds may be used to pay for 75 percent of the cost of establishing and operating centers for rural cooperative development. Grant funds may be used to pay for 95 percent of the cost of establishing and operating centers for rural cooperative development, when the applicant is a 1994 Institution as defined by 7 U.S.C. § 301. 1994 Institutions are commonly known as Tribal Land Grant Institutions. Centers may have the expertise on staff or they can contract out for the expertise, to assist individuals or entities in the startup, expansion or operational improvement of rural businesses, especially cooperative or mutually-owned businesses. The RCDG program is authorized under section 310B(e) of the Consolidated Farm and Rural Development Act (CONACT) (7 U.S.C. 1932(e)). You should become familiar with the regulations for this program published at 7 CFR part 4284, subparts A and F, which are incorporated by reference in this Notice.

Definitions

The terms you need to understand are defined and published at 7 CFR 4284.3 and 7 CFR 4284.504. In addition, the terms ''rural'' and ''rural area,'' defined at section 343(a)(13) of the CONACT (7 U.S.C. 1991(a)), are incorporated by reference, and will be used for this program instead of those terms currently published at 7 CFR 4284.3. The term ''you'' referenced throughout this Notice should be understood to mean ''you'' the applicant. Finally, there has been some confusion on the Agency's meaning of the terms ''conflict of interest,'' and ''mutually-owned business,'' because they are not defined in the CONACT or in the regulations used for the program. Therefore, the terms are clarified and should be understood as follows.

Conflict of interest—A situation in which the ability of a person or entity to act impartially would be questionable due to competing professional or personal interests. An example of conflict of interest occurs when the grantee's employees, board of directors, or the immediate family of either, have the appearance of a professional or personal financial interest in the recipients receiving the benefits or services of the grant.

Mutually-owned business—An organization owned and governed by members who either are its consumers, producers, employees, or suppliers.

II. Award Information

Type of Award: Grant.
Fiscal Year Funds: FY 2013.
Total Funding: Approximately $6.5 million.
Maximum Award: $200,000.
Anticipated Award Date: September 30, 2013.

III. Eligibility Information

A. Eligible Applicants

You must be a nonprofit corporation or an institution of higher education to apply for this program. Public bodies and individuals cannot apply for this program. See 7 CFR 4284.507.

An applicant must obtain a Dun and Bradstreet Data Universal Numbering System (DUNS) number and register in the System for Awards Management (SAM, formally managed by the Central Contractor Registry (CCR)) prior to submitting an application. (See 2 CFR 25.200(b)). An applicant must provide their DUNS number in the application. In addition, an applicant must maintain its registration in SAM during the time its application is active. Finally, an applicant must have the necessary processes and systems in place to comply with the reporting requirements in 2 CFR 170.200(b), as long as it is not exempted from reporting. Exemptions are identified at 2 CFR 170.110(b).

B. Cost Sharing or Matching

Your matching funds requirement is 25 percent of the total project cost (5 percent for 1994 Institutions). See 7 CFR 4284.508. When you calculate your matching funds requirement, please round up or down to whole dollars as appropriate. An example of how to calculate your matching funds is as follows:

1. Take the amount of grant funds you are requesting and divide it by .75. This will give you your total project cost.

Example: $175,000 (grant amount)/.75 (percentage for use of grant funds) = $233,333 (total project cost)

2. Subtract the amount of grant funds you are requesting from your total project cost. This will give you your matching funds requirement.

Example: $233,333 (total project cost) − $175,000 (grant amount) = $58,333 (matching funds requirement).

3. A quick way to double check that you have the correct amount of matching funds is to take your total project cost and multiply it by .25.

Example: $233,333 (total project cost) × .25 (maximum percentage of matching funds requirement) = $58,333 (matching funds requirement)

You must verify that all matching funds are available during the grant period and provide this documentation with your application. If you are awarded a grant, additional verification documentation may be required to confirm the availability of matching funds.

Other guidelines for matching funds that you must follow are below.

- They must be spent on eligible expenses during the grant period.
- They must be from eligible sources.
- They must be spent in advance or as a pro-rata portion of grant funds being spent.
- They must be provided by either the applicant or a third party in the form of cash or an in-kind contribution.
- They cannot include board/advisory council members' time.
- They cannot include other Federal grants unless provided by authorizing legislation.
- They cannot include cash or in-kind contributions donated outside the grant period.
- They cannot include over-valued, in-kind contributions.
- They cannot include any project costs that are ineligible under the RCDG program.
- They can include loan funds from a Federal source.
- They can include travel and incidentals for board/advisory council members if you have established written policies explaining how these costs are normally reimbursed, including rates. You must include an explanation of this policy in your application or the contributions will not be considered as eligible matching funds.
- You must be able to document and verify the number of hours worked and the value associated with any in-kind contribution being used to meet a matching funds requirement.
- In-kind contributions provided by individuals, businesses, or cooperatives which are being assisted by you cannot be provided for the direct benefit of their own projects as USDA Rural Development considers this to be a conflict of interest or the appearance of a conflict of interest.

C. Other Eligibility Requirements

Your application will not be considered for funding if it does not propose the establishment or continuation of a cooperative development center concept. You must use project funds, including grant and matching funds for eligible purposes (See 7 CFR 4284.508). In addition, project funds may be used for programs

providing for the coordination of services and sharing of information among the Centers (See 7 U.S.C. 1932(e)(4)(C)(vi)). All project activities must be for the benefit of a rural area. Only one application can be submitted per applicant. If two applications are submitted (regardless of the applicant name) that include the same Executive Director and/or advisory boards or committees of an existing Center, both applications will be determined not eligible for FY 2013 funding.

Project funds, including grant and matching funds, cannot be used for ineligible grant purposes (See 7 CFR 4284.10). Also, you may not use project funds for the following:

1. To purchase, rent, or install laboratory equipment or processing machinery;
2. To pay for the operating costs of any entity receiving assistance from the Center;
3. To pay costs of the project where a conflict of interest exists; or
4. To fund any activities prohibited by 7 CFR parts 3015 or 3019.

In addition, your application will not be considered for funding if it does any of the following:

- Focuses assistance on only one cooperative or mutually-owned business;
- Requests more than the maximum grant amount; or
- Proposes ineligible costs that equal more than 10 percent of total project costs.

We will consider your application for funding if it includes ineligible costs of 10 percent or less of total project costs, as long as the remaining costs are determined eligible otherwise. However, if your application is successful, those ineligible costs must be removed and replaced with eligible costs, before the Agency will make the grant award, or the amount of the grant award will be reduced accordingly. If we cannot determine the percentage of ineligible costs, your application will not be considered for funding.

D. Grant Period

Your application must include a one-year grant period or it will not be considered for funding. The grant period should begin no earlier than October 1, 2013 and no later than January 1, 2014. Prior approval is needed from the Agency if you are awarded a grant and desire the grant period to begin earlier or later than previously discussed. Projects must be completed within a one-year timeframe. The Agency may approve requests to extend the grant period for up to an additional 12 months at its discretion. Further guidance on grant period extensions will be provided in the award document.

If you have an existing RCDG award, you must discuss the status of your existing RCDG award at application time under the Eligibility Discussion. You must be performing satisfactorily to be considered eligible for a new award. Satisfactory performance includes being up-to-date on all financial and performance reports and being current on all tasks as approved in the work plan. The Agency will use its discretion to make this determination.

E. Completeness

Your application will not be considered for funding if it does not provide sufficient information to determine eligibility and scoring. In particular, you must include all of the forms and proposal elements as discussed in the regulation and as clarified further in this Notice. For more information on what is required for an application, see 7 CFR 4284.510.

IV. Application and Submission Information

A. Address To Request Application Package

For further information, you should contact your State Office identified in the **ADDRESSES** section of this Notice. Program materials may also be obtained at *http://www.rurdev.usda.gov/bcp_rcdg.html.*

B. Form of Submission

- You may submit your application in paper form or electronically. If you submit in paper form, any forms requiring signatures must include an original signature. To submit an application electronically, you must use the Grants.gov Web site at *http://www.grants.gov.* You may not submit an application electronically in any way other than through Grants.gov.
- When you enter the Grants.gov Web site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- To use Grants.gov, you must have a DUNS number, which can be obtained at no cost via a toll-free request line at (866) 705–5711. Please note that obtaining the DUNS number is required prior to submitting an application. You must also maintain registration in SAM (formerly the CCR database). (See 2 CFR part 25.) You may register for SAM at *https://www.sam.gov/portal/public/SAM/.* You must submit all of your application documents electronically through Grants.gov.
- After electronically submitting an application through Grants.gov, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number.
- You may be required to provide original signatures on forms at a later date.
- You can locate the Grants.gov downloadable application package for this program by using a keyword, the program name, the Catalog of Federal Domestic Assistance Number, or the Funding Opportunity Number.

C. Application Contents

Your application must contain all of the required forms and proposal elements described in 7 CFR 4284.510 and as otherwise clarified in this Notice. Specifically, your application must include (1) the required forms as described in 7 CFR 4284.510(b) and (2) the required proposal elements as described in 7 CFR 4284.510(c). Further clarification of application requirements is as follows:

1. Clarifications on Forms

a. Your DUNS number should be identified in the ''Organizational DUNS'' field on Standard Form (SF) 424, ''Application for Federal Assistance.'' Since there are no specific fields for a Commercial and Government Entity (CAGE) code and expiration date, you may identify them anywhere you want to on Form SF 424. In addition, you should provide the DUNS number and the CAGE code and expiration date under the applicant eligibility discussion in your proposal narrative. If you do not include the CAGE code and expiration date and the DUNS number in your application, it will not be considered for funding.

b. You must complete Form AD–3030, ''Representations Regarding Felony Conviction and Tax Delinquent Status for Corporate Applicants,'' if you are a corporation. A corporation is any entity that has filed articles of incorporation in one of the 50 States, the District of Columbia, or the various territories of the United States including American Samoa, Federated States of Micronesia, Guam, Midway Islands, Northern Mariana Islands, Puerto Rico, Republic of Palau, Republic of the Marshall Islands, or the U.S. Virgin Islands. Corporations include both for profit and non-profit entities.

c. You can voluntarily fill out and submit the ''Survey on Ensuring Equal Opportunity for Applicants,'' as part of your application if you are a nonprofit organization.

2. Clarifications on Proposal Elements

a. You must include the title of the project as well as any other relevant identifying information on the Title Page.

b. You must include page numbers on the Table of Contents for each component of the application to facilitate review.

c. Your Executive Summary must include the items in 7 CFR 4284.510 (c)(3), and also discuss the percentage of work that will be performed among organizational staff, consultants, or other contractors. It should not exceed two pages.

d. Your Eligibility Discussion must not exceed two pages and cover how you meet the eligibility requirements for applicant, matching funds, other eligibility requirements and grant period.

e. Your Proposal Narrative must not exceed 40 pages and should describe the essential aspects of the project.

(i) You are only required to have one title page for the proposal.

(ii) If you list the evaluation criteria on the Table of Contents and specifically and individually addressed each criterion in narrative form, then it is not necessary for you to include an Information Sheet. Otherwise the Information Sheet is required under 7 CFR 4284.510(c)(ii).

(iii) You should include the following under Goals of the Project.

(*A*) A statement that substantiates that the Center will effectively serve rural areas in the United States;

(*B*) A statement that the primary objective of the Center will be to improve the economic condition of rural areas through cooperative development;

(*C*) A description of the contributions that the proposed activities are likely to make to the improvement of the economic conditions of the rural areas for which the Center will provide services. Expected economic impacts should be tied to tasks included in the work plan and budget; and

(*D*) A statement that the Center, in carrying out its activities, will seek, where appropriate, the advice, participation, expertise, and assistance of representatives of business, industry, educational institutions, the Federal government, and State and local governments.

(iv) The Agency has established annual performance evaluation measures to evaluate the RCDG program. You must provide estimates on the following performance evaluation measures.

- Number of groups who are not legal entities assisted.
- Number of businesses that are not cooperatives assisted.
- Number of cooperatives assisted.
- Number of businesses incorporated that are not cooperatives.
- Number of cooperatives incorporated.
- Total number of jobs created as a result of assistance.
- Total number of jobs saved as a result of assistance.
- Number of jobs created for the Center as a result of RCDG funding.
- Number of jobs saved for the Center as a result of RCDG funding.

It is permissible to have a zero in a performance element. When you calculate jobs created, estimates should be based upon actual jobs to be created by your organization as a result of the RCDG funding or actual jobs to be created by cooperative businesses or other businesses as a result of assistance from your organization. When you calculate jobs saved, estimates should be based only on actual jobs that have been lost if your organization did not receive RCDG funding or actual jobs that would have been lost without assistance from your organization.

(v) You can also suggest additional performance elements for example where job creation or jobs saved may not be a relevant indicator (e.g. housing). These additional criteria should be specific, measurable performance elements that could be included in an award document.

(vi) You must describe in the application how you will undertake to do each of the following. We would prefer if you described these undertakings within proposal evaluation criteria to reduce duplication in your application. The specific proposal evaluation criterion where you should address each undertaking is noted below.

(*A*) Take all practicable steps to develop continuing sources of financial support for the Center, particularly from sources in the private sectors (should be presented under proposal evaluation criterion number 10, utilizing the specific requirements of Section V.B.10);

(*B*) Make arrangements for the Center's activities to be monitored and evaluated (should be addressed under proposal evaluation criterion number 8 utilizing the specific requirements of Section V.B.8); and

(*C*) Provide an accounting for the money received by the grantee in accordance with 7 CFR part 4284, subpart F. This should be addressed under proposal evaluation criterion number 1, utilizing the specific requirements of Section V.B.1.

(vii) You should present the Work Plan and Budget proposal element under proposal evaluation criterion number 8, utilizing the specific requirements of Section V.B.8 of this Notice to reduce duplication in your application.

(viii) You should present the Delivery of Cooperative development assistance proposal element under proposal evaluation criterion number 2, utilizing the specific requirements of Section V.B.2 of this Notice.

(ix) You should present the Qualifications of Personnel proposal element under proposal evaluation criterion number 9, utilizing the specific requirements of Section V.B.9 of this Notice.

(x) You should present the Local Support and Future Support proposal elements under proposal evaluation criterion number 10, utilizing the requirements of Section V.B.10 of this Notice.

(xi) Your application will not be considered for funding if you do not address all of the proposal evaluation criteria. See Section V.B. of this Notice for a description of the proposal evaluation criteria.

(xii) Only appendices A–C will be considered when evaluating your application. You must not include resumes of staff or consultants in the application.

f. You must certify that there are no current outstanding Federal judgments against your property and that you will not use grant funds to pay for any judgment obtained by the United States. To satisfy the Certification requirement, you should include this statement in your application: ''[INSERT NAME OF APPLICANT] certifies that the United States has not obtained an unsatisfied judgment against its property and will not use grant funds to pay any judgments obtained by the United States.'' A separate signature is not required.

g. You must certify that matching funds will be available at the same time grant funds are anticipated to be spent and that expenditures of matching funds are pro-rated or spent in advance of grant funding, such that for every dollar of the total project cost, not less than the required amount of matching funds will be expended. Please note that this Certification is a separate requirement from the Verification of Matching Funds requirement. To satisfy the Certification requirement, you should include this statement in your application: ''[INSERT NAME OF APPLICANT] certifies that matching funds will be available at the same time grant funds are anticipated to be spent and that expenditures of matching funds shall be pro-rated or spent in advance of grant funding, such

that for every dollar of the total project cost, at least 25 cents (5 cents for 1994 Institutions) of matching funds will be expended.'' A separate signature is not required.

h. You must provide documentation in your application to verify all of your proposed matching funds. The documentation must be included in Appendix A of your application and will not count towards the 40-page limitation. Template letters are available for each type of matching funds contribution at *http://www.rurdev.usda.gov/bcp_rcdg.html.*

(i) If matching funds are to be provided in cash, you must meet the following requirements.

• You: The application must include a statement verifying (1) the amount of the cash and (2) the source of the cash. You may also provide a bank statement dated 30 days or less from the application deadline date to verify your cash match.

• Third-party: The application must include a signed letter from the third party verifying (1) how much cash will be donated and (2) that it will be available corresponding to the proposed grant period or donated on a specific date within the grant period.

(ii) If matching funds are to be provided by an in-kind donation, you must meet the following requirements.

• You: The application must include a signed letter from you or your authorized representative verifying (1) the nature of the goods and/or services to be donated and how they will be used, (2) when the goods and/or services will be donated (i.e., corresponding to the proposed grant period or to specific dates within the grant period), and (3) the value of the goods and/or services.

• Third-Party: The application must include a signed letter from the third party verifying (1) the nature of the goods and/or services to be donated and how they will be used, (2) when the goods and/or services will be donated (i.e., corresponding to the proposed grant period or to specific dates within the grant period), and (3) the value of the goods and/or services.

To ensure that you are identifying and verifying your matching funds appropriately, please note the following:

• If you are paying for goods and/or services as part of the matching funds requirement, the expenditure is considered a cash match, and you must verify it as such. Universities should verify the goods and services they are providing to the project as a cash match and the verification must be approved by the appropriate approval official (i.e. sponsored programs office or equivalent).

• If you have already received cash from a third-party (i.e. Foundation) before the start of your proposed grant period, you must verify this as your own cash match and not as a third-party cash match. If you are receiving cash from a third-party during the grant period, than you must be verifying the cash as a third-party cash match.

• Board resolutions for a cash match must be approved at the time of application.

• You can only consider goods or services for which no expenditure is made as an in-kind contribution.

• If a non-profit or another organization contributes the services of affiliated volunteers, they must follow the third-party, in-kind donation verification requirement for each individual volunteer.

• Expected program income may not be used to fulfill your matching funds requirement at the time you submit your application. However, if you have a contract to provide services in place at the time you submit your application, you can verify the amount of the contract as a cash match.

• The valuation process you use for in-kind contributions does not need to be included in your application, but you must be able to demonstrate how the valuation was derived if you are awarded a grant. The grant award may be withdrawn or the amount of the grant reduced if you cannot demonstrate how the valuation was derived.

• Your negotiated indirect cost rate agreement does not need to be included in your application, but you will be required to provide it if a grant is awarded.

• Approval for indirect costs that are requested in an application without an approved indirect cost rate agreement is at the discretion of the Agency.

D. Submission Dates and Times

Application Deadline Date: July 15, 2013.

Explanation of Deadlines: Complete applications must be submitted on paper or electronically according to the following deadlines:

Paper applications must be postmarked and mailed, shipped, or sent overnight no later than July 15, 2013, to be eligible for FY 2013 grant funding. You may also hand carry your application to one of our field offices, but it must be received by close of business on the deadline date. Late applications are not eligible for FY 2013 grant funding.

Electronic copies must be received by *http://www.grants.gov* no later than midnight eastern time July 10, 2013, to be eligible for FY 2013 grant funding. Please review the Grants.gov Web site at *http://grants.gov/applicants/organization_registration.jsp* for instructions on the process of registering your organization as soon as possible to ensure you are able to meet the electronic application deadline.

If you do not meet the deadline for submitting an electronic application, you may hand carry or submit a paper application by the deadline as discussed above. Late applications will not be eligible for FY 2013 grant funding.

E. Intergovernmental Review of Applications

Executive Order (EO) 12372, ''Intergovernmental Review of Federal Programs,'' applies to this program. This EO requires that Federal agencies provide opportunities for consultation on proposed assistance with State and local governments. Many States have established a Single Point of Contact (SPOC) to facilitate this consultation. For a list of States that maintain a SPOC, please see the White House Web site: *http://www.whitehouse.gov/omb/grants_spoc.* If your State has a SPOC, you may submit a copy of the application directly for review. Any comments obtained through the SPOC must be provided to your State Office for consideration as part of your application. If your State has not established a SPOC, or if you do not want to submit a copy of the application, our State Offices will submit your application to the SPOC or other appropriate agency or agencies.

F. Environmental Review

Applications for financial assistance are subject to an environmental review. However, if your application is for technical assistance or planning purposes, it is generally excluded from the environmental review process (See 7 CFR 1940.310(e)(1)). We will ensure that any required environmental review is completed prior to approval of an application or obligation of funds.

V. Application Review Information

A. Application and Scoring Process

The State Offices will review applications to determine if they are eligible for assistance based on requirements in 7 CFR part 4284, subparts A and F, this Notice, and other applicable Federal regulations. If determined eligible, your application will be scored by a panel of USDA employees in accordance with the point allocation specified in this Notice. A recommendation will be submitted to

the Administrator to fund applications in highest ranking order. Applications that cannot be fully funded may be offered partial funding at the Agency's discretion.

B. Scoring Criteria

Scoring criteria will follow criteria published at 7 CFR 4284.513 as supplemented below including any amendments made by the Food, Conservation, and Energy Act of 2008, which is incorporated by reference in this Notice. The regulatory and statutory criteria are clarified and supplemented below. You should also include information as described in Section IV.C.6 (a)–(c). Evaluators will base scores only on the information provided or cross-referenced by page number in each individual evaluation criterion. The maximum amount of points available is 100. Newly established or proposed Centers that do not yet have a track record on which to evaluate the following criteria should refer to the expertise and track records of staff or consultants expected to perform tasks related to the respective criteria. Proposed or newly established Centers must be organized well-enough at time of application to address its capabilities for meeting these criteria.

1. Administrative capabilities (maximum score of 10 points). A panel of USDA employees will evaluate your demonstrated track record in carrying out activities in support of development assistance to cooperatively and mutually owned businesses. At a minimum, you must discuss the following administrative capabilities:

a. Financial systems and audit controls;

b. Personnel and program administration performance measures;

c. Clear written rules of governance; and

d. Experience administering Federal grant funding no later than the last 5 years, including but not limited to past RCDG's.

If you discuss the Center's administrative capabilities and track record, versus those of umbrella or supporting institutions, such as universities or parent organizations, you will score higher on this factor.

2. Technical assistance and other services (maximum score of 10 points). A panel of USDA employees will evaluate your demonstrated expertise no later than the last 5 years in providing technical assistance and accomplishing effective outcomes in rural areas to promote and assist the development of cooperatively and mutually owned businesses. You must discuss at least:

a. Your potential for delivering effective technical assistance;

b. The types of assistance provided;

c. The expected effects of that assistance;

d. The sustainability of organizations receiving the assistance; and

e. The transferability of your cooperative development strategies and focus to other areas of the U.S.

f. A chart or table showing the outcomes of your demonstrated expertise based upon the performance elements listed in Section IV.C.2.e.4. or as identified in your award document (vi). on previous RCDG awards. At a minimum, please provide information for FY 2010–FY 2012. You do not need to address this element if you have never received a RCDG award.

In addition, if you discuss the demonstrated expertise specific to the Center (as opposed to umbrella or supporting institutions such as universities or parent organizations), you will score higher on this factor.

3. Economic development (maximum score of 10 points). A panel of USDA employees will evaluate your demonstrated ability to facilitate:

a. Establishment of cooperatives or mutually owned businesses;

b. New cooperative approaches; and

c. Retention of businesses, generation of employment opportunities or other factors, as applicable, that will otherwise improve the economic conditions of rural areas.

If you provide statistics for historical and potential development and identify your role in economic development outcomes, you will score higher on this factor.

4. Past performance (maximum score of 10 points). A panel of USDA employees will evaluate your demonstrated past performance in establishing legal cooperative business entities and other legal business entities during FY 2010–FY 2012. Provide the name of the organization(s) established, the year of formation and your role in assisting with the incorporation(s) under this criterion. In addition, documentation verifying the establishment of legal business entities must be included in Appendix C of your application and will not count against the 40-page limit for the narrative. The documentation must include an organizational document from the Secretary of State's Office; or if the business entity is not required to register with the Secretary of State, a certification from the business entity that a legal business entity has been established and when. The establishment of legal cooperative businesses will score higher on this factor.

5. Networking and regional focus (maximum score of 10 points). A panel of USDA employees will evaluate your demonstrated commitment to:

a. Networking with other cooperative development centers, and other organizations involved in rural economic development efforts, and

b. Developing multi-organization and multi-state approaches to addressing the economic development and cooperative needs of rural areas.

6. Commitment (maximum score of 10 points). A panel of USDA employees will evaluate your commitment to providing technical assistance and other services to under-served and economically distressed areas in rural areas of the United States. If you define and describe the underserved and economically distressed areas within your service area, provide statistics, and identify projects within or affecting these areas, as appropriate, you will score higher on this factor.

7. Matching Funds (maximum score of 10 points). A panel of USDA employees will evaluate your commitment for the 25 percent (5 percent for 1994 Institutions) matching funds requirement. Discussion or a table may be provided to describe all matching funds being committed to the project. However, formal documentation to verify all of the matching funds must be included in Appendix A of your application.

a. If you met the 25 percent (5 percent for 1994 Institutions) matching requirement, points will be assigned as follows:

- In-kind only—1 point
- Mix of in-kind and cash—3–4 points (based upon the amount of cash provided)
- Cash only—5 points

b. If you exceeded the 25 percent (5 percent for 1994 Institutions) matching requirement, points will be assigned as follows:

- In-kind only—2 points
- Mix of in-kind and cash—6–7 points (based upon the amount of cash provided)
- Cash only—10 points

8. Work Plan/Budget (maximum score of 10 points). A panel of USDA employees will evaluate your work plan for detailed actions and an accompanying timetable for implementing the proposal. Clear, logical, realistic, and efficient plans will result in a higher score. Budgets will be reviewed for completeness and the quality of non-Federal funding commitments. You must discuss at a minimum:

a. Specific tasks (whether it be by type of service or specific project) to be completed using grant and matching funds;

b. How customers will be identified;

c. Key personnel; and

d. The evaluation methods to be used to determine the success of specific tasks and overall objectives of Center operations.

The budget must present a breakdown of the estimated costs associated with cooperative and business development activities as well as the operation of the Center and allocate these costs to each of the tasks to be undertaken. Matching funds as well as grant funds must be accounted for in the budget.

9. Qualifications of those Performing the Tasks (maximum score of 10 points). A panel of USDA employees will evaluate your application to determine if the personnel expected to perform key tasks have a track record of:

a. Positive solutions for complex cooperative development and/or marketing problems; or

b. A successful record of conducting accurate feasibility studies, business plans, marketing analysis, or other activities relevant to your success as determined by the tasks identified in the your work plan; and

c. Whether the personnel expected to perform the tasks are full/part-time employees of your organization or are contract personnel.

If you demonstrate commitment/availability of qualified personnel expected to perform the tasks, you will score higher on this factor.

10. Local and Future Support (maximum score of 10 points). A panel of USDA employees will evaluate your application for local and future support. Support should be discussed directly within the response to this criterion.

a. Discussion on local support should include previous and/or expected local support and plans for coordinating with other developmental organizations in the proposed service area or with state and local government institutions. If you demonstrate strong support from potential beneficiaries and formal evidence of intent to coordinate with other developmental organizations, you will score higher on this factor. You may also submit a maximum of 10 letters of support or intent to coordinate with the application. These letters should be included in Appendix B of your application and will not count against the 40-page limit for the narrative.

b. Discussion on future support will include your vision for funding operations in future years. You should document:

(i) New and existing funding sources that support your goals;

(ii) Alternative funding sources that reduce reliance on Federal, State, and local grants; and

(iii) The use of in-house personnel for providing services versus contracting out for that expertise.

If you demonstrate vision and likelihood of long-term sustainability with diversification of funding sources and building in-house technical assistance capacity, you will score higher on this factor.

VI. Award Administration Information

A. Award Notices

If your application is successful, you will receive notification regarding funding from the State Office where your application is submitted or headquarter if you submit your application via Grants.gov. You must comply with all applicable statutes, regulations, and notice requirements before the grant award will be approved. If your application is not successful, you will receive notification, including mediation and appeal rights by mail. See 7 CFR part 11 for USDA National Appeals Division procedures.

Administrative and National Policy Requirements

Additional requirements that apply to grantees selected for this program can be found in 7 CFR part 4284, subparts A and F, parts 3015, 3019, 3052 and 2 CFR parts 215 and 417. All recipients of Federal financial assistance are required to report information about first-tier subawards and executive compensation (See 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Transparency Act reporting requirements (See 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)).

The following additional requirements apply to grantees selected for this program:

- Agency-approved Grant Agreement.
- Letter of Conditions.
- Form RD 1940–1, ''Request for Obligation of Funds.''
- Form RD 1942–46, ''Letter of Intent to Meet Conditions.''
- Form AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions.''
- Form AD–1048, ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions.''
- Form AD–1049, ''Certification Regarding Drug-Free Workplace Requirements (Grants).''
- Form AD–3031, ''Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants.''
- Form RD 400–4, ''Assurance Agreement.''
- SF LLL, ''Disclosure of Lobbying Activities,'' if applicable.

VII. Agency Contacts

If you have questions about this Notice, please contact the State Office as identified in the **ADDRESSES** section of this Notice.

VIII. Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (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 TDD).

To file a complaint of discrimination, write to USDA, Assistant Secretary for Civil Rights, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Stop 9410, Washington, DC 20250–9410, or call toll-free at (866) 632–9992 (English) or (800) 877–8339 (TDD) or (866) 377–8642 (English Federal-relay) or (800) 845–6136 (Spanish Federal-relay). USDA is an equal opportunity provider and employer.

Dated: May 16, 2013.

Lillian Salerno,

Acting Administrator, Rural Business Cooperative Service.

[FR Doc. 2013–12329 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Funding Availability (NOFA) for Loan Guarantees Under Section 538 Guaranteed Rural Rental Housing Program (GRRHP) for Fiscal Year 2013

AGENCY: Rural Housing Service, USDA.

ACTION: NOFA.

SUMMARY: This is a request for proposals for guaranteed loans under the Section 538 Guaranteed Rural Rental Housing

Program (GRRHP) pursuant to 7 CFR 3565.4 for Fiscal Year (FY) 2013. The Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113–6 (March 26, 2013) appropriated $150 million in FY 2013. The commitment of program dollars will be made first to approved and complete applications from prior years notices, then to applicants of selected responses in the order they are ranked under this notice that have fulfilled the necessary requirements for obligation. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available to the Agency through appropriations.

Expenses incurred in developing applications will be at the applicant's risk. The following paragraphs outline the timeframes, eligibility requirements, lender responsibilities, and the overall response and application processes.

Eligible lenders are invited to submit responses for new construction and acquisition with rehabilitation of affordable rural rental housing. The Agency will review responses submitted by eligible lenders, on the lender's letterhead, and signed by both the prospective borrower and lender. Although a complete application is not required in response to this notice, eligible lenders may submit a complete application concurrently with the response. Submitting a complete application will not have any effect on the respondent's response score.

DATES: Eligible responses to this notice will be accepted until December 31, 2013, 12:00 p.m. Eastern Time. Selected responses that develop into complete applications and meet all Federal eligibility requirements prior to September 30, 2013 will receive conditional commitments until all FY 2013 funds are expended. Selected responses to this notice that are deemed eligible for further processing after September 30, 2013, will be funded to the extent an appropriation act provides funding for GRRHP for FY 2014 and will be subject to the fee structure in the FY 2014 notice.

Eligible lenders mailing a response or application must provide sufficient time to permit delivery to the appropriate *submission address* below on or before the closing deadline date and time. Acceptance by a U.S. Post Office or private mailer does not constitute delivery. Postage due responses and applications will not be accepted.

ADDRESSES: *Submission Address:* Eligible lenders will send responses to the Multi-Family Housing Program Director of the State Office where the project will be located.

USDA Rural Development State Offices, their addresses, and telephone numbers, follow: [This information may also be found at *http://www.rurdev.usda.gov/recd_map.html*]

Note: Telephone numbers listed are not toll-free.

Alabama State Office
Sterling Centre, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3400, TDD (334) 279–3495.

Alaska State Office
800 West Evergreen, Suite 201, Palmer, AK 99645–6539, (907) 761–7740, TDD (907) 761–8905, Arizona State Office, 230 North First Avenue, Suite 206, Phoenix, AZ 85003–1706, (602) 280–8755, TDD (602) 280–8706.

Arkansas State Office
700 W. Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3200, TDD (501) 301–3279.

California State Office
430 G Street, #4169, Davis, CA 95616–4169, (530) 792–5800, TDD (530) 792–5848.

Colorado State Office
Denver Federal Center, Building 56, Room 2300, PO Box 25426, Denver, CO 80255–0426, (720) 544–2903, TDD (720) 544–2976.

Connecticut
Served by Massachusetts State Office.

Delaware and Maryland State Office
1221 College Park Drive, Suite 200, Dover, DE 19904, (302) 857–3580, TDD (302) 857–3585.

Florida and Virgin Islands State Office
4440 NW. 25th Place, PO Box 147010, Gainesville, FL 32614, –7010, (352) 338–3400, TDD (352) 338–3499.

Georgia State Office
Stephens Federal Building, 355 E. Hancock Avenue—Stop 307, Athens, GA 30601–2768, (706) 546–2162, TDD (706) 546–2034.

Hawaii State Office
(Services all Hawaii, American Samoa, Guam, and Western Pacific) Room 311, Federal Building, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8380, TDD (808) 933–8321.

Idaho State Office
9713 West Barnes Drive, Suite A1, Boise, ID 83709, (208) 378–5630, TDD (208) 378–5644.

Illinois State Office
2118 West Park Court, Suite A, Champaign, IL 61821–2986, (217) 403–6200, TDD (217) 403–6240.

Indiana State Office
5975 Lakeside Boulevard, Indianapolis, IN 46278–1966, (317) 290–3100 (ext. 4) TDD (317) 290–3343.

Iowa State Office
210 Walnut Street, Room 873, Des Moines, IA 50273, (515) 284–4663, TDD (515) 284–4858.

Kansas State Office
1303 SW First American Place, Suite 100, Topeka, KS 66604–4040, (785) 271–2700, TDD (785) 271–2767.

Kentucky State Office
771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7300, TDD (859) 224–7422.

Louisiana State Office
3727 Government Street, Alexandria, LA 71302, (318) 473–7921, TDD (318) 473–7655.

Maine State Office
967 Illinois Avenue, Suite 4, Bangor, ME 04402–0405, (207) 990–9100 (ext. 4), TDD (207) 942–7331.

Maryland
Served by Delaware State Office.

Massachusetts, Connecticut, and Rhode Island State Office
451 West Street, Suite 2, Amherst, MA 01002, (413) 253–4300, TDD (413) 253–4590.

Michigan State Office
3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5190, TDD (800) 649–3777.

Minnesota State Office
375 Jackson Street, Suite 410, St. Paul, MN 55101–1853, (651) 602–7800, TDD (651) 602–7830.

Mississippi State Office
Federal Building, Suite 831, 100 W. Capitol Street, Jackson, MS 39269, (601) 965–4318, TDD (601) 965–5850.

Missouri State Office
601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–0976, TDD (573) 876–9480.

Montana State Office
2229 Boot Hill Court, Bozeman, MT 59715, (406) 585–2540, TDD (406) 585–2562.

Nebraska State Office
Federal Building, Room 152, 100 Centennial Mall N, Lincoln, NE 68508, (402) 437–5551, TDD (402) 437–5093.

Nevada State Office
1390 South Curry Street, Carson City, NV 89703–9910, (775) 887–1222 (ext. 100), TDD (775) 885–0633.

New Hampshire State Office
10 Ferry Street, Concord, NH 03301–5004, Suite 218, (603) 223–6046, TDD (802) 828–6365.

New Jersey State Office
8000 Midlantic Drive, 5th Floor North Suite 500 Mt. Laurel, NJ 08054, (856) 787–7700, TDD (856) 787–7784.

New Mexico State Office
6200 Jefferson Street NE, Albuquerque, NM 87109, (505) 761–4950, TDD (505) 761–4938.
New York State Office
The Galleries of Syracuse, 441 S. Salina Street, Suite 357, Syracuse, NY 13202–2541, (315) 477–6400, TDD (315) 477–6447.
North Carolina State Office
4405 Bland Road, Suite 260, Raleigh, NC 27609, (919) 873–2000, TDD 711 (state relay system).
North Dakota State Office
Federal Building, Room 208, 220 East Rosser, PO Box 1737, Bismarck, ND 58502, (701) 530–2061, TDD (701) 530–2090.
Ohio State Office
Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2477, (614) 255–2400, TDD (800) 877–8339.
Oklahoma State Office
100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1000, TDD (405) 742–1007.
Oregon State Office
1201 NE Lloyd Boulevard, Suite 801, Portland, OR 97232–1274, (503) 414–3300, TDD (503) 414–3387.
Pennsylvania State Office
One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2299, TDD (717) 237–2261.
Puerto Rico State Office
654 Munoz Rivera Avenue, Suite 601, San Juan, PR 00918, (787) 766–5095, TDD (787) 766–5332.
Rhode Island
Served by Massachusetts State Office.
South Carolina State Office
Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 765–5163, TDD (803) 765–5697.
South Dakota State Office
Federal Building, Room 210, 200 Fourth Street SW., Huron, SD 57350, (605) 352–1100, TDD (605) 352–1147.
Tennessee State Office
3322 West End Avenue, Suite 300, Nashville, TN 37203, (615) 783–1300, TDD (615) 783–1397.
Texas State Office
Federal Building, Suite 102, 101 South Main, Temple, TX 76501, (254) 742–9700, TDD (254) 742–9712.
Utah State Office
Wallace F. Bennett Federal Building, 125 S. State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4320, TDD (801) 524–3309.
Vermont State Office
City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, (802) 828–6080, TDD (802) 223–6365.
Virgin Islands
Served by Florida State Office.
Virginia State Office
1606 Santa Rosa Road, Suite 238, Richmond, VA 23229, (804) 287–1500, TDD (804) 287–1753.
Washington State Office
1835 Black Lake Blvd. SW., Suite B, Olympia, WA 98512, (360) 704–7740, TDD (360) 704–7772.
Western Pacific Territories
Served by Hawaii State Office.
West Virginia State Office
Federal Building, 1550 Earl Core Road, Suite 101, Morgantown, WV 26505, (304) 284–4881, TDD (304) 284–4836.
Wisconsin State Office
5417 Clem's Way, Stevens Point, WI 54481, (715) 345–7600, TDD (715) 345–7614.
Wyoming State Office
100 East B. Street Room 1005, Casper, WY 82601, (307) 233–6700, TDD (307) 233–6733.

FOR FURTHER INFORMATION CONTACT: Tammy Daniels, Financial and Loan Analyst, USDA Rural Development Guaranteed Rural Rental Housing Program, Multi-Family Housing Guaranteed Loan Division, U.S. Department of Agriculture, South Agriculture Building, Room 1263–S, STOP 0781, 1400 Independence Avenue SW., Washington, DC 20250–0781. Email: *tammy.daniels@wdc.usda.gov.* Telephone: (202) 720–0021. This number is not toll-free. Hearing or speech-impaired persons may access that number by calling the Federal Information Relay Service toll-free at (800) 877–8339.

Overview

Federal Agency: Rural Housing Service.

Solicitation Opportunity Title: Guaranteed Multi-Family Housing Loans.

Announcement Type: Initial Solicitation Announcement.

Catalog of Federal Domestic Assistance: 10.438.

Dates: Response Deadline: December 31, 2013, 12:00 p.m. Eastern Time.

I. Funding Opportunity Description

The GRRHP is authorized by Section 538 of the Housing Act of 1949, as amended (42 U.S.C. 1490p–2) and operates under 7 CFR part 3565. The purpose of the GRRHP is to increase the supply of affordable rural rental housing through the use of loan guarantees that encourage partnerships between the Agency, private lenders, and public agencies. The Agency advises all interested parties that the applicant bears the burden in preparing and submitting an application in response to this Notice whether or not funding is appropriated for this program in FY 2013.

Eligibility of Prior Year Selected Responses: Prior fiscal year response selections that did not develop into complete applications within the time constraints stipulated by the corresponding State Office have been cancelled. Applicants have been notified of the cancellation by the State Office. A new response for the project may be submitted subject to the conditions of this Notice.

Prior years responses that were selected by the Agency, with a complete application submitted by the lender within 90 days from the date of notification of response selection (unless an extension was granted by the Agency), will be eligible for FY 2013 program dollars without having to complete a FY 2013 response. A complete application includes all Federal environmental documents required by 7 CFR part 1940, subpart G, and a Form RD 3565–1, ''Application for Loan and Guarantee.'' Any approved applications originating from FY 2012 and previous fiscal years (outstanding prior years approved applications) that are obligated in FY 2013, however, are subject to ''*Program Fees For Fy 2013*'' section in this Notice. Outstanding prior years approved applications will be obligated to the extent of available funding in order of priority score with the highest scores obligated first. The scores the applications received under the NOFA the year the application was submitted will be used for the ranking. In the case of tied scores, the project with the greatest leveraging (lowest loan to cost ratio) will receive selection priority. Once the outstanding prior years approved applications have been funded, the Agency will select FY 2013 responses for further processing in rank order as determined by the scoring criteria set forth in this Notice to the extent that funds remain available.

II. Award Information

Anyone interested in submitting an application for funding under this program is encouraged to consult the Rural Development Web site periodically for updated information regarding the status of funding authorized for this program.

Qualifying Properties: Qualifying properties include new construction for multi-family housing units and the acquisition of existing structures with a minimum per unit rehabilitation expenditure requirement in accordance with 7 CFR 3565.252.

Also eligible is the revitalization, repair and transfer (as stipulated in 7 CFR 3560.406) of existing direct Section 515 housing (transfer costs are subject to Agency approval and must be an eligible use of loan proceeds as listed in 7 CFR 3565.205), and properties involved in the Agency's Multi-Family Preservation and Revitalization (MPR) program. Equity payment, as stipulated in 7 CFR 3560.406, in the transfer of existing direct Section 515 housing, is an eligible use of guaranteed loan proceeds; however, the amount of funding available for transfers of existing Section 515 properties involving equity payments will be limited to 25 percent of the FY 2013 funding level through July 31, 2013. Once the Agency has committed 25 percent of the total funding available for transfers of existing Section 515 properties with equity payments, no further funding will be available for transfers of existing Section 515 properties with equity payments until after July 31, 2013, if funding is available.

If there is funding available after July 31, 2013, funding requests for transfers of existing Section 515 properties involving equity payments will be selected for obligation according to the selection criteria stipulated in the ''*Obligation of Program Funds*'' section of this Notice. Funding requests for transfers of existing Section 515 properties involving equity payments will be kept in a separate queue. The 25 percent limit is solely for equity payments and does not affect Section 515 properties' use of Section 538 loan guarantees exclusively for rehabilitation and repairs. In order to be considered, the transfer of Section 515 housing and MPR projects must need repairs and undergo revitalization of a minimum of $6,500 per unit.

Eligible Financing Sources: Any form of Federal, state, and conventional sources of financing can be used in conjunction with the loan guarantee, including Home Investment Partnerships Program (HOME) grant funds, tax exempt bonds, and Low Income Housing Tax Credits (LIHTC).

Types of Guarantees: The Agency offers three types of guarantees which are set forth at 7 CFR 3565.52(c). The Agency's liability under any guarantee will decrease or increase, in proportion to any decrease or increase in the amount of the unpaid portion of the loan, up to the maximum amount specified in the Loan Note Guarantee. Penalties incurred as a result of default are not covered by any of the program's guarantees. The Agency may provide a lesser guarantee based upon its evaluation of the credit quality of the loan.

Energy Conservation: All new multi-family housing projects financed in whole or in part by the USDA, are encouraged to engage in sustainable building development that emphasizes energy-efficiency and conservation. In order to assist in the achievement of this goal, any GRRHP project that participates in one or all of the programs included in priority 8 under the ''*Scoring of Priority Criteria for Selection of Projects*'' Section of this Notice may receive a maximum of 25 additional points added to their project score. Participation in these nationwide initiatives is voluntary, but strongly encouraged.

Interest Credit: The Continuing Appropriations Resolution, 2013 did not fund interest credit.

Program Fees For FY 2013: The Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113–6 (March 26, 2013) continued the provision ''That to support the loan program level for Section 538 guaranteed loans made available under this heading the Secretary may charge or adjust any fees to cover the projected cost of such loan guarantees pursuant to the provisions of the Credit Reform Act of 1990 (2 U.S.C. 661 et seq), and the interest on such loans may not be subsidized.'' The following fees have been determined necessary to cover the projected cost of such loan guarantees for FY 2013. These fees may be adjusted in future years to cover the projected costs of loan guarantees in those future years or additional fees may be charged. These fees are also applicable to all outstanding prior years responses funded with FY 2013 funds. The fees are as follows:

1. Initial guarantee fee. The Agency will charge an initial guarantee fee equal to 1% of the guarantee principal amount. For purposes of calculating this fee, the guarantee amount is the product of the percentage of the guarantee times the initial principal amount of the guaranteed loan.

2. Annual guarantee fee. An annual guarantee fee of 50 basis points (½%) of the outstanding principal amount of the loan as of December 31 will be charged each year or portion of a year that the guarantee is outstanding.

3. As permitted under 7 CFR 3565.302(b)(5), there is a non-refundable service fee of $1,500 for the review and approval of a lender's first request to extend the term of a guarantee commitment beyond its original expiration (the request must be received by the Agency prior to the commitment's expiration). For any subsequent extension request, the fee will be $2,500.

4. As permitted under 7 CFR 3565.302(b)(5), there is a non-refundable service fee of $3,500 for the review and approval of a lender's first request to reopen an application when a commitment has expired. For any subsequent extension request to reopen an application after the commitment has expired, the fee will be $3,500.

5. As permitted under 7 CFR 3565.302(b)(4), there is a non-refundable service fee of $1,500 in connection with a lender's request to approve the transfer of property or a change in composition of the ownership entity.

6. There is no lender application fee for lender approval.

7. There is no surcharge for the guarantee of construction advances.

III. Eligibility Information

Eligible Lenders: An eligible lender for the Section 538 GRRHP as required by 7 CFR 3565.102 must be a licensed business entity or Housing Finance Agency (HFA) in good standing in the state or states where it conducts business. Lender eligibility requirements are contained in 7 CFR 3565.102. Please review that section for a complete list of all of the criteria. The Agency will only accept responses from GRRHP eligible or approved lenders as described in 7 CFR 3565.102 and 3565.103 respectively. Lenders whose responses are selected will be notified by the Agency to submit a request for GRRHP lender approval within 30 days of notification. Lenders who request GRRHP approval must meet the standards in 7 CFR 3565.103.

Lenders that have received GRRHP lender approval that remain in good standing do not need to reapply for GRRHP lender approval. A lender making a construction loan must demonstrate an ability to originate and service construction loans, in addition to meeting the other requirements of 7 CFR part 3565, subpart C.

Submission of Documentation For GRRHP Lender Approval: All lenders that have not yet received GRRHP lender approval must submit a complete lender application to: Director, Multi-Family Housing Guaranteed Loan Division, Rural Development, U.S. Department of Agriculture, Room 1263–S, STOP 0781, 1400 Independence Avenue SW., Washington, DC 20250–0781. Lender applications must be identified as ''Lender Application—Section 538 Guaranteed Rural Rental Housing Program'' on the envelope.

IV. Application and Submission Information

Content of Responses: All responses require lender information and project specific data as set out in this Notice. Incomplete responses will not be considered for funding. Lenders will be notified of incomplete responses no later than 30 calendar days from the date of receipt of the response by the Agency. Complete responses are to include a signed cover letter from the lender, on the lender's letterhead, to the office address identified in the ''Submission Address'' section of this Notice for the scoring and ranking of a proposed GRRHP project. The lender must provide the requested information concerning the project, to establish the purpose of the proposed project, its location, and how it meets the established priorities for funding. The Agency will determine the highest ranked responses based on priority criteria and a threshold score.

(1) *Lender Certification:* The lender must certify that the lender will make a loan to the prospective borrower for the proposed project, under specified terms and conditions subject to the issuance of the GRRHP guarantee. Lender certification must be on the lender's letterhead and signed by both the lender and the prospective borrower.

(2) Project Specific Data: The lender must submit the project specific data below on the lender's letterhead, signed by both the lender and the prospective borrower:

Data element	Information that must be included
Lender Name	Insert the lender's name.
Lender Tax ID #	Insert lender's tax ID number.
Lender Contact Name	Name of the lender contact for loan.
Mailing Address	Lender's complete mailing address.
Phone #	Phone number for lender contact.
Fax #	Insert lender's fax number.
Email Address	Insert lender contact email address.
Borrower Name and Organization Type	State whether borrower is a Limited Partnership, Corporation, Indian Tribe, etc.
Equal Opportunity Survey	Optional Completion.
Tax Classification Type	State whether borrower is for profit, not for profit, etc.
Borrower Tax ID #	Insert borrower's tax ID number.
Borrower DUNS #	Insert DUNS number.
Borrower Address, including County	Insert borrower's address and county.
Borrower Phone #, fax # and email address	Insert borrower's phone number, fax number and email address.
Principal or Key Member for the Borrower	Insert name and title. List the general partners if a limited partnership, officers if a corporation or members of a Limited Liability Corporation.
Borrower Information and Statement of Housing Development Experience.	Attach relevant information.
New Construction, Acquisition With Rehabilitation	State whether the project is new construction or acquisition with rehabilitation.
Revitalization, Repair, and Transfer (as stipulated in 7 CFR 3560.406) of Existing Direct Section 515 Housing or MPR.	Yes or No (Transfer costs, including equity payments, are subject to Agency approval and must be an eligible use of loan proceeds in 7 CFR 3565.205).
Project Location Town or City	Town or city in which the project is located.
Project County	County in which the project is located.
Project State	State in which the project is located.
Project Zip Code	Insert Zip Code where the project is located.
Project Congressional District	Congressional District for project location.
Project Name	Insert project name.
Project Type	Family, senior (all residents 55 years or older), or mixed.
Property Description and Proposed Development Schedule	Provide as an attachment.
Total Project Development Cost	Enter amount for total project.
# of Units	Insert the number of units in the project.
Ratio of 3–5 bedroom units to total units	Insert percentage of 3–5 bedroom units to total units.
Cost per Unit	Total development cost divided by number of units.
Rent	Proposed rent structure.
Median Income for Community	Provide median income for the community.
Evidence of Site Control	Attach relevant information.
Description of Any Environmental Issues	Attach relevant information.
Loan Amount	Insert the loan amount.
Borrower's Proposed Equity	Insert amount and source.
Tax Credits	Have tax credits been awarded? If tax credits were awarded, submit a copy of the award/evidence of award with your response. If not, when do you anticipate an award will be made (announced)? What is the [estimated] value of the tax credits? Letters of application and commitment letters should be included, if available.
Other Sources of Funds	List all funding sources other than tax credits and amounts for each source, type, rates and terms of loans or grant funds.
Loan to Total Development Cost	Guaranteed loan divided by the total development costs of project.
Debt Coverage Ratio	Net Operating Income divided by debt service payments.
Percentage of Guarantee	Percentage guarantee requested.
Collateral	Attach relevant information.

Data element	Information that must be included
Colonia, Tribal Lands, or State's Consolidated Plan or State Needs Assessment.	Colonia, on an Indian Reservation, or in a place identified in the State's Consolidated Plan or State Needs Assessment as a high need community for multi-family housing.
Is the Property Located in a Federally Declared Disaster Area?	If yes, please provide documentation (i.e., Presidential Declaration document).
Population	Provide the population of the county, city, or town where the project is or will be located.
What type of guarantee is being requested, Permanent only (Option 1), Construction and Permanent (Option 2) or Continuous (Option 3).	Enter the type of guarantee.
Loan Term	Minimum 25-year term. Maximum 40-year term (includes construction period). May amortize up to 40 years. Balloon mortgages permitted after the 25th year.
Participation in Energy Efficient Programs	Initial checklist indicating prerequisites to register for participation in a particular energy efficient program. All checklists must be accompanied by a signed affidavit by the project architect stating that the goals are achievable. If property management is certified for green property management, the certification must be provided.

(3) The Proposed Borrower Information:

a) Lender certification that the borrower or principals of the owner are not barred from participating in Federal housing programs and are not delinquent on any Federal debt.

b) Borrower's unaudited or audited financial statements.

c) Statement of borrower's housing development experience.

(4) Lender Eligibility and Approval Status: Evidence that the lender is either an approved lender for the purposes of the GRRHP or that the lender is eligible to apply for approved lender status. The lender's application for approved lender status can be submitted with the response but must be submitted to the National Office within 30 calendar days of the lender's receipt of the ''Notice to Proceed with Application Processing'' letter.

(5) Competitive Criteria: Information that shows how the proposal is responsive to the selection criteria specified in this notice.

V. Application Review Information

Scoring of Priority Criteria For Selection: All FY 2013 responses will be scored based on the criteria set forth below to establish their priority for further processing. Per 7 CFR 3565.5(b), priority will be given to projects: In smaller rural communities, in the most needy communities having the highest percentage of leveraging, having the lowest interest rate, or having the highest ratio of 3–5 bedroom units to total units. In addition, as permitted in 7 CFR 3565.5(b), in order to meet important program goals, priority points will be given for projects that include LIHTC funding, Section 515 projects with no equity payments and projects that are participating in specified energy efficient programs.

The eight priority scoring criteria for projects are listed below.

Priority 1— Projects located in eligible rural communities with the lowest populations will receive the highest points.

Population size	Points
0–5,000	30
5,001–10,000 people	15
10,001–15,000 people	10
15,001–20,000 people	5

Priority 2—The neediest communities as determined by the median income from the most recent census data published by the United States Department of Housing and Urban Development (HUD), will receive points. The Agency will allocate points to projects located in communities having the lowest median income. Points for median income will be awarded as follows:

Median income (dollars)	Points
Less than $45,000	20
$45,000—less than $55,000	15
$55,000—less than $65,000	10
$65,000—less than $75,000	5
$75,000 or more	0

Priority 3—Projects that demonstrate partnering and leveraging in order to develop the maximum number of units and promote partnerships with state and local communities will also receive points. Points will be awarded as follows:

Loan to total development cost ratio (percentage %)	Points
Less than 25	60
Less than 50 to 25	30
Less than 70 to 50	10
70 or more	0

Priority 4—Responses that include equity from low income housing tax credits will receive an additional 50 points.

Priority 5—The USDA Rural Development will award points to projects with the highest ratio of 3–5 bedroom units to total units as follows:

Ratio of 3–5 bedroom units to total units	Points
More than 50%	10
21%–50%	5
Less than 21%—more than 0%	1

Priority 6—Responses for the revitalization, repair, and transfer (as stipulated in 7 CFR 3560.406) of existing direct section 515 housing and properties involved in the Agency's MPR program (transfer costs, including equity payments, are subject to Agency approval and must be an eligible use of loan proceeds listed in 7 CFR 3565.205) will receive an additional 10 points. If the transfer of existing section 515 properties includes equity payments, 0 points will be awarded.

Priority 7—Section 515 Rural Rental Housing Projects—Projects in which Section 538 funds will not be used to finance new construction of Section 515 Rural Rental Housing projects will receive 20 points.

Priority 8—Energy-Efficiency.

(A) Projects that are energy-efficient and registered for participation in the following programs will receive points as indicated up to a maximum of 25 points. Each program has an initial checklist indicating prerequisites for participation. Each applicant must provide a checklist establishing that the prerequisites for each program's participation will be met. Additional points will be awarded for checklists that achieve higher levels of energy efficiency certification as set forth

below. All checklists must be accompanied by a signed affidavit by the project architect stating that the goals are achievable. Points will be awarded for the listed programs as follows:

- *Energy Star for Homes*—5 points;
- *Green Communities* by the Enterprise Community Partners (*www.enterprisefoundation.org*)—10 points;
- *LEED for Homes* program by the U.S. Green Building Council (USGBC) (*www.usgbc.org*)—Certified (10 points), Silver (12 points), Gold (15 points), or Platinum (25 points);
- *National Association of Home Builders (NAHB) ICC 700–2008—National Green Building Standard™* (*www.nahb.org*)—Bronze (10 points), Silver (12 points), Gold (15 points), or Emerald (25 points); or
- A State or local green building program—2 points.

(B) Projects that will be managed by a property management company that are certified green property management companies will receive 5 points. Applicants must provide proof of certification. Certification may be achieved through one of the following programs:

- National Apartment Association, Credential for Green Property Management (CGPM); *www.naahq.org/EDUCATION/DESIGNATIONPROGRAMS/OTHER/Pages/default.aspx*;
- National Affordable Housing Management Association (NAHMA), Credential for Green Property Management (CGPM); *www.nahma.org/content/greencred.html;* or
- U.S. Green Building Council (USGBC), Green Building Certification Institute (GBCI) LEED AP (any discipline) or LEED Green Associate; *www.gbci.org*.

Notifications: Responses will be reviewed for completeness and eligibility. The Agency will notify those lenders whose responses are selected via a Notice to Proceed with Application Processing letter. The Agency will request lenders without GRRHP lender approval to apply for GRRHP lender approval within 30 days upon receipt of notification of selection.

Lenders will also be invited to submit a complete application to the USDA Rural Development State Office where the project is located.

Submission of GRRHP Applications: Notification letters will instruct lenders to contact the USDA Rural Development State Office immediately following notification of selection to schedule required agency reviews.

USDA Rural Development State Office staff will work with lenders in the development of an application package. The deadline for the submission of a complete application is 90 calendar days from the date of notification of response selection. If the application is not received by the appropriate State Office within 90 calendar days from the date of notification, the selection is subject to cancellation, thereby allowing another response that is ready to proceed with processing to be selected. The Agency may extend this 90 day deadline for receipt of an application at its own discretion.

VI. Award Administration Information

Obligation of Program Funds: The Agency will only obligate funds to projects that meet the requirements for obligation under 7 CFR part 3565 and this Notice, including having undergone a satisfactory environmental review in accordance with the National Environmental Protection Act (NEPA) and completed Form RD 3565–1 for the selected project.

The Agency will prioritize the obligation requests using the highest score and the procedures outlined as follows. The Agency will select the responses that meet eligibility criteria and invite lenders to submit complete applications to the Agency. Once a complete application is received and approved, the State Office will submit a request to obligate funds to the National Office. In the event of a tie, priority will be given to the request for the project that has the highest percentage of leveraging (lowest Loan to Cost) and in the event there is still a tie, priority will be given to the project in the smaller rural community.

Conditional Commitment: Once the required documents for obligation are received and all NEPA and regulatory requirements have been met, the USDA Rural Development State Office will issue a conditional commitment, which stipulates the conditions that must be fulfilled before the issuance of a guarantee, in accordance with 7 CFR 3565.303.

Issuance of Guarantee: The USDA Rural Development Office will issue a guarantee to the lender for a project in accordance with 7 CFR 3565.303. No guarantee can be issued without a complete application, review of appropriate certifications, satisfactory assessment of the appropriate level of environmental review, and the completion of any conditional requirements.

Non-Discrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (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 TDD).

To file a complaint of discrimination, write to USDA, Assistant Secretary for Civil Rights, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Stop 9410, Washington, DC 20250–9410, or call toll-free at (866) 632–9992 (English) or (800) 877–8339 (TDD) or (866) 377–8642 (English Federal-relay) or (800) 845–6136 (Spanish Federal-relay). ''USDA is an equal opportunity provider, employer, and lender.''

Dated: May 14, 2013.

Tammye H. Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2013–12325 Filed 5–22–13; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Massachusetts Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Massachusetts Advisory Committee to the Commission will convene at 12:00 p.m. (ET) on Wednesday, June 19, 2013, at the McCarter and English Law Office, 265 Franklin Street, Boston, MA 02110. The purpose of the meeting is for project planning.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by Tuesday, July 19, 2013. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to *ero@usccr.gov*. Persons who desire additional

information may contact the Eastern Regional Office at 202–376–7533.

Persons needing accessibility services should contact the Eastern Regional Office at least 10 working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, on May 20, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2013–12304 Filed 5–22–13; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Briefing and Business Meeting.

DATE AND TIME: Friday, May 31, 2013 at 9:30 a.m. EST.

PLACE: Washington Marriott at Metro Center, 775 12th St NW.,—Grand Ballroom, Washington, DC 20005.

Briefing Agenda—9:30 a.m.–3:00 p.m.

This briefing is open to the public.

Topic: Protecting the Civil Rights of our Veterans and Service Members

I. Introductory Remarks by Chairman
II. Panel 1—9:30 a.m.–11:00 a.m.: Federal Government Officials Speakers' Remarks and Questions from Commissioners
III. Panel 2—11:00 a.m.–12:30 p.m.: Advocacy Groups Speakers' Remarks and Questions from Commissioners
IV. LUNCH—12:30 p.m.–1:30 p.m.
V. Panel 3—1:30 p.m.–3:00 p.m.: Experts Speakers' Remarks and Questions from Commissioners
VI. Adjourn Briefing

Meeting Agenda—3:00 p.m.

I. Approval of Agenda
II. Results of Notational Vote Ballots regarding:
  a. Delegation of authority to initiate the Affected Agency Review of the 2013 Statutory Report
  b. Concurrence with the President's appointment of a U.S. Commission on Civil Rights Staff Director
III. Management and Operations
  • Consideration of date change for the September 2013 business meeting
IV. Approval of State Advisory Committee Appointment Slates
  • Kentucky
  • New Jersey
  • Oregon
V. Adjourn Meeting

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591.

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at *signlanguage@usccr.gov* at least seven business days before the scheduled date of the meeting.

Dated: May 20, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2013–12389 Filed 5–21–13; 11:15 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting; Agenda Changed

Notice is hereby given of a change in the agenda for the meeting of the United States Commission on Civil Rights, May 31, 2013, 9:30 a.m. to 3:00 p.m. EST, Washington Marriot at Metro Center, 775 12th St. NW.—Grand Ballroom, Washington, DC 20005, which was published in the **Federal Register** May 23, 2013.

The Meeting Agenda has been amended to include a discussion and vote on the Stand Your Ground research topic and a discussion of concept papers.

AGENCY: United States Commission on Civil Rights.

ACTION: Amended Notice of Briefing and Business Meeting.

DATE AND TIME: Friday, May 31, 2013 at 9:30 a.m. EST.

PLACE: Washington Marriott at Metro Center, 775 12th St. NW.—Grand Ballroom, Washington, DC 20005.

Briefing Agenda—9:30 a.m.–3:00 p.m.

The briefing is open to the public.

Topic: Protecting the Civil Rights of Our Veterans and Service Members

I. Introductory Remarks by Chairman
II. Panel 1—9:30 a.m.–11:00 a.m.: Federal Government Officials Speakers' Remarks and Questions from Commissioners
III. Panel 2—11:00 a.m.–12:30 p.m.: Advocacy Groups Speakers' Remarks and Questions from Commissioners
IV. LUNCH—12:30 p.m.–1:30 p.m.
V. Panel 3—1:30 p.m.–3:00 p.m.: Experts Speakers' Remarks and Questions from Commissioners
VI. Adjourn Briefing

Meeting Agenda—3:00 p.m.

I. Approval of Agenda
II. Results of Notational Vote Ballots regarding:
  a. Delegation of authority to initiate the Affected Agency Review of the 2013 Statutory Report
  b. Concurrence with the President's appointment of a U.S. Commission on Civil Rights Staff Director
III. Management and Operations
  • Consideration of date change for the September 2013 business meeting
  • Discussion and Vote on the Stand Your Ground Research Topic
  • Discussion of Concept Papers
IV. Approval of State Advisory Committee Appointment Slates
  • Kentucky
  • New Jersey
  • Oregon
V. Adjourn Meeting

FOR FURTHER INFORMATION CONTACT: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591.

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at s*ignlanguage@usccr.gov* at least seven business days before the scheduled date of the meeting.

Dated: May 21, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2013–12428 Filed 5–21–13; 4:15 pm]

BILLING CODE 6335–01–P

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, 2015.

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/PRB are set forth below by organization: Department of Commerce, Office of the Secretary, 2013–2015, Performance Review Board Membership.

Office of the Secretary

Ellen Herbst, Senior Advisor for Policy & Program Integration
Theodore Constantine Johnston, Director, Office of White House Liaison
Office of the Chief Financial Officer and Assistant Secretary for Administration
Frederick E. Stephens, Deputy Assistant Secretary for Administration
Suzan J. Aramaki, Director, Office of Civil Rights
Narahari Sastry, Deputy Assistant Secretary for Resources Management, Office of Security
Teresa S. Coppolino, Director, Financial Management Systems
Gordon T. Alston, Director, Financial Reporting and Internal Controls
Michael E. Phelps, Director, Office of Budget
Lisa Casias, Director for Financial Management and Deputy Chief Financial Officer

Office of the General Counsel

Elise B. Packard, Chief, General Law Division
Barbara S. Fredericks, Assistant General Counsel for Administration

Economics and Statistics Administration

Kenneth A. Arnold, Associate Under Secretary for Management

Bureau of the Census

Douglas R. Clift, Senior Advisor for Project Management
Carol M. Rose, Chief Budget Division

International Trade Administration

Renee A. Macklin, Chief Information Officer

National Oceanic and Atmospheric Administration

James M. Turner, Deputy Assistant Secretary for International Affairs
Joanne Buenzli Crane, Director Budget Office

National Telecommunications and Information Administration

Leonard M. Bechtel, Chief Financial Officer and Director for Administration

National Technical Information Service

Bruce E. Borzino, Director, National Technical Information Service

Dated: May 8, 2013.

Denise A. Yaag,

Director, Office of Executive Resources.

[FR Doc. 2013–12238 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–BS–M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–71–2013]

Foreign-Trade Zone 61—San Juan, Puerto Rico; Application for Subzone; Janssen Ortho LLC; Gurabo, Puerto Rico

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Puerto Rico Trade & Export Company, grantee of FTZ 61, requesting special-purpose subzone status for the facility of Janssen Ortho LLC located in Gurabo, Puerto Rico. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on May 17, 2013.

The proposed subzone (105.71 acres) is located at PR Road 933, Km 0.1 Mamey Ward, Gurabo. A notification of proposed production activity has been submitted and is being published separately for public comment (B–46–2013). The proposed subzone would be subject to the existing activation limit of FTZ 61.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 2, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 17, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.* For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: May 17, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–12350 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–9–2013]

Foreign-Trade Zone 41—Milwaukee, Wisconsin; Authorization of Production Activity; CNH America, LLC; Subzone 41I (Tractors and Tractor/Combine Components); Racine, Wisconsin

On January 18, 2013, the Port of Milwaukee, grantee of FTZ 41, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of CNH America, LLC, within Subzone 41I, at its facilities in Racine, Wisconsin.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (78 FR 7394, 02–01–2013). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: May 17, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–12358 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–49–2013]

Foreign-Trade Zone 40—Cleveland, Ohio; Application for Reorganization and Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Cleveland-Cuyahoga County Port Authority, grantee of FTZ 40, requesting authority to reorganize and expand the zone under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on May 17, 2013.

FTZ 40 was approved by the FTZ Board on September 29, 1978 (Board Order 135, 43 FR 46886, 10–11–1978) and expanded on June 18, 1982 (Board Order 194, 47 FR 27579, 6–25–1982), April 10, 1992 (Board Order 574, 57 FR 13694, 4–17–1992), February 10, 1997 (Board Order 870, 62 FR 7750, 2–20–1997), June 11, 1999 (Board Order 1040, 64 FR 33242, 6–22–1999), April 15, 2002 (Board Order 1224, 67 FR 20087, 4–24–2002), August 21, 2003 (Board Orders 1289, 1290 and 1295, 68 FR 52384–52385, 9–3–2003), March 11, 2004 (Board Order 1320, 69 FR 13283, 3–22–2004), March 24, 2004 (Board Order 1322, 69 FR 17642, 4–5–2004), September 10, 2004 (Board Order 1351, 69 FR 56063, 9–17–2004), April 15, 2005 (Board Orders 1384, 1385 and 1386, 70 FR 21736, 4–27–2005), December 9, 2005 (Board Order 1425, 70 FR 76023, 12–22–2005) and December 21, 2005 (Board Orders 1428, 1429 and 1430, 70 FR 77376, 12–30–2005).

The current zone includes the following sites: *Site 1* (68 acres)—Port of Cleveland Complex, W. 9th St. at Cleveland Harbor, Lake Erie, Cleveland; *Site 2* (172 acres)—Cleveland Business Park, Grayton/Brook Park Roads, Cleveland; *Site 3* (450 acres)—Burke Lakefront Airport, 1501 North Marginal Road, Cleveland; *Site 4* (324 acres)—Emerald Valley Business Park, Cochran Road and Beaver Meadow Parkway, Glenwillow; *Site 5* (17 acres)—Collinwood Industrial Park, South Waterloo Road and East 152nd Street, Cleveland; *Site 6* (174 acres)—Strongsville Industrial Park, SR 82 and Lunn Road, Strongsville; *Site 7* (13 acres)—East 40th Street, between Kelley Avenue and Perkins Avenue, Cleveland; *Site 8* (15 acres)—Frame Properties Industrial Park, 2399 Forman Road, Morgan Township; *Site 9* (170 acres)—Harbor Point Business Park, Baumhart Road, Vermillion; *Site 10* (42 acres)—Broad Oak Business Park, Broadway Avenue and Golden Parkway Avenue, Oakwood; *Site 11* (29 acres)—Ashtabula Distribution Center, 1527 Cook Road, Ashtabula Township; *Site 12* (448 acres)—Taylor Woods Commerce Park, Taylor Parkway, North Ridgeville; *Site 13* (118 acres)—Solon Business Park, Aurora Road, Solon; *Site 14* (45 acres)—Cleveland Bulk Terminal, 5500 Whiskey Island Drive, Cleveland; *Site 15* (1,200 acres)—Tow Path Valley Business Park, Dille Road and 14th Street, Cleveland; *Site 16* (1,727 acres)—Cleveland Hopkins International Airport, Cleveland; *Site 17* (175 acres)—I–X Center, 1 I–X Center Drive, Brook Park; *Site 18* (42 acres)—Snow Road Industrial Park, 18901 Snow Road, Brook Park; *Site 19* (322 acres)—Park Road Industrial Park, 17601 Brook Park Road, Brook Park; *Site 20* (70 acres)—Progress Drive Business Park, 11792 Alameda Drive, Strongsville; *Site 21* (212 acres)—Strongsville Commerce Center, Drake and Boston Roads, Strongsville; *Site 22* (20 acres)—Oakwood Commerce Center, 21500 Alexander Road, Oakwood; and, *Site 23* (8 acres)—Cleveland Processing Center, 4510 E. 71st Street, Cleveland (approved on a temporary basis until 4–30–2014).

The grantee's proposed service area under the ASF would be Cuyahoga, Geauga, Lake and Lorain Counties, Ohio, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Cleveland Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include existing Sites 1–22 as ''magnet'' sites and Site 23 as a usage-driven site. The ASF allows for the possible exemption of one magnet site from the ''sunset'' time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted. The application would have no impact on FTZ 40's previously authorized subzones.

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

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is July 22, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 6, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz.* For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: May 17, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–12360 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Judges Panel of the Malcolm Baldrige National Quality Award and Board of Overseers of the Malcolm Baldrige National Quality Award

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of Open Meeting.

SUMMARY: The Judges Panel of the Malcolm Baldrige National Quality Award (Judges Panel) and the Board of Overseers of the Malcolm Baldrige National Quality Award (Board of Overseers) will meet together in open session on Thursday, June 13, 2013 from 8:30 a.m. to 3:00 p.m. Eastern time. The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology and from the Chair of the Judges Panel of the Malcolm Baldrige National Quality Award.

DATES: The meeting will convene on Thursday, June 13, 2013, at 8:30 a.m. Eastern time and adjourn at 3:00 p.m.

Eastern time. The meeting will be open to the public.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, Maryland 20899. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, Baldrige Performance Excellence Program, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, Maryland 20899–1020, telephone number (301) 975–2361, or by email at *harry.hertz@nist.gov*.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 3711a(d)(1), 15 U.S.C. 3711a(d)(2)(B) and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the Judges Panel and the Board of Overseers will meet together on Thursday, June 13, 2013 from 8:30 a.m. to 3:00 p.m. Eastern time. The Judges Panel consists of twelve members with balanced representation from U.S. service, manufacturing, nonprofit, education, and health care industries. The Panel includes members familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, small businesses, health care providers, and educational institutions. The Judges Panel recommends Malcolm Baldrige National Quality Award recipients to the Secretary of Commerce. The Board of Overseers, composed of twelve members preeminent in the field of organizational performance excellence and appointed by the Secretary of Commerce, make an annual report on the results of Award activities to the Director of the National Institute of Standards and Technology (NIST), along with its recommendations for improvement of the Award process.

The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology and from the Chair of the Judges Panel of the Malcolm Baldrige National Quality Award. The agenda will include: Baldrige Program Update, Baldrige Fundraising Update, Accreditation and Baldrige Judges Panel Update and Ethics Review, Applicants and Eligibility, New Business/Public Comment. The agenda may change to accommodate the Judges Panel and Board of Overseers business. The final agenda will be posted on the NIST Baldrige Performance Excellence Web site at *http://www.nist.gov/baldrige/community/overseers.cfm*. The meeting is open to the public.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Board's affairs and/or the Panel of Judges' general process are invited to request a place on the agenda. On June 13, 2013 approximately one-half hour will be reserved in the afternoon for public comments, and speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about 3 minutes each. The exact time for public comments will be included in the final agenda that will be posted on the Baldrige Performance Excellence Program Web site at *http://www.nist.gov/baldrige/community/overseers.cfm*. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak, but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to the Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, Maryland, 20899–1020, via fax at 301–975–4967 or electronically by email to *nancy.young@nist.gov*.

All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, email address and phone number to Nancy Young no later than 4:00 p.m. Eastern time, Thursday, June 6, 2013, and she will provide you with instructions for admittance. Non-U.S. citizens must also submit their passport number, country of citizenship, title, employer/sponsor, address and telephone. Ms. Young's email address is *nancy.young@nist.gov* and her phone number is (301) 975–2361.

Dated: May 16, 2013.

Phillip Singerman,

Associate Director for Innovation & Industry Services.

[FR Doc. 2013–12328 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Judges Panel of the Malcolm Baldrige National Quality Award

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of Closed Meeting.

SUMMARY: The Judges Panel of the Malcolm Baldrige National Quality Award will meet in closed session on Wednesday, June 12, 2013, 9:00 a.m. to 3:30 p.m., Eastern time. The purpose of this meeting is to discuss and review the role and responsibilities of the Judges Panel and information received from the National Institute of Standards and Technology in order to ensure the integrity of the Award selection process. The agenda will include: The Role of the Judges, Debrief of Category Recognition, Improvements to the Judging Process, Baldrige Program Updates, and the 2013 Baldrige Award Cycle.

DATES: The meeting will convene on Wednesday, June 12, 2013, 9:00 a.m. to 3:30 p.m., Eastern time. The entire meeting will be closed to the public.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, Maryland 20899.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, Baldrige Performance Excellence Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361, email *harry.hertz@nist.gov*.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 3711a(d)(1) and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the Judges Panel of the Malcolm Baldrige National Quality Award will meet on Wednesday, June 12, 2013, 9:00 a.m. to 3:30 p.m., Eastern time. The Judges Panel is composed of twelve members, appointed by the Secretary of Commerce, chosen for their familiarity with quality improvement operations and competitiveness issues of manufacturing companies, services companies, small businesses, health care providers, and educational institutions. Members are also chosen who have broad experience in for-profit and nonprofit areas. The Judges Panel will assemble to discuss and review the

role and responsibilities of the Judges Panel and information received from the National Institute of Standards and Technology in order to ensure the integrity of the Malcolm Baldrige National Quality Award selection process. The agenda will include: The Role of the Judges, Debrief of Category Recognition, Improvements to the Judging Process, Baldrige Program Updates, and the 2013 Baldrige Award Cycle.

The Senior Advisor to the Deputy Secretary performing the non-exclusive duties of the Chief Financial Officer and Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on March 19, 2013, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended by Section 5(c) of the Government in Sunshine Act, Public Law 94–409, that the meeting of the Judges Panel may be closed in accordance with 5 U.S.C. 552b(c)(4) because the meeting is likely to disclose trade secrets and commercial or financial information obtained from a person which is privileged or confidential and 5 U.S.C. 552b(c)(9)(B) because for a government agency the meeting is likely to disclose information that could significantly frustrate implementation of a proposed agency action. The meeting, which involves examination of Award applicant data from U.S. companies and other organizations and a discussion of these data as compared to the Award criteria in order to recommend Award recipients, will be closed to the public.

Dated: May 16, 2013.

Phillip Singerman,

Associate Director for Innovation & Industry Services.

[FR Doc. 2013–12330 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Tilefish Individual Fishing Quota Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before July 22, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jason Berthiaume, (978) 281–9177 or *Jason.Berthiaume@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

National Marine Fisheries Service (NMFS) Northeast Region manages the tilefish fishery of the Exclusive Economic Zone (EEZ) of the Northeastern United States, through the Tilefish Fishery Management Plan (FMP). The Mid-Atlantic Fishery Management Council prepared the FMP pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The regulations implementing the FMP are specified at 50 CFR part 648 subpart N.

The recordkeeping and reporting requirements at § 648.294 form the basis for this collection of information. NMFS requests information from tilefish individual fishing quota (IFQ) permit holders in order to process applications to ensure that IFQ allocation holders are provided a statement of their annual catch quota, and for enforcement purposes, to ensure vessels are not exceeding an individual quota allocation. In conjunction with the application, NMFS also collects IFQ share accumulation information to ensure that an IFQ allocation holder does not acquire an excessive share of the total limited access privileges, as required by section 303A(c)(5)(D) of the Magnuson-Stevens Act.

NMFS requests transfer application information to process and track requests from allocation holders to transfer quota allocation (permanent and temporary) to another entity. The NMFS also collects information for cost recovery purposes as required under the Magnuson-Stevens Act to collect fees to recover the costs directly related to management, data collection and analysis, and enforcement of IFQ programs. Lastly, NMFS collects landings information to ensure that the amounts of tilefish landed and ex-vessel prices are properly recorded for quota monitoring purposes and the calculation of IFQ fees, respectively. Having this information results in an increasingly more efficient and accurate database for management and monitoring of fisheries of the Northeastern U.S. EEZ.

II. Method of Collection

The IFQ Allocation permit application, IFQ holder cap form, and the IFQ transfer form are paper applications. These applications can be filled out online, but must be printed and signed to complete. The IFQ cost recovery process is entirely online at *www.pay.gov* and the IFQ reporting requirements are completed through a phone call to NMFS interactive voice response phone line.

III. Data

OMB Control Number: 0648–0590.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 79.

Estimated Time per Response: IFQ Allocation Permit Application, 30 minutes; IFQ Holder Cap Form, 5 minutes; IFQ Transfer Form, 5 minutes; IFQ Cost Recovery, 2 hours; IFQ Reporting Requirements, 2 minutes.

Estimated Total Annual Burden Hours: 53.

Estimated Total Annual Cost to Public: $23.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 20, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–12331 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC694

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Meeting of the South Atlantic Fishery Management Council.

SUMMARY: In addition to a Council Member Visioning Workshop, the South Atlantic Fishery Management Council (Council) will hold a joint meeting of the Ecosystem-Based Management Committee and Habitat & Environmental Protection Committee as well as meetings of the: Dolphin Wahoo Committee; Southeast Data, Assessment and Review Committee (partially CLOSED SESSION); Snapper Grouper Committee; King & Spanish Mackerel Committee; Advisory Panel Selection Committee (CLOSED SESSION); Scientific & Statistical Selection Committee (CLOSED SESSION); Law Enforcement Committee (CLOSED SESSION); Executive Finance Committee; Protected Resources Committee; Data Collection Committee; and a meeting of the Full Council. The Council will take action as necessary. The Council will also hold an informal public question and answer session regarding agenda items and a formal public comment session.

DATES: The Council meeting will be held from 9 a.m. on Monday, June 10, 2013 until 1:30 p.m. on Friday, June 14, 2013.

ADDRESSES:

Meeting address: The meeting will be held at the Hutchinson Island Marriott, 555 NE Ocean Boulevard, Stuart, FL 34996; telephone: (800) 775–5936 or (772) 225–3700; fax: (772) 225–7131.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The items of discussion in the individual meeting agendas are as follows:

Council Member Visioning Workshop Agenda, Monday, June 10, 2013, 9 a.m. Until 12 noon

1. Receive a recapitulation of the March 2013 Visioning Workshop.
2. Review the visioning decision document as well as the Snapper Grouper Fishery Management Plan (FMP) objectives.
3. Develop a Vision Statement and provide guidance to staff.

Joint Ecosystem-Based Management Committee and Habitat & Environmental Protection Committee Agenda, Monday, June 10, 2013, 1:30 p.m. Until 3 p.m.

1. Receive a report on the following Advisory Panel (AP) meetings: Coral AP; Habitat & Environmental Protection AP; and Deepwater Shrimp AP.
2. Review and discuss actions and alternatives in Coral Amendment 8, pertaining to Coral Habitat Areas of Particular Concern (HAPCs) and transit through the Oculina HAPC. Review and discuss spatial information on habitat mapping and fishery activity for modified Coral HAPC area alternatives. Provide guidance to staff and recommend approval of Coral Amendment 8 for public hearings.
3. Receive and discuss an update on ecosystem activities and provide guidance to staff.

Dolphin Wahoo Committee Agenda, Monday, June 10, 2013, 3 p.m. Until 4:30 p.m.

1. Receive and discuss updates on the status of commercial and recreational catches versus quotas.
2. Review and discuss comments from the Dolphin Wahoo AP meeting.
3. Review the Decision Document for Dolphin Wahoo Amendment 5, pertaining to bag limit sales of fish and changes to the Annual Catch Limit (ACL) and the Allowable Biological Catch (ABC). Discuss actions and alternatives to Amendment 5, select preferred alternatives and recommend approval of the amendment for public hearings.

Southeast Data, Assessment and Review (SEDAR) Committee Agenda, Monday, June 10, 2013, 4:30 p.m. Until 5:30 p.m. (Note: A Portion of This Meeting Will be CLOSED)

1. Receive a SEDAR activities update, review SEDAR Steering Committee recommendations and provide guidance to Committee members.
2. Receive an overview of the report and recommendations from the Only Reliable Catch Stocks (ORCS) Workshop.
3. Receive an overview of Council research prioritization and approve a research plan.
4. Develop recommendations for the following SEDAR projects: SEDAR 38 (King Mackerel) Schedule and Terms of Reference (TOR); SEDAR 32 (Gray Triggerfish and Blueline Tilefish) and SEDAR 36 (Snowy Grouper) TOR review; and participants for SEDAR 38 and SEDAR 36.

Note: There will be an informal public question and answer session with the NMFS Regional Administrator and the Council Chairman on Tuesday, June 11, 2013, beginning at 5:30 p.m.

Snapper Grouper Committee Agenda, Tuesday, June 11, 2013, 8:30 a.m. Until 5 p.m. and Wednesday, June 12, 2013, 8:30 a.m. Until 12 noon

1. Receive and discuss the status of commercial and recreational catches versus ACLs.
2. Receive a report on total removals of red snapper in 2012 from United States South Atlantic waters.
3. Receive an update on the status of the following amendments under formal Secretarial review: Regulatory Amendment 13, pertaining to MRIP (Marine Recreational Information Program) adjustments; Regulatory Amendment 15, relating to Yellowtail Snapper, Gag Grouper and Red Snapper; Amendment 28, regarding the Red Snapper framework; Amendment 27, pertaining to the management authority, framework and crew size for Blue Runner; Regulatory Amendment 18, relating to Vermilion Snapper and Red Porgy; and Regulatory Amendment 19, pertaining to Black Sea Bass.
4. Receive updates on the Marine Resources Monitoring, Assessment and Prediction Program (MARMAP), the Southeast Area Monitoring and Assessment Program (SEAMAP) and the Southeast Fishery-Independent Survey (SEFIS) group.
5. Receive reports on the Snapper Grouper AP meeting and the Scientific and Statistical Committee (SSC) meeting.
6. Receive an overview of Regulatory Amendment 14, relating to a multitude of species in the Snapper Grouper FMP, and Regulatory Amendment 16, pertaining to Golden Tilefish. Provide guidance to staff and recommend approval of the amendments for public hearings.

7. Receive an overview of Snapper Grouper Amendment 30, regarding Vessel Monitoring Systems (VMS); review public hearing comments; discuss recommendation of approval of Amendment 30 for formal Secretarial review; and deem the codified text as necessary and appropriate.

8. Receive an update on Snapper Grouper Amendment 29, pertaining to allocations and ORCS; and provide guidance to staff on content and timing of the amendment.

9. Receive an overview of options for Snapper Grouper Amendment 22, relating to tags in order to track recreational harvest of species; and provide guidance to staff on content and timing of the amendment.

King & Spanish Mackerel Committee Agenda, Wednesday, June 12, 2013, 1:30 p.m. Until 5 p.m.

1. Receive and discuss the status of commercial and recreational catches versus ACLs for Atlantic group King Mackerel, Spanish Mackerel and Cobia.

2. Receive and discuss an SSC report on SEDAR 28, pertaining to Spanish Mackerel and Cobia, and take action as necessary.

3. Receive a report on the King & Spanish Mackerel AP meeting.

4. Receive an overview of the Joint South Atlantic/Gulf of Mexico (Gulf) Mackerel Amendment 19, pertaining to permits and tournament sale requirements, and the Joint Mackerel Amendment 20, regarding boundaries and transit provisions; select preferred alternatives for the amendments; modify the amendments as appropriate; provide guidance to staff; and recommend approval of the amendments for public hearings.

5. Receive an overview of actions in the South Atlantic Mackerel Framework; select preferred alternatives; modify the amendment as appropriate; provide guidance to staff; and recommend approval of the South Atlantic Framework actions for public hearings.

Note: A formal public comment session will be held on Wednesday, June 12, 2013, beginning at 5:30 p.m. on Snapper Grouper Amendment 30, followed by comment on any other item on the Council agenda. The amount of time provided to individuals will be determined by the Chairman based on the number of individuals wishing to comment.

AP Selection Committee Agenda, Thursday, June 13, 2013, 8:30 a.m. Until 9:30 a.m. (Closed Session)

1. Review AP applications and develop recommendations for appointments and reappointments.

SSC Selection Committee Agenda, Thursday, June 13, 2013, 9:30 a.m. Until 10:30 a.m. (Closed Session)

1. Review SSC and Socio-Economic Panel (SEP) applications and develop recommendations for appointments and reappointments.

Law Enforcement Committee Agenda, Thursday, June 13, 2013, 10:30 a.m. Until 11 a.m. (Closed Session)

1. Review Law Enforcement Officer of the Year nominations and develop a recommendation for officer of the year.

Executive Finance Committee Agenda, Thursday, June 13, 2013, 11 a.m. Until 12 noon

1. Receive an update on the status of Council calendar year (CY) 2013 funding as well as CY 2013 budget expenditures.

2. Receive an update on the Joint Committee on South Florida Management Issues activities and discuss the Florida Tarpon issue.

3. Discuss Council Follow-up and Priorities and address other issues as appropriate.

Protected Resources Committee Agenda, Thursday, June 13, 2013, 1:30 p.m. Until 3 p.m.

1. Receive an update from the Southeast Regional Office (SERO) Protected Resources Division on the following: Atlantic Sturgeon; coral species; Right Whales and the interaction with the Black Sea Bass pot fishery; Nassau Grouper; and Herring.

2. Receive briefings on the American Eel and Loggerhead Sea Turtles and critical habitat.

3. Discuss updates and briefings and take action as appropriate.

Data Collection Committee Agenda, Thursday, June 13, 2013, 3 p.m. Until 5 p.m.

1. Receive an update on the status of the review of the Joint South Atlantic/Gulf Generic Dealer Amendment and the Joint South Atlantic/Gulf Generic For-Hire Reporting Amendment (South Atlantic portion only); discuss the amendments and take action as appropriate.

2. Receive a project report on the pilot study that tested the feasibility of electronic logbook reporting in the Gulf for for-hire vessels, including a briefing on the project findings and the next possible steps for the project. Discuss the report and the briefing and take action as appropriate.

3. Receive an overview on the Coastal Migratory Pelagics (CMP) Framework for Headboat Reporting in the Gulf; discuss the overview; provide guidance to staff; and approve the next steps for the CMP Framework.

4. Receive an overview of both the Joint South Atlantic/Gulf Generic Commercial Logbook Reporting Amendment and the Joint South Atlantic/Gulf Generic Charterboat Reporting Amendment as well as an overview of Gulf actions for the amendments; discuss the overviews; provide guidance to staff; and recommend approval of the next steps for the amendments.

5. Receive an overview of the Southeast Fisheries Science Center (SEFSC) sampling protocols (size/age) for biological samples and Red Snapper and Black Sea Bass research projects; discuss the overview; and take action as appropriate.

Council Session Agenda, Friday, June 14, 2013, 8 a.m. Until 1:30 p.m.

8–8:15 a.m.: Call the meeting to order, adopt the agenda, approve the May 2013 minutes, and receive a presentation.

8:15–9 a.m.: The Council will receive a report from the Snapper Grouper Committee and is scheduled to approve Regulatory Amendments 14 and 16 for public hearings. The Council will either approve or disprove Snapper Grouper Amendment 30 for formal Secretarial review. The Council will consider other Committee recommendations and take action as appropriate.

9–9:15 a.m.: The Council will receive a report from the Joint Ecosystem-Based Management Committee and Habitat & Environmental Protection Committee and is scheduled to approve Coral Amendment 8 for public hearings. The Council will consider other Committee recommendations and take action as appropriate.

9:15–9:30 a.m.: The Council will receive a report from the Dolphin Wahoo Committee and is scheduled to approve Dolphin Wahoo Amendment 5 for public hearings. The Council will consider other Committee recommendations and take action as appropriate.

9:30–9:45 a.m.: The Council will receive a report from the SEDAR Committee and is scheduled to approve the SEDAR Research Plan. The Council is scheduled to approve the following: SEDAR 38 Schedule and TOR; SEDAR 32 and 36 TOR reviews; and participants for SEDAR 38 and SEDAR 36. The Council will consider other Committee recommendations and take action as appropriate.

9:45–10 a.m.: The Council will receive a report from the Council Member Visioning Workshop and is scheduled to approve the Vision Statement. The Council will consider

other workshop recommendations and take action as appropriate.

10–10:15 a.m.: The Council will receive a report from the King & Spanish Mackerel Committee and is scheduled to approve the following for public hearings: Mackerel Amendment 19; Mackerel Amendment 20; and South Atlantic Framework actions. The Council will consider other Committee recommendations and take action as appropriate.

10:15–10:30 a.m.: The Council will receive a report from the AP Selection Committee and is scheduled to approve Committee recommendations for the appointment/reappointment of AP members. The Council will consider other Committee recommendations and take action as appropriate.

10:30–10:45 a.m.: The Council will receive a report from the SSC Selection Committee and is scheduled to approve Committee recommendations for the appointment/reappointment of SSC members. The Council will consider other Committee recommendations and take action as appropriate.

10:45–11 a.m.: The Council will receive a report from the Law Enforcement Committee and will choose the Law Enforcement Officer of the Year. The Council will consider other Committee recommendations and take action as appropriate.

11–11:15 a.m.: The Council will receive a report from the Executive Finance Committee; will approve the Council Follow-up and Priorities documents; and will take action on the Florida Tarpon issue. The Council will consider other Committee recommendations and take action as appropriate.

11:15–11:30 a.m.: The Council will receive a report from the Protected Resources Committee and will consider Committee recommendations. The Council will take action as appropriate.

11:30–11:45 a.m.: The Council will receive a report from the Data Collection Committee and will consider Committee recommendations. The Council will take action as appropriate.

11:45–1:30 p.m.: The Council will receive presentations and status reports from the NOAA Southeast Regional Office (SERO) and the NMFS SEFSC, including the status of Shrimp Amendment 9, which would expedite the closure process during severe cold events in order to protect overwintering shrimp populations and would revise the Minimum Stock Size Threshold (MSST) proxy for Pink Shrimp. The Council will review and develop recommendations on Experimental Fishing Permits as necessary; review agency and liaison reports; and discuss other business, including upcoming meetings. The Council will also hold a Closed Session to address litigation if necessary.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: May 20, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–12281 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC692

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a joint public meeting of its Groundfish Committee and Habitat Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, June 11, 2013 at 9 a.m.

ADDRESSES: *Meeting address:* The meeting will be held at the Providence Biltmore, 11 Dorrance Street, Providence, RI 02903; telephone: (401) 421–0700; fax: (401) 455–3040.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Habitat and Groundfish Committee's will identify and recommend Omnibus EFH Amendment 2 draft management alternatives for Council approval, based on analyses and recommendations of technical teams and the public. At the June 18–20, 2013 Council meeting, the Council is scheduled to approve draft alternatives for inclusion and analysis in the Draft Omnibus EFH Amendment 2 Environmental Impact Statement (DEIS). The Council may identify preferred alternatives at a later date, before taking the DEIS out to public hearing. Other business may be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: May 20, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–12264 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC693

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Advisory Panel will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Monday, June 10, 2013 at 10 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Providence Biltmore Hotel, 11 Dorrance Street, Providence, RI 02903; telephone: (401) 421–0700; fax: (401) 455–3040.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

The Groundfish Advisory Panel will meet, primarily to develop recommendations on issues that will be discussed during the June 11, 2013 joint meeting of the Groundfish and Habitat Oversight Committees and the June 12, 2013 meeting of the Groundfish Oversight Committee. They will discuss issues related to Amendment 18 of the Northeast Multispecies FMP to include: Review Plan Development Team analyses to date; Develop recommendations on a purpose and need statement, and on potentially revising the goals and objectives. Also on the agenda will be items related to the alternatives development for the Omnibus Essential Fish Habitat Amendment 2 (OA2) which will include: Development of appropriate bridle length caps to be used on no-groundcable trawl gear within two potential adverse effects habitat management areas in the Great South Channel and on Georges Shoal. These gear modification options could be implemented via OA2 if approved by the Council. They will also develop a list of key groundfish gear characteristics to be part of a data collection program, which could be implemented via OA2 if approved by the Council. The information gathered via this data collection program would be used to develop gear modification options to minimize the adverse effects of fishing on EFH in future management actions. The panel will address other business as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: May 20, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–12265 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC695

Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

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 (Council) and its Research Set-Aside Committee, its Mackerel, Squid, Butterfish Committee, its Surfclam and Ocean Quahog Committee, and its Executive Committee will hold public meetings.

DATES: The meetings will be held Tuesday, June 11, 2013 through Thursday, June 13, 2013. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held at the Double Tree Hilton Tinton Falls-Eatontown, 700 Hope Road, Eatontown, NJ 07724; telephone: (732) 544–9300.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State St., 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; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION:

Tuesday, June 11, 2013

8 a.m. until 11 a.m.—The Mackerel, Squid, Butterfish (MSB) Committee will meet.

11 a.m. until 3 p.m.—The Surfclam and Ocean Quahog (SC/OQ) Committee will meet.

3 p.m.—The Council will convene.

3 p.m. until 5 p.m.—The Council Strategic Plan will be discussed.

5 p.m. until 6 p.m.—The Listening Session will be held.

Wednesday, June 12, 2013

9 a.m.—The Council will convene.

9 a.m. until 11 a.m.—The Omnibus Recreational Amendment will be discussed.

11 a.m. until 12 p.m.—There will be an Update on Atlantic Sturgeon Biological Opinion.

1 p.m. until 3 p.m.—The Council will discuss MSB Committee actions and approve annual specifications and related management measures.

3 p.m. until 5 p.m.—The Council will discuss SC/OQ Committee actions and approve the Data Collection Protocol document by the FMAT.

Thursday, June 13, 2013

9 a.m. until 10 a.m.—The Executive Committee will meet.

10 a.m. until 2 p.m.—The Council will hold its regular Business Session to approve the December 2012 and April 2013 minutes, receive Organizational Reports, the New England and South Atlantic Liaison Reports, the Executive Director's Report, the Science Report; Committee Reports, and conduct any continuing and/or new business.

Agenda items by day for the Council's Committees and the Council itself are:

On Tuesday, June 11—The MSB Committee will review and develop recommendations for annual MSB specifications and related management measures, including but limited to: Butterfish Allowable Biological Catch for 2014, river herring/shad cap for the mackerel fishery, gear stowage requirements, longfin roll-over and reserve options, longfin mesh

requirements, and Longfin possession limits for the Illex fishery; Illex control date, Amendment 15 update, and the squid port meeting results. The SC/OQ Committee will review and develop recommendations for the 2014–2016 specifications and review and advise on the Data Collection Protocol document prepared by the Fishery Management Action Team. The Council will review and approve the Draft Strategic Plan. During the Listening Session John Bullard will give a review of the NMFS Listening Sessions.

On Wednesday, June 12—The Council will review and approve the Omnibus Recreational Amendment for submission to NMFS. NERO will provide an Update on Atlantic Sturgeon Biological Opinion. The Council will review MSB Committee actions, approve annual specifications and related management measures (see above list for MSB Committee), approve Illex control date, and receive an Amendment 15 update. The Council will review SC/OQ Committee actions, approve 2014–16 specifications for surfclams and ocean quahogs and approve the Data Collection Protocol document prepared by the FMAT.

On Thursday, June 13—The Executive Committee will receive an update on the Ecosystem Approach to Fisheries Management document and discuss wind energy, Bureau of Ocean Energy Management, and the next steps. The Council will hold its regular Business Session to approve the December 2012 and April 2013 minutes, receive Organizational Reports, the New England and South Atlantic Liaison Report, the Executive Director's Report, Science Report, Committee Reports, and conduct any continuing and/or new business.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: May 20, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–12323 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Nomination of Existing Marine Protected Areas to the National System of Marine Protected Areas

AGENCY: National Marine Protected Areas Center (MPA Center), Office of National Marine Sanctuaries (ONMS), National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice; request for public comments.

SUMMARY: In January 2013, NOAA and the Department of the Interior (DOI) invited federal, state, commonwealth, and territorial marine protected area (MPA) programs with potentially eligible existing MPAs to nominate their sites to the National System of MPAs (national system). The national system and the nomination process are described in the *Framework for the National System of Marine Protected Areas of the United States* (Framework), developed in response to Executive Order 13158 on Marine Protected Areas and published on November 19, 2008 (73 FR 69608). The Framework provides guidance for collaborative efforts among federal, state, commonwealth, territorial, tribal and local governments and stakeholders to develop an effective and well-coordinated national system of MPAs.

DATES: Comments on the nominations to the national system are due July 22, 2013.

ADDRESSES: Lauren Wenzel, National Marine Protected Areas Center, Office of National Marine Sanctuaries, 1305 East-West Highway, N/NMS, Silver Spring, MD 20910. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, will not be considered by NOAA.

FOR FURTHER INFORMATION CONTACT: Lauren Wenzel, NOAA, at 301–713–7265 or via email at *lauren.wenzel@noaa.gov.* A detailed electronic copy of the List of National System MPAs is available for download at *http://www.mpa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on National System

The national system of MPAs is made up of member MPA sites, networks and systems established and managed by federal, state, commonwealth, territorial, tribal or local governments that collectively enhance conservation of the nation's natural and cultural marine heritage and represent its diverse ecosystems and resources.

Benefits of joining the national system, include a facilitated means to work with other MPA managers in the region, and nationally on issues of common conservation concern; fostering greater public and international recognition of U.S. MPAs and the resources they protect; priority in the receipt of available technical and other support for cross-cutting needs; and additional opportunities to participate in and influence federal and regional ocean conservation and management initiatives (such as integrated ocean observing systems, systematic monitoring and evaluation, targeted outreach to key user groups, and helping to identify and address MPA research needs). In addition, the national system provides a forum for coordinated regional planning about place-based conservation priorities that does not otherwise exist.

A site must have existing protections of natural and/or cultural resources in place in order to be eligible to join the national system, as well as meet other criteria described in the Framework. Joining the national system does not establish new regulatory authority or change existing regulations in any way, require changes affecting the designation process or management of member MPAs, or bring state, territorial, tribal or local sites under federal authority.

II. Nomination Process

This current round of nominations began on January 28, 2013 and the deadline for nominations was March 29, 2013.

There are four entry criteria for existing MPAs to join the national system.

1. Meets the definition of an MPA as defined in the Framework.

2. Has a management plan (can be site-specific or part of a broader programmatic management plan; must have goals and objectives and call for monitoring or evaluation of those goals and objectives).

3. Contributes to at least one priority conservation objective as listed in the Framework.

4. Cultural heritage MPAs must also conform to criteria for the National Register for Historic Places.

Additional sites not currently meeting the management plan criterion can be evaluated for eligibility to be nominated to the national system on a case-by-case basis based on their ability to fill gaps in the national system coverage of the priority conservation objectives and design principles described in the Framework.

NOAA used existing information in the MPA Inventory to determine which MPAs meet the first and second criteria. The inventory is online at *http://www.mpa.gov/dataanalysis/mpainventory/* and information about potentially eligible sites is posted online at *http://www.mpa.gov/pdf/helpful-resources/nomination_summary_jan2013.pdf.* As part of the nomination process, the managing entity for each potentially eligible site is asked to provide information on the third and fourth criteria. Following this public comment period, NOAA and DOI will make a determination about the eligibility of nominated sites. All comments will be forwarded to the relevant MPA management agency, which will reaffirm or withdraw the nomination based on public comment received and any other factors deemed relevant.

III. List of MPAs Nominated to the National System MPAs

The following 82 MPAs have been nominated by the California Department of Fish and Wildlife and the National Park Service. The complete list of National System MPAs, which now includes 355 members, is available at *www.mpa.gov.*

Federal Marine Protected Areas

Padre Island National Seashore (TX)
Redwood National Park (CA)

California

Abalone Cove State Marine Conservation Area
Anacapa Island Special Closure (A)
Anacapa Island Special Closure (B)
Anacapa Island State Marine Conservation Area
Anacapa Island State Marine Reserve
Arrow Point to Lion Head Point (Catalina Island) State Marine Conservation Area
Batiquitos Lagoon State Marine Conservation Area
Begg Rock (San Nicolas Island Quad) State Marine Reserve
Big Flat State Marine Conservation Area
Big River Estuary State Marine Conservation Area
Bird Rock (Catalina Island) State Marine Conservation Area
Blue Cavern (Catalina Island) State Marine Conservation Area
Bolsa Bay State Marine Conservation Area
Bolsa Chica Basin State Marine Conservation Area
Cabrillo State Marine Reserve
Campus Point State Marine Conservation Area
Carrington Point (Santa Rosa Island) State Marine Reserve
Casino Point (Catalina Island) State Marine Conservation Area
Castle Rock Special Closure
Cat Harbor (Catalina Island) State Marine Conservation Area
Crystal Cove State Marine Conservation Area
Dana Point State Marine Conservation Area
Double Cone Rock State Marine Conservation Area
False Klamath Rock Special Closure
Famosa Slough State Marine Conservation Area
Farnsworth Offshore (Catalina Island) State Marine Conservation Area
Farnsworth Onshore (Catalina Island) State Marine Conservation Area
Footprint State Marine Reserve
Goleta Slough State Marine Conservation Area
Gull Island (Santa Cruz Island) State Marine Reserve
Harris Point (San Miguel Island) State Marine Reserve
Judith Rock (San Miguel Island) State Marine Reserve
Kashtayit State Marine Conservation Area
Laguna Beach State Marine Conservation Area
Laguna Beach State Marine Reserve
Long Point (Catalina Island) State Marine Reserve
Lover's Cove (Catalina Island) State Marine Conservation Area
MacKerricher State Marine Conservation Area
Matlahuayl State Marine Reserve
Mattole Canyon State Marine Reserve
Naples State Marine Conservation Area
Navarro River Estuary State Marine Conservation Area
Painted Cave (Santa Cruz Island) State Marine Conservation Area
Point Cabrillo State Marine Reserve
Point Conception State Marine Reserve
Point Dume State Marine Conservation Area
Point Dume State Marine Reserve
Point St. George Reef Offshore State Marine Conservation Area
Point Vicente State Marine Conservation Area
Pyramid Point State Marine Conservation Area
Reading Rock State Marine Conservation Area
Reading Rock State Marine Reserve
Richardson Rock (San Miguel Island) State Marine Reserve
Rockport Rocks Special Closure
Russian Gulch State Marine Conservation Area
Samoa State Marine Conservation Area
San Diego-Scripps Coastal State Marine Conservation Area
San Dieguito Lagoon State Marine Conservation Area
San Elijo Lagoon State Marine Conservation Area
San Miguel Island Special Closure A–1
Santa Barbara Island State Marine Reserve
Scorpion (Santa Cruz Island) State Marine Reserve
Sea Lion Gulch State Marine Reserve
Skunk Point (Santa Rosa Island) State Marine Reserve
South Cape Mendocino State Marine Reserve
South Humboldt Bay State Marine Recreational Management Area
South La Jolla State Marine Conservation Area
South La Jolla State Marine Reserve
South Point (Santa Rosa Island) State Marine Reserve
Southwest Seal Rock Special Closure
Steamboat Rock Special Closure
Sugarloaf Island Special Closure
Swami's State Marine Conservation Area
Ten Mile Beach State Marine Conservation Area
Ten Mile Estuary State Marine Conservation Area
Ten Mile State Marine Reserve
Tijuana River Mouth State Marine Conservation Area
Upper Newport Bay State Marine Conservation Area
Van Damme State Marine Conservation Area
Vizcaino Rock Special Closure

IV. Request for Comments

NOAA is requesting comments on degree to which the nominated MPAs meet the criteria for membership in the National System of Marine Protected Areas. Details on the criteria are found at *http://www.mpa.gov/pdf/national-system/finalframework_full.pdf.*

Dated: May 15, 2013.

Holly A. Bamford,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 2013–12175 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX69

Marine Mammals; File Nos. 14451, 14353, and 13846

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

ACTION: Notice; issuance of permit amendments.

SUMMARY: Notice is hereby given that major permit amendments have been issued to Joseph Mobley, Jr., University of Hawaii at Manoa, 2528 McCarthy Mall, Honolulu, HI 96816; Ann Zoidis, Cetos Research Organization, 11 Des Isle Ave Bar Harbor, ME 04609; and Jim Darling, Ph.D., Whale Trust, P.O. Box 384, Tofino, BC V0R2Z0, Canada, for Scientific Research Permit Nos. 14451, 14353, and 13846, respectively.

ADDRESSES: The permit amendments and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814–4700; phone (808) 944–2200; fax (808) 973–2941.

FOR FURTHER INFORMATION CONTACT: Kristy Beard or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On January 15, 2013, notice was published in the **Federal Register** (78 FR 2955) that the subject amendment requests had been submitted by the above-named applicants. The requested permit amendments have been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 14451, issued on July 14, 2010 (75 FR 43151), authorizes the permit holder, Joseph Mobley, Jr., to study cetaceans off the east and west coast of the United States, Hawaii, Alaska, Guam, and the Mariana Islands. Researchers target numerous cetacean species including endangered blue whales (*Balaenoptera musculus*), fin whales (*B. physalus*), humpback whales (*Megaptera novaeangliae*), sei whales (*B. borealis*), and sperm whales (*Physeter macrocephalus*), during aerial and vessel surveys for photo-identification, videography, and behavioral observations. The permit includes authorization under the MMPA to take 205 false killer whales (*Pseudorca crassidens*) in Pacific waters off of Hawaii. Insular Hawaiian false killer whales were listed as endangered under the ESA in November 2012; therefore, the permit holder now requires authorization under the ESA to take Insular Hawaiian false killer whales. The permit amendment, Permit No. 14451–01, authorizes 180 of the false killer whale takes previously authorized by the permit to be takes of Insular Hawaiian false killer whales under the ESA.

Permit No. 14353, issued on July 14, 2010 (75 FR 43151), authorizes the permit holder, Ann Zoidis, to conduct scientific research on humpback and minke (*B. acutorostrata*) whales in Hawaiian waters. Research occurs annually from January through March. Humpback whale research is focused in the Au'au Channel near Maui. Research activities include photo-identification, behavioral observations, passive acoustic recording, and underwater photo/videography. Suction cup tags are deployed on humpback whales. Minke whales are approached for photo-identification anywhere within the main Hawaiian islands. The permit includes authorization under the MMPA for the incidental harassment of up to 1,000 false killer whales during activities in Pacific waters off of Hawaii. Insular Hawaiian false killer whales were listed as endangered under the ESA in November 2012; therefore, the permit holder now requires authorization under the ESA to take Insular Hawaiian false killer whales. The permit amendment, Permit No. 14353–01, authorizes the incidental harassment of Insular Hawaiian false killer whales under the ESA and expands the geographic area throughout the Hawaiian Islands, including the Northwestern Hawaiian Islands chain.

Permit No. 13846, issued on July 14, 2010 (75 FR 43151), authorizes the permit holder, Jim Darling, Ph.D., to study humpback whales in Hawaii (primarily off west Maui) and humpback and Eastern gray (*Eschrichtius robustus*) whales along the coastlines of Washington and Alaska. Researchers may conduct photo-identification, passive acoustic recording, behavioral observation (by vessel, underwater and aerial), videorecording, collection of sloughed skin, photogrammetry, biopsy sampling, playback experiments, and/or suction cup and implant tagging of target whales. The permit includes authorization under the MMPA for the incidental harassment of up to 150 false killer whales during playback experiments in Pacific waters off Hawaii. Insular Hawaiian false killer whales were listed as endangered under the ESA in November 2012; therefore, the permit holder now requires authorization under the ESA to take Insular Hawaiian false killer whales. The permit amendment, Permit No. 13846–02, authorizes the incidental harassment of Insular Hawaiian false killer whales under the ESA.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are consistent with the Proposed Action Alternative in the Environmental Assessment for the Issuance of Scientific Research Permits for Research on Humpback Whales and Other Cetaceans (NMFS 2010). Based on the analyses in the EA, NMFS determined that issuance of the permits would not significantly impact the quality of the human environment and that preparation of an environmental impact statement was not required. That determination is documented in a Finding of No Significant Impact (FONSI), signed on May 9, 2013. The EA and FONSI are available upon request.

As required by the ESA, issuance of these permits was based on a finding that such permits: (1) Were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: May 20, 2013.

P. Michael Payne,

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

[FR Doc. 2013–12278 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC622

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Pier Replacement Project

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the U.S. Navy (Navy) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to construction activities as part of a pier replacement project. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to the Navy to take, by Level B Harassment only, four species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than June 24, 2013.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Laws@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application as well as a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Supplemental documents provided by the U.S. Navy may be found at the same web address. The Navy has prepared a Draft Environmental Assessment (*Naval Base Point Loma Fuel Pier Replacement and Dredging (P–151/DESC1306) Environmental Assessment*) in accordance with the National Environmental Policy Act (NEPA) and the regulations published by the Council on Environmental Quality. It is posted at the foregoing site. NMFS will independently evaluate the EA and determine whether or not to adopt it. We may prepare a separate NEPA analysis and incorporate relevant portions of the Navy's EA by reference. Information in the Navy's application, EA and this notice collectively provide the environmental information related to proposed issuance of the IHA for public review and comment. We will review all comments submitted in response to this notice as we complete the NEPA process, including a decision of whether to sign a Finding of No Significant Impact (FONSI), prior to a final decision on the IHA request. Documents cited in this notice may also be viewed, by appointment only, at the aforementioned physical address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

Summary of Request

We received an application on September 24, 2012 from the Navy for the taking of marine mammals incidental to pile driving and removal in association with a pier replacement project in San Diego Bay at Naval Base Point Loma in San Diego, CA (NBPL). The Navy submitted a revised version of the application on November 15, 2012 which we deemed adequate and complete. The pier replacement project is proposed to occur over multiple years; however, this IHA would cover only the initial year of work, beginning September 1, 2013. Four species of marine mammals are expected to occur in the vicinity of the project during all or a portion of the project duration: California sea lion (*Zalophus californianus californianus*), harbor seal (*Phoca vitulina richardii*), bottlenose dolphin (*Tursiops truncatus truncatus*), and gray whale (*Eschrichtius robustus*). California sea lions are present year-round and are common in the project area, while bottlenose dolphins may be present year-round but sightings are highly variable in Navy marine mammal surveys of northern San Diego Bay. Harbor seals have limited occurrence in the project area. Gray whales may be observed in San Diego Bay sporadically during migration periods.

NBPL provides berthing and support services for Navy submarines and other fleet assets. The existing fuel pier serves as a fuel depot for loading and unloading tankers and Navy underway replenishment vessels that refuel ships at sea (''oilers''), as well as transferring fuel to local replenishment vessels and

other small craft operating in San Diego Bay, and is the only active Navy fueling facility in southern California. Portions of the pier are over one hundred years old, while the newer segment was constructed in 1942. The pier as a whole is significantly past its design service life and does not meet current construction standards.

Demolition and construction would occur in two phases to maintain the fueling capabilities of the existing fuel pier while the new pier is being constructed. The total duration of demolition/construction is estimated to be approximately four years (2013–17). During the first year of construction (the specified activity considered under this proposed IHA), approximately 120 piles (including 18-in concrete and 36- to 48-in steel) would be installed and 109 piles would be removed (via multiple methods). All steel piles would be driven with a vibratory hammer for their initial embedment depths and finished with an impact hammer for proofing, as necessary. Proofing involves striking a driven pile with an impact hammer to verify that it provides the required load-bearing capacity, as indicated by the number of hammer blows per foot of pile advancement.

For pile driving activities, the Navy used NMFS-promulgated thresholds for assessing project impacts, outlined later in this document. The Navy used a site-specific model for transmission loss and empirically-measured source levels from other 36–72 in diameter pile driving events to estimate potential marine mammal exposures. Predicted exposures are outlined later in this document. The calculations predict that no Level A harassments would occur associated with pile driving or construction activities, and that as many as 1,738 incidents of Level B harassment may occur during the first year of the pier replacement project from sound produced by pile driving and removal activity.

Description of the Specified Activity

NBPL is located on the peninsula of Point Loma near the mouth and along the northern edge of San Diego Bay (see Figures 1–1 and 1–2 in the Navy's application). The proposed actions with the potential to cause harassment of marine mammals within the waterways adjacent to NBPL, under the MMPA, are vibratory and impact pile driving and removal of piles via vibratory driver or pneumatic chipper associated with the pier replacement project and associated projects. The entire project is scheduled to occur from 2013–17; the proposed activities that would be authorized by this IHA would occur for one year from September 1, 2013. Under the terms of a memorandum of understanding between the Navy and the U.S. Fish and Wildlife Service, all noise- and turbidity-producing in-water activities in designated least tern foraging habitat are to be avoided during the period when least terns are present and engaged in nesting and foraging. Therefore, all in-water construction activities will occur during a window from approximately September 15 through April 1.

Specific Geographic Region

San Diego Bay is a narrow, crescent-shaped natural embayment oriented northwest-southeast with an approximate length of fifteen miles and a total area of roughly 11,000 acres. The width of the bay ranges from 0.2 to 3.6 miles, and depths range from 74 ft mean lower low water (MLLW) near the tip of Ballast Point to less than 4 ft at the southern end (see Figure 2–1 of the Navy's application). San Diego Bay is a heavily urbanized area with a mix of industrial, military, and recreational uses. The northern and central portions of the bay have been shaped by historic dredging to support large ship navigation. Dredging occurs as necessary to maintain constant depth within the navigation channel. Outside the navigation channel, the bay floor consists of platforms at depths that vary slightly. Sediments in northern San Diego Bay are relatively sandy as tidal currents tend to keep the finer silt and clay fractions in suspension, except in harbors and elsewhere in the lee of structures where water movement is diminished. Much of the shoreline consists of riprap and manmade structures.

San Diego Bay is heavily used by commercial, recreational, and military vessels, with an average of 82,413 vessel movements (in or out of the bay) per year (not including recreational boating within the Bay) (see Table 2–2 of the Navy's application). The Navy has been measuring underwater noise in northern San Diego Bay and has thus far found that the median broadband sound pressure level for background sound in the Bay is 123.8 dB re 1 μPa. These preliminary data reflect the busy nature of the project area and show that background sound may be higher than the NMFS-specified Level B harassment threshold of 120 dB for continuous sound (see Figures 2–4 to 2–6 of the Navy's application). The Navy intends to continue gathering ambient sound data for the project area and this subject will be addressed in greater detail under future IHA requests. For more information about the specific geographic region, please see section 2.3 of the Navy's application.

In order to provide context, we will first describe the entire project and then describe the specific portions scheduled for completion during the first work window. Associated projects (separate from primary construction/demolition) are described first. The project consists of the following key elements:

Temporary Relocation of the Marine Mammal Program

The Navy Marine Mammal Program, administered by Space and Naval Warfare Systems Command (SPAWAR) Systems Center (SSC), would be moved approximately three kilometers to the Naval Mine and Anti-submarine Warfare Command (NMAWC). Although not subject to the MMPA, SSC's working animals are being relocated so that they will not be affected by the project. In addition to the distance of remove, NMAWC is acoustically shadowed from potential project noise (see Figure 1–4 of the Navy's application). Construction of the temporary holding facility would include impact driving fifty 18-in square concrete piles. After completion of the new fuel pier the Marine Mammal Program would move back to its original location adjacent to the fuel pier and the temporary facilities at NMAWC would be removed.

Temporary Relocation of Bait Barges

The Everingham Brothers San Diego Bay Bait Barge facility will be temporarily relocated by the owners. Although not an element of the Navy's Fuel Pier Replacement Project, this action is mentioned here because the barges, currently anchored approximately 600 m south of the existing fuel pier, attract large numbers of California sea lions and their relocation would be expected to reduce the number of sea lions that would be exposed to noise levels constituting harassment under the MMPA. The barges would be moved to either of two locations along the southwest side of Harbor Island, approximately five kilometers from the project site (see Figure 1–5 in the Navy's application). The Bait Barge would be moved prior to the initiation of in-water construction and may be moved back to the current location when in-water construction is complete.

Dredging and Sediment Disposal

Dredging and sediment disposal are needed to deepen the existing turning basin in order to safely accommodate current and future deep draft berthing capabilities. An estimated 80,000 yd^3 of sediment would be dredged. Laboratory

testing of the sediments confirmed the lack of contamination and they were approved for ocean disposal by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. However, the sediments also have sufficient content of sand for beneficial reuse in nearshore replenishment. Accordingly, the sediments would be transported by barge and deposited at an approved nearshore replenishment site (Imperial Beach). Noise measurements of dredging activities are rare in the literature, but dredging is considered to be a low-impact activity for marine mammals, producing non-pulsed sound and being substantially quieter in terms of acoustic energy output than sources such as seismic airguns and impact pile driving. Noise produced by dredging operations has been compared to that produced by a commercial vessel travelling at modest speed (Robinson *et al.,* 2011). Further discussion of dredging sound production may be found in the literature (e.g., Richardson *et al.,* 1995, Nedwell *et al.,* 2008, Parvin *et al.,* 2008, Ainslie *et al.,* 2009). Generally, the effects of dredging on marine mammals are not expected to rise to the level of a take. Therefore, this project component will not be discussed further.

Construction of the New Pier and Demolition and Removal of the Existing Pier

Demolition and construction would occur on a segment-by-segment basis to allow for continuous fueling operations during the project. The south side of the existing pier would remain operational while the north side is undergoing demolition and the new pier is being constructed. When construction of the new pier is complete, the remainder of the old pier would be demolished. See Table 1–1 in the Navy's application for a complete construction phase summary. More detail is provided below only on those aspects of the project that involve in-water activity and that have the potential to result in incidental take of marine mammals. The majority of the work would be conducted over water and would include removal of the pier, pilings, plastic camels and fenders. All utility infrastructure would be removed, including water and sewer pipelines, lighting systems, and wiring. The fueling systems, including piping and pipe supports, would also be removed. These and other aspects of the project are considered in more detail in the Navy's Draft Environmental Assessment.

Methods, Pile Removal—Typical pier demolition takes place bayward to landward and from the top down. Fender piles and exterior appurtenances (such as utilities and the fuel piping systems) would first be removed above and below the pier deck before the deck would be demolished using concrete saws and a barge-mounted excavator equipped with a hydraulic breaker. Next, structural and fender piles would be demolished. Table 1 summarizes the total number and nature of existing piles to be removed.

TABLE 1—EXISTING FUEL PIER TOTAL PILES AND CAISSONS

[To be removed]

Pile type or structure	Quantity
16-in concrete structural piles	518
14- and 24-in concrete fender piles	105
13-in plastic fender piles	34
16-in steel pipe filled with concrete	24
12-in timber piles	739
66-in diameter concrete-filled steel caissons	26
84-in diameter concrete-filled steel caissons	25
Total	1,471

There are multiple methods for pile removal, including dry pulling, cutting at the mudline, jetting, and vibratory removal. Typically piles would be cut off at the mudline; however, the full length of the piles would be pulled at the area where the new approach segment would be constructed. An attempt would first be made to dry pull the piles with a barge-mounted crane. A vibratory hammer or a pneumatic chipper may be used to loosen the piles. Jetting (the application of a focused stream of water under high pressure) would be another option to loosen piles that could not be removed through the previous procedures. The caisson elements would be removed with a clamshell, which is a dredging bucket consisting of two similar halves that open/close at the bottom and are hinged at the top. The clamshell would be used to grasp and lift large components. When a wooden pile cannot be completely pulled out, the pile may be cut at the mudline using the clamshell's hydraulic jaws and/or a diver-operated underwater chainsaw, except for piles that are within the footprint of the approach pier, which may require jetting to remove.

Methods, Pile Installation—In general, pile installation work would be accomplished during the in-water work window from September through March, with installation of deck and utility components as well as acceptable demolition work (i.e., work that is not considered a significant source of underwater noise or turbidity) occurring from April through August. Pile driving would occur during normal working hours (7:00 a.m. to 4:00 p.m.). The impact pile driver would be used for all types of piles (steel, concrete and fiberglass). For steel piles, a vibratory hammer would be used to drive the pile to refusal and then the impact hammer would be used for proofing or until the pile meets structural requirements (expected to require 25–125 blows). The concrete piles would first be jetted, a process wherein pressurized air or water jets are applied at the tip of the pile to loosen the substrate and allow the pile to sink vertically, before being driven the last few feet with the impact hammer. The fiberglass piles do not need to be embedded very deeply into the subsurface so would be impact-driven for the entire length. In all cases, impact driving would be minimized.

The replacement pier structure, including the mooring dolphins, would consist of steel pipe piles, supporting concrete pile caps and cast-in-place concrete deck slabs. The upper 10 ft of the steel wall pipe piles would be filled with concrete as part of the connection between the piles and the pier deck. Approximately 554 total piles would be installed, including 228 36-in steel pipe piles, 77 48-in steel pipe piles, 84 16-in concrete-filled fiberglass piles, and 165 24-in prestressed concrete piles. The sizes of the steel piles are dependent on water depth, subsurface soil conditions, and the mass of the deck structure. In most areas, a 36-in diameter steel pile is adequate to meet the criteria. In other areas, a 48-in diameter pile is necessary. Table 1–4 in the Navy's application summarizes the total piles that would be installed over the life of the project.

Project Indicator Pile Program and Temporary Mooring Dolphin (March–April 2014); North Segment Demolition (March–July 2014)—The Indicator Pile Program (IPP) is designed to validate the length of pile required and the method of installation (vibratory and impact). Approximately twelve steel pipe piles (36- and 48-in diameter, exact mix to be determined later) would be driven in the new pier alignment to verify the driving conditions and establish the final driving lengths prior to fabrication of the final production piles that would be used to construct the new pier. In addition, the IPP will validate the acoustics modeling used by the Navy to estimate incidental take levels.

A temporary mooring dolphin would be constructed to allow vessels to berth and load/unload fuel on the existing south segment while the north segment of the existing pier is under demolition.

Sixteen 36-in piles would be driven during construction. The north segment would be demolished by water access using barges to provide a working area for the crane and equipment. Some equipment used for demolition may include: hydraulic hammers mounted to back-hoes for breaking concrete, front-end loaders, fork-lifts, concrete saws, steel cutting torches, and excavators with hydraulic thumb shears.

Approach Pier Construction, North Pier Construction and Mooring Dolphins (March 2014–September 2016)—The north pier would be constructed concurrently with the approach pier. Two mooring dolphins and connecting catwalks would also be constructed at this time.

South Pier Construction (September 2016–November 2016)—The south berthing dolphin and mooring dolphin construction would begin after the approach pier, north pier, and mooring dolphins are operational.

South Pier and Approach Pier Demolition (June 2016–November 2016)—The old south pier and old approach pier demolition would begin after the new south pier is operational. The temporary mooring dolphin near the north pier would also be demolished at this time.

The currently proposed action (i.e., the specified activity for the one-year period of this proposed IHA) includes pile driving associated with relocation of the Navy Marine Mammal Program (MMP), pile driving associated with the Indicator Pile Program and construction of the temporary mooring dolphin, and beginning of construction of the new pier structure. In addition, pile removal associated with demolition of the old structure will begin. These activities are detailed in Table 2. As described under Methods, the majority of pile removal will likely not require the use of vibratory extraction and/or pneumatic chipping, and these methods are included here as contingency in the event other methods of extraction are not successful.

TABLE 2—SPECIFIED ACTIVITY SUMMARY

[2013–14]

Activity	Timing (days)	Pile type	Number piles
MMP relocation (at NMAWC)	Sep–Oct 2013 (16)	18-in square concrete	50
Indicator Pile Program	Mar 2014 (17)	36- and 48-in steel pipe	12
Temporary mooring dolphin	Mar 2014 (5)	36-in steel pipe	16
Abutment pile driving	Mar–Apr 2014 (13)	48-in steel pipe	24
Structural pile driving	Mar–Apr 2014 (15)	36- and 48-in steel pipe	26
Total installed			128
Pile removal [1]	Mar–Sep 2014	16- and 24-in square concrete	18
Pile removal [1]	Mar–Sep 2014	12-in timber	91

[1] Pile removal schedule is notional and is dependent on contractor workload and timing of in-water work shutdown in spring 2014. Removals using no-impact methods (e.g., dry pull) may continue outside the in-water work window or would resume under the period of subsequent IHAs (i.e., September 2014).

The Navy assumes that the contractor will drive approximately two steel piles per day, and five concrete or fiberglass piles per day. For steel piles, each pile is assumed to require up to two hours of driving, including 1–1.5 hours of vibratory pile driving and up to 0.5 hour of impact pile driving (if necessary). Concrete and fiberglass piles would be jetted then driven with an impact pile driver only. During the first year of work, approximately 66 non-overlapping days of pile driving are expected to occur in the episodes described in Table 2. Approximately 84 days of demolition work are expected, beginning in March 2014. The majority of these 84 days will involve above-water work or other no-impact methods and would not impact marine mammals; the Navy assumes that approximately one quarter of the days (21 days) might involve methods that could cause disturbance to marine mammals.

Description of Sound Sources

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to SPLs (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions

associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones. Underwater sound levels ('ambient sound') are comprised of multiple sources, including physical (e.g., waves, earthquakes, ice, atmospheric sound), biological (e.g., sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (e.g., vessels, dredging, aircraft, construction). Even in the absence of anthropogenic sound, the sea is typically a loud environment. A number of sources of sound are likely to occur within Hood Canal, including the following (Richardson *et al.,* 1995):

• Wind and waves: The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient noise levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km (5.3 mi) from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.

• Precipitation noise: Noise from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.

• Biological noise: Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.

• Anthropogenic noise: Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies (Richardson *et al.,* 1995). Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they will attenuate (decrease) rapidly (Richardson *et al.,* 1995). Known sound levels and frequency ranges associated with anthropogenic sources similar to those that would be used for this project are summarized in Table 2. Details of each of the sources are described in the following text.

TABLE 3—REPRESENTATIVE SOUND LEVELS OF ANTHROPOGENIC SOURCES

Sound source	Frequency range (Hz)	Underwater sound level (dB re 1 μPa)	Reference
Small vessels	250–1,000	151 dB rms at 1 m (3.3 ft)	Richardson *et al.,* 1995.
Tug docking gravel barge	200–1,000	149 dB rms at 100 m (328 ft)	Blackwell and Greene, 2002.
Vibratory driving of 72-in (1.8 m) steel pipe pile.	10–1,500	180 dB rms at 10 m (33 ft)	Reyff, 2007.
Impact driving of 36-in steel pipe pile	10–1,500	195 dB rms at 10 m	Laughlin, 2007.
Impact driving of 66-in cast-in-steel-shell pile.	10–1,500	195 dB rms at 10 m	Reviewed in Hastings and Popper, 2005.

In-water construction activities associated with the project would include impact pile driving, vibratory pile driving and removal, and possibly pneumatic chipping. The sounds produced by these activities fall into one of two sound types: Pulsed and non-pulsed (defined in next paragraph). The distinction between these two general sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (e.g., Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts.

Pulsed sounds (e.g., explosions, gunshots, sonic booms, and impact pile driving) are brief, broadband, atonal transients (ANSI, 1986; Harris, 1998) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a decay period that may include a period of diminishing, oscillating maximal and minimal pressures. Pulsed sounds generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulse (intermittent or continuous sounds) can be tonal, broadband, or both. Some of these non-pulse sounds can be transient signals of short duration but without the essential properties of pulses (e.g., rapid rise time). Examples of non-pulse sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak SPLs may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

Ambient Sound

The underwater acoustic environment consists of ambient sound, defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The ambient underwater sound level of a region is defined by the total acoustical energy being generated by known and unknown sources, including sounds from both natural and anthropogenic sources. The sum of the various natural and anthropogenic sound sources at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a

result of the dependence on a large number of varying factors, the ambient sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995).

In the vicinity of the project area, the median broadband background underwater sound levels have been measured by the Navy at 123.8 dB re 1 μPa between 3 Hz and 20 kHz (see Figures 2–4 to 2–6 in the Navy's application. The distribution of underwater sound levels was relatively uniform, reflecting the active ship traffic passing through the navigation channel at all times of day. The sample locations are distributed in the project area on either side of the channel in the fairly narrow entrance of San Diego Bay proper. Most ship traffic is transiting through the vicinity of the fuel pier to berths farther in the bay. Higher levels were observationally associated with nearby ship movements when the data were collected (refer to the field log in Appendix B of the Navy's application), with the exception of Zuniga Jetty, where large populations of snapping shrimp are found.

Sound Thresholds

NMFS uses generic sound exposure thresholds to determine when an activity that produces sound might result in impacts to a marine mammal such that a take by harassment might occur. To date, no studies have been conducted that examine impacts to marine mammals from pile driving sounds from which empirical sound thresholds have been established. Current NMFS practice (in relation to the MMPA) regarding exposure of marine mammals to sound is that cetaceans and pinnipeds exposed to impulsive sounds of 180 and 190 dB rms or above, respectively, are considered to have been taken by Level A (i.e., injurious) harassment. Behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 160 dB rms and 120 dB rms (for pulsive sounds such as impact pile driving and for non-pulsed sounds such as vibratory pile driving, respectively), but below injurious thresholds. For airborne sound, pinniped disturbance from haul-outs has been documented at 100 dB (unweighted) for pinnipeds in general, and at 90 dB (unweighted) for harbor seals. NMFS uses these levels as guidelines to estimate when harassment may occur.

Distance to Sound Thresholds

Underwater sound propagation formula—Pile driving would generate underwater noise that potentially could result in disturbance to marine mammals in the project area. Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \log_{10}(R_1/R_2)$$

Where:

R_1 = the distance of the modeled SPL from the driven pile, and

R_2 = the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably by the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20*log[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10*log[range]). A practical spreading value of 15 is often used in shallow water conditions, such as San Diego Bay, where spreading may start out spherically but then end up cylindrically as the sound is constrained by the surface and the bottom.

However, for this request, the Navy consulted with the University of Washington Applied Physics Laboratory to develop a site-specific model for TL from pile driving at a central point at the project site (see Appendix A in the Navy's application). The model is based on historical temperature-salinity data and location-dependent bathymetry. In the model, TL is the same for different sound source levels and is applied to each of the different activities to determine the point at which the applicable thresholds are reached as a function of distance from the source. The model's predictions result in a slightly lower average rate of TL than practical spreading, and hence are conservative. We reviewed and approved this approach. Because the model is specific to the project area around the fuel pier site, practical spreading loss was assumed in modeling sound propagation for pile driving at NMAWC (for relocation of the Navy Marine Mammal Program facility).

Underwater sound from pile driving and extraction—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. A large quantity of literature regarding SPLs recorded from pile driving projects is available for consideration. In order to determine reasonable SPLs and their associated affects on marine mammals that are likely to result from pile driving at NBPL, studies with similar properties to the proposed action were evaluated. Piles to be installed include 36- and 48-in steel pipes, 24- and 18-in concrete piles, and 16-in fiberglass-concrete piles. In addition, a vibratory pile driver could be used in the extraction of 16-in steel, 14-, 16- and 24-in concrete, 13-in plastic, and 12-in timber piles. Sound levels associated with vibratory pile removal are assumed to be the same as those during vibratory installation (Caltrans, 2007)—which is likely a conservative assumption—and have been taken into consideration in the modeling analysis. Overall, studies which met the following parameters were considered: (1) Pile size and materials: Steel pipe piles (30–72 in diameter); (2) Hammer machinery: Vibratory and impact hammer; and (3) Physical environment: shallow depth (less than 100 ft [30 m]).

TABLE 4—UNDERWATER SPLS FROM MONITORED CONSTRUCTION ACTIVITIES USING IMPACT HAMMERS

Project and location	Pile size and type	Method	Water depth	Measured SPLs
Mukilteo Test Piles, WA [1]	36-in steel pipe	Impact	7.3 m	195 dB re 1 μPa (rms) at 10 m.
Richmond-San Rafael Bridge, CA [2]	66-in steel cast-in-steel shell	Impact	4 m	195 dB re 1 μPa (rms) at 10 m.
Richmond Inner Harbor, CA [2]	72-in steel pipe	Vibratory	~5 m	180 dB re 1 μPa (rms) at 10 m.

TABLE 4—UNDERWATER SPLS FROM MONITORED CONSTRUCTION ACTIVITIES USING IMPACT HAMMERS—Continued

Project and location	Pile size and type	Method	Water depth	Measured SPLs
San Francisco Bay, CA [2]	16–24-in concrete	Impact	10–15 m	173–176 dB re 1 μPa (rms) at 10 m.
Columbia River Crossing, OR/WA [3]	24–48-in steel pipe	Vibratory extraction.	10 m	172 dB re 1 μPa (rms) at 10 m.

Sources: [1] Laughlin, 2007;
[2] Oestman *et al.,* 2009;
[3] Coleman, 2011.

Driving of non-steel piles produces lower levels of sound than does that of steel piles, and extraction of non-steel piles is assumed to produce lower sound levels than that of steel piles (Oestman *et al.,* 2009). We assume here that a reduction of 10–20 dB from the sound produced by extraction of steel piles can be assumed for non-steel (i.e., concrete, timber, plastic) piles. There are few data regarding use of pneumatic chippers or other underwater cutting tools. In a previous IHA proposal (NMFS, 2012), we considered a source value of 161 dB re 1 μPa (rms) at 1 m for use of a jackhammer (Nedwell and Howell, 2004). Here, we conservatively assume that use of these tools will produce the same sound levels as vibratory extraction of non-steel piles. Underwater sound levels from pile driving for this project are therefore assumed to be as follows:

- For 36- and 48-in steel pipes, 195 dB re 1 μPa (rms) at 10 m when driven by impact hammer, 180 dB re 1 μPa (rms) at 10 m when driven by vibratory hammer;
- For 24-in concrete piles driven by impact hammer, 176 dB re 1 μPa (rms) at 10 m; and
- For 16- and 18-in concrete piles driven by impact hammer, 173 dB re 1 μPa (rms) at 10 m.
- For vibratory removal of steel piles, 172 dB re 1 μPa (rms) at 10 m; for vibratory removal/pneumatic chipping of non-steel piles, 160 dB re 1 μPa (rms) at 10 m.

Based on these values and the results of site-specific transmission loss modeling, distances to relevant thresholds and associated areas of ensonification are presented in Table 5. Predicted distances to thresholds for different sources are shown in Figures 6–1 through 6–7 of the Navy's application. The areas of ensonification reflect the conventional assumption that topographical features such as shorelines act as a barrier to underwater sound. Although it is known that there can be leakage or diffraction around such barriers, it is generally accepted practice to model underwater sound propagation from pile driving as continuing in a straight line past a shoreline projection such as Ballast Point. In contrast, although Zuniga Jetty would likely prevent sound propagation east of the jetty, this effect was not considered. Hence the projection of sound through the mouth of the bay into the open ocean would be truncated along the jetty and narrower in reality than shown. The limits of ensonification due to the project are assumed to be essentially the same for different pile sizes subject to vibratory installation or removal.

TABLE 5—DISTANCES TO RELEVANT SOUND THRESHOLDS AND AREAS OF ENSONIFICATION

Description	Source level (dB at 10 m)	Distance to threshold (m) and associated area of ensonification (km²)			
		190 dB	180 dB	160 dB	120 dB
Steel piles, impact	195	36, 0.0034	452, 0.1477	5,484, 8.5069	n/a
Steel piles, vibratory	180	n/a	14, 0.0004	n/a	6,470, 11.4895
24-in concrete piles	176	n/a	n/a	505, 0.1914	n/a
16-in concrete-fiberglass piles	173	n/a	n/a	259, 0.0834	n/a
18-in concrete piles [1] (NMAWC)	173	n/a	n/a	84, 0.0620	n/a
Vibratory extraction, steel	172	n/a	n/a	n/a	6,467, 11.4895
Vibratory extraction/pneumatic chipping, non-steel	160	n/a	n/a	n/a	6,467, 11.4890

[1] Practical spreading loss was assumed for pile driving at marine mammal relocation site because site-specific TL model used for sources at fuel pier is not applicable.

Airborne sound from pile installation and removal—Pile driving can generate airborne sound that could potentially result in disturbance to marine mammals (specifically, pinnipeds) which are hauled out or at the water's surface. As a result, the Navy analyzed the potential for pinnipeds hauled out or swimming at the surface near NBPL to be exposed to airborne SPLs that could result in Level B behavioral harassment. Although there is no official airborne sound threshold, NMFS assumes for purposes of the MMPA that behavioral disturbance can occur upon exposure to sounds above 100 dB re 20 μPa rms (unweighted) for all pinnipeds, except harbor seals. For harbor seals, the threshold is 90 dB re 20 μPa rms (unweighted). A spherical spreading loss model, assuming average atmospheric conditions, was used to estimate the distance to the 100 dB and 90 dB re 20 μPa rms (unweighted) airborne thresholds.

As was discussed for underwater sound from pile driving, the intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. In order to determine reasonable airborne SPLs and their associated effects on marine mammals that are likely to result from pile driving at NBPL, studies with similar properties to the proposed action, as described previously, were evaluated. Table 6 details representative pile driving activities that have occurred in recent years. Due to the similarity of these actions and the Navy's proposed

action, they represent reasonable SPLs which could be anticipated.

TABLE 6—AIRBORNE SPLS FROM SIMILAR CONSTRUCTION ACTIVITIES

Project and location	Pile size and type	Method	Water depth	Measured SPLs
Northstar Island, AK [1]	42-in steel pipe	Impact	Approximately 12 m	97 dB re 20 μPa (rms) at 160 m.
Keystone Ferry Terminal, WA [2].	30-in steel pipe	Vibratory	Approximately 9 m	97 dB re 20 μPa (rms) at 13 m.

Sources: [1] Blackwell *et al.,* 2004; [2] Laughlin, 2010.

Based on these values and the assumption of spherical spreading loss, distances to relevant thresholds and associated areas of ensonification are presented in Table 7. The nearest known haul-out location for harbor seals is approximately 250 m away and hence would be subject to sound levels that may result in behavioral disturbance, if animals are present. For sea lions, all airborne distances are less than those calculated for underwater sound thresholds, therefore, protective measures would be in place out to the distances calculated for the underwater thresholds, and the distances for the airborne thresholds would be covered fully by mitigation and monitoring measures in place for underwater sound thresholds. No sea lion haul-outs or rookeries are located within the airborne harassment radii.

TABLE 7—DISTANCES TO RELEVANT SOUND THRESHOLDS AND AREAS OF ENSONIFICATION, AIRBORNE SOUND

Group	Threshold, re 20 μPa rms (unweighted)	Distance to threshold (m) and associated area of ensonification (km²)	
		Impact driving	Vibratory driving
Harbor seals	90 dB	358, 0.403	28, 0.002
California sea lions	100 dB	113, 0.040	9, 0.000

Description of Marine Mammals in the Area of the Specified Activity

The Navy has conducted marine mammal surveys in the project area beginning in 2007 and continuing through March 2012 (Merkel and Associates, Inc., 2008; Johnson, 2010, 2011; Lerma, 2012). Boat survey routes (see Figure 3–1 of the Navy's application) established in 2007 have been resurveyed on 16 occasions, 13 of which were during the seasonal window for in-water construction and demolition (September–April). There are four marine mammal species which are either resident or have known seasonal occurrence in San Diego Bay, including the California sea lion, harbor seal, bottlenose dolphin, and gray whale. Navy records indicate that other species that occur in the Southern California Bight may have the potential for isolated occurrence within San Diego Bay or just offshore. The Pacific white-sided and common dolphin (*Lagenorhynchus obliquidens* and *Delphinus* sp., respectively) were sighted along a previously used transect on the opposite side of the Point Loma peninsula (Merkel & Associates, Inc., 2008), near the kelp forests. Risso's dolphin (*Grampus griseus*) is fairly common in southern California coastal waters, but has not been seen in San Diego Bay. These species have not been observed near the project area and are not expected to occur there, and, given the unlikelihood of their exposure to sound generated from the project, are thus not considered further. This section summarizes the population status and abundance of the four species for which we anticipate exposure to sound from the project. We have reviewed the Navy's detailed species descriptions, including life history information, for accuracy and completeness and refer the reader to Sections 3 and 4 of the Navy's application instead of reprinting the information here. Table 7 lists the marine mammal species that occur in the vicinity of NBPL. The following information is summarized largely from NMFS Stock Assessment Reports.

TABLE 8—MARINE MAMMALS PRESENT IN THE VICINITY OF NBPL

Species	Stock abundance [1] (CV, N_{min})	Relative occurrence in north San Diego Bay	Season of occurrence
California sea lion U.S. stock	296,750 (n/a, 153,337)	Abundant	Year-round.
Harbor seal California stock	30,196 (0.157, 26,667)	Uncommon, localized	Year-round.
Bottlenose dolphin California coastal stock.	323 (0.13, 290)	Occasional	Year-round.
Gray whale Eastern North Pacific stock	19,126 (0.07, 18,017)	Rare, during migration only	Late winter.

[1] NMFS marine mammal stock assessment reports at: *http://www.nmfs.noaa.gov/pr/sars/species.htm.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

California Sea Lion

California sea lions range from the Gulf of California north to the Gulf of Alaska, with breeding areas located in the Gulf of California, western Baja California, and southern California. Five genetically distinct geographic populations have been identified: (1) Pacific Temperate, (2) Pacific Subtropical, (3) Southern Gulf of California, (4) Central Gulf of California and (5) Northern Gulf of California (Schramm *et al.,* 2009). Rookeries for the Pacific Temperate population are found within U.S. waters and just south of the U.S.-Mexico border, and animals belonging to this population may be found form the Gulf of Alaska to Mexican waters off Baja California. Animals belonging to other populations (e.g., Pacific Subtropical) may range into U.S. waters during non-breeding periods. For management purposes, a stock of California sea lions comprising those animals at rookeries within the U.S. is defined (i.e., the U.S. stock of California sea lions) (Carretta *et al.,* 2012). Pup production at the Coronado Islands rookery in Mexican waters is considered an insignificant contribution to the overall size of the Pacific Temperate population (Lowry and Maravilla-Chavez, 2005).

California sea lions are not protected under the Endangered Species Act (ESA) or listed as depleted under the MMPA. Total annual human-caused mortality (at least 431) is substantially less than the potential biological removal (PBR, estimated at 9,200 per year); therefore, California sea lions are not considered a strategic stock under the MMPA. There are indications that the California sea lion may have reached or is approaching carrying capacity, although more data are needed to confirm that leveling in growth persists (Carretta *et al.,* 2012).

The best abundance estimate of the U.S. stock of California sea lions is 296,750 and the minimum population size of this stock is 153,337 individuals (Carretta *et al.,* 2012). The entire population cannot be counted because all age and sex classes are never ashore at the same time; therefore, the best abundance estimate is determined from the number of births and the proportion of pups in the population, with censuses conducted in July after all pups have been born. Specifically, the pup count for rookeries in southern California from 2008 was adjusted for pre-census mortality and then multiplied by the inverse of the fraction of newborn pups in the population (Carretta *et al.,* 2012). The minimum population size was determined from counts of all age and sex classes that were ashore at all the major rookeries and haul-out sites in southern and central California during the 2007 breeding season, including all California sea lions counted during the July 2007 census at the Channel Islands in southern California and at haul-out sites located between Point Conception and Point Reyes, California (Carretta *et al.,* 2012). An additional unknown number of California sea lions are at sea or hauled out at locations that were not censused and are not accounted for in the minimum population size.

Trends in pup counts from 1975 through 2008 have been assessed for four rookeries in southern California and for haul-outs in central and northern California. During this time period counts of pups increased at an annual rate of 5.4 percent, excluding six El Nino years when pup production declined dramatically before quickly rebounding (Carretta *et al.,* 2012). The maximum population growth rate was 9.2 percent when pup counts from the El Niño years were removed. However, the apparent growth rate from the population trajectory underestimates the intrinsic growth rate because it does not consider human-caused mortality occurring during the time series; the default maximum net productivity rate for pinnipeds (12 percent per year) is considered appropriate for California sea lions (Carretta *et al.,* 2012).

Historic exploitation of California sea lions include harvest for food by Native Americans in pre-historic times and for oil and hides in the mid-1800s, as well as exploitation for a variety of reasons more recently (Carretta *et al.,* 2012). There are few historical records to document the effects of such exploitation on sea lion abundance (Lowry *et al.,* 1992). Data from 2003–09 indicate that a minimum of 337 (CV = 0.56) California sea lions are killed annually in commercial fisheries. In addition, a summary of stranding database records for 2005–09 shows an annual average of 65 such events, which is likely a gross underestimate because most carcasses are not recovered. California sea lions may also be removed because of predation on endangered salmonids (17 per year, 2008–10) or incidentally captured during scientific research (3 per year, 2005–09) (Carretta *et al.,* 2012). Sea lion mortality has also been linked to the algal-produced neurotoxin domoic acid (Scholin *et al.,* 2000). There is currently an Unusual Mortality Event (UME) declaration in effect for California sea lions. Future mortality may be expected to occur, due to the sporadic occurrence of such harmful algal blooms. Beginning in January 2013, elevated strandings of California sea lion pups have been observed in Southern California, with live sea lion strandings nearly three times higher than the historical average. The causes of this UME are under investigation (*http://www.nmfs.noaa.gov/pr/health/mmume/californiasealions2013.htm;* accessed April 10, 2013).

The California sea lion is by far the most commonly-sighted pinniped species at sea or on land in the vicinity of NBPL and northern San Diego Bay, where there is a resident non-breeding population. California sea lions regularly occur on rocks, buoys and other structures, and especially on the bait barges, although numbers vary greatly as individuals move between the bay and rookeries on offshore islands. Different age classes of California sea lions are found in the San Diego region throughout the year (Lowry *et al.,* 1991), although Navy surveys show that the local population comprises adult females and subadult males and females, with adult males being uncommon. The Navy has conducted marine mammal surveys throughout the north San Diego Bay project area (Merkel & Associates, Inc., 2008, Johnson, 2010, 2011, Lerma, 2012). Sightings include all animals observed and their locations (using geographical positioning systems). The majority of observations are of animals hauled out.

Harbor Seal

Harbor seals inhabit coastal and estuarine waters and shoreline areas of the northern hemisphere from temperate to polar regions. The eastern North Pacific subspecies is found from Baja California north to the Aleutian Islands and into the Bering Sea. Multiple lines of evidence support the existence of geographic structure among harbor seal populations from California to Alaska (Carretta *et al.,* 2012). However, because stock boundaries are difficult to meaningfully draw from a biological perspective, three separate harbor seal stocks are recognized for management purposes along the west coast of the continental U.S.: (1) Inland waters of Washington, (2) outer coast of Oregon and Washington, and (3) California (Carretta *et al.,* 2012). Multiple stocks are recognized in Alaska. Placement of a stock boundary at the California-Oregon border is not based on biology but is considered a political and jurisdictional convenience (Carretta *et al.,* 2012). In addition, harbor seals may occur in Mexican waters, but these animals are not considered part of the California stock. Only the California stock may be found in the project area.

California harbor seals are not protected under the ESA or listed as depleted under the MMPA, and are not considered a strategic stock under the MMPA because annual human-caused mortality (31) is significantly less than the calculated PBR (1,600). The population appears to be stabilizing at what may be its carrying capacity and the fishery mortality is declining.

The best abundance estimate of the California stock of harbor seals is 30,196 (CV = 0.157) and the minimum population size of this stock is 26,667 individuals (Carretta *et al.,* 2012). The entire population cannot be counted because some individuals are always away from haul-out sites. In addition, complete pup counts are not possible as for other species of pinniped because pups are precocious and enter the water almost immediately after birth. Therefore, the best abundance estimate is estimated by counting the number of seals ashore during the peak haul-out period (May to July) and by multiplying this count by a correction factor equal to the inverse of the estimated fraction of seals on land (Carretta *et al.,* 2012). The current abundance estimate, as well as the minimum population size, is based off of haul-out counts from 2009.

Counts of harbor seals in California increased from 1981 to 2004, with a calculated annual net productivity rate of 9.2 percent for the period 1983–1994 (Carretta *et al.,* 2012). However, maximum net productivity rates cannot be estimated because measurements were not made when the stock size was very small, and the default maximum net productivity rate for pinnipeds (12 percent per year) is considered appropriate for harbor seals (Carretta *et al.,* 2012).

Prior to state and federal protection and especially during the nineteenth century, harbor seals along the west coast of North America were greatly reduced by commercial hunting, with only a few hundred individuals surviving in a few isolated areas along the California coast (Carretta *et al.,* 2012). However, in the last half of this century, the population has increased dramatically. Data from 2004–09 indicate that 18 (CV = 0.73) California harbor seals are killed annually in commercial fisheries. In addition, California stranding database records for 2005–09 shows an annual average of 12 such events, which is likely an underestimate because most carcasses are not recovered. Two UMEs of harbor seals in California occurred in 1997 and 2000 with the cause considered to be infectious disease. All west coast harbor seals that have been tested for morbilliviruses were found to be seronegative, indicating that this disease is not endemic in the population and that this population is extremely susceptible to an epidemic of this disease (Ham-Lammé *et al.,* 1999).

Harbor seals are relatively uncommon within San Diego Bay, and do not have a significant mainland California distribution south of Point Mugu. Sightings in the Navy transect surveys of northern San Diego Bay cited above were limited to individuals outside of the project area, on the south side of Ballast Point. The haul-out area south of Ballast Point is only temporary with overwash of the rocks occurring daily; primary local harbor seal haul-outs are in La Jolla. With heavy vessel traffic and noise in the project area, it is likely that harbor seals seen outside the project area at Ballast Point move toward Point Loma and preferred foraging habitat rather than actively foraging in or transiting the project area on a frequent basis. However, Navy marine mammal monitoring for another project conducted intermittently from 2010–12 has documented several harbor seals near Pier 122 (within the project area) at various times, with the greatest number of sightings during April and May.

Gray Whale

Gray whales are found in shallow coastal waters, migrating between summer feeding areas in the north and winter breeding areas in the south. Gray whales were historically common throughout the northern hemisphere but are now found only in the Pacific, where two populations are recognized, Eastern and Western North Pacific (ENP and WNP). ENP whales breed and calve primarily in areas off Baja California and in the Gulf of California. From February to May, whales typically migrate northbound to summer/fall feeding areas in the Chukchi and northern Bering Seas, with the southbound return to calving areas typically occurring in November and December. WNP whales are known to feed in the Okhotsk Sea and off of Kamchatka before migrating south to poorly known wintering grounds, possibly in the South China Sea.

The two populations have historically been considered geographically isolated from each other; however, recent data from satellite-tracked whales indicates that there is some overlap between the stocks. Two WNP whales were tracked from Russian foraging areas along the Pacific rim to Baja California (Mate *et al.,* 2011), and, in one case where the satellite tag remained attached to the whale for a longer period, a WNP whale was tracked from Russia to Mexico and back again (IWC, 2012). Between 22–24 WNP whales are known to have occurred in the eastern Pacific through comparisons of ENP and WNP photo-identification catalogs (IWC, 2012; Weller *et al.,* 2011; Burdin *et al.,* 2011), and WNP animals comprised 8.1 percent of gray whales identified during a recent field season off of Vancouver Island (Weller *et al.,* 2012). In addition, two genetic matches of WNP whales have been recorded off of Santa Barbara, CA (Lang *et al.,* 2011). Therefore, a portion of the WNP population is assumed to migrate, at least in some years, to the eastern Pacific during the winter breeding season.

However, only ENP whales are expected to occur in the project area. The likelihood of any gray whale being exposed to project sound to the degree considered in this document is already low, as it would require a migrating whale to linger for an extended period of time, or for multiple migrating whales to linger for shorter periods of time. While such an occurrence is not unknown, it is uncommon. Further, of the approximately 20,000 gray whales migrating through the Southern California Bight, it is extremely unlikely that one found in San Diego Bay would be one of the approximately 20 WNP whales that have been documented in the eastern Pacific (less than one percent probability). The likelihood that a WNP whale would be exposed to elevated levels of sound from the specified activities is insignificant and discountable.

The ENP population of gray whales, which is managed as a stock, was removed from ESA protection in 1994, is not currently protected under the ESA, and is not listed as depleted under the MMPA. Punt and Wade (2010) estimated the ENP population was at 91 percent of carrying capacity and at 129 percent of the maximum net productivity level and therefore within the range of its optimum sustainable population. The ENP stock of gray whales is not classified as a strategic stock under the MMPA because the estimated annual level of human-caused mortality (128) is less than the calculated PBR (558) (Carretta *et al.,* 2013). The WNP population is listed as endangered under the ESA and depleted under the MMPA as a foreign stock.

The best abundance estimate of the ENP stock of gray whales is 19,126 (CV = 0.071) and the minimum population size of this stock is 18,017 individuals (Carretta *et al.,* 2013). Systematic counts of gray whales migrating south along the central California coast have been conducted by shore-based observers since 1967. The best and minimum

abundance estimates were calculated from 2006–07 survey data, the first year in which improved counting techniques and a more consistent approach to abundance estimation were used (Carretta *et al.,* 2013). The population size of the ENP gray whale stock has been increasing over the past several decades despite a west coast UME (unexplained causes) from 1999–2001. The estimated annual rate of increase from 1967–88, based on the revised abundance time series from Laake et al. (2009), is 3.2 percent (Punt and Wade, 2010). Based on the same analyses, the best estimate of the maximum productivity rate for gray whales is considered to be 6.2 percent. The most recent estimate of WNP gray whale abundance is 137 individuals (IWC, 2012).

As noted above, gray whale numbers were significantly reduced by whaling, becoming extirpated from the Atlantic by the early 1700s and listed as an endangered species in the Pacific. The ENP stock has since recovered sufficiently to be delisted from the ESA. Gray whales remain subject to occasional fisheries-related mortality and death from ship strikes. Based on stranding network data for the period 2006–10, there are an average of 0.2 deaths per year from the former and 2.2 per year from the latter. In addition, subsistence hunting of gray whales by hunters in Russia and the U.S. is approved by the International Whaling Commission, although none is currently authorized in the U.S. From 2006–10, the annual Russian subsistence harvest was 123 whales (Carretta *et al.,* 2013). Climate change is considered a significant habitat concern for gray whales, as prey composition and distribution is likely to be altered and human activity in the whales' summer feeding grounds increases (Carretta *et al.,* 2013).

Peak abundance of gray whales off the coast of San Diego is typically during January during the southbound migration and in March as whales return north, although females with calves, which depart Mexico later than males or females without calves, can be sighted from March through May or June (Leatherwood, 1974; Poole, 1984; Rugh *et al.,* 2001). Gray whales are not expected in the project area except during the northward migration, when they are closest to the coast and may be infrequently observed offshore of San Diego Bay (Rice *et al.,* 1981). Migrating gray whales that do transit nearshore waters would likely be traveling, rather than foraging, and would likely be present only briefly at typical travel speeds of 3 kn (Perryman *et al.,* 1999, Mate and Urbán-Ramirez, 2003). Gray whales are known to occur near the mouth of San Diego Bay, and occasionally enter the bay. However, their occurrence in San Diego Bay is sporadic and unpredictable. In recent years, local records show that solitary individuals have entered the bay and remained for varying lengths of time during March 2009, April 2010, and July 2011. Navy field notes show an occurrence of one gray whale that lingered in the northern part of the bay for two weeks.

Bottlenose Dolphin

Bottlenose dolphins are found worldwide in tropical to temperate waters and can be found in all depths from estuarine inshore to deep offshore waters. Temperature appears to limit the range of the species, either directly, or indirectly, for example, through distribution of prey. Off North American coasts, common bottlenose dolphins are found where surface water temperatures range from about 10 °C to 32 °C. In many regions, including California, separate coastal and offshore populations are known, with significant genetic differentiation evident between the two ecotypes (e.g., Walker, 1981). Therefore, two stocks of bottlenose dolphins—coastal and offshore—are managed along the west coast. California coastal bottlenose dolphins are found within about one kilometer of shore from San Francisco Bay south into Mexican waters (Hansen, 1990; Carretta *et al.,* 1998; Defran and Weller, 1999). Although there is little site fidelity of coastal bottlenose dolphins in California and they are known to move between U.S. and Mexican waters, the stock as defined for management purposes includes only animals found in U.S. waters. In southern California, animals are found within 500 m of the shoreline 99 percent of the time and within 250 m 90 percent of the time (Hanson and Defran, 1993). Only coastal bottlenose dolphins would be expected to occur at the project location.

California coastal bottlenose dolphins are not protected under the MMPA or listed as depleted under the MMPA. The total annual human-caused mortality for this stock (≥0.2) is less than the calculated PBR (2.4) and the stock is not considered strategic under the MMPA.

The best abundance estimate for California coastal bottlenose dolphins is 323 (CV = 0.13, 95% CI 259–430), and the minimum population estimate is approximately 290 individuals (Carretta *et al.,* 2009). These values are based on photographic mark-recapture surveys conducted along the San Diego coast in 2004–05, but are considered likely underestimates, as they do not reflect that approximately 35 percent of dolphins encountered lack identifiable dorsal fin marks (Defran and Weller, 1999). If 35 percent of all animals lack distinguishing marks, then the true population size would be closer to 450–500 animals (Carretta *et al.,* 2009). Based on a comparison of mark-recapture abundance estimates for the periods 1987–89, 1996–98, and 2004–05, Dudzik *et al.* (2006) stated that the population size had remained stable over this period. No information on current or maximum net productivity rates is available for California coastal bottlenose dolphins, and the default maximum annual net growth rate for cetaceans (4 percent) is considered appropriate (Carretta *et al.,* 2009).

Historically, bottlenose dolphins were removed via live-capture for display, but no such captures have been documented since 1982 and no permits are active. Due to its exclusive use of coastal habitats, the California coastal bottlenose dolphin population is susceptible to fishery-related mortality in coastal set net fisheries. However, because of various fishery closures, the potential for mortality of coastal bottlenose dolphins in California set gillnet fisheries has been greatly reduced. Records from 2002–06 indicate that a minimum of 0.2 deaths per year occurred (Carretta *et al.,* 2009). Coastal gillnet fisheries exist in Mexico and may take animals from this population, but no details are available. Habitat concerns may be an issue for this stock, as pollutant levels, especially DDT residues, found in Southern California coastal bottlenose dolphins have been found to be among the highest of any cetacean examined (O'Shea et al. 1980). Effects of these pollutants are not well understood. In addition, California coastal bottlenose dolphins may be vulnerable to the effects of morbillivirus outbreaks, which have been implicated in mass mortality of bottlenose dolphins on the U.S. Atlantic coast (Lipscomb et al. 1994).

As seen in the Navy's marine mammal surveys of San Diego Bay, cited above, coastal bottlenose dolphins have occurred within San Diego Bay sporadically and in variable numbers and locations. California coastal bottlenose dolphins show little site fidelity and likely move within their home range in response to patchy concentrations of nearshore prey (Defran et al., 1999, Bearzi et al., 2009). After finding concentrations of prey, animals may then forage within a more limited spatial extent to take advantage of this local accumulation until such time that prey abundance is reduced,

likely then shifting location once again and possibly covering larger distances. Navy surveys frequently result in no observations of bottlenose dolphins, and sightings have ranged from 0–8 groups observed (0–40 individuals).

Potential Effects of the Specified Activity on Marine Mammals

We have determined that pile driving and removal (depending on technique used), as outlined in the project description, has the potential to result in behavioral harassment of marine mammals present in the project area, which may include California sea lions, harbor seals, bottlenose dolphins, and gray whales. Pinnipeds spend much of their time in the water with heads held above the surface and therefore are not subject to underwater noise to the same degree as cetaceans (although they are correspondingly more susceptible to exposure to airborne sound). For purposes of this assessment, however, pinnipeds are conservatively assumed to be available to be exposed to underwater sound 100 percent of the time that they are in the water.

Marine Mammal Hearing

The primary effect on marine mammals anticipated from the specified activities would result from exposure of animals to underwater sound. Exposure to sound can affect marine mammal hearing. When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data, Southall *et al.* (2007) designate functional hearing groups for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (thirteen species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hz and 22 kHz;
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and nineteen species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (six species of true porpoises, four species of river dolphins, two members of the genus *Kogia,* and four dolphin species of the genus *Cephalorhynchus*): Functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in water: Functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

Two pinniped and two cetacean species are likely to occur in the proposed project area. Of the two cetacean species likely to occur in the project area, the bottlenose dolphin is classified as a mid-frequency cetacean, and the gray whale is classified as a low-frequency cetacean (Southall *et al.,* 2007).

Underwater Sound Effects

Potential Effects of Pile Driving Sound—The effects of sounds from pile driving might result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). The effects of pile driving on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (e.g., sand) would absorb or attenuate the sound more readily than hard substrates (e.g., rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species would be expected to result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.,* 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of impulsive sounds on marine mammals. Potential effects from impulsive sound sources can range in severity, ranging from effects such as behavioral disturbance, tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to mortality (Yelverton *et al.,* 1973).

Hearing Impairment and Other Physical Effects—Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2002, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Marine mammals depend on acoustic cues for vital biological functions, (e.g., orientation, communication, finding prey, avoiding predators); thus, TTS may result in reduced fitness in survival and reproduction. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. PTS, in the unlikely event that it occurred, would constitute injury, but TTS is not considered injury (Southall *et al.,* 2007). It is unlikely that the project would result in any cases of temporary or especially permanent hearing impairment or any significant non-auditory physical or physiological effects for reasons discussed later in this document. Some behavioral disturbance is expected, but it is likely that this would be localized and short-term because of the short project duration.

Several aspects of the planned monitoring and mitigation measures for this project (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections later in this document) are designed to detect marine mammals occurring near the pile driving to avoid exposing them to sound pulses that might, in theory, cause hearing impairment. In addition, many

cetaceans are likely to show some avoidance of the area where received levels of pile driving sound are high enough that hearing impairment could potentially occur. In those cases, the avoidance responses of the animals themselves would reduce or (most likely) avoid any possibility of hearing impairment. Non-auditory physical effects may also occur in marine mammals exposed to strong underwater pulsed sound. It is especially unlikely that any effects of these types would occur during the present project given the brief duration of exposure for any given individual and the planned monitoring and mitigation measures. The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007).

Given the available data, the received level of a single pulse (with no frequency weighting) might need to be approximately 186 dB re 1 μPa^2-s (i.e., 186 dB sound exposure level [SEL] or approximately 221–226 dB pk-pk) in order to produce brief, mild TTS. Exposure to several strong pulses that each have received levels near 190 dB re 1 μPa rms (175–180 dB SEL) might result in cumulative exposure of approximately 186 dB SEL and thus slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. Levels greater than or equal to 190 dB re 1 μPa rms are expected to be restricted to radii no more than 5 m (16 ft) from the pile driving. For an odontocete closer to the surface, the maximum radius with greater than or equal to 190 dB re 1 μPa rms would be smaller.

The above TTS information for odontocetes is derived from studies on the bottlenose dolphin and beluga whale (*Delphinapterus leucas*). There is no published TTS information for other species of cetaceans. However, preliminary evidence from a harbor porpoise exposed to pulsed sound suggests that its TTS threshold may have been lower (Lucke *et al.,* 2009). To avoid the potential for injury, NMFS has determined that cetaceans should not be exposed to pulsed underwater sound at received levels exceeding 180 dB re 1 μPa rms. As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes are exposed to pile driving pulses stronger than 180 dB re 1 μPa rms.

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985). There is no specific evidence that exposure to pulses of sound can cause PTS in any marine mammal. However, given the possibility that mammals close to pile driving activity might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to pile driving might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as pile driving pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably greater than 6 dB (Southall *et al.,* 2007). On an SEL basis, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB for there to be risk of PTS. Thus, for cetaceans, Southall *et al.* (2007) estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of approximately 198 dB re 1 μPa^2-s (15 dB higher than the TTS threshold for an impulse). Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Measured source levels from impact pile driving can be as high as 214 dB re 1 μPa at 1 m (3.3 ft). Although no marine mammals have been shown to experience TTS or PTS as a result of being exposed to pile driving activities, captive bottlenose dolphins and beluga whales exhibited changes in behavior when exposed to strong pulsed sounds (Finneran *et al.,* 2000, 2002, 2005). The animals tolerated high received levels of sound before exhibiting aversive behaviors. Experiments on a beluga whale showed that exposure to a single watergun impulse at a received level of 207 kPa (30 psi) p-p, which is equivalent to 228 dB p-p re 1 μPa, resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within four minutes of the exposure (Finneran *et al.,* 2002). Although the source level of pile driving from one hammer strike is expected to be much lower than the single watergun impulse cited here, animals being exposed for a prolonged period to repeated hammer strikes could receive more sound exposure in terms of SEL than from the single watergun impulse (estimated at 188 dB re 1 μPa^2-s) in the aforementioned experiment (Finneran *et al.,* 2002). However, in order for marine mammals to experience TTS or PTS, the animals have to be close enough to be exposed to high intensity sound levels for a prolonged period of time. Based on the best scientific information available, these SPLs are far below the thresholds that could cause TTS or the onset of PTS.

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that could theoretically occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. In general, little is known about the potential for pile driving to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances from the sound source and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in such ways. Marine mammals that

show behavioral avoidance of pile driving, including some odontocetes and some pinnipeds, are especially unlikely to incur auditory impairment or non-auditory physical effects.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Behavioral responses to sound are highly variable and context-specific and reactions, if any, depend on species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2003/2004; Southall *et al.,* 2007).

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003/04). Animals are most likely to habituate to sounds that are predictable and unvarying. The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003/04).

Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic guns or acoustic harassment devices, but also including pile driving) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Thorson and Reyff, 2006; see also Gordon *et al.,* 2004; Wartzok *et al.,* 2003/04; Nowacek *et al.,* 2007). Responses to continuous sound, such as vibratory pile installation, have not been documented as well as responses to pulsed sounds.

With both types of pile driving, it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses (e.g., pinnipeds flushing into water from haul-outs or rookeries). Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Since pile driving would likely only occur for a few hours a day, over a short period of time, it is unlikely to result in permanent displacement. Any potential impacts from pile driving activities could be experienced by individual marine mammals, but would not be likely to cause population level impacts, or affect the long-term fitness of the species.

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns (such as those thought to be causing beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking

Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were man-made, it could be potentially harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. Because sound generated from in-water pile driving is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds made by porpoises. However, lower frequency man-made sounds are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey sound. It may also affect communication signals when they occur near the sound band and thus reduce the communication space of animals (e.g., Clark *et al.,* 2009) and cause increased stress levels (e.g., Foote *et al.,* 2004; Holt *et al.,* 2009).

Masking has the potential to impact species at population, community, or even ecosystem levels, as well as at individual levels. Masking affects both senders and receivers of the signals and can potentially have long-term chronic effects on marine mammal species and populations. Recent research suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, and that most of these increases are from distant shipping (Hildebrand, 2009). All anthropogenic sound sources, such as those from vessel traffic, pile driving, and dredging activities, contribute to the elevated ambient sound levels, thus intensifying masking. However, the sum of sound from the proposed activities is confined in an area of inland waters (San Diego Bay) that is bounded by landmass; therefore, the sound generated is not expected to contribute to increased ocean ambient sound.

The most intense underwater sounds in the proposed action are those produced by impact pile driving. Given that the energy distribution of pile

driving covers a broad frequency spectrum, sound from these sources would likely be within the audible range of marine mammals present in the project area. Impact pile driving activity is relatively short-term, with rapid pulses occurring for approximately fifteen minutes per pile. The probability for impact pile driving resulting from this proposed action masking acoustic signals important to the behavior and survival of marine mammal species is likely to be negligible. Vibratory pile driving is also relatively short-term, with rapid oscillations occurring for approximately one and a half hours per pile. It is possible that vibratory pile driving resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory and impact pile driving, and which have already been taken into account in the exposure analysis.

Airborne Sound Effects

Marine mammals that occur in the project area could be exposed to airborne sounds associated with pile driving that have the potential to cause harassment, depending on their distance from pile driving activities. Airborne pile driving sound would have less impact on cetaceans than pinnipeds because sound from atmospheric sources does not transmit well underwater (Richardson *et al.,* 1995); thus, airborne sound would only be an issue for hauled-out pinnipeds in the project area. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2004) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 112 dB peak and 96 dB rms.

Anticipated Effects on Habitat

The proposed activities at NBPL would not result in permanent impacts to habitats used directly by marine mammals, such as haul-out sites, but may have potential short-term impacts to food sources such as forage fish. There are no rookeries or major haul-out sites nearby (the bait barges will be relocated from the project area), foraging hotspots, or other ocean bottom structure of significant biological importance to marine mammals that may be present in the marine waters in the vicinity of the project area. Therefore, the main impact issue associated with the proposed activity would be temporarily elevated sound levels and the associated direct effects on marine mammals, as discussed previously in this document. The most likely impact to marine mammal habitat occurs from pile driving effects on likely marine mammal prey (i.e., fish) near NBPL and minor impacts to the immediate substrate during installation and removal of piles during the wharf construction project.

Pile Driving Effects on Potential Prey (Fish)

Construction activities would produce both pulsed (i.e., impact pile driving) and continuous (i.e., vibratory pile driving) sounds. Fish react to sounds which are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005, 2009) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving (or other types of continuous sounds) on fish, although several are based on studies in support of large, multiyear bridge construction projects (e.g., Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Sound pulses at received levels of 160 dB re 1 μPa may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.,* 1992; Skalski *et al.,* 1992). SPLs of sufficient strength may cause injury to fish and fish mortality. The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe for the pier replacement project.

Pile Driving Effects on Potential Foraging Habitat

Avoidance by potential prey (i.e., fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the vicinity of San Diego Bay.

Given the short daily duration of sound associated with individual pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Therefore, pile driving is not likely to have a permanent, adverse effect on marine mammal foraging habitat at the project area.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(D) of the MMPA, we must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

Proxy source measurements and site-specific modeling of spreading loss (with the exception of the MMP relocation site, where practical spreading loss was assumed) were used to estimate zones of influence (ZOIs; see ''Estimated Take by Incidental Harassment''); these values were used to develop mitigation measures for pile driving activities at NBPL. The ZOIs effectively represent the mitigation zone that would be established around each pile to prevent Level A harassment to marine mammals, while providing estimates of the areas within which Level B harassment might occur. In addition to the measures described later in this section, the Navy would employ the following standard mitigation measures:

(a) Conduct briefings between construction supervisors and crews, marine mammal monitoring team, acoustical monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(b) Comply with applicable equipment sound standards and ensure that all construction equipment has sound control devices no less effective than those provided on the original equipment.

(c) For in-water heavy machinery work with the potential to affect marine mammals (other than pile driving), if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location and (2) removal of the pile from the water column/substrate via a crane (i.e., deadpull). For these activities, monitoring would take place from 15 minutes prior to initiation until the action is complete.

Monitoring and Shutdown for Pile Driving

The following measures would apply to the Navy's mitigation through shutdown and disturbance zones:

Shutdown Zone—For all pile driving and removal activities, the Navy will establish a shutdown zone intended to contain the area in which SPLs equal or exceed the 180/190 dB rms acoustic injury criteria. The purpose of a shutdown zone is to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing injury, serious injury, or death of marine mammals. Radial distances for shutdown zones are shown in Table 5. For certain pile types or techniques, the shutdown zone would not exist because source levels are lower than the threshold (see Table 5). However, a minimum shutdown zone of 10 m will be established during all pile driving and removal activities, regardless of the estimated zone. These precautionary measures are intended to prevent the already unlikely possibility of physical interaction with construction equipment and to further reduce any possibility of acoustic injury.

Disturbance Zone—Disturbance zones are typically defined as the area in which SPLs equal or exceed 160 or 120 dB rms (for pulsed or non-pulsed sound, respectively). Disturbance zones provide utility for monitoring conducted for mitigation purposes (i.e., shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones enables observers to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone and thus prepare for potential shutdowns of activity. However, the primary purpose of disturbance zone monitoring is for documenting incidents of Level B harassment; disturbance zone monitoring is discussed in greater detail later (see ''Proposed Monitoring and Reporting''). Nominal radial distances for disturbance zones are shown in Table 5 and Table 7 (for airborne sound). As with any such large action area, it is impossible to guarantee that all animals would be observed or to make comprehensive observations of fine-scale behavioral reactions to sound.

In order to document observed incidences of harassment, monitors record all marine mammal observations, regardless of location. The observer's location, as well as the location of the pile being driven, is known from a GPS. The location of the animal is estimated as a distance from the observer, which is then compared to the location from the pile. If acoustic monitoring is being conducted for that pile, a received SPL may be estimated, or the received level may be estimated on the basis of past or subsequent acoustic monitoring. It may then be determined whether the animal was exposed to sound levels constituting incidental harassment in post-processing of observational and acoustic data, and a precise accounting of observed incidences of harassment created. Therefore, although the predicted distances to behavioral harassment thresholds are useful for estimating incidental harassment for purposes of authorizing levels of incidental take, actual take may be determined in part through the use of empirical data. That information may then be used to extrapolate observed takes to reach an approximate understanding of actual total takes.

Monitoring Protocols—Monitoring would be conducted before, during, and after pile driving activities. In addition, observers shall record all incidences of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown; that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted. Please see the Marine Mammal Monitoring Plan (available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), developed by the Navy in agreement with us, for full details of the monitoring protocols. Monitoring will take place from 15 minutes prior to initiation through 15 minutes post-completion of pile driving activities. Pile driving activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

The following additional measures apply to visual monitoring:

(1) Monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable (as defined in the Navy's Marine Mammal Monitoring Plan) to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. Qualified observers are trained biologists, with the following minimum qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- Advanced education in biological science, wildlife management, mammalogy, or related fields (bachelor's degree or higher is required);
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(2) Prior to the start of pile driving activity, the shutdown zone will be monitored for 15 minutes to ensure that it is clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; animals will be allowed to remain in the

shutdown zone (i.e., must leave of their own volition) and their behavior will be monitored and documented. The shutdown zone may only be declared clear, and pile driving started, when the entire shutdown zone is visible (i.e., when not obscured by dark, rain, fog, etc.). In addition, if such conditions should arise during impact pile driving that is already underway, the activity would be halted.

(3) If a marine mammal approaches or enters the shutdown zone during the course of pile driving operations, activity will be halted and delayed until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal. Monitoring will be conducted throughout the time required to drive a pile.

Sound Attenuation Devices

The use of bubble curtains to reduce underwater sound from impact pile driving was considered but is not proposed. Use of a bubble curtain in a channel with substantial current may not be effective, as unconfined bubbles are likely to be swept away and confined curtain systems may be difficult to deploy effectively in high currents. Data gathered during monitoring of construction on the San Francisco-Oakland Bay Bridge indicated that no reduction in the overall linear sound level resulted from use of a bubble curtain in deep water with relatively strong current, and the distance to the 190 dB zone was considered to be the same with and without the bubble curtain (Illingworth & Rodkin, Inc., 2001). During project monitoring for pile driving associated with the Richmond-San Rafael Bridge, also in San Francisco Bay, it was observed that performance in moderate current was significantly reduced (Oestman *et al.,* 2009). Lucke et al. (2011) also note that the effectiveness of most currently used curtain designs may be compromised in stronger currents and greater water depths. We believe that conditions (relatively deep water and strong tidal currents of up to 3 kn) at the project site would disperse the bubbles and compromise the effectiveness of sound attenuation.

Timing Restrictions

The Navy has set timing restrictions for pile driving activities to avoid in-water work when least tern populations are most likely to be foraging and nesting. The in-water work window for avoiding negative impacts to terns is September 16–March 31.

Soft-Start

The use of a soft-start procedure is believed to provide additional protection to marine mammals by warning or providing a chance to leave the area prior to the hammer operating at full capacity. The pier replacement project will utilize soft-start techniques (ramp-up and dry fire) for impact and vibratory pile driving. The soft-start requires contractors to initiate sound from vibratory hammers for fifteen seconds at reduced energy followed by a 30-second waiting period. This procedure is repeated two additional times. For impact driving, contractors will be required to provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 30-second waiting period, then two subsequent three strike sets.

Daylight Construction

All pile driving would be conducted only during daylight hours.

We have carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that we prescribe the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, and practicality of implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that we must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that would result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Please see the Navy's Acoustic and Marine Mammal Monitoring Plan for full details of the requirements for monitoring and reporting. We have preliminarily determined this monitoring plan, which is summarized here, to be sufficient to meet the MMPA's monitoring and reporting requirements.

Acoustic Measurements

The primary purpose of acoustic monitoring is to empirically verify modeled injury and behavioral disturbance zones for marine mammals. The Navy will determine actual distances to the 160-, 180-, and 190-dB zones for underwater sound (where applicable) and to the 90- and 100-dB zones for airborne sound. For non-pulsed sound, distances will be determined for attenuation to the greater of either the 120-dB threshold or to the point at which sound becomes indistinguishable from background levels. Acoustic monitoring will be conducted with the following objectives:

(1) Indicator Pile Program (IPP)—Implement a robust in-situ monitoring effort to measure sound pressure levels from different project activities, including impact and vibratory driving of 36- and 48-in piles, and to validate the Navy's site-specific transmission loss modeling effort.

(2) Conduct acoustic monitoring for vibratory pile extraction and for pneumatic chipping, if used.

(3) Continue the Navy's collection of ambient underwater sound measurements in the absence of project activities to develop a rigorous baseline for the San Diego Bay region.

It is assumed that the measured contours will be significantly reduced compared to the conservatively modeled ZOIs. As statistically robust results from acoustic monitoring become available, marine mammal mitigation zones would be revised as necessary to encompass actual ZOIs in subsequent years of the fuel pier replacement project. However, should substantial discrepancies become evident through limited data processing, the Navy will contact NMFS to propose and discuss appropriate changes in monitoring. Acoustic monitoring will be conducted in accordance with the approved Acoustic and Marine Mammal Monitoring Plan

developed by the Navy. Notional monitoring locations are shown in Figures 3–1 and 3–2 of the Navy's Plan. Please see that plan, available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm,* for full details of the required acoustic monitoring.

Some details of the methodology include:

- Hydroacoustic monitoring will be conducted for each different type of pile and each different method of installation and removal. Monitoring will occur across a representative range of locations with special attention given to the 120-, 160-, 180-, and 190-dB ZOI contours. The resulting data set will be analyzed to provide a statistically robust characterization of the sound source levels and transmission loss associated with different types of pile driving and removal activities.
- For underwater recordings, hydrophone systems with the ability to measure real time SPLs will be used in accordance with NMFS' most recent guidance for the collection of source levels.
- For airborne recordings, to the extent that logistics and security allow, reference recordings will be collected at approximately 50 ft (15.2 m) from the source via a sound meter with integrated microphone placed on a tripod 5 ft above the ground. Other distances may also be utilized to obtain better data if the signal cannot be isolated clearly due to other sound sources (i.e., barges or generators). If from a distance other than 50 ft, the source data would be converted to the 50-ft distance based on simple spherical spreading.
- Hydrophones will be placed 10 m from the source and within the ZOIs to their predicted eastern and southern limits. An integrated DGPS will record the location of individual acoustic records. A depth sounder or weighted tape measure will be used to determine the depth of the water. The hydrophone will be attached to a weighted line to maintain a constant depth.
- Each hydrophone (underwater) and microphone (airborne) will be calibrated at the beginning of each day of monitoring activity. Pressure and intensity levels will be reported relative to 1 μPa and 1 μPa^2, respectively.
- For each monitored location, a hydrophone will be deployed at mid-depth in order to evaluate site specific attenuation and propagation characteristics.
- In order to determine the area encompassed by the relevant isopleths for marine mammals, hydrophones will collect data at various distances from the source to measure attenuation throughout the ZOIs.
- Ambient conditions, both airborne and underwater, would be measured at the same monitoring locations but in the absence of project sound to determine background sound levels. Ambient levels are intended to be recorded over the frequency range from 7 Hz to 20 kHz. Ambient conditions will be recorded for at least one minute every hour of the work day, for at least one week of each month of the period of the IHA.
- Sound levels associated with soft-start techniques will also be measured but will be differentiated from source level measurements.
- Airborne levels would be recorded as unweighted, as well as in dBA and the distance to marine mammal injury and behavioral disturbance thresholds, also referred to as shutdown and buffer zones, would be measured.
- Environmental data would be collected including but not limited to: Wind speed and direction, air temperature, humidity, surface water temperature, water depth, wave height, weather conditions and other factors that could contribute to influencing the airborne and underwater sound levels (e.g., aircraft, boats, etc.).

Visual Marine Mammal Observations

The Navy will collect sighting data and behavioral responses to construction for marine mammal species observed in the region of activity during the period of activity. All observers will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring. The Navy will monitor the shutdown zone and disturbance zone before, during, and after pile driving as described under ''Proposed Mitigation'' and in the Acoustic and Marine Mammal Monitoring Plan. Notional monitoring locations are shown in Figures 3–1 and 3–2 of the Navy's Plan. Please see that plan, available at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm,* for full details of the required marine mammal monitoring. Based on our requirements, the Plan includes the following procedures for pile driving:

- MMOs would be located at the best vantage point(s) in order to properly see the entire shutdown zone and as much of the disturbance zone as possible.
- During all observation periods, observers will use binoculars and the naked eye to search continuously for marine mammals.
- If the shutdown zones are obscured by fog or poor lighting conditions, pile driving at that location will not be initiated until that zone is visible. Should such conditions arise while impact driving is underway, the activity would be halted.
- The shutdown and disturbance zones around the pile will be monitored for the presence of marine mammals before, during, and after any pile driving or removal activity.

Individuals implementing the monitoring protocol will assess its effectiveness using an adaptive approach. Monitoring biologists will use their best professional judgment throughout implementation and seek improvements to these methods when deemed appropriate. Any modifications to protocol will be coordinated between NMFS and the Navy.

Data Collection

We require that observers use approved data forms. Among other pieces of information, the Navy will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. We require that, at a minimum, the following information be collected on the sighting forms:

- Date and time that pile driving begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (e.g., percent cover, visibility);
- Water conditions (e.g., sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Marine mammal behavior patterns observed, including bearing and direction of travel, and if possible, the correlation to SPLs;
- Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
- Locations of all marine mammal observations; and
- Other human activity in the area.

In addition, photographs would be taken of any gray whales observed. These photographs would be submitted to NMFS' Southwest Regional Office for comparison with photo-identification catalogs to determine whether the whale is a member of the WNP population.

Reporting

A draft report would be submitted to NMFS within 45 calendar days of the completion of acoustic measurements and marine mammal monitoring. The

report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving days, and will also provide descriptions of any adverse responses to construction activities by marine mammals and a complete description of all mitigation shutdowns and the results of those actions. A final report would be prepared and submitted within 30 days following resolution of comments on the draft report. Required contents of the monitoring reports are described in more detail in the Navy's Acoustic and Marine Mammal Monitoring Plan.

Estimated Take by Incidental Harassment

With respect to the activities described here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

All anticipated takes would be by Level B harassment, involving temporary changes in behavior. The proposed mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by Level A harassment, serious injury or mortality is considered remote. However, as noted earlier, it is unlikely that injurious or lethal takes would occur even in the absence of the planned mitigation and monitoring measures.

If a marine mammal responds to an underwater sound by changing its behavior (e.g., through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound. This practice potentially overestimates the numbers of marine mammals taken.

The proposed project area is not believed to be particularly important habitat for marine mammals, nor is it considered an area frequented by marine mammals (with the exception of California sea lions). The occurrence of California sea lions in the project area, and, therefore, the likely incidence of exposure of sea lions to sound levels above relevant thresholds, will be much reduced due to the relocation of the bait barges (i.e., significant California sea lion haul-outs). Behavioral disturbances that could result from anthropogenic sound associated with the proposed activities are expected to affect only a relatively small number of individual marine mammals, although those effects could be recurring over the life of the project if the same individuals remain in the project vicinity.

The Navy is requesting authorization for the potential taking of small numbers of California sea lions, harbor seals, bottlenose dolphins, and gray whales in San Diego Bay that may result from pile driving during construction activities associated with the fuel pier replacement project described previously in this document. The takes requested are expected to have no more than a minor effect on individual animals and no effect at the population level for these species. Any effects experienced by individual marine mammals are anticipated to be limited to short-term disturbance of normal behavior or temporary displacement of animals near the source of the sound.

Marine Mammal Densities

For all species, the best scientific information available was used to construct density estimates or estimate local abundance. Although information exists for regional offshore surveys for marine mammals, it is unlikely that these data would be representative of the fauna that may be encountered in San Diego Bay. As a result, the data resulting from dedicated line-transect surveys conducted by the Navy from 2007–12, or from opportunistic observations for more rarely observed species, was deemed most appropriate for use in estimating the number of incidental harassments that may occur as a result of the specified activities (see Figures 3–1 and 3–2 of the Navy's application). Boat survey transects established within northern San Diego Bay in 2007 have been resurveyed on 16 occasions, 13 of which were during the seasonal window for in-water construction and demolition (September–April).

Description of Take Calculation

The take calculations presented here rely on the best data currently available for marine mammal populations in San Diego Bay. The formula was developed for calculating take due to pile driving activity and applied to each group-specific sound impact threshold. The formula is founded on the following assumptions:

- Each species' density is based on the average daily number of individuals observed within the project area (defined as the 120-dB ZOI for potential behavioral disturbance by vibratory pile driving) during Navy marine mammal surveys, corrected for detection probability. It is the opinion of the professional biologists who conducted these surveys that detectability of animals during these surveys, at slow speeds and under calm weather and excellent viewing conditions, approached 100%. However, to account for the possibility that some parts of the study area may not have been covered due to access limitations, and to allow for variation in the accuracy of counts of large numbers of animals, a 95% detection rate is assumed.
- ZOIs for underwater sound generating activities at the fuel pier location are based on sound emanating from a central point in the water column slightly offshore of the existing pier, at the source levels specified in Table 5, and rates of transmission loss derived from the site-specific model described in Appendix A of the Navy's application.
- Pile driving or vibratory extraction is conservatively estimated to occur on every day within the scheduled window for that component of project construction, as defined in in the project description.
- An individual can only be ''taken'' once during each 24-hour period of activity.
- Although sea lions and harbor seals in the project area spend a considerable amount of time above water, when they would not be subject to underwater sound, the conservative assumption is made that all sea lions within the ZOI are underwater during at least a portion of the noise generating activity, and hence exposed to sound at the predicted levels. However, all sea lions within each airborne sound ZOI are also assumed to be exposed to the airborne sound of each activity.

The calculation for marine mammal takes is estimated by:

Take estimate = (n * ZOI) * days of total activity

Where:

n = density estimate used for each species/

season

n * ZOI produces an estimate of the abundance of animals that could be present in the area for exposure, and is rounded to the nearest whole number before multiplying by days of total activity.

The ZOI impact area is the estimated range of impact to the sound criteria. The distances (actual) specified in Table 5 were used to calculate ZOI around each pile. The ZOI impact area took into consideration the possible affected area of San Diego Bay with attenuation due to land shadowing from bends in the shoreline. Because of the close proximity of some of the piles to the shore, the ZOIs for each threshold are not necessarily spherical and may be truncated.

While pile driving can occur any day throughout the in-water work window, and the analysis is conducted on a per day basis, only a fraction of that time is actually spent pile driving. On days when pile driving occurs, it could take place for thirty minutes, or up to several hours. The Navy assumes that the contractor will drive approximately two steel piles per day, and five concrete or fiberglass piles per day. For each pile installed, vibratory pile driving is expected to be no more than 1–1.5 hours. The impact driving portion of the project is anticipated to take approximately thirty minutes per pile (for proofing, when necessary). Based on the proposed action, the total pile driving time from vibratory pile driving during installation would be a maximum of 66 days. Approximately 21 days of demolition work might involve methods that could cause disturbance to marine mammals are expected.

The exposure assessment methodology is an estimate of the numbers of individuals exposed to the effects of pile driving activities exceeding NMFS-established thresholds. Of note in these exposure estimates, mitigation methods (i.e., visual monitoring and the use of shutdown zones) were not quantified within the assessment and successful implementation of mitigation is not reflected in exposure estimates. Results from acoustic impact exposure assessments should be regarded as conservative estimates.

California Sea Lion

The Navy Marine Species Density Database (NMSDD) reports estimated densities for North and Central San Diego Bay of 5.75/km² for the summer and fall periods and 2.51/km² during the winter and spring. During Navy surveys of northern San Diego Bay, the maximum number of sea lions observed within the study area was 114, with an average abundance of 59.92 individuals per survey day; translating to an average density of 5.22/km². Adjusting based on 95% detection results in an average abundance of 63.07 and density of 5.50/km², which is similar to the value reported by Hanser *et al.* (2012). For California sea lions, the most common species in northern San Diego Bay and the only species with regular occurrence in the project area, it was determined that the density value derived from site-specific surveys would be most appropriate for use in estimating potential incidences of take.

In the surveys analyzed for this IHA request, an average of 47.00 animals were observed on or swimming next to the bait barges. Assuming the same proportion of the population continues to spend most of their time at the bait barges when they are relocated, there would be an average of 12.92 individuals within the ZOI (1.12/km²). Assuming 95% detection results in an estimated average abundance of 13.60 and density of 1.18/km² in the ZOI without the bait barges' influence as a sea lion aggregator within the project area. With the relocation of the bait barges, no haul-outs are available for California sea lions within the airborne ZOI. We acknowledge that California sea lions may experience airborne acoustic harassment when in the water within the airborne ZOI but with their heads above water. However, these animals are considered harassed by underwater sound.

Harbor Seal

As discussed previously, the occurrence of harbor seals in the ZOI appears to be limited. Small numbers of individuals are known to haul out south of Ballast Point, but these have not been observed entering or transiting the project area and are believed to move from this location to haul-outs further north at La Jolla. Accordingly, harbor seal presence in the project area is assessed on the basis of the only observational data available, the opportunistic observation of several individuals occurring in the vicinity of Pier 122 repeatedly for a period of about a month. We therefore assume that as many as three harbor seals could be incidentally harassed on a daily basis for as much as one month. In addition, because the Pier 122 location is approximately 250 m from the fuel pier, these individuals we assume that these individuals could be either in the water or hauled out each day and therefore conservatively consider them to be exposed to both underwater and airborne sound on each day.

Gray Whale

Similar to the harbor seal, observational data for gray whales is limited and their occurrence in the project area infrequent and unpredictable. On the basis of limited information, we assume here that 15 exposures of gray whales to sound that could result in harassment might occur. This could result from as many as 15 individuals transiting near the mouth of the Bay, or from one individual entering the Bay and lingering in the project area for 15 days. We limit the time period to 15 days because, although both of these scenarios are unlikely, they would only possibly occur in March. Most sightings of gray whales near or within the Bay have been outside of the in-water work window.

Bottlenose Dolphin

Coastal bottlenose dolphins can occur at any time of year in San Diego Bay, and with California sea lions are the only species observed during site-specific marine mammal surveys conducted by the Navy. Numbers sighted have been highly variable, ranging from zero (6 out of 13 surveys) to 40 individuals. Unidentified dolphins recorded in the surveys are assumed to have been coastal bottlenose dolphins. Given the sporadic nature of bottlenose dolphin sightings and their high variability in terms of numbers and locations, the regional density estimate of 0.36/km² developed for the NMSDD (Hanser et al., 2012) was considered a more reliable indicator of the number of bottlenose dolphins that may be present and is used here to estimate the potential number of incidences of take.

Steel pile installation involves a combination of vibratory and impact hammering. Both are assumed to occur on the same day and, therefore, the estimated number of animals taken is given by the maximum of either type of exposure. Given that the vibratory (120 dB rms) ZOI is larger, all animals considered behaviorally harassed by impact pile driving are also considered to potentially be harassed by vibratory pile driving, whereas animals outside of the ZOI for impact hammering but within the ZOI for vibratory hammering would only be harassed by the latter. For example, for California sea lions the estimate for vibratory pile driving is 700 and the estimate for impact pile driving is 500. Because both events occur on the same day and the vibratory harassment zone subsumes the impact harassment zone, the estimate for vibratory pile driving necessarily includes the 500 incidents of harassment estimated for impact pile driving alone. To provide a

more conservative estimate of total harassments, demolition use of vibratory extraction is assumed not to overlap the driving of steel piles for the new pier. Thus, the 294 incidences of harassment for California sea lions resulting from pile removal would add to the 700 estimated for pile installation (500 resulting from either vibratory or impact installation and 200 resulting from vibratory installation alone) for a total estimate of 994 incidences of harassment.

TABLE 8—NUMBER OF POTENTIAL INCIDENTAL TAKES OF MARINE MAMMALS WITHIN VARIOUS ACOUSTIC THRESHOLD ZONES

Species	Density (#/km^2)	Underwater		Vibratory injury threshold (180/190 dB)	Vibratory disturbance threshold (120 dB)	Airborne	Total proposed authorized takes
		Impact injury threshold (180/190 dB)	Disturbance threshold, combined impact/vibratory (160 dB) [1]			Impact disturbance threshold (90/100 dB)	
California sea lion	1.18	0	500	0	494	0	994
Harbor seal [2]	n/a	0	90	0	0	90	180
Gray whale [2]	n/a	0	15	0	0	n/a	15
Bottlenose dolphin	0.36	0	144	0	163	n/a	307

[1] The 160-dB acoustic harassment zone associated with impact pile driving would always be subsumed by the 120-dB harassment zone produced by vibratory driving. Therefore, total takes estimated for impact driving alone could occur as a result of either impact or vibratory driving.

[2] Because there is no density estimate available for harbor seals or gray whales, we cannot estimate takes separately for vibratory and impact pile driving. We simply assume here that these animals could be present within the project area for 30 (3 harbor seals) or 15 days (1 gray whale), respectively, and that they could be taken by impact or vibratory driving or vibratory removal. We also assume that mitigation measures would be effective in preventing Level A harassment for these species and believe a zero value for Level A harassments to be reasonable.

Potential takes could occur if individuals of these species move through the area on foraging trips when pile driving is occurring. Individuals that are taken could exhibit behavioral changes such as increased swimming speeds, increased surfacing time, or decreased foraging. Most likely, individuals may move away from the sound source and be temporarily displaced from the areas of pile driving. Potential takes by disturbance would likely have a negligible short-term effect on individuals and not result in population-level impacts. Negligible Impact and Small Numbers Analysis and Preliminary Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . .an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, we consider a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the take occurs.

Pile driving activities associated with the pier replacement project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the proposed activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from airborne or underwater sounds generated from pile driving. No mortality, serious injury, or Level A harassment is anticipated given the methods of installation and measures designed to minimize the possibility of injury to marine mammals and Level B harassment would be reduced to the level of least practicable adverse impact. Specifically, vibratory hammers, which do not have significant potential to cause injury to marine mammals due to the relatively low source levels (less than 190 dB), would be the primary method of installation. Also, pile driving would either not start or be halted if marine mammals approach the shutdown zone (described previously in this document). The pile driving activities analyzed here are similar to other similar construction activities, including recent projects conducted by the Navy in the Hood Canal as well as substantial work conducted in San Francisco Bay by the California Department of Transportation, which have taken place with no reported injuries or mortality to marine mammals.

The proposed numbers of authorized take for California sea lions, harbor seals, and gray whales would be considered small relative to the relevant stocks or populations (each less than one percent) even if each estimated taking occurred to a new individual—an extremely unlikely scenario. For pinnipeds, no rookeries are present in the project area, there are no haul-outs other than those provided opportunistically by man-made objects, and the project area is not known to provide foraging habitat of any special importance.

The proposed numbers of authorized take for bottlenose dolphins are higher relative to the total stock abundance estimate and would not represent small numbers if a significant portion of the take was for a new individual. However, these numbers represent the estimated incidences of take, not the number of individuals taken. That is, it is likely that a relatively small subset of California coastal bottlenose dolphins would be harassed by project activities. California coastal bottlenose dolphins range from San Francisco Bay to San Diego (and south into Mexico) and the specified activity would be stationary within an enclosed Bay that is not recognized as an area of any special significance for coastal bottlenose dolphins (and is therefore not an area of dolphin aggregation, as evident in Navy observational records). We therefore believe that the estimated numbers of takes, were they to occur, likely represent repeated exposures of a much smaller number of bottlenose dolphins and that, based on the limited region of exposure in comparison with the known distribution of the coastal bottlenose dolphin, these estimated incidences of take represent small numbers of bottlenose dolphins.

Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stock is

unlikely to result in any significant realized decrease in viability for California coastal bottlenose dolphins, and thus would not result in any adverse impact to the stock as a whole. The potential for multiple exposures of a small portion of the overall stock to levels associated with Level B harassment in this area is expected to have a negligible impact on the stock.

We have preliminarily determined that the impact of the first phase of the previously described wharf construction project, to be conducted under this proposed one-year IHA, may result, at worst, in a temporary modification in behavior (Level B harassment) of small numbers of marine mammals. No injuries, serious injuries, or mortalities are anticipated as a result of the specified activity, and none are proposed to be authorized. Additionally, animals in the area are not expected to incur hearing impairment (i.e., TTS or PTS) or non-auditory physiological effects. For pinnipeds, the absence of any major rookeries and only a few isolated and opportunistic haul-out areas near or adjacent to the project site means that potential takes by disturbance would have an insignificant short-term effect on individuals and would not result in population-level impacts. Similarly, for cetacean species the absence of any known regular occurrence adjacent to the project site means that potential takes by disturbance would have an insignificant short-term effect on individuals and would not result in population-level impacts. Due to the nature, degree, and context of behavioral harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

For reasons stated previously in this document, the negligible impact determination is also supported by the likelihood that, given sufficient ''notice'' through mitigation measures including soft start, marine mammals are expected to move away from a sound source that is annoying prior to its becoming potentially injurious, and the likelihood that marine mammal detection ability by trained observers is high under the environmental conditions described for San Diego Bay, enabling the implementation of shutdowns to avoid injury, serious injury, or mortality. As a result, no take by injury, serious injury or death is anticipated, and the potential for temporary or permanent hearing impairment is very low and would be avoided through the incorporation of the proposed mitigation measures.

While the number of marine mammals potentially incidentally harassed would depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, and has been mitigated to the lowest level practicable through incorporation of the proposed mitigation and monitoring measures mentioned previously in this document. This activity is expected to result in a negligible impact on the affected species or stocks. No species for which take authorization is requested are either ESA-listed or considered depleted under the MMPA.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, we preliminarily find that the first year of construction associated with the proposed pier replacement project would result in the incidental take of small numbers of marine mammal, by Level B harassment only, and that the total taking from the activity would have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

The Navy initiated informal consultation under section 7 of the ESA with NMFS Southwest Regional Office on March 5, 2013. NMFS concluded on May 16, 2013, that the proposed action may affect, but is not likely to adversely affect, WNP gray whales. The Navy has not requested authorization of the incidental take of WNP gray whales and no such authorization is proposed, and there are no other ESA-listed marine mammals found in the action area. Therefore, no consultation under the ESA is required.

National Environmental Policy Act (NEPA)

In September 2012, the Navy prepared a Draft Environmental Assessment (*Naval Base Point Loma Fuel Pier Replacement and Dredging (P–151/DESC1306) Environmental Assessment*) in accordance with the National Environmental Policy Act (NEPA) and the regulations published by the Council on Environmental Quality. We have posted it on the NMFS Web site (see **ADDRESSES**) concurrently with the publication of this proposed IHA. NMFS will independently evaluate the EA and determine whether or not to adopt it. We may prepare a separate NEPA analysis and incorporate relevant portions of the Navy's EA by reference. Information in the Navy's application, EA and this notice collectively provide the environmental information related to proposed issuance of the IHA for public review and comment. We will review all comments submitted in response to this notice as we complete the NEPA process, including a decision of whether to sign a Finding of No Significant Impact (FONSI), prior to a final decision on the IHA request.

Proposed Authorization

As a result of these preliminary determinations, we propose to authorize the take of marine mammals incidental to the Navy's pier replacement project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 17, 2013.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC640

Taking and Importing Marine Mammals; U.S. Navy Training in the Gulf of Alaska Temporary Maritime Activities Area

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

ACTION: Notice of issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notice is hereby given that NMFS has issued a 3-year Letter of Authorization (LOA) to the U.S. Navy (Navy) to take marine mammals incidental to Navy training and research activities to be conducted within the Gulf of Alaska Temporary Maritime Activities Area (GOA TMAA). These activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act of 2004 (NDAA).

DATES: This Authorization is effective from May 16, 2013, through May 4, 2016.

ADDRESSES: An electronic copy of the LOA and supporting documentation may be obtained by writing to P. Michael Payne, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Brian D. Hopper, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, upon request, the incidental taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing), if certain findings are made by NMFS and regulations are issued. Under the MMPA, the term ''take'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Regulations governing the taking of marine mammals by the Navy incidental to training and research activities in the GOA TMAA became effective on May 4, 2011 (76 FR 25505), and remain in effect through May 4, 2016. For detailed information on this action, please refer to that document. These regulations include mitigation, monitoring, and reporting requirements and establish a framework to authorize incidental take through the issuance of LOAs. On February 1, 2012, NMFS amended the regulations for 12 Navy Range Complexes, including GOA TMAA, to allow for multi-year LOAs (77 FR 4917).

Summary of Request

On December 15, 2012, NMFS received a request from the Navy for an LOA for the taking of marine mammals incidental to training activities conducted within the GOA TMAA under regulations issued on May 4, 2011 (76 FR 25505). The Navy has complied with the measures required in 50 CFR 218.124 and 218.125, as well as the LOA issued on May 17, 2011, and submitted the reports and other documentation required in the final rule and the 2011 LOA.

Summary of Activity Under the 2011 LOA

As described in the Navy's exercise reports (both classified and unclassified), from May 2011 to October 2012, the training activities conducted by the Navy were within the scope and amounts indicated in the 2011 LOA and the levels of take remain within the scope and amounts contemplated by the final rule.

Planned Activities and Estimated Take for 2013 Through 2016

Between 2013 and 2016, the Navy expects to conduct the same type and amount of training identified in the 2011 LOA; however, the Navy does not plan to conduct any Sinking Exercises (SINKEXs). While the Navy requested the same amount of take that was authorized in the 2011 LOA, NMFS has slightly adjusted those numbers to account for the exposure analysis contained in the Biological Opinion. However, the authorized take remains within the annual estimates analyzed in the final rule.

Summary of Monitoring, Reporting, and Other Requirements Under the 2011 LOA Annual Exercise Reports

The Navy submitted their classified and unclassified exercise reports within the required timeframes and the unclassified report is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* NMFS has reviewed both reports and they contain the information required by the 2011 LOA. The reports indicate the amounts of different types of training that occurred from May 2011, to October 2012. The Navy conducted zero SINKEXs and all other exercise types conducted (classified data) fell within the amount indicated in the LOA.

2011–2012 Monitoring

The Navy conducted the monitoring required by the 2011 LOA and described in the Monitoring Plan, which included passive acoustic monitoring utilizing high-frequency acoustic recording packages (HARPs). The Navy submitted their Monitoring Reports, which are posted on NMFS' Web site (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), within the required timeframe. Because data is gathered through May 1 and the report is due in July, some of the data analysis will occur in the subsequent year's report. Navy-funded marine mammal monitoring accomplishments within GOA TMAA for the past year consisted of the following:

Passive Acoustic Monitoring

Two high-frequency acoustic monitoring packages (HARP) have been deployed by Scripps Institute of Oceanography (SIO) within the GOA TMAA. Both HARPs were bottom-deployed in July 2011. One is located on the shelf (203 m) and the other is located on the slope (900 m) of the north central Gulf of Alaska. Both HARPs were field serviced in early May 2012. In addition to these two HARPs, in September 2012, a third HARP was deployed to obtain passive acoustic data along the side of the Pratt Seamount (930 m). Over 5,756 hours of passive acoustic data have been recorded. Subsequent analysis confirmed detection of the following marine mammals: blue whale, fin whale, gray whale, humpback whale, six toothed whale species, and sounds dominated by shipping noise.

Vessel-Based Survey

In the summer of 2013, a Navy-funded visual line transect survey will be conducted in the offshore waters of the Gulf of Alaska (GOALS 2013). The primary objectives for GOALS 2013 are to acquire baseline data to increase understanding of the likely occurrence (i.e., presence, abundance, distribution and/or density of species) of beaked whales and other ESA-listed marine mammals in the Gulf of Alaska.

Other Monitoring Activities

Pacific Northwest Cetacean Tagging

An ongoing Navy-funded effort in the Pacific Northwest will attach long-term satellite tracking tags to migrating gray whales off the coasts of Oregon and northern California. This study is being conducted by the University of Oregon and may also include tagging of resident gray whales or other large whales species such as humpback and fin whales, if encountered. Although this effort is not directly affiliated with the GOA TMAA monitoring program, depending on when these tags are attached, gray whale movement patterns along the Pacific Coast and through the Gulf of Alaska may be tracked. Results from this effort will be summarized and referenced in next year's 2013 GOA TMAA annual Monitoring Report if animals are found to be passing through or adjacent to the GOA TMAA.

In conclusion, the Navy successfully implemented the monitoring requirements for the GOA TMAA by the end of the second monitoring period. Over the next three years, the Navy will continue to maintain the HARPs that are currently in the water, while analyzing and presenting results from previously recorded data. Furthermore, the Navy will continue to report tagging results from the Pacific Northwest Cetacean Tagging study.

New Studies

Recent Navy applications, Draft Environmental Impact Statements, and

proposed MMPA regulations for testing and training activities contain proposed acoustic criteria and thresholds that would, if adopted, represent changes from the criteria and thresholds currently employed by NMFS in incidental take authorizations and associated biological opinions for Navy military readiness activities. The revised thresholds are based on evaluations of recent scientific studies (see Finneran *et al.* (2010), Finneran and Schlundt (2010), and Tyack *et al.* (2011)).

The proposed new criteria and thresholds based on the Finneran and Tyack studies have recently been made available for public comment, (AFTT: 78 FR 7050, January 31, 2013; and HSTT: 78 FR 6978, January 31, 2013), and the public comments are still being evaluated. Until that process is complete, it is not appropriate to apply the new criteria and thresholds in any take authorization or associated biological opinion.

Adaptive Management

The Navy's adaptive management of the GOA TMAA monitoring program involves close coordination with NMFS to align marine mammal monitoring with the overall objectives of the monitoring plan. Monitoring under the 2011 LOA only represents the two years of a planned five-year effort. At this point, it would be premature to draw detailed conclusions or initiate comprehensive monitoring changes because the analysis of monitoring and other data is not complete. In addition, at the annual adaptive management meeting, NMFS and the Navy took into consideration, among other things, the study by Tyack *et al.* (2011) evaluating the documented responses of marine mammals to sonar to determine if it warranted additional mitigation or monitoring for beaked whales. During their October 2011 meeting, NMFS and the Navy determined that the study by Tyack *et al.* (2011) did not provide a basis for prescribing any additional mitigation or monitoring for beaked whales. The study itself makes no recommendations regarding potential additional mitigation or monitoring, and NMFS, the Navy, and the Marine Mammal Commission did not think that the new information included in the study lent itself to the incorporation of new mitigation measures.

Authorization

The Navy complied with the requirements of the 2011 LOA. Based on our review of the record, NMFS has determined that the marine mammal take resulting from the 2011 military readiness training and research activities falls within the levels previously anticipated, analyzed, and authorized. Further, the level of taking authorized from 2013 to 2016 for the Navy's GOA TMAA activities is consistent with our previous findings made for the total taking allowed under the GOA TMAA regulations. Finally, the record supports NMFS' conclusion that the total number of marine mammals taken by the 2013 to 2016 activities in the GOA TMAA will have no more than a negligible impact on the affected species or stocks of marine mammals and will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. Accordingly, NMFS has issued an LOA for Navy training and research activities conducted in the GOA TMAA from May 16, 2013, through May 4, 2016.

Dated: May 20, 2013.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–12343 Filed 5–22–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0026]

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 June 24, 2013.

Title, Associated Form and OMB Number: Interactive Customer Evaluation (ICE)/Enterprise Voice of the Customer (EVoC) System; OMB Control Number 0704–0420.

Type of Request: Revision to a Currently Approved Collection.

Number of Respondents: 51,000.

Responses per Respondent: 1.

Annual Responses: 51,000.

Average Burden per Response: 3 minutes.

Annual Burden Hours: 2,550.

Needs and Uses: The Interactive Customer Evaluation (ICE)/Enterprise Voice of the Customer (EVoC) System automates and minimizes the use of the current manual paper comment cards and other customer satisfaction collection media, which exits at various customer service locations, throughout the DoD. Members of the public have the opportunity to give automated feedback to the service provider on the quality of their experience and their satisfaction level. This is a management tool for improving customer services.

Affected Public: Individuals or households; business or other for-profit.

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, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: May 20, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–12317 Filed 5–22–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 13–08]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the

requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 13–08 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: May 20, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

MAY 14 2013

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 13-08, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Qatar for defense articles and services estimated to cost $110 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

William E. Landay III
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Transmittal No. 13–08

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Qatar

(ii) *Total Estimated Value:*

Major Defense Equipment* ..	$ 45 million
Other	$ 65 million
TOTAL	$110 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* 2 AN/AAQ–24(V) Large Aircraft Infrared Countermeasures (LAIRCM) Systems for B747–800 Aircraft, 11 Small Laser Transmitter Assemblies, 3 System Processors/Repeaters, 14 AN/AAR–54 Missile Warning Sensors, User Data Module Cards and Control Interface Units, Multi-role Electro-Optic End-to-End test set, Card Memory, Smart Cards, and Support Equipment, Consumables, and Flight Test/Certification. Also included are tools and test equipment, support equipment, spare and repair parts, publications and technical documents, personnel training and training equipment, U.S. Government and contractor technical assistance, and other related elements of logistics and program support.

(iv) *Military Department:* Air Force (QAF)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* 14 May 2013

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Qatar—AN/AAQ–24(V) Large Aircraft Infrared Countermeasures (LAIRCM) Systems

The Government of Qatar has requested a possible sale of 2 AN/AAQ–24(V) Large Aircraft Infrared Countermeasures (LAIRCM) Systems for B747–800 Aircraft, 11 Small Laser Transmitter Assemblies, 3 System Processors/Repeaters, 14 AN/AAR–54 Missile Warning Sensors, User Data Module Cards and Control Interface Units, Multi-role Electro-Optic End-to-End test set, Card Memory, Smart Cards, and Support Equipment, Consumables, and Flight Test/Certification. Also included are tools and test equipment, support equipment, spare and repair parts, publications and technical documents, personnel training and training equipment, U.S. Government and contractor technical assistance, and other related elements of logistics and program support. The estimated cost is $110 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been, and continues to be, an important force for political stability and economic progress in the Middle East.

Qatar requests these capabilities to provide for the protection of its head-of-state aircraft fleet. LAIRCM will provide increased protection from missile threats. The proposed purchase of LAIRCM will enhance the safety of Qatar's political leadership, promoting stability and global engagement of a friendly country.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be Northrop Grumman Corporation of Rolling Meadows, Illinois. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require U.S. Government or contractor representatives to travel to Qatar for a period of 10 years to provide program and technical support and training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 13–08

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AN/AAQ–24(V) LAIRCM is a self-contained, directed energy countermeasures system designed to protect aircraft from infrared-guided surface-to-air missiles. The system features digital technology and micro-miniature solid-state electronics. The system operates in all conditions, detecting incoming missiles and jamming infrared-seeker equipped missiles with aimed bursts of laser energy.

2. LAIRCM system software, including Operational Flight Program and jam codes, is classified Secret.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2013–12337 Filed 5–22–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2013–0013]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Rights in Technical Data and Computer Software

AGENCY: Defense Acquisition Regulations System; Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through July 31, 2013. DoD proposes that OMB extend its approval for use for 3 additional years beyond the current expiration date.

DATES: DoD will consider all comments received by July 22, 2013.

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: dfars@osd.mil. Include OMB Control Number 0704–0369 in the subject line of the message.

Fax: (571) 372–6094.

Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, at (571) 372–6106. The information collection requirements addressed in this notice are available via the Internet at: *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html*. Paper copies are available from Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION: *Title, Associated Form, and OMB Number:* Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 227.71, Rights in Technical Data, and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses of the Defense Federal Acquisition Regulation Supplement (DFARS); OMB Control Number 0704–0369.

Needs and Uses: DFARS Subparts 227.71 and 227.72 prescribe the use of solicitation provisions and contract clauses containing information collection requirements that are associated with rights in technical data and computer software. DoD needs this information to implement 10 U.S.C. 2320, Rights in technical data, and 10 U.S.C. 2321, Validation of proprietary data restrictions. DoD uses the information to recognize and protect contractor rights in technical data and computer software that are associated with privately funded developments; and to ensure that technical data delivered under a contract are complete and accurate and satisfy contract requirements.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Number of Respondents: 50,250.

Responses Per Respondent: about 16.8.

Annual Responses: 846,135.

Average Burden Per Response: about 1.16 hours.

Annual Response Burden Hours: 978,801 hours.

Annual Recordkeeping Burden Hours: 75,000 hours.

Total Annual Burden Hours: 1,053,801 hours.

Frequency: On occasion.

Summary of Information Collection

DoD uses the following DFARS provisions and clauses in solicitations and contracts to require offerors and contractors to identify and mark data or software requiring protection from unauthorized release or disclosure in accordance with 10 U.S.C. 2320:

252.227–7013, Rights in Technical Data—Noncommercial Items.

252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions.

252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

In accordance with 10 U.S.C. 2320(a)(2)(D), DoD may disclose limited rights data to persons outside the Government, or allow those persons to use limited rights data, if the recipient agrees not to further release, disclose, or use the data. Therefore, the clause at DFARS 252.227–7013, Rights in Technical Data—Noncommercial Items, requires the contractor to identify and mark data or software that it provides with limited rights.

In accordance with 10 U.S.C. 2321(b), contractors and subcontractors at any tier must be prepared to furnish written justification for any asserted restriction on the Government's rights to use or release data. The following DFARS clauses require contractors and subcontractors to maintain adequate records and procedures to justify any asserted restrictions:

252.227–7019, Validation of Asserted Restrictions—Computer Software.

252.227–7037, Validation of Restrictive Markings on Technical Data.

In accordance with 10 U.S.C. 2320, DoD must protect the rights of contractors that have developed items, components, or processes at private expense. Therefore, the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, requires a contractor or subcontractor to submit a use and non-disclosure agreement when it obtains data from the Government to which the Government has only limited rights.

The provision at DFARS 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government, requires an offeror to identify any technical data or computer software that it previously delivered, or will deliver, under any Government contract. DoD needs this information to avoid paying for rights in technical data or computer software that the Government already owns.

Kortnee Stewart,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2013–12288 Filed 5–22–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0069]

Agency Information Collection Activities; Comment Request; NCES Cognitive, Pilot, and Field Test Studies System

AGENCY: Institute of Education Sciences/National Center for Education Statistics (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before July 22, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0069 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner;

(3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: NCES Cognitive, Pilot, and Field Test Studies System.

OMB Control Number: 1850–0803.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 135,000.

Total Estimated Number of Annual Burden Hours: 27,000.

Abstract: This is a request for a 3-year renewal of the generic clearance to allow the National Center for Education Statistics (NCES) to continue to develop, test, and improve its survey and assessment instruments and methodologies. The procedures utilized to this effect include but are not limited to experiments with levels of incentives for various types of survey operations, focus groups, cognitive laboratory activities, pilot testing, exploratory interviews, experiments with questionnaire design, and usability testing of electronic data collection instruments.

Dated: May 20, 2013.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–12338 Filed 5–22–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0068]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Applications for New Grants Under the Rehabilitation Services Administration (RSA) (1894–0001)

AGENCY: Department of Education (ED), Office of Special Education and Rehabilitative Services (OSERS).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing; an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before June 24, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0068 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Applications for New Grants under the Rehabilitation Services Administration (RSA) (1894–0001).

OMB Control Number: 1820–0018.

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 100.

Total Estimated Number of Annual Burden Hours: 4,000.

Abstract: The Rehabilitation Services Administration (RSA) is seeking approval to extend the current Information Collection package, OMB #1820–0018 (streamlined discretionary grants 1894–0001) in order to solicit applications for RSA's Discretionary Grant Awards authorized by the Rehabilitation Act of 1973, as amended. The discretionary program areas include Rehabilitation Long Term and Short Term Training, Demonstrations, Capacity Building projects, Interpreter Training, In-Service Training, National Clearinghouse, National Leadership Institute, Technical Assistance and Continuing Education (TACE) Centers, Service Programs, Centers for Independent Living, the Helen Keller National Center and other discretionary grant programs approved by the Secretary. The current application package expires June 30, 2013 and in order to provide application packages to applicants, RSA is requesting an extension of the currently approved package for an additional three years.

Dated: May 20, 2013.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division Privacy, Information and Records Management Services Office of Management.

[FR Doc. 2013–12335 Filed 5–22–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0067]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Part D Discretionary Grant Application—Individuals With Disabilities Education Act (1894–0001)

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before June 24, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0067 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Part D Discretionary Grant Application—Individuals with Disabilities Education Act (1894–0001).

OMB Control Number: 1820–0028.

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 800.

Total Estimated Number of Annual Burden Hours: 20,000.

Abstract: Under the Individuals with Disabilities Education Act discretionary grants are authorized to support technology, State personnel development, personnel preparation, parent training and information, and technical assistance activities. This grant application provides the forms and information necessary for applicants to submit an application for funding, and information for use by technical reviewers to determine the quality of the application.

Dated: May 20, 2013.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–12334 Filed 5–22–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Record of Decision and Wetland/Floodplain Statement of Findings for the W.A. Parish Post-Combustion CO_2 Capture and Sequestration Project

AGENCY: Department of Energy.

ACTION: Record of Decision.

SUMMARY: The U.S. Department of Energy (DOE) announces its decision to provide cost-shared funding to NRG Energy, Inc. (NRG) for the W.A. Parish Post-Combustion CO_2 Capture and Sequestration Project (Parish PCCS Project) under DOE's Clean Coal Power Initiative (CCPI) Program. DOE prepared an environmental impact statement (EIS) to evaluate the potential environmental impacts associated with DOE's proposed action of providing financial assistance for the Parish PCCS Project. The EIS also evaluated the impacts associated with construction and operation of the proposed Parish PCCS Project, as submitted by NRG. DOE's proposed action is to provide limited financial assistance through a cooperative agreement with NRG for a new post-combustion carbon dioxide (CO_2) capture and compression system that would be added to Unit 8 of the existing W.A. Parish power plant, with the captured CO_2 piped to the West Ranch oil field for use in enhanced oil recovery (EOR).

ADDRESSES: The EIS and this Record of Decision (ROD) are available on DOE's National Environmental Policy Act (NEPA) Web site at *http://energy.gov/nepa/* and on the DOE National Energy Technology Laboratory (NETL) Web site at *http://www.netl.doe.gov/publications/others/nepa/index.html*. Copies of these documents may also be obtained by contacting Mr. Lusk, NEPA Document Manager, U.S. Department of Energy, National Energy Technology Laboratory, 3610 Collins Ferry Road, Morgantown, WV 26507–0880; telephone, 304–285–4145; or email: *Mark.Lusk@netl.doe.gov*.

FOR FURTHER INFORMATION CONTACT: To obtain additional information about the project or the EIS, contact Mr. Mark W. Lusk at the address provided above. For general information on DOE's NEPA process, contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; telephone: 202–586–4600; or leave a toll free message at 1–800–472–2756.

SUPPLEMENTARY INFORMATION: DOE prepared this ROD pursuant to the National Environmental Policy Act (NEPA) of 1969 (42 United States Code [U.S.C.] 4321 et seq.), and in compliance with the Council on Environmental Quality (CEQ) implementing regulations for NEPA (40 Code of Federal Regulations [CFR] parts 1500 through 1508) and DOE's NEPA implementing procedures (10 CFR part 1021) and DOE's Compliance with Floodplain and Wetland Environmental Review regulations (10 CFR Part 1022). This ROD is based on DOE's EIS for the W.A. Parish Post-Combustion CO_2 Capture and Sequestration Project (DOE/EIS–0473, February 2013) and other program considerations.

Background and Purpose and Need for Agency Action

Public Law 107–63, enacted in November 2001, first provided funding for the CCPI program, a federal program to accelerate the commercial readiness of advanced technologies in existing and new coal-based power plants. The program encompasses a broad spectrum of commercial-scale demonstrations that target today's most pressing environmental challenges, including reducing mercury and greenhouse gas (GHG) emissions. When integrated with other DOE initiatives, the program will help the nation successfully commercialize advanced power systems to produce electricity at greater efficiencies, release almost no

emissions, create fuels, and employ CO_2 management capabilities.

The purpose of DOE's proposed action under the CCPI program is to meet program goals by providing cost-shared funding for this proposed project to demonstrate the feasibility of advanced coal-based technologies at a commercial scale that capture and geologically sequester CO_2 emissions. The principal need addressed by DOE's proposed action is to satisfy the responsibility Congress imposed on DOE to demonstrate advanced coal-based technologies that can generate clean, reliable, and affordable electricity in the United States Successful commercial-scale demonstration of amine-based carbon capture technology at NRG's W.A. Parish Plant with beneficial use of the CO_2 at an existing oil field would also generate technical, environmental, and financial data from the design, construction, and integrated operation of the CO_2 capture facility, pipeline, EOR, and CO_2 monitoring facilities at the oil field. These data would be used to evaluate whether the deployed technologies could be effectively and economically implemented at a commercial scale.

NEPA Process

DOE formally initiated the NEPA process by publishing a Notice of Intent (NOI) to prepare an EIS in the **Federal Register** (FR) on November 14, 2011, under Docket ID No. FR Doc. 2011–29333; (76 FR 70429). DOE conducted a scoping process that included two public scoping meetings and consultation with interested governmental agencies and stakeholders. DOE held public scoping meetings on November 30, 2011, in Needville, Texas, and December 1, 2011, in Edna, Texas. The public scoping period ended on December 15, 2011, after a 30-day opportunity to submit comments. The Environmental Protection Agency (EPA) and DOE both published a notice of availability (NOA) for the draft EIS on September 21, 2012. DOE's NOA (77 FR 58533) also announced its plans for two public hearings. Public hearings on the draft EIS were held in Thompsons, Texas, on October 10, 2012, and Edna, Texas, on October 11, 2012.

DOE received one verbal comment on the draft EIS at the two public hearings and listened to questions and concerns during informal sessions before the hearings. During the 45-day public comment period, which ended November 5, 2012, DOE received comment letters from the Department of Interior, EPA, and the Texas Parks and Wildlife Department. Comments included concerns about: (1) Use of coal as fuel for electricity generation; (2) use of nitrogen dioxide (NO_2) emission credits to offset volatile organic carbon (VOC) emissions; (3) use of horizontal directional drilling to cross under waterways; (4) mitigation of wetland impacts; (5) impacts on state or global rare plant communities; (6) adequacy of the environmental justice analysis; (7) mitigation measures for construction-related emissions; (8) impacts on threatened and endangered species, including whooping cranes; (9) impacts to nesting bald eagles; (10) protection of freshwater mussel species; and (11) impacts on migratory birds. EPA rated the draft EIS as LO—''Lack of Objections''.

DOE distributed the final EIS during the last week of February 2013. The U.S. EPA published a NOA in the FR on March 8, 2013, (75 FR 28612). In the final EIS, DOE updated project information, refined analyses, and responded to comments on the draft EIS. DOE received no comments on the final EIS.

Decision

DOE has decided to provide NRG with $167 million in cost-shared funding for its proposed project through a cooperative agreement under DOE's CCPI program. The project and its potential environmental impacts, as analyzed in the EIS, and required mitigation measures are described below.

Basis of Decision

DOE based its decision on the importance of achieving the objectives of the CCPI program and a careful review of the potential environmental impacts presented in the EIS. The proposed project would help DOE meet its congressionally mandated mission to support advanced clean-coal technology projects. Post-combustion CO_2 capture offers the greatest near-term potential for reducing power sector CO_2 emissions because it can be used to retrofit existing coal-based power plants and can also be tuned for various levels of CO_2 capture, which may accelerate market acceptance. A successful commercial-scale demonstration of amine-based carbon capture technology at NRG's W.A. Parish Plant with beneficial use of the CO_2 at an existing oil field would also generate technical, environmental, and financial data from the design, construction, and operation of the CO_2 capture facility, pipeline, and CO_2 monitoring facilities at the oil field. The data would be used to help DOE evaluate whether the deployed technologies could be effectively and economically implemented at a commercial scale.

This decision incorporates all practicable means to avoid or minimize environmental harm. DOE plans to verify the environmental impacts predicted in the EIS and the implementation of appropriate avoidance and mitigation measures.

Mitigation

DOE's decision incorporates measures to avoid or minimize adverse environmental impacts during the design, construction and operation of the project. DOE requires that recipients of financial assistance comply with all applicable federal, state, and local environmental laws, orders, and regulations. During project planning, NRG incorporated various mitigation measures and anticipated permit requirements into its project, and the analyses completed for the EIS assumed that such measures would be implemented. These measures are identified in Chapter 4 of the EIS, described as needed in each resource section of Chapter 3, and incorporated into this ROD as conditions for DOE's financial assistance under the cooperative agreement between DOE and NRG. Additional mitigation measures or measures specific to certain impacts or comments received are further discussed below in the section entitled *Potential Environmental Impacts and Mitigation Measures.*

Mitigation measures beyond those typically specified in permit conditions will be addressed in a Mitigation Action Plan (MAP). DOE will prepare the MAP, consistent with 10 CFR 1021.331, to establish how the mitigation measures will be planned, implemented, and monitored. The MAP will be an adaptive management tool; therefore mitigation conditions in it would be removed if equivalent conditions are otherwise established by permit, license, or law. Compliance with permit, license or regulatory requirements is not considered mitigation subject to DOE control and would therefore not be included in a MAP.

DOE will ensure that commitments in the MAP are met through management of its cooperative agreement with NRG, which requires that NRG fulfill the monitoring and mitigation requirements specified in this ROD. DOE will make copies of the MAP available for inspection in the appropriate locations for a reasonable time. Copies of the MAP and any annual reports required by the MAP will also be available upon written request.

Project Description and Location

The Parish PCCS Project would result in the construction and operation of a CO_2 capture facility utilizing an advanced amine-based absorption technology to capture at least 90 percent (approximately 1.6 million tons) of CO_2 annually from a flue gas slipstream taken from Unit 8 at the W.A. Parish Plant. This existing power plant is located on 4,880 acres in rural Fort Bend County within the incorporated area of the town of Thompsons, Texas. Up to 5,475 tons per day of captured CO_2 would be dried, compressed, and transported via a newly constructed approximately 81-mile long pipeline to the West Ranch oil field where it would be used in EOR operations. The four primary components of the project are:

(1) *CO_2 Capture Facility*—A post-combustion CO_2 capture facility would be constructed and attached to Unit 8 at the existing W.A. Parish Plant in Fort Bend County, Texas. A new 80-MW natural gas-fired turbine, currently under construction at the plant site, would produce the auxiliary electricity and steam needed by the CO_2 capture system.

(2) *CO_2 Pipeline*—Captured CO_2 would be transported via a new, approximately 81-mile-long, 12-inch-diameter pipeline to the West Ranch oil field, located near Vanderbilt, Texas, in Jackson County. The pipeline route crosses mostly rural and sparsely-developed agricultural lands in Fort Bend, Wharton, and Jackson Counties. NRG plans to use existing mowed and maintained utility ROWs to the extent practicable to minimize environmental impacts and avoid sensitive resources. A joint venture between NRG and Hillcorp Energy Company (HEC), known as Texas Coastal Ventures LLC (TCV), would operate the pipeline.

(3) *EOR Operations*—The proposed project would deliver up to 1.6 million tons of CO_2 per year to the West Ranch oil field for its use in EOR. The CO_2 would be injected into the 98–A, 41–A, Glasscock, and Greta sand units of the Frio Formation, approximately 5,000 to 6,300 feet below ground surface (bgs). The portions of the oil field in which EOR operations would be conducted are currently owned or leased by TCV. HEC has been contracted to conduct the EOR operations. TCV plans to make additional investments outside of the DOE funded program to modernize and prepare the oil field to safely accept CO_2 injection, but the activities are included in this project description because they are integrated into the project concept and considered connected actions.

(4) *CO_2 Monitoring Program*—TCV would implement a program to monitor the injection and migration of CO_2 within the geologic formations at the EOR site based on a CO_2 Monitoring Plan developed in cooperation with the Texas Bureau of Economic Geology (BEG). The monitoring program would be established and operated in accordance with requirements of the CCPI program and Railroad Commission of Texas (RRC) regulations for certification of CO_2 storage related to EOR operations (i.e., as specified in 16 TAC 5.305) and provisions of underground injection control permits for injection wells at the West Ranch oil field (i.e., existing permits for existing injection wells and new permits that would be required for newly installed injection wells).

The W.A. Parish Plant occupies an industrial area located next to relatively undeveloped lands. Scattered ranches and residences are located to the east and southwest, and Smithers Lake (a 2,430-acre man-made water body used for plant cooling water) is located to the north. The proposed CO_2 capture facility would have a footprint of approximately 400 feet by 400 feet (3.3 acres) within the existing W.A. Parish Plant. Including the CO_2 capture facility, the combustion turbine and heat recovery steam generator (CT/HRSG) area, two large laydown areas, and other project areas, a total of approximately 29 acres within the existing plant boundaries would be used during construction. Construction of the proposed project is planned to begin in mid-2013, at the earliest, and would take approximately 24 months to complete. Within the existing plant site, up to 22 acres of land would be required for two temporary construction staging and laydown areas for storage of materials and equipment. Construction materials and equipment would be delivered by truck and rail. The number of workers would vary during the two-year construction period, ranging from 250 to 600 during the various phases of construction and averaging approximately 300 personnel. The largest demand for construction workers would likely occur approximately six months after the start of construction, when approximately 600 construction workers would be on site. Construction water needs would be supplied by the existing plant's water system. Electricity would be provided by on-site maintenance power sources or by new metered service from a local retail provider. Potential construction-related environmental impacts would be typical of those associated with a large industrial construction project and would primarily be related to air emissions, construction traffic, fugitive dust from disturbance, and storm water runoff from construction areas. Best management practices (BMPs) would be implemented and all necessary permits would be obtained to minimize potential impacts and to comply with regulatory requirements during construction. For the purposes of this EIS, DOE assumes the CO_2 capture system would continue to operate for 20 years. The capture facility and associated equipment installed as part of the project would require an increase of approximately 15 full-time personnel divided among shifts (i.e., an increase of approximately 4 percent over current conditions). Also, up to five additional new positions may be required at the plant.

During operation of the project, process-related chemicals would be transported to the W.A. Parish Plant either by truck or rail. In addition to regulatory requirements, NRG would follow the chemical suppliers' recommendations and procedures in storing and handling all chemicals.

DOE's Proposed Action

DOE's proposed action is to provide $167 million in cost-shared funding through a cooperative agreement with NRG for its proposed project. DOE has already provided $7 million to NRG under Phase I for preliminary design and related preliminary activities of the project, as described above. The estimated total project cost is $845 million.

Alternatives

Congress directed DOE to pursue the goals of the CCPI program by means of partial funding of projects owned and controlled by non-federal sponsors. This statutory requirement places DOE in a much more limited role than if it were the owner and operator of the project. Here, the purpose of, and need for, DOE action is defined by the CCPI program (and its enabling legislation, Pub. L. 107–63). Given these programmatic purposes and needs, reasonable alternatives available to DOE prior to the selection of this project under the CCPI program were other projects that met the eligibility requirements. Other applications (and their potential environmental, safety, and health impacts) were considered during the selection process. Pursuant to 10 CFR 1021.216, a publicly-available synopsis of the environmental review and critique completed for the selection process has been included as Appendix A of the EIS.

The alternatives considered by DOE were limited to the applications submitted to DOE in response to requirements specified in the CCPI Round 3 solicitation. DOE considered all the applications that met the mandatory eligibility requirements as expressed in the funding opportunity announcement. DOE's action concerning these applications was to decide which projects would receive DOE financial assistance from among the eligible applications submitted. Unlike a project owned by DOE, when projects are selected in a competitive process in response to a funding opportunity announcement, DOE does not make decisions concerning the location, layout, design, or other features of the project. In other words, DOE must select among the eligible projects submitted to DOE by the applicants. DOE's initial decision is to select projects to receive federal financial assistance for a project definition phase prior to DOE's decision on whether to fund the project's construction and operation.

After DOE selects a project for an award, the range of reasonable alternatives becomes the project as proposed by the applicant, any alternatives still under consideration by the applicant, and the no-action alternative.

No-Action Alternative

Under the no-action alternative, DOE would not provide cost-shared funding for the proposed W.A. Parish PCCS Project. In the absence of DOE cost-shared funding, NRG could still elect to construct and operate the proposed project. Therefore, under the DOE no-action alternative, DOE assumes the proposed project would not be built or it would be built by NRG without the benefit of DOE funding.

DOE assumes that if NRG proceeded with project development in the absence of DOE funding, the project would include the features, attributes, and impacts as described for the proposed project. However, without DOE's participation, it is possible that the project would be canceled. Therefore, for the purposes of analysis in this EIS, DOE's no-action alternative is defined as the no-build alternative. This means that the project would not be built and environmental conditions would not change from the current baseline (i.e., no new construction, resource use, or CO_2 capture and storage would occur).

Therefore, under the no-action alternative, the project technologies (i.e., large-scale CO_2 capture and geologic storage) may not be implemented in the near term. Consequently, timely commercialization of these technologies for large-scale, coal-fired electric generation facilities would be postponed and may not be realized. This scenario would not contribute to the CCPI goals to invest in the demonstration of advanced coal-based power generation technologies that capture and sequester, CO_2 emissions. While the no-action alternative would not satisfy the purpose and need for DOE's proposed action, this alternative was retained for comparison to the effects of the proposed project, as required under CEQ Regulations (40 CFR 15012.14). The no-action alternative reflects the current baseline condition and serves as a benchmark against which the effects of the proposed action can be evaluated.

NRG has begun construction and plans to operate certain individual project components such as the natural gas-fired turbine without DOE funding for other purposes not related to the Parish PCCS project. The construction of the natural gas-fired turbine would not be part of the cooperative agreement with DOE. This facility would begin operation in 2013 and would provide peaking power unrelated to the Parish PCCS Project. At a later date, possibly 2015, the natural gas-fired turbine would be used to power the compressors of the carbon capture facility. This would result in a variation of the no-action alternative that would have minor environmental impacts, primarily in the area of air quality. If NRG decided to pursue the project without DOE funding, potential impacts would be similar to those evaluated under DOE's proposed action.

Potential Environmental Impacts and Mitigation Measures

In making its decision, DOE considered the environmental impacts of NRG's proposed project, DOE's proposed action, and the no-action alternative on potentially affected environmental resource areas. These included: Air quality and climate; greenhouse gas emissions; geology; physiography and soils; surface waters; ground water; floodplains; wetlands; biological resources; cultural resources; land use; aesthetics; traffic; transportation; noise; materials and waste management; human health and safety; utilities; community services; socioeconomics; and environmental justice. The EIS also considers the impacts from project facilities combined with those from other past, present and reasonably foreseeable future actions (i.e., cumulative impacts). The following sections discuss the potential impacts in these areas.

Air Quality and Climate

Construction of the CO_2 capture facility, CO_2 pipeline, and CO_2 monitoring infrastructure would result in short-term, localized increased tailpipe and fugitive dust emissions. Emission rates for criteria pollutants would be less than 1 percent of the total emissions in the region of influence (ROI), except PM_{10} emissions during 2013, which would account for 3.1 percent of total ROI emissions. Emission rates for ozone precursors (i.e., VOC and nitrogen oxides [NO_X]) during the construction phase of the project would be lower than thresholds documented in the EPA rules for General Conformity (40 CFR 94.153).

Operational emissions from the pipeline corridor would be negligible. Operational emissions of criteria pollutants from the CO_2 capture facility and related infrastructure (e.g., CT/HRSG) and the CO_2 recycle facility would be less than 1 percent of the total emissions in the ROI. Operational emissions of NO_X and VOC would exceed the thresholds documented in the Conformity Rules. NRG is required to obtain and retire 1.3 tons of credits or allowances, as applicable, for each ton of NO_X and VOC emissions increase related to the proposed project. NRG owns and has assigned the appropriate amount of NO_X emission credits approved for use in the Houston Galveston Brazoria Metropolitan Statistical Area (HGB MSA) to the Parish PCCS Project.

NRG would be required to purchase and retire 1.3 tons of credits or allowances, as applicable, for each ton of emission increase related to the proposed project. Due to the 1.3 to 1 retirement ratio of emission reduction credits and allowances, the proposed project would result in no net adverse impact on air quality in the HGB MSA with regard to ozone. Therefore, adverse impacts to air quality in the ROI due to operational emissions from the proposed project would be considered negligible to minor with some beneficial impacts in the form of elimination of sulfur dioxide and other emissions from Unit 8's flue gas slipstream.

As part of the state air permit application process, NRG was required to complete an air quality analysis to determine the effect of anticipated project air emissions on area air quality. The analysis included dispersion modeling, which compared the predicted ambient air quality concentrations to the National Ambient Air Quality Standards (NAAQS). The analysis supported the conclusion that predicted emissions resulting from the

project would not cause or contribute to a violation of the NAAQS. The Texas Commission on Environmental Quality (TCEQ) approved the analysis and issued the air permit on December 2012.

Mitigation: To control fugitive dust, NRG must stabilize open piles and disturbed areas by covering and/or applying water or other dust control additive. NRG must also limit the speed of non-earthmoving equipment to 15 mph and earthmoving equipment to 10 mph to prevent spilling hauled materials. Disturbed areas shall be revegetated as soon as possible.

To control mobile and stationary source emissions, NRG must use modern, well-maintained diesel-powered equipment during construction and limit idling of heavy equipment. EPA recommended limiting idling to less than five minutes.

Greenhouse Gasses

Construction of the CO_2 capture facility, CO_2 pipeline, and CO_2 monitoring infrastructure would generate up to approximately 4,900 tpy (4,400 metric tons per annum) of CO_2 emissions over the two-year construction period. Operation of the CO_2 capture facility and CO_2 recycle facility would result in approximately 785,000 tpy (0.71 million metric tons per annum [MMTA]) of new CO_2 emissions. However, the proposed project would result in the capture of approximately 1.6 million tpy (1.5 MMTA) of existing CO_2 emissions, resulting in a net reduction of approximately 815,000 tpy (0.74 MMTA) of CO_2 emissions during operations.

The capture and geological storage of existing GHG emissions by the project would produce a minor beneficial cumulative effect on a national and global scale. The reduction in CO_2 emissions resulting from the Parish PCCS Project would incrementally reduce the rate of GHG accumulation in the atmosphere and help to incrementally mitigate climate change related to atmospheric concentrations of GHGs.

Mitigation: NRG must design and construct the Parish PCCS Project to capture at least 90 percent of the carbon in the fossil fuels when operating under normal conditions, and use best efforts to achieve at least a 90 percent capture rate during the demonstration period.

Geology

Construction of the CO_2 capture facility, pipeline, and recycle facility would result in negligible impacts to geologic resources. New well construction in the EOR area would result in removal of geologic media through the drilling process. This process would not be unique to the area and would not affect the availability of local geologic resources. Existing wells used by the project would be reworked, resulting in a potential beneficial impact to geologic resources by reducing the risk of leakage.

Operation of the CO_2 capture facility and pipeline would not affect geologic resources. In the EOR area, the potential for CO_2 migration upward through the caprock seal is considered unlikely; however, leakage from one or more previously plugged and abandoned wells, oil-producing wells, injection wells, or observation wells might occur if any casing and/or cement placed in or around a well were to leak. To mitigate the potential for impacts related to casing or annular seal issues associated with wells in the proposed injection area, TCV would correct deficiencies prior to the use of such wells. These improvements to existing wells would result in a potential beneficial impact to geological resources by reducing the chance of leakage due to improperly sealed wells.

Preliminary reservoir modeling indicates that injected CO_2 and associated zones of increased pressure would not be expected to migrate laterally outside the area at the West Ranch oil field that is leased and operated by TCV. No known major faults exist within the West Ranch oil field or within the area of maximum predicted EOR-induced impacts to geologic formations. Therefore, the potential for the proposed project to increase seismic activity or for seismic activity to impact proposed project activities or facilities is low.

The addition of CO_2 to a geologic unit (i.e., a target geologic unit or an overlying unit, if leakage were to occur) could make the fluids within the unit more acidic. The creation of potentially more corrosive conditions could result in increased costs for later oil and gas development. However, DOE expects the injection of CO_2 to beneficially impact oil and gas resources at the West Ranch oil field by increasing production from the target geologic units. Furthermore, the presence of infrastructure for CO_2 floods may make oil production from other geologic units at the oil field more feasible, which could result in an indirect beneficial impact.

Mitigation: NRG must develop a CO_2 monitoring plan, in coordination with the Texas Bureau of Economic Geology (BEG) and DOE, to account for the CO_2 used for EOR and ultimately sequestered. Subsequent reports submitted to the state of Texas must also be submitted to DOE.

Physiography and Soils

Potential minor impacts to physiography and soils during construction would include disturbance of soils and the potential for increased soil erosion from grading, soil excavation activities, earthwork compaction, and installation of impermeable surfaces over soils at some locations. At the CO_2 capture facility, up to 29 acres of soil within the plant boundary would be disturbed or lost. Soils in this area are classified as Prime Farmland, but they have been previously impacted and would not be used for agricultural purposes. For the proposed pipeline development, up to 1,197 acres of soils would be disturbed; however, the disturbed areas would be restored following construction and overall impacts would be minimized through use of existing ROW for most of its length. Approximately 819 acres in the construction ROW is classified as Prime Farmland and approximately 43 acres classified as more than slightly erodible (i.e., moderately to severely erodible). In agricultural areas, impacts to soil would be minimized by segregating topsoil from underlying soil and placing the topsoil back as the top layer when the trench is filled. For the EOR area, construction and operational activities would be conducted in existing operational areas; therefore, impacts to soils would be similar to existing impacts. Potential soil impacts in all construction areas would be avoided or mitigated as described in a project-specific storm water pollution prevention plan (SWPPP).

Operational activities associated with the CO_2 capture facility, CO_2 pipeline, and CO_2 monitoring infrastructure would be anticipated to result in negligible impacts to soil resources, primarily due to disturbance of soils from vehicle traffic and an increased potential for erosion.

Ground Water

The potential for groundwater contamination during construction is considered low as potential spills and unintentional releases of wastes or petroleum-based materials to groundwater would be avoided or mitigated as described in a project-specific spill prevention, control and countermeasures (SPCC) plan.

Operation of the CO_2 capture facility would require an additional 0.2 to 0.3 million gallons per day (mgd) of groundwater from existing onsite wells (an approximately 13 percent increase as compared to current groundwater

usage rates). The existing wells at the W.A. Parish Plant offer adequate capacity to supply the CO_2 capture facility with potential minor impacts to on-site groundwater supplies.

There are currently no plans to withdraw groundwater or to discharge directly to groundwater during construction of the proposed pipeline.

Water supply wells near the West Ranch oil field are not anticipated to be affected by injected or displaced fluids due to the relatively shallow depths of existing groundwater supply wells as compared to the depths of the proposed CO_2 injection wells in the Frio Formation (approximately 5,000 to 6,200 feet bgs) and the existing produced water injection wells in the Catahoula Sandstone (approximately 4,250 to 4,500 feet bgs); the presence of the approximately 400-foot-thick, low-permeability confining caprock formation (i.e., the Anahuac Formation) and the approximately 2,000-foot-thick low-permeability Burkeville confining system; and the absence of known faults in the EOR area.

DOE considers it unlikely that CO_2 would leak from the injection zone. However, the possibility exists for impacts to occur to shallower geologic units if leakage of CO_2 from the injection reservoir units occurred. As part of the proposed CO_2 monitoring program, TCV and BEG would conduct studies to detect migration of injected or displaced fluids, should migration occur, so that potential long term impacts to groundwater resources may be minimized or avoided.

In the EOR area, the potential for CO_2 to migrate upward through fractures in the caprock seal is considered unlikely. However, leakage from one or more wells might occur if any casing and/or cement placed in or around a well failed. TCV and BEG would conduct well integrity testing prior to EOR operations and TCV would correct deficiencies prior to use of such wells in order to mitigate the potential for impacts. Additionally, existing wells used by the project would be reworked. Improvements to existing wells would result in a potential beneficial impact to groundwater resources by reducing the chance of leakage due to improperly sealed wells.

Surface Water

Construction of project-related facilities has the potential to cause increased sedimentation and turbidity in adjacent water bodies and increase the potential for surface water contamination from material spills. A SWPPP would be developed and implemented to avoid or minimize potential impacts to surface waters during construction activities.

Negligible impacts to the surface water supply at the W.A. Parish Plant would be expected due to the approximately 12,000 gallons per day (gpd) required during construction for dust suppression, vehicle wash down, and other construction-related uses. Operation of the CO_2 capture facility (including supporting infrastructure and facilities, such as the CT/HRSG and cooling water tower), would require approximately 3.5 to 4.9 mgd more surface water from Smithers Lake than is currently used by the W.A. Parish Plant. Including this approximately 10 percent increase in surface water usage, the plant would use a total of 38 to 55 mgd of surface water. Minor impacts on surface water supplies would be expected. NRG's projected surface water usage would also be well below its current 99 mgd of surface water rights.

During construction of the proposed pipeline, approximately 1.75 million gallons of water would be trucked in from outside sources or obtained from nearby surface water. NRG must discharge spent hydrostatic test water to upland areas according to RRC and EPA discharge permits and guidelines, as applicable. Additional mitigation measures, as identified in communication from the Texas Parks and Wildlife Department (TPWD) must be employed when crossing or working near Ecologically Significant Stream Segments. Some of these streams will be crossed using horizontal directional drilling (HDD) construction techniques. Crossings of the San Bernard River and Caney Creek are not expected to exacerbate existing water quality impairments in these water bodies. Construction-related impacts are expected to be negligible to moderate and temporary. Normal pipeline operations are not expected to impact surface waters.

Negligible to minor impacts to surface water features at the West Ranch oil field would be expected to occur as a result of construction activities within the proposed EOR area. During EOR operations, the potential exists for a CO_2 well blow-out, with some injected material being ejected and deposited into nearby surface waters. If that were to occur, such effects would be highly localized, minor, and readily remediated.

Mitigation: NRG must implement the additional mitigation measures, e.g., double silt fencing, identified by the TPWD in a March 20, 2012, letter when crossing or working near Ecologically Significant Stream Segments during pipeline construction.

Floodplains and Wetlands

In accordance with 10 CFR Part 1022 (DOE regulations on Compliance with Floodplain and Wetland Environmental Review Requirements), DOE considered the potential impacts of the proposed project and its connected actions on wetlands and floodplains in the affected area. An assessment of impacts to wetlands and floodplains is included in the EIS. NRG selected sites and a pipeline route that would minimize impacts to wetlands and floodplains, and has committed to implementing methods designed to further reduce impacts. Overall, the proposed project would result in minor, direct short-term impacts to wetlands and negligible impacts to floodplains.

No wetlands or floodplains exist within the area proposed for the CO_2 capture facility at the W.A. Parish Plant or within the area proposed for the CO_2 recycle facility at the West Ranch oil field. However, construction of project-related facilities has the potential to cause increased sedimentation and turbidity in adjacent wetlands and increase the potential for contamination from materials spills. A SWPPP utilizing appropriate spill prevention, control and countermeasures would be developed and implemented to avoid or minimize potential impacts to wetland and floodplain areas during construction activities, resulting in negligible to minor impacts.

Approximately 81 acres of wetlands would be temporarily impacted during pipeline construction and approximately 4 acres of wetlands may be permanently impacted. Topsoil in wetland areas would be segregated from other excavated material during trenching and returned to the surface to promote revegetation of disturbed areas and to restore preexisting soil conditions. NRG plans to reduce the width of the construction ROW in wetland areas and/or use timber mats or low ground pressure equipment to minimize wetland impacts, as appropriate. Impacts to large riverine features and any adjacent wetlands would be avoided through the use of HDD methodology. Based on the current project design and field survey data collected to date, compensatory wetland mitigation would likely not be required for NRG's proposed project by the U.S. Army Corps of Engineers (USACE) or the state of Texas. At this time, DOE anticipates that wetland impacts will require Nationwide Permits for all stream and water body crossings. If conditions or plans become altered, any changes in permitting strategy or the need for compensatory wetland

mitigation would come under the jurisdiction of the USACE. Mitigation requirements would be detailed as part of the permitting process.

The pipeline route would cross Federal Emergency Management Agency (FEMA) 100-year and 500-year floodplains in 25 locations. DOE does not expect that the minor, temporary impacts from construction would reach a level of endangering human health or property or conflict with any state, local, or federal floodplain ordinances or plans. Following pipeline installation, the construction ROW would be returned to its original topography to the extent practicable. Five main line valves would be constructed within the FEMA 100-year floodplain in Wharton County. Changes to the flood elevation or the flow of water in the floodplain as a result of these valves would be negligible. No other aboveground facilities are planned within floodplain areas. Additionally, BMPs (as specified in a site-specific SWPPP) would be implemented to avoid or minimize potential impacts to wetland and floodplain areas during construction activities, resulting in negligible to minor impacts.

During pipeline operations, a 30-foot permanent ROW would be mowed and maintained along the pipeline route for pipeline inspection and maintenance activities, which could result in minor long-term impacts due to the potential changes to wetland quality and function in the approximately 31 acres of wetlands located within the proposed permanent ROW. Impacts to floodplains would be minor during pipeline operations.

DOE does not expect EOR operations or related CO_2 monitoring activities to impact floodplains or wetlands within the West Ranch oil field. Activities would be conducted on existing well pads and within existing ROWs as much as possible.

Mitigation: NRG must implement the mitigation techniques described above and analyzed in the EIS, including but not limited to reducing the construction ROW width in wetland areas, use of timber mats or low ground pressure equipment, and the use of HDD to cross sensitive areas. If compensatory wetland mitigation becomes necessary as part of any USACE permit, NRG must implement additional mitigation as required and described in the permit.

Biological Resources

Construction and operations activities at the CO_2 capture facility and EOR area would be expected to have negligible impacts to biological resources. Affected habitats at these locations have been disturbed by past and ongoing industrial and oil production activities. Impacts to wildlife from construction of the pipeline corridor would be negligible to minor. Approximately 75 percent of the proposed pipeline corridor would be constructed within or immediately adjacent to existing mowed and maintained utility corridors. Also, approximately 60 percent of the pipeline corridor is currently in agricultural use, which is of limited use to wildlife. The pipeline route was chosen to minimize the overall effect to wildlife and fragmentation of wildlife habitat. Construction activities, including land clearing, would cause a negligible loss of wildlife habitat. The potential would exist for invasive species to colonize newly disturbed areas following construction, which could result in long-term moderate adverse impacts to biological resources. Except in cultivated fields or unless requested by the landowner, NRG would revegetate areas of disturbed soil along the pipeline construction ROW following construction with an appropriate mix of seeds for perennial grasses and forbs native to the area or with a seed mixture requested by the landowner to reduce the potential for establishment of invasive plant species. Depending on the season in which construction is completed, NRG may also seed with a cold-weather annual grass species, such as Gulf Coast ryegrass (*Lolium multiflorum*), to establish a temporary vegetative cover until conditions become favorable for growth of perennial grasses and forbs.

One active bald eagle nest was observed during field surveys in the ROI. The proposed pipeline route has been located approximately one mile from this nest, thus avoiding any impact.

One state-listed threatened mussel species (smooth pimpleback, *Quadrula houstonensis*) was observed during field surveys in the ROI. This species has also been proposed for federal listing. Impacts to this mussel species, and mussel habitat in general, would be avoided by using HDD and by careful placement of temporary water intakes and discharges at this location. Similarly, HDD methodology will be employed at other river crossing locations classified as Ecologically Significant Stream Segments by the state of Texas.

NRG would limit land-clearing activities in previously undisturbed areas to periods outside of migratory birds' nesting seasons, to the extent practicable, to minimize the potential for impacts to migratory birds. If clearing vegetation during the nesting season or whooping crane migration period is unavoidable, previously undisturbed areas within the construction area would be surveyed prior to construction to verify that whooping cranes or nests with eggs or young would not be disturbed by construction activities. The proposed pipeline corridor would cross the whooping crane migratory pathway. Any areas being temporarily used by whooping cranes during its migration at the time of construction must be avoided until the cranes have left the area.

Mitigation: NRG must continue consultation with the TPWD to minimize potential impacts on state-listed mussel species at pipeline crossings at larger rivers. As described in the EIS, HDD methods must be employed at these and other crossings, with appropriate actions taken to locate soil borings and temporary water intakes and discharges to minimize impacts to nearby mussel beds. If mussel relocations become necessary, NRG must coordinate its efforts with the TPWD.

NRG must avoid ground disturbing activities during migratory birds' nesting and breeding seasons to protect species protected by the Migratory Bird Treaty Act. If this is not practicable, a qualified biologist must survey potentially affected areas prior to ground disturbing activities and determine the appropriate actions needed to avoid impacts.

During the whooping crane migration period (late March to early April; and late October to mid-December), if whooping cranes are observed in areas planned for pipeline construction, NRG must temporarily suspend activities in those immediate areas until the cranes leave.

NRG, in coordination with DOE, must continue consultation with the TPWD and should request technical assistance from the USFWS if project changes require additional disturbance at new locations. This may occur if the currently proposed pipeline route needs to be altered or for other unforeseen areas of ground disturbance not included in the EIS. NRG must complete any additional surveys and identified mitigation prior to construction in those areas.

NRG must revegetate disturbed areas using methods approved by the state of Texas and with coordination with land owners.

Cultural Resources

The THC identified the following Native American Tribes that may have an interest in activities in the proposed

project area: The Alabama-Coushatta Tribe of Texas, the Apache Tribe of Oklahoma, the Comanche Nation of Oklahoma, the Coushatta Tribe of Louisiana, the Kiowa Indian Tribe of Oklahoma, the Mescalero Apache Tribe of the Mescalero Reservation, the Tonkawa Tribe of Indians of Oklahoma, and the Tunica-Biloxi Indian Tribe of Louisiana. DOE sent letters to these tribes, and only the Coushatta Tribe of Louisiana responded. The Coushatta Tribe of Louisiana concurred with DOE's findings of ''no historical properties affected.''

DOE determined, and the THC has concurred, that no impacts to historic properties listed, or eligible for listing, in the Nation Register of Historic Places (NRHP) would be expected from construction or operational activities for the CO_2 capture facility or EOR areas. Additionally, based on cultural resources survey data collected to date, DOE has determined that no historic properties listed, or eligible for listing, in the NRHP would be impacted by the construction and operation of the proposed pipeline. Additional investigation activities (i.e., mechanized trenching) found no deeply buried archaeological deposits at HDD entry and exit locations near several proposed river crossings. DOE submitted its findings regarding pipeline corridor surveys to the THC for review, and consultation with the THC is ongoing.

Mitigation: NRG, in coordination with DOE, must continue consultation with the Texas Historical Commission (State Historical Preservation Office) for areas not previously surveyed for cultural resources. This may occur if the currently proposed pipeline route needs to be altered or for other unforeseen areas of ground disturbance not included in the EIS. NRG must complete any additional surveys prior to construction in those areas.

Land Use and Aesthetics

The proposed construction and operation of the CO_2 capture facility at the W.A. Parish Plant and CO_2 monitoring infrastructure at the West Ranch oil field is consistent with existing land use and would result in negligible to minor impacts. Construction of the proposed CO_2 pipeline would temporarily impact approximately 386 acres of agricultural lands, but no permanent loss of agricultural lands would occur. Less than 0.3 acres would be converted for aboveground pipeline facilities (one meter station and 12 main line valves).

Impacts to aesthetic values would be negligible at the CO_2 capture facility and EOR field as the existing aesthetic character would generally remain unchanged. Along the proposed CO_2 pipeline route, minor to moderate aesthetic impacts to adjacent property owners would occur in some locations due to construction noise, truck traffic, fugitive dust emissions, and vegetation clearing. Operational aesthetic impacts would be negligible to minor and would be related to placement of pipeline markers, periodic vegetation clearing, and other maintenance activities.

The impact of lighting during construction would be temporary and minor. The impact of lighting for operations at the proposed CO_2 capture facility, the CO_2 monitoring facilities, and the pipeline meter station would be negligible to minor as lighting would be consistent with existing operations. Lighting along the pipeline would be limited to the meter station. Meter station lighting would be down shielded to avoid interference with wildlife, which would result in minor impacts.

Mitigation: NRG must install down-shielded lighting for permanent light needs wherever possible.

Traffic and Transportation

A temporary increase in traffic during construction (up to 1,100 workers) is expected and would be easily accommodated by the existing road systems with only minor temporary disruptions. Continuing operation of the W.A. Parish Plant, the pipeline, and the West Ranch oil field would have negligible effects as a relatively small number of commuting employees (10 to 15) would be added as well as a relatively small amount of additional material deliveries.

Noise

Construction of the CO_2 capture facility would result an estimated 0.3 dB increase over existing noise levels for nearby receptors (i.e., nearby residential areas), which is below the threshold of human perception. Increased truck traffic during daytime hours may result in minor, short-term noise impacts along transportation corridors. Residences within 500 to 1,000 feet of pipeline construction would experience a short-term increase in ambient noise and vibrations from construction activity. Receptors near HDD locations could experience elevated temporary ambient noise levels as high as 78 dBA. Overall, noise and vibrations would result in minor to moderate impacts to receptors, depending on the distance from the receptor to the construction area. Construction and operations at the West Ranch oil field would result in an estimated 0.8 dB increase over existing noise levels for nearby individuals (i.e., in Vanderbilt), which is below the threshold of human perception, resulting in negligible to minor impacts to receptors.

Materials and Waste Management

Construction materials, equipment and supplies are readily available within the ROI and quantities required to support the proposed project are expected to be well within the capacity of material suppliers. Some specialized equipment may be required from outside the ROI; however, it is expected that this equipment would also be within existing supplier capacities. As a result, impacts to regional and national construction material resources and special equipment suppliers would be negligible.

The W.A. Parish Plant is currently a conditionally exempt small quantity generator and generates approximately 200 pounds of hazardous waste per year. During operations, the generation of approximately 2,712 pounds per day of reclaimer effluent, a hazardous material, would cause the plant to be classified as a large quantity generator. Approximately 24 shipments of reclaimer effluent would be sent to a permitted treatment, storage and disposal facility (TSDF) per year. The amounts sent for disposal would not substantially affect the capacities of the TSDF selected.

Adequate non-hazardous solid waste disposal capacity exists within the ROI. Based on the over 20 million tons of capacity available in regional waste disposal facilities and the relatively low volumes of solid waste that would be generated by the proposed project (e.g., up to approximately 60 tons per year from the CO_2 capture facility), adequate regional capacity exists for solid waste disposal with negligible impacts to waste management service providers.

Human Health and Safety

The potential for worker injuries and fatalities would be present during the construction of the proposed CO_2 capture facility, CO_2 pipeline, and CO_2 monitoring infrastructure. Based on historical records for related industries, no worker fatalities would be expected. During facility operation, workers could be subject to physical and chemical hazards, which would be typical of those associated with similar power plant, pipeline, and oil field operations. An estimated nine to 12 OSHA recordable incidents would be anticipated during project construction based on national incidence rates for comparable industries.

A human health risk assessment was performed for the EIS to analyze the

potential health and safety impacts associated with CO_2 and amine releases from proposed project components. The potential for CO_2 pipeline ruptures or punctures is considered to be unlikely. The upper bound impact from a pipeline release of CO_2 would be transient and reversible effects for up to 12 people. More severe impacts would affect less than one person for all other pipeline release scenarios. If a release were to occur with workers present, the workers would likely experience the physical effects of an accident or a higher concentration exposure to CO_2 than the surrounding population. Potential exposure would be limited because the pipeline would be buried underground. Additionally, NRG plans to install 12 main line valves to stop the release of CO_2 should a puncture or rupture occur. These valves, along with pipeline pressure monitoring equipment, would be linked to the CO_2 capture system operations control room, which would be staffed at all times when the system is in operation. In the event of a pressure drop indicating a pipeline rupture, the control room operator would shut down the system and remotely activate the main line valves to prevent further damage to the pipeline and minimize impacts to people in the surrounding area and the environment.

The potential for release of CO_2 from the EOR area is considered to range from unlikely to incredible (i.e., extremely unlikely), with less than one person affected for all release scenarios. In the extremely unlikely occurrence of an injection well blowout, the main adverse outcome would be the potential for ejection of CO_2, possibly as dry ice particles, and formation fluids from the wellhead. Effects would be expected to be localized to the area around the affected wellhead and events of this type would be avoided or minimized by incorporating high pressure piping, overpressure protection valves, and blowout preventers into the design of the injection wells. A leak of amine-based solvent from a storage tank was also evaluated. Such a release would be unlikely and effects would be confined to the plant property. No nearby residents or the general public in the vicinity of the plant would be affected. Plant workers would need to take appropriate response actions, since life-threatening concentrations of the solvent in air could occur within the plant site to a distance of 0.3 miles from the release. No nearby residents or other individuals in the vicinity of the plant would be affected beyond mild irritation if an amine-based solvent tank release occurred, although an odor may be detectable depending on wind conditions.

Utilities

The construction and operations phases of the proposed project would increase demand for potable and industrial water; and wastewater treatment services. Construction-related impacts to water supplies would be short term and negligible to minor. Construction-related impacts to wastewater treatment would be negligible. Operations impacts to water supplies would be negligible. Operations of the CO_2 capture facility would result in negligible impacts to the natural gas supply as compared to existing use (i.e., much less than 1 percent of the current maximum usage).

EOR operations may require additional natural gas supply and electricity, which may result in minor impacts to the local utility infrastructure. Beneficial impacts to oil supplies would be provided in the long term as a result of increased production of oil in the ROI as a result of EOR operations.

Community Services

A temporary workforce of up to 1,100 workers would be required for construction of the proposed project. Long-term operation of the project would require up to 20 new employees. Many of these workers are expected to be employed from within the ROI. Negligible impacts on community services would be expected due to a relatively small population increase during the construction and operation phases of the Parish PCCS Project. Existing community services (i.e., law enforcement, emergency response, hospitals, and education) are expected to be adequate to address the needs of the population in the ROI, including project personnel.

Socioeconomics

The project would be expected to contribute minor, long-term, beneficial impacts on the local economy and employment activities, as well as taxes and revenue through increased employment opportunities and expenditures in the local economy. Housing demand may increase slightly during construction if a portion of the 1,100 construction workers temporarily relocate to the area; however, this would be a negligible, short-term effect. TCV estimates that using CO_2 floods (i.e., EOR), the West Ranch oil field could produce an additional 55 to 75 million barrels of oil. This projected increase in oil production would translate directly into additional revenues for the State of Texas, even after taking into account the tax exemptions related to use of CO_2 from anthropogenic sources for EOR.

Environmental Justice

Three census tracts in the ROI qualify as minority environmental justice areas of concern using the threshold of 50 percent minority in the corresponding county. However, the proposed project is not expected to have disproportionately high and adverse human health or environmental impacts on minority populations. The overall impacts of the proposed project would be negligible or minor, depending on the resource area evaluated, and would not be directed at any particular minority group. Significant or adverse impacts on potential environmental justice areas of concern would not occur. In addition, the proposed project is expected to create economic benefits for local communities, regardless of race, by generating employment opportunities, local expenditures by workers, and compensation for proposed project-related easements to local landowners. Mitigation measures for resource areas impacted have been identified to further reduce environmental impacts and adhere to policies and regulations for the protection of the environment and local public health. Therefore, the proposed project would not create disproportionately high and adverse human health or environmental impacts on minority populations during construction or operation.

Because there is no low-income population in the ROI to be affected, there would be no adverse environmental justice impacts associated with the proposed project. However, DOE expects the proposed project would create economic benefits for local communities during construction and operation.

Potential Environmental Impacts of the No-Action Alternative

Under the no-action alternative, DOE assumed the only development at the facility would be the construction and operation of a natural gas-fired turbine at the W.A. Parish Plant that would begin operation in 2013. The impacts under the no-action alternative (i.e. no development) were evaluated in the EIS and compared to the proposed action.

Under the no-action alternative, the W.A. Parish Plant, pipeline corridor, and the EOR area at the West Ranch oil field would remain in their current condition with respect to the following: Geologic resources; physiography and soils; groundwater resources; surface

waters; wetlands and floodplains; biological resources; cultural resources; land use and aesthetic resources; noise; material use and waste generation; human health and safety; community services; and environmental justice.

Construction and operation of a natural gas-fired turbine at the W.A. Parish Plant under the no-action alternative would be a new source with emissions of criteria pollutants and GHG. The criteria pollutant emissions associated with the facility are estimated to be: 102.1 tpy of CO, 37.6 tpy of NO_X, 75.1 tpy of PM_{10}, 71.7 tpy of $PM_{2.5}$, 6.9 tpy of SO_2, and 12.88 tpy of VOC. These potential emission increases were evaluated by TCEQ, and are authorized in the permit that it issued on December 21, 2012. The GHG emissions associated with the turbine are estimated to be: 582,328 tpy of CO_2, 2.44 tpy of H_2SO_4, and 34.2 tpy of NH_3. Since there will be no emission reductions to offset the emission increases from the turbine; there would be an overall increase in GHG emissions. These GHG emission increases would have to be authorized under a PSD permit from the EPA. There would also be no commercial-scale demonstration of advanced coal-based power generation technologies to capture CO_2 for EOR and ultimate sequestration.

Construction of the natural gas-fired turbine at the W.A. Parish Plant would temporarily increase traffic during construction (up to 100 workers), but would be easily accommodated by the existing road systems with only minor temporary disruptions. The personnel employed during construction of the turbine would result in minor short-term beneficial impacts by consumption of goods and services. Construction of the natural gas-fired turbine would likely result in a moderate, beneficial impact to taxes and revenue within the ROI.

The construction and operations phases of the natural gas-fired turbine would increase demand for potable and industrial water; and wastewater treatment services. Construction-related impacts to water supplies would be short term and negligible to minor. Construction-related impacts to wastewater treatment would be negligible. Operations impacts to water supplies would be negligible. Operations of the turbine would result in negligible impacts to the natural gas supply as compared to existing use (i.e., much less than 1 percent of the current maximum usage). The turbine would supply electricity that would be available for commercial sale through the power grid, and would be a beneficial impact until the electricity and steam are needed for the capture facility.

Environmentally Preferred Alternative

From a local perspective, the no-action alternative is the environmentally preferable alternative because it would result in no changes to the existing environmental conditions, with the exception of the natural gas-fired turbine, which NRG has begun constructing and plans to operate with or without DOE funding. However, from a national perspective, DOE's proposed action is the environmentally preferred alternative. Successful demonstration of the proposed project could facilitate the deployment of carbon capture, utilization and storage (sequestration) practices at power plants and other industrial facilities in an effort to reduce greenhouse gas emissions that would otherwise occur with the continued combustion of fossil fuels, especially coal, from large stationary sources.

Issued in Pittsburgh, Pennsylvania, on this 8th of May 2013.

Anthony V. Cugini,

Director, National Energy Technology Laboratory.

[FR Doc. 2013–12280 Filed 5–22–13; 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. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, June 12, 2013 8:00 a.m.–5:00 p.m.

The opportunities for public comment will be at 9:45 a.m. and 2:45 p.m.

These times are subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Hilton Garden Inn, 700 Lindsay Boulevard, Idaho Falls, Idaho 83402.

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 email: *pencerl@id.doe.gov* or visit the Board's Internet home page at: *http://inlcab.energy.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 Topics (agenda topics may change up to the day of the meeting; please contact Robert L. Pence for the most current agenda):

- Recent Public Involvement
- Idaho Cleanup Project Progress to Date
- Sodium Bearing Waste Treatment Plant Update
- Results of Remote-Handled Transuranic Waste Negotiations with the State
- Discuss Hanford Cleanup Issues—Hanford 101
- National Transportation Stakeholders' Forum—Overview
- Waste Isolation Pilot Plant 101

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://inlcab.energy.gov/pages/meetings.php.*

Issued at Washington, DC, on May 20, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–12283 Filed 5–22–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

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), Oak Ridge Reservation. 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, June 12, 2013 6:00 p.m.

ADDRESSES: Department of Energy Information Center, Office of Science and Technical Information, 1 Science.gov Way, Oak Ridge, Tennessee 37830.

FOR FURTHER INFORMATION CONTACT: Melyssa P. Noe, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 241–3315; Fax (865) 576–0956 or email: *noemp@emor.doe.gov* or check the Web site at *www.oakridge.doe.gov/em/ssab.*

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:

- Welcome and Announcements
- Comments from the Deputy Designated Federal Officer
- Comments from the DOE, Tennessee Department of Environment and Conservation, and Environmental Protection Agency Liaisons
- Public Comment Period
- Presentation on the National Environmental Management Program
- Additions/Approval of Agenda
- Motions/Approval of May 8, 2013 meeting minutes
- Status of Recommendations with DOE
- Committee Reports
- Federal Coordinator Report
- Adjourn

Public Participation: The EM SSAB, Oak Ridge, 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 Melyssa P. Noe 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 statements pertaining to the agenda item should contact Melyssa P. Noe at the address or telephone number listed above. Requests 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 Melyssa P. Noe at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/board-minutes.html.*

Issued at Washington, DC, on May 20, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–12284 Filed 5–22–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–474–000]

Texas Eastern Transmission, LP; Prior Notice Activity Under Blanket Certificate

On May 8, 2013, Texas Eastern Transmission, LP (Texas Eastern), filed a prior notice request pursuant to Sections 157.205, 157.213, and 157.216 of the Commission's regulations under the Natural Gas Act, and Texas Eastern's blanket certificate issued in Docket No. CP82–535–000. Texas Eastern seeks authorization to convert an existing injection/withdrawal well to an observation well, and to abandon an associated storage lateral line and ancillary facilities at the Accident Storage Field in Garrett County, Maryland.

Questions regarding this application may be directed to Lisa A. Connolly, General Manager, Rates & Certificates, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642, or by calling 713 627–4102, by faxing 713 627–5947, or by emailing *laconnolly@spectraenergy.com.*

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review (NSER). If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a NSER will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such motions or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the

''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12295 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC13–15–000]

Commission Information Collection Activities (FERC–582); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC–582 (Electric Fees, Annual Charges, Waivers, and Exemptions).

DATES: Comments on the collection of information are due July 22, 2013.

ADDRESSES: You may submit comments (identified by Docket No. IC13–15–000) by either of the following methods:

- *eFiling at Commission's Web site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Title: Electric Fees, Annual Charges, Waivers, and Exemptions.

OMB Control No.: 1902–0132.

Type of Request: Three-year extension of the FERC–582 information collection requirements with no changes to the current reporting requirements.

Abstract: The information required by FERC–582 is contained within 18 Code of Federal Regulations (CFR) part 381 [1] and part 382.[2]

The Commission uses the FERC–582 to implement the statutory provisions of the Independent Offices Appropriation Act of 1952 (IOAA) [3] which authorizes the Commission to establish fees for its services. In addition, the Omnibus Budget Reconciliation Act of 1986 (OBRA) [4] authorizes the Commission to assess and collect fees and annual charges in any fiscal year in amounts equal to all the costs incurred by the Commission in that fiscal year.

To comply with the FERC–582 respondents submit to the Commission the sum of the megawatt-hours (MWh) of all unbundled transmission (including MWh delivered in wheeling transactions and MWh delivered in exchange transactions) and the megawatt-hours of all bundled wholesale power sales (to the extent the bundled wholesale power sales were not separately reported as unbundled transmission). The data collected within the FERC–582 is drawn directly from the FERC Form 1 transmission data. The Commission sums the costs of its electric regulatory program and subtracts all electric regulatory program filing fee collections to determine the total collectible electric regulatory program costs. Then, the Commission uses the data submitted under FERC–582 to determine the total megawatt-hours of transmission of electric energy in interstate commerce.

Respondents (e.g. public utilities, power marketers) subject to these annual charges must submit FERC–582 data to the Commission by April 30 of each year.[5] The Commission issues bills for annual charges to respondents. Then, respondents must pay the charges within 45 days of the Commission's issuance of the bill.

Respondents file requests for waivers and exemptions of fees and charges [6] based on need. The Commission's staff uses the filer's financial information to evaluate the request for a waiver or exemption of the obligation to pay a fee or an annual charge.

Estimate of Annual Burden: [7] The Commission estimates the total Public Reporting Burden for this information collection as:

FERC–582—ELECTRIC FEES; ANNUAL CHARGES; WAIVERS; AND EXEMPTIONS

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A) × (B) = (C)	Average burden hours per response (D)	Estimated total annual burden (C) × (D)
FERC–582 [8]	114	1	114	1	114

[1] Title 18 CFR, Sections 381.105, 381.106, 381.108, 381.302, and 381.305.

[2] Title 18 CFR, Sections 382.102, 382.103, 382.105, 382.106, and 382.201.

[3] 31 U.S.C. 9701.

[4] 42 U.S.C. 7178.

[5] 18 CFR 382.201.

[6] 18 CFR parts 381 and 382.

[7] The Commission defines burden as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 CFR 1320.3.

The total estimated annual cost burden to respondents is $7,980 [114 hours * $70/hour[9] = $7,980].

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost 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 collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: May 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12297 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2454–072]

ALLETE, Inc.; Notice of Application for Temporary Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type: Temporary* Amendment of License.

b. *Project No:* 2454–072.

c. *Date Filed:* April 30, 2013.

d. *Applicant:* ALLETE, Inc.

e. *Name of Project:* Sylvan Project.

f. *Location:* The project is located on the Crow Wing River in Cass, Crow Wing, and Morrison counties, Minnesota.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Bonnie L. Carlson, Minnesota Power, 30 West Superior Street, Duluth, MN 55802–2093, (218) 722–5642.

i. *FERC Contact:* Christopher Chaney, (202) 502–6778, *christopher.chaney@ferc.gov*.

j. *Deadline for filing comments, motions to intervene, and protests:* June 17, 2013.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. Please include the project number (P–2454–072) on any comments or motions filed.

k. *Description of Application:* ALLETE, Inc., d/b/a Minnesota Power, is requesting a temporary amendment of Article 401 of its license in order to address spillway structure stability concerns. The applicant initiated a drawdown of 1.5 feet from the normal reservoir elevation of 1177.0 feet on December 17, 2012. The applicant proposes to maintain the elevation within ±0.25 feet of 1175.5 feet under normal operations until spillway repairs are completed, and the reservoir is refilled. As currently planned, the reservoir will be refilled during the fall of 2014.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (P–2454) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12298 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

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[8] Includes requirements of 18 CFR 381.105 (methods of payment), 381.106 (waiver), 381.108 (exemption), 381.302 (declaratory order), 381.303 (review of DOE remedial order), 381.304 (DOE denial of adjustment, and 381.305 (OGC interpretation).

[9] FY2013 Estimated Average Hourly Cost per FERC FTE, including salary plus benefits.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–416]

Grand River Dam Authority Notice of Application for Temporary Variance of License and Soliciting Comments, Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Temporary variance of license.

b. *Project No.:* 1494–416.

c. *Date Filed:* March 20, 2013, and supplemented on May 3, 2013, and May 16, 2013.

d. *Applicant:* Grand River Dam Authority.

e. *Name of Project:* Pensacola Hydroelectric Project.

f. *Location:* The project is located on the Grand River in Craig, Delaware, Mayes, and Ottawa Counties, Oklahoma.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Daniel S. Sullivan, Chief Executive Officer, Grand River Dam Authority, P.O. Box 409, Vinita, OK 74301; telephone: (918) 256–5545.

i. *FERC Contact:* B. Peter Yarrington, telephone: (202) 502–6129, and email address: *peter.yarrington@ferc.gov;* or Linda Stewart, telephone: (202) 502–6680, and email address: *linda.stewart@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests is 15 days from the issuance date of this notice by the Commission.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail a copy to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–1494–416) on any comments or motions filed.

k. *Description of Request:* Grand River Dam Authority (GRDA) requests a temporary variance, for the year 2013, to deviate from the reservoir elevation rule curve stipulated under Article 401 of the project license. GRDA makes its request based on existing and expected drought conditions in the Grand (Neosho) River basin. Specifically, GRDA requests that it be allowed to forgo the annual drawdown required by the rule curve to begin on August 1, and instead implement release rates equivalent to 0.03 to 0.06 foot of reservoir elevation per day, beginning on August 1. Reservoir elevations under the proposal would be above the rule curve until approximately September 20. Between approximately September 20 and October 24, reservoir elevations would be above or below the rule curve depending on a number of factors including inflows to the reservoir, and releases made to ensure maintenance of downstream dissolved oxygen concentrations and to support operation of downstream hydroelectric projects. Specific flow releases and the timing of the termination of the temporary variance would be determined through adaptive management.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable ; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12293 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–913–000.

Applicants: Carolina Gas Transmission Corporation.

Description: Rate Schedule BH Compliance Filing to be effective 5/16/2013.

Filed Date: 5/15/13.

Accession Number: 20130515–5157.

Comments Due: 5 p.m. ET 5/28/13.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP95–408–080.

Applicants: Columbia Gas Transmission, LLC.

Description: Annual Report on Sharing Profits from Base Gas Sales with Customers of Columbia Gas Transmission, LLC.

Filed Date: 5/2/13.

Accession Number: 20130502–5098.

Comments Due: 5 p.m. ET 5/14/13.

Docket Numbers: RP13–120–003.

Applicants: Millennium Pipeline Company, LLC.

Description: NAESB 2.0 Waiver Removal to be effective 12/1/2012.

Filed Date: 5/15/13.

Accession Number: 20130515–5016.

Comments Due: 5 p.m. ET 5/28/13.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 16, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–12302 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2310–193–California; Project No. 2266–102–California]

Pacific Gas and Electric Company; Nevada Irrigation District; Notice of Availability of the Draft Environmental Impact Statement for the Drum-Spaulding and Yuba-Bear Hydroelectric Projects

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission or FERC) regulations contained in the Code of Federal Regulations (CFR) (18 CFR part 380 [FERC Order No. 486, 52 FR 47897]), the Office of Energy Projects has reviewed the application for license for the Drum-Spaulding Project (FERC No. 2310) and the Yuba-Bear Project (FERC No. 2266) and has prepared a draft environmental impact statement (EIS) for the projects. The Drum-Spaulding Project is located within three primary river basins, the South Yuba River, Bear River, and North Fork of the North Fork American River, in Nevada and Placer Counties, California, and occupies 994 acres of federal lands administered by the Forest Service, Bureau of Land Management (BLM), and Bureau of Reclamation. The Yuba-Bear Project is located within three major river basins, the Middle Yuba River, South Yuba River, and Bear River, in Sierra, Nevada, and Placer Counties, California, and occupies 1,748 acres of federal lands administered by the Forest Service and BLM.

The draft EIS contains staff's analysis of the applicants' proposals and the alternatives for relicensing the Drum-Spaulding and Yuba-Bear Projects. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, the license applicants, and Commission staff.

A copy of the draft EIS is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''e-Library'' link. Enter the docket number, excluding the last three digits, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866)208–3676, or for TTY, contact (202)502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

All comments must be filed by Tuesday, July 23, 2013, and should reference Project Nos. 2310–193 and 2266–102. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Anyone may intervene in this proceeding based on this draft EIS (18 CFR 380.10). You must file your request to intervene as specified above.[1] You do not need intervenor status to have your comments considered.

Commission staff will hold two public meetings for the purpose of receiving comments on the draft EIS. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization comments, while the evening meeting is primarily for receiving input from the public. All interested individuals and entities will be invited to attend one or both of the public meetings. A notice detailing the exact date, time, and location of the public meetings will be forthcoming.

For further information, please contact Alan Mitchnick at (202) 502–6074 or at *alan.mitchnick@ferc.gov.*

Dated: May 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12294 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–1504–000]

SWG Arapahoe, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of SWG Arapahoe, LLC's application for market-

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is June 6, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 17, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–12286 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR13–21–000]

CenterPoint Energy Bakken Crude Services, LLC; Notice of Petition for Declaratory Order

Take notice that on May 14, 2013, pursuant to Rule 207(a)(2) of the Commission's Rules of Practices and Procedure, 18 CFR 385.207(a)(2)(2012), CenterPoint Energy Bakken Crude Services, LLC filed a petition seeking a declaratory order approving the overall tariff and rate structure for a new crude oil gathering pipeline system that will gather crude oil produced from various points in Dunn and McKenzie Counties, North Dakota and transport it to an interconnection with Great Northern Gathering and Marketing, L.L.C.'s Watford Terminal, which is located in McKenzie County, North Dakota.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on June 10, 2013.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12292 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14475–000]

FFP Project 117, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 1, 2013, FFP Project 117, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of a hydropower project at the Kentucky River Lock and Dam #13 located on the Kentucky River near the town of Beattyville in Lee County, Kentucky. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A 300-foot-long, 43-foot-high concrete dam; (2) a reservoir with a surface area of 295 acres and a storage capacity of 5,540 acre-feet; (3) a 310-foot-long, 100-foot-wide intake channel with a 175-foot-long retaining wall; (4) a 110-foot-long, 80-foot-wide powerhouse containing two generating units with a total capacity of 5.0 megawatts; (5) a 230-foot-long, 110-foot-wide tailrace with a 110-foot-long retaining wall; (6) a 4.16/34.5 kilo-Volt (kV) substation; (7) a 2.2- mile-long access road; (8) a 0.3- mile-long, 34.5 kV transmission line. The project would have an average annual generation of 19,500 megawatt-hours.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114. (978) 283–2822

FERC Contact: Chris Casey, *christiane.casey@ferc.gov*, (202) 502–8577.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60

days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14475) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12299 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14476–000]

FFP Project 116, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 1, 2013, FFP Project 116, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of a hydropower project at the Kentucky River Lock and Dam #9 located on the Kentucky River near the town of Valley View in Jessamine and Madison Counties, Kentucky. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A 575-foot-long, 36-foot-high concrete dam with a 294-foot-long spillway; (2) a reservoir with a surface area of 763 acres and a storage capacity of 15,030 acre-feet; (3) a 220-foot-long, 130-foot-wide intake channel with a 50-foot-long retaining wall; (4) a 130-foot-long, 90-foot-wide powerhouse containing two generating units with a total capacity of 7.2 megawatts; (5) a 420-foot-long, 150-foot-wide tailrace with a 100-foot-long retaining wall; (6) a 4.16/69 kilo-Volt (kV) substation; (7) a 0.3- mile-long, 69 kV transmission line. The project would have an average annual generation of 27,800 megawatt-hours.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114. (978) 283–2822

FERC Contact: Chris Casey, *christiane.casey@ferc.gov*, (202) 502–8577.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14476) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12301 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14477–000]

FFP Project 115, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 1, 2013, FFP Project 115, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of a hydropower project at the Kentucky River Lock and Dam #5 located on the Kentucky River near the town of Tyrone in Anderson and Woodford Counties, Kentucky. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A 594-foot-long, 36-foot-high timber dam; (2) a reservoir with a surface area of 730 acres and a storage capacity of 17,390 acre-feet; (3) a 480-foot-long, 100-foot-wide intake channel with a 100-foot-long retaining wall; (4) a 260-foot-long fixed crest dam extension connecting the exiting dam to the new powerhouse; (5) a 150-foot-long, 100-foot-wide powerhouse containing two generating units with a total capacity of 9.3 megawatts; (6) a 280-foot-long, 180-foot-wide tailrace with a 110-foot-long retaining wall; (7) a 4.16/69 kilo-Volt (kV) substation; (8) a 1.0-mile-long access road; (9) a 0.9-mile-long, 69 kV transmission line. The project would have an average annual generation of 39,500 megawatt-hours.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114. (978) 283–2822.

FERC Contact: Chris Casey, *christiane.casey@ferc.gov,* (202) 502–8577.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14477) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12290 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–476–000]

Natural Gas Pipeline Company of America LLC; Notice of Request Under Blanket Authorization

Take notice that on May 10, 2013, Natural Gas Pipeline Company of America LLC (Natural), pursuant to the blanket certificate authorization granted in Docket No. CP82–402–000,[1] filed an application in accordance to sections 157.205, 157.208, and 157(213) of the Commission's Regulations under the Natural Gas Act (NGA) as amended, requesting authority to convert one (1.0) Bcf of cushion gas to working gas at its Herscher Mount Simon Reservoir located in Kankakee County, Illinois. The proposed project will provide greater operational flexibility with the ability to withdraw additional working gas from the Mount Simon Reservoir instead of the Galesville Reservoir, which could be used to partially recharge or refill the Galesville Reservoir during low demand period, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The proposed conversion will result in an increase in working gas inventory from 12.6 Bcf to 13.6 Bcf and a decrease in the cushion gas inventory from 54.4 Bcf to 53.4 Bcf. Natural states that the conversion will not change the total volume of 67 Bcf stored at the Mount Simon Reservoir. The conversion of one (1.0) Bcf of cushion gas to working gas will be achieved by stimulation of existing I/W wells to improve their withdrawal capacity. The stimulation will be conducted during daytime hours using truck mounted equipment. The trucks will use existing roads to access the well sites. No new ground disturbance is required to complete the proposed well stimulation activities.

Any questions concerning this application may be directed to Bruce H. Newsome, Vice President, Natural Gas Pipeline Company of America LLC, 3250 Lacey Road, Suite 700, Downers Grove, Illinois 60515, (630) 725–3070, or email at *bruce newsome@kindermorgan.com.* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice, the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Dated: May 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12296 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–471–000]

Perryville Gas Storage LLC; Notice of Request Under Blanket Authorization

Take notice that on May 3, 2013, Perryville Gas Storage LLC (Perryville), Three Riverway, Suite 1350, Houston, Texas 77056, filed a prior notice request pursuant to sections 157.205 and 157.213(b) of the Commission's regulations under the Natural Gas Act (NGA) for authorization to reclassify one billion cubic feet of base gas as working gas in Cavern PGS–1 at Perryville's natural gas storage facility in Franklin and Richland Parishes, Louisiana. Perryville does not propose to increase

[1] 20 FERC ¶ 62,415 (1982).

the certificated working gas capacity, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding the application should be directed Kevin Holder, Sr. Vice President and Chief Commercial Officer, Perryville Gas Storage LLC, Three Riverway, Suite 1350, Houston, Texas 77056, by telephone at (713) 350–2500, or by email at *Kevin.Holder@cardinalgs.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: May 16, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–12291 Filed 5–22–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL 9801–5]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Consent Decree; Request for Public Comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree to address a lawsuit filed by Sierra Club in the United States District Court for the Northern District of California: *Sierra Club* v. *Perciasepe*, No. 3:12–cv–4078–JST (N.D. CA). On August 2, 2012, Plaintiff filed a complaint alleging that EPA failed to take action on certain state implementation plan (''SIP'') submissions from the State of Nevada by the statutory deadline established by CAA section 110(k)(2). EPA has since taken final action on most of these SIP submissions, and the proposed consent decree establishes a deadline for EPA to take action on the one remaining SIP submission.

DATES: Written comments on the proposed consent decree must be received by June 24, 2013.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2013–0391, online at *www.regulations.gov* (EPA's preferred method); by email to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Geoffrey L. Wilcox, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–5601; fax number (202) 564–5603; email address: *wilcox.geoffrey@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit filed by the Sierra Club seeking to compel the Administrator to take final action under sections 110(k) of the CAA, 42 U.S.C. 7410(k), to approve or disapprove, in whole or in part, five regulations submitted by the State of Nevada for inclusion in the Clark County portion of Nevada's state implementation plan (''SIP''). EPA has already taken final action on four of these regulations and notice of such final action was published in the **Federal Register** on October 18, 2012. The proposed consent decree only addresses the fifth regulation identified in the Complaint as ''Section 25 of the Clark County Air Quality Regulations, as amended May 18, 2010 and submitted to EPA on September 1, 2010'' (''Section 25''). Section 25 pertains generally to the treatment of excess emissions during startup, shutdown, and malfunction events.

The proposed consent decree provides that no later than December 2, 2013, EPA shall sign a notice of the Agency's final action on the SIP submission with respect to Section 25 pursuant to section 110(k) of the CAA, 42 U.S.C. 7410(k). The proposed consent decree requires that following signature of EPA's final action, EPA shall promptly send the notice to the Office of the Federal Register for publication in the **Federal Register**. After EPA fulfills its obligations under the proposed consent decree, the consent decree shall be terminated and the case dismissed with prejudice.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2013–0391) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal

holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: May 15, 2013.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2013–12322 Filed 5–22–13; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application for a $650 million long-term guarantee or direct loan to support the export of approximately $522 million worth of mining equipment to Australia. The repayment term of the guarantee or direct loan is 8.5 years. The U.S. exports will enable the Australian mining company to establish a maximum production capacity of 55 million metric tons of iron ore per year. Available information indicates that the iron ore will be consumed in Asian Markets including: China, Japan, Korea, and Taiwan. Interested parties may submit comments on this transaction by email to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue NW., Room 947, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Angela Mariana Freyre,

Senior Vice President and General Counsel.

[FR Doc. 2013–12272 Filed 5–22–13; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: 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; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; 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 ways to further reduce the information 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 OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before July 22, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Benish Shah, Federal Communications Commission, via the Internet at *Benish.Shah@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Benish Shah, Office of Managing Director, (202) 418–7866.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0398.

Title: Sections 2.948 and 15.117(g)(2)—Equipment Authorization Measurement Standards.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1,225 respondents; 525 responses.

Estimated Time per Response: 2 to 30 hours.

Frequency of Response: On occasion, one time and every three year reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 4(i), 302, 303(c), 303(f), 303(g) and 303(r), and 309(a).

Total Annual Burden: 5,360 hours.

Total Annual Cost: None.

Privacy Impact Assessment: N.A.

Nature and Extent of Confidentiality: There is a minimal exemption from the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4) and 47 CFR 0.459(d) of the Commission's rules that is granted for trade secrets, which may be submitted to the Commission as part of the documentation of the test results. No other assurances of confidentiality are provided to respondents.

Needs and Uses: The Commission will submit this information collection after this 60 day comment period to obtain the full three year clearance from the Office of Management and Budget (OMB).

Description of Measurement Facilities

The Commission established uniform technical standards for various non-licensed equipment operating under the guidelines established in 47 CFR parts 2, 15 and 18 of the FCC rules, which include personal computers, garage door openers, baby monitors, etc. In order to ensure that technical standards are applied uniformly to non-licensed equipment, the Commission requires manufacturers to follow the standardized measurement procedures and practices:

(a) 47 CFR part 2 of the Commission's rules requires each Electro-Magnetic Compatibility (EMC) testing facility that performs equipment testing in support of any request for equipment authorization to file a test site description with the Commission. The Commission also permits a testing facility to be accredited by Commission-approved accrediting bodies. A testing laboratory that is accredited by a Commission-approved accrediting body is not required to file a test site description with the Commission since the accreditation body will review this information as part of the accreditation assessment.

(b) The test site description and the supporting information documents that the EMC testing facility complies with the testing standards used to make the measurements that support any request for equipment authorization.

The Commission or a Telecommunications certification body uses the information from these test sites and the supporting documentation, which accompany all requests for equipment authorization:

(a) To ensure that the data are valid and that proper testing procedures are used;

(b) To ensure that potential interference to radio communications is controlled; and

(c) To investigate complaints of harmful interference or to verify the manufacturer's compliance with Section 47 CFR 2.948 of the Commission's rules.

Accreditation Bodies

On September 14, 2009, the Office of Engineering and Technology (OET) identified and requested comment on certain types of information that an applicant should provide to be considered as an accreditation body of test laboratories under the Commission's rules, *see* DA 09–2049. 47 CFR 2.948(d) of the Commission's rules sets forth the requirements for accreditation bodies seeking recognition from the FCC as a laboratory accreditation body. Accreditation bodies seeking such recognition from the Commission must file a report of their qualifications with the Office of Engineering and Technology (OET). They are only required to file this information once. The Commission currently has three recognized accreditations bodies.

Other Information

In addition, the referenced 47 CFR part 15 rules (47 CFR 15.117(g)(2)) require that certain equipment manufacturers file information concerning the testing of TV receivers, which tune to UHF channels, to show that the UHF channels provide approximately the same degree of tuning accuracy with approximately the same expenditure of time and effort.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2013–12303 Filed 5–22–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

AG International Cargo Corp (NVO & OFF), 8290 NW 64th Street, Miami, FL 33166, Officers: Maria C. Reyes, President (QI), Maily C. Reyes, Vice President, Application Type: New NVO & OFF License

Dove Global Logistics, Inc. (NVO), 2160 Plaza Del Amo, Suite 161, Torrance, CA 90501, Officers: Chol Min Kim, President (QI), Eun Hwang, CFO, Application Type: New NVO License

ICargo Global Logistics Inc dba ICargo Express (NVO), 2085 New York Avenue, Huntington Station, NY 11746, Officers: Edwin J. Arriaga, President (QI), Ravi Sulaiman, Vice President, Application Type: New NVO License

Jawed Salim dba Continents Shipping & Trading (OFF), 18062 FM 529 Road, Suite 172, Cypress, TX 77433, Officer: Jawed Salim, Sole Proprietor (QI), Application Type: New OFF License

Safe Movers, Inc. dba Isaac's Relocation Service (NVO), 181Campanelli Parkway, Stoughton, MA 02072, Officers: Yizhaq Edry, Treasurer (QI), Ami Joseph, President, Application Type: Change Trade Name to Safe Movers, Inc., dba Isaac's Moving & Storage

Sealaska Global Logistics, LLC (NVO & OFF), 5324 Georgia Highway 85, Suite 500, Forest Park, GA 30297, Officers: Angela Higgs, Senior Vice President (QI), Mahesh Niruttan, President, Application Type: Name Change to 20Cube Logistics Worldwide, LLC

TGP Logistics Inc. (NVO & OFF), 2500 Wilcrest Drive, Suite 300, Houston, TX 77042, Officers: Myrian T. Morales, Vice President (QI), Colin B. Charnock, Secretary, Application Type: Add NVO Service

Triple ''B'' Packers & Forwarders, Inc. dba Pacific Micronesian Lines (NVO),

1511 Glenn Curtiss Street, Carson, CA 90746, Officer: Richard Beliveau, President (QI), Application Type: Name Change to Triple ''B'' Forwarders, Inc. dba Pacific Micronesian Lines

Unity Container Line, Inc. (NVO), 3550 NW 155th Avenue, Miami, FL 33178, Officer: Jose R. Gantus, President (QI), Application Type: QI Change

XL Worldwide Corp. (NVO & OFF), 10570 NW 37th Terrace, Miami, FL 33178, Officers: Freddy Franco, Secretary (QI), Marcelo Castro, President, Application Type: New NVO & OFF License

Dated: May 17, 2013.

By the Commission.

Rachel E. Dickon.

Assistant Secretary.

[FR Doc. 2013–12233 Filed 5–22–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Commission gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101) effective on the date shown.

License No.: 4525F.

Name: Overseas Forwarding Corporation.

Address: 10975 NW 29th Street, Miami, FL 33172.

Date Revoked: April 26, 2013.

Reason: Voluntary Surrender of License.

License No.: 021582F.

Name: PNGL (USA) Inc.

Address: 2730 Monterey Street, Suite 103, Torrance, CA 90503.

Date Revoked: April 25, 2013.

Reason: Voluntary Surrender of License.

James A. Nussbaumer,

Deputy Director, Bureau of Certification and Licensing.

[FR Doc. 2013–12234 Filed 5–22–13; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Joint Comment Request

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the OCC, the Board, and the FDIC (the ''agencies'') may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. On February 21, 2013, the agencies, under the auspices of the Federal Financial Institutions Examination Council (FFIEC), requested public comment for 60 days on a proposal to extend, with revision, the Consolidated Reports of Condition and Income (Call Report), which are currently approved collections of information. After considering the comments received on the proposal, the FFIEC and the agencies would proceed with the following proposed revisions effective June 30, 2013: (1) A scope revision to an item in the equity capital reconciliation; and (2) reporting changes for large and highly complex institutions for deposit insurance assessment purposes. Certain modifications have been made to the assessment reporting changes in response to comments received. The FFIEC and the agencies are continuing to evaluate the other Call Report changes proposed in February 2013 in light of the comments received and would not implement these changes as of June 30, 2013 (and, in one case, as of December 31, 2013), as had been proposed. The FFIEC's and the agencies' decisions regarding these additional proposed data items would be the subject of a separate **Federal Register** notice.

DATES: Comments must be submitted on or before June 24, 2013.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies on the revisions to the Call Report for June 30, 2013, for which the agencies are requesting approval from OMB. All comments, which should refer to the OMB control number(s), will be shared among the agencies.

OCC: Because paper mail in the Washington, DC, area and at the OCC is subject to delay, commenters are encouraged to submit comments by email if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0081, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Board: You may submit comments, which should refer to ''Consolidated Reports of Condition and Income (FFIEC 031 and 041),'' by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include reporting form number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's Web site at

www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FDIC: You may submit comments, which should refer to ''Consolidated Reports of Condition and Income, 3064–0052,'' by any of the following methods:

- *Agency Web site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow the instructions for submitting comments on the FDIC Web site.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: comments@FDIC.gov.* Include ''Consolidated Reports of Condition and Income, 3064–0052'' in the subject line of the message.
- *Mail:* Gary A. Kuiper, Counsel, Attn: Comments, Room NYA–5046, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided. Comments may be inspected at the FDIC Public Information Center, Room E–1002, 3501 Fairfax Drive, Arlington, VA 22226, between 9 a.m. and 5 p.m. on business days.

Additionally, commenters may send a copy of their comments to the OMB desk officer for the agencies by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503; by fax to (202) 395–6974; or by email to *oira submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the revisions discussed in this notice, please contact any of the agency clearance officers whose names appear below. In addition, copies of the Call Report forms and instructions can be obtained at the FFIEC's Web site (*http://www.ffiec.gov/ffiec_report_forms.htm*).

OCC: Mary H. Gottlieb and Johnny Vilela, OCC Clearance Officers, (202) 649–6301 and (202) 649–7265, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Washington, DC 20219.

Board: Cynthia Ayouch, Federal Reserve Board Clearance Officer, (202) 452–3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Gary A. Kuiper, Counsel, (202) 898–3877, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: The agencies are proposing to revise and extend for three years the Call Report, which is currently an approved collection of information for each agency.

Report Title: Consolidated Reports of Condition and Income (Call Report).

Form Number: Call Report: FFIEC 031 (for banks and savings associations with domestic and foreign offices) and FFIEC 041 (for banks and savings associations with domestic offices only).

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

OCC:

OMB Number: 1557–0081.

Estimated Number of Respondents: 1,810 national banks and federal savings associations.

Estimated Time per Response: 53.81 burden hours per quarter to file.

Estimated Total Annual Burden: 389,570 burden hours to file.

Board:

OMB Number: 7100–0036.

Estimated Number of Respondents: 843 state member banks.

Estimated Time per Response: 55.70 burden hours per quarter to file.

Estimated Total Annual Burden: 187,820 burden hours to file.

FDIC:

OMB Number: 3064–0052.

Estimated Number of Respondents: 4,404 insured state nonmember banks and state savings associations.

Estimated Time per Response: 40.57 burden hours per quarter to file.

Estimated Total Annual Burden: 714,681 burden hours to file.

The estimated time per response for the quarterly filings of the Call Report is an average that varies by agency because of differences in the composition of the institutions under each agency's supervision (e.g., size distribution of institutions, types of activities in which they are engaged, and existence of foreign offices). The average reporting burden for the filing of the Call Report as it is proposed to be revised is estimated to range from 17 to 720 hours per quarter, depending on an individual institution's circumstances.

Type of Review: Revision and extension of currently approved collections.

General Description of Reports

These information collections are mandatory: 12 U.S.C. 161 (for national banks), 12 U.S.C. 324 (for state member banks), 12 U.S.C. 1817 (for insured state nonmember commercial and savings banks), and 12 U.S.C. 1464 (for federal and state savings associations). At present, except for selected data items, these information collections are not given confidential treatment.

Abstract

Institutions submit Call Report data to the agencies each quarter for the agencies' use in monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole. Call Report data provide the most current statistical data available for evaluating institutions' corporate applications, identifying areas of focus for on-site and off-site examinations, and monetary and other public policy purposes. The agencies use Call Report data in evaluating interstate merger and acquisition applications to determine, as required by law, whether the resulting institution would control more than ten percent of the total amount of deposits of insured depository institutions in the United States. Call Report data also are used to calculate institutions' deposit insurance and Financing Corporation assessments and national banks' and federal savings associations' semiannual assessment fees.

Current Actions

On February 21, 2013, the agencies requested comment on a number of proposed revisions to the Call Report (78 FR 12141) for implementation as of the June 30, 2013, report date, except for one new data item proposed to be added to the Call Report effective December 31, 2013. These revisions were proposed with the intent to provide data needed for reasons of safety and soundness or other public purposes by the members of the FFIEC that use Call Report data to carry out their missions and responsibilities, including the agencies, the Bureau of Consumer Financial Protection (Bureau), and state supervisors of banks and savings associations.

The proposed Call Report changes included:

- A question that would be added to Schedule RC–E, Deposit Liabilities, asking whether the reporting institution offers separate deposit products (other than time deposits) to consumers compared to businesses, and
  - For those institutions with $1 billion or more in total assets that offer separate products, new data items on the quarter-end amount of certain types of consumer transaction accounts and nontransaction savings deposit accounts that would be reported in Schedule RC–E, and
  - For all institutions that offer separate products, a new breakdown on the year-to-date amounts of certain types of service charges on consumer deposit accounts reported as noninterest income in Schedule RI, Income Statement;
- A request for information on international remittance transfers in Schedule RC–M, Memoranda, including:
  - Questions about types of international remittance transfers offered, the settlement systems used to process the transfers, and whether the number of remittance transfers provided exceeds or is expected to exceed the Bureau's safe harbor threshold (more than 100 transfers); and
  - New data items to be reported by institutions not qualifying for the safe harbor on the number and dollar amount of international remittance transfers;
- New data items in Schedule RC–M for reporting all trade names that differ from an institution's legal title that the institution uses to identify physical branches and public-facing Internet Web sites;
- Additional data to be reported in Schedule RC–O, Other Data for Deposit Insurance and FICO Assessments, by large institutions and highly complex institutions (generally, institutions with $10 billion or more in total assets) to support the FDIC's large bank pricing method for insurance assessments, including a new table of consumer loans by loan type and probability of default band, new data items providing information on loans secured by real estate at institutions with foreign offices, revisions of existing data items on real estate loan commitments and U.S. government-guaranteed real estate loans to include those in foreign offices, and other revisions to the information collected on assets guaranteed by the U.S. government;
- A new data item in Schedule RC–M applicable only to institutions whose parent depository institution holding company is not a bank or savings and loan holding company in which the institution would report the total consolidated liabilities of its parent depository institution holding company annually as of December 31 to support the Board's administration of the financial sector concentration limit established by the Dodd-Frank Act; and
- A revision of the scope of the existing item in Schedule RI–A, Changes in Bank Equity Capital, for ''Other transactions with parent holding company'' to include such transactions with all stockholders.

In addition, the agencies invited comments on their plans to continue the collection of two existing items on the amount and number of noninterest-bearing transaction accounts of more than $250,000 in Schedule RC–O in the March 2013 and future Call Reports, subject to further review and reconsideration of the collection of these data.

Further details concerning the preceding Call Report proposals may be found in Sections II.A through II.F of the agencies' February 2013 **Federal Register** notice.[1]

Comments Received

The comment period on the proposed changes closed on April 22, 2013. The agencies collectively received comments on their February 2013 **Federal Register** notice from 33 entities: 20 banking organizations, seven bankers' associations, four consumer advocacy organizations, one life insurers' association, and one government agency. Comments received on the proposed changes that will be finalized for the June 30, 2013, report date are discussed in detail below.

Many of the comments received opposed one or more of the proposed changes, although some supported one or more of these changes. Therefore, after considering the comments the agencies received, the FFIEC and the agencies are proceeding at this time only with two of the proposed Call Report revisions: (1) The scope revision affecting the reporting of certain changes in bank equity capital on Schedule RI–A; and (2) the reporting changes for large and highly complex institutions for deposit insurance assessment purposes. As discussed further below, the agencies have made certain modifications to the proposed assessment data changes in response to comments received. The effective date of these reporting changes would be June 30, 2013, as had been proposed. However, for large and highly complex institutions with foreign offices, the reporting of foreign office data in certain existing items in Schedule RC–O, Other Data for Deposit Insurance and FICO Assessments, that currently capture only domestic office data would be optional as of June 30, 2013, and required effective September 30, 2013. The agencies also would continue collecting the existing Schedule RC–O items on the amount and number of noninterest-bearing transaction accounts of more than $250,000 from all institutions through December 31, 2013, after which these items would be eliminated.

As for the other new data items that had been proposed to be added to the Call Report effective June 30, 2013 (and one new item proposed to be collected annually beginning December 31, 2013), the FFIEC and the agencies are continuing to evaluate these proposed new Call Report items in light of the comments received. When the FFIEC and the agencies have decided whether and how to proceed with these other proposed new data items, a separate **Federal Register** notice would be published and, if applicable, submissions by the agencies would be made to OMB. Because of the additional time necessary for the FFIEC and the agencies to determine the outcome of these additional proposed Call Report revisions and to allow sufficient lead time for affected institutions to prepare for any resulting new reporting requirements, implementation of the following revisions would take effect no earlier than December 31, 2013:

- International remittance transfers (including certain questions about remittance transfer activity and, for institutions not qualifying for the Bureau's safe harbor, data items on the number and amount of remittance transfers); and
- Trade names other than an institution's legal title used to identify physical branches and Internet Web sites.

In addition, implementation of the following revisions would take effect no earlier than March 31, 2014:

- Consumer deposit accounts (including the screening question about an institution's offering of such deposits, consumer transaction and nontransaction savings deposit account

[1] *See* 78 FR 12141–12154, February 21, 2013.

balances for institutions with $1 billion or more in total assets, and data on certain service charges on consumer deposit accounts); and

• Total liabilities of an institution's parent depository institution holding company that is not a bank or savings and loan holding company.[2]

Final Call Report Changes

Reporting Certain Transactions with Stockholders—The agencies proposed to revise the scope of Schedule RI–A, item 11, which is currently captioned ''Other transactions with parent holding company,'' to include capital contributions received from stockholders other than an institution's parent holding company when stock is not issued, property dividends involving stockholders other than a parent holding company, and return-of-capital transactions with all stockholders, including a parent holding company. In addition, the agencies proposed to change the caption for this item to read ''Other transactions with stockholders (including a parent holding company).'' The agencies received no comments on this proposed change, which will be incorporated into the Call Report effective June 30, 2013, as proposed.

Reporting Changes for Large and Highly Complex Institutions—The agencies' February 2013 **Federal Register** notice explained that the FDIC Board of Directors had approved a final rule in October 2012 that amended certain aspects of the methodology set forth in the FDIC's assessment regulations (12 CFR part 327) for determining the deposit insurance assessment rates for large and highly complex institutions.[3] This ''large bank pricing rule,'' originally adopted by the FDIC Board in February 2011,[4] uses a scorecard method to determine a large or highly complex institution's assessment rate. One of the financial ratios used in the scorecard is the ratio of higher-risk assets to Tier 1 capital and reserves. The FDIC's October 2012 assessments final rule, which took effect April 1, 2013, (1) revises the definitions of certain higher-risk assets in the February 2011 assessments rule, specifically leveraged loans, which are renamed ''higher-risk commercial and industrial (C&I) loans and securities,'' and subprime consumer loans, which are renamed ''higher-risk consumer loans''; (2) clarifies when an asset must be classified as higher risk; (3) clarifies the way securitizations are identified as higher risk; and (4) further defines terms that are used in the large bank pricing rule.

The agencies' February 2013 **Federal Register** notice also explained that, in response to large and highly complex institutions' concerns about their ability to identify loans meeting the subprime and leveraged loan definitions in the FDIC's February 2011 assessments rule, the agencies provided transition guidance for reporting subprime consumer and leveraged loans and securities that took effect with the initial reporting of these data in Schedule RC–O, Other Data for Deposit Insurance and FICO Assessments, as of June 30, 2011. The transition period for identifying and reporting subprime and leveraged loans has been extended over time to April 1, 2013. Because the FDIC's October 2012 assessments final rule amended the definitions of subprime and leveraged loans and securities and renamed these higher-risk asset categories, the agencies stated in their February 2013 **Federal Register** notice that they would make corresponding changes to Memorandum items 8 and 9 of Schedule RC–O, recaptioning these items to read '''Higher-risk consumer loans' as defined for assessment purposes only in FDIC regulations'' and '''Higher-risk commercial and industrial loans and securities' as defined for assessment purposes only in FDIC regulations,'' respectively. The agencies also stated that the instructions for these two Schedule RC–O Memorandum items would be revised to incorporate the revised definitions of these higher-risk asset categories in the FDIC's October 2012 assessments final rule, including the clarified definitions of higher-risk securitizations.[5] The effective date for these revisions was scheduled for June 30, 2013, the first report date after the April 1, 2013, effective date of the FDIC's October 2012 assessments final rule.[6]

In addition, as previously mentioned, the FFIEC and the agencies proposed in their February 2013 **Federal Register** notice to implement several revisions to the data to be reported in Schedule RC–O by large institutions and highly complex institutions to support the FDIC's large bank pricing method for insurance assessments. These revisions, which were proposed to take effect June 30, 2013, included a new table of consumer loans by loan type and probability of default band, new data items providing information on loans secured by real estate in foreign offices, revisions of certain existing data items on real estate loan commitments and U.S. government-guaranteed real estate loans to include those in foreign offices, and revisions to the information collected on government-guaranteed assets to include the portion of non-agency residential mortgage-backed securities and loans covered under FDIC loss-sharing agreements.

In a joint letter, three bankers' associations[7] commented on several aspects of the Schedule RC–O reporting changes applicable to large and highly complex institutions. These commenters generally supported the proposed revisions, but recommended some modifications as discussed below.

First, these associations recommended clarification of the definition of ''higher-risk commercial and industrial loans and securities'' in the draft of the revised Call Report instructions for Schedule RC–O, Memorandum item 9, to exclude loans to individuals for commercial, industrial, and professional purposes. The bankers' associations also commented that commercial loans of at least $5 million to individuals to finance material acquisitions, buyouts, or capital distributions are exceedingly rare, so excluding loans to individuals from being reported as ''higher-risk C&I loans and securities'' will not have a noticeable impact on the aggregate amount of such higher-risk assets. Adding an exclusion for loans to individuals for commercial, industrial, and professional purposes to the draft revised Memorandum item 9 instructions would be consistent with the existing instructions for reporting leveraged loans and securities in Memorandum item 9. The agencies plan to clarify the draft revised Memorandum item 9.

[2] Total liabilities would be reported annually. The data to be reported would be the amount of total liabilities as of the end of the calendar year preceding the quarter-end collection date of this proposed annual data item; e.g., if the reporting requirement took effect March 31, 2014, the total liabilities as of December 31, 2013, would be reported.

[3] *See* 77 FR 66000, October 31, 2012.

[4] *See* 76 FR 10672, February 25, 2011.

[5] The FDIC's October 2012 assessments final rule defines ''higher-risk consumer loans,'' ''higher-risk commercial and industrial loans,'' and ''higher-risk securitizations'' in Sections I.A.3, I.A.2, and I.A.5, respectively, of Appendix C to Subpart A to Part 327 of the FDIC's regulations.

[6] As stated in the agencies' final Paperwork Reduction Act **Federal Register** notice pertaining to the introduction of the Schedule RC–O reporting requirements for large and highly complex institutions (76 FR 77321, December 12, 2011), when ''the definitions of these high-risk asset categories . . . are revised through FDIC rulemaking, the definitions of these asset categories in the agencies' regulatory reporting instructions will be revised in the same manner to maintain conformity with the assessment regulations.''

[7] The American Bankers Association, the Financial Services Roundtable, and the Consumer Bankers Association.

The bankers' associations also commented that it is unclear how an institution could evaluate loans to proprietorships and partnerships against the definition of ''higher-risk C&I loans and securities,'' asserting that the financial statements of such firms do not include the data needed to calculate the leverage and materiality tests included in the definition. However, because ''higher-risk C&I loans and securities,'' as defined, include certain loans with an original amount of at least $5 million, the agencies do not agree with this assertion and would expect that institutions, when lending such an amount to a commercial borrower, including a sole proprietorship or partnership, would regularly obtain financial statements that include the necessary data to determine debt levels and calculate debt-to-EBITDA [8] ratios. The decision to exclude loans to individuals for commercial, industrial, and professional purposes from ''higher-risk C&I loans and securities'' was based upon the fact that EBITDA cannot be calculated for an individual; [9] however, this is not the case for a commercial borrower operating as a sole proprietorship or partnership. Therefore, the definition of higher-risk C&I loans will not exclude loans to sole proprietorships and partnerships.

Second, the three associations recommended that large and highly complex institutions with foreign offices report the proposed breakdown of their ''loans secured by real estate'' for the consolidated institution (i.e., for both domestic and foreign offices) in Schedule RC–C, Part I, rather than in new Memorandum items in Schedule RC–O as had been proposed. All institutions with foreign offices file the FFIEC 031 version of the Call Report and they currently report a nine-category breakdown of their loans secured by real estate in domestic offices, but at present they report only the total amount of loans secured by real estate for the consolidated institution. The associations asserted that requiring only those institutions with foreign offices that are large or highly complex institutions to include the real estate breakdown in Schedule RC–C, Part I, could be dealt with instructionally and would not cause confusion since special instructions are already in place to explain which subsets of institutions are required to report certain types of loan data in Schedule RC–C, Part I. The agencies agree with the associations' recommendation. Accordingly, Schedule RC–C, Part I, on the FFIEC 031 version of the Call Report would be revised to include the nine-category breakdown of loans secured by real estate for the consolidated institution. The Call Report instructions and the FFIEC 031 Call Report form would state that this breakdown is to be provided only by large and highly complex institutions.

Third, the three bankers' associations recommended that the two-year probability of default table in proposed Schedule RC–O, Memorandum item 19,[10] combine Memorandum items 19.d and 19.e for revolving, open-end loans secured by first and junior liens, respectively, on 1–4 family residential properties and extended under lines of credit into a single item, rather than requiring large and highly complex institutions to report these categories of loans separately. The associations stated that because Schedule RC–C, part I, Loans and Leases, does not currently require institutions to separately report first and junior lien revolving credits, institutions' reporting systems are not currently designed to separately identify these credits. As a consequence, the associations questioned the merits of imposing such a systems change on institutions given the cost and burden that would be involved. The agencies agree with the associations' recommendation and would revise the two-year probability of default table so that large and highly complex institutions would report the two-year probability of default for all revolving, open-end loans secured by 1–4 family residential properties and extended under lines of credit without regard to their lien position.[11]

Fourth, the three associations' comment letter stated that, based on the provisions of the FDIC's October 2012 assessments final rule, large and highly complex institutions expected that Schedule RC–O would be revised to require them to report higher-risk securitizations separately from nontraditional 1–4 family residential mortgage loans, higher-risk consumer loans, and higher-risk C&I loans. The associations indicated that large and highly complex institutions would prefer to report these higher-risk securitizations separately from the three categories of higher-risk loans. The associations further believe that the separate reporting of higher-risk securitizations would allow the FDIC and the other banking agencies to examine the validity of the associations' previous argument that the structure of a securitization should be considered when determining whether a securitization is truly higher-risk. The agencies agree that reporting higher-risk securitizations separately from higher-risk loans, as recommended by the associations, would be beneficial. Accordingly, the agencies would split Memorandum items 7, 8, and 9 of Schedule RC–O into two items each, which will enable large and highly complex institutions to report the amount of securitizations of (1) nontraditional 1–4 family residential mortgage loans (Memorandum item 7.b), (2) higher-risk consumer loans (Memorandum item 8.b), and (3) higher-risk C&I loans (Memorandum item 9.b) separately from the three categories of higher-risk loans themselves (Memorandum items 7.a, 8.a, and 9.a). Separate reporting of these three categories of higher-risk securitizations would allow the FDIC to better track and analyze the composition of a bank's higher-risk assets.

Fifth, Schedule RC–O, Memorandum items 10.a and 10.b, provide certain data on unfunded commitments for construction, land development, and other land loans secured by real estate (construction loans) while Memorandum items 13.a through 13.d collect data on the U.S. government-guaranteed or -insured portion of four categories of funded loans secured by real estate. The agencies proposed to revise these existing Schedule RC–O Memorandum items on the FFIEC 031 version of the Call Report by expanding their scope to include commitments and loans in both foreign and domestic offices rather than only domestic offices. The three bankers' associations agreed that this proposed change would enable large and highly complex institutions

[8] EBITDA is defined as earnings before interest, taxes, depreciation, and amortization.

[9] Under U.S. generally accepted accounting principles, personal financial statements prepared for individuals for such purposes as obtaining credit include a statement of financial condition that presents assets at their estimated current values and liabilities at their estimated current amounts. The presentation of a statement of changes in net worth is optional. See Accounting Standards Codification Topic 274, Personal Financial Statements.

[10] As described above, the nine-category breakdown of loans secured by real estate for the consolidated institution, which initially had been designated Memorandum item 18 of Schedule RC–O, would be moved from Schedule RC–O to Schedule RC–C, part I, item 1, column A, on the FFIEC 031 version of the Call Report. As a result, the two-year probability of default table, which initially had been designated Memorandum item 19 of Schedule RC–O, would be renumbered as Memorandum item 18 of Schedule RC–O in the Call Report forms for June 30, 2013.

[11] The combined items would be designated as renumbered Memorandum item 18.d in the Call Report forms for June 30, 2013. As a result of this change, the Schedule RC–O Memorandum items that initially had been numbered 19.f through 19.k would be renumbered as Memorandum items 18.e through 18.j.

with foreign offices to ''report more accurately the balances needed for Large Bank Pricing,'' but their letter stated that these institutions would not have sufficient time to be prepared to report as of June 30, 2013, their commitments to fund construction loans in foreign offices, the portion of such unfunded commitments that are guaranteed or insured by the U.S. government, and the portion of the four categories of funded real estate loans in foreign offices that are guaranteed or insured by the U.S. government. The agencies acknowledge that large and highly complex institutions with foreign offices may need additional time to comply with the expanded scope of Memorandum items 10.a, 10.b, and 13.a through 13.d of Schedule RC–O. Accordingly, the reporting of foreign office data in these Memorandum items would be optional for June 30, 2013, and required beginning September 30, 2013.[12] A large or highly complex institution that opts not to report the foreign office data in Memorandum items 10.a, 10.b, and 13.a through 13.d of Schedule RC–O when it initially files its Call Report for June 30, 2013, would be permitted, but not required, to amend the amounts originally reported in these Schedule RC–O Memorandum items for June 30 after it has the systems in place to gather the necessary foreign office data.

Noninterest-bearing Transaction Accounts of More than $250,000—In their February 2013 **Federal Register** notice, the agencies stated that they would continue to collect Memorandum items 5.a and 5.b of Schedule RC–O on the amount and number of noninterest-bearing transaction accounts of more than $250,000 for which temporary unlimited deposit insurance coverage ended on December 31, 2012. The agencies' interest in monitoring the behavior of these deposit accounts following the change in insurance coverage could be fulfilled through institutions' continued reporting of these Memorandum items. The agencies stated that they would review the reported information and reconsider its collection when the number of accounts and amount of deposits stabilizes.

In their joint comment letter, the three bankers' associations encouraged the agencies to discontinue collecting Memorandum items 5.a and 5.b because the need to monitor the volume of deposits covered by the temporary unlimited deposit insurance is no longer relevant. The associations also noted the reporting burden associated with these Memorandum items and stated that the agencies can analyze other deposit data collected in the Call Report to monitor significant deposit runoff. The agencies recognize that there is ongoing burden associated with the continued collection of data on the amount and number of noninterest-bearing transaction accounts of more than $250,000. In this regard, the agencies' burden estimates for the Call Report, which are disclosed earlier in this notice, continue to include the estimated burden of these two Schedule RC–O Memorandum items.

The March 2013 Call Report data on noninterest-bearing transaction accounts of more than $250,000 have recently become available, which will allow the agencies to track any initial movements of these funds and accounts since year-end 2012. Nevertheless, whether migrations of these balances and accounts among individual insured institutions and within the entire depository institution system will begin or continue to occur, including monitoring whether any initial declines in noninterest-bearing transaction accounts of more than $250,000 are temporary, remains to be seen. The behavior of these deposit accounts following their reduction in deposit insurance coverage also will inform any future deliberations about temporary increases in deposit insurance and their subsequent effects. Nevertheless, to provide certainty to institutions about the extent to which they will need to continue supplying data on the amount and number on noninterest-bearing transaction accounts of more than $250,000, the agencies have agreed to terminate the collection of Memorandum items 5.a and 5.b after the December 31, 2013, report date.[13]

Other Matters—In November 2009, the FDIC Board of Directors approved a final rule requiring insured depository institutions to prepay 13 quarters of estimated risk-based deposit insurance assessments to strengthen the cash position of the Deposit Insurance Fund.[14] These assessments were prepaid on December 30, 2009. As required by the final rule, the FDIC will be returning each institution's remaining prepaid assessment, if any, on June 28, 2013. As a consequence, as of June 30, 2013, each institution will have a zero balance for prepaid deposit insurance assessments. Thus, item 6.f, ''Prepaid deposit insurance assessments,'' of Call Report Schedule RC–F, Other Assets,[15] would no longer be necessary as of the June 30, 2013, report date and would be removed from the schedule as of that date. The caption for item 6.f would be revised to read ''Not applicable.''

In August 2012, the agencies published a joint final rule revising their market risk capital rules effective January 1, 2013.[16] The joint final rule modified the definition of a covered position, revised the calculation of the measure for market risk, and eliminated Tier 3 capital. Thus, Schedule RC–R, Regulatory Capital, item 19, ''Tier 3 capital allocated for market risk,'' is no longer necessary and would be removed from the schedule effective June 30, 2013. The caption for item 19 would be revised to read ''Not applicable.''[17]

Request for Comment

Public comment is requested on all aspects of this joint notice. Comments are invited on:

(a) Whether the proposed revisions to the collections of information that are the subject of this notice are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections as they are proposed to be revised, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections 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.

Comments submitted in response to this joint notice will be shared among the agencies. All comments will become a matter of public record.

[12] Large and highly complex institutions with foreign offices would continue to be required to report domestic office data in Memorandum items 10.a, 10.b, and 13.a through 13.d of Schedule RC–O in their Call Reports for June 30, 2013.

[13] Similarly, the agencies would also terminate the collection of the corresponding Memorandum items 5.a and 5.b of Schedule O on the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002; OMB No. 7100–0032) after the December 31, 2013, report date.

[14] 74 FR 59056, November 17, 2009.

[15] An institution completes item 6.f of Schedule RC–F if the remaining amount of its prepaid assessments is greater than $25,000 and exceeds 25 percent of the amount the institution reports for ''All other assets'' in Schedule RC–F, item 6.

[16] 77 FR 53060, August 30, 2012.

[17] Similarly, corresponding Schedule A, item 20, ''Tier 3 capital allocated for market risk,'' on the Risk-Based Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework (FFIEC 101; OMB Nos. 1557–0239, 7100–0319, and 3064–0159) is no longer necessary and the item would be removed from the schedule effective June 30, 2013. The caption for item 20 also would be revised to read ''Not applicable.''

Dated: May 15, 2013.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System, May 16, 2013.

Robert deV. Frierson,

Secretary of the Board.

Dated at Washington, DC, this 15th day of May, 2013.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2013–12220 Filed 5–22–13; 8:45 am]

BILLING CODE 6210–01–P; 4810–33–P; 6714–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0429]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Guidance on Meetings With Industry and Investigators on the Research and Development of Tobacco Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Guidance on Meetings With Industry and Investigators on the Research and Development of Tobacco Products'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: On December 13, 2012, the Agency submitted a proposed collection of information entitled ''Guidance on Meetings With Industry and Investigators on the Research and Development of Tobacco Products'' to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0731. The approval expires on February 29, 2016. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: May 20, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–12274 Filed 5–22–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

General and Plastic Surgery Devices Panel of the Medical Devices 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: General and Plastic Surgery Devices Panel of the Medical Devices 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 June 26, 2013, from 8 a.m. to 5 p.m.

Location: Holiday Inn, Ballroom 2, Montgomery Village Ave., Gaithersburg, MD 20879. The hotel phone number is 301–948–8900.

Contact Person: Avena Russell, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1535, Silver Spring, MD 20993–0002, *Avena.Russell@fda.hhs.gov,* 301–796–3805, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: On June 26, 2013, the committee will discuss and make recommendations regarding the possible reclassification of blood lancet devices. The committee will discuss whether new scientific data are sufficient to support the reasonable assurance of safety and effectiveness to develop special controls that support regulation of blood lancets from class I to class II and class III. The four subsets of blood lancets have been identified with the following indications for use:

- Blood lancet with an integral sharps injury prevention feature is for single use only, disposable blood lancet with a blade attached to a solid base which includes an integral sharps injury prevention feature that allows the device to be used once and then renders it inoperable and incapable of further use and which is used to puncture the skin to obtain a drop of blood for diagnostic purposes;
- Blood lancet without an integral sharps injury prevention feature is for single use only, disposable blood lancet with a blade attached to a solid base which is used to puncture the skin to obtain a drop of blood for diagnostic purposes;
- Blood lancet for single patient use only is a multiple use capable blood lancet with a single use blade inserted into a solid, reusable base which is used only for a single patient to puncture the skin to obtain a drop of blood for diagnostic purposes; and
- Multiple use blood lancet for multiple patient use is a multiple use capable blood lancet with a single use blade inserted into a solid, reusable base which is used for multiple patients to puncture the skin to obtain a drop of blood for diagnostic purposes.

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 meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 7, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral

presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 6, 2013. 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 June 10, 2013.

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 AnnMarie Williams, Committee Management Staff, at 301–796–5966 or *AnnMarie.Williams@fda.hhs.gov* 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: May 17, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–12230 Filed 5–22–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

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 Committee: Drug Safety and Risk Management 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 July 10, 2013, from 8 a.m. to 5 p.m.

Location: FDA White Oak Campus, Building 31, the Great Room, White Oak Conference Center (Rm. 1503), 10903 New Hampshire Ave., Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Nicole Vesely, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., WO31–2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *DSaRM@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: The Food and Drug Administration Amendments Act of 2007 requires FDA to bring, at least annually, one or more drugs with Risk Evaluation and Mitigation Strategies (REMS) with elements to assure safe use (ETASU) before its Drug Safety and Risk Management Advisory Committee (DSaRM). On July 10, 2013, the Agency plans to discuss the risk management of LOTRONEX (alosetron hydrochloride) tablets, by Prometheus Laboratories Inc., which is approved for the treatment of women with severe diarrhea predominant irritable bowel syndrome (IBS-d). The Agency will seek the committee's comments as to whether the REMS with ETASU for this drug assures safe use, is not unduly burdensome to patient access to the drug, and to the extent practicable, minimizes the burden to the health care delivery system.

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 meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 25, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. to 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 17, 2013. 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 June 18, 2013.

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 Nicole Vesely 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: May 17, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–12226 Filed 5–22–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request: Generic Clearance To Support Programs and Administrative Operations at the National Cancer Institute (NCI)

SUMMARY: 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 National Cancer Institute (NCI), National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

To Submit Comments and For Further Information: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Vivian Horovitch-Kelley, PRA/OMB Project Clearance Liaison, Office of Management Policy and Compliance (OMPC), National Cancer Institute, 11400 Rockville Pike, Room 707, Rockville, MD 20852 or call non-toll-free number 301–480–0541 or Email your request, including your address to: *Horovitchkellv@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

Comment Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Proposed Collection: Generic Clearance to Support Programs and Administrative Operations At the National Cancer Institute (NCI), 0925–NEW, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: This is a request for a new, generic submission that would be used for administrative and program-related submissions. Administrative submissions are defined as information collections (ICs) wherein the primary content is used for administrative purposes (e.g., an application) or to monitor or improve a program. These ICs may involve little if any, subsequent analysis and/or the use of simple, descriptive statistics. Some ICs are forms used to source and aggregate contact information, history, preferences, opinions, and/or other data that does not necessitate further inquiry but allow the respondents to maintain contact, indicate preferences, and respond to data calls of information that has not already been collected. Other ICs may be program-related requests for the purpose of monitoring, improving or assessing the effectiveness of the program. NCI program staff who have submitted sub-projects that have been reviewed and returned by OMB, have contributed ideas and comments to this request. Along with the analysis, NCI's ongoing education and outreach effort has increased the awareness and the need for the request of a generic, administrative and program-related information collection. NCI's current scope and capacity for administrative generic sub-studies is non-existent and this request would fill this gap.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 5,000.

ESTIMATED ANNUALIZED BURDEN HOURS

Category of respondents	Number of respondents	Frequency of responses	Average time per response (in hours)	Total burden hours
Individuals, Households, Private Sector, State Government, Local Government, Tribal Government, or Federal Government	6,000	1	50/60	5,000

Dated: May 17, 2013.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2013–12276 Filed 5–22–13; 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; PAR10–169: Academic Industrial Partnership.

Date: June 18–19, 2013.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Mehrdad Mohseni, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7854, Bethesda, MD 20892, 301–435–0484, *mohsenim@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Radiation Therapy and Biology.

Date: June 18–19, 2013.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bo Hong, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–435–5879, *hongb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Plant Natural Product Pathways.

Date: June 19–20, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Michael Eissenstat, Ph.D., Scientific Review Officer, BCMB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, Bethesda, MD 20892, 301–435–1722, *eissenstatma@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–13–008: Shared Instrumentation: Miscellaneous.

Date: June 19–20, 2013.

Time: 9:00 a.m. to 10:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kenneth Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7717, Bethesda, MD 20892, 301–435–0229, *kenneth.ryan@nih.hhs.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Sensory Technologies.

Date: June 20, 2013.

Time: 7:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613–2064, *leepg@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Medical Imaging.

Date: June 20–21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Leonid V Tsap, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435–2507, *tsapl@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Sensory and Motor Neurosciences, Cognition and Perception.

Date: June 20–21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Mark Hopkins Hotel, 999 California Street, San Francisco, CA 94108.

Contact Person: Sharon S Low, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 5104, Bethesda, MD 20892–5104, 301–237–1487, *lowss@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Neurodevelopment, Synaptic Plasticity and Neurodegeneration.

Date: June 20–21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Mark Hopkins Hotel, 999 California Street, San Francisco, CA 94108.

Contact Person: Mary Schueler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7846, Bethesda, MD 20892, 301–451–0996, *marygs@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Drug Discovery for Aging, Neuropsychiatric and Neurologic Disorders.

Date: June 20–21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Intercontinental Mark Hopkins, 999 California Street, San Francisco, CA 94108.

Contact Person: Yuan Luo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207 MSC 7846, Bethesda, MD 20892–7846, 301–827–7915.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Clinical Neurophysiology, Devices, Neuroprosthetics, and Biosensors.

Date: June 20–21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue NW., Washington, DC 20036.

Contact Person: Joseph G Rudolph, Ph.D., Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7844, Bethesda, MD 20892, 301–408–9098, *josephru@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Clinical and Translational Imaging Applications.

Date: June 20, 2013.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Eileen W Bradley, DSC, Chief, SBIB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5100, MSC 7854, Bethesda, MD 20892, (301) 435–1179, *bradleye@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–13–080: Accelerating the Pace of Drug Abuse Research Using Existing Data.

Date: June 20, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: George Vogler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7770, Bethesda, MD 20892, (301) 237–2693, *voglergp@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PA–12–139: Pilot and Feasibility Clinical Research Studies in Digestive Diseases and Nutrition.

Date: June 20, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Peter J Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Biomedical Sensing, Measurement and Instrumentation.

Date: June 21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Guo Feng Xu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5122, MSC 7854, Bethesda, MD 20892, 301–237–9870, *xuguofen@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Risk, Prevention and Health Behavior.

Date: June 21, 2013.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Claire E Gutkin, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3106, MSC 7808, Bethesda, MD 20892, 301–594–3139, *gutkincl@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular and Surgical Devices.

Date: June 21, 2013.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892, 301.435.1049, *lij21@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular and Surgical Devices.

Date: June 21, 2013.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: John Firrell, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, 301–435–2598, *firrellj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Molecular Probes.

Date: June 21, 2013.

Time: 10:30 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, DuPont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Mary Custer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892, (301) 435–1164, *custerm@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: May 17, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–12258 Filed 5–22–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Advisory Committee to the Director, National Institutes of Health, June 13, 2013, 9:00 a.m. to June 14, 2013, 1:00 p.m., National Institutes of Health, Building 31, 6th Floor, Conference Room 6C6, 31 Center Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on May 14, 2013, 78 FR 28235.

The meeting notice is being amended to announce the open sessions originally scheduled from 9:00 a.m. to 12:00 p.m. and 2:00 p.m. to 5:00 p.m. on June 13, 2013 have been changed to 9:00 a.m. to 3:15 p.m. on June 13, 2013. The closed session originally scheduled from 1:00 p.m. to 2:00 p.m. on June 13, 2013 has been changed to 3:30 p.m. until adjournment. There is no change to the open session times scheduled on June 14, 2013. There is no change in the meeting location. The meeting is partially closed to the public.

Dated: May 17, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–12253 Filed 5–22–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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: National Institute on Aging Special Emphasis Panel; Mobility and Aging.

Date: June 20, 2013.

Time: 10:00 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, Ph.D., D.Sc., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; VZV Pathogenesis.

Date: June 24, 2013.

Time: 9:30 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: Rebecca Jo Ferrell, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7703, *rebecca.ferrell@nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Heart Failure and Obesity.

Date: July 10, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, Ph.D., D.Sc., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 17, 2013

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–12257 Filed 5–22–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Cancellation of Meeting

Notice is hereby given of the cancellation of the National Cancer Institute Special Emphasis Panel, June 7, 2013, 10:00 a.m. to June 7, 2013, 1:00 p.m., National Institutes of Health, National Cancer Institute, 9609 Medical Center Drive, Room 7W640, Rockville, MD, 20850 which was published in the

Federal Register on May 14, 2013, 78 FR 11346.

Meeting has been canceled.

Dated: May 17, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–12255 Filed 5–22–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel, June 7, 2013, 9:00 a.m. to June 7, 2013, 10:00 a.m., National Institutes of Health, National Cancer Institute, 9609 Medical Center Drive, Room 7W640, Rockville, MD, 20850 which was published in the **Federal Register** on May 14, 2013, 78 FR 11346.

This notice is being amended due to a change in the meeting name and time to ''NCI: Development of Devices for Point of Care Analysis of Circulating Tumor Cells'' at 9:30 a.m. to 1:00 p.m. on June 7, 2013. The meeting is closed to the public.

Dated: May 17, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–12256 Filed 5–22–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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/contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Topic 306 Development of Innovative Algorithms/Software for Processing & Analysis of In Vivo Images in Oncology.

Date: June 14, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 4W032 ,Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Clifford W Schweinfest, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W108, Bethesda, Md 20892–9750, 240–276–6378, *schweinfestcw@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Nanotech-Biosensor Platforms for Cancer.

Date: June 19, 2013.

Time: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 6W032, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Christopher L. Hatch, Ph.D., Chief, Health Scientist Administrator, Program Coordination and Referral Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W554, Bethesda, MD 20892–9750, 240–276–6454, *hatchc@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Development of Glycosylation-Specific Research Reagents (Antibodies and Aptamers).

Date: July 2, 2013.

Time: 10:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 7W034, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Marvin L. Salin, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W236, Bethesda, MD 20892–9750, 240–276–6369, *msalin@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; T32 Application Review.

Date: July 8, 2013.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 7W030, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Robert Bird, Ph.D., Chief, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W110, Bethesda, MD 20892–9750, 240–276–6344, *birdr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Utilizing the PLCO Biospecimens Resource to Bridge Gaps in Cancer Etiology & Early Detection.

Date: July 9, 2013.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 7W034, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Donald L Coppock, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W260, Bethesda, MD 20892, 240–276–6382, *donald.coppock@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Validation and Advanced Development of Emerging Molecular Analysis Technologies for Cancer Research.

Date: July 17, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 7W034, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Timothy C. Meeker, MD, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606, Bethesda, MD 20892, 240–276–6454, *Meekert@Mail.Nih.Gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Feasibility Studies to Build Collaborative Partnerships in Cancer Research.

Date: July 23, 2013.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, Shady Grove, 9609 Medical Center Drive, Room 5W030, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Gerald G. Lovinger, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W266, Bethesda, MD 20892–8329, 240–276–6385, *lovingeg@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional information for the meeting will be posted when available.

(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: May 17, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–12254 Filed 5–22–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs And Border Protection

Agency Information Collection Activities: Customs-Trade Partnership Against Terrorism (C–TPAT)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing information collection: 1651–0077.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Customs-Trade Partnership Against Terrorism (C–TPAT). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 22, 2013, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Customs-Trade Partnership Against Terrorism (C–TPAT).

OMB Number: 1651–0077.

Form Number: None.

Abstract: The Customs-Trade Partnership Against Terrorism (C–TPAT) Program is designed to safeguard the world's trade industry from terrorists and smugglers by prescreening its participants. The C–TPAT Program applies to United States importers, customs brokers, consolidators, port and terminal operators, carriers and foreign manufacturers. Respondents apply to participate in C–TPAT using an on-line application at *https://ctpat.cbp.dhs.gov/CompanyProfile.aspx.* The information collected includes the applicant's contact information and business information including the number of employees, the number of years in business, and a list of company officers. This information collection was authorized by the SAFE Port Act (Pub. L.109–347).

Current Actions: This submission is being made to extend the expiration date with a change to the burden hours as a result of updated estimates for the number of annual respondents. There is no change to the C–TPAT application or to the information collected.

Type of Review: Extension (with change).

Affected Public: Businesses.

Estimated Number of Respondents: 2,541.

Estimated Time per Respondent: 5 hours.

Estimated Total Annual Hours: 12,705.

Dated: May 20, 2013.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2013–12327 Filed 5–22–13; 8:45 am]

BILLING CODE 9111–14–P

INTERNATIONAL TRADE COMMISSION

[Docket No 2956]

Certain Consumer Electronics With Display and Processing Capabilities; Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Consumer Electronics with Display and Processing Capabilities,* DN 2956; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Acting Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at EDIS,[1] and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at USITC.[2] The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at EDIS.[3] Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Graphics Properties Holdings, Inc. on May 17, 2013. The complaint alleges violations of section 337 of the Tariff

[1] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

[2] United States International Trade Commission (USITC): *http://edis.usitc.gov.*

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain consumer electronics with display and processing capabilities. The complaint names as respondents Panasonic Corporation of Japan; Panasonic Corporation of North America of Secaucus, NJ; Toshiba Corporation of Japan; Toshiba America, Inc. of New York, NY; Toshiba America Information Systems, Inc. of Irvine, CA; Vizio, Inc. of Irvine, CA; AmTran Logistics, Inc. of Irvine, CA; AmTran Technology Co., Ltd. of Taiwan; ZTE Corporation of China; ZTE (USA) Inc. of Iselin, NJ; and ZTE Solutions Inc. of Richardson, TX.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 2956'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [4]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on *EDIS*.[5]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10 and 210.8(c)).

Issued: May 17, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–12249 Filed 5–22–13; 8:45 am]

BILLING CODE 7020–02–P

[4] Handbook for Electronic Filing Procedures: *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf.*

[5] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Settlement Under the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act

On May 16, 2013, a proposed Stipulation Between Debtors and the United States Environmental Protection Agency (''Stipulation'') was lodged with the United States Bankruptcy Court for the District of Delaware in the Chapter 11 Proceeding entitled *In re WP Steel Venture, et al.,* Case No. 12–11661.

The Stipulation resolves EPA's Proofs of Claim for civil penalties for alleged violations of the Clean Air Act, the Clean Water Act and the Resource Conservation and Recovery Act regarding three debtors in the jointly administered bankruptcy proceedings: RG Steel Sparrows Point, LLC; RG Steel Warren, LLC; and RG Steel Wheeling, LLC. Specifically, the Stipulation provides that EPA will have an allowed general unsecured claim in the amount of $15,748,295 in connection with EPA's claim that RG Steel Wheeling is liable for civil penalties for violation of the Clean Water Act at its former facilities in Yorkville and Martins Ferry, Ohio, and the Clean Air Act and the Resource Conservation and Recovery Act at its former facilities in Mingo Junction and Steubenville, Ohio and its facility in Follansbee, West Virginia. The Stipulation also provides that EPA will have an allowed general unsecured claim in the amount of $4,132,776 in connection with EPA's claim that RG Steel Warren is liable for civil penalties for violation of the Clean Air Act at its former facility located in Warren, Ohio. In addition, the Stipulation provides that EPA will have an allowed general unsecured claim in the amount of $8,431 in connection with EPA's claim that RG Steel Sparrows Point is liable for civil penalties for violation of a Consent Agreement and Final Order issued under the Clean Air Act at its former facility located in Sparrows Point, Maryland.

The publication of this notice opens a period for public comment on the proposed Stipulation. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *In re WP Steel Venture, LLC, et al.,* D.J. Ref. No. 90–7–1–10607. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email ...	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Stipulation may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Stipulation upon written request and payment of reproduction costs. Please mail your

request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $4.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–12270 Filed 5–22–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemption From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemption.

SUMMARY: This document contains an exemption 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). This notice includes the following: 2013–07, The Mo-Kan Teamsters Apprenticeship and Training Fund (the Fund) L–11720.

SUPPLEMENTARY INFORMATION: 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 (76 FR 66637, 66644, October 27, 2011) [1] 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.

The Mo-Kan Teamsters Apprenticeship and Training Fund (the Fund) Located in Kansas City, Missouri

[Prohibited Transaction Exemption 2013–07; Exemption Application No. L–11720]

Exemption

The restrictions of sections 406(a)(1)(A) and (D) of the Act shall not apply to the purchase (the Purchase) by the Fund of certain real property located in Kansas City, Missouri (the Property) from Jim Kidwell Construction, a party in interest with respect to the Fund; provided that the following conditions are satisfied:

(a) The terms and conditions of the Purchase are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(b) The Purchase is a one-time transaction for cash;

(c) The Fund pays the lesser of $1,500,000 or the fair market value of the Property, as of the date of the Purchase, as determined by a qualified, independent appraiser (the Appraiser);

(d) The Fund's fiduciaries (the Trustees) review and approve the methodology used by the Appraiser, ensure that such methodology is properly applied in determining the fair market value of the Property, and determine whether it is prudent to go forward with the transaction; and

(e) The Fund pays only reasonable closing costs with respect to the Purchase that a similarly situated buyer would customarily pay in a similar transaction.

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Written Comments

The Department invited all interested persons to submit written comments with respect to the notice of proposed exemption on or before February 10, 2013. During this comment period, the Department received one written comment. To ensure that all participants had been given the opportunity to comment, the Department decided to extend the comment period until March 21, 2013. During the second comment period, the Department received three written comments from Fund participants.

Of the four comments received by the Department, one commenter disapproved of the proposed transaction because he thought it might affect his benefits. The three comments that were substantive were, in part, concerned with the value of the Property. The participants' comments, as well as the responses to these comments by the Appraiser and the Trustees, are described below.

Comments Regarding Property Overvaluation and Purchase Not Negotiated in Good Faith

In three comment letters, the participants noted that the Property's value was overstated. One commenter attached an online document (the Document) that placed the fair market value of the Property at $300,000.00, as of January 17, 2013. The commenter further stated that the Purchase was not negotiated in good faith.

The Appraiser's Response

The Appraiser reviewed the comments relating to the value of the Property and the Document. The Appraiser states that he disagrees with the participants' assertion that the Property is overvalued. The Appraiser also explains that the Document only depicts the value of a single parcel of land rather than the twelve parcels comprising the Property.

In addition, the Appraiser notes that the Document was obtained from the Jackson County, Missouri Web site, containing the tax assessment information. According to the Appraiser, this information has no relevance for the purposes of assessing market value and is not a source of information that the Appraiser relied on or should rely on.

Comment Regarding Union Voting and Fund Assets Invested in the Property

Another participant inquired about the lack of information offered to the union membership and why the transaction was not subject to a union vote. The participant also questioned

the knowledge and experience of the Fund with managing a mine that is located on the Property. Further, the participant questioned whether it is prudent to spend 83% of the Fund's cash on the Purchase.

Trustees' Response

In response to the participant's comments, the Trustees note that the decision to purchase the Property was a financial decision made by the Trustees for the benefit of the participants and beneficiaries of the Fund. The Trustees state further that all of the Trustees are familiar with the matters regarding the Purchase. According to the Trustees, the decision to purchase the Property by the Fund is not a union matter or a decision that the union or its members were required or permitted to make.

With respect to the knowledge and experience of the Fund to manage the mine, the Trustees state that there is no requirement that the Fund manage the mine or conduct mining activities on the Property. The Trustees point out that the Property will be used for the purpose of truck driving, heavy equipment training, and equipment storage underneath the surface where the mine is located. The Trustees explain that they expect to oversee and employ proper personnel to handle issues of maintenance when necessary.

In response to the participant's comment regarding the high percentage of the Fund's assets involved in this Purchase, the Trustees represent that the decision to purchase the Property was made with due diligence as established and required by the regulations under the Act. The Trustees represent further that based on this due diligence, they have determined that purchasing the Property is in the Fund's best interest. The Trustees note that the Fund will be able to make any changes or additions to meet future training requirements of the Training Fund and its apprenticeship program without the consent or outside interference from other parties. In addition, the Fund will acquire an equity interest in the Property which will, in return, have a future value as a plan asset, and the Purchase is a transaction that is customary for similarly situated employee benefit plans.

After giving full consideration to the entire record, including the written comments, the Department has decided to grant the exemption, as described above. The complete application is made available for inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the proposed exemption published in the **Federal Register** on December 28, 2012 at 77 FR 76776.

FOR FURTHER INFORMATION CONTACT: Mr. Asrar Ahmed of the Department, telephone (202) 693–8557. (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.

Lyssa E. Hall,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2013–12236 Filed 5–22–13; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2013–0015]

National Advisory Committee on Occupational Safety and Health (NACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Announcement of a meeting of NACOSH.

SUMMARY: NACOSH will meet June 11, 2013 in Washington, DC.

DATES: *NACOSH meeting:* NACOSH will meet from 1 p.m. to 5 p.m. e.t., Tuesday, June 11, 2013.

Comments, requests to speak, speaker presentations, and requests for special accommodation: You must submit (postmark, send, transmit) comments, requests to address NACOSH, speaker presentations (written or electronic), and requests for special accommodations for the NACOSH meeting by June 4, 2013.

ADDRESSES: *NACOSH meeting:* The NACOSH meeting will be in Room C–5320–6, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Submission of comments, requests to speak, and speaker presentations: You may submit comments, requests to speak at the NACOSH meeting and speaker presentations, using one of the following methods:

Electronically: You may submit materials, including attachments, electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions on that Web page for making submissions;

Facsimile: If your submission, including attachments, does not exceed 10 pages, you may fax it to the OSHA Docket Office at (202) 693–1648; or

Regular mail, express mail, hand delivery, or messenger/courier service: You may submit your materials to the OSHA Docket Office, Docket No. OSHA–2013–0015, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA TTY (887) 889–5627). OSHA's Docket Office accepts deliveries (hand deliveries, express mail, and messenger service) during normal business hours, 8:15 a.m. to 4:45 p.m., e.t., weekdays.

Requests for special accommodation: Please submit requests for special accommodations to attend the NACOSH meeting to Ms. Frances Owens, OSHA,

Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–1999 (OSHA TTY (887) 889–5627); email *owens.frances@dol.gov.*

Instructions: Your submissions must include the Agency name and docket number for this **Federal Register** notice (Docket No. OSHA–2013–0015). Due to security-related procedures, submission by regular mail may experience significant delays. Please contact the OSHA Docket Office for information about security procedures for making submissions. For additional information on submitting comments, requests to speak and speaker presentations see the **SUPPLEMENTARY INFORMATION** section of this notice.

OSHA will post comments, requests to speak, and speaker presentations, including any personal information you provide, without change, at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting personal information such as Social Security numbers and birthdates.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–1999; email *meilinger.francis2@dol.gov.*

For general information about NACOSH and NACOSH meetings: Ms. Elizabeth Grossman, Director, OSHA Office of Evaluation and Audit Analysis, Directorate of Evaluation and Analysis, U.S. Department of Labor, Room N–3641, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2225; email *grossman.elizabeth@dol.gov.*

SUPPLEMENTARY INFORMATION:

NACOSH Meeting

NACOSH will meet June 11, 2013, in Washington, DC. Some NACOSH members will participate in the meeting electronically. The NACOSH meeting is open to the public.

Section 7(a) of the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651, 656) authorizes NACOSH to advise the Secretary of Labor and the Secretary of Health and Human Services on matters relating to the administration of the OSH Act. NACOSH is a continuing advisory body and operates in compliance with the OSH Act, the Federal Advisory Committee Act (5 U.S.C. App. 2), and regulations issued pursuant to those laws (29 CFR Part 1912a, 41 CFR Part 102–3).

The focus of this NACOSH meeting will be occupational safety and health issues that temporary workers face. The tentative agenda for the NACOSH meeting includes:

- Remarks from the Assistant Secretary of Labor for Occupational Safety and Health (OSHA);
- Remarks from the Director of the National Institute of Occupational Safety and Health (NIOSH);
- NACOSH discussion of and recommendations on occupational safety and health issues related to temporary workers; and
- Public comments.

OSHA transcribes NACOSH meetings and prepares detailed minutes of NACOSH meetings. OSHA places the meeting transcripts and minutes in the public docket for the meeting. The docket also includes speaker presentations, comments, and other materials submitted to NACOSH.

Public Participation, Submissions, and Access to Public Record

NACOSH meeting: All NACOSH meetings are open to the public. Individuals attending NACOSH meetings at the U.S. Department of Labor must enter the building at the Visitors' Entrance at 3rd and C Streets NW., and pass through building security. Attendees must have valid government-issued photo identification (e.g., driver's license) to enter the building. For additional information about building security measures for attending the NACOSH meeting, please contact Ms. Owens (see **ADDRESSES** section).

Individuals needing special accommodation to attend the NACOSH meeting also should contact Ms. Owens.

Submission of comments: You may submit comments using one of the methods listed in the **ADDRESSES** section. Your submission must include the Agency name and docket number for this NACOSH meeting (Docket No. OSHA–2013–0015). OSHA will provide copies of submissions to NACOSH members.

Because of security-related procedures, submissions by regular mail may experience significant delays. For information about security procedures for submitting materials by hand delivery, express mail, and messenger or courier service, please contact the OSHA Docket Office (see **ADDRESSES** section).

Requests to speak and speaker presentations: If you want to address NACOSH at the meeting you must submit your request to speak, as well as any written or electronic presentation, by June 4, 2013, using one of the methods listed in the **ADDRESSES** section. Your request must state:

- The amount of time requested to speak;
- The interest you represent (e.g., business, organization, affiliation), if any; and
- A brief outline of the presentation.

PowerPoint presentations and other electronic materials must be compatible with PowerPoint 2010 and other Microsoft Office 2010 formats. The NACOSH Chair may grant requests to address NACOSH as time and circumstances permit.

Public docket of the NACOSH meeting: OSHA places comments, requests to speak and speaker presentations, including any personal information you provide, in the public record of this NACOSH meeting without change, and those documents may be available online at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting certain personal information such as Social Security numbers and birthdates.

OSHA also places in the public docket the meeting transcript, meeting minutes, documents presented at the NACOSH meeting, and other documents pertaining to the NACOSH meeting. These documents are available online at *http://www.regulations.gov. Access to the public record of NACOSH meetings:* To read or download documents in the public docket of this NACOSH meeting, go to Docket No. OSHA–2013–0015 at *http://www.regulations.gov.* The *http://www.regulations.gov* index lists all documents in the public record for this meeting; however, some documents (e.g., copyrighted materials) are not publicly available through that Web page. All documents in the public record, including materials not available through *http://www.regulations.gov,* are available for inspection and copying in the OSHA Docket Office (see **ADDRESSES** section). Please contact the OSHA Docket Office for assistance in making submissions to, or obtaining materials from, the public docket.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available on the OSHA Web page at *http://www.osha.gov.*

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by Section 7 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656), the Federal

Advisory Committee Act (5 U.S.C. App. 2); 29 CFR Part 1912a; 41 CFR Part 102–3; and Secretary of Labor's Order No. 1–2012 (77 FR 3912 (1/25/2012)).

Signed at Washington, DC, on May 17, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–12277 Filed 5–22–13; 8:45 am]

BILLING CODE 4510–26–P

OFFICE OF NATIONAL DRUG CONTROL POLICY

Appointment of Members of Senior Executive Services Performance Review Board

AGENCY: Office of National Drug Control Policy [ONDCP].

ACTION: Notice of appointments.

SUMMARY: The following persons have been appointed to the ONDCP Senior Executive Service Performance Review Board: Mr. Jeffrey Teitz, Dr. Terry Zobeck, Ms. Martha Gagne, and Mr. Gerard Burns.

FOR FURTHER INFORMATION CONTACT: Please direct any questions to Daniel R. Petersen, Deputy General Counsel (202) 395–6745, Office of National Drug Control Policy, Executive Office of the President, Washington, DC 20503.

Daniel R. Petersen,

Deputy General Counsel.

[FR Doc. 2013–12248 Filed 5–22–13; 8:45 am]

BILLING CODE 3180–02–P

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Notice of Proposed Information Collection Requests: State Library Administrative Agencies Survey, FY 2014

AGENCY: Institute of Museum and Library Services, The National Foundation for the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Service (''IMLS'') 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 (44 U.S.C. 3501 *et seq.*). This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the continuance of the State Library Administrative Agencies Survey for FY 2014.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before July 22, 2013.

The IMLS is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submissions of responses.

ADDRESSES: For a copy of the documents contact: Deanne W. Swan, Senior Statistician, Office of Planning, Research, and Evaluation, Institute of Museum and Library Services, 1800 M Street NW., 9th Floor, Washington, DC 20036. Dr. Swan can be reached by Telephone: 202–653–4769, Fax: 202–653–4601, or by email at *dswan@imls.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Institute of Museum and Library Services (IMLS) is an independent Federal grant-making agency and is the primary source of federal support for the Nation's 123,000 libraries and 17,500 museums. IMLS provides a variety of grant programs to assist the Nation's museums and libraries in improving their operations and enhancing their services to the public. IMLS is responsible for identifying national needs for and trends in museum, library, and information services; measuring and reporting on the impact and effectiveness of museum, library and information services throughout the United States, including programs conducted with funds made available by IMLS; identifying, and disseminating information on, the best practices of such programs; and developing plans to improve museum, library and information services of the United States and strengthen national, State, local, regional, and international communications and cooperative networks (20 U.S.C. Chapter 72, 20 U.S.C. 9108).

II. Current Actions

The State Library Administrative Agencies Survey has been conducted by the Institute of Museum and Library Services under the clearance number 3137–0072, which expires 10/31/2013. State library administrative agencies (''SLAAs'') are the official agencies of each state charged by state law with the extension and development of public library services throughout the state. (20 U.S.C. Chapter 72, 20 U.S.C. 9122.) The purpose of this survey is to provide state and federal policymakers with information about SLAAs, including their governance, allied operations, developmental services to libraries and library systems, support of electronic information networks and resources, number and types of outlets, and direct services to the public. Through the FY 2010 collection, the SLAA Survey was conducted annually; beginning with the FY 2012 collection, the survey will be conducted biennially. Before the beginning of the FY 2014 collection, IMLS will review and revise the questionnaire. Because the FY 2014 collection will not begin until late 2014, we are carrying over the documentation and estimated burden associated with the FY 2012 data.

Agency: Institute of Museum and Library Services.

Title: State Library Administrative Agencies Survey, FY 2014.

OMB Number: 3137–0072.

Agency Number: 3137.

Affected Public: Federal, State and local governments, State library administrative agencies, libraries, general public.

Number of Respondents: 51.

Frequency: Biennially.

Burden hours per respondent: 24.

Total burden hours: 1,248.

Total Annual Costs: $34,307.

Contact: Kim A. Miller, Management Analyst, Office of Planning, Research, and Evaluation, Institute of Museum and Library Services, 1800 M Street

NW., 9th Floor, Washington, DC 20036. Ms. Miller can be reached by Telephone: 202–653–4762, Fax: 202–653–4601, or by email at *kmiller@imls.gov.*

Dated: May 20, 2013.

Kim A. Miller,

Management Analyst, Office of Planning, Research, and Evaluation.

[FR Doc. 2013–12269 Filed 5–22–13; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson, Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov/events/* This information may also be requested by telephoning, 703/292–8182.

Dated: May 20, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013–12279 Filed 5–22–13; 8:45 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2013–50 and CP2013–63; Order No. 1719]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Express Mail Contract 15 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* May 23, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Notice of Filings
III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Express Mail Contract 15 to the competitive product list.[1] The Postal Service asserts that Express Mail Contract 15 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Request has been assigned Docket No. MC2013–50.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–63.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective one business day following the day that the Commission issues all necessary regulatory approval. *Id.* at 3. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment E.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–50 and CP2013–63 to consider the Request pertaining to the proposed Express Mail Contract 15

[1] Request of the United States Postal Service to Add Express Mail Contract 15 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, May 15, 2013 (Request).

product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than May 23, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Lawrence E. Fenster to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–50 and CP2013–63 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Lawrence E. Fenster is appointed to serve as an officer of the Commission to represent the interests of the general public in these proceedings (Public Representative).

3. Comments by interested persons in these proceedings are due no later than May 23, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–12247 Filed 5–22–13; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30524; File No. 812–13783]

Frank Russell Company, et al.; Notice of Application

May 17, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements.

SUMMARY: *Summary of the Application:* Applicants, including an actively-managed open-end exchange traded fund, request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval and would grant relief from certain disclosure requirements.

APPLICANTS: Frank Russell Company (''Russell''), Russell Investment Management Company (''RIMCo''), Russell Investment Company (''RIC''), Russell Investment Funds (''RIF''), and Russell Exchange Traded Funds Trust (''RET'', and together with RIC and RIF, the ''Trusts'') (collectively, the ''Applicants'').

DATES: *Filing Dates:* The application was filed on June 9, 2010, and amended on November 22, 2010, April 27, 2012, November 22, 2012, and March 15, 2013.

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 June 11, 2013, 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: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: 1301 Second Avenue, 18th Floor, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at (202) 551–6990, or Jennifer L. Sawin, Branch Chief, at (202) 551–6821 (Division of Investment Management, Exemptive Applications Office).

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 an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. RIC and RIF are organized as Massachusetts business trusts and are registered under the Act as open-end management investment companies. RIC is comprised of forty-two separate registered funds and RIF is comprised of ten separate registered funds, each with its own investment objective, policies and restrictions. RET is organized as a Delaware statutory trust and is registered under the Act as an open-end management investment company. RET is comprised of one separate registered fund and twelve separate funds in registration, each with its own investment objective, policies and restrictions.[1]

2. RIMCo, a corporation organized under the laws of the State of Washington, is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (''Advisers Act''). RIMCo serves as the investment adviser of the Funds and RIMCo or another Adviser will serve as investment adviser to the future Funds, in each case pursuant to an investment advisory agreement with the Fund (each an ''Advisory Agreement'').[2] The Advisory Agreements have been approved (and future Advisory Agreements will be approved) by the applicable board of trustees of a Trust (the ''Board''),[3] including a majority of the trustees who are not ''interested persons,'' (as defined in section 2(a)(19) of the Act) of the applicable Trust, the applicable Fund, RIMCo or other Adviser, or any Money Manager (as defined below) (the ''Independent Trustees'') and by shareholders in the manner required by sections 15(a) and 15(c) of the Act and rule 18f–2 thereunder. With respect to new Funds offered in the future, the applicable Advisory Agreement will be approved by the Board and the initial shareholder of the Fund in the manner required by sections 15(a) and 15(c) of the Act and rule 18f–2 thereunder. Applicants are not seeking any exemptions from the provisions of the

[1] Applicants request relief with respect to existing or future series of the Trusts and any other existing or future registered open-end management investment company or series thereof that: (a) is advised by RIMCo or an entity controlling, controlled by, or under common control with RIMCo or its successors (each such entity, together with RIMCo, an ''Adviser''); (b) uses the manager-of-managers structure described in the application (''Managers of Managers Structure''); and (c) complies with the terms and conditions of the application (the ''Funds'' and each, individually, a ''Fund''). Every existing registered open-end investment company that currently intends to rely on the requested order is named as an Applicant. For the purposes of the requested order, ''successor'' is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization. Every existing or future entity that intends to rely on the order in the future will do so only in accordance with the terms and conditions in the application. If the name of any Fund contains the name of a Money Manager (as defined below), the name of the Fund's Adviser, or a trademark or trade name that is owned or publicly used to identify that Adviser, will precede the name of the Money Manager.

[2] Other Advisers are or will be registered as investment advisers under the Advisers Act.

[3] The term ''Board'' also includes the board of trustees or directors of a future Fund, if different.

Act with respect to the Advisory Agreements.

3. Under the terms of an Advisory Agreement, and subject to the authority of the applicable Board, RIMCo will provide or oversee the provision of investment advisory and portfolio management services for a Fund, including the development of the investment program for the Fund all in accordance with the investment objectives, policies and limitations of each such Fund. For the advisory services it provides to the Funds, RIMCo receives the fee specified in the Advisory Agreements from the Funds based on each Fund's average daily net assets. The Advisory Agreement will permit the Adviser to: (a) Select certain money managers that are not Affiliated Money Managers [4] (each a ''Discretionary Money Manager'') to manage all or a portion of the assets of the Funds pursuant to portfolio management agreements (each agreement with a Money Manager (as defined below) a ''Portfolio Management Agreement''); (b) select certain money managers that are not Affiliated Money Managers (each a ''Non-Discretionary Money Manager'' and together with the Discretionary Money Managers, the ''Money Managers'') to provide model portfolios to an Adviser pursuant to a Portfolio Management Agreement, which such Adviser would utilize in connection with the management of a Fund. Each Money Manager to a Fund is, or will be, an ''investment adviser'' as defined in section 2(a)(20)(B) of the Act and registered as an investment adviser under the Advisers Act unless not subject to such registration. An Adviser will continuously supervise and monitor each Money Manager for adherence to its specific strategy. An Adviser will evaluate Money Managers, allocate assets to Discretionary Money Managers, implement the model portfolios of Non-Discretionary Money Managers, oversee the Money Managers, and make recommendations about the hiring, termination and replacement of Money Managers to the applicable Board, at all times subject to the authority of the applicable Board. A Fund's Adviser will manage the portion of the Fund's assets that the Adviser determines not to allocate to one or more Discretionary Money Managers, including implementing model portfolios of Non-Discretionary Money Managers. Assets not allocated to a Discretionary Money Manager may also include a Fund's liquidity reserves and assets which may be managed directly by the Adviser. The applicable Adviser will compensate each Money Manager out of the fees that are paid to such Adviser under the Advisory Agreement.

4. Applicants request an order to permit an Adviser, subject to the approval of the applicable Board, including a majority of the Independent Trustees, to enter into and materially amend Portfolio Management Agreements with Money Managers without shareholder approval.[5]

5. Applicants also request an order exempting them from certain disclosure requirements described below that may require the Funds to disclose fees paid by the Advisor to the Money Managers. An exemption is requested to permit the Funds to disclose (as both a dollar amount and as a percentage of each Fund's net assets) (i) the aggregate fees paid to an Adviser and any Affiliated Money Managers, and (ii) the aggregate fees paid to Money Managers (collectively, ''Aggregate Fee Disclosure''). Any Fund that employs an Affiliated Money Manager will provide separate disclosure of any fees paid to the Affiliated Money Manager.

6. Applicants state that the requested relief is no longer novel insofar as the requested order seeks exemptions to include as Funds open-end investment companies, the shares of which will be traded on the national securities exchanges, as defined in section 2(a)(26) of the Act (''ETFs''). Applicants note that the requested relief is substantially identical to multimanager relief recently granted by the Commission to other ETFs. Applicants believe that the requested relief is equally appropriate for ETFs as for mutual funds, and that the operations of the Funds under the requested order address the concerns historically considered by the Commission when granting identical relief to mutual funds. Applicants believe that similar to shareholders of a mutual fund who may ''vote with their feet'' by redeeming their individual shares at net asset value (''NAV'') if they do not approve of a change in subadviser or subadvisory agreement, shareholders of a Fund that is an ETF will be able to sell shares in the secondary market at negotiated prices that usually closely track the relevant Fund's NAV if they do not approve of a change. Applicants state that each Fund that is an ETF intends to ensure that shareholders who purchase its shares in the secondary market receive a prospectus and all of the information that would have been provided with a proxy statement, except for the modifications discussed below, under the Modified Notice and Access Procedures and that Applicants' prospectus delivery obligation is satisfied by relying on the same mechanisms currently used by the Funds.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by a vote of a majority of the company's outstanding voting securities. Rule 18f-2 under the Act provides that each series or class of stock in a series investment company affected by a matter must approve the matter if the Act requires shareholder approval.

2. Form N–1A is the registration statement used by open-end investment companies. Item 19(a)(3) of Form N–1A requires disclosure of the method and amount of the investment adviser's compensation.

3. Rule 20a–1 under the Act requires proxies solicited with respect to an investment company to comply with Schedule 14A under the Securities Exchange Act of 1934 (''Exchange Act''). Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the ''rate of compensation of the investment adviser,'' the ''aggregate amount of the investment adviser's fees,'' a description of the ''terms of the contract to be acted upon,'' and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

4. Regulation S–X sets forth the requirements for financial statements required to be included as part of investment company registration statements and shareholder reports filed with the Commission. Sections 6–

[4] If an Adviser wishes to use money managers that would be ''affiliated persons'' (as defined in Section 2(a)(3) of the Act) of a Trust, the Funds or of any Adviser (other than by reason of serving as a Subadviser to the Funds) (''Affiliated Money Manager''), shareholder approval of the Portfolio Management Agreement with any Affiliated Money Manager will be obtained. The requested relief will not extend to Affiliated Money Managers.

[5] Pursuant to a prior order obtained by RIMCo, RIC, and RIF, RIMCo has entered into Portfolio Management Agreements with certain Money Managers to provide investment advisory services to the RIC and RIF Funds. The relief granted pursuant to the application would supersede the Prior Order. *See In the Matter of Frank Russell Investment Company, et al.,* Investment Company Act Release No. 21108 (June 2, 1995) (notice) and 21169 (June 28, 1995) (order) (''Prior Order''). Except for Portfolio Management Agreements covered by the Prior Order, all Portfolio Management Agreements have been approved by the shareholders of the applicable Fund in the manner required by section 15(a) of the Act and rule 18f–2 thereunder.

07(2)(a), (b) and (c) of Regulation S–X require that investment companies include in their financial statements information about investment advisory fees.

5. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or from any rule thereunder, if such 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. Applicants state that the requested relief meets the necessary standards for the reasons discussed below.

6. Applicants state that the shareholders expect the Adviser and the applicable Board to select the Money Managers for the Funds that they believe are best suited to achieve each Fund's investment objective. Applicants assert that, from the perspective of the investor, the role of the Money Managers with respect to the Funds is substantially equivalent to the role of a traditional individual portfolio manager for a fund that does not employ a manager-of-managers structure. In the absence of exemptive relief from Section 15(a) of the Act, when a new Money Manager is proposed for retention by a Fund or a Trust on behalf of the Fund, shareholders would be required to approve the Portfolio Management Agreement with that Money Manager. Similarly, if an existing Portfolio Management Agreement were to be amended in any material respect, approval by the shareholders of the Fund would be required. In addition, a Fund would be prohibited from continuing to retain an existing Money Manager whose Portfolio Management Agreement had been ''assigned'' as a result of a change of control of the Money Manager unless shareholder approval had been obtained. Applicants state that obtaining shareholder approval would be costly and slow, and potentially harmful to the Fund and its shareholders. Applicants also note that the Advisory Agreement is and will remain fully subject to the requirements of section 15(a) of the Act and rule 18f-2 under the Act, including the requirement for shareholder voting.[6]

7. If a new Money Manager is hired, the Funds will inform shareholders of the hiring of a new Money Manager pursuant to the following procedures (''Modified Notice and Access Procedures''): (a) Within 90 days after a new Money Manager is hired for any Fund, that Fund will send its shareholders either a Multi-manager Notice or a Multi-manager Notice and Multi-manager Information Statement;[7] and (b) the Fund will make the Multi-manager Information Statement available on the Web site identified in the Multi-manager Notice no later than when the Multi-manager Notice (or Multi-manager Notice and Multi-manager Information Statement) is first sent to shareholders, and will maintain it on that Web site for at least 90 days. In the circumstances described in the Application, a proxy solicitation to approve the appointment of new Money Managers provides no more meaningful information to shareholders than the proposed Multi-manager Information Statement. Moreover, as indicated above, the applicable Board would comply with the requirements of Sections 15(a) and 15(c) of the 1940 Act before entering into or amending Portfolio Management Agreements.

8. Applicants assert that many Money Managers use a ''posted'' rate schedule to set their fees. Applicants state that while Money Managers are willing to negotiate fees lower than those posted in the schedule, they are reluctant to do so where the fees are disclosed to other prospective and existing customers. Applicants submit that the requested Aggregate Fee Disclosure relief will allow an Adviser to negotiate more effectively with each Money Manager.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Fund may rely on the requested order, the operation of the Fund in the manner described in the application will be approved by a majority of the Fund's outstanding voting securities, as defined in the Act, or in the case of a Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the initial shareholder(s) before offering shares of that Fund to the public.

2. Each Fund relying on the requested order will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. Each Fund will hold itself out to the public as utilizing the Manager of Managers Structure. The prospectus will prominently disclose that the applicable Adviser has ultimate responsibility (subject to oversight by the applicable Board) to oversee the Money Managers and recommend their hiring, termination, and replacement.

3. Funds will inform shareholders of the hiring of a new Money Manager within 90 days after the hiring of the new Money Manager pursuant to the Modified Notice and Access Procedures.

4. An Adviser will not enter into a Portfolio Management Agreement with any Affiliated Money Manager without such agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

5. At all times, at least a majority of each Board will be Independent Trustees, and the nomination of new or additional Independent Trustees will be placed within the discretion of the then-existing Independent Trustees.

6. Whenever a money manager change is proposed for a Fund with an Affiliated Money Manager, the applicable Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the applicable Board minutes, that such change is in the best interests of the Fund and its shareholders, and does not involve a conflict of interest from which the applicable Adviser or the Affiliated Money Manager derives an inappropriate advantage.

7. Independent legal counsel, as defined in rule 0–1(a)(6) under the Act, will be engaged to represent the Independent Trustees. The selection of such counsel will be within the discretion of the then existing Independent Trustees.

8. Each Adviser will provide the Board, no less frequently than quarterly, with information about the profitability of such Adviser on a per-Fund basis. The information will reflect the impact on profitability of the hiring or termination of any money manager during the applicable quarter.

[6] In addition, any subadvisory agreement with any Affiliated Money Manager is subject to section 15(a) of the Act and rule 18f–2 under the Act.

[7] A ''Multi-manager Notice'' will be modeled on a Notice of Internet Availability as defined in rule 14a-16 under the Exchange Act, and specifically will, among other things: (a) Summarize the relevant information regarding the new Money Manager; (b) inform shareholders that the Multi-manager Information Statement is available on a Web site; (c) provide the Web site address; (d) state the time period during which the Multi-manager Information Statement will remain available on that Web site; (e) provide instructions for accessing and printing the Multi-manager Information Statement; and (f) instruct the shareholder that a paper or email copy of the Multi-manager Information Statement may be obtained, without charge, by contacting the Funds.

A ''Multi-manager Information Statement'' will meet the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the Exchange Act for an information statement, except as modified by the requested order to permit Aggregate Fee Disclosure. Multi-manager Information Statements will be filed electronically with the Commission via the EDGAR system.

9. Whenever a money manager is hired or terminated, the applicable Adviser will provide the applicable Board with information showing the expected impact on the profitability of such Adviser.

10. Each Adviser will provide general management services to each Fund, including overall supervisory responsibility for the general management and investment of each Fund's assets, and, subject to review and approval of the Board, will: (a) Set each Fund's overall investment strategies; (b) evaluate, select and recommend Money Managers to manage all or a part of each Fund's assets and/or provide model portfolios for the Funds; (c) in the case of Discretionary Money Managers, allocate and, when appropriate, reallocate each Fund's assets among one or more Money Managers; (d) monitor and evaluate the performance of Money Managers; and (e) implement procedures reasonably designed to ensure that the Money Managers comply with each Fund's investment objective, policies and restrictions.

11. No trustee or officer of a Trust or the Funds, or director, manager or officer of an Adviser, will own, directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in a Money Manager, except for (a) ownership of interests in such Adviser or any entity that controls, is controlled by, or is under common control with such Adviser, or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of any publicly traded company that is either a Money Manager or an entity that controls, is controlled by or is under common control with a Money Manager.

12. Each Fund will disclose in its registration statement the Aggregate Fee Disclosure.

13. In the event the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69603; File No. SR–OCC–2013–802]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of an Advance Notice To Change the Expiration Date for Most Option Contracts to the Third Friday of the Expiration Month Instead of the Saturday Following the Third Friday

May 17, 2013.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''),[1] entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'')[2] and Rule 19b–4(n)(1)(i)[3] of the Securities Exchange Act of 1934 (''Exchange Act''), notice is hereby given that on April 17, 2013, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the advance notice, which concerns a proposed rule change, as described in Items I and II below, which Items have been substantially prepared by the clearing agency.[4] The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice concerns a proposed rule change which would allow OCC to change the expiration date for most option contracts to the third Friday of the expiration month instead of the Saturday following the third Friday.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change and Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and advance notice and discussed any comments it received on the proposed rule change and advance notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections (A), (B), (C), and (D) below, of the most significant aspects of such statements.[5]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change and the Advance Notice

Most option contracts (''Standard Expiration Contracts'') currently expire at the ''expiration time'' (11:59 p.m. Eastern Time) on the Saturday following the third Friday of the specified expiration month (''Expiration Date'').[6] The purpose of this proposed rule change is to change the Expiration Date for Standard Expiration Contracts to the third Friday of the expiration month. (The expiration time would continue to be 11:59 p.m. Eastern Time on the Expiration Date.) The proposed change would apply only to Standard Expiration Contracts expiring after February 1, 2015, and OCC does not propose to change the Expiration Date for any outstanding option contract. The proposed change will apply only to series of option contracts opened for trading after the effective date of this proposed rule change and having Expiration Dates later than February 1, 2015. Option contracts having non-standard expiration dates (''Non-standard Expiration Contracts'') will be unaffected by this proposed rule change.[7]

In order to provide a smooth transition to the Friday expiration, OCC would, beginning June 21, 2013, move the expiration exercise procedures to Friday for all Standard Expiration Contracts even though the contracts would continue to expire on Saturday. After February 1, 2015, virtually all Standard Expiration Contracts will actually expire on Friday. The only Standard Expiration Contracts that will expire on a Saturday after February 1, 2015 are certain options that were listed prior to the effectiveness of this rule change, and a limited number of options that may be listed prior to necessary systems changes of the options exchanges, which are expected to be completed in August 2013. The exchanges have agreed that once these systems changes are made they will not

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] 12 U.S.C. 5465(e)(1).

[3] 17 CFR 240.19b–4(n)(1)(i).

[4] OCC also filed the proposals contained in this advance notice as a proposed rule change, under Section 19(b)(1) of the Exchange Act and Rule 19b–4 thereunder, seeking Commission approval to permit OCC to change its rules to reflect the proposed changes in this advance notice. 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4; *See* Exchange Act Release No. 69480 (April 30, 2013) (SR–OCC–2013–04).

[5] The Commission has modified slightly the text of the summaries prepared by the clearing agency.

[6] *See* the definition of ''expiration time'' in Article I of OCC's By-Laws.

[7] Examples of options with Non-standard Expiration Contracts include flex options, quarterly, monthly and weekly options, where the expiration exercise processing for such options presently occurs on a weekday.

open for trading any new series of option contracts with Saturday expiration dates falling after February 1, 2015.

Background

Saturday was established as the standard Expiration Date for OCC-cleared options primarily in order to allow sufficient time for processing of option exercises, including correction of errors, while the markets were closed and positions remained fixed. However, improvements in technology and a great deal of experience have rendered Saturday expiration processing inefficient, and Saturday processing also poses unnecessary operational risk upon OCC and its clearing members. Therefore, it has been a long-term goal of OCC and its clearing members to move the expiration process for all options with Standard Expiration Contracts from Saturday to Friday night.

OCC states that eliminating Saturday expirations would allow OCC to streamline the expiration process between Standard Expiration Contracts and Non-standard Expiration Contracts, which will increase operational efficiencies and reduce operational risk for OCC and its clearing members. After the expiration date for Standard Expiration Contracts is moved to Friday night, expiration processing for standard options, quarterly options, and weekly options will all occur on the same day and will be a single, and inherently more efficient, operational process. The move to Friday night processing will also align expiration processing schedules for United States markets with expiration processing schedules for European markets and will allow affected clearing members to run a single, consistent, and efficient operational process for all U.S. equity/index options regardless of where such options are exercised. Moreover, the move to Friday night processing will also eliminate the operational risk presented by scheduling an expiration process to run on one Saturday per month when it is otherwise run weekly on Friday night. Saturdays are typically reserved for system maintenance and installs of system enhancements so Saturday expiration processes force such maintenance and installs to be rescheduled and sometimes delayed.

OCC states that from a risk management perspective, the proposed rule change would compress the operational timeframe for processing option expirations such that clearing members will be required to reconcile options trades on trade date. Trade date reconciliation is a better risk management practice and will facilitate and promote the use of intra-day risk management systems by clearing members as well as move clearing members toward adopting real-time trade date reconciliation and position balancing systems.

According to OCC, industry groups, clearing members, and options exchanges have been active participants in planning for the transition to the Friday expiration. In March 2012, OCC began to discuss moving Standard Expiration Contracts to Friday expiration dates with industry groups, including two Securities Industry and Financial Markets Association (''SIFMA'') committees, the Operations and Technology Steering Committee and the Options Committee, and at two major industry conferences, the SIFMA Operations Conference and the Options Industry Conference. OCC also discussed the project with the Intermarket Surveillance Group and at an OCC Operations Roundtable. In each case, OCC received broad support for the initiative. Also, OCC surveyed all of its clearing members as well as its service bureaus and learned that a significant majority of those surveyed are currently ready to move to Friday night expiration processing. OCC has worked with the other clearing members and service bureaus so that all affected parties experience a smooth transition to Friday night expiration processing. OCC has obtained assurances from all options industry participants that they will be ready to move to Friday night expiration processing by June 2013.

OCC states that Friday night expiration processing is also consistent with the long-standing rules and procedures of the options exchanges and the Financial Industry Regulatory Authority (''FINRA''),[8] which generally provide that exercise decisions with respect to Standard Expiration Contracts must be made by, and exercise instructions may not be accepted from customers after, 5:30 p.m. Eastern Time on the business day preceding expiration (usually Friday).[9] Brokerage firms may set earlier cutoff times for customers submitting exercise notices. Clearing members are permitted to submit exercise instructions after the cutoff time (''Supplementary Exercises'') only in case of errors or other unusual situations, and may be subject to fines or disciplinary actions.[10] OCC believes that the extended period between cutoff time and expiration of options is no longer necessary given modern technology.

Transition Period

Based on significant dialogue between OCC and clearing members regarding the move to Friday expiration, OCC believes that the adoption of Friday expiration for Standard Expiration Contracts is best accomplished through an appropriate transition period during which processing activity for all options, whether expiring on Friday or Saturday, would move to Friday, followed by a change in the expiration day for new series of options. In May 2012, OCC and its clearing members determined that Friday, June 21, 2013, would be an appropriate date on which to move expiration processing from Saturday to Friday night. Accordingly, OCC proposes that, beginning June 21, 2013, Friday expiration processing will be in effect for all expiring Standard Expiration Contracts, regardless of whether the contract's actual expiration date is Friday or Saturday. However, for contracts having a Saturday expiration date, exercise requests received after Friday expiration processing is complete but before the Saturday contract expiration time will continue to be processed so long as they are submitted in accordance with OCC's procedures governing such requests. After the transition period and the expiration of all existing Saturday-expiring options, expiration processing will be a single operational process and will run on Friday night for all Standard Expiration Contracts.

Friday Expiration Processing Schedule

Currently, expiration processing for Standard Expiration Contracts begins on Saturday morning at 6:00 a.m. Central Time and is completed at approximately noon Central Time when margin and settlement reports are available. The window for submission of instructions in accordance with OCC's exercise-by-exception procedures under OCC Rule 805(d) is open from 6:00 a.m. to 9:00 a.m. Central Time on Saturday

[8] OCC has contacted FINRA regarding the need to review the Contrary Exercise Advisory Rule to ensure such rule is consistent with the industry effort to move to Friday expiration dates. FINRA has determined that no changes to its current rules are needed in order to accommodate the transition of expiration processing from Saturday to Friday night. FINRA has agreed that it will work with the industry to implement coordinated and appropriate modifications to its rules in order to accommodate Friday night expiration dates, which will begin on or after February 1, 2015.

[9] *See, e.g.,* FINRA Rule 4210(b)(23)(A)(iii). ''Option holders have until 5:30 p.m. Eastern Time (''ET'') on the business day immediately prior to the expiration date to make a final exercise decision to exercise or not exercise an expiring option. Members may not accept exercise instructions for customer or noncustomer accounts after 5:30 p.m. ET.'' Member firms may specify earlier cutoff times.

[10] *See* OCC Rule 805(g).

morning.[11] OCC proposes that the window for submission of exercise-by-exception instructions be open from 6:00 p.m. to 9:15 p.m. Central Time on Friday evening.[12] Friday expiration processing for Standard Expiration Contracts would therefore begin at 6:00 p.m. Central Time on Friday evening and end at approximately 2:00 a.m. Central Time on Saturday morning when margin and settlement reports will be available.[13]

Exercises for Standard Expiration Contracts with Saturday expirations must be allowed under the terms of the contracts. However, in order to accommodate the proposed new expiration schedule, OCC also proposes to shorten the period of time in which clearing members may submit a Supplementary Exercise notice under OCC Rule 805(b). In addition, OCC Rule 801 would be amended to eliminate the ability of clearing members to revoke or modify exercise notices submitted to OCC. This proposed change, along with the proposed change in the processing timeline discussed above, will more closely align OCC's expiration processing procedures with exchange rules, under which exchange members must submit exercise instructions by 5:30 p.m. Central Time on Friday and may not accept exercise instructions from customers after 4:30 p.m. Central Time on Friday. Accordingly, this proposed change will not represent a departure from current practices for clearing members or their customers.

In connection with moving from Saturday to Friday night processing and expiration, OCC reviewed other aspects of its business to confirm that there would be no unintended consequences, and concluded that there would be none. For example, OCC believes the proposed changes do not affect OCC's liquidity forecasting procedures, nor do they impact OCC's liquidity needs, since OCC's liquidity forecasts and liquidity needs are driven by settlement obligations, which occur on the same day (T+3) irrespective of the move to Friday night processing and expiration dates.

Grandfathering of Certain Options Series

Certain option contracts have already been listed on exchanges with expiration dates as distant as December 2016. Such options have Saturday expiration dates and OCC cannot change the terms of existing option contracts. In addition, according to OCC clearing members have expressed a clear preference to not have open interest in any particular month with different expiration dates. Therefore, OCC will designate certain expiration dates as ''grandfathered,'' and any option contract that is listed, or may be listed in the future, that expires on a grandfathered date will have a Saturday expiration date even if such expiration date is after February 1, 2015.[14] Further, certain FLEX options that have already been accepted for clearance and have expiration dates beyond February 1, 2015, will also be designated as grandfathered. The Friday night expiration transition period processing schedule, as described above, will be in effect for any grandfathered Saturday expiration contract. According to OCC, in order to minimize the number of grandfathered expiration dates, exchanges have already agreed that, if there is not already a previously listed Standard Expiration Contract with an expiration in a particular month that is after February 1, 2015,[15] they will not open for trading any new series of Standard Expiration Contracts with Saturday expiration dates in such month.

Proposed Amendments to By-Laws and Rules

In order to implement the change to Friday expiration processing and eventual transition to Friday expiration for all Standard Expiration Contracts, OCC proposes to amend the definition of ''expiration date'' in Article I and certain other articles of the By-Laws. As amended, the applicability of the definition would not be limited to stock options, and the definition of ''expiration date'' in certain articles of the By-Laws therefore can be deleted in reliance on the Article I definition. OCC also proposes to amend Rule 805, and all rules supplementing or replacing Rule 805, to allow for Friday expiration processing during the transition to Friday expiration. Section 18 of Article VI of the By-Laws would also be amended to align procedures for delays in producing Expiration Exercise Reports and submission of exercise instructions with the amended expiration exercise procedures in OCC Rule 805. OCC Rule 801 would be amended to modify the prohibition against exercising an American-style option contract on the business day prior to its expiration date because this prohibition is necessary only for options expiring on a Saturday. The prohibition can be removed altogether when there are no longer any options expiring on a Saturday.

OCC Rule 801 would also be amended to remove clearing members' ability to revoke or modify exercise notices in order to accommodate the proposed compressed Friday expiration processing expiration schedule. Finally, OCC Rules 801 and 805 would be amended to allow certain determinations to be made by high-level officers of OCC, rather than the Board of Directors, in order to provide OCC with greater operational flexibility in processing exercise requests received after Friday expiration processing is complete but before the Saturday contract expiration time, and to replace various references to the expiration date of options with reference to the procedures of Rule 805.

Under the proposed rule change, OCC would preserve the ability of the options exchanges to designate (or, in the case of flexibly structured options, permit clearing members to designate) non-standard expiration dates for options, or classes or series of options, so long as the designated expiration date is not a date OCC has specified as ineligible to be an expiration date.

OCC believes the proposed rule change is consistent with the purposes and requirements of Section 17A of the Exchange Act[16] because it provides for the prompt and accurate clearance and settlement of securities transactions and the protection of securities investors and the public interest[17] by improving the processing time for clearing of option contracts, standardizing the expiration day of numerous options contracts, and requiring clearing members to reconcile options transactions on the trade date, which will facilitate and promote intra-day risk management by the clearing members.

[11] OCC's exercise-by-exception procedures are described in its Rule 805(d), which generally provides that each clearing member will automatically be deemed to have submitted an exercise notice immediately prior to the expiration time for all in-the-money option contracts unless the clearing member has instructed OCC otherwise in a written exercise notice.

[12] The exercise-by-exception window for weekly and quarterly expiration options is from 6:00 p.m. to 7:00 p.m. Central Time on the expiration date.

[13] The proposed expiration schedule for Friday expiration processing is similar to the expiration schedule for weekly options, which begins at 6:00 p.m. Central Time on Friday evening and ends at 11:30 p.m. Central Time on Friday evening. All timeframes would be set forth in OCC's procedures and subject to change based on OCC's experience with Friday expiration processing.

[14] After OCC designates an expiration date as grandfathered, the exchanges have agreed to not permit the listing of, and OCC will not accept for clearance, any newly listed standard expiration option contract with a Friday expiration in the applicable month.

[15] Until exchanges complete certain systems enhancements in August 2013, it is possible that additional option contracts may be listed with Saturday expiration dates beyond February 1, 2015.

[16] 15 U.S.C. 78q–1.

[17] 15 U.S.C. 78q–1(b)(3)(F).

OCC believes proposed rule change is not inconsistent with any existing OCC By-Laws or Rules.

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change, which will apply to all OCC clearing members, involves operational improvements that will allow OCC and its clearing members to become more operationally efficient and reduce operational risk. Moreover, OCC has coordinated moving to a Friday night expiration process with options industry participants and has also obtained assurance from all such participants that they are able to adhere to OCC's Friday night expiration implementation schedule. Therefore, OCC does not believe the proposed rule change would impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

While the matters discussed in this proposed rule change have been subject to extensive discussion with clearing members, including during an OCC Operations Roundtable, written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

(D) Advance Notices Filed Pursuant to Section 806(e) of the Clearing Supervision Act

OCC is filing this proposed rule change as an advance notice pursuant to Section 806(e)(2) of Clearing Supervision Act because OCC believes the proposed change could be deemed to materially affect the nature or level of risks presented by OCC. OCC believes that the Rule change will enhance OCC's ability to manage the risks presented to it. The operational processing of stock option contracts with Saturday expiration dates on the preceding Friday and the ultimate transition to a Friday expiration date for standard expiration contracts as described above will reduce the operational risk to OCC by allowing OCC to streamline the expiration process for all such options contracts and increase the operational efficiencies for OCC and its clearing members. In addition, it will compress the operational timeframe for processing the options expirations such that clearing members will be required to reconcile options trades on the trade date, which will facilitate and promote intra-day risk management of cleared trades, and promote real-time trade date reconciliation and positions balancing, by clearing members.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act [18] if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission or the Board of Governors of the Federal Reserve System providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[19]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–OCC–2013–802 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.

All submissions should refer to File Number SR–OCC–2013–802. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*.) Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site: (*http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_13_04.pdf*). 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–2013–802 and should be submitted on or before June 13, 2013.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–12267 Filed 5–22–13; 8:45 am]

BILLING CODE 8011–01–P

[18] 12 U.S.C. 5465(e)(1)(G).

[19] OCC also filed the proposals contained in this advance notice as a proposed rule change, under Section 19(b)(1) of the Exchange Act and Rule 19b–4 thereunder, seeking Commission approval to permit OCC to change its rules to reflect the proposed changes in this advance notice. 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4; SR–OCC–2013–04. *See Supra* note 4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69602; File No. SR–FICC–2013–802]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Advance Notice To Include Options on Interest Rate Futures Contracts With Maturities Not Longer Than Two Years in the One-Pot Cross-Margining Program Between the Government Securities Division and New York Portfolio Clearing, LLC

May 17, 2013.

Pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] of the Securities Exchange Act of 1934 (''Exchange Act''),[3] notice is hereby given that, on April 15, 2013, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the advance notice described in Items I and II below, which Items have been prepared primarily by FICC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice concerns proposed rule changes that would allow FICC to include options on interest rate futures contracts with maturities not longer than two years in the one-pot cross-margining program between FICC's Government Securities Division (''GSD'') and New York Portfolio Clearing, LLC (''NYPC'').[4]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, FICC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. FICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[5]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

(i) The purpose of the advance notice is to include options on interest rate futures contracts with maturities not longer than two years in the one-pot cross-margining program between the GSD and NYPC.

Background on NYPC and the FICC–NYPC One-Pot Cross-Margining Program

NYPC is registered with the Commodity Futures Trading Commission (''CFTC'') as a derivatives clearing organization (''DCO'') pursuant to Section 5b of the Commodity Exchange Act and Part 39 of the CFTC regulations. NYPC launched operations on March 21, 2011, and currently clears U.S. dollar-denominated interest rate futures contracts. It plans to add options on interest rate futures to its suite of products.

Pursuant to FICC Rule Filing 2010–09,[6] FICC offers ''single pot'' cross margining of certain positions cleared at NYPC and the GSD. This arrangement is reflected in a cross-margining agreement (''FICC–NYPC Cross-Margining Agreement'') between FICC and NYPC, which is a part of the GSD's rules. Specifically, certain GSD members are permitted to combine their positions at GSD with their positions at NYPC, or with the positions of certain permitted affiliates that are cleared at NYPC, within a single margin portfolio. Joint GSD–NYPC members or GSD members and their permitted affiliates who wish to participate in the one-pot program must execute the requisite cross-margining participant agreements, which are exhibits to the FICC–NYPC Cross-Margining Agreement.[7]

As noted in FICC Rule Filing 2010–09, FICC is responsible for performing the margin calculations in its capacity as the ''Administrator'' under the terms of the FICC–NYPC Cross-Margining Agreement. Specifically, FICC determines the combined FICC Clearing Fund and NYPC Original Margin [8] requirement for each cross-margining participant. The FICC–NYPC one-pot margin requirement for each participant is then allocated between FICC and NYPC in proportion to each clearing organization's respective ''stand-alone'' margin requirements—in other words, an amount reflecting the ratio of what each clearing organization would have required from that member if it were not participating in the cross-margining program. The FICC–NYPC Cross-Margining Agreement refers to this as the ''Constituent Margin Ratio.''

The FICC–NYPC Cross-Margining Agreement provides that either FICC or NYPC may, at any time, require additional margin to be deposited by a participant (above what is calculated under the FICC–NYPC Cross-Margining Agreement) based upon the financial condition of the participant, unusual market conditions or other special circumstances. The standards that FICC proposed in Rule Filing 2010–09 to use for these purposes are the standards contained within the GSD's rules currently, so that notwithstanding the calculation of a participant's Clearing Fund requirement pursuant to the FICC–NYPC Cross-Margining Agreement, FICC still retains the rights contained within the GSD's rules to require an additional Clearing Fund deposit under the circumstances specified in the GSD's rules. For example, the GSD's rules currently provide that, if a Dealer Netting Member [9] falls below its minimum financial requirement, it shall be required to make an additional Clearing Fund deposit equal to the greater of (i) $1 million or (ii) 25 percent of its Required Fund Deposit.[10]

In the event of the insolvency or default of a member that participates in the one-pot cross-margining arrangement, the positions in such member's FICC–NYPC one-pot portfolio (including, when applicable, the positions of its permitted margin affiliate at NYPC) will be liquidated by FICC and NYPC as a single portfolio, and the liquidation proceeds will be applied to the defaulting member's obligations to FICC and NYPC in accordance with the provisions of the FICC–NYPC Cross-Margining Agreement. The FICC–NYPC Cross-Margining Agreement provides for the sharing of losses by FICC and NYPC in the event that the one-pot portfolio

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78q–1.

[4] NYPC is jointly owned by NYSE Euronext and The Depository Trust & Clearing Corporation (''DTCC'').

[5] The Commission has modified the text of the summaries prepared by FICC.

[6] The Commission approved this rule filing on February 28, 2011. *See* Securities Exchange Act Release No. 63986 (Feb. 28, 2011); 76 FR 12144 (Mar. 4, 2011) (SR–FICC–2010–09).

[7] GSD members and NYPC members are also permitted to cross margin in the single pot the activity of their market professional customers. *See* Securities Exchange Act Release No. 66989 (May 15, 2012); 77 FR 30032 (May 21, 2012) (SR–FICC–2012–03).

[8] Original Margin is NYPC's equivalent of the GSD's Clearing Fund.

[9] The GSD's rules define the term ''Dealer Netting Member'' as ''a Registered Government Securities Dealer that is admitted to membership in the Netting System pursuant to these Rules, and whose membership in the Netting System has not been terminated. . . .'' GSD Rulebook, Rule 2A, Section 2.

[10] The GSD's rules define the term ''Required Fund Deposit'' as ''the amount a Netting Member is required to deposit to the Clearing Fund.'' GSD Rulebook, Rule 1.

margin deposits of a defaulting participant are not sufficient to cover the losses resulting from the liquidation of that participant's trades and positions, which is covered in detail in FICC Rule Filing 2010–09, and is reflected in the terms of the FICC–NYPC Cross-Margining Agreement.

According to FICC, the addition of options on interest rate futures to the one-pot cross-margining arrangement does not require any changes to the terms of the FICC–NYPC Cross-Margining Agreement. FICC would continue to act as the Administrator for purposes of margin calculations if the proposed rule changes were approved. The loss-sharing provisions in the FICC–NYPC Cross-Margining Agreement that would apply in the event of a participant's default would remain unchanged under this proposal, as well.

Proposal To Include Options on Interest Rate Futures in the One-Pot Cross-Margining Arrangement

FICC proposes to add options on interest rate futures contracts with maturities not longer than two years to the one-pot cross-margining arrangement. NYPC will act as the DCO for such products.

FICC observes that options on interest rate futures are a well-established, standardized product traded and cleared by futures exchanges [11] around the globe, including the Chicago Mercantile Exchange (''CME'').[12] FICC states that the key risks associated with adding options on interest rate futures to the one-pot cross-margining arrangement relate to the ability of FICC and NYPC to properly model, test and monitor the risks that options on interest rate futures present to the clearing organizations. Consistent with FICC's quantitative policy for new initiatives, any new models or enhancements are subject to external review before they are utilized. FICC avers that the options proposal has followed this protocol, and that a team of external reviewers has tested the models and validated their methodology.

FICC asserts that, in the case of options on interest rate futures that are physically deliverable, the addition of options on interest rate futures to the one-pot cross-margining arrangement will not alter the manner in which physical deliveries occur. According to FICC, upon exercise or assignment of an option, the resulting futures position will be treated as a traded futures contract, with the same delivery obligations if the resulting futures position is not closed out prior to delivery. In general, delivery of U.S. Treasury futures can be submitted to FICC by NYPC on a locked-in basis and processed in accordance with FICC's rules (when such futures are submitted to FICC, they are no longer futures contracts but rather are in the form of buy-sells eligible for processing at the GSD).

FICC asserts that it will submit a separate rule filing to the Commission seeking approval for the inclusion in the single pot of longer-dated interest rate options products. FICC contends that it will also conduct appropriate testing and analysis of any future changes to the options model and, consistent with FICC's quantitative policy for new initiatives, submit the model for external review.

Risk Considerations Regarding the Proposal To Include Options on Interest Rate Futures in the One-Pot Cross-Margining Arrangement

FICC states that its methodology for managing the risks associated with options on interest rate futures that will be included in the one-pot cross-margining arrangement has three pillars: (i) Value-at-Risk (''VaR'') with historical simulation, (ii) the Barone-Adesi & Whaley (''BAW'') approximation, and (iii) the Stochastic Alpha, Beta, Rho (''SABR'') volatility model.

According to FICC, the historical-simulation-based VaR model proposed for options on interest rate futures to be included in the one-pot cross-margining arrangement is the same model utilized in the current one-pot cross-margining arrangement between NYPC and the GSD, which is described in FICC Rule Filing 2010–09. FICC contends that the backbone of this VaR model—namely, the three-day/one-day liquidation period assumption for cash and derivatives positions, respectively; the 99th percentile confidence level; the one-year look-back period and the use of a linear interpolation/front-weighting mechanism to arrive at the 99th percentile threshold from simulated profits and losses—will remain the same when options on interest rate futures are added to FICC–NYPC one-pot portfolios.

FICC asserts that the BAW approximation is the pricing function that FICC and NYPC will use to estimate the value of options on interest rate futures within the Black-Scholes-Merton framework. FICC also contends that the SABR volatility model will be used to estimate volatility curves for various options series.

As noted above, a three-day liquidation period is assumed for cash positions cleared by FICC, whereas a one-day liquidation period is assumed for futures positions cleared by NYPC. FICC states that options on interest rate futures in the one-pot cross-margining arrangement will also be subject to a one-day liquidation requirement because options and futures share a similar liquidity profile. FICC contends that this is also consistent with CFTC requirements. FICC further observes that each cross-margining participant's FICC–NYPC one-pot margin requirement is currently subject to a daily back test, and that a ''coverage component'' is applied and charged to the participant in the event the daily back test reflects insufficient coverage. FICC states that options on interest rate futures in the one-pot cross-margining arrangement will be subject to this daily testing.

FICC asserts that the one-pot FICC–NYPC VaR model will account for the non-linear risk posed by the addition of options on interest rate futures to the one-pot cross-margining arrangement by performing full revaluation of such options using BAW and SABR. As options on interest rate futures can exhibit magnified exposure in extreme market conditions, FICC is proposing to employ the additional tools described below:

1. Minimum Margin Charge for Portfolios That Include Options

Similar to the practice FICC's Mortgage-Backed Securities Division uses to address potential mark-to-market offset of margin requirements, FICC and NYPC are proposing to apply a floor margin charge of five basis points of the gross market value of positions in options on interest rate futures to the unadjusted Required Fund Deposit of GSD Netting Members with one-pot portfolios that include options on interest rate futures. Therefore, for GSD Netting Members with one-pot portfolios that include options on interest rate futures, their minimum Required Fund Deposit will be the greater of: (i) The current minimum Required Fund Deposit as prescribed in GSD Rule 4, Section 2; or (ii) the proposed floor margin charge.

2. Short Option Minimum Charge

To address the risk associated with short positions in deep out-of-the-

[11] Exchanges that list options on interest rate futures include the following: (i) CME (US); (ii) CBOT (a subsidiary of CME); (iii) BM&F (Brazil); (iv) NYSE LIFFE (UK); (v) Eurex (Germany); (vi) ASX (Australia); (vii) Montreal Exchange (Canada); (viii) SGX (Singapore); and (ix) TFX (Japan).

[12] Options on interest rate futures are currently included in the ''two-pot'' cross-margining arrangement between FICC and the CME. The cross-margining agreement between FICC and the CME is incorporated in the GSD's Rules and may be found on the DTCC Web site, *www.dtcc.com.*

money (''OTM'') options, FICC and NYPC propose to introduce a short option minimum (''SOM'') for options on interest rate futures in the one-pot cross-margining arrangement. The SOM will apply only to options on interest rate futures with a settlement price of ''cabinet.'' [13] FICC notes that these options demonstrate minimum price volatility in normal market conditions, but may potentially become volatile when market conditions change dramatically. In light of the losses that such options may cause, FICC proposes to apply an SOM charge to any short position in these options.

3. Out-of-the-Money Options Surcharge

FICC and NYPC also propose to impose a surcharge on all OTM options positions in the one-pot cross-margining arrangement in order to address any potential biases in the BAW options pricing model. The amount of the surcharge will be determined by the moneyness of the options position.

4. Options Stress Testing

In addition to the regular stress testing practices utilized by FICC and NYPC, FICC proposes to conduct monthly hypothetical implied volatility stress tests of FICC–NYPC one-pot portfolios, including options on interest rate futures, in order to analyze specifically the non-linear tail risks associated with options products.

Proposed Rule Changes

FICC's proposal to add options on interest rate futures to the one-pot cross-margining arrangement requires that Rule 4, Section 2 of GSD's rulebook be changed to include a reference to the proposed minimum margin charge discussed above. Technical clarifications to certain GSD Rules would also be required in order to make it clear that options on interest rate futures will be included in the arrangement. Specifically, FICC is proposing to make technical clarifications to the following: (i) The definitions of ''CFTC-Recognized Clearing Organization'' and ''Eligible Positions'' set forth in Rule 1; (ii) Section 5a of GSD Rule 13, and (iii) subsection (b) of GSD Rule 29. As noted above, no changes are required to be made to the FICC–NYPC Cross-Margining Agreement itself.

(ii) FICC believes the proposed rule changes described above are consistent with the purposes and requirements of Section 17A of the Exchange Act [14] and the rules and regulations promulgated thereunder. FICC contends that these proposed changes may increase the available offsets among positions held at FICC and NYPC, which, in turn, may allow a more efficient use of member collateral and promote additional efficiencies in the marketplace. FICC therefore believes the proposed rule changes would support the prompt and accurate clearance and settlement of securities transactions.[15] FICC further believes that, as it will implement the proposed rule changes using the enhanced risk-management measures discussed above, the proposed rule changes will also be consistent with the Exchange Act because they will help to assure the safeguarding of the securities and funds in FICC's custody and control.[16]

(B) Clearing Agency's Statement on Burden on Competition

FICC does not believe that the proposed rule changes described above will have any negative impact, or impose any burden, on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

(C) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments relating to the advance notice have not yet been solicited or received. FICC will notify the Commission of any written comments received by FICC.

(D) Anticipated Effect on and Management of Risk

FICC is filing these proposed rule changes as an advance notice pursuant to Section 806(e)(2) of Clearing Supervision Act because it believes the proposed changes could be deemed to affect materially the nature or level of risks presented by FICC. FICC believes that the proposed rule changes will not impair its ability to manage these risks. As described in Section (A) above, FICC has enhanced its risk-management framework to account for the added risks posed by including options on interest rate futures with a maturity of less than two years in the one-pot cross-margining arrangement. This framework has three pillars: (i) VaR with historical simulation, (ii) BAW approximation, and (iii) the SABR volatility model. Options on interest rate futures in the one-pot cross-margining arrangement will also be subject to a one-day liquidation requirement, as these products' liquidity profile is similar to that of futures, and because this is consistent with CFTC requirements. In addition, each cross-margining participant's FICC–NYPC one-pot margin requirement is currently subject to a daily back test, and a ''coverage component'' is applied and charged to the participant in the event the daily back test reflects insufficient coverage. Options on interest rate futures in the one-pot cross-margining arrangement will be subject to this daily testing.

The one-pot FICC–NYPC VaR model will account for the non-linear risk posed by the addition of options on interest rate futures to the one-pot cross-margining arrangement by performing full revaluation of such options using the BAW and SABR methodologies. Because options on interest rate futures may exhibit magnified exposure in extreme market conditions, FICC is proposing to employ the following additional tools, as described above: (1) A minimum margin charge for portfolios including options, (2) an SOM charge, (3) an OTM options surcharge, and (4) options stress testing.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

A clearing agency may implement a proposed change pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act [17] if the Commission does not object to the proposed change within 60 days of the later of: (i) The date the advance notice was filed with the Commission; or (ii) the date the Commission receives any further information it requests in order to facilitate its review of the notice. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date the Commission receives any further information it has

[13] The minimum price increment for futures or options on futures is normally referred to as a ''tick.'' For options on futures whose value is less than one tick, trading and settlement in the options are allowed at a price that is less than a tick. This latter price is known as ''cabinet.''

[14] 15 U.S.C. 78q–1.

[15] 15 U.S.C. 78q–1(b)(3)(F) (requiring that a clearing agency's rules be designed to ''promote the prompt and accurate clearance and settlement of securities transactions. . . .'').

[16] 15 U.S.C. 78q–1(b)(3)(A) (requiring a clearing agency to have the capacity to ''safeguard securities and funds in its custody or control or for which it is responsible. . .'').

[17] 12 U.S.C. 5465(e)(1)(G).

requested, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[18] The clearing agency shall post notice on its Web site of proposed changes that are implemented.[19]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File No. SR–FICC–2013–802 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–FICC–2013–802. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. 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 advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and printing at the principal office of FICC and on FICC's Web site at *http://dtcc.com/downloads/legal/rule_filings/2013/ficc/AN_FICC_2013_802.pdf.* 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–FICC–2013–802 and should be submitted on or before June 13, 2013.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–12266 Filed 5–22–13; 8:45 am]

BILLING CODE 8011–01–P

[18] FICC also filed the proposals contained in this advance notice as a proposed rule change under Section 19(b)(1) of the Act and Rule 19b–4 thereunder, seeking Commission approval to permit it to change its rules to reflect the proposed changes in this advance notice. Securities Exchange Act Release No. 69470 (Apr. 29, 2013), 78 FR 26093 (May 3, 2013) (File No. SR–FICC–2013–02). Pursuant to Section 19(b)(2) of the Exchange Act, within 45 days of the date of publication of the proposed rule change 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. 15 U.S.C. 78s(b)(2)(A). The Commission will consider all public comments received on these proposed changes regardless of whether the comments are submitted in response to the proposed rule change (File No. SR–FICC–2013–02) or this advance notice (File No. SR–FICC–2013–802).

[19] *See* 17 CFR 240.19b–4(n)(4).

SMALL BUSINESS ADMINISTRATION

SBIR/STTR Phase I to Phase II Transition Benchmarks

AGENCY: U.S. Small Business Administration.

ACTION: Notice for Small Business Innovation Research Program Phase I to Phase II Transition Benchmarks; Amended.

SUMMARY: The Small Business Administration (SBA) is soliciting comments on proposed amendments to the SBIR/STTR Phase I to Phase II transition rate benchmark Table, which was originally published in the **Federal Register** on October 16, 2012. The Table will be amended to change the transition benchmark rate for the U.S. Department of Transportation (DOT) from the current rate of 0.45 to 0.25, and to change the length of the time period used to calculate the transition rate for the Environmental Protection Agency (EPA) and the Department of Education (ED) from the current length of 10 years to 5 years.

DATES: *Effective Date:* The amended rate is effective July 22, 2013.

Comment Date: Comments must be received on or before July 8, 2013.

ADDRESSES: Comments may be submitted to Edsel Brown, Jr., Assistant Director, Office of Innovation, Small Business Administration, 409 Third Street SW., Washington, DC 20416; or email to *Technology@sba.gov*.

FOR FURTHER INFORMATION CONTACT: Edsel Brown, Jr., Assistant Director, Office of Innovation at the address listed above, or telephone (202) 205–6450.

SUPPLEMENTARY INFORMATION: Section 4(a)(3)(iii) of the SBIR Policy Directive (77 FR 46806) and the STTR Policy Directive (77 FR 46855) require each agency to establish an SBA-approved Phase I–Phase II Transition Rate benchmark for the minimum required number of Phase II awards the applicant must have received relative to a given number of Phase I awards during a specified period. Section 5165 of the SBIR/STTR Reauthorization Act of 2011, requires SBA to publish the approved benchmarks and any subsequent changes to the benchmarks in the **Federal Register** and solicit comments from the public at least 60 days before the benchmarks can take effect. As a result, on October 16, 2012, at 77 FR 63410, SBA published the required notice in the **Federal Register** announcing that the Agency had approved the benchmarks for the 11 SBIR/STTR participating agencies and requested comments on those benchmarks. The benchmarks, including the required transition rates and the time period used to calculate the rates, were subsequently published on *www.sbir.gov*.

The approved and published transition benchmark rate for DOT is currently 0.45 and DOT uses a five year period for the benchmark calculation. DOT is revising its benchmark rate from 0.45 to 0.25. After review of the transition rates, DOT concludes that a benchmark rate of 0.25 is more appropriate for its SBIR program than the benchmark rate of 0.45. DOT is interested in providing small businesses with an ample opportunity to participate in its SBIR program and considers the lower rate to be more consistent with the innovative and exploratory nature of SBIR Phase I research. DOT is not changing the time period used for this benchmark.

The approved and published time period used by EPA and ED for this benchmark calculation is currently 10 years. EPA and ED have concluded that

the 5 year period is appropriate and that the use of a uniform period across all agencies would make the requirement less confusing and burdensome on potential applicants.

The amended Table will read as follows:

Agency	Benchmark rate (Phase II/ Phase I)	Length of period (years)
USDA	0.25	5
DOC (NIST)	0.25	5
DOC (NOAA)	0.25	5
NASA	0.25	5
DHS	0.25	5
DOE	0.25	5
EPA	0.25	5
DoD	0.25	5
NSF	0.25	5
DOT	0.25	5
ED	0.25	5

Authority: 15 U.S.C. 638(9).

Pravina Raghavan,

Director, Office of Innovation and Technology.

[FR Doc. 2013–12312 Filed 5–22–13; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCRDP, Attn: Reports Clearance Director, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than July 22, 2013. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. *Waiver of Your Right to Personal Appearance before an Administrative Law Judge—20 CFR 404.948(b)(l)(i) and 416.1448(b)(l)(i)—0960–0284.* Applicants for Social Security, Old Age, Survivors and Disability Insurance (OASDI) benefits and Supplemental Security Income (SSI) payments have the statutory right to appear in person (or through a representative) and present evidence about their claims at a hearing before an administrative law judge (ALJ). If claimants wish to waive this right to appear before an ALJ, they do so in writing. Form HA–4608 serves as a written waiver for the claimant's right to a personal appearance before an ALJ. The ALJ uses the information we collect on Form HA–4608 to continue processing the case, and makes the completed form a part of the documentary evidence of record by placing it in the official record of the proceedings as an exhibit. Respondents are applicants or claimants for OASDI and SSI, or their representatives, who request to waive their right to appear in person before an ALJ.

Type of Request: Revision of an approved-OMB information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
HA–4608	12,000	1	2	400

2. *Letter to Custodian of Birth Records/Letter to Custodian of School Records—20 CFR 404.704, 404.716, 416.802, and 422.107—0960–0693.* When individuals need help in obtaining evidence of their age in connection with Social Security number (SSN) card applications and claims for benefits, SSA can prepare SSA–L106, Letter to Custodian of School Records, or SSA–L706, Letter to Custodian of Birth Records. SSA uses the SSA–L706 to determine the existence of primary evidence of age of SSN applicants. SSA uses both letters to verify with the issuing entity, when necessary, the authenticity of the record submitted by the SSN applicant or claimant. The respondents are schools, State and local bureaus of vital statistics, and religious entities.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Type of respondents	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L106	Private Sector	1,800	1	10	300
SSA–L106	State/Local/Tribal Government	1,800	1	10	300
SSA–L706	Private Sector	1,800	1	10	300
SSA–L706	State/Local/Tribal Government	1,800	1	10	300
Totals		7,200			1,200

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than June 24, 2013. Individuals can obtain copies of the OMB clearance packages by writing to OR.Reports.Clearance@ssa.gov.

1. *Employer Verification of Earnings After Death—20 CFR 404.821 and 404.822—0960–0472.* When SSA records show a wage earner is deceased and we receive wage reports from an employer for the wage earner for a year subsequent to the year of death, SSA mails the employer Form SSA–L4112 (Employer Verification of Earnings After Death). SSA uses the information Form SSA–L4112 provides to verify wage information previously received from the employer is correct for the employee and the year in question. The respondents are employers who report wages for employees who have died.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L4112	50,000	1	10	8,333

2. *Registration for Appointed Representative Services and Direct Payment—0960–0732.* SSA uses Form SSA–1699 to register appointed representatives of claimants before SSA who:

- Want to register for direct payment of fees;
- Registered for direct payment of fees prior to 10/31/09, but need to update their information;
- Registered as appointed representatives on or after 10/31/09, but need to update their information; or
- Received a notice from SSA instructing them to complete this form.

By registering these individuals, SSA: (1) Authenticates and authorizes them to do business with us; (2) allows them to access our records for the claimants they represent; (3) facilitates direct payment of authorized fees to appointed representatives; and, (4) collects the information we need to meet Internal Revenue Service (IRS) requirements to issue specific IRS forms if we pay an appointed representative in excess of a specific amount ($600). The respondents are appointed representatives who use Form SSA–1699 for any of the purposes cited in this Notice.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1699	52,800	1	20	17,600

3. *Statement for Certificate of Election for Reduced Widower(er)'s and Surviving Divorced Spouse's Benefits—20 CFR 404.335—0960–0759.* Section 202(q) of the Social Security Act provides SSA the authority to reduce benefits under certain conditions when elected by a title II beneficiary. However, reduced benefits are not payable to an already entitled spouse (or divorced spouse) who:

- Is at least age 62 and under full retirement age in the month of the number holder's death; and
- Is receiving both reduced spouse's (or divorced spouse's) benefits and either retirement or disability benefits in the month before the month of the number holder's death.

To elect reduced widow(er) benefits, a recipient completes Form SSA–4111. SSA uses the information Form SSA–4111 collects to pay a qualified dually entitled widow(er) (or surviving divorced spouse) who elects to receive a reduced widow(er) benefit. The respondents are qualified dually entitled widow(er)s (or surviving divorced spouse) who elect to receive a reduced widow(er) benefit.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–4111	30,000	1	2	1,000

Dated: May 20, 2013.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2013–12259 Filed 5–22–13; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA 2013–0058]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Driver Qualification Files

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) *''Driver Qualification (DQ) Files''* to the Office of Management and Budget (OMB) for its review and approval. Motor carriers must maintain a DQ file on each employee-driver and document therein that the individual meets the minimum qualification requirements for a driver of commercial motor vehicles (CMVs) in interstate commerce. The Agency's estimate of the number of drivers subject to these requirements has been revised to exclude any consideration of drivers and motor carriers operating exclusively in intrastate commerce. In addition, this revision request includes an updated estimate of the interstate drivers and an increase in the estimated annual burden hours for this ICR. The bulk of the increase in burden hours is the result of a more accurate Agency estimate of the number of job openings for CMV drivers offered each year. On March 5, 2013, FMCSA published a **Federal Register** notice allowing for a 60-day comment period on this ICR. The agency received five comments in response to that notice.

DATES: Please send your comments to this notice by June 24, 2013. OMB must receive your comments by this date to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2013–0058. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Telephone: 202–366–4325. Email: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Driver Qualification Files.

OMB Control Number: 2126–0004.

Type of Request: Revision of a currently approved ICR.

Respondents: Motor carriers and drivers of commercial motor vehicles.

Estimated Number of Respondents: 46,900,000.

Estimated Time per Response: 30 minutes (average).

Expiration Date: May 31, 2013.

Frequency of Response: Responses to some regulatory requirements of the driver qualification rules occur on a random basis. Other responses occur more predictably. Some responses recur; others do not. For example, motor carriers are required to obtain and review the motor vehicle driving record of their drivers from the State of licensure. They must complete this task at the time of hiring and again every year thereafter. The time-of-hiring requirement results in a random frequency of response, but, thereafter, the annual requirement results in a fixed frequency of response.

Estimated Total Annual Burden: 5,800,000 hours [5,400,000 hours for driver hiring + 300,000 hours for annual review of driver qualifications + 100,000 hours for driver review and rebuttal of safety performance history = 5,800,000].

Background

The Motor Carrier Safety Act of 1984 [Pub. L. 98–554, Title II, 98 Stat. 2832 (October 30, 1984)] requires the Secretary of Transportation to issue regulations pertaining to CMV safety. These regulations are also issued under the authority provided by 49 U.S.C. 504, 31133, 31136, and 31502. Part 391 of volume 49 of the Code of Federal Regulations (CFR) contains the qualification requirements for drivers of CMVs in interstate commerce.

Motor carriers may not require or permit an unqualified driver to operate a CMV (49 CFR 391.11). The foremost proof of driver qualification is the information that part 391 requires be collected and maintained in the DQ file (49 CFR 391.51). Motor carriers must obtain this information from sources specified in the regulations. These include the driver, previous employers of the driver, and officials of the State of driver licensure.

Motor carriers are not required to forward driver qualification information to FMCSA, but must maintain the information in a DQ file. The DQ file must be updated annually (49 CFR 391.25). The DQ file of each driver must be made available to State and Federal safety investigators on demand.

This request for OMB approval revises the Agency's previous Paperwork Reduction Act estimate of the information collection burden of the DQ file requirements.

Public Comments Invited

FMCSA requests that you comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA to perform its functions, (2) the accuracy of the estimated burden, (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information, and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: May 14, 2013.

G. Kelly Leone,

Associate Administrator, Office of Research and Information Technology and Chief Information Officer.

[FR Doc. 2013–12355 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7918; 2002–13411; 2003–14504; 2006–26066; 2008–0231]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from

the vision requirement in the Federal Motor Carrier Safety Regulations for 17 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective June 4, 2013. Comments must be received on or before June 24, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–2000–7918; 2002–13411; 2003–14504; 2006–26066; 2008–0231], using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Fax: 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 17 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 17 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Rickie L. Boone (NC)
Michael C. Boyne (FL)
Timothy H. DuBois (MN)
Alf M. Gronstedt (TX)
Dennis K. Harris (GA)
Donald E. Howell (PA)
Timothy T. Hudson (VA)
William D. Johnson (OK)
Phillip L. Mangen (OH)
Tommy R. Masterson (OR)
Clarence M. Miles (OK)
Steven M. Montalbo (CA)
Randel G. Pierce (WI)
Vincent Rubino (NJ)
Randy G. Spilman (OH)
Thomas S. Thompson (NE)
Robert A. Wegner (MN)

The exemptions are extended subject to the following conditions: (1) that each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10) and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 17 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 66286; 66 FR 13825; 67 FR 76439; 68 FR 10298; 68 FR 13360; 68 FR 19598; 68 FR 33570; 70 FR 25878; 71 FR 63379; 72 FR 1050; 72 FR 28093; 73 FR 54888; 73 FR 46973; 74 FR 19270; 74 FR 20253; 76 FR 25762; 76 29026). Each of these 17 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety

equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by June 24, 2013.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 17 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: May 15, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–12357 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2013–0039]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by documents dated April 2, 2013, and April 24, 2013, the City of Burlington, WI (City), and Wisconsin Central Ltd. (WCL) have jointly petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 222, Use of Locomotive Horns at Public Highway-Rail Grade Crossings. FRA assigned the petition Docket Number FRA–2013–0039.

The City and CL (jointly referred to as Petitioners) seek a waiver from the requirements of 49 CFR 222.41(c)(2)(i)(B), which provides that a detailed plan for quiet zone improvements must be filed with FRA by June 24, 2008, in order to continue existing locomotive horn restrictions. The Petitioners also seek a waiver from the requirements of 49 CFR 222.41(c)(3), which provides that locomotive horn restrictions may continue until June 24, 2013, for a pre-rule quiet zone that was not able to be established by automatic approval, had been continued under the provisions of 49 CFR 222.31(c)(1) and 49 CFR 222.31(c)(2), and for which the State agency had provided a comprehensive statewide implementation plan. Specifically, the Petitioners request that the City be granted permission to correct the detailed plan that FRA has on file. The Petitioners also wish to retain the present locomotive horn restriction as trains approach the public highway-rail grade crossings at Roberts Street (DOT #689851C), Adams Street (DOT #689853R), Jefferson Street (DOT #689854X), Milwaukee Avenue (DOT #689857T), and Chestnut Street (DOT #689856L) until June 24, 2015.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by July 8, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as is practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

Issued in Washington, DC, on May 20, 2013.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–12352 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD–2013–0022]

Cruise Vessel Security and Safety Training Provider Certification

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of Proposed New Policy.

SUMMARY: This notice provides interested parties with the opportunity

to comment on the Maritime Administration's (MarAd) new policy to certify cruise vessel security and safety training providers. As a result of the enactment of the Cruise Vessel Security and Safety Act (''CVSSA''), the USCG, in consultation with the FBI, MarAd headquarters and the United States Merchant Marine Academy (USMMA), developed training standards and curricula to allow for the certification of passenger vessel security personnel, crewmembers, and law enforcement. In addition, the CVSSA provided the Maritime Administrator with the discretionary authority to certify organizations in the United States and abroad that offer the curriculum for training and certification. Pursuant to this authority, the agency is now proposing a voluntary certification program for training providers to assure the general public that passenger cruise vessel security and safety personnel have received training that is in strict compliance with the CVSSA mandated model standards. MarAd certification would serve to assist the cruise industry in identifying and obtaining qualified training services. MarAd invites public comment on this new proposed policy.

DATES: Comments must be received on or before July 22, 2013. MarAd will consider comments filed after this date to the extent practicable.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2013–0022 by any of the following methods:

- *Web site/Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments on the electronic docket site.
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Instructions: All submissions must include the agency name and docket number for this rulemaking.

Note: All comments received will be posted without change to *http://www.regulations.gov* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room W12–401 of the Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: You may contact T. Mitchell Hudson, Jr., Attorney-Advisor, Office of Chief Counsel, Maritime Administration, at (202) 366–9373. You may send mail to Mr. Hudson at Maritime Administration, 1200 New Jersey Avenue, SE., MAR 225, W24–220, Washington, DC 20590–0001. You may send electronic mail to *Mitch.Hudson@dot.gov.* If you have questions on viewing the Docket, call Barbara Hairston, Acting Program Manager, Docket Operations, telephone: 202–366–9826.

SUPPLEMENTARY INFORMATION: Following the enactment of the Cruise Vessel Security and Safety Act of 2010 (''CVSSA''), the USCG, MarAd, USMMA, and the FBI began work, as directed under the act, developing the standards and curricula to allow for the certification of security personnel. Published in July of 2011, the ''Model Course CVSSA 11–01 Crime Prevention, Detection, Evidence Preservation and Reporting'' set the standards for security personnel training. The CVSSA training requirements are applicable to passenger vessels that carry at least 250 passengers; have onboard sleeping facilities for each passenger; are on a voyage that embarks and disembarks passengers in the United States; and are not engaged on a coastwise voyage. Since July 27, 2011, passenger vessels have been required to certify to the USCG that they have at least one crewmember on board that is properly trained on prevention, detection, evidence preservation, and reporting requirements of criminal activities in the international maritime environment before entering a United States port on a voyage or voyage segment on which a United States citizen is a passenger.

MarAd is now proposing to implement a voluntary training provider certification program to help assure the general public that passenger vessel security and safety personnel have received proper training consistent with the model standards developed by USCG in coordination with MarAd, the USMMA, and the FBI, and in order to assist the industry in obtaining quality training services. Training providers seeking to be certified by MarAd will be required to submit training plans and supporting information for review. If the training provider's plans meet the model course criteria, the agency will offer its certification subject to the training provider entering into an agreement which, in addition to other terms, will subject the organization to program audits. The MarAd application procedure and program details will be available to the public on its Web site *www.marad.dot.gov/cvssa.*

Proposed New Policy

The agency is requesting public comment on the following proposed application procedure and training provider agreement:

How To Become a Maritime Administration (MarAd) Certified CVSSA Training Provider

Is there a model course that training providers must follow in order to become a MarAd Certified CVSSA Training Provider?

Yes. Training provider certification is voluntary. Training providers seeking certification must meet the minimum requirements found in the Model Course CVSSA 11–01; Crime Prevention, Detection, Evidence Preservation and Reporting (July 2011 version). The course was prepared by the United States Coast Guard, in consultation with MarAd and the Federal Bureau of Investigation. A copy of the Model Course is available for download at MarAd's Web site: w*ww.marad.dot.gov/cvssa.*

What is the scope of the model course?

The model course is intended to provide the knowledge required for personnel who are assigned passenger vessel security responsibilities to perform their duties as mandated in the Cruise Vessel Security and Safety Act of 2010, Public Law 111–207 (July 27, 2010) (codified at 46 U.S.C. 3507–08).

What should be included in my application for MarAd certification?

In addition to the following items, the applicant must include a signed Training Provider Agreement. (An agreement wherein the applicant agrees to an audit regimen and to additional specific requirements for certification.)

Note: Except where indicated, all items pertain to live training and E-learning courses.

1. Include the following information about your organization:
- Company name;
- Business address;
- State of incorporation;
- Articles of Incorporation; and
- Name, address, and contact information of individual that will liaise with MarAd.

2. Include a list of instructors with a description of their experience, background, and qualifications that demonstrate that they have the subject matter expertise to answer student questions, as well as the instructional capability to impart the required information to students.

3. Cruise lines must provide the names, positions, and backgrounds of shore side and shipboard staff that will evaluate, review, and monitor any element of the CVSSA course.

4. Include a course schedule, including the length of each lesson and indicate whether the lesson is presented through a classroom lecture, distance E-learning, practical demonstration, or simulator exercise and the particulars of how the assessment of students will be administered.

Note: Each lesson in the course schedule must be prefaced by a number that corresponds to the subject area listed in the Model Course teaching syllabus and outline.

5. Include a course outline, containing a summary of the teaching syllabus and learning objectives by subject area with the number of hours to be allocated for each lecture, practical demonstration, or simulation program. A detailed instructor manual must be submitted. Submissions should demonstrate the focus of the course while highlighting how the course conforms to the standards and content contained in the model course.

6. For E-Learning courses, include an estimate of the time required for a student to complete the lesson and any applicable time limits for lesson completion.

7. For E-Learning courses, include information describing the method for distance learners to obtain prompt feedback and assistance from someone meeting the same qualification standards as an instructor in a ''live'' course.

8. Include a sample student course evaluation form(s) or the training provider's procedures for obtaining student feedback on the effectiveness of the instruction and instructors.

9. For live training courses, include the following information for the training facility:

- address;
- description of the training facility rooms including capacity of rooms; and
- description of the equipment that will be used during the course, including all equipment to be used during hands-on training and/or testing, and any simulators or simulation programs to be used. If a simulator or simulation program is to be used, include technical specifications and brochures provided by the manufacturer.

10. Provide the maximum class size for classroom lessons and, if appropriate, for practical demonstrations or simulation exercises and assessments, including the number of the students per simulator. Provide the learner/teacher ratio and provide the organization's policy for circumstances when more than one instructor will be present during any of the lessons.

11. Include copies of all visual aids and a discussion of how audiovisual and other aids will be used during the training course, and which performance objectives they will impact. (This information may be a part of the curriculum documentation that discusses the make-up of the lesson plans.)

12. Include, as appropriate, sample copies of all student handouts, homework assignments, workbooks, and a bibliography of textbooks to be used. Include, as appropriate, sample copies of all written assessments, the grading procedure to be used, the frequency of revision, and what will be considered a passing score.

13. Include a detailed description of any practical or simulator assessments, tests, or exercises that describe the situation presented to the student; what the students must do to successfully complete each assessment and how each student's performance will be evaluated and recorded. Include a separate checklist to evaluate each practical assessment, if any, and what is considered a passing score. This checklist must include the condition under which the practical demonstration will occur, the behavior to be observed, and the criteria for successful completion of the demonstration. Include a discussion of how the instructor(s) will determine final grades by proportioning written and practical examination scores as appropriate.

14. Include a description of the training provider's policy on re-tests of failed assessments.

How long should my organization maintain course records?

A training provider must maintain a file at the training facility, or other location approved by MarAd, available for review within 3 business days of notice, for at least 5 years after the end of each student's enrollment.

What should be contained in the administrative record?

The record must be comprised of the student's assessment reports, a report of practical tests administered (if any), and a record of classroom attendance. If approved courses are taught in more than one location, or if the course is delivered by E-Learning, the records must be made available within 3 business days of notice.

How should my organization administer course completion certification?

The MarAd certified CVSSA Training Provider must first verify the identity of all students (whether live training or E-learning) who have completed a certified security training course and issue consecutively numbered certificates to students who successfully complete the approved course. Blank course completion certificates must be kept secure at all times. The paper stock of course completion certificates must contain micro printing, watermarks and/or other effective measures to help prevent production of fraudulent certificates. Training providers should consult International Maritime Organization MSC/Circ. 1089 ''Guidance on Recommended Anti-Fraud Measures and Forgery Prevention Features for Seafarers' Certificates'' available via the IMO Web site at *www.imo.org.*

Course completion certificates should be in a standardized format and contain the following:

- the name of the course as stated in the course certification letter;
- the name of the school or training provider;
- the date the training began and was completed;
- the signatures of the course instructor and director or department head; and
- the student's full name.

May my organization deviate or modify from the specifications of the Model Course and still obtain MarAd approval and certification?

Any deviations or modifications from the specifications of the Model Course must be highlighted in the application for certification with an explanation justifying the change, its benefits, and how the additional material will be covered. (One example of material that may not be covered during classroom training is found under Section 4: Security Equipment. On board training may be the more appropriate venue for the instruction in the use of the equipment. Training providers must provide documentation that security personnel that are certified, have received training in this area.)

Implementation and Administration

MarAd will evaluate the application's supporting documentation and either approve or disapprove the content of the submission. Upon approval, the organization will enter into a voluntary agreement with MarAd evidencing the applicant's intention to implement the MarAd approved training regimen.

Training Provider Certification will be issued to the applicant only after the voluntary agreement has been entered into. MarAd will thereafter publish the certified training providers name and contact information on its Web site.

Where would I submit my application for certification?

A training provider seeking MarAd certification as a CVSSA Training Provider may electronically submit the required information to *www.marad.dot.gov/cvssa* or by mail addressed as follows: Department of Transportation, Maritime Administration, Attention: CVSSA Training Certification Program, 1200 New Jersey Ave. SE., Washington, DC 20590.

How will I know whether I was approved for certification?

MarAd will issue a course approval letter and certification. The letter will inform you that in order to maintain certification, the course must be conducted consistent with the information provided in your application.

After my course is approved and my organization is certified, are there any on-going responsibilities necessary to maintaining my certification?

Yes. It will be incumbent upon the certified training organization to notify the MarAd CVSSA certification program office in writing within 30 calendar days of any changes in information last furnished with respect to the course, teaching staff, maximum teacher/student ratio, maximum class size, training facility, or training equipment.

It will also be incumbent upon the certified training organization to maintain a copy of all students' identification for purposes of MarAd audit and law enforcement.

How will MarAd review training provider compliance?

MarAd will ensure compliance utilizing two methods-1. Audits performed by private accredited auditors on a scheduled basis and 2. Random audits performed by agency personnel. The first accredited audit will be scheduled to occur within the first 6 to 12 months of MarAd certification. Thereafter, two more accredited audits will be scheduled over years 2 and 3 with a final audit to take place no earlier than 6 months before the expiration of the MarAd certification.

Does my certification expire?

Course approvals and certification are effective for a period of five years or until the approval and certification is suspended or withdrawn.

How can I renew my organization's certification?

A request for the renewal of a course approval and certification should be submitted at least 90 days before the current approval expires. The applicant is responsible for the content of its submission. Therefore, the renewing organization should review MarAd application instructions and guidance in order to ensure that the new application is consistent with current MarAd requirements. Assuming that no updates have been made to the CVSSA training provider application process, to facilitate the renewal process, all changes should be highlighted. If there have been no changes since the last approval, a statement to the effect that the curriculum, instructors, and facilities are the same as was previously submitted and approved should accompany the submittal.

Revocation and Appeal Process

Training providers can appeal disapproval, revocation, or suspension of the certificate by appealing to the Maritime Administrator or his designated representative. The appeal must be in writing and address the specific reasons why you believe your submission should be approved or reinstated by MarAd.

MARITIME ADMINISTRATION (MarAd) CERTIFIED CVSSA TRAINING PROVIDER AGREEMENT

I, _____ (NAME) AM AUTHORIZED BY AND IN BEHALF OF _____ (THE CORPORATION) A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF _____ (HEREINAFTER CALLED THE "CORPORATION"), WITH OFFICES AT _____ , _____ (BUSINESS ADDRESS) IN EVIDENCE OF WHICH INCORPORATION A CERTIFIED COPY OF THE ARTICLES OF INCORPORATION (OR ASSOCIATION) IS FILED HEREWITH (OR HAS BEEN FILED).

I AM AUTHORIZED BY AND IN BEHALF OF THE CORPORATION TO EXECUTE AND DELIVER THIS AGREEMENT AS A CONDITION OF MarAd APPROVAL AND CERTIFICATION:

(I) The Corporation agrees that:

(a) the content of approved training courses will conform to the syllabi of the Model Course CVSSA 11–01 Crime Prevention, Detection, Evidence Preservation and Reporting, or other model courses that may be approved by MarAd.

(b) a complete administrative record to include the student's assessment reports, a report of practical tests administered, and a record of classroom attendance, will be maintained at the training facility or other location approved by MarAd and will be made available for MarAd review within 3 business days of notice for at least 5 years from the student's date of enrollment.

(c) training courses will be conducted as proposed and in accordance with the conditions of the approval as stated in the course approval letter.

(d) all administrative records will be provided electronically to MarAd within 3 business day of a request for review by MarAd officials.

(e) it will accommodate MarAd attendance in CVSSA training classes and training facilities whether unannounced or otherwise.

(f) it will authorize course instructors to answer MarAd inquiries and provide course material as requested.

(g) the identity of students will undergo verification and be evidenced through one of the forms of photo identification listed under section (h) below. For E-Learning, equivalent arrangements for student identity will be established, controlled, provided, and administered at the training provider's centralized location.

(h) Acceptable forms of identification are:

(1) Merchant Mariner Document;

(2) National Passport;

(3) Armed Forces Identification Card;

(4) Photo identification cards issued by U.S. federal, state, or local government agencies; or

(5) Driver's license with photo of the driver.

(i) it will maintain a copy of all students' identification for purposes of MarAd audits and law enforcement.

(j) E-learning student projects and work will be reviewed by an assessor meeting the same qualification standards as an instructor in a live course.

(k) instructors or training provider personnel will not assist or coach

students in any way during the evaluation process.

(l) it will issue consecutively numbered certificates to students who successfully complete the approved course.

(m) blank course completion certificates will be kept secure at all times.

(1) The paper stock of course completion certificates will contain micro printing, watermarks and/or other effective measures to help prevent production of fraudulent certificates.

(2) Course completion certificates will be in a standardized format and contain the following:

(i) the name of the course as stated in the course certification letter;

(ii) the name of the school or training provider;

(iii) the date the training began and was completed;

(iv) the signatures of the course instructor and director or department head; and

(v) the student's full name.

(II) The Corporation agrees to provide:

(a) the class schedule to MarAd one month before any CVSSA training class enrollment.

(b) copies of training textbooks upon request from MarAd.

(c) notice to MarAd of any instructor changes no fewer than 10 days prior to course enrollment.

(d) notice to MarAd in writing within 30 calendar days of any changes in information previously provided and relied upon for approval and certification including but not limited to the Corporation, the courses, teaching staff, maximum teacher/student ratio, class size, training facility, or training equipment.

(e) photographs, diagrams, or plans of the training site.

(f) a description of the equipment that will be used during the course. This includes all equipment to be used during hands-on training and/or testing, and any simulators or simulation programs to be used. If a simulator or simulation program is to be used, include technical specifications and brochures provided by the manufacturer.

(g) a request for renewal of course approval and certification at least 90 days before the approval and certification expiration date.

(III) The Corporation agrees to independent audits of its CVSSA Training Program within 30 days of being directed by MarAd and:

(a) carried out at the expense of the Corporation and performed by a MarAd approved independent third party.

(b) the results of which will be provided directly to MarAd by the third party auditor.

(c) will instruct its third party auditor to provide the corrective action (CA) plan to MarAd.

(d) subject to MarAd's right to reject the CA plan and to provide its own CA plan directly to the training provider.

(e) will allow implementation of a MarAd corrective action plan if the third party audit CA plan is rejected by MarAd.

(f) will report any and all training non-conformities immediately to MarAd.

(IV) The Corporation acknowledges, understands, and further agrees that:

(a) MarAd course approval and provider certification are effective for a period of five years from the date of the approval letter; or until the approval and certification is revoked or suspended.

(b) MarAd may suspend or revoke its approval and certification at any time, without notice and with immediate effect.

(c) upon written notice of suspension or revocation of certification, the Corporation will immediately cease any display, marketing or otherwise, of MarAd certification.

(d) MarAd disapproval, or the suspension or revocation of approval and certification may only be appealed in writing to the Maritime Administrator or his designated representative and by addressing the specific reasons why the approval and certification should be made or reinstated.

_____

Signature of Authorized Official, Title, Date

PENALTY FOR FALSE STATEMENT: A fine or imprisonment, or both, are provided for violation of the proscriptions contained in 18 U.S.C. § 1001 (see also 18 U.S.C. §§ 286 and 287).

SPECIFIC ISSUES FOR COMMENT:

In addition to seeking general comments on the proposed new policy, the agency is requesting public comment on the following issues:

1. How best to make MarAd certification readily apparent to the general public;

2. Whether foreign based training providers will be faced with legal barriers or other special challenges in submitting a complete application or complying with program requirements; and

3. Whether the proposed process raises specific legal or practical issues for the program participant or the cruise line passenger.

POLICY ANALYSIS AND NOTICES:

Consistent with the Administrative Procedures Act and Department of Transportation rulemaking policy, MarAd is publishing this proposed policy in the Federal Register to indicate how it plans to exercise the discretionary authority provided by Section 3508 of the Cruise Vessel Security and Safety Act of 2010. This proposed policy would establish a voluntary program in which successful applicants would obtain MarAd cruise vessel security and safety training provider certification.

Paperwork Reduction Act: This proposed policy would establish a new requirement for the collection of information for all program participants. The Office of Management and Budget (OMB) will be requested to review the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Section 3501, et seq.).

In accordance with the Paperwork Reduction Act, this document announces MarAd's intentions to request public comments regarding the collection of information arising under this proposed policy.

—Copies of this notice and information collection request may be obtained from the Office of Security, MAR–420, Suite W25–308, 1200 New Jersey Avenue SE., Washington, DC 20590.

—Title of Information Collection: CVSSA Training Provider Certification Program

—OMB Control Number: Pending.

—Form Number: None.

—Expiration Date of Approval: Three years following approval by the Office of Management and Budget.

—Summary of Collection of Information: Persons or Entities seeking to obtain or maintain MarAd certification as CVSSA Training Providers. Persons or Entities seeking training provider certification must submit certain information described in the proposed application procedure and sign the training provider agreement. No particular form is required for the application procedure. However, all information described in the application procedure will be required to be submitted and is necessary for proper review of the applicant's qualifications. The training provider agreement will be required to follow the published format and be signed by the successful applicant before MarAd will issue its certification. To maintain training provider certification, training providers will

be required to submit to random audits and to provide accredited audit reports to MarAd on a scheduled basis.

—Need for and Use of the Information: The information collected will be used to analyze the applicant's methods and process of instruction in providing information that is comprehensive in scope and consistent with the USCG Model Course. Information arising under training provider audits will be used to ensure that certified training providers remain qualified throughout the certification period. The training provider agreement is necessary to establish an understanding between the agency and the training provider that certain terms must be met in order to hold and maintain MarAd training provider certification. Without this information, MarAd would not be able to offer the benefit of its training provider certification to program applicants. In addition, MarAd training provider certification will assist the USCG in ensuring cruise vessel CVSSA compliance.

—Description of Respondents: Individuals, partnerships, or corporations seeking training provider certification.

—Annual Responses: Once the Program is implemented, the agency anticipates between 25–35 submissions each year. Certification is anticipated to span a period of 5 years before expiration and renewal. However, the agency does anticipate the collection of information annually from the same estimated number of training providers seeking to maintain their certification by complying with agency audits.

—Annual Burden: 40 hours per program participant.

(Authority: The Cruise Vessel Security and Safety Act of 2010, 46 U.S.C. § 3508)

* * * * *

Dated: May 17, 2013

By Order of the Maritime Administrator.

Julie Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–12300 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013–0057]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel LITTLE DUTCH; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

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.

DATES: Submit comments on or before June 24, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0057. 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*. 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: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel LITTLE DUTCH is:

Intended Commercial Use of Vessel: ''Carrying up to six passengers for day trips, sunset sails, weekend or full week sails on a seasonal basis''.

Geographic Region: ''New York, New Jersey, Connecticut, Rhode Island and Massachusetts''.

The complete application is given in DOT docket MARAD–2013–0057 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, 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.

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: May 16, 2013.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–12187 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2013–0032; Notice 1]

Notice of Receipt of Petition for Decision that Nonconforming 2005–2007 Alpina B5 Passenger Cars Manufactured Before September 1, 2006 Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that nonconforming 2005–2007 Alpina B5 passenger cars manufactured before September 1, 2006 that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS), are eligible for importation into the United States

because they have safety features that comply with, or are capable of being altered to comply with, all such standards.

DATES: The closing date for comments on the petition is June 24, 2013.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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 (65 FR 19477–78).

How To Read Comments Submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov*. Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(B), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS, and has no substantially similar U.S.-certified counterpart, shall be refused admission into the United States unless NHTSA has decided that the motor vehicle has safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC. of Baltimore, Maryland (''J.K.'') (Registered Importer 90–006) has petitioned NHTSA to decide whether nonconforming 2005–2007 Alpina B5 Series passenger cars manufactured before September 1, 2006 are eligible for importation into the United States. J.K. believes these vehicles are capable of being modified to meet all applicable FMVSS.

In the past, NHTSA has granted import eligibility to a number of Alpina vehicles that were derived from BMW vehicles. These include the 1988–1994 Alpina B11 coupe, the 1988–1994 Alpina B12 5.0 coupe, and the 1989–1996 Alpina B12 coupe (assigned vehicle eligibility numbers VCP–48, VCP–41, and VCP–43, respectively). These eligibility decisions were based on petitions submitted by other Registered Importers (RI's) who claimed that the vehicles were capable of being altered to comply with all applicable FMVSS.

Because those vehicles were not manufactured for importation into and sale in the United States, and were not certified by their original manufacturer (Alpina), as conforming to all applicable FMVSS, they cannot be categorized as ''substantially similar'' to the vehicle that is the subject of the petition at issue for the purpose of establishing import eligibility for that vehicle under 49 U.S.C. 30141(a)(1)(A). Therefore, the agency will consider J.K.'s petition as a petition pursuant to 49 U.S.C. 30141(a)(1)(B).

J.K. submitted information with its petition intended to demonstrate that non-U.S. certified 2005–2007 Alpina B5 passenger cars manufactured before September 1, 2006, as originally manufactured, conform to many FMVSS. Specifically, the petitioner claims that non-U.S. certified 2005–2007 Alpina B5 passenger cars manufactured before September 1, 2006, as originally manufactured, conform to: Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 124 *Accelerator Control Systems,* 135 *Light Vehicle Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* Replacement of the instrument cluster with components from the U.S.-model BMW 5-series and reprogramming the vehicle computer to operate the necessary safety systems.

Standard No. 108 *Lamps, Reflective Devices, and Associated Equipment:* Replacement of the headlamps and tail lamps (which include side marker lights), from the U.S.-model BMW 5-series, and installation of the high-mounted stop light assembly from the U.S.-model BMW 5-series if not already so equipped.

Standard No. 110 *Tire Selection and Rims for Motor Vehicles With a GVWR of 4,536 kilograms (10,000 pounds) or Less:* installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger side rearview mirror with a component from the U.S.-model BMW 5-series or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection and Rollaway Prevention:* Reprogramming the vehicle computer to activate the required safety systems.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* Reprogramming the vehicle computer to prevent the operation of these systems when the ignition is turned off.

Standard No. 208 *Occupant Crash Protection:* Reprogramming the vehicle computer to activate the audible warning system and installation of vehicle airbags, sensors, front passenger and rear seat belts, child seat support mount, rear window shelf, and instrument panel support tube from the U.S.-model BMW 5-series.

Standard No. 209 *Seat Belt Assemblies:* Replacement of front passenger and rear seatbelts with components from the U.S.-model BMW 5-series.

Standard No. 225 *Child Restraint Anchorage Systems:* Installation of child seat support mounts from the U.S.-model BMW 5-series.

Standard No. 301 *Fuel System Integrity:* Installation of an evaporative system with a rollover and check valve from the U.S.-model BMW 5-series.

Standard No. 401 *Interior Trunk Release:* Installation of U.S.-model BMW 5-series interior trunk release components.

The petitioner states that the bumper carriers, bumper shocks, deformation elements, and support structures will be replaced with U.S.-model 5-series components to meet the requirements of the Bumper Standard of 49 CFR part 581.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicle near the left windshield post to meet the requirements of 49 CFR Part 565.

As previously stated, the petitioner claims that the vehicle, is capable of being modified to comply with all requirements of FMVSS No. 208 *Occupant Crash Protection.* NHTSA seeks specific comments on whether the vehicle, which is manufactured for sale in the European Market, is in fact capable of being modified to comply with all requirements of FMVSS No. 208, including the unbelted occupant protection requirements of this standard.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Issued on: May 17, 2013.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2013–12356 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0083; Notice 2]

Michelin North America, Incorporated, Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Grant of Petition.

SUMMARY: Michelin North America, Inc. (MNA), has determined that certain Michelin brand passenger car replacement tires, do not fully comply with paragraph S5.5 [1] of Federal Motor Vehicle Safety Standard (FMVSS) No. 139, *New pneumatic radial tires for light vehicles.* MNA has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports* on June 2, 2011.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the rule implementing those provisions at 49 CFR Part 556, MNA has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety. Notice of receipt of the petition was published, with a 30-day public comment period, on April 4, 2012 in the **Federal Register** (77 FR 20483). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2011–0083.''

For further information on this decision contact Mr. Jack Chern, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–0661, facsimile (202) 493–0073.

Tires Involved: Affected are approximately 17,500 Michelin Primacy MXV4 TL passenger car replacement tires labeled as sizes P205 65 R15 94H, P205 65 R15 94V, and P225 55 R17 97H that were manufactured by SC Michelin Romania SA in Victoria, Romania between January 9, 2011 and May 28, 2011.

Summary of MNA's Analysis And Arguments: MNA explained that the noncompliance is a tire sidewall labeling error. A prefix letter ''P'' was inadvertently added to the tire size designation required by paragraph S5.5 (b) by FMVSS No. 139.

The tire was designed to comply with the European Tyre and Rim Technical Organization (ETRTO) standard for maximum load and inflation pressure. The Max Load and Max Pressure markings on the tire are correct and the tire passes all certification requirements at the marked loads/pressures under 49 CFR 571.139. The mix of ETRTO loads with the ''P''-metric size designation causes the tire to be noncompliant with both the ETRTO standard and the Tire and Rim Association (T&RA) standard, thus becoming noncompliant with the labeling requirements of 49 CPR 571.139 S5.5. All other markings are compliant with the FMVSS requirements.

MNA stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

1. Both the 205/65 R15 and the 225/55 R17 radial tire were originally conceived as a Euro-metric radial tire. Both tires when certifying to DOT requirements were tested in accordance with safety standard FMVSS No. 139 as well as the ETRTO standard for dimensions, pressure, load, and performance. The subject tires meet or exceed all of the minimum performance requirements for FMVSS No. 139 at the load and pressure marked on the respective sidewall.

2. The P-metric version of the tire dimensions specify a maximum load and pressure that is less than the maximum load and associated pressure of the Euro-metric dimension. Performance capabilities as P-metric dimensions exceed all P-metric requirements.

[1] In its petition MNA states its belief that the subject tires do not meet the load marking requirements of 49 CFR Part 571.139 S5.5(d). However, the actual noncompliance is due to an error in the tire size designation marking required by 49 CFR 571.139 S5.5(b) which causes the load marking to appear to be incorrect.

3. Should the subject tires be selected and fitted based on their markings, no possibility of tire overloading exists.

4. The P-metric dimensional marks on the subject tires would be treated as such in the replacement market. At the dealer or consumer level, the inconsistency between the dimensional marking and the maximum load marking may lead to some confusion at the time of installation, but fitment would still be acceptable.

5. Whether the tires are fitted as P-metric dimensions per the current industry fitment guide, or fitted according to the subject tire's sidewall's maximum load. These tires do not risk the possibility of being overloaded when making a replacement tire selection for vehicle fitment.

In addition, MNA states that it has corrected the problem that caused the noncompliance so that it will not reoccur in future production.

In summation, MNA believes that the subject noncompliance is inconsequential to motor vehicle safety, and that its petition, to exempt it from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

Requirement Background: Paragraph S5.5 of FMVSS No. 139 specifically states:

S5.5 *Tire markings.* Except as specified in paragraphs (a) through (i) of S5.5 each tire must be marked on each sidewall with the information specified in S5.5 (a) through (d) and on one sidewall with the information specified in S5.5 (e) through (i) according to the phase-in schedule specified in S7 of this standard. The markings must be placed between the maximum section width and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area that is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, those markings must appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings must be in letters and numerals not less than 0.078 inches high and raised above or sunk below the tire surface not less than 0.015 inches* * *

(b) The tire size designation as listed in the documents and publications specified in S4.1.1 of this standard;* * *

NHTSA'S Analysis of MNA'S Reasoning: Pursuant to 49 U.S.C. 30118(d) and 49 U.S.C. 30120(h) and the rule implementing those provisions at 49 CFR part 556, Michelin North America, Inc. (''MNA''), has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety. Specifically MNA states that the inconsistence does not meet the load marking requirements of 49 CFR 571.139 S5.5(d).

The affected tires in this petition of noncompliance are approximately 133,906 tires that were manufactured, of which approximately 17,500 Michelin P205/65R15 and P225/55R17 Primacy MXV4 TL tires were released and/or imported to the United States market whose sidewall markings contain the letter ''P'' as a prefix to the Euro-metric dimension marking, resulting in the creation of an unintended P-metric dimension, for which the marked maximum load value is not consistent with the published T&RA standard. As stated by Michelin North American, Inc ''MNA'', ''whether the subject tires are fitted as P-metric dimensions per the current industry fitment guide, or fitted following the subject tire's sidewall marked maximum load, these tires do not risk the possibility of being overloaded when marking a replacement tire selection for fitment.

NHTSA Decision: NHTSA agrees with Michelin North America, Inc. (''MNA'') that the tires in question, Michelin 205/65R15 and 225/55R17, that the noncompliances are inconsequential to motor vehicle safety. The agency believes that the true measure of inconsequentiality to motor vehicle safety in this case is that there is no impact on the operational safety of the vehicles on which these tires are mounted.

As MNA stated, both subject tires are marked on both the inboard and outboard sidewall with the prefix ''P''. Since the intended design max load specifications of these tires is higher than those specified with the ''P'' prefix under the T&RA standard then we can conclude that the parameters specified in the T&RA standard do not surpass the parameters molded on the tire sidewall, and hence safety is not compromised.

In consideration of the foregoing, NHTSA has decided that MNA has met its burden of persuasion that the FMVSS No. 139 noncompliance for the replacement tires identified in MNA's Noncompliance Information Report is inconsequential to motor vehicle safety. Accordingly, MNA's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the 17,500 replacement tires that MNA no longer controlled at the time it determined that a noncompliance existed in the subject tires. However, the granting of this petition does not relieve tire distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires under their control after MNA notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

Issued on: May 17, 2013.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2013–12359 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2013–0094]

Pipeline Safety: Workshop on Public Awareness Programs

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of workshop.

SUMMARY: PHMSA is sponsoring a two-day public awareness workshop on June 19 and June 20, 2013, at the Hyatt Regency North Dallas hotel in Richardson, Texas. The workshop serves as an opportunity to bring pipeline safety stakeholders together to discuss ways to improve public awareness outreach. Federal and state regulators will share general findings from recent public awareness inspections and various stakeholders (Federal and state regulators, industry, pipeline operators, public, emergency response officials, local public officials, land planners, and excavators) will share their perspectives on what is working and what is not working with existing public awareness requirements and API RP 1162 (1st edition). The goal of the workshop is to discuss ways to strengthen pipeline safety public awareness. The workshop will be webcast.

DATES: The workshop will be held on June 19–20, 2013. Name badge pick up

and on-site registration will be available starting at 8:00 a.m. central time on June 19, 2013, with the workshop taking place from 9:00 a.m. until approximately 5:00 p.m. central time, both days. Refer to the meeting Web site for agenda and times at: *http://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=90&nocache=6406.* Please note that all workshop presentations will be available on the meeting Web site within 15 days following the workshop.

ADDRESSES: The workshop will be held at the Hyatt Regency North Dallas hotel, 701 East Campbell Road, Richardson, TX 75081. Hotel reservations must be made by contacting the hotel directly. Hotel reservations can be made under the ''Public Awareness Workshop'' room block for the nights of June 18–20, 2013, at 1–888–421–1442, or online at *https://resweb.passkey.com/Resweb.do?mode=welcome_ei_new&eventID=10635869.* A daily room rate of $113.00 per night is available until May 27, 2013, under the room block. The meeting room location will be posted at the hotel on the day of the workshop.

Registration: Members of the public may attend this free workshop. To help assure that adequate space is provided, all attendees are encouraged to register for the workshop at *http://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=90&nocache=6406.*

Comments: Members of the public may also submit written comments either before or after the workshop. Comments should reference Docket ID PHMSA–2013–0094. Comments may be submitted in the following ways:

- *E-Gov Web site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.

Hand Delivery: DOT Docket Management System, Room W12–140, on the ground floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the Docket ID at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.*

Note: Comments will be posted without changes or edits to *http://www.regulations.gov* including any personal information provided. Please see the Privacy Act heading in the Regulatory Analyses and Notices section of the **SUPPLEMENTARY INFORMATION** for additional information.

Privacy Act Statement: Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477).

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, please contact Christie Murray at (202) 366–4996 or by email at *Christie.murray@dot.gov* by June 14, 2013.

FOR FURTHER INFORMATION CONTACT: Christie Murray at 202–366–4996 or by email at *christie.murry@dot.gov.*

SUPPLEMENTARY INFORMATION:

The primary goals of the public awareness workshop are to:

(1) Provide an overview of the public awareness program and discuss recent inspection findings;

(2) Understand what's working and not working with public awareness requirements and API RP 1162 (1st edition) from various stakeholder perspectives (industry, pipeline operators, public, emergency response officials, local public officials, and excavators);

(3) Share ways to improve public awareness outreach efforts; and

(4) Discuss the path forward for improving public awareness.

Issued in Washington, DC on May 17, 2013.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2013–12241 Filed 5–22–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35736]

AG Valley Railroad, LLC—Operation Exemption—Ag Valley Holdings, LLC

AG Valley Railroad, LLC (AVRR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to operate approximately 3.09 miles of rail line (16,304 feet), known as the Chicago Transload Facility trackage (the Line), in Chicago, Ill., pursuant to an operating agreement with Ag Valley Holdings, LLC, (Ag Valley Holdings). AVRR states that there are no mileposts on the Line. Based on the map provided in Appendix 1–B, the Line is located between E. 100th St. and E. 104th St., and roughly parallel to S. Torrence Ave.

According to AVRR, the Line, which is owned by Ag Valley Holdings, is used in conjunction with interchange to and from Chicago Rail Link and for transloading carloads of inbound and outbound shipments of specified products for distribution to their final destination.

The earliest the transaction can be consummated is June 6, 2013, the effective date of the exemption (30 days after the exemption was filed).

AVRR certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier and will not exceed $5 million.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than May 30, 2013 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35736, 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 David C. Dillon, Dillon & Nash, Ltd., 111 West Washington Street, Suite 1023, Chicago, IL 60602.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: May 20, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–12332 Filed 5–22–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

May 20, 2013.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before June 24, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov*, or the entire information collection request maybe found at *www.reginfo.gov*.

Internal Revenue Service (IRS)

OMB Number: 1545–0016.

Type of Review: Extension without change of a currently approved collection.

Title: United States Additional Estate Tax Return.

Form: 706–A.

Abstract: Form 706–A is used by individuals to compute and pay the additional estate taxes due under Code section 2032A(c). IRS uses the information to determine that the taxes have been properly computed. The form is also used for the basis election of section 1016(c)(1).

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 1,678.

OMB Number: 1545–1144.

Type of Review: Extension without change of a currently approved collection.

Title: Generation-Skipping Transfer Tax Return for Distributions.

Form: 706–GS(D).

Abstract: Form 706–GS(D) is used by distributees to compute and report the Federal Generation Skipping Transfer tax imposed by IRC section 2601. IRS uses the information to enforce this tax and to verify that the tax has been properly computed.

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 980.

OMB Number: 1545–1702.

Type of Review: Extension without change of a currently approved collection.

Title: Information Return for Transfers Associated With Certain Personal Benefit Contracts.

Form: 8870.

Abstract: Section 170(c) charitable organizations or section 664(d) charitable remainder trusts that paid premiums after February 8, 1999, on certain ''personal benefit contracts'' must file Form 8870.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Annual Burden Hours: 74,200.

OMB Number: 1545–2153.

Type of Review: Extension without change of a currently approved collection.

Title: Notice 2009–83—Credit for Carbon Dioxide Sequestration Under Section 45Q.

Abstract: This notice sets forth interim guidance, pending the issuance of regulations, relating to the credit for carbon dioxide sequestration (CO_2 sequestration credit) under § 45Q of the Internal Revenue Code.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 180.

OMB Number: 1545–2237.

Type of Review: Extension without change of a currently approved collection.

Title: RP–141793–11 (Rev. Proc. XXXX–XX), Disaster Relief.

Abstract: This revenue procedure provides guidance to State housing credit agencies (Agencies) and owners of low-income buildings (Owners) regarding the suspension of certain income limitation requirements under section 42 of the Internal Revenue Code for certain low-income housing tax credit properties affected by major disaster areas declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (Stafford Act).

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 1,750.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–12282 Filed 5–22–13; 8:45 am]

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FEDERAL REGISTER

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Part II

Securities and Exchange Commission

17 CFR Parts 240, 242, and 249

Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, and 249

[Release No. 34–69490; File Nos. S7–02–13; S7–34–10; S7–40–11]

RIN 3235–AL25

Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules; proposed interpretations.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is publishing for public comment proposed rules and interpretive guidance to address the application of the provisions of the Securities Exchange Act of 1934, as amended (''Exchange Act''), that were added by Subtitle B of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), to cross-border security-based swap activities. Our proposed rules and interpretive guidance address the application of Subtitle B of Title VII of the Dodd-Frank Act with respect to each of the major registration categories covered by Title VII relating to market intermediaries, participants, and infrastructures for security-based swaps, and certain transaction-related requirements under Title VII in connection with reporting and dissemination, clearing, and trade execution for security-based swaps. In this connection, we are re-proposing Regulation SBSR and certain rules and forms relating to the registration of security-based swap dealers and major security-based swap participants. The proposal also contains a proposed rule providing an exception from the aggregation requirement, in the context of the security-based swap dealer definition, for affiliated groups with a registered security-based swap dealer. Moreover, the proposal addresses the sharing of information and preservation of confidentiality with respect to data collected and maintained by SDRs. In addition, the Commission is proposing rules and interpretive guidance addressing the policy and procedural framework under which the Commission would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps (*i.e.,* ''substituted compliance''). Finally, the Commission is setting forth our view of the scope of our authority, with respect to enforcement proceedings, under Section 929P of the Dodd-Frank Act.

DATES: Submit comments on or before August 21, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–02–13, and File Numbers S7–34–10 (Regulation SBSR) and/or S7–40–11 (registration of security-based swap dealers and major security-based swap participants), as applicable, on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–02–13, and File Numbers S7–34–10 (Regulation SBSR) and/or S7–40–11 (registration of security-based swap dealers and major security-based swap participants), as applicable. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Matthew A. Daigler, Senior Special Counsel, at 202–551–5578, Wenchi Hu, Senior Special Counsel, at 202–551–6268, Richard E. Grant, Special Counsel, at 202–551–5914, or Richard Gabbert, Special Counsel, at 202–551–7814, Office of Derivatives Policy, Division of Trading and Markets, regarding security-based swap dealers and major security-based swap participants; Jeffrey Mooney, Assistant Director, Matthew Landon, Senior Special Counsel, or Stephanie Park, Special Counsel, Office of Clearance and Settlement, Division of Trading and Markets, at 202–551–5710, regarding security-based swap clearing agencies, security-based swap data repositories, and the security-based swap clearing requirement; David Michehl, Senior Counsel, Office of Market Supervision, Division of Trading and Markets, at 202–551–5627, regarding security-based swap reporting; Leah Mesfin, Special Counsel, at 202–551–5655, or Michael P. Bradley, Special Counsel, at 202–551–5594, Office of Market Supervision, Division of Trading and Markets, regarding the trade execution requirement and swap execution facilities; Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing new rules and interpretive guidance under the Exchange Act relating to the application of Subtitle B of Title VII of the Dodd-Frank Act to cross-border activities and re-proposing Regulation SBSR and certain rules and forms relating to the registration of security-based swap dealers and major security-based swap participants.

The Commission is proposing the following rules under the Exchange Act: Rule 0–13 (Substituted Compliance Request Procedure); Rule 3a67–10 (Foreign Major Security-Based Swap Participants); Rule 3a71–3 (Cross-Border Security-Based Swap Dealing Activity); Rule 3a71–4 (Exception from Aggregation for Affiliated Groups with Registered Security-Based Swap Dealers); Rule 3a71–5 (Substituted Compliance for Foreign Security-Based Swap Dealers); Rule 3Ca–3 (Application of the Mandatory Clearing Requirement to Cross-Border Security-Based Swap Transactions); Rule 3Ch–1 (Application of the Mandatory Trade Execution Requirement to Cross-Border Security-Based Swap Transactions); Rule 3Ch–2 (Substituted Compliance for Mandatory Trade Execution); Rule 13n–4(d) (Exemption from the Indemnification Requirement); Rule 13n–12 (Exemption from Requirements Governing Security-Based Swap Data Repositories for Certain Non-U.S. Persons); Rule 18a–4(e) (Segregation Requirements for Foreign Security-Based Swap Dealers); and Rule 18a–4(f) (Segregation Requirements for Foreign Major

Security-Based Swap Participants). The Commission also is re-proposing the following rules and forms: 17 CFR 242.900–242.911 (Regulation SBSR) (RIN 3235–AK80) and 17 CFR 249.1600 (Form SBSE), 249.1600a (Form SBSE–A), and 249.1600b (Form SBSE–BD) (RIN 3235–AL05).

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I. Background

The global nature of the security-based swap market highlights the critical importance of addressing the application of the Title VII of the Dodd-Frank Act [1] (''Title VII'') to cross-border activities.[2] The Commission has received numerous inquiries and comments from market participants, foreign regulators, and other interested parties concerning how Title VII and the Commission's implementing regulations thereunder will apply to the cross-border activities of U.S. and non-U.S. market participants. To respond to these inquiries and comments, the Commission is providing our preliminary views on the application of Title VII to cross-border security-based swap activities [3] and non-U.S. persons

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] Unless otherwise indicated, references to Title VII of the Dodd-Frank Act in this release are to Subtitle B of Title VII.

[3] Generally, in this release, the application of Title VII to ''cross-border activities'' refers to the application of Title VII to a security-based swap transaction involving (i) A U.S. person and a non-U.S. person, (ii) two non-U.S. persons where one or both are located within the United States, or (iii) two non-U.S. persons conducting a security-based swap transaction that otherwise occurs in relevant part within the United States, including by

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that act in capacities regulated under the Dodd-Frank Act in the proposed rules and interpretations discussed below.

A. The Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[4] The 2008 financial crisis highlighted significant issues in the over-the-counter (''OTC'') derivatives markets, which have experienced dramatic growth in recent years [5] and are capable of affecting significant sectors of the U.S. economy.[6] Title VII of the Dodd-Frank Act provides for a comprehensive new regulatory framework for swaps and security-based swaps, including by: (i) Providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating recordkeeping and real-time reporting regimes and public dissemination; and (iv) enhancing the rulemaking and enforcement authorities of the Commission and the Commodity Futures Trading Commission (''CFTC'').[7]

Specifically, the Dodd-Frank Act provides that the CFTC will regulate ''swaps,'' the Commission will regulate ''security-based swaps,'' [8] and both the CFTC and the Commission (together, the ''Commissions'') will regulate ''mixed swaps.'' [9] Title VII also amends the Exchange Act to include many specific provisions governing security-based swaps that could apply to cross-border security-based swap transactions and to non-U.S. persons who act in capacities regulated under the Dodd-Frank Act.[10] These provisions primarily relate to Commission oversight of security-based swap dealers,[11] major security-based

negotiating the terms of the security-based swap transaction within the United States or where performance of one or both counterparties under the security-based swap is guaranteed by a U.S. person.

[4] The Dodd-Frank Act was enacted ''[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.'' Public Law 111–203, Preamble.

[5] From their beginnings in the early 1980s, the notional value of these markets grew to approximately $650 trillion globally by the end of 2011. *See* Bank for International Settlements, Statistical Release: OTC Derivatives Statistics at End–December 2011 (May 2012) at 1, *available at: http://www.bis.org/publ/otc_hy1205.pdf.*

[6] *See* Section II.A.6(b), *infra.*

[7] *See* Public Law 111–203 sections 701–774.

[8] The definition of ''security'' in both the Exchange Act and the Securities Act of 1933 (''Securities Act''), 15 U.S.C. 77a *et seq.,* was amended by the Dodd-Frank Act to include security-based swaps. Public Law 111–203, Section 761(a)(2) (inserting ''security-based swap'' after ''security future'' in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10)) and Section 768(a)(1) (inserting ''security-based swap'' after ''security future'' in Section 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1)). The revision of the Exchange Act's definition of ''security'' raises, among other things, issues related to the definition of ''broker'' in Section 3(a)(4) of the Exchange Act, 15 U.S.C. 78c(a)(4), the definition of ''dealer'' in Section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), the exchange registration requirements in Sections 5 and 6 of the Exchange Act, 15 U.S.C. 78e and 78f, respectively, and the requirement in Section 12 of the Exchange Act that securities be registered before a transaction is effected on a national securities exchange. *See* 15 U.S.C. 78l(a). The Securities Act requires that any offer and sale of a security must either be registered under the Securities Act (*see* Section 5 of the Securities Act, 15 U.S.C. 77e) or made pursuant to an exemption from registration (*see,* e.g., Sections 3 and 4 of the Securities Act, 15 U.S.C. 77c and 77d, respectively). In addition, the Securities Act requires that any offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant (''ECP'') must be registered under the Securities Act. *See* Section 5(e) of the Securities Act, 15 U.S.C. 77e(e). Because of the statutory language of Section 5(e), exemptions from this requirement in Sections 3 and 4 of the Securities Act are not available. This release does not address the requirements under Section 5 of the Securities Act.

The Commission adopted interim final rules that provide exemptions from certain provisions of the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939 (''Trust Indenture Act''), 15 U.S.C. 77aaa *et seq.,* for those security-based swaps that prior to July 16, 2011 were ''security-based swap agreements'' and are defined as ''securities'' under the Securities Act and the Exchange Act as of July 16, 2011 due solely to the provisions of Title VII of the Dodd-Frank Act. *See* Exemptions for Security-Based Swaps, Securities Act Release No. 9231 (July 1, 2011), 76 FR 40605 (July 11, 2011); *see also* Extension of Exemptions for Security-Based Swaps, Securities Act Release No. 9383 (Jan. 29, 2013), 78 FR 7654 (Feb. 4, 2013). The Commission also issued temporary exemptions under the Exchange Act regarding certain issues raised by the inclusion of security-based swaps in the definition of ''security.'' *See* Order Extending Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Revision of the Definition of ''Security'' To Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 68864 (Feb. 7, 2013), 78 FR 10218 (Feb. 13, 2013); *see also* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Pending Revision of the Definition of ''Security'' To Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 64795 (July 1, 2011) 76 FR 39927 (July 7, 2011).

[9] In addition, the Dodd-Frank Act adds to the Commodity Exchange Act (''CEA'') and Exchange Act definitions of the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' and ''major security-based swap participant,'' and amends the CEA definition of the term ''eligible contract participant.'' These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term ''eligible contract participant,'' in Section 1a(18) of the CEA, 7 U.S.C. 1a(18), as redesignated and amended by Section 721 of the Dodd-Frank Act. Section 712(d)(1) of the Dodd-Frank Act provides that the CFTC and the Commission, in consultation with the Board of Governors of the Federal Reserve System, shall jointly further define the terms ''swap,'' ''security-based swap,'' ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' ''eligible contract participant,'' and ''security-based swap agreement.'' Further, Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant,'' and Section 761(b)(3) of the Dodd-Frank Act permits the Commission to adopt a rule to further define the terms ''security-based swap,'' ''security-based swap dealer,'' ''major security-based swap participant,'' and ''eligible contract participant,'' with regard to security-based swaps, for the purpose of including transactions and entities that have been structured to evade Title VII or the amendments made by Title VII.

The Commission and the CFTC jointly adopted rules and interpretive guidance further defining the terms ''swap,'' ''security-based swap,'' and ''security-based swap agreement,'' and regulations regarding mixed swaps. *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012) (''Product Definitions Adopting Release''). The Commission and the CFTC also jointly adopted rules further defining the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and ''eligible contract participant.'' *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (''Intermediary Definitions Adopting Release'').

[10] The provisions of the Exchange Act relating to security-based swaps that were enacted by Title VII also are referred to herein as ''Title VII requirements'' or ''requirements in Title VII.''

[11] *See* Section 764(a) of the Dodd-Frank Act. The Commission, jointly with the CFTC, adopted rules further defining the term ''security-based swap dealer.'' *See* Intermediary Definitions Adopting Release, 77 FR 30596.

The Commission has proposed rules regarding the registration and substantive requirements for security-based swap dealers and major security-based swap participants. *See* Proposed Rules Governing Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012) 77 FR 70214 (Nov. 23, 2012) (''Capital, Margin, and Segregation Proposing Release''); Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 65543 (Oct. 12, 2011) (RIN 3235–AL05), 76 FR 65784 (Oct. 24, 2011) (''Registration Proposing Release''); Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396 (July 18, 2011) (''External Business Conduct Standards Proposing Release''); and Trade Acknowledgment and Verification of Security-Based Swap Transactions, Exchange Act Release No. 63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) (''Trade Acknowledgment Proposing Release''). The Commission has not yet proposed rules governing the recordkeeping, reporting, and notification requirements for security-based swap

swap participants,[12] security-based swap data repositories (''SDRs''),[13] security-based swap clearing agencies,[14] security-based swap execution facilities (''SB SEFs''),[15] and mandatory security-based swap reporting and dissemination,[16] clearing,[17] and trade execution.[18]

B. Overview of the Cross-Border Proposal

With limited exceptions, the Commission has not proposed specific provisions of rules or forms or provided guidance regarding the application of Title VII to cross-border activities.[19] Rather than addressing these issues in a piecemeal fashion through the various substantive rulemaking proposals implementing Title VII, the Commission instead is addressing the application of Title VII to cross-border activities holistically in a single proposing release.[20] This approach provides market participants, foreign regulators, and other interested parties with an opportunity to consider, as an integrated whole, the Commission's proposed approach to the application of Title VII to cross-border security-based swap activities and non-U.S. persons that act in capacities regulated under the Dodd-Frank Act.[21]

After providing an overview of the security-based swap market, the Commission's preliminary views on the scope of application of Title VII to cross-border security-based swap activity, and the legal and policy principles guiding the Commission's approach to the application of Title VII to cross-border activities in Section II, we set forth our proposed approach in the subsequent sections of the release.

In Sections III and IV, we propose rules and interpretive guidance regarding the registration and regulation of security-based swap dealers and major security-based swap participants, including the treatment of foreign branches of U.S. banks and the provision of guarantees in the cross-border context. In connection with this, we are re-proposing the following rules and forms: 17 CFR 249.1600 (Form SBSE), 249.1600a (Form SBSE–A), and 249.1600b (Form SBSE–BD).[22]

In Sections V–VII, we propose rules and interpretive guidance regarding the registration of security-based swap clearing agencies, SDRs, and SB SEFs, as well as discuss generally under what circumstances the Commission would consider granting exemptions from registration for these infrastructures. To facilitate relevant authorities' access to security-based swap data collected and maintained by Commission-registered SDRs, the Commission also is proposing interpretive guidance to specify how SDRs may comply with the notification requirement in the Exchange Act and specifying how the Commission proposes to determine whether a relevant authority is appropriate for purposes of receiving security-based swap data from an SDR.[23] In addition, the Commission is proposing a tailored exemption from the indemnification requirement in the Exchange Act.[24]

In Sections VIII–X, we propose rules and interpretive guidance regarding the application of Title VII to cross-border activities with respect to certain transactional requirements in connection with reporting and dissemination, clearing, and trade execution for security-based swaps. As discussed further below, these requirements apply to persons independent of their registration status. In connection with this, we are re-proposing the following rules: 17 CFR 242.900–242.911 (Regulation SBSR).[25]

In Section XI, we set forth a proposed policy and procedural framework under which we would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with certain requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps (*i.e.,* ''substituted compliance'').[26] Generally speaking, the Commission is proposing a policy and procedural framework that would allow for the possibility of substituted compliance in recognition of

dealers and major security-based swap dealers pursuant to Section 15F(f) of the Exchange Act, 15 U.S.C. 78o–10(f), as added by Section 764(a) of the Dodd-Frank Act.

[12] *See* Section 764(a) of the Dodd-Frank Act. The Commission, jointly with the CFTC, adopted rules further defining the term ''major security-based swap participant.'' *See* Intermediary Definitions Adopting Release, 77 FR 30596. In a number of releases, the Commission also has proposed rules regarding the registration and substantive requirements for major security-based swap participants. *See* note 11, *supra.*

[13] *See* Section 763(i) of the Dodd-Frank Act. The Commission has proposed rules regarding the registration and regulation of SDRs. *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010), corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) (''SDR Proposing Release'').

[14] *See* Section 763(b) of the Dodd-Frank Act. The Commission adopted rules regarding the standards for risk management practices and operations of registered clearing agencies, including security-based swap clearing agencies. *See* Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220 (Nov. 2, 2012) (''Clearing Agency Standards Adopting Release'').

[15] *See* Section 763(c) of the Dodd-Frank Act. The Commission has proposed rules regarding the registration and regulation of SB SEFs. *See* Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 29, 2011) (''SB SEF Proposing Release'').

[16] *See* Sections 763 and 766 of the Dodd-Frank Act. The Commission has proposed rules on trade reporting, data elements, and real-time public reporting for security-based swaps. *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 63346 (Nov. 19, 2010) (RIN 3235–AK80), 75 FR 75208 (Dec. 2, 2010) (''Regulation SBSR Proposing Release'').

[17] *See* Section 763(b) of the Dodd-Frank Act. The Commission has proposed or adopted rules relating to the end-user clearing exception and the process for submitting for review of security-based swaps for mandatory clearing. *See* Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b–4 and Form 19b–4 Applicable to All Self-Regulatory Organizations, Exchange Act Release No. 67286 (June 28, 2012), 77 FR 41602 (July 13, 2012) (''Clearing Procedures Adopting Release''); End-User Exception to Mandatory Clearing of Security-Based Swaps (Corrected), Exchange Act Release No. 63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) (''End-User Exception Proposing Release'').

[18] *See* Section 763(b) of the Dodd-Frank Act.

[19] The Commission has proposed a rule addressing the application of the security-based swap trade reporting requirement to cross-border transactions and to non-U.S. persons. *See* Regulation SBSR Proposing Release, 75 FR 75239–40, as discussed in Section VIII, *infra.* The Commission also has proposed rules imposing special requirements on ''nonresident security-based swap dealers,'' ''nonresident major security-based swap participants,'' ''non-resident swap data repositories,'' and ''non-resident SB SEFs.'' *See* Registration Proposing Release, 76 FR 65799–801, as discussed in Section III.E, *infra;* SDR Proposing Release, 75 FR 77310, as discussed in Section VI, *infra;* and SB SEF Proposing Release, 76 FR 11000–3, as discussed in Section VII, *infra.*

[20] Tables reflecting the Commission's proposed approach as it would apply to security-based swap transactions between different types of entities are included in this release as Appendix A. Each table focuses on a specific type of security-based swap dealing entity or market participant and sets out the Title VII requirements that would apply to such person under different transaction scenarios.

[21] *Cf.* CFTC Proposed Interpretive Guidance and Policy Statement, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012) (''CFTC Cross-Border Proposal''); Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 FR 41110 (July 12, 2012) (''CFTC Proposed Cross-Border Exemptive Order''); Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013) (''Final CFTC Cross-Border Exemptive Order''); Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 FR 909 (Jan. 7, 2013) (''CFTC Further Proposed Guidance''). In Section XIII.B below, we solicit general comment on the differences between our proposed approach and the CFTC's proposed approach.

[22] *See* Registration Proposing Release, 76 FR 65784, as discussed in Section III.E, *infra.*

[23] *See* Section VI.C, *infra.*

[24] *Id.*

[25] *See* Regulation SBSR Proposing Release, 75 FR 75208, as discussed in Section VIII, *infra.*

[26] *See* Section XI, *infra.* As discussed in Section XI, in permitting substituted compliance, the Commission might use different procedural approaches depending on the different substantive requirements that are the subject of the substituted compliance determinations. *See also* note 27, *infra.*

the potential, in a market as global as the security-based swap market, for market participants who engage in cross-border security-based swap activity to be subject to conflicting or duplicative compliance obligations.[27] In addition, the Commission is proposing a rule that would set forth procedures for requesting a substituted compliance determination.

In Section XII, the Commission sets forth our view of the scope of our authority, with respect to enforcement proceedings, under Section 929P of the Dodd-Frank Act.[28] Section XIII sets forth a general request for comment, including request for comment on the consistency of our proposed approach with the CFTC's proposed approach to applying the provisions of the CEA that were enacted by Title VII in the cross-border context.

Finally, in Section XIV, the Commission addresses the Paperwork Reduction Act, and Section XV provides an economic analysis of the proposed approach, including a discussion of the associated costs and benefits of the proposals discussed in Sections III–XI, as well as a discussion of issues related to efficiency, competition, and capital formation.

Because this release is directly related to security-based swap data reporting and dissemination, clearing, and trade execution, as well as the regulation of various persons required to register as a result of amendments made to the Exchange Act by Title VII, we anticipate that some of the rules, forms, and interpretive guidance proposed herein, and comments received thereon, will be addressed in the adopting releases relating to the impacted substantive rules. In some areas, we may decide to address comments received on the proposals contained in this release by adopting rules in a separate rulemaking.[29]

C. Consultation and Coordination

As discussed more fully below, a number of market participants, foreign regulators, and other interested parties have already provided their views on the application of Title VII to cross-border activities through both written comment letters to the Commission and/or the CFTC and meetings with Commissioners and Commission staff.[30] The Commission has taken the commenters' views expressed thus far into consideration in developing these proposed rules, forms, and interpretive guidance.[31] In addition, in developing this proposal, the Commission has, in compliance with Sections 712(a)(2)[32] and 752(a)[33] of the Dodd-Frank Act, consulted and coordinated with the CFTC, the prudential regulators,[34] and foreign regulatory authorities.

Efforts to regulate the swaps market are underway not only in the United States but also abroad. In 2009, leaders of the Group of 20 (''G20'')—whose membership includes the United States, 18 other countries, and the European Union (''EU'')—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets. Specifically, the G20 leaders declared that:

> [a]ll standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the [Financial Stability Board] and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk and protect against market abuse.[35]

In subsequent summits, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform.[36] The Commission has participated in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives.[37] Through these

[27] Separately, in Sections V–VII below, the Commission also discusses generally when we would consider exempting non-resident security-based swap clearing agencies and SB SEFs that are subject to comparable, comprehensive supervision and regulation in their home countries, and certain SDRs that are non-U.S. persons, from certain obligations under the Exchange Act, including the requirement to register.

[28] The rules, forms, and interpretive guidance proposed herein and discussed in Sections II–XI below relate solely to the applicability of the registration (and the attendant substantive regulation) and reporting and dissemination, clearing, and trade execution requirements in Title VII, and are not intended to limit or address the cross-border reach or extraterritorial application of the antifraud or other provisions of the federal securities laws.

[29] The Commission is not addressing in this release issues relating to compliance dates of final rules adopted pursuant to amendments made to the Exchange Act by Title VII. Compliance issues, including compliance dates, will be addressed in connection with the various Title VII final rules. *See* Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 67177 (June 11, 2012), 77 FR 35625 (June 14, 2012) (''Implementation Policy Statement''). *See also* Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 34–69491 (May 1, 2013).

[30] The views expressed in comment letters and meetings are collectively referred to as the views of ''commenters.'' See Appendix D for a list of commenters referred to in this release and the location of their comment letters on the Commission's (or the CFTC's) Web site.

[31] In addition, the Commission and the CFTC held a joint public roundtable regarding the application of Title VII to cross-border activities. *See* Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64939 (July 21, 2011), 76 FR 44507 (July 26, 2011).

[32] Section 712(a)(2) of the Dodd-Frank Act states, in part, that ''the Securities and Exchange Commission shall consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible.''

[33] Section 752(a) of the Dodd-Frank Act states, in part, that ''[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in Section 1a(39) of the Commodity Exchange Act), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps.''

[34] The term ''prudential regulator'' is defined in Section 1a(39) of the CEA, 7 U.S.C. 1a(39), and that definition is incorporated by reference in Section 3(a)(74) of the Exchange Act, 15 U.S.C. 78c(a)(74). Pursuant to the definition, the Board of Governors of the Federal Reserve System (''Federal Reserve Board''), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, or the Federal Housing Finance Agency (collectively, the ''prudential regulators'') is the ''prudential regulator'' of a security-based swap dealer if the entity is directly supervised by that agency.

[35] G20 Meeting, Pittsburgh, United States, September 25, 2009, *available at: http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.*

[36] For example, on June 18–19, 2012, the leaders of the G20 convened in Los Cabos, Mexico, and reaffirmed their commitments with respect to the regulation of the OTC derivatives markets. *See* the G20 Leaders Declaration (June 2012), para. 39, *available at: http://www.g20.org/documents/.*

[37] Senior representatives of OTC derivatives market regulators from G20 jurisdictions have met on a number of occasions to discuss international coordination of OTC derivatives regulations. *See, e.g.,* Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market (Dec. 4, 2012), *available at: http://www.sec.gov/news/press/2012/2012-251.htm;* Joint Statement on Regulation of OTC Derivatives Markets (May 7, 2012), *available at: http://www.sec.gov/news/press/2012/2012-85.htm;* and Joint Statement on Regulation of OTC Derivatives Markets (Dec. 9, 2011), *available at: http://www.sec.gov/news/press/2011/2011-260.htm . See also* Financial Stability Board (''FSB''), OTC Derivatives Market Reforms, Fifth Progress Report on Implementation (April 15, 2013) (''FSB Progress Report April 2013''), at 47, *available at: http://www.financialstabilityboard.org/publications/r_130415.pdf* (noting that SEC staff has regularly consulted its counterparts in other jurisdictions to discuss and compare approaches to the application of Title VII of the Dodd-Frank Act in cross-border contexts); FSB Progress Report April 2013 at 5 and

discussions and our participation in various international task forces and working groups,[38] we have gathered information about foreign regulatory reform efforts and have discussed the possibility of conflicts and gaps, as well as inconsistencies and duplications, between U.S. and foreign regulatory regimes. We have taken these discussions into consideration in developing these proposed rules, forms, and interpretations.

In addition, the Commission and the CFTC have conducted staff studies to assess developments in OTC derivatives regulation abroad. As directed by Congress in Section 719(c) of the Dodd-Frank Act, on January 31, 2012, the Commission and the CFTC jointly submitted to Congress a ''Joint Report on International Swap Regulation'' (''Swap Report'').[39] The Swap Report discussed swap and security-based swap regulation and clearinghouse regulation in the Americas, Asia, and the European Union, and identified similarities and differences in jurisdictions' approaches to areas of regulation, as well as other areas of regulation that could be harmonized. The Swap Report also identified major clearinghouses, clearing members, and regulators in each geographic area and described the major contracts (including clearing volumes and notional values), methods for clearing swaps, and the systems used for setting margin in each geographic area.[40]

D. Substituted Compliance

As noted above, we recognize the potential, in a market as global as the security-based swap market, that market participants who engage in cross-border security-based swap activity may be subject to conflicting or duplicative compliance obligations. To address this possibility, we are proposing a ''substituted compliance'' framework under which we would consider permitting compliance with requirements in a foreign[41] regulatory system to substitute for compliance with certain requirements of the Exchange Act relating to security-based swaps, provided that the corresponding requirements in the foreign regulatory system are comparable to the relevant provisions of the Exchange Act.[42] The availability of substituted compliance should reduce the likelihood that market participants would be subject to potentially conflicting or duplicative sets of rules.

As discussed more fully below, the Commission would perform comparability analysis and make substituted compliance determinations with respect to four separate categories of requirements.[43] If, for example, a foreign regulatory system achieves comparable regulatory outcomes in three out of the four categories, then the Commission would permit substituted compliance with respect to those three categories of comparable requirements, but not for the one, non-comparable category for which comparable regulatory outcomes are not achieved. In other words, we are not proposing an ''all-or-nothing'' approach. In addition, in making comparability determinations within each category of requirements, the Commission is proposing to take a holistic approach; that is, we would ultimately focus on regulatory outcomes rather than a rule-by-rule comparison. Substituted compliance therefore should accept differences between regulatory regimes when those differences nevertheless accomplish comparable regulatory outcomes.

E. Conclusion

In proposing these rules, forms, and interpretations, the Commission is mindful that the security-based swap market is global in nature and developed prior to the enactment of the Dodd-Frank Act.[44] There are challenges involved in imposing a comprehensive regulatory regime on existing markets, particularly ones that have not been subject to the particular regulation that the Dodd-Frank Act provides. Any rules and interpretive guidance we adopt governing the application of Title VII to cross-border activities could significantly affect the global security-based swap market. As discussed further below, to the extent practicable and consistent with our statutory mandate,[45] the Commission has proposed these rules and interpretations with the intent to achieve the regulatory benefits intended by the Dodd-Frank Act and to facilitate a well-functioning global security-based swap market, including by taking into account the impact these proposed rules and interpretations will have on counterparty protection, transparency, systemic risk, liquidity, efficiency, and competition in the market. In addition, the Commission is mindful of the fact that the application of Title VII to cross-border activities raises issues of potential conflict or overlap with foreign regulatory regimes. Furthermore, the Commission is attentive to the fact that a number of registrants may be registered with both us and the CFTC.[46]

The rules and interpretations proposed today represent the Commission's preliminary views regarding the application of Title VII to cross-border security-based swap activities and to non-U.S. persons who act in capacities regulated under the Dodd-Frank Act. We note that these proposed rules and interpretations are tailored to the unique circumstances of the security-based swap market, and as such would not necessarily be appropriate to apply to the Commission's regulation of traditional securities markets. We also recognize that there are a number of possible alternative approaches to applying Title VII in the cross-border context. Accordingly, the Commission invites public comment regarding all aspects of

45–46 (discussing meetings of the group of market regulators ''to identify and explore ways to address issues and uncertainties in the application of rules in a cross-border context, including options to address identified conflicts, inconsistencies, and duplication.'').

[38] The Commission participates in the FSB's Working Group on OTC Derivatives Regulation (''ODWG''), both on its own behalf and as the representative of the International Organization of Securities Commissions (''IOSCO''), which is co-chair of the ODWG. The Commission also serves as one of the co-chairs of the IOSCO Task Force on OTC Derivatives Regulation.

[39] *See* CFTC and SEC, Joint Report on International Swap Regulation (Jan. 31, 2012), *available at: http://www.sec.gov/news/studies/2012/sec-cftc-intlswapreg.pdf.*

[40] In addition, Commission and CFTC staff submitted a joint study to Congress on the feasibility of requiring the derivatives industry to adopt standardized computer-readable algorithmic descriptions which may be used to describe complex and standardized financial derivatives. *See* Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives: A Study by the Staff of the Securities and Exchange Commission and the Commodity Futures Trading Commission as Required by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Apr. 7, 2011), *available at: http://www.sec.gov/news/studies/2011/719b-study.pdf.* In preparing this report, Commission and CFTC staff coordinated extensively with international financial institutions and foreign regulators.

[41] In this release, the term ''foreign'' is used interchangeably with the term ''non-U.S.'' *See, e.g.,* note 372, *infra* (discussing the definition of ''foreign security-based swap dealer'').

[42] *See* Section XI, *infra.*

[43] Specifically, the Commission is proposing to make substituted compliance determinations with respect to the following categories of requirements: (i) Requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act and the rules and regulations thereunder; (ii) requirements relating to regulatory reporting and public dissemination of security-based swaps; (iii) requirements relating to clearing for security-based swaps; and (iv) requirements relating to trade execution for security-based swaps. *See* Section XI, *infra.*

[44] *See* Section II, *infra.*

[45] *See* Section II.C, *infra* (discussing the principles guiding proposed approach to applying Title VII in the cross-border context).

[46] All references in this release to an entity that is ''registered'' indicate an entity that is registered with the Commission, unless otherwise indicated.

the proposed approach, including each proposed rule and interpretation contained herein, and potential alternative approaches. In particular, data and comment from market participants and other interested parties with respect to the likely effect of each proposed rule and interpretation regarding application of a specific Title VII requirement, and the effect of such proposed application in the aggregate, will be particularly useful to the Commission in evaluating possible modifications to the proposal and understanding the consequences of the substantive rules that have not yet been adopted under Title VII.

II. Overview of the Security-Based Swap Market and the Legal and Policy Principles Guiding the Commission's Approach to the Application of Title VII to Cross-Border Activities

In this section, the Commission provides a general overview of the security-based swap market that informs our proposed implementation of Title VII, including a description of the various dealing structures used by U.S.-based and foreign-based entities to conduct their security-based swap businesses, and existing clearing, reporting, and trade execution practices. We also discuss the Commission's preliminary views on the scope of application of Title VII and the principles guiding our proposed approach to applying Title VII in the cross-border context.

A. Overview of the Security-Based Swap Market

1. Global Nature of the Security-Based Swap Market

The security-based swap market is a global market.[47] Security-based swap business currently takes place across national borders, with agreements negotiated and executed between counterparties often in different jurisdictions (and at times booked and risk-managed in still other jurisdictions).[48]

The global nature of the security-based swap market is evidenced by the data available to the Commission.[49] Based on market data in the Depository Trust and Clearing Corporation's Trade Information Warehouse (''DTCC–TIW''),[50] viewed from the perspective of the domiciles of the counterparties booking credit default swap (''CDS'') transactions, approximately 49% of U.S. single-name CDS transactions in 2011 were cross-border transactions between a U.S.-domiciled[51] counterparty and a foreign-domiciled counterparty[52] and an additional 44% of such CDS transactions were between two foreign-domiciled counterparties.[53] Thus, approximately 7% of the U.S. single-name CDS transactions in 2011 were between two U.S.-domiciled counterparties.[54] These statistics indicate that cross-border transactions are the norm, not the exception, in the security-based swap market.[55] Accordingly, the question of how the Commission is implementing Title VII with respect to security-based swaps will, to a large extent, be affected by how the Commission applies Title VII to the cross-border transactions that are the majority of security-based swaps.

2. Dealing Structures

Dealers use a variety of business models and legal structures to conduct security-based swap dealing business[56] with counterparties in jurisdictions all around the world.[57] Commenters have indicated that both U.S.-based and foreign-based entities use certain dealing structures for a variety of legal, tax, strategic, and business reasons that often pre-date the enactment of the Dodd-Frank Act.[58] Among the reasons cited for the variety of dealing structures is the desire of counterparties to reduce risk and enhance credit protection based on the particular characteristics of each entity's business.[59]

In this subsection, we describe certain dealing structures that U.S.-based entities and foreign-based entities in the security-based swap market might use. In each of these dealing structures, because the booking entity is the counterparty to the security-based swap transaction resulting from the dealing activity (*i.e.,* the principal) and bears the ongoing risk of performance on the transaction, we view the booking entity, and not the intermediary that acts as an agent on behalf of the booking entity to originate the transaction, as the dealing entity.[60]

(a) U.S. Bank Dealer

A U.S. bank holding company may use a U.S. subsidiary that is a banking entity to deal directly with U.S. and foreign counterparties. Such U.S. bank dealer may use a sales force in its U.S. home office to originate security-based swap transactions in the United States and use separate sales force in foreign branches to originate security-based swap transactions with counterparties in foreign local markets.[61] The resulting security-based swap transactions may be

[47] *See, e.g.,* IIB Letter at 1 (noting the ''truly global nature of the OTC derivatives market''); Cleary Letter IV at 2 (noting that swaps and security-based swaps trade in a ''unique global market''); Société Générale Letter II at 2 (noting the ''global nature of the derivatives business''); *see also* Bank of International Settlements (''BIS''), Committee on the Global Financial System, No. 46, The macro financial implications of alternative configurations for access to central counterparties in OTC derivatives markets (Nov. 2011) at 1, *available at: http://www.bis.org/publ/cgfs46.pdf* (referring to the ''globalized nature of the market, in which a significant proportion of OTC derivatives trading is undertaken across borders'').

[48] *See, e.g.,* SIFMA Letter I at 2.

[49] *See* Section XV.B, *infra* (discussing in detail the global nature of the security-based swap market).

[50] The information was made available to the Commission in accordance with the agreement between DTCC–TIW and the OTC Derivatives Regulatory Forum (''ODRF'').

[51] The domicile classifications in DTCC–TIW are based on the market participants' own reporting and may not have been verified. Prior to enactment of the Dodd-Frank Act, funds and accounts did not formally report their domicile to DTCC–TIW because there was no systematic requirement to do so. After enactment of the Dodd-Frank Act, the DTCC–TIW has collected the registered office location of the account or fund. This information is self-reported on a voluntary basis. It is possible that some market participants may misclassify their domicile status because the databases in DTCC–TIW do not assign a unique legal entity identifier to each separate entity. Notwithstanding this limitation, we believe that the cross-border and foreign activity presented in the analysis by the Commission's Division of Risk, Strategy, and Financial Innovation demonstrates the nature of the CDS market. *See* Section XV.B.2.c, *infra.*

[52] DTCC–TIW classified a foreign branch or foreign subsidiary of a U.S. domiciled entity as foreign-domiciled. Therefore, CDS transactions with a foreign-domiciled counterparty include CDS transactions with a foreign branch or foreign subsidiary of a U.S.-domiciled entity as counterparty.

[53] Put another way, in 2011, a vast majority (approximately 93%) of U.S. single-name CDS transactions directly involved at least one foreign-domiciled counterparty. This observation is based on the data compiled by the Commission's Division of Risk, Strategy, and Financial Innovation on single-name CDS transactions with U.S. reference entities from the DTCC–TIW between January 1, 2011, and December 31, 2011. *See* Section XV.B.2.d, *infra.*

[54] *Id.*

[55] We note, however, that, in addition to classifying transactions between a U.S. counterparty and a foreign branch of a U.S. bank as a cross-border transaction (*see* note 51, *supra*), these statistics characterize as cross-border transactions those in which all or substantially all of the activity takes place in the United States and all or much of the risk of the transactions ultimately is borne by U.S. persons.

[56] As used in this release, ''security-based swap dealing,'' ''security-based swap dealing activity,'' ''dealing activity,'' and related concepts have the meaning described in the Intermediary Definitions Adopting Release, 77 FR 30596, unless otherwise indicated in this release.

[57] *See, e.g.,* Cleary Letter IV at 5; Davis Polk Letter I at 2–3; IIB Letter at 7.

[58] *See, e.g.,* Cleary Letter at 3.

[59] *See, e.g.,* SIFMA Letter at 2.

[60] *See* Intermediary Definitions Adopting Release, 77 FR 30617 n.264 (''A sales force, however, is not a prerequisite to a person being a security-based swap dealer. For example, a person that enters into security-based swaps in a dealing capacity can fall within the dealer definition even if it uses an affiliated entity to market and/or negotiate those security-based swaps (*e.g.,* the person is a booking entity).''). *See also* Section III.D, *infra.*

[61] *See* Sullivan & Cromwell Letter at 2.

booked in the home office of the U.S. bank or in a foreign branch of the bank.[62]

(b) U.S. Non-bank Dealer

A U.S.-based holding company may use a non-bank subsidiary to conduct security-based swap dealing activity in the U.S. market and foreign local markets. The U.S. non-bank dealer may act as principal to originate and book transactions in the United States and use a sales force in the foreign local markets (*e.g.,* salespersons employed by its foreign affiliate) as agent to originate transactions on its behalf, and then centrally book the resulting transactions in the U.S. non-bank dealer. In some situations, such as where the holding company has rated debt, but the U.S. non-bank dealer does not, the U.S. non-bank dealer's performance under security-based swaps may be supported by a parental guarantee provided by the holding company.[63] The guarantee would typically give counterparties to the U.S. non-bank dealer direct recourse to the holding company for obligations owed by such non-bank dealer under the security-based swaps as though the guarantor had entered into the transactions directly with the counterparties.[64]

(c) Foreign Subsidiary Guaranteed by a U.S. Person

A U.S.-based holding company also may conduct dealing activity in both U.S. markets and foreign markets out of a foreign subsidiary.[65] The foreign subsidiary may use a sales force in the United States (*e.g.,* salespersons employed by its U.S. affiliate) to originate security-based swap transactions with counterparties in the U.S. markets, or may directly solicit, negotiate, and execute security-based swap transactions with counterparties in the U.S. markets from outside the United States, and centrally book the resulting transactions itself. The foreign subsidiary also may conduct security-based swap dealing activity in various foreign markets using local salespersons as agent to originate and centrally book the resulting security-based swap transactions itself. In some situations, such as where the U.S.-based holding company has rated debt, but the foreign subsidiary's performance under security-based swaps may be supported by a parental guarantee provided by the holding company.[66] Such guarantee would typically give its counterparty direct recourse to the U.S. parent acting as guarantor for obligations owed by such foreign subsidiary under the security-based swaps. As a result, a guarantee provided by a U.S. person of another person's obligations owed under a security-based swap transaction poses the same degree of risk to the United States as the risk posed by a transaction entered into directly by such U.S. person.

In circumstances where a foreign non-bank subsidiary of a U.S. holding company has sufficient credit-worthiness and does not rely on a U.S. parental guarantee to support its creditworthiness, the risk of the security-based swaps entered into by the foreign subsidiary of a U.S.-based holding company resides in the foreign subsidiary outside the United States.

(d) Foreign-Based Dealer

i. Direct Dealing

Foreign-based entities also may use a number of business models and legal structures to conduct global security-based swap dealing activity in both the U.S. and foreign markets. Like U.S. dealers, foreign dealers may deal directly with U.S. counterparties and non-U.S. counterparties without using any agents in the local market to intermediate and book the resulting transactions in the foreign entities themselves.[67]

ii. Intermediation in the United States

Foreign dealers also may use local personnel with knowledge of and expertise on the local markets to intermediate security-based swap transactions in each local market, for instance, using salespersons in the United States to originate security-based swaps in the U.S. market, and either book the resulting transactions in an entity based in the United States (such as a U.S. affiliate) or centrally book the resulting transactions in a foreign central booking affiliate.[68]

Intermediation activity within the United States on behalf of foreign entities may occur in two principal legal structures.

First, foreign dealers that are banking entities may conduct dealing activity with U.S. counterparties out of their U.S. branches. In this structure, a foreign banking entity may originate and book transactions in its U.S. branch, or the U.S. branch may originate transactions that are booked in the foreign home office.[69]

Second, both bank and non-bank foreign dealers may conduct dealing activity out of their U.S. subsidiaries. The U.S. subsidiaries may act as principal to originate and book security-based swaps in the United States and enter into inter-affiliate back-to-back transactions with the foreign central booking entity (usually the foreign parent) for purposes of centralized booking and centralized risk management.[70] The U.S. subsidiary also may act as agent to originate security-based swaps in the United States on behalf of the foreign entity and the resulting transactions would be booked in a centralized foreign booking entity, usually the foreign parent. In some situations, such as where the foreign-based entity has rated debt, but the U.S. subsidiary does not, the U.S.-based subsidiary's performance under security-based swaps that it enters into as principal may be supported by a parental guarantee provided by the foreign-based entity.[71]

The transactions originated by the U.S. branch of a foreign bank or a U.S. subsidiary of a foreign bank or non-bank entity may not be limited to those with U.S. counterparties in the U.S. security-based swap market. Foreign bank or non-bank entities may utilize their U.S. branches or U.S. subsidiaries to conduct dealing activity with, for instance, non-U.S. counterparties located in various jurisdictions within the same region or same time zones, such as Canada or Latin America, and centrally book the resulting transactions in the home offices of the foreign entities themselves. For example, a Canadian counterparty might enter into a security-based swap with a non-U.S.-based dealer that solicits and negotiates the transaction out of a U.S subsidiary

[62] *See id.* at 3–4.

[63] *See* Cleary Letter IV at 10 (discussing a U.S. holding company providing a guarantee of performance on the obligations of its foreign swap dealing subsidiary).

[64] *See* Intermediary Definitions Adopting Release, 77 FR 30689. *See also* Product Definitions Adopting Release, 77 FR 48227 (stating that the Commission would consider issues involving cross-border guarantees of security-based swaps in a separate release addressing the application of Title VII in the cross-border context).

[65] *See, e.g.,* Sullivan & Cromwell Letter, at 3–4 (stating that Bank of America Corporation, Citigroup Inc. and JPMorgan Chase & Co. conduct swap activities overseas through subsidiaries of the bank holding company, Edge Corporation subsidiaries of their U.S. banks and non-U.S. branches of the bank); Cleary Letter IV at 10–11.

[66] *See* Cleary Letter IV at 10 (discussing a U.S. holding company providing a guarantee of performance on the obligations of its foreign swap dealing subsidiary).

[67] *See* Cleary Letter VI at 3, 13 (discussing direct dealing by a foreign dealer from abroad); IIB Letter at 7.

[68] *See* Cleary Letter IV at 4, 21 (discussing the use of U.S. affiliate to intermediate) and IIB Letter at 7.

[69] *See* IIB Letter at 8.

[70] *See* Cleary Letter IV at 10 (discussing inter-affiliate transactions).

[71] *See id.* (discussing a non-U.S. holding company providing a guarantee on the obligations of its U.S. swap dealing subsidiary).

acting as agent but books the transaction itself outside the United States.

3. Clearing Practices

Prior to the enactment of the Dodd-Frank Act, there was no provision in the Exchange Act or any other laws in the United States for the mandatory clearing of OTC derivatives. Although initiatives related to central clearing had been considered before 2008, the 2008 financial crisis brought a new focus on CDS as a source of systemic risk and contributed to a more general recognition that central clearing parties (''CCPs'') could play a role in helping to manage bilateral counterparty credit risk in OTC CDS.[72]

In November 2008, the Commission, in consultation and coordination with the Federal Reserve Board and the CFTC, took steps to help facilitate the prompt development of CCPs for OTC derivatives.[73] Specifically, the Commission authorized the clearing of OTC security-based swaps by permitting certain clearing agencies to clear CDS on a temporary conditional basis.[74] As the Commission and other regulatory agencies monitored the activities of those clearing agencies, a significant volume of interdealer OTC CDS transactions and a smaller volume of dealer-to-non-dealer OTC CDS transactions were centrally cleared on a voluntary basis.[75] The level of voluntary clearing in swaps and security-based swaps has steadily increased since that time. Although the volume of interdealer CDS cleared to date is quite large,[76] many security-based swap transactions are still ineligible for central clearing, and many transactions in security-based swaps eligible for clearing at a CCP continue to settle bilaterally.

Voluntary clearing of security-based swaps in the United States is currently limited to CDS products. Central clearing of security-based swaps began in March 2009 for index CDS products, in December 2009 for single-name corporate CDS products, and in November 2011 for single-name sovereign CDS products. At present, there is no central clearing in the United States for security-based swaps that are not CDS products, such as those based on equity securities. The level of clearing activity appears to have steadily increased as more CDS have become eligible to be cleared.[77]

4. Reporting Practices

The OTC derivatives markets have historically been largely opaque.[78] With respect to CDS, for example, the Government Accountability Office found in 2009 that ''comprehensive and consistent data on the overall market have not been readily available,'' that ''authoritative information about the actual size of the CDS market is generally not available,'' and that regulators currently are unable ''to monitor activities across the market.''[79] The reporting of comprehensive OTC derivative transaction data to trade repositories is intended to address the lack of transparency in this market, and as such it was one of the G20 regulatory reform commitments previously discussed.[80]

The first trade repositories were established in the mid-2000s.[81] The development of trade repositories for different asset classes accelerated following the 2009 G20 commitment in this area, and as legislative and regulatory requirements began to be put in place. As of the end of the first quarter of 2013, fourteen FSB member jurisdictions had legislation in place either requiring reporting of OTC derivatives contracts or authorizing regulators to implement such regulations.[82] In addition, as of the date of publication of the FSB Progress Report April 2013, eighteen trade repositories were either registered or in the process of becoming registered and twelve were operational, meaning, typically, that they were at least accepting transaction reports from more than one asset class.[83]

Prior to the Dodd-Frank Act, global trade repositories had been established for credit, interest rate, and equity

[72] The President's Working Group on Financial Markets made the central clearing of OTC derivatives a top policy objective in 2008. *See* Policy Objectives for the OTC Derivatives Market (Nov. 14, 2008), *available at: http://www.treasury.gov/resource-center/fin-mkts/Documents/policyobjectives.pdf*; *see also* Policy Statement on Financial Market Developments (Mar. 13, 2008), *available at: http://www.law.du.edu/images/uploads/presidents-working-group.pdf*; and Progress Update on March Policy Statement on Financial Market Developments (Oct. 2008), *available at: http://www.treasury.gov/resource-center/fin-mkts/Documents/q4progress%20update.pdf*.

[73] On November 14, 2008, the Commission executed a Memorandum of Understanding with the Board and the CFTC that established a framework for consultation and information sharing on issues related to central counterparties for the OTC derivatives market. *See http://www.sec.gov/news/press/2008/2008-269.htm*.

[74] The Commission authorized five entities to clear CDS. *See* CDS clearing by ICE Clear Europe Limited, Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010); CDS clearing by Eurex Clearing AG, Exchange Act Release Nos. 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010); CDS clearing by Chicago Mercantile Exchange Inc., Exchange Act Release Nos. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) and 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010); CDS clearing by ICE Clear Credit LLC (formerly ICE Trust US LLC), Exchange Act Release Nos. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009) and 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010); Temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd., Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (''CDS Clearing Exemption Orders'').

[75] Voluntary CCP clearing grew out of a series of meetings beginning in September 2005 hosted by the Federal Reserve Bank of New York with major market participants and their domestic and international supervisors for the purpose of discussing problems in the processing of CDS, and related risk management and control issues. *See http://www.ny.frb.org/newsevents/news/markets/2005/an050915.html*. In June 2008 the attendees agreed to an agenda for improvement in the derivatives market infrastructure that included ''developing a central counterparty for credit default swaps that, with a robust risk management regime, can help reduce systemic risk.'' *See http://www.ny.frb.org/newsevents/news/markets/2008/ma080609.html*; *see also https://www.theice.com/marketdata/reports/ReportCenter.shtml*.

[76] As of April 19, 2012, ICE Clear Credit had cleared approximately $15.6 trillion notional amount of CDS contracts based on indices of securities and approximately $1.5 trillion notional amount of CDS contracts based on individual reference entities or securities. As of April 19, 2012, ICE Clear Europe had cleared approximately €7.2 trillion notional amount of CDS contracts based on indices of securities and approximately €1.2 trillion notional amount of CDS contracts based on individual reference entities or securities. *See* Clearing Agency Standards Adopting Release, 77 FR 66236 n.184 (*citing https://www.theice.com/marketdata/reports/ReportCenter.shtml*).

[77] *See* Section XV.B.2(e), *infra*.

[78] *See* FSB, Implementing OTC Derivatives Market Reforms (Oct. 25, 2010) (''FSB October 2010 Report''), at 11, *available at: http://www.financialstabilityboard.org/publications/r_101025.pdf*.

[79] Government Accountability Office, ''Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps,'' GAO–09–397T (Mar. 2009), at 2, 5, 27, *available at: http://www.gao.gov/new.items/d09397t.pdf*.

[80] *See* note 35 and accompanying text, *supra*. *See also* SDR Proposing Release, 75 FR 77307 (''Under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the [security-based swap] market by retaining complete records of [security-based swap] transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs. The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the [security-based swap] market. Without an SDR, data on [security-based swap] transactions is dispersed and not readily available to regulators and others.'').

[81] *See* Committee on Payment and Settlement Systems (''CPSS'') and Technical Committee of IOSCO, Report on OTC Derivatives Data Reporting and Aggregation Requirements (Jan. 2012), at 5, *available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf (''CPSS–IOSCO Data Report'')*.

[82] FSB Progress Report April 2013 at 19.

[83] *Id.* at 20–21, 63–65. Ten trade repositories were offering trade reporting on interest rate derivatives transactions; eight were offering trade reporting on commodity derivative transactions; seven were offering trade reporting on equity derivatives transactions; eight were offering trade reporting on foreign exchange derivative transactions; and seven were offering trade reporting on credit derivatives.

derivatives.[84] In addition, in June 2010, the OTC Derivatives Regulators' Forum (''ODRF'')[85] developed indicative guidance for Warehouse Trust[86] aiming to identify data that authorities would expect to request from Warehouse Trust to carry out their mandates.[87]

Public availability of trade repository data varies globally and has changed significantly over time. For example, since October 2008, on a weekly basis, DTCC has published aggregated data via its Web site.[88] More generally, in a recent FSB survey, all trade repositories that responded stated that they provide or intend to provide, transaction data on OTC derivatives to the public. In some cases and for some products, trading information is provided on a real-time basis. Some trade repositories publicly disclose only aggregated, end-of-day information.[89]

5. Trade Execution Practices

Unlike the markets for cash equity securities and listed options, the market for security-based swaps currently is characterized generally by bilateral negotiation directly between two counterparties in the OTC market and is largely decentralized; many instruments are individually negotiated and often customized; and many security-based swaps are not centrally cleared.[90] The historical one-to-one nature of trade negotiation in security-based swaps has fostered various types of trading venues and execution practices, ranging among the following:

Bilateral Negotiations

''Bilateral negotiation'' refers to the execution practice whereby one party uses the telephone, email or other means of communication to directly contact a potential counterparty to negotiate and execute a security-based swap. In bilateral negotiation and execution, only the two parties to the transaction are aware of the terms of the negotiation and the final terms of the agreement.[91]

Single-Dealer RFQ Platforms

A single-dealer request for quote (''RFQ'') platform refers to an electronic trading platform where a dealer may post indicative quotes for security-based swaps in various asset classes that the dealer is willing to trade. Only the dealer's approved customers have access to the platform. When a customer wishes to transact in a security-based swap, the customer requests an executable quote, the dealer provides one, and if the customer accepts the dealer's quote, the transaction is executed electronically. This type of platform generally provides indicative quotes on a pricing screen, but only from one dealer to its customers.[92]

Multi-Dealer RFQ Platforms

A multi-dealer RFQ electronic trading platform refers to a multi-dealer RFQ system whereby a requester can send an RFQ to solicit quotes on a certain security-based swap from multiple dealers at the same time. After the RFQ is submitted, the recipients have a prescribed amount of time in which to respond to the RFQ with a quote. Responses to the RFQ are firm. The requestor then has the opportunity to review the responses and accept the best quote. A multi-dealer RFQ platform provides a certain amount of pricing information, depending on its characteristics.[93]

Central Limit Order Books

A central limit order book system or similar system refers to a trading system in which firm bids and offers are posted for all participants to see, with the identity of the parties withheld until a transaction occurs. Bids and offers are then matched based on price-time priority or other established parameters and trades are executed accordingly. The quotes on a limit order book system are firm. In general, a limit order book system provides greater pricing information than the three platforms described above because all participants can view bids and offers before placing their bids and offers.[94] Currently, limit order books for the trading of security-based swaps in the United States are utilized by inter-dealer brokers for dealer-to-dealer transactions.

Brokerage Trading

''Brokerage trading'' refers to an execution practice used by brokers to execute security-based swaps on behalf of customers, often in larger sized transactions. In such a system, a broker receives a request from a customer (which may be a dealer) who seeks to execute a specific type of security-based swap. The broker then interacts with other customers (which may also be dealers) to fill the request and execute the transaction. This model often is used by dealers that seek to transact with other dealers through the use of an interdealer broker as an intermediary. In this model, participants may or may not be able to see bids and offers of other participants.[95]

These various trading venues and execution practices provide different degrees of pre-trade pricing information and different levels of access. The Commission currently does not have sufficient information with respect to the volume of security-based swap transactions executed across these different trading venues and execution practices to evaluate the individual impact of such venues and practices on

[84] Pursuant to initiatives led by the OTC Derivatives Supervisors Group (''ODSG''), in 2009 the largest OTC derivatives dealers at the global level committed to reporting all of their CDS trades to a trade repository. At that time, a trade repository for credit derivatives was already in existence and used by the industry. To promote the development of trade repositories for all interest rate and equity derivatives, in 2008 and 2009 ISDA sought proposals for the creation of central trade repositories for these asset classes. Two entities were selected to provide trade repository functions for these asset classes. *See* FSB October 2010 Report at 44. The ODSG originated in 2005, when the Federal Reserve Bank of New York (''New York Federal Reserve'') hosted a meeting with representatives of major OTC derivatives market participants and their domestic and international supervisors, including the Commission, in order to address the emerging risks of inadequate infrastructure for the rapidly growing market in credit derivatives. The ODSG is chaired by the New York Federal Reserve.

[85] The ODRF, formed in January 2009, brings together representatives from central banks, prudential supervisors, and securities and market regulators to discuss issues of common interest, regarding OTC derivatives central counterparties and trade repositories. The ODRF's scope and focus include information sharing/needs and oversight co-ordination and co-operation.

[86] The Warehouse Trust Company LLC (''Warehouse Trust'') today provides certain post-trade processing services to DTCC–TIW. DTCC–TIW provides a centralized electronic trade database for OTC credit derivatives contracts.

[87] *See* FSB October 2010 Report at 63. Building on this work, CPSS and IOSCO have published a consultation paper setting forth more comprehensive guidance regarding trade repositories more broadly. The paper provides guidance to authorities that supervise trade repositories; regulators, supervisors, resolution authorities, central banks, and other public-sector authorities (collectively, ''authorities'') that request OTC derivative data from trade repositories; and trade repositories. This guidance concerns the types of data to which authorities will typically require access and possible approaches to addressing potential constraints and concerns that may prevent effective access to such data. *See* CPSS and IOSCO, Consultative Report on Authorities' Access to Trade Repository Data (April 2013), *available at: http://iosco.org/library/pubdocs/pdf/IOSCOPD408.pdf?v=1.*

[88] *See* CPSS–IOSCO Data Report at 45–46.

[89] *See* OTC Derivatives Market Reforms, Fourth Progress Report on Implementation (Oct. 31, 2012) at 5, *available at: http://www.financialstabilityboard.org/publications/r_121031a.pdf.*

[90] *See* SB SEF Proposing Release, 76 FR 10951.

[91] *See id.*

[92] *See id.* at 10951.

[93] For example, to the extent that a RFQ platform sets limits on the number of dealers to whom a customer may send an RFQ, the customer's pre-trade transparency is restricted to that number of quotes it receives in response to its RFQ. *See* SB SEF Proposing Release, 76 FR 10952.

[94] *See id.*

[95] *See id.*

pricing information available in the security-based swap market.

6. Broad Economic Considerations of Cross-Border Security-Based Swaps [96]

Our primary economic considerations for promulgating rules and interpretations regarding the application of Title VII to cross-border activities include the potential risks of security-based swaps to the U.S. financial system [97] that could affect financial stability, the level of transparency and counterparty protection in the security-based swap market, the costs to market participants, and the impact of such rules and interpretations on liquidity, efficiency, and competition in the market. Unlike most other securities transactions, a security-based swap gives rise to ongoing obligations between transaction counterparties during the life of the transaction. This means that each counterparty to the transaction undertakes the obligation to perform the security-based swap in accordance with its terms and bears the counterparty credit risk and market risk until the transaction is terminated.[98] The cross-border rules ultimately adopted by the Commission could materially impact the economic effects of the final Title VII regulatory requirements.

(a) Major Economic Considerations

In determining how Title VII requirements should apply to persons and transactions in the cross-border context, the Commission is aware of the potentially significant trade-offs inherent in our policy decisions. For example, it is possible that counterparties excluded from the Title VII regulatory framework would not, among other things, receive the same level of counterparty protection or impartial access to trading venues and information as those included in the Title VII regulatory framework. However, it is also possible that market participants excluded from the Title VII regulatory framework would face lower regulatory burdens and lower compliance costs associated with their security-based swap activity. Further, it is possible that these trade-offs could alter the incentives for individuals to participate in the security-based swap market, which may impact the overall market, affecting its liquidity, as well as its efficiency and the competitive dynamics among participants. In addition, we also recognize that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority. In proposing our rules and interpretations in this release, the Commission has considered the benefits of the Title VII regulatory framework, including counterparty protection and access to information, as well as the costs of compliance, taking into account the potential impact of the rules and interpretations on liquidity, efficiency, and competition in the security-based swap market.

Moreover, the costs and benefits of various Title VII substantive requirements may not be the same for each individual market participant, depending on the role it plays, the market function it performs, and the activity it engages in in the security-based swap market. For example, Title VII requirements for security-based swap dealers and major security-based swap participants may impose significant costs on persons falling within the definitions of security-based swap dealer and major security-based swap participant that are not borne by other market participants. The costs of these requirements may provide economic incentive for some market participants falling within the definitions of security-based swap dealer and major security-based swap participant to restructure their security-based swap business to operate wholly outside of the Title VII regulatory framework, exiting the security-based swap market in the United States and not transacting with U.S. persons. Conversely, certain Title VII requirements may promote financial stability and increase market participants' confidence in entering into security-based swap transactions.

(b) Global Nature and Interconnectedness of the Security-Based Swap Market

In considering the proposed approach to the application of the Title VII requirements, the Commission has been informed by the analysis of current market activity described in this release,[99] including the extent of cross-border trading activity in the security-based swap market.[100] The security-based swap transactions between U.S.- and non-U.S. domiciled market participants provide conduits of risk into the U.S. financial system, which could affect the safety and soundness of the U.S. financial system. Similarly, such transactions also provide conduits for liquidity into the U.S. financial system. As a consequence, changes to incentives or costs that result from the application of U.S. regulatory requirements may have effects on the liquidity of the global market, as well as its efficiency and competitive dynamics.

With respect to conduits of risk, one area of particular concern in the current security-based swap market is the risks that arise when a large market participant becomes financially distressed, including the potential for sequential counterparty failure. A default by one or more security-based swap dealers or major security-based swap participants could produce spillovers or contagion by reducing the willingness and/or ability of market participants to extend credit to each other, and thus could substantially reduce liquidity and valuations for particular types of financial instruments.[101]

The experience of American International Group, Inc. (''AIG''), a Delaware corporation based in New York, and its subsidiary, AIG Financial Products Corp. (''AIG FP''), a Delaware corporation based in Connecticut, during and after the 2008 financial crisis both illustrates spillovers and contagion arising from security-based swap transactions and demonstrates how cross-border transactions could contribute to the destabilization of the

[96] *See* Section XV, *infra* (providing more detailed commentary on the economic effects of the proposed rules, including supporting citations).

[97] The Commission generally understands the ''U.S. financial system'' to include the U.S. banking system and the U.S. financial markets, including the U.S. security-based swap market, the traditional securities markets (*e.g.,* the debt and equity markets), and the markets for other financial activities (*e.g.,* lending).

[98] *See* Intermediary Definitions Adopting Release, 77 FR 30616–17 (noting that ''the completion of a purchase or sale transaction'' in the secondary equity or debt markets ''can be expected to terminate the mutual obligations of the parties,'' unlike security-based swap transactions, which often give rise to ''an ongoing obligation to exchange cash flows over the life of the agreement'').

[99] *See* Section II.A, *supra,* and Section XV.B.2, *infra.*

[100] For example, review of the DTCC–TIW single-name CDS transactions executed in 2011 reveals that approximately 49% of the U.S. single-name CDS transactions were between one U.S.-domiciled counterparty and one foreign-domiciled counterparty, and 44% of such transactions were between two foreign-domiciled counterparties. *See* Section II.A.1, *supra,* and Section XV.B.2(d), *infra.*

[101] *See, e.g.,* Markus K. Brunnermeier and Lasse Heje Pedersen, ''Market Liquidity and Funding Liquidity,'' Rev. Financ. Stud. (2009); Denis Gromb and Dimitri Vayanos, ''A Model of Financial Market Liquidity,'' Journal of the European Economic Association (2010).

U.S. financial system if the security-based swap market were not adequately regulated.[102] AIG FP sold extensive amounts of credit protection in the form of CDS in the years leading up to the crisis,[103] largely on the strength of AIG's AAA rating; AIG FP's obligations were guaranteed by its parent AIG.[104] AIG FP's CDS business reflected the global nature of the security-based swap market because, although both AIG and AIG FP were headquartered in the United States, much of AIG FP's CDS business was run out of its London office,[105] and AIG FP sold credit protection to counterparties both within the United States and around the world.[106]

As the subprime mortgage market in the United States collapsed, the ongoing obligations borne by AIG FP and, through its guarantees, its parent AIG, arising from AIG FP's CDS transactions produced losses that threatened to overwhelm both AIG FP and AIG. The Federal Reserve Bank of New York established a credit facility to prevent AIG from collapsing. These funds were later supplemented by financial support from the U.S. Treasury and the Federal Reserve, resulting in over $180 billion in financial assistance.[107]

As we discuss in more detail below, security-based swap market regulators need to take into account the spillover and contagion effect of security-based swap risk to avoid overburdening the financial system. One way to mitigate the spillover effect of a firm failure is to impose capital standards that take into account the security-based swap risk the firm undertakes while allowing flexibility in how it conducts security-based swap business.[108] At the same time, the Commission is mindful that the application of Title VII prudential requirements such as capital and margin impose costs on market participants that could provide economic incentives to restructure or separate their security-based swap activity according to geographical or jurisdictional regions, or to engage in less security-based swap activity, which may reduce the liquidity or efficiency of the overall market.[109]

There are circumstances where risk generated by security-based swaps may reside in the United States while conduits of such risk (*e.g.,* security-based swap transactions or persons engaged in security-based swap transactions) could take place or reside outside the United States or outside the scope of application of the Title VII requirements. In these instances, the Commission has considered the nature of the risk, the magnitude of the risk, and the existence of other financial regulations, such as regulation of systemically important financial institutions in Title I and Title II of the Dodd-Frank Act and banking regulations.

The Commission is mindful that the same interconnectedness in the security-based swap market that may provide conduits for risk also may mean that changes to incentives or costs caused by the application of U.S. regulatory requirements may have effects on the liquidity of the global market, as well as its efficiency and competitive dynamics. As described below in Section XV.C, there are a myriad of paths for liquidity as well as risk to move throughout the financial system in this interconnected market. In addition, differences in regulatory requirements between the United States and non-U.S. jurisdictions may also impact markets by changing the competitive dynamics currently at play in the interconnected global market. For example, as articulated in Section XV.C, some potential responses by market participants to the proposed rules and interpretations in this release may result in lessened competition in the security-based swap market within the United States. Among other considerations, some entities may determine that the compliance costs arising from the requirements of Title VII warrant exiting the security-based swap market in the United States and not transacting with U.S. persons. These exits could result in higher spreads and affect the ability and willingness of end users to engage in security-based swaps.

(c) Central Clearing

Many of the bilateral counterparty credit risks associated with security-based swaps can be mitigated by central clearing. Central clearing of security-based swaps provides a mechanism for market participants to engage in security-based swap activity without having to assess the creditworthiness of each counterparty. Clearing of security-based swaps shifts the counterparty risk from individual counterparties to CCPs whose members collectively share the default risk of all members.[110] Central clearing also requires consistent application of mark-to-market pricing and margin requirements, which standardizes the settling of payment or collateral delivery resulting from market movements and minimizes the risk of clearing member defaults.[111]

However, central clearing may also pose risk to financial systems. Because a CCP necessarily concentrates a large number of otherwise bilateral contracts into a single location, a CCP could itself become systemically important.[112]

[102] More generally, the Lehman Brothers Holding Inc. bankruptcy offers an example of how risk can spread across affiliated entities of multinational financial institutions. *See* Lehman Brothers International (Europe) in Administration, Joint Administrators' Progress Report for the Period 15 September 2008 to 14 March 2009 (Apr. 14, 2009), *available at: http://www.pwc.co.uk/assets/pdf/lbie-progress-report-140409.pdf* (''The global nature of the Lehman business with highly integrated, trading and non-trading relationships across the group led to a complex series of inter-company positions being outstanding at the date of Administration. There are over 300 debtor and creditor balances between LBIE and its affiliates representing $10.5B of receivables and $11.0B of payables as at 15 September 2008.'').

[103] In 2007, AIG FP's CDS portfolio reached a peak of $527 billion. Congressional Oversight Panel, June Oversight Report, ''The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy,'' June 2010, at 23, *available at: http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT56698/pdf/CPRT-111JPRT56698.pdf* (''AIG Report'').

[104] *See* Intermediary Definitions Adopting Release, 77 FR 30689 n.1133 (''AIGFP's obligations were guaranteed by its highly-rated parent company . . . an arrangement that facilitated easy money via much lower interest rates from the public markets, but ultimately made it difficult to isolate AIGFP from its parent, with disastrous consequences'') (quoting AIG Report at 20).

[105] *See* AIG Report at 18.

[106] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Efforts to Limit Payments to AIG Counterparties, at 20 (Nov. 17, 2009) (listing AIG FP's CDS counterparties, including a variety of U.S. and foreign financial institutions), *available at: http://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf.*

[107] *See* AIG Report at 2.

[108] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70218.

[109] *See id.* at 70303–06.

[110] *See, e.g.,* Darrell Duffie and Haoxiang Zhu, ''Does a Central Clearing Counterparty Reduce Counterparty Risk?'' Stanford University, Working Paper (2010), *available at: http://www.stanford.edu/~duffie/DuffieZhu.pdf*; Nout Wellink, ''Mitigating systemic risk in OTC derivatives markets,'' Banque de France, Financial Stability Review, No. 14—Derivatives—Financial innovation and stability (July 2010), *available at: http://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/Revue_de_la_stabilite_financiere/etude15_rsf_1007.pdf.*

[111] *See* Christopher Culp, ''OTC-Cleared Derivative: Benefits, Costs, and Implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act,'' Journal of Applied Finance No. 2 (2010), *available at: http://www.rmcsinc.com/articles/OTCCleared.pdf.*

[112] The Financial Stability Oversight Council (''FSOC'') can designate a CCP as systemically important under Section 804 of the Dodd-Frank Act. *See, e.g.,* Craig Pirrong, ''Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets,'' University of Houston, Working Paper (2010), *available at: http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf* (''[c]learing of OTC derivatives has been touted as an essential component of reforms designed to prevent a repeat of the financial crisis. A back-to-basics analysis of the economics of clearing suggests

Continued

While a loss by any single member in excess of its margin posted with the CCP is likely to be absorbed by the CCP's risk capital structure, correlated losses among many members, such as those which occurred among many asset classes during the 2008 financial crisis, could diminish the effectiveness of the risk mutualization structure of a CCP. Its failure could create financial instability through its members if the members, as residual obligors to the default related losses are unable to absorb the resulting financial impact. Such an outcome could lead to failure among CCP member counterparties, particularly when obligations are sizable, which may be the case if the members are themselves systemically important.

Certain aspects of Title VII are intended to reduce the risk of CCP failure by promoting sound risk management practices among registered clearing agencies, while also providing open access to market participants.[113] Sound risk management practices are important among both domestic and foreign CCPs, given the global nature of CCP membership.[114] When a CCP in the United States has significant number of foreign members, the CCP and its U.S.-domiciled members would be exposed to the foreign members. Similarly, when U.S.-domiciled entities are members of foreign domiciled CCPs, U.S. exposure to a foreign institution is created that may be systemically important.

(d) Security-Based Swap Data Reporting

Certain Title VII requirements are designed to increase market transparency for regulators and among security-based swap market participants. Requirements of regulatory reporting are designed to provide regulators with a broad view of the market and help monitor pockets of risk that might not otherwise be observed by market participants with an incomplete view of the market. Separately, requirements of post-trade reporting of prices in real-time are intended to promote price discovery and lower the trading costs by lessening the information advantage afforded certain OTC market participants with the largest order flow. Allowing all market participants access to more information about transactions' prices and sizes should create a more level playing field and may promote the efficiency of exchange or SEF trading of security-based swaps. In particular, as in other security markets, quoted bids and offers should form and adjust according to the reporting of executed trades. At the same time, however, we recognize that increased post-trade transparency also could impact the liquidity of, and competition in, the security-based swap market.[115] For example, market participants may be less willing to provide liquidity for large, potentially market-moving trades if the implementation of the Title VII public dissemination requirements reveals private information about future hedging and inventory needs.

The increased transparency caused by the Title VII reporting requirements could be diminished if consistent reporting requirements are not applied to transactions across various jurisdictions and information regarding security-based swaps taking place in the global market is not shared among jurisdictions. For instance, the aggregate exposures created by a particular security-based swap or class of security-based swaps may only be partially observed if security-based swap transactions span multiple jurisdictions. As a result any single regulator may not have a complete view of the security-based swap risks and may underestimate such risks. Separately, if some regulatory regimes do not require, or provide for less informative, post-trade reporting rules, then certain transactions may gravitate to these jurisdictions so that market participants can escape reporting their transaction prices. In both instances the increased transparency contemplated by the Title VII reporting requirements may be diluted.

B. Scope of Title VII's Application to Cross-Border Security-Based Swap Activity

Congress has given the Commission authority in Title VII to implement a security-based swap regulatory framework. In the statutory definitions and registration requirements for market intermediaries and participants (*i.e.,* security-based swap dealers and major security-based swap participants) and security-based swap infrastructures (*i.e.,* SDRs, security-based swap clearing agencies, and SB SEFs), Congress has identified the types of security-based swap activity that triggers Title VII registration and regulatory requirements relevant to such persons or the application of Title VII transaction-level requirements.

We recognize that applying Title VII to persons and transactions that fall within the statutory definitions or requirements may subject some persons based outside the United States, or some transactions arising from activity that occurs in part inside and in part outside the United States, to the various provisions of Title VII. At the same time, however, the global nature of the security-based swap market and the characteristics of the risk associated with security-based swap activity suggest that applying Title VII only to the conduct of persons located within the United States or to security-based swap activity occurring entirely within the United States would exclude from regulation a significant proportion of security-based swap activity that occurs in part inside and in part outside the United States.[116] Our proposed approach is intended to strike a reasonable balance in light of the authority provided by Congress, the structure of the security-based swap market, and the transfer of risk within that market. Accordingly, among other things, our proposed approach does not impose Title VII requirements on persons whose relevant security-based swap activity occurs entirely outside the United States and thus likely does not raise the types of concerns in the U.S. financial system that would warrant application of Title VII.

Commenters have raised concerns about the application of Title VII to security-based swap activity in the cross-border context and specifically about the possibility that the Commission may apply our security-based swap regulations to ''extraterritorial'' conduct. In this subsection, we discuss commenters' views regarding the applicability of Title VII to cross-border security-based swap activity, explain our proposed approach to determining whether the relevant security-based swap activity takes place, in whole or in part, within the United States, and interpret what it means for a person to ''transact a business in security-based swaps without the jurisdiction of the United States'' as set forth in Section 30(c) of the Exchange Act (''Section 30(c)'').[117] In subsequent sections of the release, we discuss in more detail our proposed

that such claims are overstated, and that traditional OTC mechanisms may be more efficient for some instruments and some counterparties.'').

[113] *See, e.g.,* Clearing Agency Standards Adopting Release, 77 FR 66220.

[114] Based on the analysis of the member positions at ICE Clear Credit in the United States by the staff in the Division of Risk, Strategy and Financial Innovation, approximately half of the positions at ICE Clear Credit in the United States are held by foreign-domiciled dealing entities. *See* Section XV.B.2(e), *infra.*

[115] *See* Section XV.C, *infra* (discussing the effects of our proposed cross-border approach on competition, efficiency, and capital formation).

[116] *See* Section II.A, *supra.* We preliminarily believe that many of the circumstances of concern also would create the opportunity for evasion of the Dodd-Frank Act's regulatory regime. *See, e.g.,* note 558, *infra.*

[117] 15 U.S.C. 78dd(c).

application of Title VII to cross-border security-based swap activity.

1. Commenters' Views

Commenters generally expressed the view that Section 30(c) restricts the Commission's authority to apply Title VII to ''extraterritorial'' conduct and thus, that the Commission follow a territorial approach in applying Title VII to cross-border security-based swap activity. One commenter interpreted Section 30(c) as prescribing a strictly territorial approach to the application of Title VII, arguing that this section codifies the territorial approach that we have historically taken in our existing securities regulations.[118] Several commenters argued that a narrow interpretation of the ''extraterritorial'' reach of Title VII was consistent with both Commission precedent[119] and the Supreme Court's decision in *Morrison* v. *National Australia Bank.*[120]

Based on this interpretation of Section 30(c), commenters generally argued that Title VII does not give the Commission authority to regulate entities that transact a business in security-based swaps outside the United States.[121] Some commenters suggested that non-U.S. entities (including affiliates of U.S. persons) that conduct business entirely with counterparties outside the United States should not be required to register as swap or security-based swap dealers or comply with Title VII.[122] Some of these commenters also urged the Commission not to subject foreign branches and affiliates of U.S. banks to Title VII registration requirements to the extent that they transact solely with foreign persons.[123] Some commenters urged that, even within a single entity, only those branches, departments, or divisions that engage in business within the United States should be required to register.[124]

Commenters generally took the view that Section 30(c) does not permit the Commission to apply Title VII to transactions occurring outside the United States. Accordingly, commenters suggested that Section 30(c) restricts the Commission's ability to apply Title VII requirements to the foreign business of entities that are required to register with the Commission.[125] For example, one commenter interpreted Section 30(c) to prohibit application of Title VII to any of a person's ''activity'' or ''business'' outside the United States, even if that person otherwise transacts a business in security-based swaps within the jurisdiction of the United States.[126]

Similarly, some commenters suggested that Section 30(c) prohibits the application of Title VII to transactions involving the foreign affiliates of U.S. persons, on the basis that such transactions occur ''without the jurisdiction of the United States'' when no U.S. person is a counterparty to the trade.[127] One commenter explained that, because such transactions involve parties outside the United States and occur outside the United States, they are ''removed from the stream of U.S. commerce.'' [128]

Commenters also generally recommended a narrower interpretation of the language in Section 30(c) permitting the application of Title VII regulations to persons transacting a business in security-based swaps without the jurisdiction of the United States to the extent that they are doing so in contravention of rules the Commission has prescribed as ''necessary or appropriate to prevent the evasion of any provision of [the Exchange Act that was added by the Dodd-Frank Act].'' Under this view, Section 30(c) permits ''extraterritorial'' application of Title VII only to entities that have themselves engaged in willful or intentional evasion.[129] These commenters argued that the longstanding use of foreign branches and affiliates by security-based swap market entities demonstrates that these types of business structures are not evasive and, therefore, do not fall within the exception to the limits on the applicability of Title VII as set forth in Section 30(c).[130]

2. Scope of Application of Title VII in the Cross-Border Context

(a) Overview and General Approach

Section 772(b) of the Dodd-Frank Act amends Section 30 of the Exchange Act to provide that ''[n]o provision of [Title VII] . . . shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States,'' unless that business is transacted in contravention of rules prescribed to prevent evasion of Title VII.[131] In so amending Section 30 of the Exchange Act, Congress directly appropriated nearly identical language defining the scope of the Exchange Act's application that appears in subsection (b) of Section 30 of the Exchange Act,[132] indicating that Congress intended the territorial application of Title VII to entities and transactions in the security-based swap market to follow similar principles to those applicable to the

[118] *See* Cleary Letter IV at 33–36; *see also* SIFMA Letter I at 5, 22; Sullivan & Cromwell Letter at 6 (suggesting that Section 30(c) permits ''extraterritorial'' application of Title VII only to prevent ''efforts to evade'' statutory requirements).

[119] *See, e.g.,* Sullivan & Cromwell Letter at 11 (stating that the Commission has ''plainly stated that it uses a territorial approach in applying the broker-dealer requirements to international operations'').

[120] 130 S.Ct. 2869 (2010). *See, e.g.,* Jones Day Letter at 7–8 (suggesting that the jurisdictional limits of Dodd-Frank Act Sections 722 and 772 be interpreted narrowly in a manner consistent with the *Morrison* decision); Cleary Letter IV at 33–6 (arguing against an extraterritorial application of Title VII); SIFMA Letter I at 5–6; ISDA Letter I at 11.

[121] *See, e.g.,* Jones Day Letter at 7–8; Cleary Letter IV at 33–6; Sullivan & Cromwell Letter at 10–11; SIFMA Letter I at 5–6; ISDA Letter I at 11.

[122] *See* SIFMA Letter I at 4; *see also* ISDA Letter I at 11 (recommending that designation as a dealer should not be triggered by transactions entered into with foreign affiliates or branches of a U.S. bank or with foreign entities whose obligations are guaranteed by a U.S. person, or by legacy positions with U.S. counterparties); Davis Polk Letter II at 5–6 (stating that a foreign entity engaged in swaps exclusively with foreign counterparties is '''without the jurisdiction of the United States'''). Similarly, one commenter recommended that transactions between two foreign entities should be excluded from calculations of substantial position for purposes of the major participant definition. Canadian MAVs Letter at 7–8.

[123] *See, e.g.,* Sullivan & Cromwell Letter at 7 (stating that a territorial interpretation of Section 30(c) prevented the Commission from imposing Title VII requirements on the U.S. banks' ''Non-U.S. Operations,'' defined to include both foreign affiliates or subsidiaries and foreign branches of these banks).

[124] *See, e.g.,* Cleary Letter IV at 12; *see also id.* at 26 (arguing that a non-U.S. branch or affiliate of a U.S. entity should not be required to register as a dealer by virtue of its transactions with a non-U.S. person counterparty); ISDA Letter I at 11 (stating that a ''branch, division or office of an entity should be able to be designated as a Dealer without subjecting the whole entity to regulation'').

[125] *See* Cleary Letter IV at 11; *see also* SIFMA Letter I at 14 (suggesting that Section 30(c) ''provide[s] strong support'' for not applying Title VII to transactions between a registered foreign swap dealer and non-U.S. persons); ISDA Letter I at 11 (recommending that no Title VII requirements should apply to transactions between a non-U.S. entity registered as a dealer and its non-U.S. person counterparties).

[126] *See* Cleary Letter IV at 12.

[127] *See* SIFMA Letter I at 5–6; *see also* ISDA Letter I at 11 (suggesting that dealer-related requirements of Title VII should not apply to business with non-U.S. person counterparties, including foreign affiliates and branches of U.S. persons).

[128] *See* Sullivan & Cromwell Letter at 9.

[129] *See, e.g., id.* at 9–10 (suggesting that ''extraterritorial'' application of Title VII requires an ''intent to evade'' Title VII).

[130] *See* Cleary Letter IV at 7.

[131] *See* Section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c), added by Section 772(b) of the Dodd-Frank Act.

[132] Section 30(b) of the Exchange Act, 15 U.S.C. 78dd(b), provides that the Exchange Act and related rules ''shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States,'' unless that business is transacted in contravention of rules prescribed as necessary or appropriate to prevent evasion of the Exchange Act.

securities market under the Exchange Act.[133]

In light of this similar language, commenters have urged us to follow a territorial approach in applying Title VII to cross-border security-based swap activity.[134] We preliminarily agree that a territorial approach, if properly tailored to the characteristics of the security-based swap market, should help ensure that our regulatory framework focuses on security-based swap activity that is most likely to raise the concerns that Congress intended to address in Title VII, including the effects of security-based swap activity on the financial stability of the United States, on the transparency of the U.S. financial system, and on the protection of counterparties.

We differ from commenters, however, in our understanding of what a territorial approach means in the context of a global security-based swap market. As noted above, some commenters suggested that the security-based swap activity of foreign branches and affiliates of U.S. persons with non-U.S. persons occurs outside the United States and has only an indirect connection with the United States and that, therefore, subjecting transactions resulting from that activity to Title VII would involve extraterritorial application of the statute.[135] Although we recognize that some of the security-based swap activity involving these foreign branches and affiliates occur outside the United States, we believe that a properly tailored territorial approach should look to both the full range of activities described in the statutory text as well as to the concerns that Congress intended Title VII to address in determining whether the relevant activity, considered in its entirety, occurs at least in part within the United States.[136]

As noted above, security-based swap transactions differ from most traditional securities transactions in that they give rise to an ongoing obligation between the counterparties to the trade: the counterparties bear the risks that result from those transactions for the duration of the transactions.[137] The Dodd-Frank Act was enacted, in part, to address the risks to the financial stability of the United States posed by entities bearing such risks, and a territorial approach to the application of Title VII should be consistent with achieving these statutory purposes. A territorial approach to the application of Title VII that excluded from the application of Title VII any activity conducted by the foreign operations of a U.S. person where they do business only with non-U.S. counterparties located outside the United States would likely fail to achieve the financial stability goals of Title VII, as such an approach would not account for the security-based swap risks that may be borne by entities located within the United States whose foreign operations solicit, negotiate, or execute transactions outside the United States. In addition, it is not clear that a different territorial approach that focused solely on the location of the entity bearing the risk (and disregarded whether certain relevant activity, including execution of the transaction, occurred within the United States) would adequately address the Dodd-Frank Act's concern with promoting transparency in the U.S. financial system and protecting counterparties, concerns that are likely to be raised by the solicitation, negotiation, or execution within the United States, even if the risk arising from those security-based swaps transactions is borne by entities outside the United States. For example, some transactions characterized by commenters as occurring outside the United States, even with non-U.S. persons, are entered into by persons located within the United States and would appear to raise the same types of risk concerns as transactions occurring wholly within the United States.

Similarly, the Commission preliminarily believes that a territorial approach should be informed by the text of the statutory provision that imposes the registration or other regulatory requirement.[138] Some commenters suggested, for instance, that a territorial approach would necessarily exclude certain foreign operations of U.S. persons from registration as security-based swap dealers so long as they did not enter into security-based swap transactions with counterparties located within the United States.[139] However, in this instance, these commenters did not show how their suggested approach relates to the statutory definition of security-based swap dealer or to the rules and interpretation adopted by the Commission and the CFTC to further define ''security-based swap dealer'' in the Intermediary Definitions Adopting Release, including our discussion of conduct that is indicative of dealing activity.[140] In our preliminary view, we should identify the activity that the statutory provision regulates before reaching a determination of whether relevant activity is occurring within the United States.[141] Only after we identify the activity that the statutory provision regulates would we then be able to determine whether the conduct at issue involves activity that the statutory provision regulates and whether this conduct occurs within the United States. To the extent that conduct involving activity that the statutory provision regulates occurs within the United States, application of Title VII to that conduct would be consistent with a territorial approach.

(b) Territorial Approach to Application of Title VII Security-Based Swap Dealer Registration Requirements

We discuss our application of this approach with respect to each of the major Title VII registration categories and requirements in connection with reporting, public dissemination, clearing, and trade execution for security-based swaps in further detail in the sections below,[142] but for sake of illustration, we provide a brief overview of our territorial approach as it applies to the security-based swap dealer definition.

Section 3(a)(71) of the Exchange Act[143] defines security-based swap dealer as a person that engages in any of the following types of activity:

(i) Holding oneself out as a dealer in security-based swaps,

(ii) making a market in security-based swaps,

(iii) regularly entering into security-based swaps with counterparties as an ordinary course of business for one's own account,

(iv) engaging in any activity causing oneself to be commonly known in the

[133] *See, e.g., Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833, 846 (1986) (holding that ''when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'''').

[134] *See, e.g.,* Cleary Letter IV at 33–37.

[135] *See, e.g.,* Cleary Letter IV at 35; ISDA Letter I at 11; SIFMA Letter I at 5–6; Sullivan & Cromwell Letter at 11–13.

[136] *See Morrison,* 130 S. Ct. at 2884 (looking to the ''focus'' of the relevant statutory provision in determining whether the statute was being applied to domestic conduct).

[137] *See* Section II.A, *infra.*

[138] *See Morrison,* 130 S. Ct. at 2884 (performing a textual analysis of Section 10(b) of the Exchange Act to determine what conduct was relevant in determining whether the statute was being applied to domestic conduct).

[139] *See, e.g.,* Sullivan & Cromwell Letter at 11.

[140] *See* note 135, *supra; see also* Intermediary Definitions Adopting Release, 77 FR 30616–19.

[141] *See Morrison,* 130 S. Ct. at 2884.

[142] *See* Sections III–VII, *infra* (discussing each major registration category), and Sections VIII–IX.A, *infra* (discussing certain requirements in connection with reporting and dissemination, clearing, and trade execution for security-based swaps).

[143] 15 U.S.C. 78c(a)(71).

trade as a dealer in security-based swaps.[144]

We have further interpreted this definition by jointly adopting interpretive guidance with the CFTC that identifies the types of activity that is relevant in determining whether a person is a security-based swap dealer.[145] In this interpretive guidance, we have identified indicia of security-based swap dealing activity to include the following activities:

- Providing liquidity to market professionals or other persons in connection with security-based swaps,
- seeking to profit by providing liquidity in connection with security-based swaps,
- providing advice in connection with security-based swaps or structuring security-based swaps,
- having a regular clientele and actively soliciting clients,
- using inter-dealer brokers, and
- acting as a market maker on an organized security-based swap exchange or trading system.[146]

As the foregoing list of relevant activities illustrates, both the statutory text and our interpretation of that text include within the security-based swap dealer definition a range of activities. The broad scope of activities listed above identifies various characteristics of dealing activity. Given the risks associated with dealing activity that the dealer definition and associated regulatory framework in Title VII are intended to address, we preliminarily believe that a territorial approach consistent with these statutory purposes should consider whether the entity performs any of these indicia of dealing activity within the United States (even if some of these indicia also arise in activity conducted outside the United States). This type of analysis appears to us more consistent with the statutory text and with the Supreme Court's approach to statutory analysis in its decision in *Morrison* than an approach that excludes from jurisdiction certain foreign operations of U.S. persons transacting with foreign counterparties. We also believe that our proposed approach would better help ensure that our regulatory framework achieves the various purposes of security-based swap dealer regulation under Title VII, while avoiding application of security-based swap dealer registration to persons whose dealing activity is unlikely to raise the types of dealer-specific risks that Title VII dealer registration was intended to address because it occurs entirely outside the United States.[147]

Under our proposed territorial approach to the security-based swap dealer definition, as explained further below, we would require persons resident or organized in the United States, or with their principal place of business in the United States, to count all of their dealing transactions toward their *de minimis* threshold, including transactions that arise from dealing activity that occurs in part outside the United States (for example, because it is negotiated and executed through that person's foreign branch or office).[148]

An interpretation of Section 30(c) that advances the view that security-based swap activity conducted by a U.S. person through a foreign branch constitutes activity ''without the jurisdiction of the United States'' or that a transaction arising from such activity constitutes ''transacting a business in security-based swaps without the jurisdiction of the United States'' for purposes of Section 30(c) may not fully account for the statutory definition of ''security-based swap dealer,'' the purposes of Title VII, or the global nature of the security-based swap market. It does not account for the entire range of activities performed by entities active in the security-based swap market, including security-based swap dealers, and the relevance of such activities to the statutory definitions and requirements, given the purposes of Title VII, and it would leave unaddressed significant levels of activity that poses precisely the sorts of risks that Title VII was intended to address.

In our preliminary view, to the extent that a U.S. person engages in dealing activity through a foreign operation that is part of the U.S. legal person (such as a foreign branch or office), relevant activity for purposes of the security-based swap dealer definition occurs, at least in part, within the United States because we believe it is the U.S. entity as a whole, and not just the foreign branch or office, that is holding itself out as a dealer and making a market in security-based swaps. Moreover, it is necessarily the U.S. person as a whole that is seeking to profit by providing liquidity and engaging in market-making in security-based swaps, and it is the financial resources of the entire entity that enable it to provide liquidity and engage in market-making in connection with security-based swaps. Its dealing counterparties will look to the entire U.S. person, and not just the foreign branch or office, for performance on the transaction. The entire U.S. person assumes, and stands behind, the obligations arising from the resulting agreement. For these reasons, to the extent that a dealer resides or is organized, or has its principal place of business, within the United States, we believe that it cannot hold itself out as a security-based swap dealer, even through a foreign branch, as anything other than a single person, given that it generally could not operate as a dealer absent the financial and other resources of the entire U.S. person. Its dealing activity with all of its counterparties, including dealing activity conducted through its foreign branch or office, is best characterized as occurring, at least in part, within the United States and should therefore be counted toward the entity's *de minimis* threshold.

More generally, we preliminarily believe that transactions that create ongoing obligations that are borne by a U.S. person are properly described as directly occurring within the United States, particularly given Title VII's focus on, among other things, addressing risks to the financial stability of the United States.[149] Indeed, the history of AIG FP confirms that such transactions of U.S. persons can pose risks to the U.S. financial system even if they are conducted through foreign operations. The nature of such risks, and their role in the financial crisis and in the enactment of Title VII, suggest that the statutory framework established

[144] Section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A).

[145] *See* Intermediary Definitions Adopting Release, 77 FR 30617–18.

[146] *Id.*

[147] Under our proposed approach to the application of the *de minimis* threshold in the cross-border context, non-U.S. persons that engage in dealing activity with U.S. persons or otherwise within the United States at levels below the *de minimis* threshold generally would also not be required to register as security-based swap dealers. Such entities are engaged in dealing activity within the United States, and their dealing activity within the United States may raise certain concerns addressed by Title VII. However, we preliminarily believe that, to the extent that this dealing activity remains at levels below the *de minimis* threshold, they should be treated similarly to a U.S. person that engages in dealing activity at levels below the *de minimis* threshold. *See* Section III.B.4, *infra.* Like U.S. entities engaged in dealing activity, they may be required to register under the aggregation requirements the Commission and the CFTC adopted in the Intermediary Definitions Adopting Release. *See* Intermediary Definitions Adopting Release, 77 FR 30631; 17 CFR 240.3a71–2(a)(1). Under the aggregation requirements we propose below, even entities with security-based swap dealing activity at levels below the *de minimis* threshold may be required to register if the total security-based swap dealing activity of affiliates under common control (excluding the activity of any registered affiliates that have independent operations) exceeds the *de minimis* threshold. *See* Section III.B.8, *infra.*

[148] *See* Section III.B.4, *infra.*

[149] As we discuss below, such activity would include providing guarantees for a foreign entity's security-based swap transactions. *See* Section II.B.2(d), *infra.*

by Congress and the objectives of Title VII may require a broader analysis than excluding transactions involving U.S. persons from the application of Title VII solely because they are conducted through operations outside the United States, while others by the same U.S. persons occur within the United States.[150]

However, we preliminarily believe that non-U.S. persons engaged in dealing activity would be required to count toward their *de minimis* thresholds only transactions arising from their dealing activity with U.S. persons [151] or dealing activity otherwise conducted within the United States. In addition, to the extent that a non-U.S. person engages in security-based swap dealing activity within the United States, we preliminarily believe that such dealing activity should be counted toward the non-U.S. person's *de minimis* threshold regardless of whether its counterparties are U.S. persons.[152] This view is consistent with the fact that such security-based swap activity raises the types of concerns that the Dodd-Frank Act was intended to address.

We preliminarily believe that a non-U.S. person not engaged in any security-based swap activity within the United States (or engaged only at levels below the *de minimis* threshold) is unlikely to pose the types of concerns within the U.S. financial system that Title VII dealer regulation was intended to address.[153] Thus, under our proposed approach, a non-U.S. person that engages in dealing activity entirely outside the United States (*i.e.,* does not enter into transactions with a U.S. person or otherwise conduct any part of its dealing activity within the United States) would not be required to register as a security-based swap dealer.[154]

(c) Application of Other Title VII Requirements to Registered Entities

We are proposing to apply the Title VII requirements associated with registration (including, among others, capital and margin requirements and external business conduct requirements [155]) to the activities of registered entities to the extent we have determined that doing so advances the purposes of Title VII.[156] Although some commenters suggested that a territorial approach would prohibit the Commission from applying Title VII to the foreign security-based swap activities of even registered entities, such an interpretation of the application of Title VII to registered entities is difficult to reconcile with the statutory language describing the requirements applicable to registered security-based swap dealers, with the text of Section 30(c),[157] or with the purposes of Title VII and the nature of risks in the security-based swap market as described above. We have long taken the view that an entity that has registered with the Commission subjects itself to the entire regulatory system governing such registered entities.[158]

(d) Application of Title VII Regulatory Requirements to Transactions of Foreign Entities Receiving Guarantees From U.S. Persons

We also are proposing to apply certain Title VII transaction-level requirements (*e.g.,* mandatory clearing, reporting and dissemination, and mandatory trade execution of security-based swaps) to certain transactions involving one or more non-U.S. persons whose performance under the security-based swaps is guaranteed by a U.S. person. We discuss the statutory basis for applying specific Title VII requirements to such transactions in the relevant substantive discussions below.[159] In this subsection, we briefly explain why we believe that a territorial approach that is consistent with the purposes and text of the Dodd-Frank Act supports the application of Title VII to such transactions.

In a security-based swap transaction between two non-U.S. persons where the performance of at least one side of the transaction is guaranteed by a U.S. person, the guarantee gives the guaranteed entity's counterparty direct recourse to the U.S. person for performance of obligations owed by the guaranteed entity under the security-based swap,[160] and the U.S. guarantor exposes itself to the security-based swap risk as if it were a direct counterparty to the security-based swap through the security-based swap activity engaged in by the guaranteed entity. As a result, the guarantee creates risk to the U.S. financial system and counterparties (including U.S. guarantors) to the same degree as if the transaction were entered into directly by a U.S. person. In addition, in many cases, the counterparty would not enter into the transaction (or would not do so on the same terms) with the guaranteed entity, and the guaranteed entity would not be able to engage in any security-based swaps, absent the presence of the guarantee. Given that the guarantee is

[150] However, for reasons explained below, the Commission is not proposing to subject the foreign operations of U.S. persons to certain of the requirements in Title VII. *See, e.g.,* Sections III.B.7, III.B.9, VIII.C, IX.C.3(a), and X.B.3(a), *infra.*

[151] However, for reasons explained below, the Commission is not proposing to require non-U.S. persons to include transactions with the foreign branches of U.S. banks in their *de minimis* calculations. *See* Section III.B.7, *infra.*

[152] *See* Intermediary Definitions Adopting Release, 77 FR 30617–18.

[153] Proposed Rule 3a71–3(b) under the Exchange Act, as discussed in Section III.B.4, *infra.* Of course, the transactions of an entity engaged in security-based swap dealing activity within the United States at levels below the *de minimis* threshold or in security-based swap activity within the United States that is not dealing activity may be subject to other Title VII requirements, as discussed below, or other provisions of the federal securities laws.

[154] This proposed approach to the application of Title VII security-based swap dealer registration requirements is not intended to limit or address the cross-border reach or extraterritorial application of the antifraud or other provisions of the federal securities laws.

[155] *See* Section 15F of the Exchange Act, 15 U.S.C. 78o–10.

[156] *See, e.g.,* Sections III.C.3 and 4, *infra* (discussing requirements applicable to security-based swap dealers).

[157] Section 30(c) prohibits the application of the Exchange Act only with respect to those persons that ''transact[] a business in security-based swaps without the jurisdiction of the United States.'' Because only security-based swap entities that transact a business in security-based swaps within the United States would be required to register under the approach proposed in this release, registered entities are not persons that ''transact[] a business in security-based swaps without the jurisdiction of the United States.''

[158] *See* Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, 30016–17 (July 18, 1989) (''Rule 15a–6 Adopting Release'') (noting that a foreign registrant is subject to the regulatory system applicable to such entities); Revision of Form BD, Exchange Act Release No. 25285 (Jan. 22, 1988) (''It is the Commission's view that a broker-dealer submits to the Commission's jurisdiction when it registers with the Commission.''); *In re International Paper and Power Co.,* 4 SEC 873, 876 (1939) (registration with the Commission makes registrant ''subject to the complete jurisdiction of the Commission''). *See also* Exemption of Certain Foreign Brokers or Dealers, Exchange Act Release No. 58047 (June 27, 2008), 73 FR 39182 (July 8, 2008) (''Proposed Amendments to Rule 15a–6''), at 39182 (describing registration requirements as applying to the entire foreign entity); *In re Ira William Scott,* 53 SEC 862, 866 (1998) (holding that investment adviser that registers with the Commission has ''submitted himself to [the Commission's] jurisdiction pursuant to the Advisers Act''). *Cf. In re United Corp.,* 232 F.2d 601, 606 (1956) (stating that, upon registration as a holding company, an entity comes within ''the jurisdiction of the Commission and [is] subject to all requirements applicable to a registered holding company'').

[159] *See* Sections VIII–XI, *infra.*

[160] In discussing the application of the major participant tests to guaranteed positions in the Intermediary Definitions Adopting Release, the Commission and the CFTC noted that an entity's security-based swap positions are attributed to a parent, other affiliate, or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions have recourse to that parent, other affiliate, or guarantor in connection with the position. Positions are not attributed in the absence of recourse. *See* Intermediary Definitions Adopting Release, 77 FR 30689. As a result, the term ''guarantee'' as used in this release refers to a contractual agreement pursuant to which one party to a security-based swap transaction has recourse to its counterparty's parent, other affiliate, or guarantor with respect to the counterparty's obligations owed under the transaction.

provided by a U.S. person and poses risks to the U.S. financial system, and considering the reliance by both the guaranteed entity and its counterparty on the creditworthiness of the guarantor in the course of engaging in security-based swap transactions and for the duration of the security-based swap, we preliminarily believe that a transaction entered into by a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person is within the United States by virtue of the involvement of the U.S. guarantor in the security-based swap. Therefore, we preliminarily believe that subjecting such transactions to Title VII is consistent with our territorial approach.

(e) Regulations Necessary or Appropriate to Prevent Evasion of Title VII

As noted above, several commenters expressed the view that Section 30(c) of the Exchange Act restricts the Commission's authority to apply amendments made to the Exchange Act by Title VII to ''extraterritorial'' conduct. Section 30(c) provides the Commission with the express authority to prescribe rules and regulations for persons that transact a business in security-based swaps without the jurisdiction of the United States to the extent the Commission determines that doing so is necessary or appropriate to prevent evasion. Some commenters have expressed the view that this authority extends to ''extraterritorial'' activity only when such activity is intended to evade Title VII or to conceal a domestic violation of Title VII, suggesting that Section 30(c) prohibits application of Title VII to transactions by foreign affiliates or operations established for a legitimate business purpose, as the existence of such a purpose is evidence that the conduct is not intended to be evasive.[161]

While recognizing the concerns expressed by commenters, the Commission preliminarily believes that Section 30(c) does not require the Commission to find actual evasion in order to invoke our authority to reach activity ''without the jurisdiction of the United States.'' Section 30(c) also does not require that every particular application of Title VII to security-based swap activity ''without the jurisdiction of the United States'' address *only* business that is transacted in a way that evades Title VII. Section 30(c) authorizes the Commission to apply Title VII to persons transacting a business ''without the jurisdiction of the United States'' if they violate rules that the Commission has prescribed as ''necessary or appropriate to prevent the evasion of any provision'' of Title VII. The focus of this provision is not whether such rules impose Title VII requirements only on entities engaged in evasive activity but whether the rules are generally ''necessary or appropriate'' to prevent evasion of Title VII. In other words, Section 30(c) permits the Commission to impose prophylactic rules intended to prevent possible evasion, even if they affect both evasive and non-evasive conduct. Thus, under our preliminary proposed interpretation of Section 30(c), the statute permits us to prescribe such rules to conduct without the jurisdiction of the United States, even if those rules would also apply to a market participant that has been transacting business through a pre-existing market structure such as a foreign branch or guaranteed foreign affiliate established for valid business purposes, provided the proposed rule or interpretation is designed to prevent possible evasive conduct.[162]

C. Principles Guiding Proposed Approach to Applying Title VII in the Cross-Border Context

In considering how to apply Title VII in the cross-border context, the Commission has been mindful of the global nature of the security-based swap market and the types of risks created by security-based swap activity to the U.S. financial system and market participants, as well as the needs of a well-functioning security-based swap market.[163] We also have been guided by the purpose of the Dodd-Frank Act[164] and the applicable requirements of the Exchange Act, including the following:

- *Risk to the U.S. Financial System*—The Dodd-Frank Act was intended to promote, among other things, the financial stability of the United States by limiting/mitigating risks to the financial system.[165]
- *Transparency*—The Dodd-Frank Act was intended to promote transparency in the U.S. financial system.[166]
- *Counterparty Protection*—The Dodd-Frank Act adds provisions to the Exchange Act relating to counterparty protection, particularly with respect to ''special entities.''[167]
- *Economic Impacts*—The Exchange Act requires the Commission to consider the impact of our rulemakings on efficiency, competition, and capital formation.[168]
- *Harmonization with Other U.S. Regulators*—In connection with implementation of Title VII, the Dodd Frank Act requires the Commission to consult and coordinate with the CFTC and prudential regulators to ensure ''regulatory consistency and comparability, to the extent possible.''[169]
- *Consistent International Standards*—To promote effective and consistent global regulation of swaps and security-based swaps, the Dodd-Frank Act requires the Commission and the CFTC to consult and coordinate with foreign regulatory authorities on the ''establishment of consistent international standards'' with respect to the regulation of swaps and security-based swaps.[170] In this regard, the Commission recognizes that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to

[161] *See, e.g.,* Cleary Letter IV at 5–6, 7, 18; Sullivan & Cromwell Letter at 6–7.

[162] We preliminarily believe that the proposed rules or interpretations set forth in this release are not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Section 30(c). *See* Section II.B.2(a), *supra.* However, as noted below, the Commission also preliminarily believes that the proposed rules or interpretations are necessary or appropriate to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act and prophylactically will help ensure that the particular purposes of the Dodd-Frank Act addressed by the rule or interpretation are not undermined. *See, e.g.,* note 558, *infra.*

[163] *See* Sections II.A.1–II.A.3, *supra.*

[164] *See* note 4, *supra.*

[165] *See id.*

[166] *See id.*

[167] *See* Section 15F(h) of the Exchange Act, as added by Section 764(a) of the Dodd-Frank Act, in particular.

[168] Specifically, Section 3(f) of the Exchange Act provides: ''Whenever pursuant to this title the Commission is engaged in rulemaking, . . .; required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.'' Section 23(a)(2) of the Exchange Act also provides: ''The Commission . . ., in making rules and regulations pursuant to any provisions of this title, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission . . . shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].''

[169] *See* Section 712(a)(2) of the Dodd-Frank Act.

[170] *See* Section 752(a) of the Dodd-Frank Act. In this regard, some commenters have encouraged the Commission to consider international comity when applying Title VII in the cross-border context. *See* note 225, *infra.*

market participants under their authority.[171]

• *Anti-Evasion*—The Dodd-Frank Act amends the Exchange Act to provide the Commission with authority to prescribe rules and regulations as necessary or appropriate to prevent the evasion of any provision of the Exchange Act that was added by the Dodd-Frank Act.[172]

At times these principles reinforce one another; at other times they compete with each other. For instance, attempts to regulate risk posed to the United States may, depending on what is proposed, make it more costly for U.S.-based firms to conduct security-based swap business, particularly in foreign markets, compared to foreign firms, or could make foreign firms less willing to deal with U.S. persons. On the other hand, attempts to provide U.S. persons greater access to foreign security-based swap markets may, depending on what is proposed, fail to appropriately address the risk posed to the United States from transactions conducted outside the United States or create opportunities for market participants to evade the application of Title VII, particularly until such time as global initiatives to regulate the derivatives markets are fully enacted and implemented.

Balancing these sometimes competing principles is complicated by the fact that Title VII imposes a new regulatory regime on a marketplace that already exists as a functioning, global market. Title VII establishes reforms that will have implications for entities that compete internationally in the global security-based swap market. As we have formulated our proposal, we have generally sought, in accordance with the statutory factors described above, to avoid creating opportunities for regulatory arbitrage or evasion or the potential for duplicative or conflicting regulations. We also have considered the needs for a well-functioning security-based swap market and for avoiding disruption that may reduce liquidity, competition, efficiency, transparency, or stability in the security-based swap market.

D. Conclusion

Consistent with the principles and requirements outlined above, we are proposing to structure our implementation of Title VII around an approach that focuses on identifying market participants whose presence or activity within the United States or activity involving market participants within the United States may give rise to the types of risk to the U.S. financial system and counterparties that Title VII seeks to address, as described more fully below in the subsequent sections of the release.

Request for Comment

The Commission requests comment on all aspects of the discussion and analysis above, including the following:

• Is our understanding of the global nature of the security-based swap market accurate? If not, why not? Please elaborate.

• Is our understanding of the dealing structures used by U.S. and non-U.S. persons accurate? If not, why not? Are there other dealing structures used by market participants? If so, please elaborate.

• Is our understanding of clearing, reporting, and trade execution practices accurate? If not, why not? Please elaborate.

• As discussed above in Section II.B.1, some commenters recommend a narrower approach to the cross-border application of Title VII than this proposal sets forth. We request further comment on these and any other potential alternative approaches to determining the extent to which Title VII should be applied to cross-border transactions, non-U.S. persons, and registered entities.

III. Security-Based Swap Dealers

A. Introduction

Among the market participants subject to regulation under Title VII as a result of their security-based swap activities are security-based swap dealers.[173] As discussed above, a ''security-based swap dealer'' generally is defined as any person that (i) Holds itself out as a dealer in security-based swaps; (ii) makes a market in security-based swaps; (iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in security-based swaps.[174] The Commission, jointly with the CFTC, issued final rules and interpretive guidance to further define the term security-based swap dealer,[175] including rules implementing the *de minimis* exception.[176] As part of these final rules and interpretive guidance, the Commission stated that the relevant statutory provisions suggest that, rather than focusing solely on the risk these entities pose to the financial markets, we should interpret the ''security-based swap dealer definition in a way that identifies those persons for which regulation is warranted either: (i) [D]ue to the nature of their interactions with counterparties; or (ii) to promote market stability and transparency, in light of the role those persons occupy within the security-based swap markets.'' [177] Security-based swap dealers are subject to a comprehensive regulatory regime under Title VII. The statutory provisions added to the Exchange Act by Title VII are intended to provide for financial responsibility associated with security-based swap dealers' activities (*e.g.,* the ability to satisfy obligations and the protection of counterparties' funds and assets), and other counterparty protections, as well as market stability and transparency.[178]

By its terms, application of the security-based swap dealer definition set forth in Section 3(a)(71) of the Exchange Act [179] does not depend on whether a security-based swap dealer or its counterparty is a U.S. person.[180] Rather, the security-based swap dealer definition encompasses persons engaged in security-based swap dealing activities without regard to the geographic location or legal residence of either the dealing person or such person's counterparties. The Commission did not provide guidance on the application of the security-based swap dealer definition to non-U.S. persons or to U.S. persons that conduct dealing activities

[171] For example, subjecting non-U.S. persons to Title VII may prompt a foreign jurisdiction to respond by subjecting U.S. persons to the foreign jurisdiction's regulatory regime. However, substituted compliance of the type proposed in this release or other mechanisms may address potential conflicts or duplication arising from overlapping regulatory requirements.

[172] *See* Section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c), as discussed in Section II.B, *supra.*

[173] *See* Section 764(a) of the Dodd-Frank Act, codified as Section 15F of the Exchange Act, 15 U.S.C. 78o–10. *See also* Section IV, *infra* (discussing major security-based swap participants).

[174] *See* Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71), as added by Section 761(a) of the Dodd-Frank Act; *see also* Section II.B.2(b), *supra.*

[175] *See* Intermediary Definitions Adopting Release, 77 FR 30596; 17 CFR 240.3a71–1.

[176] Section 3(a)(71)(D) of the Exchange Act, 15 U.S.C. 78c(a)(71)(D), provides that ''[t]he Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.'' This provision is implemented in Rule 3a71–2 under the Exchange Act (17 CFR 240.3a71–2), as discussed in the Intermediary Definitions Adopting Release, 77 FR 30626–43.

[177] Intermediary Definitions Adopting Release, 77 FR 30617.

[178] *See* Intermediary Definitions Adopting Release, 77 FR 30608; *see also* Section III.C.1, *infra* (discussing substantive requirements applicable to security-based swap dealers).

[179] 15 U.S.C. 78c(a)(71).

[180] *See* Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71); 17 CFR 240.3a71–1.

in the cross-border context in either our proposed or final rules.[181] As discussed above [182] and as further discussed below, market participants, foreign regulators, and other interested parties have raised concerns regarding, among other things, the application of Title VII to non-U.S. persons that engage in security-based swap dealing activity and U.S. persons who conduct dealing activities ''outside the United States.'' [183]

The rules and interpretations described below represent the Commission's proposed approach to applying the security-based swap dealer definition to non-U.S. persons and to U.S. persons who conduct dealing activities in the cross-border context in light of the principles discussed above.[184] Our proposal reflects a particular balancing of these principles, informed by, among other things, the particular nature of the security-based swap market,[185] the structure of security-based swap dealing activity,[186] and our experience in applying the federal securities laws in the cross-border context in the past.[187] We recognize that other approaches are possible to achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposal described below, and each proposed rule and interpretation contained therein, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of each proposed rule and interpretation and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposal.

B. Registration Requirement

1. Introduction

In the Intermediary Definitions Adopting Release, which was adopted jointly with the CFTC, the Commission set forth a *de minimis* threshold of security-based swap dealing that takes into account the notional amount of security-based swap positions connected with a person's security-based swap dealing activity over the prior 12 months.[188] When a person engages in security-based swap dealing in connection with transactions above that threshold, such person meets the definition of a security-based swap dealer under Section 3(a)(71) of the Exchange Act,[189] and the rules and regulations thereunder,[190] and is required to register as a security-based swap dealer with the Commission pursuant to Section 15F(a)(1) of the Exchange Act.[191]

The *de minimis* exception in Section 3(a)(71) of the Exchange Act is silent on its application to the cross-border security-based swap dealing activity of U.S. persons and non-U.S. persons, and the Commission did not address this issue in the Intermediary Definitions Adopting Release.[192] Without additional Commission guidance, it would be unclear how persons would be required to calculate the notional amount of their security-based swaps for purposes of the *de minimis* exception based on their global book of security-based swap dealing activity. In addition, as discussed below, commenters have raised questions regarding how the *de minimis* threshold should be applied in the cross-border context, expressing concern that, among other things, if a non-U.S. person were required to register as a security-based swap dealer with the Commission because its security-based swap dealing activity exceeded the *de minimis* threshold, it might be subject to duplicative and potentially conflicting requirements by the Commission and a foreign jurisdiction.[193]

Under the Commission's proposal, as described more fully in the following subsections of this release, a non-U.S. person [194] would be required to register as a security-based swap dealer with the Commission pursuant to Section 15F(a)(1) of the Exchange Act [195] if the notional amount of security-based swap positions connected with its security-based swap dealing activity [196] with U.S. persons (other than with foreign branches of U.S. banks) [197] or otherwise conducted within the United States [198] exceeds the *de minimis* threshold in the security-based swap dealer definition.[199] Thus, a non-U.S. person with a global security-based swap dealing business, but whose positions connected with its security-based swap dealing activity with U.S persons (other than with foreign branches of U.S. banks) or otherwise conducted within the United States fall below the *de minimis* threshold, would not be required to register with the Commission as a security-based swap dealer.[200] A U.S. person, by contrast, would be required to count all of its security-based swap transactions (including transactions conducted

[181] *See* Intermediary Definitions Adopting Release, 77 FR 30596; Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' Exchange Act Release No. 63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010) (''Intermediary Definitions Proposing Release'').

[182] *See* Section II.B, *supra.*

[183] *See* Section III.B.3, *infra.*

[184] *See* Section II.C, *supra.*

[185] *See* Section II.A, *supra.*

[186] *See* Section II.A.2, *supra.*

[187] *See* Section III.B.2, *infra.*

[188] *See* Intermediary Definitions Adopting Release, 77 FR 30626–43. The *de minimis* threshold was adopted by the Commission in the Intermediary Definitions Adopting Release to implement a statutory exclusion from the security-based swap dealer definition found in Section 3(a)(71)(D) of the Exchange Act. *See* note 176, *supra.* The *de minimis* threshold is defined in terms of a notional amount of security-based swap positions connected with dealing activity in which a person engages over the course of the immediately preceding 12 months. An entity engaged in security-based swap dealing activity in connection with security-based swap transactions with or on behalf of its customers below the *de minimis* threshold amount is exempt from designation as a security-based swap dealer. *See* Intermediary Definitions Adopting Release, 77 FR 30626.

[189] 15 U.S.C. 78c(3)(a)(71).

[190] 17 CFR 240.3a71–1 and 240.3a71–2.

[191] Section 15F(a)(1) of the Exchange Act provides that ''[i]t shall be unlawful for any person to act as a security-based swap dealer unless the person is registered as a security-based swap dealer with the Commission.'' 15 U.S.C. 78o–10(a)(1). A person that engages in security-based swap dealing activity in connection with transactions with or on behalf of customers in excess of the *de minimis* threshold falls within the security-based swap dealer definition, and such person must register as a security-based swap dealer pursuant to Section 15F(a)(1). By contrast, persons that fall within the statutory definitions of a broker and dealer in Sections 3(a)(4) and (5) of the Exchange Act, 15 U.S.C. 78c(a)(4) and (a)(5), are required to register with the Commission only if they make use of the ''mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security. . . . '' Section 15(a)(1) of the Exchange Act, 15 U.S.C. 78o(a)(1).

[192] *See* Intermediary Definitions Adopting Release, 77 FR 30628 n.407 (indicating that the Commission and the CFTC intended to address the application of the Title VII dealer regime to non-U.S. persons in separate releases).

[193] *See* Section III.B.2, *infra.*

[194] Proposed Rule 3a71–3(a)(7) under the Exchange Act (defining ''U.S. person''), as discussed in Section III.B.5, *infra.*

[195] 15 U.S.C. 78o–10(a)(1).

[196] *See* note 188, *supra.*

[197] Proposed Rule 3a71–3(a)(1) under the Exchange Act (defining ''foreign branch''), as discussed in Section III.B.7, *infra.*

[198] Proposed Rule 3a71–3(a)(5) under the Exchange Act (defining ''transaction conducted within the United States''), as discussed in Section III.B.6, *infra.* This provision would capture dealing activity undertaken by non-U.S. persons that are physically located within the United States, such as through a U.S. branch of a foreign bank, or through an agent, such as non-U.S. person's U.S. subsidiary or an unaffiliated third party acting on the non-U.S. person's behalf. As discussed elsewhere in the release, foreign security-based swap dealers utilize these organizational models as part of their global security-based swap dealing businesses. *See* Section II.A.2, *supra* (discussing dealing structures), and Section III.D, *infra* (discussing intermediation).

[199] Proposed Rule 3a71–3(b)(1)(ii) under the Exchange Act.

[200] *But see* Section III.B.9, *infra* (discussing the aggregation of affiliate positions).

through a foreign branch),[201] conducted in a dealing capacity, toward the *de minimis* threshold to determine whether it would be required to register as a security-based swap dealer with the Commission pursuant to Section 15F(a)(1) of the Exchange Act.[202]

As further discussed below, however, we are not proposing to require a non-U.S. person engaged in security-based swap dealing activity to count a transaction with a non-U.S. person conducted outside the United States toward its *de minimis* threshold, even if its performance (or the performance of its counterparty) on the security-based swap is guaranteed by a U.S. person.[203] In addition, in conformity with the position that the Commissions took in the Intermediary Definitions Adopting Release,[204] we are not proposing to require cross-border security-based swap transactions between majority-owned affiliates to be considered when determining whether a person is a security-based swap dealer.[205]

In the following subsections, we first briefly discuss the Commission's approach to the registration of foreign brokers and dealers, as background, and the views of commenters on the application of Title VII to cross-border activities, particularly as such views relate to security-based swap dealing activity. Then we propose a rule regarding the application of the *de minimis* exception to cross-border security-based swap dealing activity.[206] In order to give further definition to this proposed rule, we are proposing rules defining a number of relevant terms, including ''U.S. person'' [207] and ''transaction conducted within the United States.''[208] We also are proposing a rule excluding from a non-U.S. person's *de minimis* calculation security-based swap transactions entered into, in a dealing capacity, with a foreign branch of a U.S. bank.[209] In addition, we are proposing a rule providing an exception from the aggregation requirement, in the context of the security-based swap dealer definition, for affiliated groups with a registered security-based swap dealer.[210] Finally, we are proposing interpretive guidance regarding and requesting comment on the treatment of inter-affiliate and guaranteed transactions in the cross-border context for purposes of the *de minimis* threshold.[211]

2. Background Discussion Regarding the Registration of Foreign Brokers and Dealers

Under the Commission's traditional approach to the registration of brokers and dealers under the Exchange Act, registration and other requirements generally are triggered by a broker or dealer physically operating in the United States, even if such activities are directed only to non-U.S. persons outside the United States.[212] The Commission's territorial approach also generally requires broker-dealer registration by foreign brokers or dealers that, from outside the United States, induce or attempt to induce securities transactions by persons within the United States.[213] By contrast, the Commission has not required foreign entities to register as broker-dealers if they conduct their ''sales activities'' entirely outside the United States.[214]

In addition to our territorial approach to registration of broker-dealers under the Exchange Act, the Commission traditionally has taken an ''entity'' approach to the application of regulation to registered broker-dealers.[215] Pursuant to this approach, we have not limited the application of the Exchange Act, and rules and regulations thereunder, solely to the transactions of such entities that result in the registration requirement. Instead, we have taken the position that a registered broker-dealer is generally subject to registration and consequent substantive requirements with respect to all of its securities activity, including the activity of its branches and offices, regardless of whether the activity occurs in the United States or with U.S. persons.[216] For instance, under this approach, if a foreign broker-dealer is required to register with the Commission as a result of conducting securities activity through a branch in the United States, the registration requirements and the regulatory system governing U.S. broker-dealers, including capital, margin, and recordkeeping requirements, would apply to the entire foreign broker-dealer entity, including its head office, not just the U.S. branch.[217] By contrast, the Commission

[201] Proposed Rule 3a71–3(a)(4) under the Exchange Act (defining ''transaction conducted through a foreign branch''), as discussed in Section III.C.4, *infra.*

[202] Proposed Rule 3a71–3(b)(1)(i) under the Exchange Act.

[203] *See* Section III.B.8, *infra.* However, such U.S. guarantor may become a major security-based swap participant by virtue of the guarantee it extends on the performance of the obligations under the transaction. *See* Section IV.C.2, *infra.* In addition, a security-based swap entered into by a non-U.S. person whose performance under such security-based swap is guaranteed by a U.S. person would be required to be reported and, in certain cases, publicly disseminated, under re-proposed Regulation SBSR. *See* Section VIII.C, *infra.* Such security-based swap also may be subject to the clearing and trade execution requirements in Title VII. *See* Sections IX and X, *infra.*

[204] *See* Intermediary Definitions Adopting Release, 77 FR 30624–25.

[205] *See* Section III.B.8, *infra.*

[206] Proposed Rule 3a71–3(b) under the Exchange Act, as discussed in Section III.B.4, *infra.*

[207] Proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *infra.* The proposed definition of U.S. person is used not only in the proposed rule regarding the application of the *de minimis* threshold in the cross-border context, but also in proposed rules discussed in subsequent sections of the release.

[208] Proposed Rule 3a71–3(a)(5) under the Exchange Act, as discussed in Section III.B.6, *infra.* Like the proposed definition of U.S. person, the definition of ''transaction conducted within the United States'' is used not only in the proposed rule regarding the application of the *de minimis* threshold in the cross-border context, but also in proposed rules discussed in subsequent sections of the release. In general, under the Commission's proposal, transactions conducted within the United States, as defined in the proposed rule, would trigger certain transaction-level requirements in Title VII. *See* Sections VIII–X, *infra.*

[209] Proposed Rule 3a71–3(b)(1)(ii) under the Exchange Act; *see also* proposed Rule 3a71–3(a)(1) under the Exchange Act (defining ''foreign branch''), as discussed in Section III.B.7, *infra.*

[210] Proposed Rule 3a71–4 under the Exchange Act, as discussed in Section III.B.8, *infra.*

[211] *See* Section III.B.8, *infra.*

[212] *See* Rule 15a–6 Adopting Release, 54 FR 30016–17 (''As a policy matter, the Commission now uses a territorial approach in applying the broker-dealer registration requirements to the international operations of broker-dealers. Under this approach, all broker-dealers physically operating within the United States that effect, induce, or attempt to induce any securities transactions would be required to register as broker-dealers with the Commission, even if these activities were directed only to foreign investors outside the United States.''); *see also* Proposed Amendments to Rule 15a–6, 73 FR 39182 (''Under this [territorial] approach, broker-dealers located outside the United States that induce or attempt to induce securities transactions with persons in the United States are required to register with the Commission, unless an exemption applies'').

[213] *See* Rule 15a–6 Adopting Release, 54 FR 30016 (''[E]ven if section 30(b) [of the Exchange Act] were read to incorporate a territorial approach, the Commission does not believe that section 30(b) would exempt from broker-dealer registration the activities suggested by the commenters. In particular, directed selling efforts to U.S. investors in the United States hardly could be considered activities not traversing the U.S. territorial limits. A broker-dealer operating outside the physical boundaries of the United States, but using the U.S. mails, wires, or telephone lines to trade securities with U.S. persons located in this country, would not be, in the words of section 30(b), 'transact[ing] a business in securities without the jurisdiction of the United States.' '').

[214] *See* Rule 15a–6 Adopting Release, 54 FR 30016 (*citing* Exchange Act Release No. 25801, 53 FR 23646 n.9, and accompanying text).

[215] *See* Rule 15a–6 Adopting Release, 54 FR 30017 (''Also, the Commission uses an entity approach with respect to registered broker-dealers''); *see also* Proposed Amendments to Rule 15a–6, 73 FR 39182 (''Because this territorial approach applies on an entity level, not a branch level, if a foreign broker-dealer establishes a branch in the United States, broker-dealer registration requirements would extend to the entire foreign broker-dealer entity.'').

[216] As noted above, this is consistent with the approach we have taken in other contexts under the federal securities laws. *See* note 158, *supra.*

[217] *See* Rule 15a–6 Adopting Release, 54 FR 30017.

traditionally has not extended our regulatory oversight of broker-dealers to the activities of their corporate parents, subsidiaries, or other affiliates.[218]

The Commission's approach to registration and regulation of foreign broker-dealers thus extends Commission oversight to the global activities of non-U.S.-based securities market intermediaries that are registered broker-dealers because of their securities activities with U.S. persons or that physically operate within the United States.[219] In recognition of the internationalization of securities markets, however, the Commission has used available exemptive authority to tailor rules and regulations to the specific circumstances of foreign markets and market participants. For example, we used our exemptive authority under Section 15(a)(2) of the Exchange Act to adopt Rule 15a–6 under the Exchange Act (''Rule 15a–6''),[220] which provides limited exemptions from registration to foreign brokers or dealers engaging in securities transactions, or offering to engage in securities transactions, within the United States or with U.S. persons, subject to certain conditions.[221]

3. Comment Summary

(a) Market Participants

As noted above, various commenters expressed concerns about the ''extraterritorial'' application of Title VII, and many of these commenters expressed particular concerns about the possible extraterritorial application of security-based swap dealer regulation and registration requirements.[222] In addition to concerns described above regarding the application of Title VII to cross-border security-based swap activity,[223] commenters noted that the derivatives industry functions in a global market and that new regulations pose the potential to disrupt this market if they do not take into account the nature of the industry and the appropriate extraterritorial reach of the regulations.[224] A consistent theme in many of these comment letters was the importance of taking into account the principles of international comity in limiting the extraterritorial reach of the proposed rules, including entering into coordination agreements with our foreign regulatory counterparts on the jurisdictional reach of U.S. and foreign derivatives rules.[225]

For example, a number of commenters recommended that the Commission take a territorial approach in determining when a person engaging in security-based swap dealing activity would be required to register with the Commission as a security-based swap dealer, generally recommending registration of an entity for its security-based swaps dealing activity from within the United States or with regard to its dealings with U.S. counterparties.[226] Several commenters further suggested that a non-U.S. person's *de minimis* amount of swap activities with U.S. persons should not trigger security-based swap dealer registration.[227] Some commenters expressed the view that the Commission's cross-border framework should seek to avoid imposing duplicative regulation and unnecessary cost on entities that are already regulated in a foreign jurisdiction.[228] Some commenters have suggested that the Commission use an approach that would be modeled after the approach the Commission has applied to foreign broker-dealers in Rule 15a–6 to address issues related to cross-border security-

[218] *See id.* (''If the foreign broker-dealer establishes an affiliate in the United States, however, only the affiliate must be registered as a broker-dealer; the foreign broker-dealer parent would not be required to register.''); *see also* Proposed Amendments to Rule 15a–6, 73 FR 39182. As discussed in Section III.B.89, *infra,* this is consistent with the approach that the Commission is proposing to take in the context of security-based swap dealer registration.

[219] *See* Rule 15a–6 Adopting Release, 54 FR 30017.

[220] 17 CFR 240.15a–6.

[221] *See* Rule 15a–6 Adopting Release, 54 FR 30013. As discussed below, some commenters have suggested that the Commission use an approach that would be modeled after the approach the Commission has applied to foreign broker-dealers in Rule 15a–6 to address issues related to cross-border security-based swap transactions and foreign security-based swap dealers.

[222] *See e.g.,* ACP/AMF Letter, BaFin Letter, Cleary Letter IV, Davis Polk Letter I, Davis Polk Letter II, IIB Letter, ISDA Letter I, Japanese Banks Letter, JFSA Letter I, Newedge Letter, Rabobank Letter, Société Générale Letter I, SIFMA Letter, Société Générale Letter II, Sullivan & Cromwell Letter, and TCX Letter.

[223] *See* Section II.B, *supra.*

[224] *See* Section II.B, *supra; see also* ISDA Letter I at 17 (urging that the new regulations be implemented so as to not distort the current global derivatives market that functions ''within a relatively level international playing field,'' and noting that to address concerns related to competition and conflicts between various regulators and regulations ''[i]t is imperative that U.S. and non-U.S. regulators must coordinate requirements to avoid unintended impediments to, and fragmentation of, the derivatives markets'').

[225] *See, e.g.,* Davis Polk Letter II at 12 (recommending that in implementing Title VII regulations, ''the Commissions and the Federal Reserve should also give effect to the general jurisdictional limits specified in Sections 722 and 772 of the Dodd-Frank Act in a manner that is consistent with the principle of international comity evident in the statute and general legal principles governing statutory construction pertaining to extraterritorial and international matters''); Société Générale Letter I at 8, 11 (recommending U.S. and foreign counterparts to work toward a memorandum of understanding on the jurisdictional reach of U.S. and EU derivatives rules and warning that without cooperation between the U.S. and foreign regulators the result could be ''regulatory retaliation'' whereby ''the [s]waps market could devolve into regulatory chaos, thereby increasing systemic risk''); Newedge Letter at 10–12 (expressing concern that requiring foreign firms to register as swaps dealers or major swap participants in the U.S. ''could result in foreign regulators taking retaliatory action against U.S. firms engaging in swap activities with non-U.S. persons domiciled within their physical borders'' and that any regulation of foreign firms not physically present in the United States that are already subject to foreign regulations is unnecessary and would violate principles of international comity).

[226] *See, e.g.,* Sullivan & Cromwell Letter at 11 (''The SEC has, in the past, plainly stated that it uses a territorial approach in applying broker-dealer registration requirements to international operations. Only those broker-dealers who induce, or attempt to induce, securities transactions with persons in the United States would be required to register.''); MFA Letter II at 15–16 (commenting that the proposed security-based swap dealer and major security-based swap participant rules do not appear to encompass trading outside of the U.S. between non-U.S. entities or non-U.S. affiliates of U.S. entities, and adding that the rules also should not capture the non-U.S. affiliates of U.S. investment managers that advise offshore funds, or non-U.S.-domiciled funds that have U.S. investment managers but trade in swaps referencing non-U.S. securities or on a non-U.S. market, considering that foreign regulators will have jurisdiction over the non-U.S. activities of U.S. entities); IIB Letter at 9 (urging the Commission to adopt an interpretation that a ''reference to a U.S. underlier or reference entity in a swap conducted outside the U.S. [is not] a sufficient connection to the U.S. to subject either counterparty to U.S. Swap Dealer registration requirements''); Newedge Letter at 2 (suggesting that foreign entities engaging in swaps transactions ''with US persons should not be required to register as swaps dealers or major swaps participants in the US to the extent they are not physically located in the US and are subject to a comparable regulatory regime'').

[227] *See, e.g.,* Sullivan & Cromwell Letter at 2, 8 (acknowledging that a foreign entity's swaps transactions with U.S. persons in excess of the *de minimis* amount, ''if otherwise covered by the definitions, [should] be required to register'' as a swaps entity, but suggesting that swaps activities with U.S. persons within ''any de minimis amount authorized by the final rules and in transactions with their U.S. affiliates for purposes of risk management'' should not trigger swaps entity registration); TCX Letter at 6 (''We are concerned that, should TCX become subject to swap dealer registration notwithstanding the arguments presented above, the de minimis exception as proposed in the [Intermediary Definitions Proposing Release] has been drafted too narrowly to be of any practical use to TCXIM or to any other similarly-situated offshore entity with limited US swaps business. In particular, we urge the Commission to clarify that an offshore entity's swaps with US counterparties, excluding non-US subsidiaries of US entities, must be counted when determining if the de minimis exemption is available.'').

[228] *See, e.g.,* IIB Letter at 7 (suggesting that the ''Commissions should establish a framework for cross-border swap activities that preserves and leverages the strengths of existing market practices and home country supervision and regulation'' and ''avoid a framework that is duplicative, inefficient (for supervisors and market participants) and would result in unrealistic extraterritorial supervisory responsibilities for the Commissions and potential fragmentation of the derivatives markets'').

based swap transactions and foreign security-based swap dealers.[229]

For purposes of analyzing the appropriate definition of U.S. person in the security-based swap dealer context, several commenters suggested that the Commission look to rules adopted under the Securities Act and adopt a definition of U.S. person based on Regulation S under the Securities Act (''Regulation S'').[230] Some commenters stated the view that under Regulation S, only affiliates or branches located within the United States would be considered U.S. persons.[231] Some commenters argued that a foreign affiliate of a U.S. person and non-U.S. branches of a U.S. bank should be treated as non-U.S. persons and, depending on their dealing activity, not be required to register as security-based swap dealers because such entities may not have direct and significant connection with, or effect on, U.S. commerce.[232] One commenter further argued that a non-U.S. affiliate of a U.S. person, in its insolvency, is subject to separate resolution from its parent, and thus should be treated as a non-U.S. entity.[233]

Several commenters stated that a foreign branch or office of a U.S. person also should be treated as a non-U.S. person, despite the fact that, as a few commenters acknowledged, foreign branches of U.S. banks are not separate legal entities from their U.S. head office and typically are not separately capitalized, although in some cases they may be subject to certain local capital or reserve maintenance requirements.[234] Several commenters suggested that broker-dealer registration, not security-based swap dealer registration, may be more appropriate for a U.S. branch, agency, or affiliate that acts as an agent of a non-U.S. person for security-based swaps transactions.[235]

Several commenters acknowledged concerns that persons may seek to book transactions through non-U.S. branches or subsidiaries in an effort to evade the requirements of Title VII.[236] These commenters, however, urged that the Commissions not seek to address the potential for evasion through an overbroad definition of a security-based swap dealer, noting that there are legitimate business reasons for conducting security-based swap transactions with non-U.S. persons through non-U.S. operations.[237]

(b) Foreign Regulators

Foreign regulators have reached out to the Commission through correspondence and bilateral and multilateral discussions to better understand the approach being considered by the Commission, to express concern about the potential impact of potential approaches on their markets, and to seek regulatory coordination.[238] One of the principal concerns of foreign regulators is that the Commission would require foreign entities to register with the Commission and subject them to regulatory requirements that are duplicative of, or potentially conflict with, the requirements imposed by their home country or host country.[239] In their view, the Commission's application of Title VII requirements to foreign entities in jurisdictions that commit to developing or have developed similar OTC derivatives regulations would fail to acknowledge, under general principles of international comity, the effectiveness, suitability, and scope of foreign regulatory regimes and place undue regulatory burdens on foreign

[229] *See, e.g.,* Davis Polk Letter I at 11 n.17 (''This model is similar to the mode of operation permitted by Rule 15a–6 under the Securities Exchange Act of 1934, pursuant to which foreign broker-dealers interface with U.S. customers under arrangements with affiliated or non-affiliated broker-dealers without themselves registering as broker-dealers in the U.S.''); Cleary Letter IV at 22 (''Accordingly, as one alternative, we suggest that the Commissions adopt an approach that is modeled on the Commissions' existing regimes, permitting non-U.S. swap dealers to transact with U.S. persons without registering in the U.S. if those transactions are intermediated by a U.S.-registered swap dealer. This would be consistent with the approach adopted by the SEC under Rule 15a–6 and prior interpretative precedents with respect to non-U.S. securities dealers.'').

[230] *See* 17 CFR 230.901(k). *See, e.g.,* Cleary Letter IV at 2, 6–9; Davis Polk Letter I at note 6.

[231] *See, e.g.,* Cleary Letter IV at 7 (stating that ''Regulation S does not include as a 'U.S. person' the non-U.S. branch or affiliate of a U.S. or non-U.S. person; only affiliates or branches located in the U.S. are covered''); SIFMA Letter at 5 (stating that (''It is noteworthy that the Regulation S definition of U.S. person does not include non-U.S. affiliates of U.S. persons or non-U.S. branches of a U.S. bank. . . .'').

[232] *See, e.g.,* Sullivan & Cromwell Letter at 2–3, 6–9 (arguing against the extraterritorial application to foreign affiliates of a U.S. person, stating that when a foreign entity's ''counterparty to a transaction is a non-U.S. affiliate of a U.S. person,'' the transactions are ''removed from the U.S. stream of commerce. As a result, there is no 'direct' effect on U.S. commerce and it is highly unlikely that the transactions would have any significant effect on U.S. commerce''); ISDA Letter I at 11 (stating that ''Non-U.S. entities (including non-U.S. affiliates and branches of U.S. banks) should not be required to register as Dealers where they are conducting business with non-U.S. counterparties.'').

[233] *See* Cleary Letter IV at 7 (''The non-U.S. affiliate of a U.S. person is, in its own insolvency or that of its parent, typically subject to separate resolution from its parent and other affiliates'').

[234] *See, e.g.,* Cleary Letter IV at 7 (arguing that ''[a]lthough bank branches are not usually separately capitalized,'' they should not be considered U.S. persons because their operations are subject to separate local licensing, examination, and books and records requirements); SIFMA Letter I at 15 n.37 (''We acknowledge that Title VII capital requirements cannot be applied at the branch-level and, therefore, must be applied at the bank level.''); Sullivan & Cromwell Letter at 16 (remarking that ''foreign branches have long been allowed to engage in a wider range of activities than are their U.S. head offices and have benefitted from the presumption against applying U.S. law extraterritorially'' despite the fact that ''foreign branches of U.S. banks are not corporate entities separate and apart from their bank parents'').

[235] *See, e.g.,* IIB Letter at 10 (suggesting that a U.S.-based person who acts as an agent for a non-U.S. person in soliciting or negotiating security-based swap transactions with counterparties located outside of the U.S. should register as a broker-dealer); Rabobank Letter at 3 (recommending that U.S. affiliates who help to arrange swaps transactions with U.S. persons should ''register as futures commissions merchants or introducing brokers, broker-dealers, or swap dealers depending upon their respective roles in soliciting transactions, receiving customer margin, performing delegated compliance functions, effecting transactions as an agent on exchanges and swap execution facilities and in OTC markets, or clearing customer transactions''); *cf.* Newedge Letter at 1–2 (asserting that broker-dealers and foreign entities subject to comparable regulations who ''engage principally in customer [security-based] swap facilitation activities'' should not be subject to security-based swap dealer and major security-based swaps participant registration requirements because they already are ''subject to stringent rules relating to capital, risk, margin and other requirements by virtue of their registration status''; and alternatively, suggesting that registrants who ''execute swaps solely in response to customer orders and that hedge each such transactions individually . . . should be exempt since, among other things, their trading poses little or no risk to themselves, their customers or the markets generally.'').

[236] *See, e.g.,* Sullivan & Cromwell Letter at 10 (''We understand the concerns that the Commission may have that persons would seek to book transactions through non-U.S. branches or subsidiaries in order to evade the requirements of the CEA or Exchange Act.'').

[237] *See, e.g.,* Sullivan & Cromwell Letter at 9–10 (expressing understanding for the Commissions' evasion concerns, but noting that U.S. companies have legitimate business reasons for establishing their non-U.S. operations, including requirements in some foreign jurisdictions that only local banks and local branches of foreign banks may engage in swap activities); Cleary Letter IV at 5–7 (noting legitimate business reasons for establishing non-U.S. operations abroad, and stating that the Commissions ''should not adopt an extraterritorial regulatory framework premised on the assumption that activities conducted outside the U.S. will be undertaken for the purpose of evasion'').

[238] *See, e.g.,* BaFIN Letter at 1–2 (''Close cooperation of our respective authorities, accompanied by a Memorandum of Understanding, might help to establish an adequate regulatory environment for the swap activities of US and German entities and to provide the confidence that the respective national legislation is adequately recognized and complied with.'').

[239] *See, e.g.,* JFSA Letter I at 1–2 (requesting that Japanese financial institutions be exempted from ''Swap Dealer'' and ''Major Swap Participant'' registration under the Dodd-Frank Act); BaFIN Letter at 1 (''The obligations for foreign banks should be proportionate and take into account equivalent requirements in their home jurisdiction.''). *See also* ECB Letter at 2 (expressing concern about the ''possible inconsistency between US and EU legislation with respect to differing rules on exempting public international institutions . . . from the clearing and reporting obligation.'').

entities that conduct security-based swap business with U.S. persons.[240]

Such concerns from foreign regulators include comments that U.S. regulators should not ask financial institutions domiciled in their jurisdictions to register as security-based swap dealers because this would create undesirable redundancies for those financial institutions that are already regulated in the foreign jurisdiction.[241] Certain foreign regulators also argued that the Commission should not regulate foreign subsidiaries of U.S. security-based swap dealers because these entities would already be regulated by a foreign regulator.[242] Some foreign regulators expressed the expectation that the Commission would limit the registration of foreign banks as security-based swap dealers to operations conducting activities with U.S. counterparties or clients and would not apply the registration and regulation requirements to foreign banks as a whole.[243]

4. Application of the *De Minimis* Exception to Cross-Border Security-Based Swap Dealing Activity

The Commission recognizes the concerns raised by commenters regarding the potential for imposing inconsistent or conflicting requirements on security-based swap dealers with global operations, as well as their desire that the Commission take into account the principles of international comity when applying Title VII to cross-border dealing activity. After considering the goals of the Dodd-Frank Act and the scope of the provisions of Title VII covering security-based swap dealers, in light of the global nature of the security-based swap market, the various structures of dealing operations, and the views of commenters, the Commission is proposing an approach to the application of the Title VII registration requirement to cross-border security-based swap dealing activity that focuses on whether dealing conduct occurs with U.S. persons or otherwise occurs within the United States.

Specifically, as explained below, the Commission is proposing to require a non-U.S. person engaged in security-based swap dealing activity to register with the Commission as a security-based swap dealer pursuant to Section 15F(a)(1) of the Exchange Act[244] if the notional amount of security-based swap transactions connected with its dealing activity with U.S. persons (other than with foreign branches of U.S. banks)[245] or otherwise conducted within the United States[246] exceeds the *de minimis* threshold in the security-based swap dealer definition.[247] A U.S. person engaged in security-based swap dealing activity would be required to count all security-based swap transactions connected with its dealing activity toward the *de minimis* threshold, including transactions conducted through a foreign branch.[248]

(a) Meaning of the Term ''Person'' in the Security-Based Swap Dealer Definition

As a preliminary matter, we note that, as the Commission discussed in the Intermediary Definitions Adopting Release, the term ''person'' as used in the security-based swap dealer definition should be interpreted to refer to a particular legal person.[249] Accordingly, a trading desk, department, office, branch, or other discrete business unit that is not a separately organized legal person would not be viewed as a security-based swap dealer (regardless of where located); rather, the legal person of which it is a part would be the security-based swap dealer.[250] Similarly, the term ''person'' in the Commission's rules implementing the *de minimis* exception should be interpreted to refer to a particular legal person.[251]

Thus, the security-based swap dealer definition would apply to the particular legal person performing the dealing activity, even if that person's dealing activity is limited to a trading desk or discrete business unit.[252] The presumption is that a person who falls within the security-based swap dealer definition is a dealer with regard to all of its security-based swap activities.[253] As a result, a legal person with a branch, agency, or office that is engaged in dealing activity in connection with transactions above the *de minimis* threshold would be required to register as a security-based swap dealer, even if the legal person's dealing activity were limited to such branch, agency, or office. By contrast, each affiliate of a security-based swap dealer would need to separately consider whether it falls within the *de minimis* exception if that affiliate engages in security-based swap dealing activity.[254]

(b) Proposed Rule

We are proposing a rule identifying the types of security-based swap transactions that should be included in

[240] *See* Asian-Pacific Regulators Letter at 4.

[241] *See, e.g.,* JFSA Letter I at 1 (''If these institutions were also to be regulated under US DFA framework, this will create an undesirable and redundant effect on these Japanese institutions.'').

[242] *See, e.g.,* ACP/AMF Letter at 1–32 (''[W]e strongly support . . . a mutual recognition regime built around an adequate and balanced symmetrical system taking into account the home and the host country regulatory regimes. Thus . . . we expect that [the registration of non-resident entities] will be limited to activities in relation with US counterparties and/or clients and will not involve similar obligations to the financial organizations as a whole. The obligations for non-resident entities should indeed be proportionate and take into [account] equivalent requirements in their home jurisdiction.'').

[243] *See, e.g.,* BaFIN Letter at 1 (''Without questioning the registration of foreign banks, I suppose that such registration will be limited to activities in relation with US counterparties and/or clients and will not involve similar obligations to foreign banks as a whole'').

[244] 15 U.S.C. 78o–10(a)(1).

[245] Proposed Rule 3a71–3(a)(7) under the Exchange Act (defining ''U.S. person''), as discussed in Section III.B.5, *infra;* proposed Rule 3a71–3(a)(1) under the Exchange Act (defining ''foreign branch''), as discussed in Section III.B.7, *infra.*

[246] Proposed Rule 3a71–3(a)(5) under the Exchange Act (defining ''transaction conducted within the United States''), as discussed in Section III.B.6, *infra.*

[247] Proposed Rule 3a71–3(b) under the Exchange Act; *see also* 17 CFR 240.3a71–2.

[248] *See id.*

[249] *See* Intermediary Definitions Adopting Release, 77 FR 30624. Section 3(a)(9) of the Exchange Act defines ''person'' as ''a natural person, company, government, or political subdivision, agency, or instrumentality of a government.'' 15 U.S.C. 78c(a)(9); *see also* proposed Rule 3a71–3(a)(7) under the Exchange Act (defining ''U.S. person''), as discussed in Section III.B.5, *infra.*

[250] This approach is consistent with the Commission's discussion in the Intermediary Definitions Adopting Release regarding the entity-level designation of security-based swap dealers. 77 FR 30624. It also generally is consistent with the Commission's traditional entity approach to the registration of broker-dealers, as discussed in Section III.B.2, *supra.*

[251] *See* 17 CFR 240.3a71–2; proposed Rule 3a71–3(b) under the Exchange Act.

[252] Within an affiliated group of companies, only those legal persons that engage in dealing activities will be designated as dealers; that designation will not be imputed to other non-dealer affiliates or to the group as a whole. A single affiliate group may have multiple swap or security-based swap dealers. *See* Intermediary Definitions Adopting Release, 77 FR 30624–25. *But see* Section III.B.8, *infra* (discussing aggregation).

[253] The definition of security-based swap dealer provides that a person may be designated as a security-based swap dealer for a single type or class or category of security-based swaps or activity, and not others. *See* Section 3(a)(71)(B) of the Exchange Act, 15 U.S.C. 78c(71)(B); 17 CFR 240.3a71–1(c) (''A person that is a security-based swap dealer in general shall be deemed to be a security-based swap dealer with respect to each security-based swap it enters into, regardless of the type, class, or category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's designation as a security-based swap dealer to specified types, classes, or categories of security-based swaps or specified activities of the person in connection with security-based swaps.''). *See* note 588, *infra.*

Although the Commission is not proposing to designate non-U.S. persons as security-based swap dealers in a limited capacity, the Commission's proposed approach would limit the application of certain transaction-level requirements to the ''U.S. Business'' of foreign security-based swap dealers. *See* Section III.C.4, *infra.*

[254] *See* Section III.B.8, *infra* (discussing inter-affiliate transactions), and Section III.B.8, *infra* (discussing aggregation).

a person's calculation of the notional amount of security-based swap transactions connected with dealing activity for purposes of determining whether the *de minimis* exception excludes that dealer from the security-based swap dealer definition.[255] The proposed rule confirms that all of a U.S. person's security-based swap transactions conducted in a dealing capacity would count toward its *de minimis* threshold, wherever those transactions are solicited, negotiated, executed, or booked.[256] Although we recognize that some commenters have suggested that the Commission should not require U.S. persons to include positions connected with dealing activity conducted through foreign branches in calculating the amount of their dealing activity,[257] we are not proposing to adopt this approach. The security-based swap dealing activity of a foreign branch is activity of the U.S. legal person regardless of the role played by the foreign branch or the location of the security-based swap dealing activity. We believe that any dealing activity undertaken by a U.S. person occurs at least in part within the United States and therefore warrants application of Title VII, regardless of where particular dealing activity in connection with the transactions is conducted.[258] The security-based swap dealing activity of a U.S. person creates risk to the U.S. person and to the U.S. financial system, because the risk of such transactions ultimately is borne by the U.S. person, even if the transactions in connection with that dealing activity are conducted in part outside the United States, and because the U.S. person is part of the U.S. financial system.[259] To achieve the purposes of Title VII, including the reduction of systemic risk, we preliminarily believe that U.S. persons that engage in security-based swap dealing activity through foreign branches should be subject to the regulatory framework for dealers established by Congress in Title VII, even if they deal exclusively with non-U.S. persons.

By contrast, a non-U.S. person would be required to consider only the security-based swap transactions connected with its dealing activity with U.S. persons (other than foreign branches of U.S. banks)[260] or otherwise conducted within the United States[261] for purposes of the *de minimis* exception.[262] Under this proposed approach, a non-U.S. person would be required to calculate its security-based swap position for purposes of the *de minimis* threshold by adding together the notional amount of transactions connected with dealing activity with U.S. persons (other than foreign branches of U.S. banks)[263] or otherwise conducted within the United States.[264] As a result, a foreign entity with a global security-based swap dealing business, but whose transactions connected with its dealing activity with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States fall under the *de minimis* threshold, would not fall within the security-based swap dealer definition and, therefore, would not be required to register as a security-based swap dealer.[265]

This approach to the *de minimis* exception for non-U.S. persons engaged in cross-border dealing activity preliminarily appears to us to focus appropriately on a non-U.S. person's security-based swap dealing activity in the United States. In addition, this proposed approach, when combined with our broader approach to the registration and regulation of foreign security-based swap dealers, appears to us to appropriately focus our oversight on those non-U.S. persons engaged in security-based swap dealing activities that most directly impact the U.S. security-based swap market and U.S. financial system and that, therefore, warrant the application of the provisions of Title VII covering security-based swap dealers.[266]

[255] Proposed Rule 3a71–3(b) under the Exchange Act. Appendix B to this release contains a table that identifies whether a potential security-based swap dealer would be required to count a transaction with a specific type of counterparty toward its *de minimis* threshold. The table in Appendix B is only a summary of the rules and interpretations proposed in this release that is provided for ease of reference; it does not supersede, and should be read in conjunction with, the proposed rules and interpretations.

[256] Proposed Rule 3a71–3(b)(1)(i) under the Exchange Act. As noted above, as used in this release, ''security-based swap dealing,'' ''security-based swap dealing activity,'' ''dealing activity,'' and related concepts have the meanings described in the Intermediary Definitions Adopting Release, 77 FR 30596, unless otherwise indicated in this release. Such dealing activity is normally carried out through interactions with counterparties or potential counterparties, which includes solicitation, negotiation, or execution of a security-based swap.

[257] *See, e.g.,* Sullivan and Cromwell Letter, at 9–11.

[258] *See* notes 231 and 234, *supra.* As noted in Section II.A.3 above, the security-based swap transactions of U.S. persons, wherever entered into, give rise to ongoing obligations that may affect the financial stability of the United States and thus present the type of risk that Title VII was intended to address.

[259] These risk concerns may be greater for uncleared security-based swap than for cleared security-based swaps where the U.S. person would not retain the credit risk of its counterparty; however, cleared security-based swaps still represent an importation of risk into the U.S. financial system when entered into by U.S. persons because in the context of cleared security-based swaps, the U.S. persons would be exposed to the credit, financial, and operational risks of the clearing agency.

[260] Proposed Rule 3a71–3(a)(7) under the Exchange Act (defining ''U.S. person''), as discussed in Section III.B.5; proposed Rule 3a71–3(a)(1) under the Exchange Act (defining ''foreign branch''), as discussed in Section III.B.7, *infra.*

[261] Proposed Rule 3a71–3(a)(5) under the Exchange Act (defining ''transaction conducted within the United States''), as discussed in Section III.B.6, *infra.* Proposed Rule 3a71–3(a)(9) under the Exchange Act defines ''United States'' as ''the United States of America, its territories and possessions, any States of the United States, and the District of Columbia.'' The proposed definition of ''United States'' is consistent with the definition of that term in other contexts in the federal securities laws. *See, e.g.,* 17 CFR 230.902(l); 17 CFR 240.15a–6(b)(6).

[262] Proposed Rule 3a71–3(b)(1)(ii) under the Exchange Act.

[263] *See* Section III.B.7, *infra* (discussing the exception from the *de minimis* threshold for transactions by foreign dealers with foreign branches of U.S. banks).

[264] Proposed Rule 3a71–3(b)(1)(ii) under the Exchange Act. For purposes of the *de minimis* threshold, the U.S. person-status of a non-U.S. person's counterparty would be relevant only at the time of a transaction that arises out of the non-U.S. person's dealing activity. Any change in a counterparty's U.S. person status after the transaction is executed would not affect that transaction's treatment for purposes of the *de minimis* exception, though it would affect the treatment of any subsequent dealing transactions with that counterparty. *See also* Product Definitions Adopting Release, 77 FR 48286 (''If the material terms of a Title VII instrument are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commissions view the amended or modified Title VII instrument as a new Title VII instrument'').

[265] *See* 17 CFR 240.3a71–2(a). The Commission notes that, to the extent that a non-U.S. person does not conduct dealing activity within the United States or with U.S. persons (or to the extent that the volume of positions connected with such dealing activity does not exceed the *de minimis* threshold discussed below), it would not be required to register with the Commission as a security-based swap dealer under Section 15F(a)(1) of the Exchange Act regardless of the volume of non-dealing security-based swap transactions it has within the United States or with U.S. persons. *See* Intermediary Definitions Adopting Release, 77 FR 30631. Such an entity still would be subject to the major security-based swap participant thresholds with respect to its non-dealing security-based swap transactions. However, once a non-U.S. person's transactions with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States involve dealing activity that exceeds the *de minimis* threshold, that person would be required to register as a security-based swap dealer and would be subject to the statutory requirements applicable to security-based swap dealers for all of its security-based swap transactions. *See* Intermediary Definitions Adopting Release, 77 FR 30645.

[266] The Commission understands that entities such as foreign central banks, international financial institutions, multilateral development banks, and sovereign wealth funds (''SWFs'') (together, ''foreign public sector financial institutions'' or ''FPSFIs'') rarely enter into security-based swap transactions in a dealing capacity. As such, we believe that the proposed approach outlined in this release would sufficiently address the dealer registration concerns of these entities.

The Commission is not proposing, as some commenters have suggested, an approach modeled on Rule 15a–6(a)(3), which would permit non-U.S. persons to conduct security-based swap dealing activity with U.S. persons without registering with the Commission if such dealing activity were intermediated by a registered security-based swap dealer.[267] The Commission preliminarily believes that such an approach would not address the risk to the U.S. financial system by dealing activity of non-U.S. persons within the United States or with U.S. persons. As a dealer, the non-U.S. person would be the party to the security-based swap transaction and, therefore, the party that bears the financial risk of such transaction and whose financial integrity is of primary concern to the Commission. This concern is heightened by the fact, noted above, that, unlike most other securities transactions, security-based swap transactions give rise to ongoing obligations between the transaction counterparties.[268] Under the alternative suggested, the important financial responsibility requirements that Title VII imposes on security-based swap dealers would not apply to the non-U.S. person with respect to that transaction. Instead, the intermediating registered security-based swap dealer would be subject to the financial responsibility rules with respect to the transaction, but since it would not be a party to, and would not bear the financial risk of, the security-based swap transaction, it would not bear the ongoing financial risk of such transaction. As a result, the financial responsibility requirements imposed on the intermediating dealer would not address the dealing risk posed by the non-U.S. person in this context.[269]

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding the application of the *de minimis* exception to U.S. persons and non-U.S. persons, including the following:

- Should the proposed rule limit the *de minimis* test to the notional amount of a U.S. person's positions connected with its dealing activity involving transactions with other U.S. persons or otherwise conducted within the United States? For example, should the proposed rule be altered to provide that U.S. banks would not include the notional amount of transactions connected with the dealing activity of their foreign branches in the *de minimis* calculation, rather than counting these transactions against the *de minimis* threshold as required under the proposed approach? Why or why not?
- Should the proposed rule require non-U.S. persons to count transactions with the foreign branches of U.S. banks towards their *de minimis* calculations? Why or why not?
- Should the proposed rule follow an approach modeled on Rule 15a–6(a)(3), which would permit non-U.S. persons to conduct security-based swap dealing activity within the United States without registering with the Commission if those transactions were intermediated by a registered U.S. security-based swap dealer? If so, what compliance obligations, if any, should the unregistered non-U.S. person be subject to? What obligations should the U.S. security-based swap dealer be subject to with respect to such intermediated transactions, particularly with respect to capital, margin, and segregation requirements? How would this approach deal with risk concerns, especially with any security-based swaps not subject to clearing?
- Should the proposed rule follow an approach modeled on Rule 15a–6(a)(4)(i), which would permit non-U.S. persons to conduct security-based swap dealing activity within the United States without registering with the Commission if those transactions were with a registered U.S. security-based swap dealer? If so, what conditions, if any, should the Commission impose on such an exception?
- Should non-U.S. persons acting in a dealing capacity be required to count transactions entered into with registered security-based swap dealers toward their *de minimis* threshold? Why or why not? If non-U.S. persons are not required to count security-based swap transactions, conducted in a dealing capacity, with registered security-based swap dealers, should U.S. persons be required to count security-based swap transactions, conducted in a dealing capacity, with registered security-based swap dealers? If not, why not? If so, why?
- The CFTC has proposed an interpretation that would require a non-U.S. person to consider the aggregate notional value of its swap dealing transactions (or any swap dealing transactions of its affiliates under common control) where the non-U.S. person's obligations are guaranteed by a U.S. person.[270] Should the proposed rule require a non-U.S. person whose security-based swap transactions are guaranteed by a U.S. person to count all of its security-based swap dealing transactions that are guaranteed by a U.S. person toward the *de minimis* threshold, even if they are not entered into with U.S. persons or otherwise conducted within the United States?
- Should the proposed rule require counting against the *de minimis* threshold the notional amount of a non-U.S. person's transactions entered into in its dealing capacity within the United States or with a U.S. person? Should a non-U.S. person be required instead to aggregate the total worldwide notional amount of its security-based swap transactions entered into in a dealing capacity, regardless of the geographic location of the dealing activity or the counterparty's status as a U.S. person if it engages in any dealing transactions with U.S. persons? Why or why not?
- What circumstances, if any, would justify requiring a non-U.S. person to register with the Commission if its dealing activity arising from its transactions with non-U.S. persons outside the United States would exceed the *de minimis* threshold if it had been conducted within the United States or with U.S. persons but the non-U.S. person enters into transactions within the United States or with U.S. persons solely in a non-dealing capacity?
- What circumstances would justify following a different territorial approach that would treat transactions connected with the dealing activity conducted by a U.S. person through its foreign locations with non-U.S. persons as outside the United States and not required to be counted against such U.S. person's *de minimis* threshold?
- Does the Commission's proposed approach adequately address the concerns of FPSFIs? Is our understanding of the security-based swap activity of FPSFIs accurate? If not, please explain.
- What would be the market impact of the proposed approach to apply the *de minimis* exception in the cross-border context? How would the proposed application of the *de minimis*

The Commission is soliciting comment on whether our proposal sufficiently addresses the concerns of FPSFIs and whether our understanding of the security-based swap activity of such entities is accurate. *See also* Section III.B.5(b)iv, *infra* (discussing international organizations).

[267] *See* note 229, *supra.*

[268] *See* Section II.A.3, *supra.*

[269] The Commission also is not proposing a dealer-to-dealer exception modeled on Rule 15a–6(a)(4)(i) (providing that a foreign broker or dealer shall be exempt from the registration requirements of Section 15(a)(l) or 15B(a)(l) of the Exchange Act to the extent that the foreign broker or dealer effects transactions in securities with or for, or induces or attempts to induce the purchase or sale of any security by "[a] registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others, or a bank acting in a broker or dealer capacity as permitted by U.S. law").

[270] *See* CFTC Cross-Border Proposal, 77 FR 41221.

exception to U.S. persons and non-U.S. persons affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the *de minimis* exception? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

5. Proposed Definition of ''U.S. Person''

Introduction

The proposed rule defining ''U.S. person'' would identify a person's status as a U.S. person for purposes of applying the calculation for the *de minimis* exception in the cross-border context.[271] The proposed definition of U.S. person generally follows an approach to defining U.S. person similar to that used by the Commission in other contexts.[272] Specifically, the proposed rule would define U.S. person to mean any of the following:

- Any natural person resident in the United States;
- Any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States [273] or having its principal place of business in the United States; or
- Any account (whether discretionary or non-discretionary) of a U.S. person.[274]

The proposed rule also would provide that the term ''U.S. person'' would not include the following international organizations: The International Monetary Fund (''IMF''), the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.[275]

We preliminarily believe that the proposed definition of U.S. person would achieve three objectives necessary to effective application of Title VII in the cross-border context. First, it would identify those types of individuals or entities that, by virtue of their location within the United States or their legal or other relationship with the United States, are likely to impact the U.S. market even if they transact with security-based swap dealers that are not U.S. persons.[276] Second, it would identify those types of individuals or entities that, by virtue of their location within the United States or their legal or other relationship with the United States, are part of the U.S. security-based swap market and should receive the protections of Title VII. Third, it would permit us to identify dealing entities that most likely would be active in the U.S. security-based swap market and whose dealing activity most likely would pose a risk to the U.S. financial system by virtue of their counterparties' resident or domicile status.

Because of the nature of the risks posed by security-based swaps, which are borne by the entire corporate entity even if the transaction is entered into by a specific trading desk, office, or branch of such entity, consistent with the Commission's approach to the meaning of ''person'' in the security-based swap dealer definition, as discussed above, we are proposing to define the term ''U.S. person'' to include the entire entity, including its branches and offices that may be located in a foreign jurisdiction.[277] Thus, under this approach, the term ''U.S. person'' would be interpreted to include any foreign trading desk, office, or branch of an entity that is organized under U.S. law or whose principal place of business is located in the United States.[278]

(b) Discussion

i. Natural Persons

Under the proposed rule, any natural person resident in the United States would be a U.S. person, regardless of that individual's citizenship status.[279] Individuals resident abroad, on the other hand, would not be treated as U.S. persons, even if they possess U.S. citizenship.[280] We preliminarily believe that natural persons residing within the United States who engage in security-based swap transactions may raise the types of concerns intended to be addressed by Title VII, including those related to transparency and customer protection.[281] We also note that this approach is generally consistent with the approach we have taken in prior rulemakings relating to the cross-border application of certain similar regulatory requirements.[282] Moreover, any risk to such person arising from its security-based swap activity may manifest itself most directly within the United States, where a significant portion of its commercial and legal relationships exist because that is where its residency is (unlike a U.S. citizen resident abroad).

ii. Corporations, Organizations, Trusts, and Other Legal Persons

Under the proposed rule, any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States [283] or having as its principal place of business in the United States would be a U.S. person.[284] We have previously looked to an entity's place of

[271] Proposed Rule 3a71–3(a)(7) under the Exchange Act. The definition of ''U.S. person'' also is used in other proposed rules and interpretive guidance discussed below. *See* Sections IV–XI, *infra*.

[272] *See, e.g.,* Regulation S Adopting Release, 55 FR 18308 (''The Regulation adopted today is based on a territorial approach to Section 5 of the Securities Act.''). Although the proposed rule generally follows the same approach as Regulation S, the Commission preliminarily believes that it is necessary to depart from Regulation S in certain respects. *See* Section III.B.10, *infra* (comparing the proposed definition of ''U.S.'' person with the definition of ''U.S. person'' in Regulation S). Notably, neither the Exchange Act nor Rule 15a–6 contains a definition of U.S. person.

The proposed definition of U.S. person is similar to the definition of U.S. person that the CFTC staff provided its October 12, 2012 no-action letter. *See* Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant (Oct. 12, 2012), *available at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-22.pdf*; *see also* Final CFTC Cross-Border Exemptive Order, 78 FR 862 (indicating that for purposes of its temporary conditional relief the CFTC is taking a similar approach to the U.S. person definition as that set forth in the October 12, 2012 no-action letter).

[273] Proposed Rule 3a71–3(a)(9) under the Exchange Act defines ''United States'' as ''the United States of America, its territories and possessions, any States of the United States, and the District of Columbia.''

[274] Proposed Rule 3a71–3(a)(7)(i) under the Exchange Act.

[275] Proposed Rule 3a71–3(a)(7)(ii) under the Exchange Act.

[276] As noted in Section II.A.3 above, the security-based swap transactions of U.S. persons give rise to ongoing liability that is borne by a person located within the United States and thus are likely to pose the types of financial stability risks to U.S. financial system that Title VII was intended to address. The security-based swap activity of U.S. persons occurs, at least in part, within the United States.

[277] *See* Section III.B.4(a), *supra*.

[278] *Id.*

[279] Proposed Rule 3a71–3(a)(7)(i)(A) under the Exchange Act.

[280] This proposed approach to treating natural persons as U.S. persons based on residency, rather than citizenship, differs from the proposed approach to legal entities, such as partnerships and corporations, discussed below.

[281] *See* note 4, *supra*.

[282] *See* Rule 15a–6 Adopting Release, 54 FR 30017 (providing that foreign broker-dealers soliciting U.S. investors abroad generally would not be subject to registration requirements with the Commission).

[283] Proposed Rule 3a71–3(a)(9) under the Exchange Act (defining ''United States'').

[284] Proposed Rule 3a71–3(a)(7)(i)(B) under the Exchange Act.

organization or incorporation to determine whether it is a U.S. person in adopting rules under the federal securities laws,[285] and we preliminarily believe that it is also appropriate to do so in the context of Title VII. We preliminarily believe that the decision of a corporation, trustee, or other entity to organize under the laws of the United States indicates a degree of involvement in the U.S. economy or legal system that warrants ensuring that its security-based swap activity is subject to the requirements of Title VII.[286]

Similarly, we believe that the proposed definition should ensure that Title VII applies to entities that are organized or incorporated in a jurisdiction outside the United States if they have their principal place of business in the United States.[287] Any risk to such entities arising from their security-based swap activity is likely to manifest itself most directly within the United States, where a significant portion of their commercial and legal relationships would be likely to exist. Moreover, focusing exclusively on whether an entity is organized or incorporated in the United States could encourage some entities that are currently organized or incorporated in the United States to incorporate in a non-U.S. jurisdiction to avoid the costs of complying with Title VII while maintaining their principal place of business—and thus in all likelihood, the risks arising from their security-based swap transactions—within the United States. To prevent this possibility, we are proposing to define ''U.S. person'' to include entities that are organized or incorporated abroad but have their principal place of business within the United States.[288]

An entity's status as a U.S. person under the proposed rule would be determined at the legal entity-level and thus apply to the entire legal entity, including any foreign operations that are part of the U.S. legal entity.[289] Consistent with this entity-level approach, a foreign branch, agency, or office of a U.S. person would be treated as a U.S. person under the proposed definition.[290] As the Commission noted in proposing Regulation SBSR, ''[b]ecause a branch or office has no separate legal existence under corporate law, the branch or office would be an integral part of the U.S. person itself.'' [291] In other words, because a branch or office is merely an extension of the head office, not a separately incorporated or organized legal entity, we preliminarily believe that it lacks the legal independence to be considered a non-U.S. person for purposes of Title VII if its head office is a U.S. person. We preliminarily believe a wholesale exclusion from the requirements of Title VII for a foreign branch, agency, or office of a U.S. person is not warranted with respect to its security-based swap transactions because the legal obligations and economic risks associated with the transactions directly affect a U.S. person, of which the branch, agency, or office is merely a part.

Under the proposed definition, the status of an entity as a U.S. person would have no bearing on whether separately incorporated or organized legal entities in its affiliated corporate group are U.S. persons. Accordingly, a foreign subsidiary of a U.S. person would not be a U.S. person by virtue of its relationship with its U.S. parent. Similarly, a foreign entity with a U.S. subsidiary would not be a U.S. person simply by virtue of its relationship with its U.S. subsidiary.[292] The Commission preliminarily believes that it is appropriate to treat each affiliate separately because of the distinct legal status of each of the affiliates.[293]

iii. Accounts of U.S. Persons

Consistent with the proposed definition's focus on the location of the person bearing the actual risk arising from the security-based swap transaction, the proposed definition of U.S. person would include any accounts (whether discretionary or not) of U.S. persons.[294] Such accounts would be U.S. persons regardless of whether the entity at which the account is held or maintained is a U.S. person. Conversely, accounts of non-U.S. persons would not be U.S. persons solely because they are held by a U.S. financial institution or other entity that is itself a U.S. person.[295] In our view, the purposes of Title VII require that its provisions apply to the person that actually bears the risks arising from the security-based swap transaction.[296] For this reason, we preliminarily believe that the status of accounts, wherever located, should turn on whether any owner of the account is itself a U.S. person,[297] and not on the status of the fiduciary or other person managing the account, the discretionary or non-discretionary nature of the

[285] *See* Regulation S Adopting Release, 55 FR 18316.

[286] Under this prong of the proposed rule, ''special entities,'' as defined in Section 15F(h)(2)(C) of the Exchange Act, would be U.S. persons because they are legal persons organized under the laws of the United States. Section 15F(h)(2)(C) of the Exchange Act defines the term ''special entity'' as ''(i) a Federal agency; (ii) a State, State agency, city, county, municipality, or other political subdivision of a State; (iii) any employee benefit plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; (iv) any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; or (v) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.'' 15 U.S.C. 78o–10(h)(2)(C).

[287] For example, a business may be incorporated under the laws of a foreign jurisdiction but nonetheless have its business operations, including its home office, in the United States.

[288] As discussed in Section III.B.6 below, the Commission also is proposing to require non-U.S. persons that conduct security-based swap transactions within the United States, in a dealing capacity, to count such transactions toward their *de minimis* threshold. In addition, the Commission is proposing to subject security-based swap transactions that are conducted within the United States to certain transaction-level requirements in Title VII in connection with reporting and dissemination, clearing, and trade execution. *See* Sections VIII–X, *infra.*

[289] In principle, Regulation S looks to the location of the branch rather than the jurisdiction in which the entity is organized or incorporated in determining whether the branch is a U.S. person. *See* 17 CFR 230.902(k)(1)(v) and (2)(v). Thus, under Regulation S, the foreign branch of a U.S. bank is not treated as a U.S. person while the U.S. branch of a foreign bank is treated as a U.S. person. Under subsection (a)(7)(ii) of proposed Rule 3a71–3 under the Exchange Act, the foreign branch of a U.S. bank would be treated as part of a U.S. person. *See* Section III.B.10, *infra* (discussing the proposed definition of ''U.S. person'' with the definition of ''U.S. person'' in Regulation S).

[290] Proposed Rule 3a71–3(a)(7) under the Exchange Act.

[291] *See* Regulation SBSR Proposing Release, 75 FR 75240 (''The Commission intends for this proposed definition [of U.S. person] to include branches and offices of U.S. persons''). The Commission is re-proposing Regulation SBSR in this release, including its definition of U.S. person. *See* Section VIII, *infra.*

[292] *See* Section III.B.8, *infra.*

[293] *But see* Section III.B.8, *infra* (discussing the aggregation of affiliate positions for purposes of the *de minimis* calculation).

[294] Proposed Rule 3a71–3(a)(7)(i)(C) under the Exchange Act.

[295] An account of a non-U.S. person and, therefore, not a ''U.S. person'' under proposed Rule 3a71–3(a)(7) under the Exchange Act, may nevertheless engage in ''transactions conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act. For example, if a non-U.S. person executes a security-based swap from an office located in the United States that security-based swap would be a ''transaction conducted within the United States'' even though neither party would be a ''U.S. person.'' Similarly, if a non-U.S. person solicits a counterparty within the United States to enter into a security-based swap transaction, that transaction would be a ''transaction conducted within the United States,'' regardless of whether both counterparties were non-U.S. persons. *See* Section III.B.6, *infra.*

[296] The same approach would apply to an account of a partnership, corporation, trust, or other legal person (*e.g.,* a fund or a special-purpose investment vehicle) to enter into a security-based swap. If the partnership, corporation, trust, or other legal person were a U.S. person, the account would be a U.S. person.

[297] For purposes of this definition, the term ''account'' includes both discretionary accounts and non-discretionary accounts. *See* proposed Rule 3a71–3(a)(7)(i)(C) under the Exchange Act.

account, or the status of the entity at which the account is held or maintained.[298] Thus any account of a U.S. person would be a U.S. person for purposes of Title VII.

iv. International Organizations

In addition to identifying the persons that fall within the U.S. person definition, the proposed rule also provides a list of specific international organizations that do not fall within such definition.[299] This list includes ''the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.'' [300] Although these organizations may have headquarters in the United States, the Commission preliminarily believes that most of their membership and financial activity are outside the United States. Thus, based on the nature of these entities as international organizations the Commission is proposing not to treat them as U.S. persons for purposes of Title VII.[301]

(c) Conclusion

In short, by following a territorial approach, the Commission preliminarily believes that the proposed definition of U.S. person describes the types of individuals and entities residing, organized, or conducting business within the United States, and the types of accounts that should be designated as U.S. persons for purposes of the proposed rule regarding application of the *de minimis* exception to security-based swap dealers.[302]

Request for Comment

The Commission requests comment on all aspects of the proposed definition of ''U.S. person,'' including the following:

- Does the proposed definition of ''U.S. person'' appropriately address the concerns of security-based swap dealer regulation under Title VII?
- Does the proposed definition appropriately identify all individuals or entities that should be designated as U.S. persons? Is the proposed definition too narrow or too broad? Why? Do the proposed criteria for determining whether an entity is a U.S. person effectively describe the types of counterparties that are relevant to identifying the transactions a security-based swap dealer must count when calculating its *de minimis* threshold for purposes of determining whether it is required to register as a security-based swap dealer and comply with the requirements of Title VII? Does the proposed definition appropriately identify the types of entities that should be entitled to the protections afforded to counterparties of security-based swap dealers under Title VII?
- Does the proposed definition appropriately treat natural persons residing in the United States as U.S. persons? Should certain categories of persons residing in the United States be excluded from the definition of U.S. person? Should certain categories of persons (such as U.S. citizens or permanent residents) residing abroad be included in the definition of U.S. person? Please explain why excluding or including particular categories of natural persons would be consistent with and further the objectives of dealer regulation under Title VII.
- Is the proposed approach to the U.S. person status of natural persons based on residency, rather than citizenship, appropriate? In particular, is the proposed approach to natural persons, which differs from the proposed approach to legal entities, such as partnerships and corporations, appropriate in light of the fact that, as the Commission understands, natural persons rarely enter into security-based swaps?
- Does incorporation or organization under the laws of the United States appropriately define the types of entities (both for-profit and non-profit) that should be treated as U.S. persons under Title VII? Is it appropriate to define an entity as a U.S. person if it has its principal place of business in the United States, even if it is incorporated or organized under the laws of a foreign jurisdiction? Why or why not?
- Does the proposed rule adequately address the risk of evasion or avoidance of Title VII requirements? Are there entities incorporated or organized under foreign law that should be defined as a U.S. person under the proposed rule that are not currently so defined? For example, should an entity incorporated or organized under foreign law but whose security-based swap transactions are guaranteed by a U.S. person be defined as a U.S. person? Why or why not? Should a foreign entity that conducts security-based swap dealing activity predominantly with U.S. persons or within the United States be defined as a U.S. person? If so, why?
- Is it appropriate to determine the U.S. person status of a corporation or organization on an entity-wide basis? Why or why not? Should foreign branches, offices, or agencies of U.S. persons be U.S. persons? Why or why not? What distinguishes transactions mediated or entered into by a foreign branch of a U.S. bank from transactions entered into by the head office of such U.S. bank for purposes of Title VII regulation?
- What, if any, competitive concerns would be raised by defining foreign branches, offices, or agencies of U.S. persons as non-U.S. persons? Please explain the mechanism of any competitive effects. For example, would particular business structures become unworkable under this approach and what would be the relevant impact? If so, please explain possible alternatives and their relative competitiveness.
- Should the proposed rule include within the definition of U.S. person foreign affiliates of U.S. persons? Should other factors be taken into account in determining the status of such affiliated entities, such as, for example, whether performance on the security-based swap obligations of the foreign entity is guaranteed by a U.S. affiliate? Should a foreign entity with performance on its security-based swap obligations guaranteed by a U.S. affiliate, where such foreign entity's security-based swap dealing activity is conducted predominantly or exclusively with non-U.S. persons, be included within the definition of U.S. person? Why or why not?
- Should a foreign branch of a U.S. parent, including a foreign branch of a U.S. bank, be included in the definition of ''U.S. person'' for all purposes under Title VII? Why or why not?

[298] This proposed approach is consistent with the treatment of managed accounts in the context of the major security-based swap participant definition, whereby the swap or security-based swap positions in client accounts managed by asset managers or investment advisers are not attributed to such entities for purposes of the major participant definitions, but rather are attributed to the beneficial owners of such positions based on where the risk associated with those positions ultimately lies. *See* Intermediary Definitions Adopting Release, 77 FR 30690.

[299] Proposed Rule 3a71–3(a)(7)(ii) under the Exchange Act.

[300] *Id.*

[301] Regulation S also specifies that these international organizations are not considered U.S. persons, but Regulation S also considers affiliates of such organizations to be non-U.S. persons. *See* 17 CFR 230.902(k)(2)(vi). The Commission is soliciting comment on whether affiliates of such organizations should be treated as non-U.S. persons under proposed Rule 3a71–3(a)(7) under the Exchange Act. Currently, under the proposed rule, an affiliate of one of these international organizations would have to separately consider its U.S. person-status.

[302] As discussed below, the proposed definition is used in other proposed rules and interpretive guidance in the release. *See* Sections IV–XI, *infra.*

• Should a majority-owned subsidiary of a U.S. parent, regardless of whether the subsidiary has financial guarantees from the U.S. parent, be included in the definition of ''U.S. person'' for purposes of Title VII? Why or why not?

• Should an account of one U.S. person and one or more non-U.S. persons be treated as a U.S. person? Should the Commission instead establish a *de minimis* threshold amount or otherwise allows some U.S. person ownership without triggering U.S. person status for the account? If so, how?

• The CFTC has proposed a definition of U.S. person that would include a legal entity that is directly or indirectly majority-owned by one or more U.S. persons and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability).[303] Should the Commission adopt a similar approach? If so, why? How should majority ownership be determined? Is majority ownership the appropriate test? If not, should some other percentage test be used (*e.g.,* 25% or some other measure of control)? Are there operational or other difficulties in implementing such an approach?

• Should entities, whatever their place of domicile, that guarantee the performance of U.S. person counterparties to security-based swaps themselves be deemed U.S. persons? Why or why not? How would treating such indirect counterparties to security-based swaps as U.S. persons affect the application of Title VII rules?

• Is the proposed definition's focus on the status of the person bearing the actual risk in the transaction (*e.g.,* looking at the status of the account owner rather than the person with authority to direct the investment decisions) appropriate in determining whether the person is a U.S. person?

• The CFTC has proposed a definition of U.S. person that would include any pension plan for the employees, officers or principals of a legal entity with its principal place of business inside the United States. Should the Commission adopt a similar approach? If so, what categories of entities would or would not be U.S. persons when compared to the Commission's proposed approach? How is including or excluding such entities, as applicable, from the definition of U.S. person consistent with and in furtherance of the objectives of Title VII?

• Does the proposed rule appropriately address the treatment of certain international organizations with respect to the definition of U.S. person? Should any or all of the organizations specifically identified in the proposed rule be treated as U.S. persons? If so, why? Are there other similarly situated international organizations that should also be explicitly excluded from the U.S. person definition? Should the affiliates of international organizations be treated as non-U.S. persons, even if organized under U.S. law? If so, why? If not, why not?

• Should the proposed definition expressly exclude from the definition of U.S. person any other entity or category of entities? If so, which ones and why?

• The CFTC has proposed a definition of U.S. person that would include any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person. Should the Commission adopt a similar definition that includes any investment fund, commodity pool, pooled account, or collective investment vehicle of which a majority ownership is held by one or more U.S. persons, even if such entity is not incorporated or organized under the laws of the United States, or does not have its principal place of business in the United States? If so, why and how should majority ownership be determined? Is majority ownership the appropriate test? If not, should some other percentage test be used (*e.g.,* 25% or some other measure of control)? Are there operational or other difficulties in implementing such an approach?

• The CFTC has proposed a definition of U.S. person that would include any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA.[304] Should the Commission adopt a similar definition that includes any investment fund, commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA or an investment adviser under the Investment Advisers Act of 1940 (''Investment Advisers Act'')? If so, why?

• Should the definition of U.S. person specifically address the status of estates, which is specifically addressed in Regulation S?[305] If so, please explain the types of security-based swap transaction such entities typically engage in and describe any problems created by the proposed definition of U.S. person relative to the goals of Title VII.

• The CFTC has proposed a definition of U.S. person that would include any estate or trust, the income of which is subject to U.S. income tax regardless of source. Should the Commission adopt a similar approach? If so, why?

• Should the Commission define the term ''principal place of business'' for purposes of the proposed definition of ''U.S. person''? If so, should the Commission define ''principal place of business'' as the location of the personnel who direct, control, or coordinate the security-based swap activities of the entity?[306] If no, how should the Commission define it?

6. Proposed Definition of ''Transaction Conducted Within the United States''

We are proposing a definition of ''transaction conducted within the United States'' to identify security-based swap transactions that involve activities in the United States that the Commission preliminarily believes would warrant requiring a non-U.S. person to count such transactions toward its *de minimis* threshold in the security-based swap dealer definition.[307] Under the proposed rule, ''transaction conducted within the United States'' would be defined to mean any ''security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty

[303] *See* CFTC Further Proposed Guidance, 78 FR 912.

[304] *See* CFTC Cross-Border Proposal, 77 FR 41218.

[305] *See* Section III.B.10, *infra* (discussing the definition of ''U.S. person'' in Regulation S).

[306] This focus would be generally consistent with the focus of the definition of ''principal office and place of business'' in the Investment Advisers Act, where it is defined as ''the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.'' 17 CFR 275.222–1(b).

[307] Proposed Rule 3a71–3(a)(5) under the Exchange Act. The proposed definition of ''transaction conducted within the United States'' also is used in other places in the release in the context of our proposed application of Title VII requirements in the cross-border context. *See* Sections VIII–X, *infra.* The proposed definition of ''transaction conducted within the United States,'' and related discussion in this release, is not intended to apply outside of the scope of the proposals set forth in this release, unless otherwise indicated. Accordingly, it thus does not affect other rights or obligations of parties under the Exchange Act or the federal securities laws generally.

to the transaction.'' [308] It would not, however, include a transaction conducted through a foreign branch of a U.S. bank, for reasons discussed below.[309]

As noted above, dealing activity is normally carried out through interactions with counterparties or potential counterparties that include solicitation, negotiation, execution, or booking of a security-based swap.[310] Engaging in any of these activities within the United States, as part of dealing activity, would involve a level of involvement in a security-based swap transaction that the Commission believes should require such transaction to count toward a potential security-based swap dealer's *de minimis* threshold. The proposed rule, therefore, is designed to identify for market participants the key aspects of a security-based swap transaction that the Commission believes should trigger security-based swap dealer registration requirements.

By contrast, we are not proposing to include either submitting a transaction for clearing in the United States or reporting a transaction to an SDR in the United States as activity that would cause a transaction to be conducted within the United States under the proposed rule, nor are we proposing to treat activities related to collateral management (*e.g.,* exchange of margin payments) that may occur in the United States or involve U.S. banks or custodians as activity conducted within the United States for these purposes. We recognize that submission of a transaction for clearing to a CCP located in the United States poses risk to the U.S. financial system, and collateral management plays a vital role in an entity's financial responsibility program and risk management. However, we preliminarily believe that none of these activities, by themselves, involves activities conducted between a potential dealer and its counterparty that may be characterized as dealing activity, although clearing and collateral management services may be offered in conjunction with dealing activity.

Under the rule adopted by the Commission, jointly with the CFTC, a potential security-based swap dealer is required to consider the security-based swap positions ''connected with'' the dealing activity in which the potential dealer—or any other entity controlling, controlled by or under common control with the potential dealer—engages over the course of the immediately preceding 12 months (or following the effective date of final rules implementing Section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68), if that period is less than 12 months).[311] By incorporating the definition of a ''transaction conducted within the United States'' into the proposed rule applying the *de minimis* exception in the cross-border context,[312] the Commission is proposing that non-U.S. persons engaged in cross-border dealing activity include in their *de minimis* calculations any security-based swap transaction that is connected with [313] an entity's dealing activity with another non-U.S. person if a U.S. branch or office of either counterparty, or an associated person [314] of either counterparty—including any affiliate and any associated person of any affiliate, or a third party agent, located within the United States—is directly involved in the transaction. Thus, a non-U.S. person engaged in security-based swap dealing activity would be required to count toward its *de minimis* threshold any dealing transaction entered into with another non-U.S. person that was conducted in the United States, whether the transaction falls within the ''conducted within the United States'' definition through such non-U.S. person's own activity (or that of an agent within the United States), or that of its non-U.S. person counterparty (or such counterparty's agent).[315] Similarly, if any transaction connected with a non-U.S. person's dealing activity is executed within the United States, the non-U.S. person would be required to count that transaction toward its *de minimis* threshold.[316]

We recognize that many of a non-U.S. person's transactions conducted within the United States that arise out of its dealing activity may also be transactions with U.S. persons, and thus would already be counted for purposes of the *de minimis* threshold. However, requiring non-U.S. persons to include in their *de minimis* calculations only transactions with U.S. person counterparties would enable such persons to engage in significant amounts of security-based swap dealing activity within the United States without Commission oversight as a security-based swap dealer, so long as the dealing activity were limited to non-U.S. persons.[317] This would be the case if the potential dealer operated out of a branch, office, or affiliate, or utilized a third-party agent acting on its behalf within the United States, or merely directed its dealing activity to non-U.S. persons that themselves operate out of the United States, either through branches, office, or affiliates, or by utilizing third party agents.[318] The Commission preliminarily does not believe that this would be consistent with the purposes of the Dodd-Frank Act, which is intended, in part, to promote accountability and transparency in the U.S. security-based swap market.[319]

First, we preliminarily believe that when a non-U.S. person engages in dealing activity with another non-U.S. person from within the United States either through an agent, branch, or office, or otherwise engages in security-based swap dealing activity within the United States (such as by soliciting persons within the United States from outside the United States), the solicitation, negotiation, or execution activity that occurs within the United States constitutes dealing activity that is described by the security-based swap dealer definition.[320] This is the case even where such transaction is

[308] Proposed Rule 3a71–3(a)(5)(i) under the Exchange Act. The use of the term ''counterparty'' in the proposed rule is intended to refer to the direct counterparty to the security-based swap transaction, not a party that provides a guarantee on the performance of the direct counterparty to the transaction. *See* Section VIII.A, *infra* (distinguishing between direct and indirect counterparties).

[309] Proposed Rule 3a71–3(a)(4)(ii) under the Exchange Act. *See* proposed Rule 3a71–3(a)(4) under the Exchange Act (defining ''transaction conducted through a foreign branch''), as discussed in Section III.B.7, *infra.*

[310] *See* Section II.B.2(b), *supra.* More generally, solicitation, negotiation, execution, and booking are activities that represent key stages in a potential or completed security-based swap transaction. As discussed below, transactions conducted within the United States, regardless of whether in a dealing or non-dealing capacity, would generally be subject to requirements relating to reporting and dissemination, clearing, and trade execution. *See* Sections VIII–X, *infra.*

[311] *See* 17 CFR 240.3a71–2(a)(1).

[312] *See* proposed Rule 3a71–3(b) under the Exchange Act.

[313] The *de minimis* exception threshold is computed based on the notional amount of an entity's security-based swap positions, connected with its dealing activity, not transactions that are merely solicited. *See* Intermediary Definitions Adopting Release, 77 FR 30630.

[314] *See* Section 3(a)(70) of the Exchange Act, 15 U.S.C. 78c(a)(70) (defining ''person associated with a security-based swap dealer or major security-based swap participant''); *see also* note 472, *infra.*

[315] *See* Proposed Rule 3a71–3(b)(1)(ii) under the Exchange Act.

[316] *See id.*

[317] Depending on the nature of the activity and the person located in the United States engaging in the activity, such person may need to register with the Commission as a broker-dealer under Section 15(a)(1) of the Exchange Act, 15 U.S.C. 78o(a)(1).

[318] The Commission is not distinguishing, for purposes of the proposed rule, whether a potential dealer or its counterparty is operating out of a branch, an office, an affiliate, or utilizes a third-party agent to act on its behalf. We are, however, soliciting comment on whether there is a basis for drawing distinctions in this area and look forward to receiving commenters' views.

[319] *See* note 97, *supra.*

[320] *See* Section II.B.2(b), *supra.*

ultimately booked by the two non-U.S. entities outside the United States. Second, most market participants, including non-U.S. persons, entering into a security-based swap transaction with a security-based swap dealer, particularly through personnel located in the United States, could reasonably expect to be entitled to the customer protections of Title VII because of Title VII's role in setting the standards for the U.S. security-based swap market and the market participant's decision to engage in a transaction within that market.[321] Given the Commission's responsibility in Title VII to regulate the U.S. security-based swap market, as well as reasonable market expectations and the risk of creating confusion among market participants,[322] we preliminarily do not believe that it is appropriate to diverge from our traditional approach to the regulation of broker-dealers by establishing a regulatory regime for the security-based swap market that would allow non-U.S. persons to engage in unregulated dealing activity within the United States, either when it acts through U.S. branches, office, or agents or it solicits, negotiates, or executes transactions with non-U.S. persons that themselves are operating out of the United States.

Moreover, suppose non-U.S. persons were not required to register when engaging in security-based swap dealing activity within the United States with other non-U.S. persons. Non-U.S. persons seeking to negotiate security-based swap transactions using personnel in the United States may choose to enter into security-based swap transactions with such unregistered non-U.S. persons rather than with a U.S. person to avoid the application of Title VII. In this way, customers may choose to forego the protections of Title VII in order to achieve potential cost savings. This could limit the access of U.S. persons engaged in dealing activity within the United States to non-U.S. persons, as well as more generally limiting the ability of U.S. persons to access liquidity in the security-based swap market. Accordingly, the Commission is proposing that a non-U.S. person would be required to count its security-based swap transactions conducted within the United States (as well as its transactions with U.S. persons) that arise out of its dealing activity to determine whether the notional amount of its dealing transactions exceeds the *de minimis* threshold. This would have the effect of subjecting both non-U.S. persons engaged in dealing activity within the United States and U.S. persons engaged in dealing activity within the United States to the same set of rules, thus providing their counterparties the same set of protections.

Finally, although the proposed rule reflects the importance of ensuring that neither non-U.S. person counterparty is engaged in the relevant activities within the United States for purposes of this definition, we also recognize the operational difficulties that could arise in investigating the activities of a counterparty to ensure compliance with the rule. As a result, we are preliminarily proposing to allow parties to rely on a representation received from a counterparty indicating that a given transaction ''is not solicited, negotiated, executed, or booked within the United States by or on behalf of such counterparty.'' [323] A party may rely on such a representation by its counterparty unless the party knows that the representation is not accurate.[324] The Commission preliminarily believes that this would address whatever operational difficulties parties may have in determining whether or not their counterparty is conducting a transaction within the United States.

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding registration by non-U.S persons who engage in dealing activity within the United States, including the following:

- Should non-U.S. persons be required to register by virtue of engaging in security-based swap dealing activity within the United States, even if none of this dealing activity is directed to, or otherwise involves, U.S. persons? Why or why not?
- Does the proposed approach appropriately impose the dealer registration requirement on non-U.S. persons based on their dealing activities conducted within the United States? Should a non-U.S. person be required to register as a security-based swap dealer if it enters into, or offers to enter into, security-based swap transactions that are transactions conducted within the United States if such non-U.S. person's dealing activity is limited to its foreign business? What about if the non-U.S. person engages in non-U.S. dealing activity, but also enters into transactions with U.S. persons in a non-dealing capacity?
- What, if any, market-transparency or counterparty-protection issues would be likely to arise if non-U.S. persons were not required to register if they engaged in dealing activity solely with non-U.S. persons from within the United States?
- What, if any, competition issues would be likely to arise if non-U.S. persons were not required to register if they engaged in dealing activity solely with non-U.S. persons from within the United States?
- Is the proposed approach toward determining whether dealing activity is conducted within the United States appropriate? Does the proposed rule identify appropriate factors in determining whether a transaction has been conducted within the United States? If not, what factors should be modified, removed, or added?
- Is the proposed identification of activities appropriate in the context of determining whether a security-based swap is a transaction conducted within

[321] The Commission previously has noted the role that the location of the dealer plays in setting expectations regarding the legal protections available in transactions with that dealer. *See* Rule 15a–6 Adopting Release, 54 FR 30017 (noting that a U.S. citizen residing abroad who seeks out transactions with foreign broker-dealers would not generally expect U.S. securities laws to apply to the transaction); Regulation S Adopting Release, 55 FR 18310 (noting the expectation that a buyer outside the United States who purchases securities offered outside the United States is aware that ''the transaction is not subject to registration under the Securities Act''). *See also* Cleary Letter IV at 17 (''As both Commissions have consistently recognized in the past, the non-U.S. counterparty in . . . transactions [with a non-U.S. branch or affiliate of a U.S. person] conducted abroad have no expectation of protection under U.S. law''); Davis Polk Letter II at 20 (''Finally, the non-U.S. counterparty would not reasonably expect the swap [with a foreign bank swap dealer] to be subject to Title VII's requirements'').

[322] *See* Rui Albequerque and Neng Wang, ''Agency Conflicts, Investment and Asset Pricing,'' Journal of Finance, Vol. 63, No. 1 (2008) (discussing the effect of customer protection on prices) and Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ''Investor Protection and Corporate Valuation,'' Journal of Finance, Vol. 57, No. 3 (2002) (discussing the effect of customer protection on prices).

[323] Proposed Rule 3a71–3(a)(5)(iii) under the Exchange Act.

[324] *Id. Cf.* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Advisers Act Release No. 3222 (June 22, 2011), 76 FR 39646, 39676 (July 6, 2011) (''if an adviser reasonably believes that an investor is not 'in the United States,' the adviser may treat the investor as not being 'in the United States'''). We are proposing to use a knowledge standard rather than a reasonable belief standard with respect to transactions conducted within the United States between non-U.S. person counterparties due to the fact that this definition applies to both counterparties to a transaction, thus each counterparty has an incentive to ensure the accuracy of its representation. In addition, the proposed ''actual knowledge'' standard and related discussion in this release are not intended to apply outside the scope of the proposals set forth in this release. Accordingly, it does not affect the standard for reliance on representations with respect to other rights or obligations of persons under the Exchange Act or the federal securities law generally.

the United States? If not, which activities should the Commission consider as key evidence of a transaction that is conducted within the United States?

• Is direct participation by a branch, agency, office, or associated person, including any affiliate and any associated person of any affiliate, within the United States an appropriate element for identifying whether a security-based swap transaction is a transaction conducted within the United States? Are there functions routinely performed by these entities that should not trigger a registration requirement, even if performed within the United States?

• Is the direct participation of a third-party agent an appropriate element for identifying whether a security-based swap transaction is a transaction conducted within the United States? If not, why not?

• From an operational perspective, what, if any, changes to policies and procedures would be required to identify transactions conducted within the United States under the proposed approach? What changes would be required, for example, to monitor circumstances that would prevent a party from relying on representations?

• Does the proposed rule appropriately identify the range of security-based swap activities (*i.e.,* solicitation, negotiation, execution, and booking) that should be considered in determining whether dealing activity is conducted within the United States? If not, what activities should be excluded or included? Why?

• Should a transaction entered into by a non-U.S. person in its capacity as a dealer be treated as dealing activity conducted within the United States if it is executed on an SB SEF, submitted to an SDR, or cleared by a security-based swap clearing agency physically located within the United States, even if no other activity related to the transaction were conducted within the United States?

• Should the Commission allow parties to rely on representations from their counterparties regarding compliance with the definition of ''transaction conducted within the United States''? Are there alternatives to relying on representations to ensure compliance? Should parties be required to exercise reasonable standards of care and due diligence?

• Is the standard used for the proposed ability to rely on a representation appropriate? Should another standard of knowledge be used? If so, what standard would be more appropriate for this purpose?

• The CFTC has proposed an interpretation that does not consider whether swap dealing activity is conducted inside or outside the United States when determining whether the *de minimis* threshold is met.[325] Should the Commission adopt this approach? If yes, please address the effect of both approaches on customer protection, market transparency, competition, and capital formation in the U.S. security-based swap market.

• What would be the market impact of the proposed approach to determining whether dealing activity occurred within the United States? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

7. Proposed Treatment of Transactions With Foreign Branches of U.S. Banks

As noted above, under the proposed rule, a non-U.S. person would not be required to count toward the *de minimis* threshold in the security-based swap dealer definition its transactions with the foreign branch of a U.S. bank.[326] For purposes of this proposed approach, and as described more fully below, ''foreign branch'' would be defined as any branch of a U.S. bank if:

• The branch is located outside the United States;

• The branch operates for valid business reasons;

and

• The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.[327]

We preliminarily believe that these factors are appropriate for determining which entities fall within the definition of a foreign branch for purposes of this proposed approach due to their focus on the physical location of the branch and the nature of the branch's business and regulation in a foreign jurisdiction. Requiring the branch to be located outside the United States is consistent with the goal of the proposed rule, which is to identify security-based swap activity that is not conducted within the United States. Requiring the branch to be operated for valid business purposes and to be engaged in the business of banking and subject to substantive banking regulation in a foreign jurisdiction is intended to help ensure that U.S. banks are not able to take advantage of the proposed rule by setting up offshore operations to evade the application of Title VII.

In order for a transaction to be a ''transaction conducted through a foreign branch,'' and therefore excluded from a non-U.S. person's *de minimis* threshold calculation,[328] the foreign branch must be the named counterparty to the transaction [329] and the transaction must not be solicited, negotiated, or executed by a person within the United States on behalf of the foreign branch or its counterparty.[330] To the extent that the transaction is conducted within the

[325] *See* CFTC Cross-Border Proposal, 77 FR 41219–20.

[326] Proposed Rule 3a71–3(b)(1)(ii) under the Exchange Act. Section 716 of the Dodd-Frank Act (commonly known as the ''Push-Out Rule'') prohibits the provision of certain types of ''Federal assistance'' to certain swap and security-based swap dealers and major swap and security-based swap participants referred to as ''swaps entities,'' subject to certain exceptions. In addition, Section 619 of the Dodd-Frank Act (commonly referred to as the ''Volcker Rule'') adds a new Section 13 to the Bank Holding Company Act of 1956 (''BHC Act'') (to be codified at 12 U.S.C. 1851) that generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (''covered fund''), subject to certain exemptions. *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, Exchange Act Release No. 66057 (Oct. 12, 2011), 76 FR 68846 (Nov. 7, 2011). Both the Push-Out Rule and the Volcker Rule will potentially limit the ability of U.S. banks to conduct security-based swap activity.

[327] Proposed Rule 3a–71–3(a)(1) under the Exchange Act. We are not proposing to include ''agencies'' within the definition of ''foreign branch'' as such term is used in connection with our treatment of transactions with foreign branches of U.S. banks. We recognize that Regulation S groups agencies and branches together in defining the term U.S. person. *See* 17 CFR 230.902(k)(1)(v), (2)(v). However, as discussed in Section III.B.10 below, although certain aspects of Regulation S may be useful in the context of security-based swaps, Title VII and Regulation S are tailored to serve different objectives. In particular, the common treatment of agencies and branches under Regulation S does not compel us to similarly group agencies and branches for purposes of our treatment of transactions with foreign branches of U.S. banks given the fact that the term ''agency'' does not have any operative meaning with respect to the foreign operations of U.S. banks.

[328] Proposed Rules 3a71–3(b)(1)(ii) and (2)(ii) under the Exchange Act.

[329] Proposed Rule 3a71–3(a)(4)(i)(A) under the Exchange Act.

[330] Proposed Rule 3a71–3(a)(4)(i)(B) under the Exchange Act.

United States, as described in the immediately preceding section (whether on behalf of the U.S. bank to which the branch belongs or of the foreign counterparty), the non-U.S. person would be required to count such transaction arising out of its dealing activity toward its *de minimis* threshold for purposes of determining whether it is required to register as a security-based swap dealer.[331]

We believe that counting transactions with a foreign branch toward the *de minimis* threshold would be consistent with the view that a foreign branch of a U.S. bank is part of a U.S. person within the proposed definition.[332] We also recognize that such transactions pose risk to the U.S. financial system. At the same time, however, we believe that imposing registration requirements on non-U.S. persons solely by virtue of their transactions with foreign branches of U.S. banks could limit the access of U.S. banks to non-U.S. counterparties when they conduct their foreign security-based swap dealing activity through foreign branches because non-U.S. persons may not be willing to enter into transactions with them in order to avoid being required to register as a security-based swap dealer.[333] We have preliminary concluded that not requiring such transactions to be counted toward the foreign counterparty's *de minimis* threshold for purposes of the security-based swap dealer registration requirement would minimize this disparate treatment while ensuring that transactions involving foreign branches of U.S. banks remain subject to certain Title VII requirements (as described below).[334]

Finally, although the proposed rule reflects the importance of ensuring that neither counterparty is operating from within the United States for purposes of conducting a transaction through a foreign branch, we also recognize the operational difficulties that could arise in investigating the activities of a counterparty to ensure compliance with the rule. As a result, we are proposing to allow parties to rely on a representation received from a counterparty indicating that ''no person within the United States is directly involved in soliciting, negotiating, executing, or booking'' a given transaction on behalf of the counterparty.[335] A party may rely on such a representation by its counterparty unless the party knows that the representation is not accurate. The Commission preliminarily believes that this would address whatever operational difficulties parties may have in determining whether or not their counterparty is conducting a transaction conducted through a foreign branch.

Request for Comment

The Commission requests comment on all aspects of the proposed treatment of transactions with foreign branches of U.S. persons for purposes of the *de minimis* exception, including the following:

- Would the proposed approach reduce the effectiveness of customer protections or any other provisions of Title VII? If so, how should these concerns be balanced against the competitiveness concerns identified as part of the rationale behind the proposed approach?
- Does the proposed approach appropriately address the potential for disparate competitive impacts related to the application of the *de minimis* exception to dealers operating out of foreign branches? If not, how might the Commission more effectively address these concerns?
- Does the proposed approach provide an advantage to U.S. banks engaging in security-based swap dealing activity through foreign branches? Are there competitiveness concerns raised by this approach for entities (either banks or nonbanks) that do not utilize the branch model? Are there competitiveness concerns for non-U.S. persons, including non-U.S. persons whose performance under security-based swaps is guaranteed by a U.S. person? If so, what are they?
- Should the Commission allow parties to rely on representations from their counterparties regarding compliance with the definition of ''transaction conducted through a foreign branch''? Should the Commission separately allow parties to rely on representations from their counterparties regarding status under the ''foreign branch'' definition?
- Is the standard used for the proposed ability to rely on a representation appropriate? Should another standard of knowledge be used? If so, what standard would be more appropriate for this purpose?
- Should the definition of a ''foreign branch'' be broadened to include ''agencies'' of U.S. banks in addition to branches? If so, what rationale justifies the inclusion of agencies? In particular, what are the similarities (or differences) in the legal status and regulatory treatment of the foreign branches and foreign agencies of U.S. banks that would warrant similar treatment? How do foreign agencies of U.S. banks differ from foreign offices of U.S. persons that are not banks?
- How might the proposed approach to the foreign branches of U.S. banks be impacted by the Volcker Rule and the Push-Out Rule? How might security-based swap dealers alter their business practices in response to the Volcker Rule and the Push-Out Rule? Should the proposed approach to the foreign branches of U.S. banks be altered to account for these changes to business practice?
- What would be the market impact of the proposed treatment of transactions with foreign branches of U.S. banks? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

8. Proposed Rule Regarding Aggregation of Affiliate Positions

One key issue related to our proposed approach to the *de minimis* exception, both in the cross-border context and domestically, is the aggregation of transactions connected with the dealing activity of an affiliate. In the Intermediary Definitions Adopting Release, the Commission and the CFTC

[331] *See* Section III.B.6, *supra.*

[332] *See* Section III.B.5, *supra.*

[333] *See, e.g.,* Sullivan and Cromwell Letter at 14 (''The jurisdictional scope of the swaps entity definitions is critical to the ability of U.S. banking organizations to maintain their competitive position in foreign marketplaces. Imposing the regulatory regime of Title VII on their Non-U.S. Operations would place them at a disadvantage to their foreign bank competitors because the Non-U.S. Operations would be subject to an additional regulatory regime which their foreign competitors would not.''); Cleary IV at 7 (''Subjecting such non-U.S. branches and affiliates to U.S. requirements could effectively preclude them from, or significantly increase the cost of, managing their risk in the local financial markets, since local financial institutions may be required to comply with Dodd-Frank to provide those services'').

[334] *See* Section III.C, *infra.* Provided the transaction is not a transaction conducted within the United States under proposed Rule 3a71–3(a)(5) under the Exchange Act, the Commission also is not proposing to require non-U.S. persons to count transactions with a non-U.S. person toward their *de minimis* threshold even if the non-U.S. person's performance on the security-based swap is guaranteed by a U.S. person. *See* Section III.B.9, *infra.*

[335] Proposed Rule 3a71–3(a)(4)(ii) under the Exchange Act; *see also* Section III.B.6, *supra.*

jointly stated that the notional thresholds in the *de minimis* exception encompass swap and security-based swap dealing positions entered into by an affiliate controlling, controlled by, or under common control with the person at issue.[336] The Commission and the CFTC further noted that for these purposes, control would be interpreted to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.[337] This aggregation of affiliate positions was deemed necessary to prevent persons from avoiding dealer regulation by dividing up dealing activity in excess of the notional thresholds among multiple affiliates.[338]

The Commission is proposing a rule that would describe how this aggregation requirement would apply to U.S. persons and non-U.S. persons engaged in cross-border security-based swap dealing activity, as well as to U.S. persons engaged in purely domestic transactions.[339] As set forth in the Intermediary Definitions Adopting Release, the affiliate aggregation principle requires that a person aggregate the entire security-based swap dealing activity of any of its affiliates, without distinguishing whether the dealing positions are entered into by U.S. person affiliates or non-U.S. person affiliates, and without distinguishing whether the dealing positions are entered into with U.S. persons or non-U.S. persons.[340] The proposed rule takes an approach that generally is consistent with the affiliate aggregation interpretive guidance jointly adopted by the Commission and the CFTC to require a person to aggregate all of the security-based swap dealing positions entered into by its U.S. person affiliates,[341] except that it excludes from such aggregation the positions of an affiliate that is a registered security-based swap dealer, under certain conditions.[342] The proposed rule also provides that such aggregation must include any security-based swap transactions of such person's non-U.S. person affiliates that would be required to be counted by such affiliates toward their respective *de minimis* thresholds in accordance with the proposed approach described above (*i.e.,* a non-U.S. person affiliate would be required to calculate its security-based swap transactions connected with dealing activity conducted with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States).[343]

The proposed rule similarly provides that the affiliate aggregation principle also would apply to non-U.S. persons that engage in transactions in a dealing capacity with U.S. persons (other than foreign branches of U.S. banks) or otherwise within the United States. In determining whether its dealing activity exceeds the *de minimis* threshold, a non-U.S. person must aggregate the amount of its own transactions connected with its dealing activity with U.S. persons (other than foreign branches) or otherwise conducted within the United States with the amount of any security-based swap transactions connected with the dealing activity conducted by its affiliates, whether U.S. persons or non-U.S. persons, that such affiliates would be required to count toward their respective *de minimis* thresholds in accordance with the proposed approach described above[344] (other than the transactions of affiliates that are registered security-based swap dealers).[345] Transactions of affiliates that are themselves non-U.S. persons with other non-U.S. persons (or foreign branches of U.S. banks) outside the United States would not need to be aggregated for purposes of the *de minimis* exception.[346]

Thus, the Commission's proposal would require aggregation of the amount of dealing transactions of all affiliates, both U.S. persons and non-U.S. persons, other than registered security-based swap dealers. We believe that the Commission's proposed approach implements the *de minimis* exception in a manner that is consistent with the Dodd-Frank Act's focus on the U.S. security-based swap market.[347] The proposed approach reflects the fact that all of a U.S. affiliate's security-based swap dealing transactions impact the U.S. financial system, regardless of whether such entity's counterparties are located in the United States or abroad. The same is not true of non-U.S. affiliates, however, because the security-based swap transactions entered into by a non-U.S. affiliate with other non-U.S. persons outside the United States would not impact the U.S. financial system to the same extent as transactions with U.S. persons. Thus, because the statutory focus is on the U.S. security-based swap market, we preliminarily believe it is appropriate to distinguish between U.S. and non-U.S. affiliates based on the disparate impact of their security-based swap dealing transactions on the U.S. financial system when determining which dealing transactions should be aggregated for purposes of the *de minimis* threshold. This further suggests that we should aggregate the dealing positions of both U.S. and non-U.S. person affiliates that are not already registered security-based swap dealers, in accordance with the rule and guidance described in the following paragraph regarding aggregation of the positions of registered dealers, with the goal of capturing all dealing transactions that warrant imposing dealer registration and regulation[348] and minimizing the opportunity for a person to evasively engage in large amounts of dealing activity.[349] As a result, where the aggregate security-based swap dealing activity of an affiliated group, calculated as described above, exceeds the *de minimis* threshold, then each affiliate within such group that engages in the security-based swap dealing activity included in such aggregation calculation would be required to register with the Commission as a security-based swap dealer, subject to the exception described below.

The Commission also is proposing a rule to address the affiliate aggregation of dealing positions for purposes of the *de minimis* threshold where one or more affiliates within a corporate group are registered with the Commission as

[336] *See* Intermediary Definitions Adopting Release, 77 FR 30631; 17 CFR 240.3a71–2(a)(1).

[337] *See* Intermediary Definitions Adopting Release, 77 FR 30631 n.437.

[338] *See* Intermediary Definitions Adopting Release, 77 FR 30631.

[339] Proposed Rule 3a71–4 under the Exchange Act.

[340] *See* Intermediary Definitions Adopting Release, 77 FR 30631 n.438 (explaining that the Commission intended to address the application of the aggregation principle to non-U.S. persons in a separate release); 17 CFR 240.3a71–2(a)(1).

[341] Proposed Rule 3a71–3(b)(2)(i) under the Exchange Act. The proposed rule also clarifies that only a person directly engaged in dealing activity that is required to be counted toward such person's *de minimis* threshold would be required to aggregate the dealing activity of its affiliates.

[342] Proposed Rule 3a71–4 under the Exchange Act.

[343] *See* Section III.B.4(b), *supra; see also* proposed Rule 3a71–3(b)(2)(ii) under the Exchange Act.

[344] *See* Section III.B.4(b), *supra.* A U.S. person affiliate would be required to calculate all of its security-based swap transactions connected with its dealing activity and a non-U.S.-person affiliate would be required to calculate its security-based swap transactions connected with its dealing activity with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States.

[345] Proposed Rules 3a71–3(b)(2)(i) and (ii) and proposed Rule 3a71–4 under the Exchange Act.

[346] *Id.*

[347] *See* Subtitle B of Title VII of the Dodd-Frank Act.

[348] *See* note 4, *supra.*

[349] *See* Intermediary Definitions Adopting Release, 77 FR 30631.

security-based swap dealers.[350] Under the proposed approach, a person calculating the amount of its security-based swap positions for purposes of the *de minimis* threshold would not need to include in such calculation the security-based swap transactions of an affiliate controlling, controlled by, or under common control with the person if such affiliate is registered with the Commission as a security-based swap dealer.[351] The application of this proposed rule would be limited to circumstances where a person's security-based swap activities are operationally independent from those of its registered security-based swap dealer affiliate. For purposes of this proposed rule, the security-based swap activities of two affiliates would be considered operationally independent if the two affiliated persons maintained separate sales and trading functions, operations (including separate back offices), and risk management with respect to any security-based swap dealing activity conducted by either affiliate that is required to be counted against their respective *de minimis* thresholds. If any of these functions were jointly administered by the two affiliates, or were managed at a central location within the affiliates' corporate group (*e.g.,* at the entity serving as the central booking entity) with respect to any security-based swap dealing activity conducted by either affiliate that is required to be counted against their respective *de minimis* thresholds, then an unregistered person would not be able to exclude the security-based swap dealing activities of its registered security-based swap dealer affiliate under the proposed rule.

Absent the proposed exclusion of the dealing positions of a registered security-based swap dealer affiliate in the proposed rule, any affiliate of a registered security-based swap dealer that engaged in security-based swap dealing activity with U.S. persons or within the United States would be required to aggregate the dealing positions of the registered security-based swap dealer with its own dealing positions for purposes of the *de minimis* threshold. Given that a registered security-based swap dealer would presumably conduct relevant security-based swap dealing positions in excess of the *de minimis* threshold over the course of the immediately preceding 12 months, all persons affiliated with a registered security-based swap dealer that engaged in any level of security-based swap dealing activity that is required to be counted against the *de minimis* threshold would necessarily be required to register with the Commission as security-based swap dealers because of the affiliate aggregation principle. We preliminarily do not believe that this outcome would be consistent with the statutory purpose of the *de minimis* exception, because it would prevent all affiliates of a registered dealer from taking advantage of the exception, even those engaged in a minimal amount of dealing activity relevant to Title VII dealer registration and regulation. We also do not believe that this scenario raises the concerns about evasion that underlie the *de minimis* affiliate aggregation rule jointly adopted by the Commission and the CFTC in the Intermediary Definitions Adopting Release, given that this proposed rule would apply only where a corporate group already included a registered dealer subject to Commission oversight, and the dealing positions of all commonly controlled unregistered affiliates in the corporate group would still be aggregated for purposes of the *de minimis* threshold.[352] For these reasons, we believe that it is appropriate not to include the security-based swap dealing positions of registered security-based swap dealers in the *de minimis* calculations of their commonly controlled affiliates provided that their security-based swap dealing activities that are relevant to the *de minimis* calculation are operationally independent of the registered security-based swap dealer affiliates.

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding the aggregation of affiliate positions, including the following:

- Should the Commission permit affiliated persons to exclude the security-based swap dealing positions of affiliated registered security-based swap dealers from their *de minimis* calculations, as proposed? Why or why not?
- Would permitting affiliated entities to exclude the security-based swap dealing positions of registered security-based swap dealers from their *de minimis* calculations undermine any of the Title VII protections associated with security-based swap dealer registration and regulation? If so, please explain. Should the Commission further explain what ''operationally independent'' means? If so, what should the Commission consider?
- Should the Commission permit affiliated entities to exclude the security-based swap dealing positions of operationally independent affiliates from their *de minimis* calculations, even if such affiliates are not registered security-based swap dealers?
- The CFTC has adopted temporary conditional relief that would permit a non-U.S. person to exclude from its *de minimis* calculation the security-based swap dealing positions of an affiliated non-U.S. person that is registered as a swap dealer and not guaranteed by a U.S. person with respect to its swap obligations.[353] Should the Commission adopt a similar interpretation to permit a non-U.S. person (but not a U.S. person) to exclude the dealing positions of its affiliated registered non-U.S. security-based swap dealer (but not the dealing positions of its affiliated registered U.S. security-based swap dealer)? Should the Commission condition such exclusion on the affiliated registered security-based swap dealer not being guaranteed by a U.S. person? If so, please describe the likely economic effects of providing different exclusions from the affiliate aggregation principle for U.S. and non-U.S. security-based swap dealers and how the Commission should best address them.
- The CFTC has also proposed an interpretation that would permit non-U.S. persons engaged in dealing activity with U.S. persons to aggregate the notional amounts of security-based swap dealing transactions by their non-U.S. affiliates separately from any dealing activity performed by their U.S. affiliates.[354] Should the Commission adopt a similar approach? If so, please explain how this approach is consistent with the *de minimis* threshold and the rationale provided for the affiliate aggregation principle in the Intermediaries Definitions Adopting Release. In addition, please describe the likely economic effects of providing an effectively higher *de minimis* threshold for corporate groups that engage in dealing activity with U.S. persons or within the United States through affiliates located in the United States and in foreign jurisdictions.
- What would be the market impact of the proposed approach to aggregation of affiliate positions? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United

[350] Proposed Rule 3a71–4 under the Exchange Act.

[351] *Id.*

[352] *See* Intermediary Definitions Adopting Release, 77 FR 30631.

[353] *See* Final CFTC Cross-Border Exemptive Order, 78 FR 868.

[354] *See* CFTC Cross-Border Proposal, 77 FR 41219–20; *see also* Final CFTC Cross-Border Exemptive Order, 78 FR 867–68 (providing temporary conditional relief from the CFTC's *de minimis* aggregation requirements).

States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

9. Treatment of Inter-Affiliate and Guaranteed Transactions

Consistent with the approach taken in the Intermediary Definitions Adopting Release, the Commission is proposing that cross-border security-based swap transactions between majority-owned affiliates would not need to be considered when determining whether a person is a security-based swap dealer.[355] Thus, a non-U.S. person engaged in dealing activity outside the United States would not be required to register as a security-based swap dealer simply by virtue of entering into security-based swap transactions with its majority-owned U.S. affiliate, even if such inter-affiliate security-based swaps were back-to-back transactions (*i.e.,* the foreign subsidiary was acting as a ''conduit'' for the U.S. person). Similarly, a U.S. person would not be required to register as a security-based swap dealer as a result of back-to-back transactions with a non-U.S. person subsidiary that acts as a conduit for such U.S. person.[356] Instead, as proposed, there must be an independent basis for requiring a person to register as a security-based swap dealer that is unrelated to its inter-affiliate transactions.[357]

Furthermore, the Commission is proposing not to require a non-U.S. person that receives a guarantee from a U.S. person of its performance on security-based swaps with non-U.S. persons outside the United States to count its dealing transactions with those non-U.S. persons toward the *de minimis* threshold as a U.S. person would be required to do.[358] We believe that the primary risk related to these transactions is the risk posed to the United States via the guarantee from a U.S. person, not the dealing activity occurring between two non-U.S. persons outside the United States. As a result, we do not believe that the risk posed by the existence of the U.S. guarantee would be better addressed through requiring non-U.S. persons receiving such guarantees to register with the Commission as security-based swap dealers. One way that the accumulation of risk resulting from security-based swap positions is addressed in Title VII is through the major security-based swap participant registration category. We preliminarily believe that the risk associated with guarantees by U.S. persons of the performance on security-based swap obligations of non-U.S. persons may be best addressed through the application of principles of attribution in the major security-based swap participant definition described in the Intermediary Definitions Adopting Release.[359] We preliminarily believe that use of the major security-based swap participant definition to address the risks posed to the United States as a result of guarantees by U.S. persons effectively deals with the specific regulatory concerns posed by the risks these guarantees present to the U.S. financial system and is consistent with the regulatory framework set forth in the Dodd-Frank Act.[360]

The Commission also is proposing not to require a foreign dealer to count security-based swap transactions with non-U.S. persons that receive guarantees from U.S. persons toward the *de minimis* threshold. The Commission notes that, in many respects, the risk created for U.S. persons and the U.S. financial system in these transactions is the same as the risk posed if the U.S. person who provides the guarantee had entered into transactions directly with non-U.S. persons. The U.S. guarantor would be held responsible to settle those obligations, thus maintaining similar liability as though the U.S. person had entered into security-based swap transactions directly with a non-U.S person. The Commission preliminarily believes that the risk posed to the U.S. markets by non-U.S. persons engaged in dealing activity with non-U.S. persons outside the United States whose performance under security-based swaps is guaranteed by a U.S. person can be best addressed through the major security-based swap participant definition and requirements applicable to major security-based swap participants, as the risks to the United States appear to arise only from the resulting positions and not the dealing activity as such.

Finally, as discussed below, the Commission is proposing to subject a security-based swap transaction between two non-U.S. persons where at least one of the persons receives a guarantee on the performance of its obligations from a U.S. person to the regulatory reporting requirement (but not, in some cases, to real-time public reporting).[361] If the proposed approach is adopted, the Commission would gain an understanding of market developments in this area as a result of the proposed *de minimis* exception.

Request for Comment

The Commission requests comment on all aspects of the proposed treatment of inter-affiliate and guaranteed transactions, including the following:

- Should the Commission revise our proposed approach to inter-affiliate transactions to require those transactions to be considered when determining whether a person is a security-based swap dealer? If so, why?
- If the Commission determines not to exclude inter-affiliate transactions from security-based swap dealing activity in the cross-border context, how could such a decision be reconciled with the exclusion for inter-affiliate transactions provided in the Intermediary Definitions Adopting Release? Should the Commission and the CFTC jointly reconsider the approach to inter-affiliate transactions provided in the Intermediary Definitions Adopting Release?

[355] *See* 17 CFR 240.3a71–1(d), as discussed in the Intermediary Definitions Adopting Release, 77 FR 30624–25. For the purposes of this rule, which was adopted in the Intermediary Definitions Adopting Release, counterparties are considered majority-owned affiliates if one party directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both, based on the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership. *See* 17 CFR 240.3a71–1(d)(2).

[356] This approach differs from the treatment of conduit entities in the CFTC Cross-Border Proposal. Under the CFTC Cross-Border Proposal, a U.S. entity may be required to register as a swap dealer as a result of its inter-affiliate swap transactions with an affiliated foreign dealer if the foreign dealer is acting as a conduit by transferring swaps to the U.S. entity through back-to-back transactions. *See* CFTC Cross-Border Proposal, 77 FR 41222.

[357] Proposed Rule 3a71–4 under the Exchange Act.

[358] This approach differs from the treatment of guaranteed entities in the CFTC Cross-Border Proposal. Under the CFTC Cross-Border Proposal, a non-U.S. person that receives a guarantee from a U.S. person would be required to count all of its swap dealing transactions against the *de minimis* threshold. *See* CFTC Cross-Border Proposal, 77 FR 41221.

[359] *See* Intermediary Definitions Adopting Release, 77 FR 30688–89; Section V.C.2(a), *infra.*

[360] *See, e.g.,* Section IV, *infra; see also* Bank Holding Company Act of 1956 (12 U.S.C. 1841, *et seq.*); Title I of the Dodd-Frank Act (concerning regulation of certain nonbank financial companies and bank holding companies that pose a threat to the financial stability of the United States).

[361] *See* Section VIII, *infra.* Under proposed Regulation SBSR, inter-affiliate transactions would be subject to reporting and dissemination requirements. *See id.*

• Should the Commission require the registration of non-U.S. dealers that receive guarantees on the performance of their security-based swap obligations from U.S. persons based on their transactions with non-U.S. persons as well as U.S. persons? Why or why not? Should the U.S. guarantor be viewed as engaging indirectly in dealing activity through its affiliate and, therefore, required to register as a security-based swap dealer if the security-based swap transactions in connection with its dealing activity exceed the *de minimis* threshold? Should there be a concern that the U.S. guarantor is using the non-US affiliate to evade the requirements of Title VII?

• Does the proposed approach to guarantees effectively address concerns related to the risk posed to the U.S. financial system resulting from guarantees by U.S. persons of security-based swap dealing activity by non-U.S. persons?

• Are there competitiveness concerns related to the proposed approach to guarantees with regard to U.S. entities that engage in non-U.S. security-based swap dealing activity through business models that do not rely on guarantees of non-U.S. persons, such as those that operate through foreign branches?

• The CFTC has proposed an interpretation that would subject an entity that operates a ''central booking system'' where swaps are booked into a single legal entity, to any applicable swap dealer registration requirement as if it had entered into such swaps directly, irrespective of whether such entity is a U.S. person or whether the booking entity is a counterparty to the swap or enters into the swap indirectly through a back-to-back swap or other arrangement with its affiliate or subsidiary.[362] Should the Commission adopt a similar approach? If so, please describe how such a decision could be reconciled with the exclusion for inter-affiliate transactions provided in the Intermediary Definitions Adopting Release.

• What would be the market impact of the proposed approach to inter-affiliate and guaranteed transactions? How would the application of the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

10. Comparison With Definition of ''U.S. Person'' in Regulation S

In proposing an entity-based approach to the definition of a U.S. person, we have declined to follow the suggestions by some commenters that we adopt the definition of ''U.S. person'' used in Regulation S, which among other things expressly excludes from the definition of ''U.S. person'' agencies or branches of U.S. persons located outside the United States.[363] Although we recognize that the Regulation S definition of U.S. person has the advantage of familiarity for many market participants, Regulation S addresses specific policy concerns that are different from those addressed by Title VII.[364] Specifically, the definition of U.S. person in Regulation S was adopted in the context of providing an ''issuer safe harbor'' from the registration requirements of Section 5 of the Securities Act, which was intended ''to ensure that the [unregistered] securities offered [abroad] come to rest offshore.'' [365] In that context, providing a safe harbor based in part on the location of the person, branch, or office making the investment decision is consistent with the goals of that regulatory framework, which include protecting the integrity of the registration requirements applicable to securities publicly offered in the United States under the Securities Act. The Regulation S definition of ''U.S. person'' reflects this policy judgment.

We preliminarily believe that the definition of U.S. person in Title VII should encompass, for example, not only a person that has its place of residence or legal organization within the United States, but also its principal place of business within the United States, as the security-based swap activities of such entities are likely to manifest themselves most directly within the United States, where the majority of their commercial, legal, and financial relationships would be likely to exist because that is where their business principally occurs.[366]

Similarly, we preliminarily believe that the definition of U.S. person in Title VII should include accounts of a U.S. person, regardless of whether the account is a discretionary account or is held by a dealer or other person that is not resident in the United States, because the U.S. person bears the direct risk of transactions in the account, regardless of where the investment decision is made.[367] Moreover, we are proposing that an entity's U.S.-person status would apply to the entity as a whole, since the risks related to the concerns of Title VII are borne by the entire entity and not just by the specific business unit (or branch or office) engaged in security-based swap activity.[368] With its exclusions for certain foreign branches and agencies of U.S. persons from the definition of ''U.S. person,'' Regulation S would not address the entity-wide nature of the risks that Title VII seeks to address.[369]

The Commission preliminarily believes that adopting the definition of ''U.S. person'' in Regulation S without significant modifications would not achieve the goals of Title VII. As discussed above, we are instead proposing a definition of U.S. person that focuses primarily on the location of the person bearing the direct risk of the transaction. Regulation S, with its focus on the person making the investment decision (rather than the person actually

[362] *See* CFTC Cross-Border Proposal, 77 FR 41221–22.

[363] *See, e.g.,* Cleary Letter IV at 2 (''The Agencies should adopt a consistent definition of 'U.S. person' based on SEC Regulation S for purposes of analyzing whether a transaction involving one or more such persons may be subject to the provisions of Dodd-Frank.''); Davis Polk I at 6 n.6 (''We propose that the term 'U.S. counterparty' be defined in the same way as the term 'U.S. person' in Rule 902(k) of the SEC's Regulation S under the Securities Act, 17 CFR 230.902(k). This established definition is familiar to countless financial market professionals. Following the 'U.S. person' definition in Regulation S, rather than creating an entirely new definition, would avoid confusion and also provide consistency of application and legal certainty for a financial institution that offers a security and a swap to the same customer, which is common.''); SIFMA Letter I at 5 (''To determine whether a party to a swap is a 'U.S. person,' the Commissions should rely on the existing definition of that term contained in Rule 902(k) of the SEC's Regulation S. This established, workable definition is familiar to regulators and market participants alike, and would provide legal certainty. It is noteworthy that the Regulation S definition of U.S. person does not include non-U.S. affiliates of U.S. persons or non-U.S. branches of a U.S. bank and generally excludes collective investment vehicles established outside the United States with U.S. investors.'') (footnotes omitted); *see also* Section III.B.5(c), *supra.*

[364] *See* 17 CFR 230.901(k); *see also* Regulation S Adopting Release, 55 FR 18306.

[365] Regulation S Adopting Release, 55 FR 18307.

[366] *See* proposed Rule 3a71–3(a)(7)(i)(B) under the Exchange Act; Section III.B.5(b)ii, *supra.*

[367] *See* proposed Rule 3a71–3(a)(7)(i)(C) under the Exchange Act; Section III.B.5(b)iii, *supra.*

[368] *See* Section III.B.5(a), *supra.*

[369] Under Regulation S, the foreign branch of a U.S. bank is not treated as a U.S. person while the U.S. branch of a foreign bank is treated as a U.S. person. By contrast, under proposed Rule 3a71–3(a)(7)(i)(B) under the Exchange Act, the foreign branch of a U.S. bank would be treated as part of a U.S. person while the U.S. branch of a foreign bank would be treated as a non-U.S. person.

bearing the risk), would not necessarily capture the entity that actually bears the risks arising from security-based swap transactions that Title VII seeks to address.[370]

In light of the specific objectives of Title VII, the Commission preliminarily believes that a definition of U.S. person specifically tailored to the regulatory objectives it is meant to serve, as described above, is appropriate.[371]

Request for Comment

The Commission requests comment on all aspects of the proposed definition of U.S. person, including the following:

- Should the Commission adopt the definition of U.S. person in Regulation S? If so, how should the Commission reconcile the objectives of Title VII with the objectives that Regulation S is meant to serve?
- Should the Commission include all U.S. citizens in the definition of U.S. person, regardless of a person's residence or domicile?
- Should the Commission include within the definition of U.S. person entities and accounts where the discretion to enter into security-based swaps resides with a U.S. person? To what extent would this approach produce a result that differs from the current approach reflected in the proposed rule and the definitions of ''security-based swap dealer'' and ''major security-based swap participant''?

[370] Rather than creating a U.S. person definition specifically tailored to Title VII, the Commission could have proposed a modified version of Regulation S. However, significantly modifying the definition of ''U.S. person'' in Regulation S to accommodate the objectives of Title VII would largely eliminate the benefits associated with adopting a consistent and well-established regulatory standard.

[371] *See* Section III.B.3(b)(4), *infra.* The Commission notes that it took a different approach to the definition of U.S. person and activity in the United States in connection with the Commission's exemption from registration for foreign private advisers. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Advisers Act Release No 3222, 76 FR 39646 (July 6, 2011) (the ''Foreign Private Adviser Exemption''). The Foreign Private Adviser Exemption defines certain terms in the statutory definition of ''foreign private adviser'' (added by Section 402 of the Dodd-Frank Act and codified at section 202(a)(30) of the Investment Advisers Act) by incorporating the definition of a ''U.S. person'' and ''United States'' under Regulation S. As discussed in this subsection, the Commission preliminarily believes that it would be inappropriate to follow the approach in Regulation S in its entirety with respect to the cross-border regulation of security-based swaps, although it may be appropriate in the context of the Foreign Private Adviser Exemption given the similar policy objectives with Regulation S.

C. Regulation of Security-Based Swap Dealers in Title VII

I. Introduction

To help address the potential effects of registration, and attendant regulatory requirements, on foreign security-based swap dealers[372] with global security-based swap businesses and U.S. security-based swap dealers[373] that engage in security-based swap dealing activity through foreign branches that also may be subject to registration or regulation in foreign jurisdictions, the Commission is proposing not to apply the external business conduct standards and segregation requirements in Title VII to the Foreign Business[374] of such registered foreign security-based swap dealers and registered U.S. security-based swap dealers that engage in dealing activity through foreign branches with non-U.S. persons and foreign branches of U.S. banks.[375] In addition, while we are not proposing a rule to limit the application of entity-level requirements in Title VII to foreign security-based swap dealers, we are proposing to establish a policy and procedural framework under which the Commission would permit substituted compliance in some circumstances by registered foreign security-based swap dealers with certain Title VII requirements specifically applicable to security-based swap dealers.[376]

[372] Proposed Rule 3a71–3(a)(8) under the Exchange Act defines ''U.S. security-based swap dealer'' as a security-based swap dealer, as defined in Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71), and the rules and regulations thereunder, that is a U.S. person, as defined in proposed Rule 3a71–3(a)(7) under the Exchange Act. Proposed Rule 3a71–3(a)(3) under the Exchange Act defines ''foreign security-based swap dealer'' as a security-based swap dealer, as defined in Section 3(a)(71) of the Exchange Act, and the rules and regulations thereunder, that is not a U.S. security-based swap dealer.

[373] *See* note 372, *supra.*

[374] As discussed below, proposed Rule 3a71–3(a)(2) under the Exchange Act defines ''Foreign Business'' as meaning the security-based swap transactions of foreign security-based swap dealers and U.S. security-based swap dealers ''other than the U.S. Business of such entities.'' ''U.S. Business'' is defined in proposed Rule 3a71–3(a)(6) under the Exchange Act, with respect to a foreign security-based swap dealer, as (i) any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than with a foreign branch); or (ii) any transaction conducted within the United States; and, with respect to a U.S. security-based swap dealer, as any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch, as defined in proposed Rule 3a71–3(a)(4), with a non-U.S. person or another foreign branch. *See* Section III.C.4, *infra.*

[375] Proposed Rule 3a71–3(b) under the Exchange Act.

[376] Proposed Rule 3a71–5 under the Exchange Act, as discussed in Section XI, *infra.*

In the following sections, we discuss the views of commenters, describe the transaction-level and entity-level requirements specifically applicable to security-based swap dealers in Title VII, and discuss the proposed application of transaction-level and entity-level requirements to registered security-based swap dealers in the cross-border context.

2. Comment Summary

Various foreign dealers expressed their views about the application of the Dodd-Frank Act requirements to their derivatives businesses. A number of them expressed concern that if the Commission applies security-based swap dealer regulations, not only to entities conducting business from within the United States, but also to foreign-domiciled entities, it could effectively prevent foreign dealers from, among other things, managing their global security-based swap business out of a centralized booking entity (*i.e.,* the entity that acts as principal—the named counterparty—to a security-based swap transaction), which they maintain has many advantages for foreign dealers and their clients, including more efficient counterparty netting, greater transparency, greater financial counterparty financial strength, and operational efficiencies.[377] One commenter cautioned that if the regulations lead foreign dealers to create ''fragmented booking structures'' to avoid duplicative and conflicting regulatory regimes, it could harm U.S. consumers through increased transaction costs with foreign dealers.[378]

Many commenters suggested that to preserve a registration framework that would allow foreign dealers to continue to book their global security-based swap business out of a central non-U.S. entity, the Commission should use our limited designation authority under the Dodd-Frank Act's swap dealer definition to designate and regulate only specific activities and particular branches or agencies of foreign banks that transact

[377] *See, e.g.,* Société Générale Letter I at 3 (''Overall, the advantages of carrying out Swap transactions in and with a foreign bank with a consolidated booking structure help control risk significantly . . . . We believe it would be sensible for the Commissions to craft regulations that do not discourage foreign banks such as SG from registering as Swap Dealers.''); Davis Polk Letter I at 2, 5 (''We believe operating and managing a global swaps business out of a single booking entity presents many advantages from the perspective of foreign banks, customers and supervisors.'').

[378] *See* ISDA Letter I at 10 (warning that ''U.S. counterparties will . . . face increased costs and decreased liquidity if U.S. regulation forces non-U.S. SDs to create fragmented booking structures to avoid duplicative and conflicting regulatory regimes'').

with U.S. customers, without subjecting the whole entity or its other branches to regulation.[379]

In addition, various commenters suggested a variety of operational models through which foreign dealers could operate in the U.S. security-based swap market, generally premising the proposed registration and regulatory regime on the notion that home country supervision should apply to entity-level regulations (*e.g.,* capital, risk management, and conflicts of interest), while Title VII transaction-level regulations should apply only to security-based swaps involving a U.S. counterparty.[380] A number of commenters emphasized that transaction-level requirements should not apply to security-based swaps entered into between foreign counterparties.[381] Other commenters remarked that if the Commission regulates both the U.S.-facing business (*i.e.,* transactions with U.S. persons) and the foreign-facing business (*i.e.,* transactions with non-U.S. persons) of U.S. security-based swap dealers, but only the U.S.-facing business of foreign security-based swap dealers, then U.S. firms would be at a competitive disadvantage vis-à-vis their foreign counterparts with respect to transactions with foreign counterparties.[382]

Several commenters further expressed concern that a requirement for foreign persons to register with the Commission as security-based swap dealers could be particularly problematic in the case of capital requirements, where foreign security-based swap dealers already would be subject to their home country's prudential requirements. These commenters favored deferring to foreign regulators the regulation and supervision of entity-level requirements when a foreign security-based swap dealer is subject to comprehensive and comparable home country regulation.[383] One commenter recommended a comparability standard whereby the Federal Reserve and the Commission determine comparability even when a home country regulator does not require margin for non-cleared security-based swaps, if the home country's capital regime takes into account functionally equivalent capital charges.[384] Several commenters recommended that, for monitoring purposes, U.S. regulators could rely on information-sharing arrangements with home regulators regarding foreign swap transactions and activities.[385] A few commenters argued that U.S. regulators should not have examination authority over foreign swap transactions and activities located outside the United States, and suggested that the Commissions obtain any necessary information about U.S. swap transactions and activities from U.S. affiliates of the foreign security-based swap dealer.[386]

3. Title VII Requirements Applicable to Security-Based Swap Dealers

Certain Title VII requirements specifically applicable to security-based swap dealers apply at a transaction level, that is, to security-based swap transactions with specific counterparties. Examples of transaction-level requirements in Title VII principally include requirements relating to external business conduct standards such as the requirement that a security-based swap dealer or major security-based swap participant verify that any counterparty meets the eligibility standards for an eligible contract participant[387] and requirements relating to segregation of assets held as collateral in security-based swap transactions.[388] Other requirements apply to security-based swap dealers at an entity level, that is, to the dealing entity as a whole. Examples of entity-level requirements include, among others, requirements relating to capital,[389] risk management procedures,[390] recordkeeping and reporting,[391] supervision,[392] and designation of a chief compliance officer.[393] Some requirements can be considered both entity-level and transaction-level requirements. For instance, the margin requirement in Section 15F(e) of the Exchange Act can be considered both an entity-level requirement because margin affects the financial soundness of an entity and a transaction-level requirement because margin calculation is based on particular transactions (*i.e.,* an entity

[379] *See, e.g.,* IIB Letter at 11 (pointing out that Section 3(a)(71) of the Exchange Act, as amended by the Dodd-Frank Act, provides for limited designation as a security-based swap dealer ''for a single type or single class . . . of activities, and not for other types, classes, of . . . activities,'' and recommending that the Commissions designate as a Swap Dealer only the particular U.S. or non-U.S. branch or agency of the foreign bank involved in the execution of swaps with U.S. customers''); Rabobank Letter at 2 (recommending that to preserve ''the benefits of the centralized booking model, a non-U.S. branch of a foreign bank should register as a swap dealer solely with respect to its swap dealing activities with U.S. persons. Under this scenario, Title VII's transaction-level rules would apply only to the non-U.S. branch's swap dealing activities with U.S. persons and would not apply to its other activities or to the swap activities of other parts of the foreign bank'').

[380] *See, e.g.,* Davis Polk Letter II at 4–20 (recommending reliance on comprehensive home country requirements such as capital, margin, conflicts of interest, risk management, and limited recordkeeping requirements for entity-level regulations if certain standards are met, and recommending the application of Title VII transaction-level rules to a swap dealer's swap dealing activities with U.S. persons).

[381] *See, e.g.,* Sullivan & Cromwell Letter at 14–15 (asserting that subjecting foreign entities to transaction-level requirements on foreign transactions would likely lead to a competitive disadvantage, because other foreign ''banking organizations that are not so burdened by such dual and potentially conflicting requirements would be able to provide a wider range of services . . ., which may cause customers to migrate away from'' those foreign operations, which would limit their ability to manage, transfer, and reduce systemic risk).

[382] *See, e.g.,* SIFMA Letter I at 11 (remarking that ''U.S. swap dealers also may be at a competitive disadvantage relative to non-U.S. entities if U.S. swap dealers must comply with U.S. rules when dealing with a non-U.S. counterparty in a jurisdiction that does not have similar rules, for example, if the foreign rules do not mandate margin requirements for non-cleared swaps'').

[383] *See, e.g.,* Financial Services Roundtable Letter at 25 (suggesting that the Commissions should defer to foreign prudential regulators with regard to entity-level requirements such as capital and margin, when they are deemed consistent with U.S. standards); Davis Polk Letter I at 3–4 (emphasizing the importance of relying on home country regulation for entity-level rules such as capital, margin, conflicts of interest, risk management, and limited recordkeeping requirements).

[384] *See* Davis Polk Letter II at 13–15 (recommending a comparability standard that ''focuses on the similarities in regulatory objectives as opposed to identity of technical rules,'' whereby the Federal Reserve, as the prudential regulator, could determine comparability even when a home country regulator does not require margin for non-cleared swaps, if ''the capital regime in such home country is determined to take account appropriately of unmargined or undermargined swaps by imposing additional capital charges'').

[385] *See, e.g.,* Davis Polk Letter I at 9 (stating that ''[w]here information is required from the foreign bank swap dealer, U.S. regulators should seek to rely upon regulatory examinations by home country regulators, and information sharing arrangements'').

[386] *See, e.g.,* Société Générale Letter I at 12 (recommending that a foreign dealer based outside the U.S. with no U.S. nexus ''should be 'ring-fenced' and outside the scope of the Commissions' examination and regulatory authority,'' but allowing for a limited examination of a foreign bank's U.S. facing business concerning its clearing, trade execution, and capital rules, through its U.S. domiciled agent who ''would facilitate this examination by making all necessary information available directly to the Commissions'').

[387] *See, e.g.,* Section 15F(h)(3)(A) of the Exchange Act, 15 U.S.C. 78o–10(h)(3)(A). *See generally* Section 15F(h) (discussing external business conduct standards). However, requirements under Section 15F(h)(1), which address fraud, supervision and adherence to position limits, apply at the entity level.

[388] *See* Section 3E of the Exchange Act, 15 U.S.C. 78c–5.

[389] *See* Section 15F(e) of the Exchange Act, 15 U.S.C. 78o–10(e).

[390] *See* Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o–10(j)(2).

[391] *See* Section 15F(k) of the Exchange Act, 15 U.S.C. 78o–10(k).

[392] *See* Section 15F(h)(1)(B) of the Exchange Act, 15 U.S.C. 78o–10(h)(1)(B).

[393] *See* Section 15F(k) of the Exchange Act, 15 U.S.C. 78o–10(k).

calculates margin based on the market value of specific transactions or on a portfolio basis).[394]

Below, we describe in more detail various transaction-level and entity-level requirements in Title VII applicable to security-based swap dealers.[395]

(a) Transaction-Level Requirements

In general, transaction-level requirements primarily focus on protecting counterparties by requiring security-based swap dealers to, among other things, provide certain disclosures to counterparties, adhere to certain standards of business conduct, and segregate customer funds, securities, and other assets. The following briefly describes the most significant transaction-level requirements applicable to security-based swap dealers in Title VII.

i. External Business Conduct Standards

Section 15F(h) of the Exchange Act requires the Commission to adopt rules specifying external business conduct standards for security-based swap dealers in their dealings with counterparties,[396] including counterparties that are ''special entities.'' [397] Congress granted the Commission broad authority to promulgate business conduct requirements, as the Commission determines to be appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Exchange Act.[398]

These standards, as described in Section 15F(h)(3) of the Exchange Act, must require security-based swap dealers to: (i) Verify that a counterparty meets the eligibility standards for an ECP; (ii) disclose to the counterparty material information about the security-based swap, including material risks and characteristics of the security-based swap, and material incentives and conflicts of interest of the security-based swap dealer in connection with the security-based swap; and (iii) provide the counterparty with information concerning the daily mark for the security-based swap. Section 15F(h)(3) also directs the Commission to establish a duty for security-based swap dealers to communicate information in a fair and balanced manner based on principles of fair dealing and good faith.

In addition, Section 15F(h)(4) of the Exchange Act requires that a security-based swap dealer that ''acts as an advisor to a special entity'' must act in the ''best interests'' of the special entity and undertake ''reasonable efforts to obtain such information as is necessary to make a reasonable determination'' that a recommended security-based swap is in the best interests of the special entity.[399] Section 15F(h)(5) requires that security-based swap dealers that enter into, or offer to enter into, security-based swaps with a special entity comply with any duty established by the Commission that requires a security-based swap dealer to have a ''reasonable basis'' for believing that a special entity has an ''independent representative'' that meets certain criteria and undertakes a duty to act in the ''best interests'' of the special entity.

The Commission has proposed Rules 15Fh–1 through 15Fh–6 under the Exchange Act to implement the business conduct requirements described above.[400] In addition to external business conduct standards expressly addressed by Title VII, the Commission has proposed certain other business conduct requirements for security-based swap dealers that the Commission preliminarily believed would further the principles that underlie the Dodd-Frank Act. These rules would, among other things, impose certain ''know your counterparty'' and suitability obligations on security-based swap dealers, as well as restrict security-based swap dealers from engaging in certain ''pay to play'' activities.[401]

ii. Segregation of Assets

Segregation requirements are designed to identify and protect customer property held by a security-based swap dealer as collateral in order to facilitate the prompt return of the property to customers or counterparties in a liquidation proceeding of such security-based swap dealer.[402] Segregation not only protects counterparties who are customers of a security-based swap dealer but also facilitates orderly liquidation of a security-based swap dealer and minimizes the disruption to and impact on the U.S. security-based swap market and the U.S. financial system overall caused by insolvency and liquidation of a security-based swap dealer.

Section 3E of the Exchange Act provides the Commission with rulemaking authority to prescribe segregation requirements for securities-based swap dealers that receive assets from, for, or on behalf of a counterparty to margin, guarantee, or secure a security-based swap transaction.[403] Section 3E(c) provides the Commission with rulemaking authority to prescribe how any margin received by a security-based swap dealer with respect to cleared security-based swap transactions may be maintained, accounted for, treated and dealt with by the security-based swap dealer.[404] In addition, Section 3E(g) extended the customer protections of the U.S. Bankruptcy Code to counterparties of a security-based swap dealer with respect to cleared security-based swaps, and with respect to non-cleared security-based swaps, if there is a customer protection requirement under Section 15(c)(3) or a segregation requirement

[394] *See* Section 15F(e) of the Exchange Act, 15 U.S.C. 78o–10(e). To take another example, the requirement that security-based swap dealers implement conflict-of-interest systems and procedures relating to security-based swaps in Section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o–10(j)(5), is transactional in the sense that potential conflicts of interest relate to particular security-based swap transactions. At the same time, however, it also is an entity-level requirement because implementing such systems and procedures would require, among other things, a security-based swap dealer to establish structural and institutional safeguards to wall off the activities of persons within the firm relating to research or analysis of the price or market for any security-based swap. *See* External Business Conduct Standards Proposing Release, 76 FR 42420.

[395] For purposes of this discussion, we are addressing only requirements applicable to security-based swap dealers in Sections 3E and 15F of the Exchange Act, 15 U.S.C. 78c–5 and 78o–10, and the rules and regulations thereunder. Title VII requirements relating to regulatory reporting and public dissemination, clearing, and trade execution are discussed in Sections VIII–X below.

[396] Section 15F(h)(6) of the Exchange Act, 15 U.S.C. 78o–10(h)(6), directs the Commission to prescribe rules governing external business conduct standards for security-based swap dealers. Section 15F(h) of the Exchange Act, 15 U.S.C. 78o–10(h), also generally authorizes and requires the Commission to adopt rules for major security-based swap participants. *See* Section IV, *infra.*

[397] Section 15F(h)(2)(C) of the Exchange Act, 15 U.S.C. 78o–10(h)(2)(C). *See* note 286, *supra.*

[398] *See* Section 15F(h)(3)(D) of the Exchange Act, 15 U.S.C. 78o–10(h)(3)(D) (''[b]usiness conduct requirements adopted by the Commission shall establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act''). *See also* Section 15F(h)(1)(D) of the Exchange Act (requiring that security-based swap dealers to comply as well with ''such business conduct standards . . . as may be prescribed by the Commission by rule or regulation that relate to . . . such other matters as the Commission determines to be appropriate'').

[399] *See* External Business Conduct Standards Proposing Release, 76 FR 42423–25.

[400] *See* External Business Conduct Standards Proposing Release, 76 FR 42396.

[401] *See* External Business Conduct Standards Proposing Release, 76 FR 42399–400; proposed Rules 15Fh–3(e) (''know your counterparty''), 15Fh–3(f) (''suitability''), and 15Fh–6 (''pay to play'') under the Exchange Act.

[402] Proposed Rule 18a–4 under the Exchange Act, as discussed in Section II.C. of the Capital, Margin, and Segregation Proposing Release, 77 FR 70274.

[403] *See* Section 3E of the Exchange Act, 15 U.S.C. 78c–5.

[404] *See* Section 3E(c)(2) of the Exchange Act, 15 U.S.C. 78c–5(c)(2).

prescribed by the Commission.[405] The Commission has proposed Rule 18a–4 under the Exchange Act to establish segregation requirements for security-based swap dealers with respect to both cleared and non-cleared security-based swap transactions.[406] The provisions of proposed Rule 18a–4 were modeled on the broker-dealer customer protection rule and take into account the characteristics of security-based swaps.[407]

(b) Entity-Level Requirements

Entity-level requirements in Title VII primarily address concerns relating to the security-based swap dealer as a whole, with a particular focus on safety and soundness of the entity to reduce systemic risk in the U.S. financial system.[408] The most significant entity-level requirements, as discussed below, are capital and margin requirements. Certain other entity-level requirements relate to the capital and margin requirements because, at their core, they relate to how the firm identifies and manages its risk exposure arising from its activities (*e.g.,* risk management requirements). Given their functions, these entity-level requirements would be applied under our proposal on a firm-wide basis to address risks to the security-based swap dealer as a whole.

i. Capital

The Commission is required to establish minimum requirements relating to capital for security-based swap dealers for which there is not a prudential regulator (''nonbank security-based swap dealers'').[409] The prudential regulators are required to establish requirements relating to capital for bank security-based swap dealers.[410] Some security-based swap dealers may also be registered as swap dealers with the CFTC. The CFTC is required to establish capital requirements for nonbank swap dealers.[411] The prudential regulators are required to establish capital requirements for bank swap dealers.[412]

The objective of the Commission's proposed capital rule for security-based swap dealers is the same as the Commission's capital rule for broker-dealers; specifically, to ensure that the entity maintains at all times sufficient liquid assets to (i) promptly satisfy its liabilities—the claims of customers, creditors, and other security-based swap dealers, and (ii) provide a cushion of liquid assets in excess of liabilities to cover potential market, credit, and other risks.[413]

As noted above, the Commission's proposed capital rules focus on the liquid assets of a nonbank security-based swap dealer available to satisfy its liabilities or cover its risks in a liquidation scenario. This focus on liquid assets would distinguish the Commission's capital rules applicable to security-based swap dealers from those applicable to banks, which generally include a more permissive list of assets that may be taken into account for purposes of capital calculations.[414] The difference in approach between the capital rules applicable to nonbank dealers and bank dealers is supported by certain operational, policy, and legal differences between nonbank security-based swap dealers and bank security-based swap dealers.[415] Notably, existing capital standards for banks and broker-dealers reflect, in part, differences in their funding models and access to certain types of financial support, and we expect that those same differences also will exist between bank security-based swap dealers and nonbank security-based swap dealers. For example, banks obtain funding through customer deposits and can generally obtain liquidity through the Federal Reserve's discount window to meet their obligations,[416] whereas broker-dealers and nonbank security-based swap dealers cannot.[417] Thus all of a nonbank entity's counterparty obligations must be met through the nonbank entity's own liquid assets. For these reasons, the Commission's proposed capital standard for nonbank security-based swap dealers is a net liquid assets test modeled on the broker-dealer capital standard in Rule 15c3–1 under the Exchange Act.[418]

ii. Margin

Margin may be viewed as an entity-level requirement given its effect on the financial soundness of an entity, as well as a transaction-level requirement due to the fact that margin is calculated based on particular transactions and positions. Although margin is calculated based on individual transactions, the cumulative effect of collecting margin from counterparties is to protect an entity from the default of its counterparties. Given the emphasis placed on the financial soundness of security-based swap dealers in Title VII,[419] we believe that margin should be treated as an entity-level requirement for purposes of implementing Title VII in the cross-border context.

We recognize that this approach differs from the approach to margin

[405] *See* Section 3E(g) of the Exchange Act, 15 U.S.C. 78c–5(g); Capital, Margin, and Segregation Proposing Release, 77 FR 70275.

[406] Proposed Rule 18a–4 under the Exchange Act, as discussed in the Capital, Margin, and Segregation Proposing Release, 77 FR 70274–88.

[407] 17 CFR 240.15c3–3. *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70276.

[408] For example, Section 15F(e)(3) of the Exchange Act provides that the requirements relating to capital and margin imposed by the Commission pursuant to Section 15F(e)(2) shall help ensure the safety and soundness of the security-based swap dealer and be appropriate for the risk associated with the non-cleared security-based swaps held as a security-based swap dealer in order ''[t]o offset the greater risk to the security-based swap dealer . . . and the financial system arising from the use of security-based swaps that are not cleared.''

[409] *See* Section 15F(e)(1)(B) of the Exchange Act, 15 U.S.C. 78o–10(e)(1)(B); note 34, *supra* (discussing the term ''prudential regulator'').

[410] *See* Section 15F(e)(1)(A) of the Exchange Act, 15 U.S.C. 78o–10(e)(1)(A); *see also* Prudential Regulators Proposed Rule, Margin and Capital Requirements for Covered Swap Entities, 76 FR 27564 (May 11, 2011) (''Prudential Regulator Margin and Capital Proposal'').

[411] *See* Section 4s(e)(1)(B) of the CEA, 7 U.S.C. 6s(e)(1)(B), as added by Section 731 of the Dodd-Frank Act; *see also* CFTC Proposed Rule, Capital Requirements of Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011) (''CFTC Capital Proposal'').

[412] *See* Section 4s(e)(1)(A) of the CEA, 7 U.S.C. 6s(e)(1)(A); *see also* Prudential Regulator Margin and Capital Proposal, 76 FR 27564.

[413] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70218 (''[T]he capital and other financial responsibility requirements for broker-dealers generally provide a reasonable template for crafting the corresponding requirements for nonbank [security-based swap dealers]. For example, among other considerations, the objectives of capital standards for both types of entities are similar.'').

[414] *See, e.g.,* Basel Committee on Banking Supervision (''BCBS''), Basel III: International framework for liquidity risk measurement, standards and monitoring for banks (Dec. 2010) (''Basel III''), *available at: http://www.bis.org/publ/bcbs188.pdf.*

[415] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70218. In this release, the Commission discussed the operational, policy, and legal differences between banks and nonbank entities for distinguishing the Commission's capital rules from those applicable to bank security-based swap dealers.

[416] Depository institutions that maintain transaction accounts or non-personal time deposits subject to reserve requirements are eligible to borrow funds from the Federal Reserve's discount window, such as commercial banks, thrift institutions, and U.S. branches and agencies of foreign banks. *See* Regulation D, 12 CFR part 204.

[417] Under the segregation requirements in Rule 15c3–3 under the Exchange Act and proposed Rule 18a–4 under the Exchange Act, broker-dealers and security-based swap dealers are not permitted to rehypothecate customer assets to finance their business activity. Thus, they cannot use customer assets as a source of funding, whereas banks are in the business of investing customer deposits (subject to banking regulations).

[418] *Id.*

[419] *See, e.g.,* Section 15F(e)(3)(A)(i) of the Exchange Act, 15 U.S.C. 78o–10(e)(3)(A)(i) (stating that Title VII's capital and margin requirements are intended to ''help ensure the safety and soundness of the security-based swap dealer or major security-based swap participant''). In setting capital and margin requirements for security-based swap dealers and major security-based swap participants, the Commission's goal is to help ensure the safety and soundness of these entities because of their connection to the U.S. financial system.

proposed by the CFTC in its cross-border guidance, which focused on the transaction-by-transaction nature of margin and thus treated it as a transaction-level requirement.[420] However, we preliminarily believe that treating margin as an entity-level requirement is consistent with the role margin plays as part of an integrated program of financial responsibility requirements, along with the capital standards and segregation requirements, that are intended to enhance the financial integrity of security-based swap dealers.[421] The margin requirements proposed by the Commission are intended to work in tandem with the capital requirements to strengthen the financial system by reducing the potential for default to an acceptable level and limiting the amount of leverage that can be employed by security-based swap dealers and other market participants.[422] For example, the capital requirements proposed by the Commission take into account whether a security-based swap is cleared or non-cleared, the amount of margin collateral imposed by registered clearing agencies with respect to cleared security-based swaps, and the circumstances where non-cleared security-based swaps are excepted from the margin collection requirements imposed by the Commission, and would impose a capital charge in certain cases for uncollateralized or insufficiently collateralized exposures arising from cleared or non-cleared security-based swaps in order to account for the counterparty default risk that is not adequately addressed by margin collateral.[423] We preliminarily do not believe that margin would effectively fulfill its purpose as part of a comprehensive financial responsibility program for non-bank security-based swap dealers if the Commission were to treat margin solely as a transaction-level requirement.

The division of regulatory responsibilities related to margin requirements in Title VII mirrors that of the capital requirements discussed above. As with capital, the Commission is required to establish minimum requirements relating to initial and variation margin on all security-based swaps that are not cleared by a registered clearing agency for nonbank security-based swap dealers.[424] The prudential regulators are required to establish requirements relating to margin for bank security-based swap dealers.[425] Security-based swap dealers that are also registered as swap dealers with the CFTC also would be subject to CFTC requirements for nonbank swap dealers with respect to initial and variation margin requirements on all swaps that are not cleared by a registered derivatives clearing organization.[426]

The objective of the margin requirements for security-based swap dealers is to offset the greater risk to the security-based swap dealer and the financial system arising from the use of security-based swaps that are not cleared.[427] Margin serves as a buffer in the event a counterparty fails to meet an obligation to the security-based swap dealer and the security-based swap dealer must liquidate the assets posted by the counterparty to satisfy the obligation.[428] More generally, under Title VII, the Commission is specifically required to set both capital and margin requirements for nonbank security-based swap dealers that (i) help ensure the safety and soundness of the nonbank security-based swap dealer and (ii) are appropriate for the risk associated with the non-cleared swaps held as a security-based swap dealer.[429]

Pursuant to Section 15F(e) of the Exchange Act, the Commission has proposed Rule 18a–3 to establish margin requirements for nonbank security-based swap dealers with respect to non-cleared security-based swaps.[430] Proposed Rule 18a–3 is based on the margin rules applicable to broker-dealers.[431] The goal of modeling proposed Rule 18a–3 on the broker-dealer margin rules is to promote consistency with existing rules and to facilitate the portfolio margining of security-based swaps with other types of securities.[432] Proposed Rule 18a–3 is intended to form part of an integrated program of financial responsibility requirements, along with the proposed capital and segregation standards.[433]

The Commission preliminarily believes that it is necessary to treat margin as an entity-level requirement applicable to all of a dealer's security-based swap transactions in order to effectively address the Dodd-Frank Act requirements for setting margin. We preliminarily believe that treating margin solely as a transaction-level requirement, and applying margin requirements differently to a security-based swap dealer's U.S. Business and Foreign Business,[434] would not adequately further the goals of using margin to ensure the safety and soundness of security-based swap dealers because it could result in security-based swap dealers with global businesses collecting significantly less collateral than would otherwise be required to the extent that they are not required by local law to collect margin from their counterparties. Further, separately applying margin in this way would force those counterparties entering into transactions that constitute the U.S. Business of a dealer to bear a greater burden in ensuring the safety and soundness of such dealer than counterparties that are part of the dealer's Foreign Business.[435] We thus preliminarily believe that it is

[420] *See* CFTC Cross-Border Proposal, 77 FR 41226.

[421] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70303 and 70259.

[422] *See id.* at 70304.

[423] *See id.* at 70245–46.

[424] *See* Sections 15F(e)(1)(B) and (2)(B) of the Exchange Act, 15 U.S.C. 78o–10(e)(1)(B) and (2)(B).

[425] *See* Section 15F(e)(1)(A) of the Exchange Act, 15 U.S.C. 78o–10(e)(1)(A); *see also* Prudential Regulator Margin and Capital Proposal, 76 FR 27564.

[426] *See* Section 4s(e)(1)(B) of the CEA, 7 U.S.C. 6s(e)(1)(B), as added by Section 731 of the Dodd-Frank Act; *see also* CFTC Proposed Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 FR 23732 (Apr. 28, 2011) (''CFTC Margin Proposal''). The CFTC also has adopted segregation requirements for cleared swaps and proposed segregation requirements for non-cleared swaps. *See* Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012) (''CFTC Segregation for Cleared Swaps Final Release''); Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 75 FR 75432 (Dec. 3, 2010) (''CFTC Segregation for Uncleared Swaps Proposing Release'').

[427] *See* Section 15F(e)(3)(A) of the Exchange Act, 15 U.S.C. 78o–10(e)(3)(A).

[428] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70259.

[429] *See* Sections 15F(e)(3)(A)(i) and (ii) of the Exchange Act, 15 U.S.C. 78o–10(e)(3)(A)(i) and (ii).

[430] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70257–74.

[431] *See id.* at 70259. Broker-dealers are subject to margin requirements in Regulation T promulgated by the Federal Reserve (12 CFR 220.1–220.132), in rules promulgated by the self-regulatory organizations (''SROs'') (*see, e.g.,* Rules 4210–4240 of the Financial Industry Regulatory Authority (''FINRA'')), and with respect to security futures, in rules jointly promulgated by the Commission and the CFTC (17 CFR 242.400–242.406).

[432] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70259.

[433] *Id.*

[434] *See* proposed Rule 3a71–3(a)(2) under the Exchange Act (defining ''Foreign Business'').

[435] Although we do not believe that it is appropriate to distinguish between the geographic locations of counterparties when applying the margin requirement, we recognize that it may be appropriate, in certain circumstances, to distinguish between types of counterparties in applying margin based on such factors as the risk they pose to dealers and the policy goal of promoting liquidity in dealers. *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70265–68 (proposing to exclude both transactions with commercial end users and those with other dealers from certain margin requirements applicable to security-based swap dealers).

appropriate to treat margin as an entity-level requirement applicable to the security-based swap transactions of registered security-based swap dealers regardless of the location of their counterparties. As noted below, the Commission is soliciting comment on this approach.

iii. Risk Management

Registered security-based swap dealers are required to establish robust and professional risk management systems adequate for managing their day-to-day business.[436] The Commission has proposed that nonbank security-based swap dealers would be required to comply with existing Rule 15c3–4 under the Exchange Act.[437] This rule, originally adopted for OTC derivative dealers, requires firms subject to its provisions to establish, document, and maintain a comprehensive system of internal risk management controls to assist in managing the risks associated with its business activities, including market, credit, leverage, liquidity, legal, and operational risks.[438] These various risks arise from both the U.S. Business and Foreign Business of a global security-based swap dealer. A risk management system limited in scope to cover only one type of business, or limited to certain security-based swap transactions, would not effectively control the risks undertaken by a security-based swap dealer because the risks stemming from business outside the scope of such risk management system could still negatively impact the dealer. As a result, we preliminarily believe that it is necessary to treat risk management requirements as entity-level requirements in order to place risk controls over the entire security-based swap business, thus effectively addressing the Dodd-Frank Act requirements for managing risk within security-based swap dealers.

Rule 15c3–4 identifies a number of qualitative factors that would need to be a part of the risk management controls of a nonbank security-based swap dealer. For example, a nonbank security-based swap dealer would need to have a risk control unit that reports directly to senior management and is independent from business trading units, and it would be required to separate duties between personnel responsible for entering into a transaction and those responsible for recording the transaction in the books and records of the firm.[439] In addition, the Commission is authorized to adopt rules governing documentation standards of security-based swap dealers for timely and accurate confirmation, processing, netting, documentation, and valuation of security-based swaps.[440] Pursuant to this authority, the Commission has proposed rules regarding trade acknowledgement and verification related to security-based swap transactions.[441]

iv. Recordkeeping and Reporting

Registered nonbank security-based swap dealers are required to keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation; registered bank security-based swap dealers are required to keep books and records of all activities related to their ''business as a security-based swap dealer'' in such form and manner and for such period as may be prescribed by the Commission.[442] Registered security-based swap dealers also are required to make such reports as are required by the Commission regarding the transactions and positions, and financial condition of the registrant.[443]

In addition, security-based swap dealers are required to maintain daily trading records of the security-based swaps they enter into.[444] Security-based swap dealers also are required to disclose to the Commission and the prudential regulators information concerning: (i) Terms and conditions of their security-based swaps; (ii) security-based swap trading operations, mechanisms, and practices; (iii) financial integrity protections relating to security-based swaps; and (iv) other information relevant to their trading in security-based swaps.[445]

Each of these types of records is an important part of the Commission's oversight of our registrants because it provides the Commission with vital information regarding such entities. If the Commission's information were limited in scope to cover only one type of business, or limited to only certain security-based swap activities, the Commission would not be able to effectively regulate our registered security-based swap dealers because it would not have a full picture of the business of such registrants. As a result, we preliminarily believe that it is necessary to treat recordkeeping and reporting as entity-level requirements in order to provide the Commission with the information necessary to regulate registered security-based swap dealers and thus effectively address the Dodd-Frank Act requirements for maintaining books and records.

The Commission has not yet proposed rules regarding the recordkeeping and reporting requirements under Section 15F of the Exchange Act and solicits comment regarding the application of recordkeeping and reporting requirements in the cross-border context.

v. Internal System and Controls

Security-based swap dealers are required to establish and enforce systems and procedures to obtain any information that is necessary to perform any of the functions that are required under Section 15F(j) of the Exchange Act[446] and to provide this information to the Commission, or the responsible prudential regulator, upon request.[447] The Commission has proposed a rule that would require a registered security-based swap dealer to establish policies and procedures that are reasonably designed to comply with its responsibilities under Section 15F(j) of the Exchange Act.[448]

Many of the functions required under Section 15F(j) of the Exchange Act are

[436] *See* Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o–10(j)(2).

[437] *See* proposed new paragraph (a)(10)(ii) of Rule 15c3–1 under the Exchange Act (17 CFR 240.15c3–1); paragraph (g) of proposed new Rule 18a–1 under the Exchange Act. *See also* 17 CFR 240.15c3–4; Capital, Margin, and Segregation Proposing Release, 77 FR 70250–51. The Commission has not proposed rules relating to risk management for bank security-based swap dealers.

[438] *See* OTC Derivatives Dealers, Exchange Act Release No. 40594 (Oct. 23, 1998), 63 FR 59362 (Nov. 3, 1998).

[439] *See* 17 CFR 240.15c3–4(c), as discussed in the Capital, Margin, and Segregation Proposing Release, 77 FR 70250.

[440] *See* Section 15F(i) of the Exchange Act, 15 U.S.C. 78o–10(i).

[441] *See* Trade Acknowledgement Proposing Release, 76 FR 3859.

[442] *See* Sections 15F(f)(1)(B)(i) and (ii) of the Exchange Act, 15 U.S.C. 78o–10(f)(1)(B)(i) and (ii).

[443] *See* Section 15F(f)(1)(A) of the Exchange Act, 15 U.S.C. 78o–10(f)(1)(A).

[444] *See* Section 15F(g) of the Exchange Act, 15 U.S.C. 78o–10(g).

[445] *See* Section 15F(j)(3) of the Exchange Act, 15 U.S.C. 78o–10(j)(3).

[446] 15 U.S.C. 78o–10(j). These functions include monitoring of applicable position limits under Section 15F(j)(1) of the Exchange Act, 15 U.S.C. 78o–10(j)(1); establishment of risk management procedures under Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o–10(j)(2); disclosure of general information to the Commission and prudential regulators under Section 15F(j)(3) of the Exchange Act, 15 U.S.C. 78o–10(j)(3); establishment of policies and procedures to avoid conflicts of interest under Section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o–10(j)(5); and avoidance of any actions that result in an unreasonable restraint of trade or place any material anticompetitive burden on trading or clearing under Section 15F(j)(6) of the Exchange Act, 15 U.S.C. 78o–10(j)(6).

[447] *See* Section 15F(j)(4) of the Exchange Act, 15 U.S.C. 78o–10(j)(4).

[448] *See* proposed Rule 15Fh–3(h)(2)(iv) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42420.

entity-level in nature (*e.g.,* risk management procedures[449] and conflicts of interest[450]). As a result, we preliminarily believe that the requirement to establish and enforce systems and procedures to obtain any information that is necessary to perform these functions cannot be effectively implemented unless it also is treated as an entity-level requirement, or else it would not cover the full scope of the requirements under Section 15F(j) of the Exchange Act to which it applies.

vi. Diligent Supervision

The Commission is authorized under the Dodd-Frank Act to adopt rules requiring diligent supervision of the business of security-based swap dealers.[451] The Commission has proposed a rule that would establish supervisory obligations and that would incorporate principles from Section 15(b) of the Exchange Act and existing SRO rules.[452] Among other things, under proposed Rule 15Fh–3(h), a security-based swap dealer would be required to establish, maintain, and enforce a system to supervise, and would be required to supervise diligently, its business and its associated persons, with a view to preventing violations of applicable federal securities laws, and the rules and regulations thereunder, relating to its business as a security-based swap dealer.[453] The rule proposed by the Commission also would establish certain minimum requirements relating to the supervisory systems that are prescriptive in nature, that is, they would impose specific obligations on security-based swap dealers.[454]

As previously noted, the purpose of diligent supervision requirements is to prevent violations of applicable federal securities laws, and the rules and regulations thereunder, relating to an entity's business as a security-based swap dealer. An entity's business as a security-based swap dealer is not limited to either its Foreign Business or its U.S. Business, but rather is comprised of its entire global security-based swap dealing activity. As a result, we preliminarily believe that it is necessary to treat diligent supervision as an entity-level requirement applicable to all of a dealer's security-based swap transactions in order to effectively address the Dodd-Frank Act requirements for diligent supervision. We believe that treating diligent supervision solely as a transaction-level requirement, and applying supervisory requirements differently to a security-based swap dealer's U.S. Business and Foreign Business, would not further the Dodd-Frank Act goal of establishing effective supervisory systems for security-based swap dealers.

vii. Conflicts of Interest

Section 15F(j)(5) of the Exchange Act requires security-based swap dealers to implement conflict-of-interest systems and procedures. Such policies and procedures must establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap, or acting in the role of providing clearing activities, or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision, and contravene the core principles of open access and the business conduct standards addressed in Title VII.[455] The Commission has proposed a rule that would require a security-based swap dealer to establish policies and procedures that are reasonably designed to comply with its responsibilities under Section 15F(j)(5).[456]

The Commission preliminarily believes that it is necessary to treat conflicts of interest as an entity-level requirement applicable to all of a dealer's security-based swap transactions in order to effectively address the Dodd-Frank Act requirements for setting systems and procedures to prevent conflicts of interest from biasing the judgment or supervision of security-based swap dealers. We believe that treating conflicts of interest solely as a transaction-level requirement, and applying the required structural and institutional safeguards differently to a security-based swap dealer's U.S. Business and Foreign Business, would not further the goals of preventing conflicts of interest from influencing the security-based swap dealing activities of registered security-based swap dealers because such safeguards would only be in place for a portion of a security-based swap dealer's activities.

viii. Chief Compliance Officer

Registered security-based swap dealers are required to designate a chief compliance officer who reports directly to the board of directors or to the senior officer of the security-based swap dealer.[457] The chief compliance officer's responsibilities include reviewing and ensuring compliance of the security-based swap dealer with applicable requirements in the Exchange Act and the rules and regulations thereunder, resolution of conflicts of interest, administration of business conduct policies and procedures, and establishment of procedures for the remediation of noncompliance issues.[458] The chief compliance officer also is required to prepare and sign a report that contains a description of the security-based swap dealer's compliance with applicable requirements in the Exchange Act, and the rules and regulations thereunder, and each of the security-based swap dealer's policies and procedures.[459] The Commission has proposed a rule to implement these statutory requirements relating to the designation and functions of a chief compliance officer.[460]

As noted above, part of the chief compliance officer's responsibilities, under the proposed rule, include establishing, maintaining, and reviewing policies and procedures reasonably designed to ensure compliance with applicable requirements in the Exchange Act and the rules and regulations thereunder.[461] Many of Title VII requirements, such as those applicable to security-based swap dealers that are described in this section, apply at the entity level. As a result, we preliminarily believe that it is necessary to treat the chief compliance officer as an entity-level requirement applicable to all of a dealer's security-

[449] *See* Section III.C.3(b)iii, *supra.*

[450] *See* Section III.C.3(b)vii, *infra.*

[451] *See* Section 15F(h)(1)(B) of the Exchange Act, 15 U.S.C. 78o–10(h)(1)(B).

[452] Proposed Rule 15Fh–3(h) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42419–21.

[453] Proposed Rule 15Fh–3(h)(1) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42419–21.

[454] Proposed Rule 15Fh–3(h)(2) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42419–21.

[455] *See* Section 15F(j)(5) of the Exchange Act, 15 U.S.C. 78o–10(j)(5), as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42420.

[456] Proposed Rule 15Fh–3(h)(2)(iv) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42420.

[457] *See* Section 15F(k) of the Exchange Act, 15 U.S.C. 78o–10(k).

[458] *See* Section 15F(k)(2) of the Exchange Act, 15 U.S.C. 78o–10(k)(2).

[459] *See* Section 15F(k)(3) of the Exchange Act, 15 U.S.C. 78o–10(k)(3).

[460] Proposed Rule 15Fk–1 under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42435–38.

[461] *See* Proposed Rule 15Fk–1(b)(2) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42435–36.

based swap business in order to effectively address the Dodd-Frank Act requirements for the chief compliance officer. We believe that treating the chief compliance officer solely as a transaction-level requirement, and applying the chief compliance officer requirements differently to a security-based swap dealer's U.S. Business and Foreign Business, would be unworkable given the chief compliance officer's oversight responsibilities over entity-level requirements and thus would not further the goals of establishing the chief compliance officer role for security-based swap dealers.

ix. Inspection and Examination

Registered bank and nonbank security-based swap dealers are obligated to keep their books and records required pursuant to Commission rules and regulations open to inspection and examination by any representative of the Commission.[462] The Commission has proposed a rule that would require, among other things, ''nonresident security-based swap dealers'' that are required to register with the Commission to appoint and identify to the Commission an agent in the United States (other than the Commission or a Commission member, official, or employee) for service of process.[463] In addition, the proposed rule would require that a nonresident security-based swap dealer certify that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission.[464] The proposed rule also would require that the nonresident security-based swap dealer provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission.[465]

In proposing this rule, the Commission stated that it preliminarily believed that the nonresident security-based swap certification and supporting opinion of counsel were important to confirm that each registered nonresident security-based swap dealer has taken the necessary steps to be in the position to provide the Commission with prompt access to its books and records and to be subject to inspection and examination by the Commission.[466] To effectively fulfill our regulatory oversight responsibilities with respect to nonresident security-based swap dealers registered with it, the Commission stated that it must have access to those entities' records and the ability to examine them. The Commission recognized, however, that certain foreign jurisdictions may have laws that complicate the ability of financial institutions, such as nonresident security-based swap dealers located in their jurisdictions, to share and/or transfer certain information including personal financial data of individuals that the financial institutions come to possess from third persons (*e.g.,* personal data relating to the identity of market participants or their customers).[467] The Commission further stated that the required certification and opinion of counsel regarding the nonresident security-based swap dealer's ability to provide prompt access to books and records and to be subject to inspection and examination would allow the Commission to better evaluate a nonresident security-based swap dealer's ability to meet the requirements of registration and ongoing supervision.[468]

The Commission's inspection and examination authority is vital to our oversight of registered security-based swap dealers. If the Commission's inspection and examination were limited in scope to cover only one type of business, or limited to only certain security-based swap activities, the Commission would not be able to effectively regulate our registered security-based swap dealers because it would not have a full picture of the business of such registrants. As a result, we preliminarily believe that it is necessary to treat inspection and examination requirements as entity-level in order to provide the Commission with the information and access necessary to regulate registered security-based swap dealers.

x. Licensing Requirements and Statutory Disqualification

The Commission has not proposed any licensing requirements for associated persons of registered security-based swap dealers, that are specifically related to their security-based swap dealing activities. However, the Commission has proposed a rule that would require security-based swap dealers (and major security-based swap participants) to certify that no person associated with such entities who effects or is involved in effecting security-based swaps on their behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Exchange Act.[469] This proposed rule relates to paragraph (b)(6) of Section 15F of the Exchange Act,[470] which generally prohibits security-based swap dealers (and major security-based swap participants) from permitting any of their associated persons[471] who are subject to a ''statutory disqualification'' to effect or be involved in effecting[472] security-based swaps on behalf of such entities if the security-based swap dealer (or major security-based swap participant) knew, or in the exercise of

[462] *See* Section 15F(f)(1)(C) of the Exchange Act, 15 U.S.C. 78o–10(f)(1)(C). Registered bank security-based swap dealers are only required to keep the books and records associated with the activities related to their security-based swap dealing business, as prescribed by the Commission, and to make these books and records available for inspection by any representative of the Commission. *See id.*

[463] Proposed Rule 15Fb2–4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65799. For a description of the term ''nonresident security-based swap dealer'' as defined in proposed Rule 15Fb2–4(a) under the Exchange Act, including how that definition differs from the definition of the term ''foreign security-based swap dealer'' as proposed in this release, see note 579 above.

[464] Proposed Rule 15Fb2–4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65800.

[465] Proposed Rule 15Fb2–4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65799–801.

[466] *See* Registration Proposing Release, 76 FR 65800.

[467] *Id.*

[468] *Id.*

[469] 15 U.S.C. 78c(a)(39). *See* proposed Rule 15Fb6–1 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65795.

[470] 15 U.S.C. 78o–10(b)(6).

[471] Section 3(a)(70) of the Exchange Act, 15 U.S.C. 78c(a)(70), generally defines the term ''person associated with'' a security-based swap dealer or major security-based swap participant (''SBS Entity'') to include: (i) any partner, officer, director, or branch manager of an SBS Entity (or any person occupying a similar status or performing similar functions); (ii) any person directly or indirectly controlling, controlled by, or under common control with an SBS Entity; or (iii) any employee of an SBS Entity. However, it generally excludes persons whose functions are solely clerical or ministerial.

[472] As stated in the Registration Proposing Release, ''[t]he Commission believes that associated persons 'involved in effecting' security-based swaps would include, but not be limited to, persons involved in drafting and negotiating master agreements and confirmations, persons recommending security-based swap transactions to counterparties, persons on a trading desk actively involved in effecting security-based swap transactions, persons pricing security-based swap positions and managing collateral for the [security-based swap dealer or major security-based swap participant], and persons assuring that the [security-based swap dealer's or major security-based swap participant's] security-based swap business operates in compliance with applicable regulations. In short, the term would encompass persons engaged in functions necessary to facilitate the [security-based swap dealer's or major security-based swap participant's] security-based swap business.'' Registration Proposing Release, 76 FR 65795 n. 56.

reasonable care should have known, of the statutory disqualification.[473]

The Commission preliminarily believes that it is necessary to treat requirements related to licensing and statutory disqualification as entity-level requirements applicable to all of a dealer's security-based swap business in order to effectively address the Exchange Act's statutory disqualification provision. We believe that treating licensing requirements and statutory disqualification solely as transaction-level requirements, and applying the statutory disqualification differently to a security-based swap dealer's U.S. Business and Foreign Business, would not further the goals of preventing statutorily disqualified persons from effecting security-based swaps on behalf of registered security-based swap dealers because such disqualifications would only be in place for a portion of a security-based swap dealer's activities.

4. Application of Certain Transaction-Level Requirements [474]

(a) Proposed Rule

The Commission is proposing a rule that would provide that a registered foreign security-based swap dealer and a foreign branch of a registered U.S. security-based swap dealer, with respect to their Foreign Business, shall not be subject to the requirements relating to external business conduct standards described in Section 15F(h) of the Exchange Act,[475] and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B).[476]

The proposed rule would define ''Foreign Business'' as security-based swap transactions entered into, or offered to be entered into, by or on behalf of a foreign security-based swap dealer or a U.S. security-based swap dealer that do not include its U.S. Business.[477] The proposed rule would define ''U.S. Business'' as:

- With respect to a foreign security-based swap dealer, (i) any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than with a foreign branch), or (ii) any transaction conducted within the United States; [478] and
- With respect to a U.S. security-based swap dealer, any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.[479]

Whether the activity occurred within the United States or with a U.S. person for purposes of identifying whether security-based swap transactions are part of a U.S. Business or Foreign Business would turn on the same factors used to determine whether a foreign security-based swap dealer is engaging in dealing activity within the United States or with U.S. persons, as discussed above.[480] The proposed rule provides that a U.S. security-based swap dealer would be considered to have conducted a security-based swap transaction through a foreign branch if:

- The foreign branch is the counterparty to such security-based swap transaction; and
- No person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap transaction on behalf of the foreign branch or its counterparty.[481]

As discussed above,[482] the proposed rule would define ''foreign branch'' as any branch of a U.S. bank if:

- The branch is located outside the United States;
- The branch operates for valid business reasons; and
- The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.[483]

All other requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, would apply to both U.S. and foreign security-based swap dealers registered with the Commission, although the Commission is proposing to establish a policy and procedural framework under which it would consider permitting substituted compliance for foreign security-based swap dealers (but not for U.S. security-based swap dealers that conduct dealing activity through foreign branches) under certain circumstances, as discussed below.[484]

The Commission also is proposing a rule that would provide that a foreign security-based swap dealer would not be required to comply with the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to security-based transactions with non-U.S. person counterparties in certain circumstances.[485] Specifically, the Commission is proposing a rule that would provide the following:

- With respect to non-cleared security-based swap transactions:
  - ○ A registered foreign security-based swap dealer that is a registered broker-dealer would be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, with respect to assets collected from, for, or on behalf of any counterparty to margin a non-cleared security-based swap transaction.
  - ○ a registered foreign security-based swap dealer that is not a registered broker-dealer would be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and Rules 18a–4(a)–(d), solely with respect to assets collected from, for, or on behalf of a counterparty that is a U.S. person to margin a non-cleared security-based swap transaction. The special account maintained by a registered foreign security-based swap dealer that is not a registered broker-dealer in accordance with proposed Rule 18a–4(c) would be required to be designated for the exclusive benefit of U.S. person security-based swap customers.[486]
- With respect to cleared security-based swap transactions:

[473] *See* Registration Proposing Release, 76 FR 65795.

[474] For purposes of this discussion, we are addressing only requirements applicable to security-based swap dealers in Sections 3E and 15F of the Exchange Act, 15 U.S.C. 78c–5 and 78o–10, and the rules and regulations thereunder. Title VII requirements relating to reporting and dissemination, clearing, and trade execution are discussed in Sections VIII–X, *infra.*

[475] 15 U.S.C. 78o–10(h).

[476] Proposed Rule 3a71–3(c) under the Exchange Act. The approach under the proposed rule does not affect applicability of the general antifraud provisions of the federal securities laws to the activity of a foreign security-based swap dealer. *See* Section XII, *infra.*

[477] Proposed Rule 3a71–3(a)(2) under the Exchange Act.

[478] Proposed Rule 3a71–3(a)(6) under the Exchange Act. A person that meets the security-based swap dealer definition is a dealer with regard to all of its security-based swap activities, not just its dealing activities. *See* Intermediary Definitions Adopting Release, 77 FR 30645. Accordingly, a foreign security-based swap dealer's U.S. Business would not be limited only to transactions arising from its dealing activity, but rather would include all types of security-based swap activity.

[479] Proposed Rule 3a71–3(a)(6) under the Exchange Act.

[480] *See* Section III.B.6, *supra* (discussing the proposed definition of ''transaction conducted within the United States'').

[481] Proposed Rule 3a71–3(a)(4) under the Exchange Act. *See also* proposed Rule 3a71–3(a)(5)(ii) under the Exchange Act (providing that the definition of ''transaction conducted within the United States'' shall not include a transaction conducted through a foreign branch).

[482] *See* Section III.B.7, *supra.*

[483] Proposed Rule 3a71–3(a)(1) under the Exchange Act.

[484] *See* Section XI.C, *infra.*

[485] Proposed Rule 18a–4(e) under the Exchange Act.

[486] Proposed Rule 18a–4(e)(1) under the Exchange Act.

○ A registered foreign security-based swap dealer that is not a foreign bank with a branch or agency in the United States and is a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, with respect to assets collected from, for, or on behalf of any counterparty to margin a cleared security-based swap transaction.

○ a registered foreign security-based swap dealer that is not a foreign bank with a branch or agency in the United States and that is not a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and Rules 18a–4(a)–(d), only if such registered foreign security-based swap dealer accepts any assets from, for, or on behalf of a counterparty that is a U.S. person to margin, guarantee, or secure a cleared security-based swap transaction.[487]

○ a registered foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States would be subject to the requirements relating to segregation of assets held as collateral set forth in Section 3E of the Exchange Act, and Rules 18a–4(a)–(d),[488] solely with respect to assets collected from a counterparty that is a U.S. person to margin a cleared security-based swap transaction. The special account maintained by a registered foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States in accordance with proposed Rule 18a–4(c) would be required to be designated for the exclusive benefit of U.S. person security-based swap customers.[489]

In addition, a registered foreign security-based swap dealer would be required to disclose to its counterparty the potential treatment of the assets segregated by such registered foreign security-based swap dealer pursuant to Section 3E of the Exchange Act, and rules and regulations thereunder, in insolvency proceedings under the U.S. bankruptcy law and applicable foreign insolvency laws.[490]

(b) Discussion

i. External Business Conduct Standards

a. Foreign Security-Based Swap Dealers

The Commission preliminarily believes it is appropriate not to impose on foreign security-based swap dealers the external business conduct standards in Section 15F(h) (other than rules and requirements prescribed by the Commission pursuant to Section 15F(h)(1)(B)) of the Exchange Act, and the rules and regulations thereunder, described in the proposed rule,[491] with respect to their Foreign Business, because these requirements relate primarily to customer protection. The Dodd-Frank Act's counterparty protection mandate focuses on the United States and the U.S. markets.[492] In addition, we preliminarily believe that foreign counterparties typically would not expect to receive the customer protections of Title VII when dealing with a foreign security-based swap dealer outside the United States. At the same time, our proposed approach would preserve customer protections for U.S. counterparties that would expect to benefit from the protection afforded to them by Title VII of the Dodd-Frank Act.

Therefore, the Commission preliminarily believes that requiring foreign security-based swap dealers to comply with the external business conduct standards requirement with respect to their security-based swap transactions conducted outside the United States with non-U.S. persons (or with foreign branches of U.S. banks) would not advance this statutory purpose. Although this approach represents a departure from the entity approach the Commission has traditionally taken in the regulation of foreign broker-dealers, as discussed above, whereby the Commission applies our regulations to the entire global business of a registered broker-dealer, we preliminarily believe this departure is appropriate in the context of a global security-based swap market in order to create a regulatory framework that provides effective protections for counterparties that are U.S. persons while recognizing the role of foreign regulators in non-U.S. markets.

The Commission also preliminarily believes that this approach addresses many of the concerns raised by commenters, including foreign regulators, concerning the potential application of Title VII to transactions between registered foreign security-based swap dealers and non-U.S. counterparties. In addition, this approach is consistent with the reasonable expectations of U.S. person counterparties, who would expect to receive the protection of external business conduct standards and conflicts of interest requirements when dealing with a foreign security-based swap dealer within the United States.[493]

The Commission's proposed approach to external business conduct standards would not except foreign security-based swap dealers from the rules and requirements prescribed by the Commission pursuant to Section 15F(h)(1)(B) of the Exchange Act with respect to their Foreign Business.[494] Section 15F(h)(1)(B) requires security-based swap dealers to conform with such business conduct standards relating to diligent supervision as the Commission shall prescribe.[495] The Commission preliminarily believes that it is not appropriate to except foreign security-based swap dealers from compliance with such requirements. Because registered foreign security-based swap dealers would be subject to a number of obligations under the federal securities laws with respect to their security-based swap business, the Commission preliminarily believes that having systems in place reasonably designed to ensure diligent supervision would be an important aspect of their compliance with the federal securities laws. However, as discussed below, the Commission is proposing to permit substituted compliance with the diligent supervision requirement in Section 15F(h)(1)(B), and the rules and regulations thereunder, by foreign security-based swap dealers.[496] The Commission preliminarily believes that foreign security-based swap dealers subject to regulation in a foreign jurisdiction are very likely to be subject to diligent supervision requirements and to the extent that such requirements are comparable to Commission requirements, we would consider permitting substituted compliance, as discussed below.[497]

The Commission is proposing to except foreign security-based swap dealers from complying with the rules and regulations that the Commission may prescribe pursuant to Section 15F(h)(1)(A) or (C) of the Exchange

[487] Proposed Rule 18a–4(e)(2)(ii) under the Exchange Act.

[488] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70274–88 (proposing Rules 18a–4(a)–(d) under the Exchange Act).

[489] Proposed Rule 18a–4(e)(2)(i) under the Exchange Act.

[490] Proposed Rule 18a–4(e)(3) under the Exchange Act.

[491] Proposed Rule 3a71–3(c) under the Exchange Act.

[492] *See* note 4, *supra.*

[493] *See* note 321, *supra.*

[494] Proposed Rule 3a71–3(c) under the Exchange Act.

[495] 15 U.S.C. 78o–10(h)(1)(B). *See* Section III.C.3(b)vi, *supra* (discussing the diligent supervision requirements).

[496] *See* Section XI.C, *infra.*

[497] *See id.*

Act.[498] Section 15F(h)(1)(A) requires security-based swap dealers to conform with such business conduct standards relating to fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into) as prescribed by the Commission. Section 15F(h)(1)(C) requires security-based swap dealers to adhere to rules and regulations prescribed by the Commission with respect to applicable position limits. The Commission has not engaged in rulemaking pursuant to these provisions.[499] If the Commission does propose rules pursuant to these provisions in the future, the Commission would consider, at that time, whether it would be appropriate to subject foreign security-based swap dealers to such requirements with respect to their Foreign Business.

b. U.S. Security-Based Swap Dealers

The Commission preliminarily believes it is appropriate not to subject U.S. security-based swap dealers to the external business conduct standards in Section 15F(h) (other than Section 15F(h)(1)(B)) of the Exchange Act, and the rules and regulations thereunder, as specified in the proposed rule, with respect to security-based swap transactions conducted through their foreign branches outside the United States with non-U.S. counterparties, because such requirements relate primarily to customer protection requirements. The Dodd-Frank Act generally is concerned with the protection of U.S. markets and participants in those markets.[500] Therefore, we preliminarily believe that subjecting U.S. security-based swap dealers to the Title VII customer protection requirements with respect to their security-based swap transactions conducted through their foreign branches outside the United States (even though the transactions may pose risk to the U.S. financial system) with non-U.S. persons would produce little or no benefit to U.S. market participants. Although this approach would represent a departure from the entity approach the Commission has traditionally taken in the regulation of broker-dealers, whereby the Commission applies our regulations to the entire global business of a registered broker-dealer, we preliminarily believe it is appropriate in the context of a global security-based swap market in order to develop a national regulatory framework that provides effective protections for counterparties who are U.S. persons while recognizing the role of foreign regulators in non-U.S. markets.

The Commission also preliminarily believes that this approach would help address the potential application of duplicative and conflicting regulatory requirements to security-based swap transactions between the foreign branches of registered U.S. bank security-based swap dealers and non-U.S. counterparties. In addition, the Commission preliminarily believes this approach is consistent with the reasonable expectations of foreign counterparties, who would not necessarily expect to receive the protections of Title VII when dealing with a foreign branch of a U.S. bank outside the United States, even if it is registered as a security-based swap dealer with the Commission.[501]

The purpose of the proposed provision defining when a security-based swap transaction would be considered to have been conducted through a foreign branch is intended to prevent U.S. security-based swap dealers from using the proposed rule to evade the application of Title VII.[502] Requiring that the foreign branch be the named counterparty to the security-based swap transaction and that no person within the United States be directly involved in soliciting, negotiating, or executing the security-based swap transaction on behalf of the foreign branch or its counterparty is intended to help ensure that the security-based swap transaction occurs outside the United States, even though the Commission recognizes that the risk of the transaction would ultimately be borne by the U.S. security-based swap dealer, of which the foreign branch is merely a part.[503] The U.S. security-based swap dealer would still be subject to the entity-level requirements described above intended to address the risk the transactions pose to the U.S. financial system.

ii. Segregation Requirements

The segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, are closely tied to U.S. bankruptcy laws.[504] Subchapter III of Chapter 7, Title 11 of the United States Code (the ''stockbroker liquidation provisions'') [505] provides special protections for ''customers'' of stockbrokers. Among other protections, ''customers'' share ratably with other customers ahead of virtually all other creditors in the ''customer property'' held by the failed stockbroker.[506] The Dodd-Frank Act contains provisions designed to ensure that cash and securities held by a security-based swap dealer relating to security-based swaps will be deemed customer property under the stockbroker liquidation provisions.[507] In particular, Section 3E(g) of the Exchange Act [508] provides, among other things, that a security-based swap shall be considered to be a ''security'' as such term is used in section 101(53A)(B) [509] and the stockbroker liquidation provisions. Section 3E(g) also provides that an account that holds a security-based swap shall be considered to be a ''securities account'' as that term is defined in the stockbroker liquidation provisions.[510] In addition, Section 3E(g) provides that the terms ''purchase'' and ''sale'' as defined in Sections 3(a)(13) and (14) of the Exchange Act, respectively, shall be applied to the terms ''purchase'' and ''sale'' as used in the stockbroker liquidation

[498] 15 U.S.C. 78o–10(h)(1)(A) and (C).

[499] Although the Commission has not proposed rules under Section 15F(h)(1)(A) of the Exchange Act, the Commission has proposed new Rule 9j–1 under the Exchange Act, which is intended to prevent fraud, manipulation, and deception in connection with the offer, purchase, or sale of any security-based swap, the exercise of any right or performance of any obligation under a security-based swap, or the avoidance of such exercise or performance. *See* Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Exchange Act Release No. 63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010). The Commission's view of its antifraud enforcement authority in the cross-border context is described in further detail in Section XI below.

[500] *See* note 4, *supra.*

[501] *See* note 321, *supra.* The proposed definition of foreign branch is the same as discussed above. *See* proposed Rule 3a71–3(a)(1) under the Exchange Act, as discussed in Section III.B.7, *supra.*

[502] Proposed Rule 3a71–3(a)(4) under the Exchange Act.

[503] Proposed Rule 3a71–3(a)(4)(i) under the Exchange Act.

[504] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70274–78 (discussing the customer protection treatment provided by proposed Rules 18a–4(a)–(d) in the stockbroker liquidation provisions in the U.S. Bankruptcy Code).

[505] *See* 11 U.S.C. 741–53.

[506] *See* 11 U.S.C. 752.

[507] *See* Public Law 111–203 section 763(d), adding Section 3E(g) to the Exchange Act, 15 U.S.C. 78c–5(g).

[508] *See* 15 U.S.C. 78c–5(g).

[509] *See* 11 U.S.C. 101(53A)(B). Section 101(53A) of the U.S. Bankruptcy Code defines a ''stockbroker'' to mean a person—(A) with respect to which there is a customer, as defined in section 741, subchapter III of chapter 7, title 11, United States Code (the definition section of the stockbroker liquidation provisions); and (B) that is engaged in the business of effecting transactions in *securities*—(i) for the account of others; or (ii) with members of the general public, from or for such person's own account. *See* 11 U.S.C. 101(53A).

[510] *See* 15 U.S.C. 78c–5(g) and 11 U.S.C. 741. There is not a definition of ''securities account'' in 11 U.S.C. 741. The term ''securities account'' is used in 11 U.S.C. 741(2) and (4) in defining the terms ''customer'' and ''customer property.''

provisions.[511] Finally, Section 3E(g) provides that the term ''customer'' as defined in the stockbroker liquidation provisions excludes any person to the extent the person has a claim based on a non-cleared security-based swap transaction except to the extent of any margin delivered to or by the customer with respect to which there is a customer protection requirement under Section 15(c)(3) of the Exchange Act or a segregation requirement.[512]

The provisions of Section 3E(g) of the Exchange Act apply the customer protection elements of the stockbroker liquidation provisions to cleared security-based swaps, including related collateral, and, if subject to customer protection requirements under Section 15(c)(3) of the Exchange Act or a segregation requirement prescribed by the Commission, to collateral delivered as margin for non-cleared security-based swaps.[513] The Commission has proposed Rule 18a–4(a)–(d) to establish segregation requirements for security-based swap dealers with respect to cleared and non-cleared security-based swaps pursuant to Section 3E of the Exchange Act and pursuant to Section 15(c)(3) of the Exchange Act [514] with respect to security-based swap dealers that are broker-dealers.[515]

Specifically, proposed Rule 18a–4(b) requires a security-based swap dealer to promptly obtain and thereafter maintain physical possession or control of all excess securities collateral carried for the accounts of security-based swap customers. Such possession or control requirement is designed to ensure the securities held for the accounts of security-based swap customers are under the control of the security-based swap dealer and, therefore, readily available to be returned to security-based swap customers. Proposed Rule 18a–4(c) requires a security-based swap dealer to maintain a special account for the exclusive benefit of security-based swap customers and have on deposit in that account at all times an amount of cash or qualified securities determined by computing the net amount of credits owed to customers.[516] The objective of the possession or control and special account requirements in proposed Rule 18a–4 is to facilitate the prompt return of ''customer property'' to security-based swap customers either before or during a liquidation proceeding if the firm fails. In the event of a failure of the security-based swap dealer, customers would share the ''customer property'' ratably with other customers and ahead of virtually all other creditors.[517] In addition, with respect to non-cleared security-based swaps, proposed Rule 18a–4(d) requires a security-based swap dealer to provide the notice required under Section 3E(f)(1)(A) of the Exchange Act [518] to a counterparty in writing prior to the execution of the first non-cleared security-based swap transaction with such counterparty. If a counterparty to a non-cleared security-based swap elects to segregate funds or other property with a third-party custodian pursuant to Section 3E(f) of the Exchange Act or elects not to require the omnibus segregation of funds or other property pursuant to proposed Rule 18a–4(c), the security-based swap dealer must obtain an agreement from such counterparty to subordinate all claims against the security-based swap dealer to the claims of security-based swap customers of such security-based swap dealer.[519]

As proposed in the Capital, Margin and Segregation Proposing Release, the segregation requirements in proposed Rule 18a–4(a)–(d) do not distinguish between U.S. security-based swap dealers and foreign security-based swap dealers or between U.S. person and non-U.S. person security-based swap counterparties, and do not address application of the segregation requirements in the cross-border context. The Commission preliminarily believes that the Dodd-Frank Act's mandate to promote financial stability, improve accountability, and protect counterparties focuses territorially on the United States and the U.S. security-based swap market [520] and, therefore, is not proposing any changes with respect to U.S. security-based swap dealers to the segregation requirements already proposed.[521] The Commission's proposed approach to application of segregation requirements to foreign security-based swap dealers intends to protect U.S. person counterparties and minimize the impact of a failed security-based swap dealer on the U.S. financial system generally and the U.S. security-based swap market in particular.

a. Foreign Security-Based Swap Dealers

As stated above, Section 3E(g) extends the customer protection provided by the stockbroker liquidation provisions of the U.S. Bankruptcy Code to cleared security-based swaps and non-cleared security-based swaps in different ways. In addition, a foreign security-based swap dealer may not be subject to the stockbroker liquidation provisions if it is a foreign bank with a branch or agency in the United States.[522] Such foreign security-based swap dealer's insolvency and liquidation would be subject to banking regulations.[523] On the

[511] *See also* 15 U.S.C. 78c–5(g) and 11 U.S.C. 741–753. Section 3(a)(13) of the Exchange Act, as amended by Section 761(a) of the Dodd-Frank Act, defines the term ''purchase'' to mean, in the case of security-based swaps, the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require. *See* 15 U.S.C. 3(a)(13). Section 3(a)(14) of the Exchange Act, as amended by Section 761(a) of the Dodd-Frank Act, defines the term ''sale'' to mean, in the case of security-based swaps, the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require. *See* 15 U.S.C. 3(a)(14).

[512] *See* 15 U.S.C. 78c–5(g) and 11 U.S.C. 741(2).

[513] *See* 15 U.S.C. 78c–5(g) and 11 U.S.C. 741–53.

[514] 15 U.S.C. 78o(c)(3).

[515] *See* proposed Rules 18a–4(a)–(d) under the Exchange Act and Section 3E of the Exchange Act, 15 U.S.C. 78c–5. *See also* the Capital, Margin, and Segregation Proposing Release, 77 FR 70278–88, for detailed descriptions and discussions of the proposed segregation requirements for security-based swaps in proposed Rules 18a–4(a), (b), and (c) under the Exchange Act and special provisions for non-cleared security-based swaps in proposed Rule 18a–4(d) under the Exchange Act.

[516] *See* proposed Rule 18a–4(c) and the related discussion in the Capital, Margin, and Segregation Proposing Release, 77 FR 70277.

[517] *See* the stockbroker liquidation provisions in the U.S. Bankruptcy Code, 11 U.S.C. 741–53.

[518] 15 U.S.C. 78c–5(f)(1)(A).

[519] *See* proposed Rules 18a–4(d)(1) and (d)(2)(i) and (ii) under the Exchange Act, as discussed in the Capital, Margin, and Segregation Proposing Release, 77 FR 70287–88. If a non-cleared security-based swap counterparty elects to segregate funds or other property with a third-party custodian, the subordination agreement would be conditioned on the counterparty's funds and other property segregated at a third-party custodian not being included in the bankruptcy estate of the security-based swap dealer. If the election is not effective in keeping the counterparty's assets bankruptcy remote, then the counterparty should be treated as a security-based swap customer with a pro rata priority claim to customer property. *See* proposed Rule 18a–4(d)(2)(i) under the Exchange Act. If a non-cleared security-based swap counterparty elects not to segregate any assets at all, the security-based swap dealer would need to obtain an unconditional subordination agreement from the counterparty that waives segregation altogether. *See* proposed Rule 18a–4(d)(2)(ii) under the Exchange Act.

[520] *See* note 4, *supra*.

[521] *See* proposed Rules 18a–4(a)–(d) under the Exchange Act and Section 3E of the Exchange Act, 15 U.S.C. 78c–5. *See also* the Capital, Margin, and Segregation Proposing Release, 77 FR 70278–88.

[522] *See* Section 109(b) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b) (providing that a person may be a debtor under chapter 7 of the U.S. Bankruptcy Code only if such person is not, among other things, a bank or similar institution which is an insured bank as defined in Section 3(h) of the Federal Deposit Insurance Act, or a foreign bank that has a branch or agency (as defined in Section 1(b) of the International Banking Act of 1978) in the United States).

[523] *See* 12 U.S.C. 1821–25. Whereas insured deposit institutions would be resolved under the Federal Deposit Insurance Act, uninsured U.S. branches of foreign banks would be resolved under either relevant state statutes, in the case of uninsured state branches, or the International

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other hand, if a foreign security-based swap dealer is not a foreign bank with a branch or agency in the United States, it may be subject to the stockbroker liquidation provisions [524] in a stockbroker liquidation proceeding in a U.S. bankruptcy court. Moreover, if a foreign security-based swap dealer is a registered broker-dealer, it is a member of the Securities Investor Protection Corporation (''SIPC'') [525] and is subject to segregation requirements under Section 15(c)(3) of the Exchange Act,[526] and rules and regulations thereunder.[527] Such a foreign security-based swap dealer would be subject to the liquidation proceeding under the Securities Investor Protection Act of 1970 (the ''SIPA'').[528] Therefore, we propose an approach that would apply the segregation requirements to a foreign security-based swap dealer depending on whether it holds assets to secure cleared security-based swap transactions or non-cleared security-based swap transactions and whether such foreign security-based swap dealer is a registered broker-dealer, a foreign bank with a branch or agency in the United States, or neither of the above.[529]

We recognize that a foreign security-based swap dealer may not be subject to the stockbroker liquidation provisions and its insolvency or liquidation proceeding in the United States may be administered under SIPA or banking regulations concurrently with other potential insolvency proceedings outside the United States under applicable foreign insolvency laws. Therefore, the effectiveness of the segregation requirements with respect to a foreign security-based swap dealer in practice may depend on many factors, including the type and objectives of the insolvency or liquidation proceeding and how the U.S. Bankruptcy Code, SIPA, banking regulations and applicable foreign insolvency laws are interpreted by the U.S. bankruptcy court, SIPC, Federal Deposit Insurance Corporation and relevant foreign authorities.

b. Non-Cleared Security-Based Swaps

i. Foreign Security-Based Swap Dealer That Is a Registered Broker-Dealer

With respect to non-cleared security-based swaps, the Commission proposes to apply segregation requirements differently to foreign security-based swap dealers depending on whether they also are registered broker-dealers. Specifically, the Commission proposes to require a foreign security-based swap dealer that is a registered broker-dealer to segregate margin received from all counterparties to secure non-cleared security-based swap transactions, in accordance with Section 3E of the Exchange Act, and rules and regulations thereunder.[530]

If a foreign security-based swap dealer is a registered broker-dealer, it already would: (i) be subject to the customer protection requirements under Section 15(c)(3) of the Exchange Act,[531] and rules and regulations thereunder, including Rule 15c3–3 if it carries customer securities and cash; (ii) be required to maintain possession or control of customer securities and maintain cash or qualified securities in a special reserve account if it carries customer securities and cash; and (iii) if it is a member of SIPC, be liquidated in a formal proceeding under the SIPA.[532] Rule 15c3–3 under Section 15(c)(3) of the Exchange Act provides customer protection and defines ''customer'' broadly to include any person from whom or on whose behalf a broker or dealer has received or acquired or holds funds or securities for the account of that person.[533] Therefore, if a foreign security-based swap dealer that is a registered broker-dealer receives collateral from a non-cleared security-based swap counterparty, such counterparty would be a ''customer'' and is afforded customer protection with respect to such collateral under Rule 15c3–3. As stated above, Section 3E(g) extends ''customer'' status to non-cleared security-based swap counterparties to the extent of any margin delivered to or by the counterparties with respect to which there is a customer protection requirement under Section 15(c)(3).[534] Therefore, non-cleared security-based swap counterparties of a foreign security-based swap dealer that is a registered broker-dealer are ''customers'' within the meaning of the stockbroker liquidation provisions.[535]

As such, if the Commission does not require a foreign security-based swap dealer that is a registered broker-dealer to segregate all counterparties' assets posted to secure non-cleared security-based swaps, in a SIPA liquidation

Banking Act, in the case of uninsured federal branches.

[524] *See* note 522, *supra.*

[525] We recognize that a very limited number of registered foreign broker-dealers who do not conduct securities business in the United States and do not hold U.S. person customers' funds are not members of SIPC.

[526] 15 U.S.C. 78o(c)(3).

[527] *See* Rule 15c3–3 under the Exchange Act, 17 CFR 240.15c3–3.

[528] *See* 15 U.S.C. 78aaa *et seq.*

[529] We preliminarily believe that the proposed approach with respect to the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Section 30(c). *See* Section II.B.2(a), *supra.* However, the Commission also preliminary believes that the proposed approach with respect to the segregation requirements is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the proposed approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. *See* Section II.B.2(e), *supra; see also* Section II.B.2(c), *supra.*

For example, if the segregation requirements do not apply to the entire business of a registered foreign security-based swap dealer that is a registered broker-dealer, or do not apply to assets received from non-U.S. person customers to secure cleared security-based swaps by a registered foreign security-based swap dealer that is not a registered broker-dealer (and is not a foreign bank with a branch or agency in the United States) if such foreign security-based swap dealer also receives assets from a U.S. person customer to secure clear security-based swaps, then U.S. security-based swap dealers would have an incentive to evade the full application of the segregation requirements by moving their operations outside the United States. In this event, these security-based swap dealers could use the assets collected from the non-U.S. person counterparties for their own business purposes, and the assets segregated (*i.e.,* assets posted by U.S. person customers) could be insufficient to satisfy the combined priority claims of both U.S. person and non-U.S. person customers, potentially resulting in losses to U.S. person customers in contravention of the purposes of the customer protection framework established by the Dodd-Frank Act. See discussions of application of the segregation requirements to a foreign security-based swap dealer that is a registered broker-dealer with respect to non-cleared security-based swaps in Section III.C.4(b)ii.b.i, application of the segregation requirements to a foreign security-based swap dealer that is a registered broker-dealer with respect to cleared security-based swaps in Section III.C.4(b)ii.c.i, and application of the segregation requirements to a foreign security-based swap dealer that is not a registered broker-dealer and is not a foreign bank with a branch or agency in the United States in Section III.C.4(b)ii.c.ii above.

[530] *See* proposed Rule 18a–4(e)(1)(i) under the Exchange Act.

[531] 15 U.S.C. 78o(c)(3).

[532] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70276–77 (discussing the broker-dealer segregation rule—Rule 15c3–3 under the Exchange Act, 17 CFR 240.15c3–3).

[533] *See* Rule 15c3–3(a)(1) under the Exchange Act, 17 CFR 240.15c3–3(a)(1).

[534] *See* Section 3E(g) of the Exchange Act, 15 U.S.C. 78c–5(g) (''The term 'customer', as defined in section 741 of title 11, United States Code, excludes any person, to the extent that such person has a claim based on any . . . non-cleared security-based swap except to the extent of any margin delivered to or by the customer with respect to which there is a customer protection requirement under section 15(c)(3) or a segregation requirement.'').

[535] A non-cleared security-based swap counterparty may waive its pro rata priority claim on customer property with other customers by executing a conditional subordination agreement pursuant to proposed Rule 18a–4(d)(i) under the Exchange Act to affirmatively elect individual segregation, or by executing an unconditional subordination agreement pursuant to proposed Rule 18a–4(d)(ii) under the Exchange Act to affirmatively waive segregation altogether.

proceeding of such foreign security-based swap dealer and broker-dealer,[536] the pool of assets segregated pursuant to Rule 15c3–3 and proposed Rule 18a–4 may be insufficient to satisfy the combined claims of all customers, resulting in losses to all customers. Therefore, the Commission proposes to subject a foreign security-based swap dealer that is a registered broker-dealer to the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, relating to assets received from all counterparties held as collateral to secure non-cleared security-based swap transactions.

ii. Non-Cleared Security-Based Swaps—Foreign Security-Based Swap Dealer That is Not a Registered Broker-Dealer

If a foreign security-based swap dealer is not a registered broker-dealer, its non-cleared security-based swap counterparties would be ''customers'' under the stockbroker liquidation provisions only to the extent that there is a segregation requirement prescribed by the Commission.[537] The Commission proposes to subject such foreign security-based swap dealer to the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, solely with respect to non-cleared security-based swaps with U.S. person counterparties.[538] This approach would provide U.S. person counterparties ''customer'' status under the stockbroker liquidation provisions and their assets would be segregated for their exclusive benefit. Non-U.S. person counterparties would not be ''customers'' and would not have ''customer'' status with respect to the segregated assets. As stated above, the Commission preliminarily believes that the objective of the Dodd-Frank Act is to protect U.S. counterparties and to minimize disruption to the U.S. financial system caused by a security-based swap dealer's failure. Therefore, the Commission preliminarily believes that the proposed approach would achieve the benefit intended by the segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder.

The Commission recognizes that a foreign security-based swap dealer that is not a broker-dealer but is a foreign bank with a branch or agency (as defined in Section 1(b) of the International Banking Act of 1978) [539] in the United States may not be eligible to be liquidated pursuant to the stockbroker liquidation provisions.[540] Such foreign security-based swap dealer's insolvency proceeding in the United States would be administered under banking regulations.[541] Nevertheless, the Commission preliminarily believes that imposing segregation requirements on such foreign security-based swap dealer when it receives collateral from U.S. person counterparties would reduce the likelihood of U.S. person counterparties incurring losses by helping identify U.S. customers' assets in an insolvency proceeding of such foreign security-based swap dealer in the United States and would potentially minimize disruption to the U.S. security-based swap market, thereby producing potential benefits to the U.S. financial system and U.S. counterparties that are consistent with the objectives of the Dodd-Frank Act.

c. Cleared Security-Based Swaps

In applying the segregation requirements to a foreign security-based swap dealer with respect to cleared security-based swap transactions, the Commission also proposes to distinguish among: (1) a foreign security-based swap dealer that is a registered broker-dealer; (2) a foreign security-based swap dealer that is not a registered broker-dealer and is not a foreign bank with a branch or agency in the United States; and (3) a foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States. In the following paragraphs, we will discuss how we propose to apply the segregation requirements to foreign security-based swap dealers in each of these categories with respect to assets held by them as collateral to secure cleared security-based swaps.

i. Foreign Security-Based Swap Dealer That Is a Registered Broker-Dealer

The proposed rule would apply segregation requirements to a foreign security-based swap dealer that is a registered broker-dealer with respect to assets received from all counterparties to secure cleared security-based swaps.[542] As stated above, Section 3E(g) of the Exchange Act extends customer protection under the stockbroker liquidation provisions to all cleared security-based swap counterparties and to all non-cleared security-based swap counterparties, with respect to which there is a customer protection requirement under Section 15(c)(3) of the Exchange Act.[543] Therefore, all security-based swap counterparties of a foreign security-based swap dealer that is a registered broker-dealer are customers under the stockbroker liquidation provisions.[544] In the absence of a Commission requirement that a foreign security-based swap dealer that is a registered broker-dealer segregate all cleared security-based swap counterparties' collateral, if such an entity were liquidated pursuant to SIPA, the amount of assets segregated could be less than the combined priority claims of all security-based swap customers, potentially resulting in losses to customers. Therefore, the Commission proposes to subject a foreign security-based swap dealer who is a registered broker-dealer to segregation requirements set forth in Section 3E of the Exchange Act, and rules and regulations thereunder, with respect to assets received from all counterparties to secure cleared security-based swaps.

ii. Foreign Security-Based Swap Dealer That Is Not a Registered Broker-Dealer and Is Not a Foreign Bank With Branch or Agency in the United States

If a foreign security-based swap dealer is not a registered broker-dealer and is not a foreign bank that has a branch or agency (as defined in Section 1(b) of the International Banking Act of 1978) in the United States, such foreign security-based swap dealer may be eligible to be

[536] In very limited circumstances where a foreign security-based swap dealer that is a registered broker-dealer is not a SIPC member, it would potentially be liquidated pursuant to the stockbroker liquidation provisions in a U.S. bankruptcy court.

[537] *See* Section 3E(g) of the Exchange Act, 15 U.S.C. 78c–5(g).

[538] *See* proposed Rule 18a–4(e)(1)(ii) under the Exchange Act.

[539] *See* Sections 1(b)(1), (3), and (7) of the International Banking Act of 1978, 12 U.S.C. 3101(b)(1), (3) and (7), for definitions of ''agency,'' ''branch,'' and ''foreign bank.''

[540] *See* Section 109(b)(3)(B) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b)(3)(B).

[541] *See* 12 U.S.C. 1821–25. Whereas insured deposit institutions would be resolved under the Federal Deposit Insurance Act, uninsured U.S. branches of foreign banks would be resolved under either relevant state statutes, in the case of uninsured state branches, or the International Banking Act, in the case of uninsured federal branches.

[542] Proposed Rule 18a–4(e)(2)(i) under the Exchange Act.

[543] *See* Section III.C.4(b)ii.b, *supra.*

[544] A non-cleared security-based swap counterparty would be a customer of a foreign security-based swap dealer that is a registered broker-dealer and have a pro rata priority claim to customer property under the stockbroker liquidation provisions unless it affirmatively waives segregation altogether by executing an unconditional subordination agreement pursuant to proposed Rule 18a–4(d)(ii) under the Exchange Act, or elects individual segregation pursuant to Section 3E(f) of the Exchange Act by executing a conditional subordination agreement pursuant to proposed Rule 18a–4(d)(i) under the Exchange Act.

a debtor under Chapter 7 of the U.S. Bankruptcy Code and may therefore be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code.[545] As stated above, Section 3E(g) of the Exchange Act provides ''customer'' status to all counterparties to cleared security-based swaps, making no distinction between U.S. customers or counterparties and non-U.S. person customers or counterparties.[546] Therefore, in the case where such foreign security-based swap dealer receives any assets from, for, or on behalf of a U.S. person customer to margin, guarantee, or secure security-based swaps, if the Commission were to apply the segregation requirements only to assets posted by U.S. person customers but not to assets posted by non-U.S. person customers, in a stockbroker liquidation proceeding of such foreign security-based swap dealer, the assets segregated (*i.e.,* assets posted by U.S. person customers) could be insufficient to satisfy the combined priority claims of both U.S person and non-U.S. person customers, potentially resulting in losses to U.S. person customers. As stated above, the Commission preliminarily believes that Section 3E intends to provide customer protection to U.S. person counterparties and apply segregation requirements in a way that would protect the U.S. financial system and counterparties in the United States. Therefore, the Commission proposes to apply segregation requirements described in Section 3E of the Exchange Act, and the rules and regulations thereunder, to a foreign security-based swap dealer that is not a registered broker-dealer and is not a foreign bank with a branch or agency in the United States with respect to assets received from both U.S. person counterparties and non-U.S. person counterparties if such foreign security-based swap dealer receives collateral from U.S. person counterparties to secure security-based swaps.[547]

iii. Foreign Security-Based Swap Dealer That is Not a Registered Broker-Dealer and is a Foreign Bank With Branch or Agency in the United States

Finally, if a foreign security-based swap dealer is not a registered broker-dealer and is a foreign bank that has a branch or agency in the United States, it is not eligible to be a debtor under Chapter 7 and will therefore not be subject to the stockbroker liquidation provisions of the U.S. Bankruptcy Code[548] and its insolvency proceeding in the United States would be administered under banking regulations.[549] Consistent with the objective of protecting U.S. person counterparties, the Commission is proposing that such foreign security-based swap dealer shall be subject to the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to any assets received from, for or on behalf of a counterparty who is a U.S. person to margin, guarantee, or secure a cleared security-based swap, but shall not be required to segregate assets received from, for or on behalf of all other counterparties to margin, guarantee, or secure a cleared security-based swap.[550] The special account maintained by the foreign security-based swap dealer shall be designated for the exclusive benefit of U.S. person security-based swap customers. The Commission preliminarily believes that imposing segregation requirements on such foreign security-based swap dealer when it receives collateral from U.S. person counterparties would reduce the likelihood of U.S. person counterparties incurring losses by helping identify U.S. customers' assets in an insolvency proceeding of such foreign security-based swap dealer in the United States and would potentially minimize disruption to the U.S. security-based swap market, thereby producing potential benefits to the U.S. financial system and U.S. counterparties that are consistent with the objectives of the Dodd-Frank Act. For the same reason, the Commission preliminarily does not believe that extending segregation requirements and customer protection to such foreign security-based swap dealer's transactions with non-U.S. persons would advance the purposes of the Dodd-Frank Act.

d. Disclosure

In addition to the proposed rules described above relating to application of the segregation requirements to foreign security-based swap dealers, the Commission also is proposing to require foreign security-based swap dealers to make certain disclosures.[551] Since the treatment of the special account under Sections 3E(b) and (g) or individually segregated assets pursuant to Section 3E(f) of the Exchange Act in insolvency proceedings of a foreign security-based swap dealer may vary depending on the status of the foreign security-based swap dealer and the insolvency proceedings such foreign security-based swap dealer is subject to, the Commission proposes to require a foreign security-based swap dealer to disclose to each counterparty that is a U.S. person, prior to accepting any assets from, for, or on behalf of such counterparty to margin, guarantee, or secure a security-based swap, the potential treatment of the assets segregated by such foreign security-based swap dealer pursuant to Section 3E of the Exchange Act, and the rules and regulations thereunder, in insolvency proceedings relating to such foreign security-based swap dealer under U.S. bankruptcy law and applicable foreign insolvency laws. Pursuant to this proposed rule, the Commission intends to require that a foreign security-based swap dealer disclose whether it is subject to the segregation requirement set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to the assets collected from the U.S. person counterparty who will receive the disclosure, whether the foreign security-based swap dealer could be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code, whether the segregated assets could be afforded customer property treatment under the U.S. bankruptcy law, and any other relevant considerations that may affect the treatment of the assets segregated under Section 3E of the Exchange Act in insolvency proceedings of a foreign security-based swap dealer.[552] Since the proposed rule regarding application of the segregation requirements in the cross-border context is designed to advance the goals of protecting U.S. person counterparties, the Commission believes that such disclosure would enhance U.S. person counterparty protection and the objectives that segregation requirements intend to achieve in the context of cross-border security-based swap dealing.

Request for Comment

The Commission requests comment on all aspects of the proposed rule regarding the application of transaction-

[545] *See* Section 109(b) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b).

[546] *See* 15 U.S.C. 78c–5(g) and 11 U.S.C. 741(2).

[547] Proposed Rule 18a–4(e)(2)(ii) under the Exchange Act.

[548] *See* Section 109(b) of the U.S. Bankruptcy Code, 11 U.S.C. 109(b).

[549] *See* 12 U.S.C. 1821–25. Whereas insured deposit institutions would be resolved under the Federal Deposit Insurance Act, uninsured U.S. branches of foreign banks would be resolved under either relevant state statutes, in the case of uninsured state branches, or the International Banking Act, in the case of uninsured federal branches.

[550] Proposed Rule 18a–4(e)(2)(iii) under the Exchange Act.

[551] Proposed Rule 18a–4(e)(3) under the Exchange Act.

[552] Proposed Rule 18a–4(e)(3) under the Exchange Act.

level requirements relating to customer protection and segregation, including the following:

• What, if any, are the likely competitive effects, within the U.S. security-based swap market and among U.S. security-based swap dealers, of the proposed approach for foreign security-based swap dealers? Please describe the specific nature of any such effects.

• Should a foreign security-based swap dealer automatically be eligible for the proposed approach by virtue of being a nonresident entity? Alternatively, should the Commission consider other factors, such as the share of the foreign security-based swap dealer's business that constitutes U.S. Business, in determining how to apply transaction-level requirements?

• From an operational perspective, what types of internal controls would be necessary to identify Foreign Business and U.S. Business and ensure that the foreign security-based swap dealer complies with the external business conduct standards with respect to its U.S. Business? Should U.S. Business be generally defined with reference to the type of activity that, if performed in a dealing capacity, triggers the registration requirement?

• Does the proposed approach appropriately classify entity-level and transaction-level requirements? Does it appropriately identify those transaction-level requirements that relate to the operation of the security-based swap dealer on an entity level? If not, please identify those requirements that should be classified differently and how doing so is consistent with the goals of Title VII.

• To what extent would foreign security-based swap dealers in various jurisdictions be prohibited from complying, under local law, with the Commission's requirements to provide the Commission with prompt access to their books and records and to submit to onsite inspection and examination by the Commission? If there are limitations, what are they, and under what circumstances would they arise? Are there other entity-level requirements that foreign security-based swap dealers would not be permitted to comply with under local law? If so, what are they?

• Should the external business conduct rules apply in transactions between a registered non-U.S. security-based swap dealer and foreign branches of a U.S. bank?

• Should the external business conduct rules apply in transactions between a registered non-U.S. security-based swap dealer and non-U.S. persons with U.S. guarantees in transactions outside the United States?

• Does the proposed application of the business conduct standards in the cross-border context appropriately implement the business conduct standards as described in Section 15F(h) of the Exchange Act?

• As described above, the Commission does not, at this time, propose to apply the business conduct standards in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations relating to diligent supervision prescribed by the Commission pursuant to Section 15F(h)(1)(B)), to the Foreign Business of registered security-based swap dealers. Should such standards apply to the Foreign Business of registered security-based swap dealers? Would such application of business conduct standards further the goals of Title VII of the Dodd-Frank Act?

• Should the Commission apply rules and regulations pursuant to Section 15F(h)(1)(A) of the Exchange Act relating to fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into) to the Foreign Business of registered foreign security-based swap dealers?

• Should the Commission apply rules and regulations pursuant to Section 15F(h)(1)(C) of the Exchange Act relating to position limits to the Foreign Business of foreign security-based swap dealers?

• Should the proposed rule relating to conflicts of interest set forth in Section 15F(j)(5) of the Exchange Act apply to both the U.S. Business and Foreign Business of security-based swap dealers?

• Does the proposed approach appropriately treat the rules and regulations prescribed by the Commission relating to diligent supervision pursuant to Section 15F(h)(1)(B) as entity-level requirements applicable to both the U.S. Business and the Foreign Business of foreign security-based swap dealers? Why or why not?

• Is it appropriate that the proposed rule does not apply future rules and regulations that the Commission may prescribe pursuant to Section 15F(h)(1)(A) of the Exchange Act relating to fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into) to the Foreign Business of foreign security-based swap dealers? Why or why not?

• Is it appropriate that the proposed rule does not apply future rules and regulations that the Commission may prescribe pursuant to Section 15F(h)(1)(C) of the Exchange Act relating to position limits to the Foreign Business of foreign security-based swap dealers? Why or why not?

• Does the proposed approach appropriately treat the requirements relating to conflicts of interest set forth in Section 15F(j)(5) of the Exchange Act as entity-level requirements applicable to both the U.S. Business and Foreign Business of foreign security-based swap dealers? If not, please identify any requirements that should not be applied to a foreign security-based swap dealer and explain how such an approach would be consistent with the goals of Title VII. Please identify what the costs or operational challenges would be, if any, for a registered security-based swap dealer to establish conflict-of-interest systems and procedures that would apply to its U.S. Business but not its Foreign Business.

• Does the proposed approach appropriately implement the requirements relating to segregation of assets held as collateral in Section 3E of the Exchange Act, and rules and regulations thereunder, in light of various statuses of foreign security-based swap dealers?

• Should the Commission apply segregation requirements to a foreign security-based swap dealer that is not subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code? If not, what are the reasons for not applying segregation requirements? If the segregation requirements do not apply, how would the objective of customer protection be achieved?

• Should the Commission adopt the disclosure requirement with respect to foreign security-based swap dealers? Why or why not? Is the proposed disclosure requirement feasible? What would the difficulties be in complying with the proposed disclosure requirement?

• The CFTC has proposed an interpretation that would effectively treat a non-U.S. person whose obligations are guaranteed by a U.S. person as a U.S. person for purposes of determining whether a swap between it and a non-U.S. swap dealer or major swap participant would be subject to transaction-level requirements as interpreted by the CFTC to include, without limitation, margin and segregation requirements, reporting, clearing, and trade execution.[553] Should the Commission adopt a similar approach? What would be the effects on efficiency, competition and capital

[553] *See* CFTC Cross-Border Proposal, 77 FR 41228–29.

formation in the event that there are overlapping or duplicative requirements across multiple jurisdictions?

• In addition, the CFTC has proposed an interpretation that includes a description of a ''conduit affiliate'' that includes: (1) a non-U.S. person that is majority-owned, directly or indirectly, by a U.S. person where (2) the non-U.S. person regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person, and (3) the financial statements of the non-U.S. person are included in the consolidated financial statements of the U.S. person.[554] Conduit affiliates would be subject to transaction-level requirements as if they were U.S. persons. Should the Commission consider a similar approach?

• The CFTC's proposed interpretation would subject foreign branches of U.S.-based bank swap dealers and major swap participants to the CFTC's entity-level requirements and transaction-level requirements (other than external business conduct standards for swaps with non-U.S. persons), provided that foreign branches would be eligible for a limited exception in emerging markets where foreign regulations are not comparable.[555] Should the Commission consider a similar approach? If so, please explain how such an approach would be consistent with the goals of Title VII.

• What would be the market impact of the proposed approach to application of the transaction-level requirements relating to customer protection and segregation? How would the proposed application of transaction-level requirements affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the transaction-level requirements? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

5. Application of Entity-Level Rules

(a) Introduction

As noted above, by their very nature, entity-level requirements apply to the operation of a security-based swap dealer as a whole. The Commission recognizes that the capital, margin, and other entity-level requirements that it adopts could have a substantial impact on international commerce and the relative competitive position of intermediaries operating in various, or multiple, jurisdictions. In particular, if these requirements are substantially more or less stringent than corresponding requirements, if any, that apply to intermediaries operating in security-based swap markets outside the United States, depending on how the rules are written, these differences could impact the ability of firms based in the United States to participate in non-U.S. markets, access to U.S. markets by foreign-based firms, and how and whether international firms make use of global ''booking entities'' to centralize risks related to security-based swaps, among other possible impacts. These issues have been the focus of numerous comments to the Commission and other regulators, as discussed above, as well as Congressional inquiries and other public dialogue.

(b) Proposed Approach

The Commission is not proposing to provide specific relief for foreign security-based swap dealers from Title VII entity-level requirements, although, as discussed in Section XI below, under a Commission substituted compliance determination, a foreign security-based swap dealer would be able to satisfy relevant Title VII entity-level requirements by substituting compliance with corresponding requirements under a foreign regulatory system.[556] The Commission preliminarily believes that entity-level requirements are core requirements of the Commission's responsibility to ensure the safety and soundness of registered security-based swap dealers.[557] The Commission preliminarily believes that it would not be consistent with this mandate to provide a blanket exclusion to foreign security-based swap dealers from entity-level requirements applicable to such entities.[558]

For example, capital requirements play an essential role in ensuring the safety and soundness of security-based swap dealers. As discussed above, the Commission's proposed capital rules for nonbank security-based swap dealers are modeled on the net liquid assets test found in the capital requirements applicable to broker-dealers.[559] We believe that this capital standard is necessary to ensure the safety and soundness of nonbank security-based swap dealers, and thus we are not proposing to exclude foreign nonbank security-based swap dealers from our capital rules. In addition, we believe that the capital, margin, and other entity-level requirements proposed and adopted by the Commission work together to provide a comprehensive regulatory scheme that is vital for ensuring the safety and soundness of registered security-based swap dealers, and that the benefits of Title VII's entity-level requirements are equally important to both foreign and U.S. dealers registered with the Commission. As a result, we are not proposing to provide specific relief from individual entity-level requirements for foreign dealers.

We do, however, recognize the concerns raised by commenters regarding the application of entity-level requirements to foreign security-based swap dealers.[560] We preliminarily believe that these concerns are largely addressed through the Commission's overall proposed approach to substituted compliance in the context of Title VII, which is discussed in detail in Section XI below. In general, the Commission is proposing a framework under which it may permit a registered foreign security-based swap dealer (or class thereof) to satisfy the capital, margin, and other requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, by

[554] *See id.* at 41229.

[555] *See id.* at 41230–31.

[556] *See* Section XI, *infra.*

[557] *See* note 419, *supra.*

[558] We preliminarily believe that the proposed approach with respect to entity-level requirements is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Section 30(c) of the Exchange Act. *See* Section II.B.2(a), *supra.* However, the Commission also preliminarily believes that the proposed approach with respect to entity-level requirements is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the proposed approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. *See* Section II.B.2(e), *supra; see also* Section II.B.2(c), *supra.*

For example, if entity-level requirements do not apply to the entire business of a registered foreign security-based swap dealer, then U.S. security-based swap dealers would have an incentive to evade the full application of the entity-level requirements by moving their operations outside the United States. In this event, assuming the scope of the security-based swap dealers dealing activity remained unchanged, the risk presented by the entity to its U.S. counterparties and the U.S. financial system would remain unchanged. If, for instance, Title VII margin requirements did not apply to the entire entity, these entities could accumulate risk through their non-U.S. dealing activity and transmit that risk to U.S. counterparties in contravention of the purposes of the financial responsibility framework established by the Dodd-Frank Act. *See* Section III.C.3(b)ii, *supra.*

[559] *See* Section III.C.3(b)i, *supra.*

[560] *See, e.g.,* Davis Polk Letter II at 4–20; Sullivan & Cromwell Letter at 14–15.

complying with the corresponding requirements established by its foreign financial regulatory authority,[561] subject to certain conditions.[562] We preliminarily believe that providing foreign security-based swap dealers with the possibility of substituted compliance in this way will help address concerns related to competitiveness and overlapping regulations related to entity-level requirements, while still ensuring that registered foreign security-based swap dealers are subject to appropriate regulatory oversight.

Request for Comment

The Commission requests comment on all aspects of the proposed interpretive guidance regarding the proposed provision of substituted compliance for certain requirements in Section 15F of the Exchange Act for foreign security-based swap dealers, including the following:

- What types of conflicts might a foreign security-based swap dealer face if subjected to capital requirements in more than one jurisdiction? In what situations would compliance with more than one capital requirement be difficult or impossible?
- Should the Commission provide specific relief to foreign security-based swap dealers with respect to entity-level requirements? If so, please indicate the specific relief that should be provided and the rationale for providing such relief.
- Would the provision of relief from entity-level requirements undermine the Commission's efforts to set capital requirements to ensure the safety and soundness of security-based swap dealers, as required by Section 15F(e)(2)(C) of the Exchange Act? Why or why not?
- Should the Commission treat margin as an entity-level requirement or a transaction-level requirement? If only a transaction-level requirement, why?
- Should the Commission consider providing relief for foreign security-based swap dealers from the statutory disqualification requirement in Section 15F(b)(6) of the Exchange Act with respect to their transactions with non-U.S. persons? For example, should the Commission permit associated persons of a foreign security-based swap dealer that are subject to a statutory disqualification to conduct security-based swap activity with non-U.S. persons outside the United States? If so, why?
- The CFTC has proposed an interpretation that categorizes certain entity-level requirements and transaction-level requirements differently when compared to the Commission's proposed approach.[563] For example, the CFTC has proposed classifying margin requirements applicable to uncleared swaps as a transaction-level requirement, where the Commission has proposed categorizing margin as an entity-level requirement. Should the Commission adopt portions of the CFTC's approach to categorization? If so, which requirements should be re-categorized and why?
- What would be the market impact of the proposed approach to applying entity-level requirements to registered foreign security-based swap dealers? How would the proposed application of the entity-level requirements affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the entity-level requirements? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

D. Intermediation

1. Introduction

Security-based swap dealers currently use a variety of business models and legal structures to do business with customers in jurisdictions around the world. For instance, many security-based swap dealers with global businesses use local personnel to provide security-based swap services to customers in a particular jurisdiction while booking transactions originated from multiple jurisdictions in a single entity (*i.e.,* a centralized booking model). Some security-based swap dealers also use unique organizational structures to provide local customers with access to market or product specialists in other jurisdictions. As discussed below, commenters have indicated that, in the U.S. market, these scenarios are particularly prevalent in the case of foreign security-based swap dealers seeking access to U.S. customers or providing non-U.S. customers with expertise from employees located in the United States.[564]

In the following discussion, we briefly describe comments received regarding various intermediation models. Throughout this release we use the term ''intermediation'' generally to refer to origination activity (*e.g.,* solicitation and negotiation of transactions) in connection with a security-based swap transaction.

2. Comment Summary

Commenters stated that foreign security-based swap dealers use different types of business models to service U.S. customers and provide their global customer base with specialized information, while at the same time reducing both customer costs and entity risks through centralized netting and risk management of their global security-based swap businesses.[565] In

[561] Section 3(a)(52) of the Exchange Act, 15 U.S.C. 78c(a)(52), defines ''foreign financial regulatory authority'' as ''any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.'' The term ''foreign securities authority'' is defined in Section 3(a)(50) of the Exchange Act as ''any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.''

[562] Proposed Rule 3a71–5 under the Exchange Act. As discussed in Section II.C.3(b) above, the Commission has authority to establish capital and margin requirements only for registered nonbank security-based swap dealers. For treatment of the capital and margin requirements for foreign bank security-based swap dealers, see Prudential Regulator Margin and Capital Proposal, 76 FR 27564.

[563] *See* CFTC Cross-Border Proposal, 77 FR 41223–27.

[564] *See, e.g.,* IIB Letter at 15 (''Perhaps more commonly, a foreign bank may transact in swaps as a dealer with U.S. customers through a separate U.S. branch, agency, or affiliate that intermediates the transactions as agent for the foreign bank. This is often because, to facilitate strong relationships with U.S. customers, the personnel who solicit and negotiate with U.S. customers and commit a foreign bank to swaps are located in the U.S.'').

[565] *See, e.g.,* IIB Letter at 6 (''Globally, there are a number of paradigms under which swap activity is conducted. To achieve the benefits of reduced risk and increased liquidity and efficiency associated with netting and margining on a portfolio basis, foreign banks (like their U.S. domestic counterparts) typically seek to transact with swap counterparties globally, to the extent feasible, through a single, highly creditworthy entity. In many cases, however, the personnel who have relationships with U.S. customers or who manage the market risk of the foreign bank's swap portfolio are located regionally, outside the jurisdiction in which the foreign bank is domiciled. In some cases, entities other than the foreign bank (such as a U.S. branch, agency, or affiliate) transact with local customers in order to satisfy unique customer documentation, insolvency, tax, regulatory, or other considerations.); Davis Polk Letter I at 2–3 (suggesting that ''operating and managing a global swaps business out of a single

Continued

support of these perceived benefits, commenters have urged the Commission not to apply Title VII to cross-border transactions in a way that would either prohibit or disincentivize the existing security-based swap dealing business models of foreign security-based swap dealers.[566]

A number of commenters recommended that a foreign dealer that engages in security-based swap transactions with U.S. counterparties, but only through U.S. registered swap or security-based swap dealers, should not be subject to security-based swap dealer registration.[567] One commenter stated that in such situations, the Commission should either not require security-based swap dealer registration of the non-U.S. security-based swap dealer at all, or require a limited registration, whereby the non-U.S. security-based swap dealer would be subject to only capital and related prudential requirements and be permitted to rely on comparable home country regulation.[568] In situations where a foreign security-based swap dealer uses a U.S. domiciled subsidiary or affiliate as its agent to solicit and negotiate the terms of security-based swap transactions, several commenters suggested that the Commission allow for a bifurcated registration and regulation framework allowing the foreign security-based swap dealer to comply with Title VII's requirements by registering both the foreign dealer and its agent in limited capacities and allocating the compliance responsibilities between the two entities.[569] Other commenters remarked that the foreign security-based swap dealer should remain ultimately responsible for ensuring compliance with all the applicable Title VII requirements whether or not the regulated activities were carried out by the foreign security-based swap dealer or its agent.[570]

3. Discussion

The Commission is not at this time proposing any specific rules regarding security-based swap dealing activities undertaken through intermediation. At the same time, we recognize the importance of intermediation, particularly with respect to foreign security-based swap dealers accessing U.S. customers or product specialists located in the United States. Based on the Commission's experience in the securities markets, we expect that many foreign security-based swap dealers will operate within the U.S. market by utilizing their U.S. affiliates or other U.S. entities as agents[571] in the United States, while booking transactions facilitated by such U.S. personnel in a central booking entity located abroad. We preliminarily believe that the approach proposed in this release for the cross-border regulation of security-based swap dealing activity will not impede the use of these types of intermediation business models by foreign security-based swap dealers. More specifically, we believe that the Commission's proposed approach to the application of transaction-level requirements related to Foreign Business[572] and proposed framework for substituted compliance on entity-level requirements[573] should help to address commenter concerns that a foreign security-based swap dealer engaging in Foreign Business would be subject to potentially duplicative and conflicting transaction-level requirements in a foreign jurisdiction with respect to its Foreign Business.

While the foreign security-based swap dealer would remain responsible for ensuring that all relevant Title VII requirements applicable to a given security-based swap transaction are fulfilled, the dealer and its agent(s) may choose to allocate the specific responsibilities such as taking responsibility that all U.S. external

booking entity presents many advantages from the perspective of foreign banks, customers and supervisors,'' including reduction in system risk, maximization of benefits of counterparty netting for customers, and consolidated supervision); Cleary IV at 3–4 (stating that the represented firms ''conduct their swap dealing businesses through a variety of structures, based on multiple and in many cases interdependent legal, strategic and business considerations that pre-date Dodd-Frank,'' and urging the Commissions to address a number of ''common cross-border transaction structures'').

[566] *See, e.g.,* IIB Letter at 6–7 (''[T]he Commissions should establish a framework for cross-border swap activities that preserves and leverages the strengths of existing market practices and home country supervision and regulation.''); Cleary IV at 3–4 (urging the Commissions to give consideration to a number of common cross-border transaction structures in deciding how to implement Title VII).

[567] *See, e.g.,* Financial Services Roundtable Letter at 25 (suggesting that ''entities that would meet the definition of 'swap dealer' based on their non-U.S. activity, but that act in the U.S. only on an intermediated basis through a regulated U.S. swap dealer, should not be subject to U.S. regulation''); Davis Polk Letter II at 4, 7 (discussing reasons to exclude dealing activities with U.S.-registered swap dealers, including because ''a swap between a foreign dealer and a U.S. registered swap dealer would be already subject to Title VII by the virtue of the latter's involvement'').

[568] *See* Cleary Letter IV at 3–4 (recommending that the Commission either adopt an approach similar to the broker-dealer registration regime, ''under which a non-U.S. swap dealer transacting with U.S. persons . . . intermediated by an affiliated U.S.-registered swap dealer'' would not have to register as a swap dealer or a major swap participant, or adopt a limited registration approach whereby ''the non-U.S. swap dealer would be subject to U.S. swap dealer registration and regulation solely with respect to the capital and related prudential requirements relevant to its status as a swap counterparty, which requirements could be satisfied through compliance with comparable home country requirements'').

[569] *See, e.g.,* Société Générale Letter I at 4–6 (suggesting a bifurcated registration model allowing foreign banks to centrally book their U.S. swap and security-based swap business with a registered ''Foreign Swap Dealer'' who is responsible for obligations associated with a booking entity (*e.g.,* complying with capital requirements), while complying with most of Title VII's regulations through a U.S. domiciled, registered ''Non-Booking Swap Dealer''); and Davis Polk Letter II at 4–22 (proposing two registration scenarios, including one that would require a foreign bank to register with the Commission solely as a booking center for security-based swap transactions, while a U.S. affiliate of a foreign bank would also register with the Commission, and the foreign bank's obligations under Title VII would be divided between the two registered entities).

[570] *See, e.g.,* Cleary Letter IV at 12 (recommending a limited designation registration whereby ''the branch, department or division of a registrant involved in the regulated swap activity should be responsible for compliance with Dodd-Frank's requirements,'' but allowing for the outsourcing of ''performance (but not responsibility for due performance) of those requirements to a U.S. affiliate that is registered as an introducing broker, futures commission merchant (''FCM'') and/or securities broker-dealer''); Rabobank Letter at 3 (suggesting that ''the non-U.S. branch registrant would use one or more U.S. affiliates as agents in arranging swaps with U.S. persons and would be permitted to delegate certain compliance functions to its U.S. affiliates, although such delegation would not relieve the non-U.S. branch registrant of its ultimate compliance responsibilities'').

[571] The Commission previously proposed new Rule 15Fh–2(d), which would provide that the term ''security-based swap dealer'' would include, where relevant, an ''associated person'' of the security-based swap dealer. *See* External Business Conduct Standards Proposing Release, 76 FR 42402. Section 3(a)(70) of the Exchange Act, as added by Section 761(a)(6), defines the term ''person associated with a security-based swap dealer or major security-based swap participant'' as ''(i) any partner, officer, director, or branch manager of such security-based swap dealer or major security-based swap participant (or any person occupying a similar status or performing similar functions); (ii) any person directly or indirectly controlling, controlled by, or under common control with such security-based swap dealer or major security-based swap participant; or (iii) any employee of such security-based swap dealer or major security-based swap participant.'' The term does not include, however, any person associated with a security-based swap dealer or major security-based swap participant ''whose functions are solely clerical or ministerial.'' *See id.*

As the Commission noted, to the extent that a security-based swap dealer acts through, or by means of, an associated person of that security-based swap dealer, the associated person must comply as well with the applicable business conduct standards. *See* External Business Conduct Standards Proposing Release, 76 FR 42402–3. In support of this position, the Commission cited Section 20(b) of the Exchange Act, which provides that ''[i]t shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.''

[572] *See* Section III.C.4, *supra.*

[573] *See* Section III.C.5, *supra,* and Section XI, *infra.*

business conduct requirements are complied with, margin is collected and segregated, and required trading records are maintained and available, to be undertaken by each entity depending on the intermediation model it adopts.[574]

Further, although a foreign security-based swap dealer could use an entity that is not a security-based swap dealer to act as its agent, the foreign security-based swap dealer would nonetheless be responsible for ensuring compliance with all the requirements applicable to security-based swap dealers under Title VII (and the federal securities laws) whether or not the regulated activities were carried out by the foreign security-based swap dealer or its non-security-based swap dealer agent.[575]

Request for Comment

The Commission requests comment on all aspects of the proposed approach to intermediation. In addition, the Commission requests comment in response to the following questions:

- Should the Commission revise our proposed approach to address directly the concerns of entities using the intermediation model to access the U.S. market? If so, what type of approach should the Commission use to address these concerns consistent with the protection of counterparties' interests and the purposes of Title VII?
- Should the Commission adopt a model on intermediation similar to the approach laid out in Rule 15a–6(a)(3) (17 CFR 240.15a–6(a)(3)) governing foreign broker-dealers, which would permit non-U.S. persons to conduct security-based swap dealing activity within the United States without registering with the Commission if those transactions were intermediated by a registered U.S. security-based swap dealer? If so, how would it work in the security-based swap context, and how would it address Title VII policy concerns?
- What would be the market impact of the proposed approach to intermediation? How would the application of the proposed approach to intermediation affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach to intermediation? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

E. Registration Application Re-Proposal

1. Introduction

As discussed in Section XI.C below, the Commission is proposing a rule that would create a framework under which the Commission would consider permitting a foreign security-based swap dealer, where appropriate, to rely on a substituted compliance determination by the Commission with respect to certain of the requirements in Section 15F of the Exchange Act and the rules and regulations thereunder.[576] In discussing the application of this proposed framework below, the Commission indicated that certain entity-level requirements under Section 15F of the Exchange Act may be candidates for substituted compliance determinations.[577]

The Commission preliminarily believes that the most appropriate time for a foreign security-based swap dealer to notify the Commission of its intention to avail itself of an existing substituted compliance determination[578] would be at the time the foreign security-based swap dealer files an application to register with the Commission as a security-based swap dealer.[579] As part of its application, the foreign security-based swap dealer would already be providing the Commission with detailed information in support of its application. The intent of a foreign security-based swap dealer to avail itself of a previously granted substituted compliance determination would be relevant to the Commission's review of such application because it would impact how the Commission will conduct oversight of the security-based swap dealer. In addition, if a security-based swap dealer determines, after it registered with the Commission, that it intends to rely on a substituted compliance determination, proposed Rule 15Fb2–3 would require that it promptly update its application.[580]

Accordingly, the Commission preliminarily believes it is appropriate to require foreign security-based swap dealers to provide additional information in their applications for registration as security-based swap dealers, as described below.

The Commission previously proposed Form SBSE, Form SBSE–A, and Form SBSE–BD for the purpose of registering security-based swap dealers and major security-based swap participants.[581] All of these forms are generally based on Form BD, which is the consolidated form used by broker-dealers to register

[574] The agent, in these circumstances, would need to consider whether it separately would need to register as a security-based swap dealer (if, for example, the agent acted as principal in a security-based swap with the counterparty, and then entered into a back-to-back transaction with the booking entity), a broker (*e.g.,* by soliciting or negotiating the terms of security-based swap transactions), or other regulated entity. Further, the allocation of functions between a foreign security-based swap dealer and a U.S. agent would not affect the aggregation calculation for determining whether the foreign security-based swap dealer exceeded the *de minimis* threshold. *See* Section III.B.3(c), *supra.*

[575] *See* note 574, *supra.*

[576] Proposed Rule 3a71–3(c) under the Exchange Act.

[577] *See* Section III.C.5, *supra.*

[578] The Commission is proposing to establish a separate process whereby foreign security-based swap dealers may request that the Commission make a substituted compliance determination with respect to a particular foreign jurisdiction. *See* Section XI, *infra.*

[579] The Commission's Registration Proposing Release does not use the term ''foreign security-based swap dealer,'' but rather references a ''nonresident security-based swap dealer.'' Proposed Rule 15Fb2–4(a) under the Exchange Act defines the term ''nonresident security-based swap dealer'' as a security-based swap dealer that is incorporated or organized any place that is not in the United States or that has its principal place of business in any place not in the United States. *See* Registration Proposing Release, 76 FR 65799–801.

The definition of ''nonresident security-based swap dealer'' in proposed Rule 15Fb2–4(a) is similar to, but potentially broader than, the definition of ''foreign security-based swap dealer'' in proposed Rule 3a71–3(a)(3) under the Exchange Act because it uses ''or'' instead of ''and'' in the definition. As a result, proposed Rule 15Fb2–4(a) would treat a U.S. corporation as a nonresident person if its principal place of business were outside the United States, whereas proposed Rule 3a71–3(a)(3) would not treat such an entity as a U.S. security-based swap dealer and, therefore, it would not be able to avail itself of substituted compliance determinations applicable to foreign security-based swap dealers.

The Commission preliminarily believes that defining the term ''foreign security-based swap dealer'' more narrowly for purposes of the proposals in this release is appropriate because proposed Rule 15Fb2–4(a) uses the term ''nonresident security-based swap dealer'' only for determining whether a nonresident security-based dealer would be required to appoint an agent for service of process in the United States and provide assurance that the Commission would have prompt access to books and records in the foreign jurisdiction. In proposed Rule 3a71–3(a)(3), by contrast, the definition of ''foreign security-based swap dealer'' would be used to determine who would be eligible to take advantage of the proposed substituted compliance framework, as well as how customer protection and segregation requirements would be applied. The Commission does not believe that it is appropriate to treat an entity as a foreign security-based swap dealer for these purposes if its principal place of business were outside the United States but it were incorporated in the United States, because of its connection to the U.S. security-based swap market. Nonetheless, the Commission would still want the assurances required of a ''nonresident security-based swap dealer'' described above, even if the dealer is incorporated in the United States but has a principal place of business outside the United States.

[580] *See* Registration Proposing Release, 76 FR 65822.

[581] *See id.* at 65784.

with the Commission, states, and SROs.[582] Forms SBSE–A and SBSE–BD are shorter forms that have been modified to provide a more streamlined application process for entities that are registered or registering with the CFTC or registered or registering with the Commission as a broker-dealer.[583] Each of these forms is designed to be used to gather information concerning a registrant's business operations to facilitate the Commission's initial registration decisions, as well as ongoing examination and monitoring of registration.'' [584] While the Commission received four comments on the Registration Proposing Release, only one specifically expressed views on the Forms SBSE, SBSE–A, and SBSE–BD.[585]

2. Discussion

To address the Commission's proposed rule regarding substituted compliance, the Commission is re-proposing Forms SBSE, SBSE–A, and SBSE–BD to add two questions to Form SBSE and Form SBSE–A, add one question to all three Forms, and to modify Schedule F to all the Forms. In addition, we are proposing one new instruction to the Forms, which is unrelated to substituted compliance, to clarify that if an application is not filed properly or completely, it may be delayed or rejected.[586] Key differences from the originally proposed forms are discussed more fully below. The Commission is not proposing to modify or eliminate any of the other Forms, or any of the rules, proposed in the Registration Proposing Release.

Re-proposed Forms SBSE and SBSE–A would include two new questions, question 3 (which has three parts) and question 6.[587] The new question 3.A. would ask whether an applicant is a foreign security-based swap dealer that intends to work with the Commission and its primary regulator to have the Commission determine whether the requirements of its primary regulator's regulatory system are comparable to the Commission's, or avail itself of a substituted compliance determination previously granted by the Commission with respect to the requirements of Section 15F of the Exchange Act and the rules and regulations thereunder. If the applicant responds in the affirmative to either part of the question, new question 3.B. would require that the applicant identify the foreign financial regulatory authority that serves as the applicant's primary regulator and for which the Commission has made, or may make, a substituted compliance determination. If the applicant indicates that it is relying on a previously granted substituted compliance determination, new question 3.C. would require the applicant to describe how it satisfies any conditions the Commission may have placed on the use of such substituted compliance determination. New question 3 would elicit basic information from an applicant to inform the Commission with respect to its intent to rely upon a substituted compliance determination.

New question 6 would ask whether the applicant is a U.S. branch of a non-resident entity. If the applicant responds in the affirmative, the applicant would need to identify the non-resident entity and its location. This question would provide the Commission with information regarding whether the firm would be subject to the rules of the foreign regulator or the rules of one of the U.S. banking regulators, which would, in turn, elicit which rules may be applicable to the entity's U.S. security-based swap business.

Re-proposed Forms SBSE and SBSE–A would also include new question 17, which would be identified as new question 15 in re-proposed Form SBSE–BD. This new question would ask if the applicant is registered with or subject to the jurisdiction of a foreign financial regulatory authority. If the applicant answered this question in the affirmative, it would be directed to provide additional information on Schedule F as discussed below. This question would apply to all applicants, not just foreign security-based swap applicants, and would provide the Commission with information regarding other regulatory schemes that may be applicable to an applicant.

The proposed revisions to Schedule F would divide Schedule F into two sections. Section I would include the full text of the originally proposed Schedule F. Section II would elicit additional information regarding foreign regulators with which the applicant may be registered or that otherwise have jurisdiction over the applicant.

The Commission preliminarily believes that modifying Forms SBSE, SBSE–A, and SBSE–BD (including the changes to Schedule F), as described above, would be appropriate because it would provide foreign security-based swap dealers with a convenient and cost-effective way of informing the Commission of their intention to rely on or seek a substituted compliance determination, as discussed above. In addition, we believe these modifications to our original proposal would provide the Commission with additional information necessary to make a determination as to whether it is appropriate to grant or institute proceedings to deny registration to a person applying to become a non-resident security-based swap dealer.

Request for Comment

The Commission requests comment on all aspects of the proposed modifications and additions to proposed Forms SBSE, SBSE–A and SBSE–BD (including the proposed changes to Schedule F). The Commission also specifically requests comment on the following:

- Please explain whether Form SBSE and Form SBSE–A are the appropriate places to identify whether an entity is intending to rely on a substituted compliance determination. If not, please explain why and what other method of notifying the Commission might be appropriate as well as when such notification to the Commission should be required to be made.
- Please explain whether Forms SBSE, SBSE–A, and SBSE–BD (and Schedule F) are the appropriate places to identify whether an entity is subject to oversight by a foreign regulator, and if so, which regulators. If so, why? If not, why not?
- Should any additional questions be added to Form SBSE to elicit information related to a registrant's reliance on a substituted compliance determination?
- Should any additional questions be added to Form SBSE–A to elicit information related to a registrant's

[582] *See id.* at 65802.

[583] *See id.* at 65804–5.

[584] *See id.* at 65802.

[585] *See* SIFMA Letter II. SIFMA indicated that it appreciated ''the Commission's attempts to minimize registration burdens by aligning its proposed registration requirements for SBSDs and MSBSPs with those the CFTC is proposing for swap dealers and major swap participants as well as by creating a streamlined registration process for entities already registered with the Commission or the CFTC,'' and was ''generally pleased that the Commission elected to make its existing broker-dealer registration forms the basis for its proposed registration requirements for SBSDs and MSBSPs'' because ''[m]arket participants are familiar with these requirements and may, in some cases, be registering broker-dealers as SBSDs.'' However, SIFMA did object to ''several of the required disclosures on proposed Form SBSE,'' which are substantially similar to disclosures required on Form BD, which it claimed would ''impose significant burdens on registrants.''

[586] *See* Instruction B.1.b. on Forms SBSE, SBSE–A, and SBSE–BD.

[587] The Commission is not proposing to add these questions to the Form SBSE–BD, because that form is only applicable to entities that are already registered as broker-dealers. These firms would not be eligible to rely on a substituted compliance determination because the substituted compliance determination only is with respect to the requirements in Section 15F of the Exchange Act, not the requirements in the Exchange Act to which registered broker-dealers are subject.

reliance on a substituted compliance determination?

• Should Form SBSE–BD also be modified to include any of the additional questions the Commission is proposing to include in re-proposed Form SBSE or Form SBSE–A? If so, which questions and why?

• The Commission previously indicated in the Intermediary Definitions Adopting Release that it would consider applications for limited purpose designations from the major security-based swap participant and security-based swap dealer definitions under Rules 3a67–1(b) and 3a71–1(c) under the Exchange Act, respectively,[588] and requested comment on this topic in the Registration Proposing Release.[589] Since that time, we have adopted and proposed, both jointly with the CFTC and individually, various rules that further clarify the regulations that will be applicable to security-based swap dealers,[590] and today we propose a substituted compliance framework to potentially address the concerns of foreign security-based swap dealers. Given these developments, are there any situations addressed by previous comments where limited registration designation would no longer be appropriate? Are there any situations, addressed by previous comments or otherwise, where a limited registration designation may be appropriate for security-based swap dealers? If so, in what situations would a limited registration designation be warranted, and how should the registration forms be amended to facilitate such limited registration? If not, why not?

IV. Major Security-Based Swap Participants

A. Introduction

Title VII defines a new type of entity regulated by the Commission, the ''major security-based swap participant.'' [591] The statutory definition of major security-based swap participant encompasses persons whose security-based swap activities do not cause them to be dealers, but nonetheless could pose a high degree of risk to the U.S. financial system generally.[592] This term was further defined in the Intermediary Definitions Adopting Release, focusing on the potential market impact and risks associated with a person's security-based swap positions.[593] In this respect, the major security-based swap participant definition differs from the security-based swap dealer definition, which generally focuses on a person's activities and how it holds itself out to the market. The amount or significance of those activities is relevant only in the context of the *de minimis* exception.[594] As a result, we believe that the cross-border issues that are raised by the definition of major security-based swap participant differ from those raised by the definition of security-based swap dealer. The application of the major security-based swap participant definition to cross-border activities was not addressed in the Intermediary Definitions Adopting Release.[595]

B. Comment Summary

A variety of commenters provided their views on the application of the major security-based swap participant definition and its related thresholds in the cross-border context, generally suggesting that the major participant tests focus on the systemic risk that an entity's swap transactions poses to the U.S. market.[596] Commenters further suggested that major security-based swap participant threshold calculations should exclude security-based swap transactions that do not involve a U.S. counterparty.[597] Several FPSFIs further

[588] As we noted in the Intermediary Definitions Adopting Release, 77 FR 30643–46 and 30696–97, the Commission will consider limited designation applications on an individual basis through analysis of the unique circumstances of each applicant, given that the types of entities that engage in security-based swap transactions are diverse and their organization and activities are varied. Any particular limited designation application will be analyzed in light of the unique circumstances presented by the applicant, and must demonstrate full compliance with the requirements that apply to the type, class, or category of security-based swap, or the activities involving security-based swaps, that fall within the security-based swap dealer or major security-based swap participant designation. A key challenge that any applicant for a limited purpose designation will face is the need to demonstrate that the applicant can comply with the statutory and regulatory requirements applicable to security-based swap dealers or major security-based swap participants while subject to a limited designation. Regardless of the type of limited designation being requested, the Commission will not designate a person as a security-based swap dealer or major security-based swap participant in a limited capacity unless it can demonstrate that it can fully comply with the applicable requirements.

[589] *See* Registration Proposing Release, 76 FR 65795. The Commission received one comment on this topic, from SIFMA (*see* note 585, *supra*). SIFMA indicated that it ''SIFMA strongly believes that the Commission should allow for limited SBSD or MSBSP registration along a number of dimensions.'' For instance, SIFMA suggested that the Commission allow entities to separately register individual trading desks, allow an entity to register as an SBSD in one class or type of security-based swap but not another (*e.g.,* ''an entity that acts as a dealer in single-name credit default swaps but not total return swaps on single securities should be able to register as an SBSD in the former but not the latter''), and ''allow entities to register as an SBSD or MSBSP for their activities with U.S. persons, keeping activities with non-U.S. persons outside the scope of registration and related regulation.''

[590] *See, e.g.,* the Product Definitions Adopting Release, 77 FR 48208, and the Capital, Margin, and Segregation Proposing Release, 77 FR 70214.

[591] *See* Section 3(a)(67) of Exchange Act, 15 U.S.C. 78c(a)(67), as added by Section 761(a) of the Dodd-Frank Act.

[592] As discussed in the Intermediary Definitions Adopting Release, the tests of the major security-based swap participant definition use terms—particularly ''systemically important,'' ''significantly impact the financial system'' or ''create substantial counterparty exposure''—that denote a focus on entities that pose a high degree of risk through their security-based swap activities. *See* Intermediary Definitions Adopting Release, 77 FR 30661 n.761. In addition, the link between the major participant definitions and risk was highlighted during the congressional debate on the statute. *See* 156 Cong. Rec. S5907 (daily ed. July 15, 2010).

[593] *See* Intermediary Definitions Adopting Release, 77 FR 30661. Under Rule 3a67–1 under the Exchange Act, 17 CFR 240.3a67–1, a major security-based swap participant is any entity that maintains security-based swap positions exceeding one of the following three thresholds: (1) $1 billion current uncollateralized exposure or $2 billion combined current uncollateralized exposure and potential future exposure in a major category of security-based swaps (excluding certain hedging positions); (2) $2 billion current uncollateralized exposure or $4 billion combined current uncollateralized exposure and potential future exposure in all security-based swaps; or (3) highly leveraged financial entities with $1 billion current uncollateralized exposure or $2 billion combined current uncollateralized exposure and potential future exposure in a major category of security-based swaps. *See* Intermediary Definitions Adopting Release, 77 FR 30751–54.

[594] *See* Intermediary Definitions Adopting Release, 77 FR 30661.

[595] The Commission indicated that the cross-border application of the major security-based swap participant definition would be addressed in a separate release. *See* Intermediary Definitions Adopting Release, 77 FR 30692 n.1181.

[596] *See, e.g.,* Financial Services Roundtable Letter at 25 (stating that ''non-US entities should not be subject to regulation as major participants unless their activities in US markets exceed the relevant thresholds, even if their aggregate global activity would exceed those thresholds'' and warning that ''the regulatory burden is sufficiently high that such entities may choose to exit the US markets, or deny US market participants access to non-US markets, rather than submit to regulation''); APG Asset Management Letter at 4 (recommending that the thresholds be amended to exclude from the computations the outward credit exposures of the computing party to non-U.S. persons, and supporting the CFTC's statement in its proposed registration release that the major participant analysis should be focused on an entity's activities with U.S. counterparties or using U.S. mails or instrumentalities); and AIMA Letter at 4–5 (suggesting that in the case of managed funds, only U.S. funds or funds otherwise regulated in the U.S. should be subject to potential major participant designation).

[597] *See, e.g.,* Jones Day Letter at 7–8 (recommending that ''[f]oreign swap transactions not involving a U.S. counterparty, *i.e.,* between two foreign counterparties[,] are more appropriately the province of the supervisory authorities in the relevant non-U.S. jurisdiction and should, therefore, be excluded from calculations of substantial swap positions''); Milbank Tweed Letter at 3 (''Clearly, the thresholds should not be applied to a non-U.S. participant's transactions with all of its counterparties. Equally, all transactions with U.S. counterparties can reasonably be included. To take account of transactions with non-U.S. counterparties that might meet the 'direct and

Continued

requested specific exclusions from the major security-based swap participant definition, suggesting that as a matter of comity, swap transactions involving foreign central banks as a counterparty,[598] international financial institutions, and/or foreign SWFs should be excluded from the major participant definitions.[599]

Certain entities managed or controlled by foreign governments also have asked for exemptions or exclusions from Commission registration or the Dodd-Frank Act's substantive requirements. For example, SWFs commented that they believe SWFs should be excluded from the definition of major security-based swap participant and thus the related regulatory obligations.[600] These entities argued that the Commission should not subject SWFs to registration requirements based on principles of international comity and cooperation and noted that SWFs are typically subject to comparable home country supervision that would render SEC regulation largely duplicative. They also argued that excluding SWFs from the major security-based swap participant definition would not increase systemic risks given that SWFs make long-term investments across diverse asset classes, use swaps or security-based swaps to hedge portfolio risks rather than generate returns, and are more likely to ensure that risk management measures are in place because of SWFs' heightened concerns regarding reputational risk.[601]

Another entity, which operates with an explicit government guarantee of its swap and security-based swap obligations, argued that it should be excluded from the major participant definition due to its lack of risk to the market resulting from this government support.[602]

C. Proposed Approach

In light of the comments received on the application of the major security-based swap participant definition in the cross-border context and the principles discussed above,[603] the Commission is proposing a rule and interpretive guidance regarding the application of the major security-based swap participant definition to cross-border activities.

1. In General

The Commission is proposing a rule under which a U.S. person would consider all security-based swap transactions entered into by it, while a non-U.S. person would consider only transactions entered into with U.S. persons,[604] when determining whether the person falls within the major security-based swap participant definition.[605] Under this proposed approach, a non-U.S. person would calculate its security-based swap positions under the three prongs of the major security-based swap participant definition [606] based solely on its transactions with U.S. persons (including foreign branches of U.S. banks). All security-based swap transactions by a non-U.S. person with other non-U.S. person counterparties, regardless of whether they are conducted within the United States or whether the non-U.S. person counterparties are guaranteed by a U.S. person, would be excluded from the major security-based swap participant analysis.

The proposed rule would use the same definition of ''U.S. person'' as proposed in the context of foreign security-based swap dealer registration.[607] As previously discussed, this definition generally follows a territorial approach to defining U.S. person.[608] The proposed approach to the U.S. person definition is intended to identify individuals or legal persons that, by virtue of their location within the United States or their legal or other relationship with the United States, are likely to impact the U.S. financial market and the U.S. financial system.[609] Therefore, we preliminarily believe that requiring a non-U.S. person to take into account its security-based swap positions with U.S. persons, as proposed to be defined, for purposes of the major security-based swap participant definition would provide an appropriate indication of the degree of default risk posed by such non-U.S. person's security-based swap positions to the U.S. financial system, which we view as the focus of the major security-based swap participant definition.[610] Consistent with the rules further defining the definition of major security-based swap participant adopted in the Intermediary Definitions Adopting Release, such risk to the U.S. financial system would be measured by calculating such non-U.S. person's aggregate outward exposures [611] to U.S. persons (that is, what such non-U.S. person owes, or potentially could owe, on its security-based swaps with U.S. persons).[612] If such non-U.S. person's aggregate outward exposures to U.S. persons exceed one of the thresholds set forth in the rules further defining ''major security-based swap

significant connection' standard, we suggest the Commissions consider including only those transactions by a potential non-U.S. major swap participant that are with non-U.S. registered swap dealers or non-U.S. registered major swap participants.'').

[598] For this purpose, we consider the Bank for International Settlements, in which the Federal Reserve and foreign central banks are members, to be a foreign central bank. *See http://www.bis.org/about/orggov.htm.*

[599] *See, e.g.,* Norges Bank Letter at 4–5 (recommending exemptions for foreign governments and their agencies); KfW letter at 8 (FPSFIs); World Bank Group Letter II at 1–2 (multilateral development institutions); China Investment Letter at 2 (SWFs); and GIC Letter at 2, 5–6 (SWFs).

[600] *See* China Investment Letter at 2–4 (further explaining that exempting SWFs from the definition of MSBSP would not result in reduced transparency, given that the SWF would still have to comply with a number of other Dodd-Frank Act requirements) and GIC Letter at 2, 5–6.

[601] *See* China Investment Letter at 3–4 and GIC Letter at 3.

[602] *See* KfW Letter at 8.

[603] *See* Section II.C, *supra.*

[604] Proposed Rule 3a67–10(a)(2) under the Exchange Act (defining the term ''U.S. person'' by cross-reference to the definition of U.S. person in proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra*).

[605] Proposed Rule 3a67–10(c) under the Exchange Act.

[606] *See* Rule 3a67–1 under the Exchange Act, 17 CFR 240.3a67–1; *see also* note 593, *supra.*

[607] Proposed Rule 3a67–10(a)(2) under the Exchange Act; *see also* proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra.*

[608] *See* Section III.B.5, *supra,* (discussing the definition of ''U.S. person'').

[609] *Id.*

[610] *See* Section 3(a)(67) of Exchange Act, 15 U.S.C. 78c(a)(67). In particular, one of the thresholds of the statutory definition of major security-based swap participant focuses on the serious adverse effects on the financial stability of the U.S. banking system or financial markets as a result of substantial counterparty exposure created by a person's security-based swap positions. *See* Section 3(a)(67)(A)(ii)(II) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A)(ii)(II). In addition, Section 3(a)(67)(B) of the Exchange Act requires the Commission to define the term ''substantial position'' in Sections 3(a)(67)(A)(ii)(I) and (III) of the Exchange Act at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. *See* Section 3(a)(67)(B) of the Exchange Act, 15 U.S.C. 78c(a)(67)(B).

[611] *See* Intermediary Definitions Adopting Release, 77 FR 30666–71; Rules 3a67–3(b) and (c) under the Exchange Act, 17 CFR 240.3a67–3(b) and (c).

[612] The determination of whether a security-based swap transaction must be included in a non-U.S. person's major security-based swap participant calculation is based on the U.S. person status of the non-U.S. person's counterparty to such transaction, regardless of whether the counterparty is a security-based swap dealer, end user, CCP, or other market participant. For example, where a non-U.S. person enters into a security-based swap transaction with a security-based swap dealer, and that transaction is submitted for clearing and novated from the dealer to a CCP, the non-U.S. person would look to the U.S. person status of the CCP that became its counterparty as a result of such novation when determining whether the transaction must be included in such non-U.S. person's major security-based swap participant calculation.

participant,'' [613] the non-U.S. person would be required to register as a major security-based swap participant.

Given the focus of the major security-based swap participant definition on the degree of risk to the U.S. financial system,[614] the Commission preliminarily believes that the location in which security-based swap transactions are conducted is not relevant to the calculation of a person's security-based swap positions for purposes of determining such person's status as a major security-based swap participant. Such an approach would differ from the approach we are proposing with respect to the security-based swap dealer definition, where we would count transactions connected with security-based swap dealing activity conducted within the United States toward a potential security-based swap dealer's *de minimis* threshold even if the transactions were with non-U.S. persons.[615] This difference in approach is driven by the different focuses of the statutory definitions of the terms security-based swap dealer and major security-based swap participant. While the statutory major security-based swap participant definition is focused specifically on risk,[616] the statutory security-based swap dealer definition is focused on, in addition to risk, the nature of the activities undertaken by an entity, its interactions with counterparties, and its role within the security-based swap market.[617] These different statutory emphases lead us to treat major security-based swap participants differently from security-based swap dealers with respect to whether activities conducted within the United States should be counted toward their respective thresholds.

In addition, as stated above, the U.S. person definition applies to the entire entity, including its branches and offices that may be located in a foreign jurisdiction.[618] Therefore, under the proposed approach, a non-U.S. person would need to include its security-based swap transactions with foreign branches of U.S. banks when calculating its security-based swap positions for purposes of the major security-based swap participant definition.

Some commenters on the CFTC Cross-Border Proposal have suggested that a non-U.S. person should be allowed to exclude swap transactions with foreign branches of U.S. banks for purposes of determining whether it is a major swap participant because otherwise non-U.S. persons would have a strong incentive to limit or even stop trading with U.S. banks that operate outside the United States via foreign branches.[619] We are mindful of these concerns. However, because foreign branches are not separate legal persons,[620] the Commission believes that the potential losses that a U.S. bank would suffer due to a non-U.S. person counterparty's default, and the potential impact on the U.S. banking system and the U.S. financial system generally, would not differ depending on whether the non-U.S. person counterparty entered into the security-based swap with the home office of the U.S. bank or with a foreign branch of the U.S. bank. Therefore, the Commission preliminarily believes that it is appropriate to require a non-U.S. person to include its security-based swap transactions with foreign branches of U.S. banks for purposes of determining its major security-based swap participant status.

By contrast, the Commission preliminarily believes that a non-U.S. person (the ''potential non-U.S. person major security-based swap participant'') does not need to include its security-based swap transactions with non-U.S. person counterparties in determining whether it is a major security-based swap participant. As stated above, the focus of the major security-based swap participant definition is on the degree of risk posed by a person's security-based swap positions to the U.S. financial system.[621] In the case of transactions with non-U.S. person counterparties, the risk that a potential non-U.S. person major security-based swap participant will not pay what it owes (or potentially could owe) under its security-based swaps to its non-U.S. counterparties is not transmitted directly and fully to the U.S. financial system in the way that such risk would be transmitted if the potential non-U.S. person major security-based swap participant engaged in security-based swap transactions with U.S. person counterparties. Instead, the non-U.S. person counterparties bear the direct and full risk of loss.[622] We recognize that there may be indirect spillover effects related to the security-based swap positions arising from the activity conducted by a potential non-U.S. person major security-based swap participant and a non-U.S. person counterparty (*e.g.,* a U.S. person that has an ownership interest in such a non-U.S. person counterparty would potentially face losses on the value of its investment in such a non-U.S. person counterparty due to failure of the potential non-U.S. person major security-based swap participant), but the Commission preliminarily believes that the major security-based swap participant tests do not need to address the potential indirect spillover risk to the U.S. financial system from foreign investments by U.S. persons in non-U.S. persons, or other non-security-based swap activities by U.S. persons with non-U.S. persons.[623]

The Commission recognizes that this proposed approach results in different treatment of U.S. and non-U.S. persons under the major security-based swap participant definition (*i.e.,* a non-U.S. person would consider its security-based swap transactions with only U.S. persons, while a U.S. person would consider all of its security-based swap transactions). However, the Commission preliminarily believes that this approach is appropriate in light of the focus in the major security-based swap participant definition on the U.S. financial system. More specifically, the need for separate analysis of U.S. and non-U.S. entities results from the fact that all of a U.S. person's security-based swap transactions are part of and create risk to the U.S. financial system, regardless of whether such entity's counterparties are U.S. persons or non-U.S. persons. The same is not true of non-U.S. persons, however, because the security-based swap transactions entered into by a non-U.S. person with other non-U.S. persons are not fundamentally part of the U.S. financial system, while such non-U.S. person's security-based swap transactions with U.S. persons would directly impact the U.S. financial system. Thus, we preliminarily believe that the statutory major security-based swap participant definition's focus on the U.S. financial system, justifies treating U.S. and non-U.S. persons differently for purposes of the major participant analysis based on

[613] *See* Rule 3a67–3 and Rule 3a67–5 under the Exchange Act, 17 CFR 240.3a67–3 and 17 CFR 240.3a67–5 (defining ''substantial position'' and ''substantial counterparty exposure'').

[614] *See* note 610, *supra.*

[615] *See* Section III.B.6, *supra.*

[616] *See* note 610, *supra.*

[617] *See* note 177 and accompanying text, *supra.*

[618] *See* Section III.B.5, *supra.*

[619] *See, e.g.,* Citigroup Letter at 3.

[620] *See* Section III.B.5, *supra.*

[621] *See* note 610, *supra.*

[622] This is the case even if the non-U.S. person counterparties' obligations under the security-based swaps with the potential non-U.S. person major security-based swap participant are guaranteed by a U.S. person. As discussed in more detail below, the Commission proposes to address the risk posed by a non-U.S. person's security-based swap positions guaranteed by a U.S. person to the U.S. financial system through its treatment of guarantees for purposes of the major security-based swap participant definition. *See* Section IV.C.2(a), *infra.*

[623] The Commission preliminarily believes that such risk is more appropriately addressed under Titles I and II of the Dodd-Frank Act.

the disparate impacts of their security-based swap transactions on the U.S. financial system.

We recognize that a non-U.S. person's transactions with other non-U.S. person counterparties could still have an impact on the U.S. financial system, including where those transactions threatened the financial integrity of a non-U.S. person counterparty and such person had significant security-based swap positions with U.S. persons. However, the amount of risk the non-U.S. person poses to the U.S. financial system would most directly stem from the size of its direct positions with U.S. persons. As a result, the Commission preliminarily believes it is appropriate to limit the international application of the major security-based swap participant definition to a non-U.S. person's security-based swaps entered into with U.S. persons.

2. Guarantees

The application of the major security-based swap participant definition to security-based swap positions guaranteed by a parent, other affiliate, or guarantor raises unique issues in the cross-border context. These issues were not addressed in the Intermediary Definitions Adopting Release.[624]

As a general principle, the Commission and the CFTC did note in the Intermediary Definitions Adopting Release that an entity's security-based swap positions are attributed to a parent, other affiliate, or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions have recourse to that parent, other affiliate, or guarantor in connection with the position.[625] Positions are not attributed in the absence of recourse.[626] The Commission and the CFTC further stated that attribution of these positions for purposes of the major participant definitions is intended to reflect the risk focus of the major participant definitions by providing that entities will be regulated as major participants when they pose a high level of risk in connection with the swap and security-based swap positions they guarantee.

The application of these general principles in the cross-border context is discussed below, including the attribution of guaranteed security-based swap positions to U.S. persons and non-U.S. persons, respectively, when they provide guarantees on performance of the security-based swap obligations of other persons, the limited circumstances where attribution of guaranteed security-based swap positions is not required, and operational compliance.

(a) Guarantees Provided by U.S. Persons to Non-U.S. Persons

One cross-border issue that arises from the general approach to guarantees set forth in the Intermediary Definitions Adopting Release is how the attribution of guarantees for purposes of the major security-based swap participant definition would apply to a guarantee provided by a U.S. person for performance on the obligations of a non-U.S. person, such as a U.S. holding company providing a guarantee on the obligations of a foreign subsidiary. As noted in the Intermediary Definitions Adopting Release, the attribution of guaranteed positions for purposes of the major participant definitions is intended to reflect the risk that a guarantor might pose to, and the systemic impact of such risk may impose on, the U.S. financial system as a result of the guarantees that it provides.[627] The Commission preliminarily believes that these risk concerns are the same when U.S. persons act as guarantors for foreign persons regardless of whether the underlying security-based swap transactions that they guarantee are entered into with U.S. persons or non-U.S. persons, given that the risk borne by the U.S. person guarantor would not be impacted by the status of the guaranteed non-U.S. person's counterparty as either a U.S. person or non-U.S. person. As a result, the Commission is proposing that, other than in the limited circumstances described below,[628] all security-based swaps entered into by a non-U.S. person and guaranteed by a U.S. person be attributed to such U.S. person guarantor for purposes of determining such U.S. person guarantor's major security-based swap participant status, regardless of whether the underlying transaction was entered into with a U.S. person counterparty or non-U.S. person counterparty.[629]

(b) Guarantees Provided by Non-U.S. Persons to U.S. Persons and Guarantees Provided by Non-U.S. Persons to Non-U.S. Persons

Another cross-border issue related to the Commission's approach to the attribution of guarantees is how guarantees provided by non-U.S. persons are treated for purposes of the major security-based swap participant definition. As previously noted, the statutory major security-based swap participant definition's focus on the accumulation of security-based swap risk by non-U.S. persons is primarily centered on the impact such risk could have on the U.S. financial system.[630] Where a non-U.S. person provides a guarantee on performance of the security-based swap obligations of a U.S. person (*e.g.,* a non-U.S. holding company providing a guarantee on performance of the obligations owed by its U.S. subsidiary under security-based swaps entered into by the U.S. subsidiary), the counterparties of such U.S. person would be taking the credit risk of the non-U.S. person guarantor as well as the U.S. person. If the non-U.S. person guarantor defaults, the full amount of risk accumulated under the guaranteed U.S. person's security-based swap positions would impact the U.S. financial system. As a result, subject to the limited circumstances described in the Intermediary Definitions Adopting Release,[631] a non-U.S. person providing

[624] In the Intermediary Definitions Adopting Release, the Commissions stated they intended to address guarantees provided to non-U.S. entities, and guarantees by non-U.S. holding companies, in separate releases. *See* Intermediary Definitions Adopting Release, 77 FR 30689 n.1134. In this release, we are not altering the interpretive approach with respect to the attribution of guarantees that was adopted by the Commissions in the Intermediary Definitions Adopting Release, but rather we are proposing an interpretive approach that would apply the principles adopted in the Intermediary Definitions Adopting Release in the cross-border context.

[625] *See* Intermediary Definitions Adopting Release, 77 FR 30689, and the accompanying note 1132 on that page.

[626] *See id.* As indicated in note 160 above, the term ''guarantee'' as used in this release refers to a contractual agreement pursuant to which one party to a security-based swap transaction has recourse to its counterparty's parent, other affiliate, or guarantor with respect to the counterparty's obligations owed under the transaction.

[627] *See id.*

[628] *See* Section IV.C.2(c), *infra* (discussing the limited circumstances where attribution of guaranteed security-based swap positions to the guarantor would not apply).

[629] In all circumstances where a U.S. person guarantor is required to attribute to itself all security-based swap transactions entered into by the guaranteed non-U.S. person, the guaranteed non-U.S. person would still be required to consider those security-based swap transactions that it enters into with U.S. person counterparties for purposes of determining whether it is a major security-based swap participant pursuant to the proposed Rule 3a67–10(c)(2) under the Exchange Act. *See* Section IV.C.1, *supra* (discussing proposed Rule 3a67–10(c) under the Exchange Act). Once the guaranteed non-U.S. person becomes a major security-based swap participant and registers with the Commission, the U.S. guarantor would no longer be required to attribute to itself the security-based swap positions entered into by the guaranteed non-U.S. person. *See* Intermediary Definitions Adopting Release, 77 FR 30689. This same result would also occur where a guaranteed non-U.S. person becomes subject to capital regulation by the Commission or the CFTC (*e.g.,* a registered major swap participant, swap dealer, security-based swap dealer, futures commission merchant, or broker-dealer). *See id.*

[630] *See* note 610, *supra.*

[631] *See* Intermediary Definitions Adopting Release, 77 FR 30730 (discussing the limited circumstances where attribution of guaranteed security-based swap positions of a U.S. person to the guarantor would not apply).

a guarantee on performance of the security-based swap obligations of a U.S. person would attribute to itself all of the U.S. person's security-based swap positions that are guaranteed by the non-U.S. person guarantor for purposes of determining the non-U.S. person guarantor's major security-based swap participant status.[632]

By contrast, where a non-U.S. person provides a guarantee on performance of the security-based swap obligations of another non-U.S. person (*e.g.,* a non-U.S. holding company providing a guarantee on performance of the obligations owed by its non-U.S. subsidiary under security-based swaps entered into by the non-U.S. subsidiary), the ultimate counterparty credit risk associated with the transaction would generally reside outside of the United States with the non-U.S. guarantor. In this scenario, the potential impact on the U.S. financial system would be limited to transactions entered into by the guaranteed non-U.S. person with U.S. person counterparties. Therefore, the Commission preliminarily believes that, other than in the limited circumstances described below,[633] where a non-U.S. person guarantees performance on the security-based swap transactions of another non-U.S. person, the non-U.S. guarantor need only attribute to itself such guaranteed security-based swap transactions entered into with U.S. person counterparties for purposes of determining its major security-based swap participant status.[634]

(c) Limited Circumstances Where Attribution of Guaranteed Security-Based Swap Positions Does Not Apply

In addition to setting forth general principles regarding the attribution of guaranteed swap or security-based swap positions to the guarantor for the major participant definitions, the Intermediary Definitions Adopting Release also provided interpretive guidance related to the limited circumstances under which attribution of guaranteed swap or security-based swap positions is not required.[635] Specifically, it stated that even in the presence of a guarantee, it is not necessary to attribute a person's swap or security-based swap positions to a parent or other guarantor if the person already is subject to capital regulation by the Commission or the CFTC (*i.e.,* swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, FCMs, and broker-dealers) or if the person is a U.S. entity regulated as a bank in the United States.[636] In providing this interpretive guidance, the Commission and the CFTC explained that the positions of those regulated entities already will be subject to capital and other requirements, making it unnecessary to separately address, via major participant regulations, the risks associated with guarantees of those positions of a regulated entity.[637]

The Intermediary Definitions Adopting Release did not address the application of the interpretive guidance regarding attribution of guaranteed positions where a guarantee is provided to support a non-U.S. person's performance on the obligations under security-based swaps in the cross-border context. The Commission preliminarily believes that the interpretation jointly adopted by the Commission and the CFTC in the Intermediary Definitions Adopting Release regarding security-based swap positions of a person subject to capital regulation by the CFTC or the Commission should equally apply to a non-U.S. person whose security-based swap positions are guaranteed by another person. Therefore, the Commission is proposing to interpret that it is not necessary to attribute a non-U.S. person's security-based swap positions to a parent or other guarantor if such non-U.S. person already is subject to capital regulation by the Commission or the CFTC (*i.e.,* swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, FCMs and broker-dealers).

In addition, in the cross-border context and with respect to a non-U.S. person, if such non-U.S. person is not subject to capital regulation by the Commission or the CFTC, consistent with the rationale for the approach to attribution of security-based swap positions of a person that is a U.S. entity regulated as a bank in the United States, it would not be necessary to attribute such non-U.S. person's security-based swap positions to its guarantor if such non-U.S. person is subject to capital standards that are consistent with the capital standards such non-U.S. person would have been subject to if such non-U.S. person were a bank subject to the prudential regulators' capital regulation. Therefore, the Commission preliminarily believes that it is not necessary to attribute such non-U.S. person's security-based swap positions to its guarantor for purposes of determining the guarantor's major security-based swap participant status, if such non-U.S. person is subject to capital standards adopted by its home country supervisor that are consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision (the ''Basel Accord'').[638] This proposed approach also is consistent with the capital standards proposed by the prudential regulators for a foreign bank that is a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, which require such foreign bank to comply with regulatory capital rules already made applicable to such foreign bank as part of the existing prudential regulatory regime.[639] The Commission preliminarily believes that security-based swap positions of a non-U.S. person subject to foreign regulatory capital requirements consistent with the Basel Accord would be subject to risk-based capital requirements that take into account the unique risks (including the

[632] *See* note 629, *supra.*

[633] *See* Section IV.C.2(c), *infra* (discussing the limited circumstances where attribution of guaranteed security-based swap positions of a non-U.S. person to the guarantor would not apply).

[634] Where a non-U.S. person guarantor is required to attribute to itself the security-based swap positions entered into by a non-U.S. person that are guaranteed by the first non-U.S. person, the guaranteed non-U.S. person also would be required to consider all security-based swap transactions entered into by itself with U.S. person counterparties for purposes of determining its major security-based swap participant status in accordance with proposed Rule 3a67–10(c)(2) under the Exchange Act. *See* Section IV.C.1, *supra* (discussing proposed Rule 3a67–10(c) under the Exchange Act). Once the guaranteed non-U.S. person becomes a major security-based swap participant and registers with the Commission, the non-U.S. guarantor would no longer be required to attribute to itself the security-based swap positions entered into by the guaranteed non-U.S. person. *See* Intermediary Definitions Adopting Release, 77 FR 30689.

[635] *See* Intermediary Definitions Adopting Release, 77 FR 30689.

[636] *Id.* This interpretive guidance applies to both U.S. persons and non-U.S. persons that are subject to registration and regulation in the enumerated categories.

[637] *See* Intermediary Definitions Adopting Release, 77 FR 30689.

[638] This is consistent with the capital standards of the prudential regulators with respect to foreign banks that are bank holding companies subject to the Federal Reserve Board of Governors' supervision. *See* § 225.2(r)(3) of the Regulation Y (''For purposes of determining whether a foreign banking organization qualifies under paragraph (r)(1) of this section: (A) A foreign banking organization whose home country supervisor . . . has adopted capital standards consistent in all respects with the Capital Accord of the Basle Committee on Banking Supervision (Basle Accord) may calculate its capital ratios under the home country standard . . .''), 12 CFR 225.2(r)(3).

[639] *See* Prudential Regulator Margin and Capital Proposal, 76 FR 27582 (''The proposed rule generally requires a covered swap entity to comply with regulatory capital rules already made applicable to that covered swap entity as part of its prudential regulatory regime. . . . In the case of a foreign bank or the U.S. branch or agency of a foreign bank, the capital rules that are made applicable to such covered entity pursuant to § 225.2(r)(3) of the Board's Regulation Y, 12 CFR 225.2(r)(3) . . .'').

credit risk, market risk, and other risks) arising from security-based swap transactions, in such a way as to make it unnecessary to separately address, via major security-based swap participant regulation, the risks associated with guarantees of those security-based swap positions.

(d) Operational Compliance

Finally, the Commission believes that it is necessary to provide interpretive guidance regarding operational compliance and the special issues that may result from the attribution of security-based swap positions to a parent or guarantor. As the Commission and the CFTC noted in the Intermediary Definitions Adopting Release, these include issues regarding the application of the transaction-focused requirements applicable to registered major participants (*e.g.,* certain requirements related to trading records and transaction confirmations), given that the entity that is the direct counterparty to the swap or security-based swap may be better positioned to comply with those requirements.[640] In the Intermediary Definitions Adopting Release, the Commission and the CFTC stated that ''an entity that becomes a major participant by virtue of swaps or security-based swaps directly entered into by others must be responsible for compliance with all applicable major participant requirements with respect to those swaps or security-based swaps (and must be liable for failures to comply), but may delegate operational compliance with transaction-focused requirements to entities that directly are party to the transactions. The entity that is the major participant, however, cannot delegate compliance duties with the entity-level requirements applicable to major participants (*e.g.,* requirements related to registration and capital).'' [641]

The Commission preliminarily believes that the same approach should apply in the cross-border context when the guarantor and the guaranteed person are located in different jurisdictions (*e.g.,* U.S. holding companies that act as guarantors of the security-based swap obligations of their non-U.S. dealing subsidiaries). In each case, the major security-based swap participant may delegate compliance duties for transaction-focused requirements to the entities that are counterparties to the transactions, but the major security-based swap participant would remain responsible for ensuring that the Title VII requirements applicable to such transactions are fulfilled. However, major security-based swap participants must comply with all relevant entity-level requirements themselves that are not transaction-focused, such as registration and capital. Entity-level requirements that have a transaction focus, such as margin, may be delegated to the guaranteed entities that directly are party to the transactions. However, the major security-based swap participants would remain responsible for ensuring compliance with these requirements.

3. Foreign Public Sector Financial Institutions (FPSFIs)

The proposed approach to the cross-border application of the major security-based swap participant definition described above provides a general framework for applying the definition to non-U.S. persons. That framework does not separately address questions raised by commenters regarding how the major security-based swap participant definition applies to FPSFIs. Specifically, some commenters requested explicit exclusions from the major security-based swap participant definition for these types of entities.[642]

We note that FPSFIs encompass a wide range of institutions and organizations, ranging from divisions of foreign central banks, to international financial institutions established under treaties, to multilateral development banks formed, owned, and controlled by sovereign members, to sovereign wealth funds and other investment corporations owned by foreign governments. Some FPSFIs' obligations are guaranteed or backed by foreign governments; others may not be. The purposes and activities of these institutions and organizations vary. For example, some FPSFIs (such as the Bank for International Settlements) provide banking services to foreign central banks who are their members. Some FPSFIs provide credits and grants to promote economic development in developing countries (*e.g.,* multilateral development banks) or distribute funds of regional recovery programs to promote regional economies (*e.g.,* KfW for the European Recovery Program). Other FPSFIs conduct investment activities around the world and their exclusive customers are the foreign governments to which they are linked. Depending on their purposes and activities, FPSFIs may engage in different types of swaps or security-based swaps to various degrees, although the Commission is not aware of data reflecting the nature and amount of such transactions across the FPSFI population. One commenter stated that it enters into swaps to manage interest rates and foreign exchange risks but does not use swaps to generate returns.[643]

Several commenters requested that FPSFIs be excluded from the major security-based swap participant definition. They provided various reasons and basis to support their requests. Some FPSFIs commented that they are subject to exceptionally high risk controls and have extremely strong capital bases and therefore pose no risk to systemic stability.[644] Others argued that they already are subject to comparable or comprehensive substantive regulation of their respective governments in their home countries and therefore, subjecting them to the major security-based swap participant regulation would create regulatory duplication or conflicts.[645] One FPSFI argued that it only conducts swap activities with dealers, which would be regulated under Title VII, and therefore it is not necessary to subject it to duplicative regulation and supervision.[646] Another FPSFI, which operates with an explicit government guarantee of its swap and security-based swap obligations, argued that it should be excluded from the major participant definition due to its lack of risk to the market resulting from this government support.[647] Intergovernmental organizations, such as multilateral development banks, argued that multilateral development institutions are never subject to national regulations and their privileges and immunities should be fully respected.[648]

After considering the concerns of these commenters, we recognize that FPSFIs raise unique and complex issues because of the diversity of the special purposes they are serving, their differing governance structures and sources of financial strength, and their supranational, intergovernmental, or sovereign nature. The Commission also recognizes that we have received relatively little information from commenters regarding the types, levels, and natures of security-based swap activity that FPSFIs regularly engage in (although some information has been

[640] Intermediary Definitions Adopting Release, 77 FR 30689.

[641] *Id.*

[642] *See* note 599, *supra.*

[643] *See* China Investment Letter at 3–4. Cf. World Bank Letter II states that ''not all multilateral development banks use derivatives in their development operations, or do so only on a limited basis.'' *See* World Bank Letter II at 1 n.1.

[644] *See* BIS Letter II at 3 and World Bank Letter I at 7.

[645] *See* GIC Letter at 3–4 and KfW Letter at 3 and 8.

[646] *See* China Investment Letter at 3–4.

[647] *See* KfW Letter at 8.

[648] *See* World Bank Letter II at 2–3.

received regarding their swap transactions) and that, consequently, the Commission has comparatively little basis on which to understand their roles in the security-based swap markets and, as appropriate, exclude them from the major security-based swap participant definition. Therefore, we are not proposing to specifically address the treatment of FPSFIs at this time. Instead, we are soliciting comment to help determine the basis on which it may be appropriate to exclude FPSFIs from the proposed rule regarding application of the major security-based swap participant definition to non-U.S. persons. In particular, we invite public comment regarding the types, levels, and nature of the security-based swap activity that various types of FPSFIs may engage in on a regular basis, the roles of FPSFIs in the security-based swap market, the mitigating factors and reasons that FPSFIs may not pose systemic risk as a result of their security-based swap activity, and whether it would be more appropriate for the Commission to address FPSFI concerns on an individual basis. We also request considerations, information, and data regarding potential definitions of a FPSFI for purposes of the major security-based swap definition. Responses that are supported by empirical data and analysis are encouraged in assisting the Commission in considering whether excluding FPSFIs from the definition of the major security-based swap participant is warranted.

D. Title VII Requirements Applicable to Major Security-Based Swap Participants

1. Transaction-Level Requirements Related to Customer Protection

(a) Overview

As previously noted, the Dodd-Frank Act is generally concerned with the protection of the U.S. financial system and counterparties in the U.S. security-based swap market.[649] This general principle is particularly relevant to the customer protection, including segregation, requirements in Title VII, which are focused on the protection of the counterparties or customers of security-based swap dealers. As a result, the Commission preliminarily believes that it is not necessary to the objective of Title VII to subject foreign major security-based swap participants to certain of the customer protection requirements in Title VII with respect to their transactions with non-U.S. persons. Accordingly, the Commission is proposing rules that would identify specific transaction-level requirements that would not apply to foreign major security-based swap participants with respect to their transactions with non-U.S. persons.

(b) Proposed Rules

The proposed rules would provide that foreign major security-based swap participants would not be subject, solely with respect to their transactions with non-U.S. persons, to certain of the transaction-level requirements that apply to major security-based swap participants.[650] Specifically, under the proposed rules registered foreign major security-based swap participants would not have to comply with business conduct standards as described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission relating to diligent supervision pursuant to Section 15F(h)(1)(B)[651] and the rules and regulations thereunder, with respect to their transactions with non-U.S. persons.[652] In addition, under the proposed rules, registered foreign major security-based swap participants that are not registered broker-dealers would not have to comply with requirements related to the segregation of assets held as collateral in Section 3E of the Exchange Act and the rules and regulations thereunder with respect to their transactions with non-U.S. persons.[653]

Our rationale for this proposed approach to the application of transaction-level requirements for foreign major security-based swap participants is substantially the same as that discussed previously in the context of foreign security-based swap dealers.[654] This rationale includes our belief that applying these customer protections and segregation requirements to security-based swap transactions with non-U.S. persons outside the United States would not advance the objectives of Title VII to protect the U.S. financial system or U.S. counterparties. At the same time, this approach would preserve customer protections for U.S. person counterparties who would expect to benefit from the protections afforded by Title VII.

(2) Entity-Level Requirements

Entity-level requirements in Title VII primarily address concerns relating to the major security-based swap participant as a whole, with a particular focus on safety and soundness of the entity to reduce systemic risk in the U.S. financial system. The most significant entity-level requirements are capital and margin requirements. Because these requirements address the financial, operational, and business integrity of the entity engaged in security-based swap activity, the Commission preliminarily believes that a registered foreign major security-based swap participant should be required to adhere to these standards. As noted above, other requirements that the Commission believes should apply at the entity, rather than the transactional, level include, but are not limited to, risk management procedures, books and records requirements, conflicts of interest systems and procedures, and designation of a chief compliance officer.[655] These entity-level requirements ensure the safety and soundness of the entire registrant and are thus distinguishable from the transaction-level requirements discussed above, which apply to transactions with individual counterparties and thus may be applied differently based on the U.S. person status of a counterparty.

3. Substituted Compliance

The Commission is not proposing, at this time, to establish a policy and procedural framework under which we would consider permitting compliance by a foreign major security-based swap participant with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, applicable to major security-based swap

[649] *See* note 4, *supra*.

[650] Proposed Rule 3a67–10(b) and proposed Rule 18a–4(f) under the Exchange Act.

[651] 15 U.S.C. 78o–10(h)(1)(B).

[652] *See* Section III.C.3(a)(i), *supra*. As discussed previously, Section 15F(h)(1)(B) requires security-based swap dealers to conform with such business conduct standards relating to diligent supervision as the Commission shall prescribe.

[653] *See* proposed Rule 18a–4(f) under the Exchange Act.

[654] *See generally* Section III.C.4(b), *supra*. In addition, all ''nonresident major security-based swap participants,'' as defined in proposed Rule 15Fb2–4(a) under the Exchange Act, would be required: (1) To appoint and identify to the Commission an agent in the United States (other than the Commission or a Commission member, official or employee) for service of process; (2) to certify that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission; and (3) to provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. *See* proposed Rule 15Fb2–4(b) under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65799–801.

[655] *See* Section III.C.3(b), *supra*.

participants, as it is proposing to do for foreign security-based swap dealers.[656]

Unlike foreign security-based swap dealers whose primary businesses are in securities, security-based swaps, swaps, banking and other financial and investment banking activities, the non-U.S. persons that may need to register as nonbank major security-based swap participants may engage in a diverse range of business activities different from, and broader than, the activities conducted by broker-dealers or security-based swap dealers (otherwise they may be required to register as a security-based swap dealer and/or broker-dealer) or the activities conducted by banks. For example, as stated in the Capital, Margin and Segregation Proposing Release, persons that may need to register as nonbank major security-based swap participants may engage in commercial activities that require them to have substantial fixed assets to support manufacturing and/or result in them having significant assets comprised of unsecured receivables.[657] Therefore, it is not clear what types of entity-level regulatory oversight, if any, especially with respect to capital and margin, a foreign major security-based swap participant would be subject to in the foreign regulatory system.

Accordingly, in light of the limited information currently available to us regarding what types of foreign entities may become major security-base swap participants, if any, and the foreign regulation of such entities, we are not, at this time, proposing to extend the proposed policy and procedural framework for substituted compliance to foreign major-security-based swap participants. Nevertheless, we will continue to consider the appropriateness of permitting substituted compliance for major security-based swap participants in light of comments received on this proposal and market developments more generally and will consider what further steps to take, if any, at adoption. In this regard, we request considerations, information, and data regarding potential foreign major security-based swap participants. Responses that are supported by empirical data and analysis are encouraged in assisting the Commission in considering whether permitting substituted compliance by foreign major security-based swap participants would be warranted.

[656] *See* Section XI.C, *infra*.

[657] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70315.

Request for Comment

The proposed rules and interpretations regarding the application of the major security-based swap participant definition and transaction-level and entity-level requirements to registered major security-based swap participants discussed above represent the Commission's preliminary views. The Commission seeks comment on the proposed rules and interpretations in all aspects. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to proposed rule text and interpretations. Responses that are supported by data and analysis provide great assistance to the Commission in considering the practicality and effectiveness of the proposed application as well as considering the benefits and costs of proposed requirements. In addition, the Commission seeks comment on the following specific questions:

- Should the major security-based swap participant definition focus only on a non-U.S. person's security-based swap transactions entered into with U.S. persons, or should the major security-based swap participant definition incorporate some or all of a non-U.S. person's other security-based swap transactions? Which transactions? For example, should a non-U.S. person include security-based swap transactions with non-U.S. person counterparties guaranteed by U.S. persons in such non-U.S. person's major security-based swap participant calculation? Why or why not?
- Should the proposed approach toward determining whether a non-U.S. person should count its security-based swap transactions that are cleared through CCPs be adopted? Why or why not? Should the Commission adopt a different approach to the treatment of security-based swap transactions cleared through CCPs for purposes of the cross-border application of the major security-based swap participant test? If so, how should cleared transactions be treated for purposes of the cross-border application of the major security-based swap participant test?
- Should a non-U.S. person be permitted to exclude its security-based swap transactions entered into with foreign branches of U.S. banks from the calculation for purposes of determining whether it is a major security-based swap participant? Why? If a non-U.S. person's security-based swaps with foreign branches of U.S. banks are not required to be considered in determining such non-U.S. person's major security-based swap participant status, how should the risk (in terms of outward exposures) that such non-U.S. person poses to U.S. banks be addressed?
- Should the Commission permit a non-U.S. person to exclude from its major security-based swap participant calculations its security-based swap positions arising from transactions with the foreign branches of U.S. banks if such non-U.S. person is subject to capital standards adopted by its home country supervisor that are consistent in all respect with the Basel Accord? Are there other conditions or standards the Commission should consider that a non-U.S. person may satisfy or comply with that should allow a non-U.S. person to exclude its security-based swap positions arising from transactions with foreign branches of U.S. banks from its major security-based swap participant calculation?
- Are there competitiveness concerns related to the proposed different treatment of U.S. persons and non-U.S. persons for purposes of calculating their status under the major security-based swap participant definition? If so, what are these concerns, and how should they be addressed?
- Should the proposed approach towards the attribution of security-based swap positions guaranteed by U.S. persons and non-U.S. persons be altered? What justifications would support an alternate approach?
- Should the Commission adopt the proposed approach to the attribution of guaranteed security-based swap positions whereby the positions of guaranteed entities subject to capital standards adopted by its home country supervisor that are consistent in all respects with the Basel Accord would not need to be attributed? Is Basel Accord capital standard an appropriate standard for determining whether it is not necessary to attribute guaranteed security-based swap positions to a guarantor, or should another standard be used? Is this proposed standard clear, or is additional guidance necessary? In addition to the proposed capital standard, should the Commission's approach to the attribution of guaranteed security-based swap positions also include a requirement that the guaranteed entities be subject to effective capital oversight by its home country supervisor as determined by the Commission in order not to attribute the guaranteed security-based swap positions to the guarantor?
- Are there FPSFIs that would fall within the definition of major security-based swap participant based on the proposed rules and interpretive guidance? If so, should the Commission

provide relief to such FPSFIs? If so, what type of relief, what types of entities should be eligible for such relief, and what factors would justify such relief? Would it be more appropriate for the Commission to address these concerns on an individual basis?

• Should the Commission adopt the proposed approach to the application of certain customer protection requirements and segregation requirements to foreign major security-based swap participants with respect to their transactions with non-U.S. persons? If so, are there other transaction-level requirements that should be included within this proposed approach?

• Should substituted compliance be provided to foreign major security-based swap participants with respect to entity-level requirements? Transaction-level requirements? If so, how should the Commission make such a determination? In particular, what standard should be used for determining whether existing regulation merits a substituted compliance determination?

• What would be the market impact of the proposed approach to major security-based swap participants? How would the application of the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach to major security-based swap participants? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

V. Security-Based Swap Clearing Agencies

A. Introduction

Title VII of the Dodd-Frank Act adds a number of provisions to the Exchange Act relating to the registration and regulation of clearing agencies that provide clearance and settlement services for security-based swaps.[658] Such provisions augment the Commission's existing authority to register and regulate clearing agencies in Section 17A of the Exchange Act.[659] In particular, Section 17A(g) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, requires clearing agencies that use interstate commerce to perform the functions of a clearing agency with respect to security-based swaps to register with the Commission.[660] Section 17A(k) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, provides the Commission with authority to exempt a security-based swap clearing agency from registration if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the CFTC or the appropriate government authorities in the home country of the clearing agency.[661] The Dodd-Frank Act also added provisions to Section 17A of the Exchange Act relating to voluntary clearing agency registration and the establishment of clearing agency standards.[662] Finally, Section 17A(j) requires the Commission to adopt rules governing persons that are registered as clearing agencies for security-based swaps.[663]

Because of the global nature of the security-based swap market, the Commission recognizes that there may be some uncertainty regarding when a foreign security-based swap clearing agency[664] that provides central counterparty (''CCP'') services[665] for security-based swaps would be required to register with the Commission as a clearing agency. Accordingly, we are proposing interpretive guidance regarding the application of the registration requirement in Section 17A(g) of the Exchange Act for security-based swap clearing agencies that act as CCPs.[666] We also address our exemptive authority under Section 17A(k) to exempt a foreign security-based swap clearing agency from the registration requirement in Section 17A(g).[667] In addition, we discuss the potential application of alternative standards to certain foreign clearing agency registrants.

The proposed interpretation discussed below represents the Commission's preliminary views regarding the application of the registration requirement in Section 17A(g) for security-based swap clearing agencies acting as CCPs in the cross-border context. Our proposal reflects a balancing of the principles described above, including, in particular, the goal of the Dodd-Frank Act to address the risk to the U.S. financial system.[668] We

[658] *See* Section 763(b) of the Dodd-Frank Act.

[659] *See* 15 U.S.C 78q–1 and 17 CFR 240.17Ab2–1.

[660] 15 U.S.C. 78q–1(g). Note that Section 929W of the Dodd-Frank Act added another subsection (g) to Section 17A of the Exchange Act. The subsection (g) added by Section 763(b) of the Dodd-Frank Act is the focus of the discussion in this section.

[661] 15 U.S.C. 78q–1(k). The exemptive authority contained in Section 17A(k) of the Exchange Act only pertains to clearing agencies that would be required to register under Section 17A of the Exchange Act for the clearing of security-based swaps. It does not alter the Commission's existing exemptive authority found in Section 17A(b)(1) and Section 36 of the Exchange Act.

[662] Section 17A(h) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, permits a person, in certain cases, to voluntarily register as a clearing agency with the Commission. 15 U.S.C. 78q–1(h). Section 17A(i) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, requires security-based swap clearing agencies to comply with standards established by the Commission. 15 U.S.C. 78q–1(i).

[663] 15 U.S.C. 78q–1(j).

[664] In using the terms ''foreign'' and ''non-resident'' in connection with a security-based swap clearing agency, the Commission means a security-based swap clearing agency that is not a U.S. person, as that term is defined in proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra.* In this regard, the Commission notes that legal persons that have their principal place of business in the United States would be considered ''U.S. persons'' under the proposed definition regardless of their place of incorporation or organization. *See* proposed Rule 3a71–3(a)(7)(i)(B) under the Exchange Act.

[665] As discussed more fully below, generally speaking, a CCP is an entity that interposes itself between the counterparties to a securities transaction. *See* 17 CFR 240.17Ad–22(a)(1).

[666] In this section, the Commission is proposing interpretive guidance only regarding the registration requirement in Section 17A(g) of the Exchange Act as it applies to clearing agencies that provide CCP services. The Commission is not addressing the registration requirement in Section 17A(b) of the Exchange Act, which was unchanged by the Dodd-Frank Act. The Commission also is not addressing the registration of clearing agencies that provide other types of services for security-based swaps and other securities. Elsewhere, the Commission has provided a temporary exemption from the clearing agency registration requirements to clearing agencies that provide non-CCP types of clearance and settlement services for security-based swaps. *See* Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions from Clearing Agency Registration Requirements under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps, Exchange Act Release No. 64796 (July 1, 2011). Accordingly, the Commission expects to address clearing agencies that provide non-CCP services in a future release.

[667] The Commission also has adopted final rules to exempt transactions by CCPs in security-based swaps from all provisions of the Securities Act, other than the anti-fraud provisions in Section 17(a), as well as from Exchange Act registration requirements and provisions of the Trust Indenture Act. *See* Exemptions for Security-Based Swaps issued by Certain Clearing Agencies, Securities Act Release No. 9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). The exemption is conditioned on the CCP being registered or exempt from registration with the Commission, on the determination that the security-based swap is required to be cleared or that the CCP is permitted to clear it pursuant to its rules, that the security-based swap is sold only to an ECP, and that certain information be made available to a counterparty or to the public.

[668] *See* Section II.C, *supra.* In addition, as noted above, to promote effective and consistent global regulation of swaps and security-based swaps, the Dodd-Frank Act requires the Commission and the CFTC to consult and coordinate with foreign regulatory authorities on the ''establishment of

Continued

recognize, however, that the proposed interpretation represents one of a number of possible alternative approaches in applying Title VII in the cross-border context. Accordingly, the Commission invites comment regarding all aspects of the proposal discussed below, including potential alternative approaches. Responses that are supported by data and analysis provide great assistance to the Commission in considering the practicality and effectiveness of the proposed application as well as considering the benefits and costs of proposed requirements.

B. Proposed Title VII Approach

1. Clearing Agency Registration

Section 17A(g) of the Exchange Act, entitled ''Registration Requirement,'' provides that ''[i]t shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap.'' [669] The Commission preliminarily believes that Title VII was intended to apply to clearing agencies that perform clearing agency functions within the United States, regardless of their principal place of business or their place of incorporation or organization.[670] For reasons discussed below, the proposed interpretive guidance would provide that a security-based swap clearing agency performs the functions of a CCP within the United States if it has a U.S. person as a member.

(a) Clearing Agencies Acting as CCPs

Clearing agencies are broadly defined under the Exchange Act and undertake a variety of functions.[671] One such function is to act as a CCP,[672] which is an entity that interposes itself between the counterparties to a securities transaction. For example, when a security-based swap contract between two counterparties that are members of a CCP is executed and submitted for clearing, it is typically replaced by two new contracts—separate contracts between the CCP and each of the two original counterparties. At that point, the original counterparties are no longer counterparties to each other. Instead, each acquires the CCP as its counterparty, and the CCP assumes the counterparty credit risk of each of the original counterparties that are members of the CCP. Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.[673]

Although technology and risk management practices frequently change and vary from CCP to CCP, the following are some of the functions performed by the subset of clearing agencies that are CCPs: [674]

- The extinguishing of a security-based swap contract between two counterparties and the associated novation of it with two new contracts between the CCP and each of the two original counterparties;
- The assumption of counterparty credit risk of members of the CCP through the novated security-based swap contracts;
- The calculation and collection of initial and variation margin during the life of the security-based swap contract;
- The determination of settlement obligations under a security-based swap contract;
- The determination of a default under a security-based swap contract;
- The collection of funds from members for contributions to a clearing fund;
- The implementation of a loss-sharing arrangement among members to respond to a member insolvency or default; and
- The multilateral netting of trades.[675]

In performing these functions, CCPs help facilitate over-the-counter trading, and trading on exchanges and other platforms, through the assumption of counterparty risk by the CCP from the original counterparties. During times of market stress, a CCP would mitigate the potential for a market participant's failure to be transmitted to other market participants, and would increase transparency of the risks borne by its members, as well as confidence of the market participants in the performance of their transactions.[676]

Furthermore, the agreements among members and between members and a CCP play a key role in the CCP's performance of the functions of a clearing agency. The Exchange Act permits clearing agencies to deny membership if a person does not meet a clearing agency's financial responsibility, operational capacity, experience and competence standards.[677] In a scenario where risk is mutualized under loss-sharing arrangements, the strength of the CCP hinges upon the strength of its members. The legal arrangements between a CCP and its members are of significant importance to the operational resilience of the CCP itself.

consistent international standards'' with respect to the regulation of swaps and security-based swaps. Public Law 111–203 section 752(a).

[669] 15 U.S.C. 78q–1(g).

[670] *See* Section II.B, *supra.*

[671] Section 3(a)(23)(A) of the Exchange defines the term ''clearing agency'' to mean any person who: (i) acts as an intermediary in making payments or deliveries or both in connection with transactions in securities; (ii) provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities; (iii) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry, without physical delivery of securities certificates (such as a securities depository); or (iv) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates (such as a securities depository). 15 U.S.C. 78c(a)(23)(A).

[672] *See* Clearing Agency Standards Adopting Release, 77 FR 66221 n.17 (''[a]n entity that acts as a CCP for securities transactions is a clearing agency as defined in the Exchange Act and is required to register with the Commission'').

[673] *See id.*

[674] The Commission does not believe that the opening and maintenance of bank accounts or investment accounts in the United States by a CCP that are not directly accessible by members of a security-based swap clearing agency constitutes the performance of functions of a CCP for these purposes. *See, e.g.,* Exchange Act Release No. 39643 (Feb. 11, 1998), 63 FR 8232, 8234 (Feb. 18, 1998) (discussing a foreign unregistered clearing agency's use of a U.S. depository, which did not in and of itself trigger the registration requirement). In addition, the Commission does not believe that the use of U.S.-based persons to perform services on behalf of a CCP in the ordinary course of business that do not involve clearing agency functions (*e.g.,* financial guaranties, banking services, or payroll operations) constitutes the performance of functions of a clearing agency.

[675] *See, e.g.,* CDS Clearing Exemption Orders, note 74, *supra.*

[676] *See* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 31 (stating that by ''mandating the use of central clearinghouses, institutions would become much less interconnected, mitigating risk and increasing transparency.''). At the same time, concentrating risk from several counterparties into a CCP could actually introduce risks through the prospect of moral hazard, such as if the costs of imprudent decisions by one clearing member were shifted to other clearing members or to the general public through bail-out of a CCP. *See, e.g.,* Craig Pirrong, ''Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets,'' University of Houston, Working Paper (2010), *available at: http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf.* Such cost-shifting mechanisms might induce members to take on more risk than they otherwise would in a bilateral setting.

[677] *See, e.g.,* 15 U.S.C. 78q–1(b)(4); *see also* 17 CFR 240.17Ad–22(d)(2) (requiring registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to require participants to meet certain operational capacity standards).

(b) Proposed Interpretive Guidance

The Commission is proposing interpretive guidance that a security-based swap clearing agency performing the functions of a CCP within the United States would be required to register pursuant to Section 17A(g) of the Exchange Act.[678] In our preliminary view, a foreign security-based swap clearing agency that provides CCP services, as described above, to a member that is a U.S. person for security-based swaps would be performing the functions of a CCP within the United States and, therefore, would be required to register pursuant to Section 17A(g) of the Exchange Act. The Commission preliminarily believes that such an approach is consistent with the Dodd-Frank Act's goal of reducing systemic risk in the U.S. financial system.[679] Foreign security-based swap clearing agencies that provide CCP services to U.S. members could pose a risk to the United States due to the risk mutualization among members of these clearing agencies.[680] Further, the more complete information about relationships between security-based swap market participants that registration would provide to regulators and the marketplace may help reduce the risk of crises.[681] Accordingly, to address the risk to the U.S. financial system posed by foreign security-based swap clearing agencies with U.S. members, the Commission preliminarily is proposing to require foreign security-based swap clearing agencies that provide CCP services to U.S. members to register pursuant to Section 17A(g) of the Exchange Act.

The Commission anticipates, however, that some U.S. persons may choose to clear transactions at a foreign security-based swap clearing agency on an indirect basis through a correspondent clearing arrangement with a non-U.S. member of the clearing agency.[682] We preliminarily do not believe that such a correspondent clearing arrangement of a U.S. person with a non-U.S. person member alone would cause the foreign security-based swap clearing agency to be required to register with the Commission because the clearing agency's business is conducted directly with its member firms, which in this example would be located outside of the United States. Correspondent clearing arrangements do not pose the same type of direct risk to the U.S. financial system that foreign security-based swap clearing agencies with U.S. members pose because customers, unlike clearing agency members, do not take mutual responsibility for the obligations of the clearing agency.[683]

2. Exemption from Registration under Section 17A(k)

Section 17A(k) of the Exchange Act, as added by Section 763(b) of the Dodd-Frank Act, provides that the Commission may grant a conditional or unconditional exemption from clearing agency registration for the clearing of security-based swaps if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the CFTC or the appropriate government authorities in the home country of the clearing agency.[684]

The Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative to registration in circumstances where the clearing agency is subject to comparable, comprehensive supervision and regulation by appropriate government authorities in the home country of the clearing agency, and the nature of the clearing agency's activities and performance of functions within the United States suggest that registration is not necessary to achieve the Commission's regulatory objectives. Exemptions that are carefully targeted could help to improve clearing agency supervision overall by allowing the Commission to devote resources most efficiently where U.S. interests are more directly implicated, while reducing duplication of efforts in areas where its interests are aligned with those of other regulators. Section 17A(k) further provides that any such exemption may be subject to appropriate conditions that may include, but are not limited to, requiring the clearing agency to be available for inspection by the Commission and to make available all information requested by the Commission.[685]

The Commission is not at this point specifying how such determinations might be made. The Commission notes that market structure and clearing agency supervision and regulation vary in other jurisdictions, and these variances in combination would affect the Commission's ability to make a determination under Section 17A(k) of the Exchange Act in a particular case, as well as the conditions that would be applied to any exemption. In addition to these factors, differences among individual clearing agencies on matters such as organizational governance, rules for members, and risk management procedures would inform individual exemption determinations.

3. Application of Alternative Standards to Certain Registrants

In addition, the Commission may consider, as an alternative to an exemption from registration, proposing rules that are specific to foreign-based CCPs that are registered with the Commission under Section 17A(g). We believe that this approach is contemplated by Section 17A(i) of the Exchange Act, which permits the Commission to adopt rules for registered CCPs that clear security-based swaps and conform our regulatory standards and supervisory practices to reflect evolving United States and international standards.[686] This approach may be particularly appropriate where the Commission determines not to grant a general exemption from registration under Section 17A(k) of the Exchange Act, based on consideration of the factors described above, but where consistency with some regulatory standards suggests that a targeted regulatory approach may be warranted.

[678] 15 U.S.C. 78q–1.

[679] *See* note 4, *supra.*

[680] *See, e.g.,* Clearing Agency Standards Adopting Release, 77 FR 66267 (stating that ''[a]ll clearing agencies that act as CCPs in the United States collect contributions from their members to guaranty funds or clearing funds for the mutualization of losses under extreme but plausible market scenarios'').

[681] *See* note 676, *supra.*

[682] Traditionally, the Commission has required registration (or an exemption from registration) as a clearing agency if a foreign clearing agency provides services for U.S. securities directly to U.S. persons. The Commission has not viewed intermediated access by U.S. persons to a foreign clearing agency's services (for example, through a foreign broker) as sufficiently direct to trigger registration requirements. *See* Proposed Amendments to Rule 15a–6, 73 FR 39198 (summarizing the Commission's position taken in past exemptive orders).

[683] As noted above, the interpretation proposed here applies solely to the registration requirement in Section 17A(g) of the Exchange Act with respect to clearing agencies that provide CCP services for security-based swaps; it does not change the Commission's interpretation of Section 17A(b) of the Exchange Act. *See* note 666, *supra.*

[684] 15 U.S.C. 78q–1(k).

[685] *Id.*

[686] Specifically, Section 17A(i) of the Exchange Act, entitled ''Standards for Clearing Agencies Clearing Security-Based Swap Transactions'': (i) Requires registered clearing agencies that clear security-based swaps to comply with such standards that the Commission may establish by rule; (ii) contemplates that the Commission may conform such standards or its oversight practices to reflect evolving United States and international standards; and (iii) except where the Commission determines otherwise by rule or regulation, confirms that a clearing agency shall have reasonable discretion in establishing the manner in which it complies with any such standards. 15 U.S.C. 78q–1(i).

Request for comment

The Commission requests comment on all aspects of the proposed interpretation, including the following:

• Should performing the functions of a CCP for only one U.S. person member of the CCP warrant requiring a foreign security-based swap clearing agency to register with the Commission? If not, why not? Further, are there other kinds of activities in the United States or outside the United States that would warrant requiring a CCP to be registered? If so, what are they?

• To what extent might the proposed approach create incentives for foreign CCPs to restrict access to U.S. person members? Please explain.

• Are there any other circumstances where a foreign security-based swap CCP should be required to register with the Commission? For example, is there a circumstance where a CCP that has no U.S. members but clears security-based swaps with a U.S. security as an underlying security should be required to register with the Commission as a clearing agency? Similarly, is there a circumstance where a CCP that has no U.S. members and does not conduct activities within the United States but that clears security-based swaps for the U.S. customers of its members should be required to register with the Commission as a clearing agency? Would the provision of omnibus or individual segregation of U.S. customer funds affect this analysis? Why or why not? Should a security-based swap CCP that relies on a financial guaranty of a U.S. person in allowing a non-U.S. person to become a member be required to register with the Commission? If not, why not?

• How will Commission registration of, exemption from registration for, or promulgation of alternative standards applicable to registered foreign security-based swap CCPs affect the central clearing of security-based swaps? How would it affect the management of counterparty credit risk? How would it affect systemic risk? What impact would it have on the continued development of the global security-based swap market?

• What factors should the Commission consider in determining whether a foreign security-based swap CCP is subject to comparable, comprehensive supervision and regulation by appropriate government authorities in the home country of the CCP? What level of similarity should be required in order for a home country supervision and regulatory framework to be considered comparable and comprehensive when compared to that of the United States?

• How should the Commission determine the home country of a CCP for purposes of Section 17A(k) of the Exchange Act? Should it be the country in which the CCP is incorporated or organized or the country in which it conducts the principal amount of its clearance and settlement activities?

• What other facts and circumstances should the Commission review in determining whether an exemption may be granted under Exchange Act Section 17A(k)? What terms and conditions should be required in connection with an exemption from registration? For example, should the Commission consider whether a jurisdiction has implemented any international standards, such as the CPSS–IOSCO Principles for Financial Market Infrastructures in its regulatory framework? [687] In addition, should the existence of a cooperative agreement with the home country be a factor?

• What would be the market impact of the proposed approach to the registration of foreign CCPs? How would the application of the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

VI. Security-Based Swap Data Repositories

A. Introduction

Under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the security-based swap market by retaining complete records of security-based swap transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public consistent with their respective information needs.[688] Title VII provides the Commission with authority to adopt rules governing SDRs.[689] Using this authority, the Commission has proposed rules governing the SDR registration process, duties, and core principles, including duties related to data maintenance and access by relevant authorities and those seeking to use the SDR's repository services.[690]

As noted above, the security-based swap market is global in scope and transactions often involve counterparties in different jurisdictions.[691] The Commission recognizes that, as a result, there may be uncertainty regarding the application of Section 13(n) of the Exchange Act [692] and the rules and regulations thereunder (collectively, ''SDR Requirements'').[693] In addition, the Commission is concerned that an overly broad application of the SDR Requirements may unnecessarily restrict global regulators' access to, and sharing of, security-based swap data in various jurisdictions and present difficulties in enhancing transparency in the global security-based swap market.[694] To address these concerns, and as explained more fully below, the Commission is proposing to limit the application of the SDR Requirements to certain persons that perform the functions of an SDR, including proposing a new rule to provide non-U.S. persons performing the functions of an SDR within the United States with exemptive relief from the SDR Requirements. In addition, to facilitate relevant authorities' access to security-based swap data collected and maintained by Commission-registered SDRs, the Commission is proposing interpretive guidance to specify how SDRs may comply with the notification requirement set forth in Section 13(n)(5)(G) of the Exchange Act [695] and previously proposed Rule 13n–4(b)(9) thereunder. The Commission also is specifying how the Commission proposes to determine whether a relevant authority is appropriate for purposes of receiving security-based swap data from an SDR. In addition, the Commission is proposing a new rule to provide SDRs with exemptive relief from the indemnification requirement

[687] *See* CPSS–IOSCO, Principles for Financial Market Infrastructures (Apr. 2012) (''FMI Principles''), *available at: http://www.bis.org/publ/cpss101a.pdf.*

[688] *See* SDR Proposing Release, 75 FR 77307.

[689] *See* Section 13(n)(9) of the Exchange Act, 15 U.S.C. 78m(n)(9), as added by Section 763(i) of the Dodd-Frank Act.

[690] *See* SDR Proposing Release, 75 FR 77306.

[691] *See* Section II.A, *supra.*

[692] 15 U.S.C. 78m(n)(9), as added by Section 763(i) of the Dodd-Frank Act.

[693] *See* Section 13(n) of the Exchange Act, 15 U.S.C. 78m(n), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n–1 to 13n–11 under the Exchange Act.

[694] *Cf.* Société Générale Letter I at 2 (suggesting that U.S. and EU regulators limit their jurisdiction to the part of the security-based swap business that they can most practically regulate, even if they have jurisdiction over a broader range of that business).

[695] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

set forth in Section 13(n)(5)(H)(ii) of the Exchange Act[696] and previously proposed Rule 13n–4(b)(10) thereunder.

In formulating this proposal, the Commission has sought to balance the policy considerations discussed above[697] and the particular concerns related to security-based swap reporting discussed below. The Commission recognizes that other approaches may exist in achieving the mandate of the Dodd-Frank Act, in whole or in part. Accordingly, the Commission invites comment regarding all aspects of the proposal described below, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of the Commission's proposed rules and interpretative guidance as well as potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposal.

B. Application of the SDR Requirements in the Cross-Border Context

1. Introduction

Section 3(a)(75) of the Exchange Act defines a ''security-based swap data repository'' to mean ''any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.''[698] Section 13(n)(1) of the Exchange Act provides that ''[i]t shall be unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository.''[699]

Although the Commission has previously proposed a rule governing the registration process for SDRs,[700] which includes requirements for ''non-resident security-based swap data repositor[ies],''[701] the Commission has not explicitly explained under what circumstances in the cross-border context would a person performing the functions of an SDR be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act[702] and previously proposed Rule 13n–1 thereunder, and to comply with the other SDR Requirements.[703] As discussed further below, the Commission is proposing interpretative guidance to discuss such circumstances and a new rule to provide exemptive relief from the SDR Requirements.

2. Comment Summary

The Commission received several comment letters concerning the registration and regulation of SDRs in the cross-border context. As a general matter, commenters suggested that the Commission should apply principles of international comity.[704]

In addition, two commenters expressed concerns about the potential impact of duplicative registration requirements imposed on SDRs.[705] Specifically, one of these commenters remarked that the Commission's previously proposed rules governing SDRs ''would seem to force a non-resident SDR to be subject to multiple regimes and to the jurisdiction of several authorities'' and that the SDR Proposing Release made no ''reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of the non-resident SDRs.''[706] To address this concern, the commenter suggested that the Commission adopt a regime under which foreign SDRs would be deemed to comply with the SDR Requirements if the laws and regulations of the relevant foreign jurisdiction were equivalent to those of the Commission and an MOU has been entered into between the Commission and the relevant foreign authority.[707] The commenter noted that the recommended ''regime would have the following advantages: (i) facilitating cooperation among authorities from different jurisdictions; (ii) ensuring the mutual recognition of [SDRs]; and (iii) establishing convergent regulatory and supervisory regimes which is necessary in a global market such as the OTC derivatives one.''[708]

Recognizing that some SDRs would function solely outside of the United States and, therefore, would be regulated by an authority in another jurisdiction, commenters suggested possible approaches to the SDR registration regime. One commenter, for example, believed that ''a non-U.S. SDR should not be subject to U.S. registration so long as it collects and maintains information from outside the U.S., even if such information is collected from non-U.S. swap dealer or [major security-based swap participant] registrants.''[709] Another commenter supported ''cross-registration'' of SDRs, whereby SDRs in all major jurisdictions may register with the appropriate regulators in each jurisdiction.[710]

3. Proposed Approach

In light of the concerns raised by commenters and the policy

[696] 15 U.S.C. 78m(n)(5)(H)(ii), as added by Section 763(i) of the Dodd-Frank Act.

[697] *See* Section II.C, *supra* (discussing principles guiding the Commission's proposed approach to applying Title VII in the cross-border context).

[698] 15 U.S.C. 78c(a)(75), as added by Section 761(a) of the Dodd-Frank Act.

[699] 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

[700] *See* proposed Rule 13n–1 under the Exchange Act.

[701] *See* proposed Rule 13n–1(a)(2) under the Exchange Act, which defines ''non-resident security-based swap data repository'' (hereinafter ''non-resident SDR'') as ''(i) [i]n the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) [i]n the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) [i]n the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.'' Proposed Rule 13n–1(g) under the Exchange Act would require any non-resident SDR applying for registration with the Commission to certify and provide an opinion of counsel that it can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by the Commission.

[702] 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

[703] In addition to the SDR Requirements, the Commission has proposed, and is re-proposing in this release, Regulation SBSR, which, if adopted as re-proposed, would impose certain obligations on SDRs registered with the Commission. *See* Section VIII, *infra.* In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(5)(E), 15 U.S.C. 78m(n)(5)(E)), the Commission has proposed rules that would require SDRs registered with the Commission to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. *See* End-User Exception Proposing Release, 75 FR 79992. Because these proposed rules and regulations, on their face, apply only to Commission-registered SDRs, the Commission preliminarily believes that these requirements, if adopted as proposed, would not apply to unregistered SDRs, including those that avail themselves of the SDR Exemption, discussed below.

[704] *See* DTCC Letter III at 3 (urging the Commission, in its regulation of SDRs, to aim for regulatory comity); Davis Polk Letter I at 7 (recommending that the Commission work with foreign authorities to permit SDRs in all major jurisdictions to register with the appropriate regulators in each jurisdiction); *see also* Société Générale Letter I at 2 (suggesting that the Commission consider international comity and public policy goals of derivatives regulation to limit its regulation of swap business); ISDA/SIFMA Letter I at 18 (''The Commission should consult with foreign regulators before establishing the extra-territorial scope of the rules promulgated under Title VII.'').

[705] *See* Cleary Letter IV at 31; ESMA Letter.

[706] ESMA Letter at 1.

[707] *See id.* at 2.

[708] *Id.*

[709] *See* Cleary Letter IV at 31.

[710] Davis Polk Letter I at 7 (''Cross-registration of SDRs is not only necessary given the global nature of the swaps market, it also reduces duplicative data reporting. Cross-registration would also facilitate the creation of uniform reporting rules and procedures that would enable easy comparison of transaction data from different jurisdictions.'').

considerations discussed above,[711] the Commission is proposing (i) interpretive guidance regarding the application of the SDR Requirements to U.S. persons that perform the functions of an SDR; and (ii) interpretive guidance regarding the application of the SDR Requirements to non-U.S. persons that perform the functions of an SDR within the United States and a new rule providing exemptive relief from the SDR Requirements for such non-U.S. persons, subject to a condition.

(a) U.S. Persons Performing SDR Functions Are Required to Register With the Commission

Consistent with the approach taken elsewhere in this release,[712] the Commission preliminarily believes that any U.S. person [713] that performs the functions of an SDR [714] would be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act [715] and previously proposed Rule 13n–1 thereunder. The Commission preliminarily believes that requiring U.S. persons that perform the functions of an SDR to register with the Commission and comply with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission,[716] is necessary to achieve the policy objectives of Title VII.[717] Requiring U.S. persons that perform the functions of an SDR to be operated in a manner consistent with the Title VII regulatory framework and subject to the Commission's oversight, would, among other things, help ensure that relevant authorities are able to monitor the build-up and concentration of risk exposure in the security-based swap market, reduce operational risk in that market, and increase operational efficiency.[718] As the Commission noted in the SDR Proposing Release, SDRs themselves are subject to certain operational risks that may impede the ability of SDRs to meet these goals,[719] and the Title VII regulatory framework is intended to address these risks.

(b) Interpretive Guidance and Exemption for Non-U.S. Persons That Perform the Functions of an SDR Within the United States

In the context of the cross-border reporting of security-based swap data, the Commission recognizes that some uncertainty may arise regarding when the SDR Requirements, and other requirements applicable to SDRs registered with the Commission,[720] apply to non-U.S. persons that perform the functions of an SDR. The Commission preliminarily believes that a non-U.S. person that performs the functions of an SDR within the United States would be required to register with the Commission, absent an exemption.[721]

In order to provide legal certainty to market participants and address concerns raised by commenters, and consistent with the proposed interpretive guidance discussed above, the Commission is proposing, pursuant to our authority under Section 36 of the Exchange Act,[722] an exemption from the SDR Requirements for non-U.S. persons that perform the functions of an SDR within the United States, subject to a condition. Specifically, the Commission is proposing Rule 13n–12 (''SDR Exemption''), which states as follows: ''A non-U.S. person [723] that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding ('MOU') or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.'' [724]

The Commission preliminarily believes that a non-U.S. person would be performing ''the functions of a security-based swap data repository within the United States'' if, for example, it enters into contracts, such as user or technical agreements, with a U.S. person to enable the U.S. person to report security-based swap data to such non-U.S. person. As another example, a non-U.S. person would be performing ''the functions of a security-based swap data repository within the United States'' if it has operations in the United States, such as maintaining security-based swap data on servers physically located in the United States, even if its principal place of business is not in the United States.[725] Given the constant

[711] *See* Section II.C, *supra* (discussing principles guiding the Commission's proposed approach to applying Title VII in the cross-border context).

[712] *See* Section V.B, *supra,* and Section VII.B, *infra.*

[713] Under this proposed interpretation, the term ''U.S. person'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra.* As a practical matter, the Commission preliminarily believes that all non-resident SDRs would likely be non-U.S. persons given the similar distinguishing factors in the definitions of ''non-resident security-based swap data repository'' and ''non-U.S. person.''

[714] Generally speaking, the Commission preliminarily believes that the ''functions of a security-based swap data repository'' include, at a minimum, the core services or functions that are embedded in the statutory definition of a ''security-based swap data repository.'' *See* Section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75), as added by Section 761(a) of the Dodd-Frank Act (defining ''security-based swap data repository'' to mean ''any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps'').

[715] 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

[716] *See* note 703, *supra.*

[717] *See* Section II.C, *supra* (discussing principles guiding the Commission's proposed approach to applying Title VII in the cross-border context).

[718] *See* SDR Proposing Release, 75 FR 77307 (''The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the [security-based swap] market . . . . In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the [security-based swap] market.'').

[719] *See id.* (''The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the [security-based swap] market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.'').

[720] *See* note 703, *supra.*

[721] *See* Section 13(n)(1) of the Exchange Act, 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act (requiring persons that, directly or indirectly, make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR, to register with the Commission). The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States and thus are not required to register with the Commission.

[722] Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from certain provisions of the Exchange Act or certain rules or regulations thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. 78mm.

[723] Proposed Rule 13n–12(a)(1) under the Exchange Act defines ''non-U.S. person'' to mean any person that is not a U.S. person. Proposed Rule 13n–12(a)(2) under the Exchange Act defines ''U.S. person'' by cross-reference to the definition of ''U.S. person'' in re-proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5 above.

[724] Proposed Rule 13n–12(b) under the Exchange Act.

[725] The Commission notes that if a person performing the functions of an SDR has operations in the United States to the extent that such operations constitute a principal place of business, then the person would fall within the proposed definition of ''U.S. person.'' As proposed, the term ''U.S. person'' includes a partnership, corporation, trust, or other legal person having its principal place of business in the United States. *See* Section

innovation in the market and the fact-specific nature of the determination, it is not possible to provide here a comprehensive discussion of every activity that would constitute a non-U.S. person performing ''the functions of a security-based swap data repository within the United States.''

The Commission preliminarily believes that the SDR Exemption is necessary or appropriate in the public interest, and consistent with the protection of investors. Because the reporting requirements of Title VII and re-proposed Regulation SBSR can be satisfied only if a security-based swap transaction is reported to an SDR that is registered with the Commission,[726] the Commission preliminarily believes that the primary reason for a person subject to the reporting requirements of Title VII and re-proposed Regulation SBSR to report a security-based swap transaction to an SDR that is not registered with the Commission would likely be to satisfy reporting obligations that it or its counterparty has under foreign law. Such person would still be required to fulfill its reporting obligations under Title VII and re-proposed Regulation SBSR by reporting its security-based swap transaction to an SDR registered with the Commission, absent other relief from the Commission,[727] even if the transaction were also reported to a non-U.S. person that relies on the SDR Exemption. The Commission preliminarily believes that this proposed approach to the SDR Requirements appropriately would balance the Commission's interest in having access to security-based swap data involving U.S. persons, while addressing commenters' concerns regarding the potential for duplicative regulatory requirements[728] as well as furthering the goals of the Dodd-Frank Act.

The SDR Exemption would be subject to the condition that each regulator with supervisory authority over the non-U.S. person that performs the functions of an SDR within the United States enters into a supervisory and enforcement MOU or other arrangement with the Commission, as specified in proposed Rule 13n–12(b) under the Exchange Act. The Commission anticipates that in determining whether to enter into such an MOU or other arrangement with a relevant authority, the Commission would consider whether the relevant authority would keep data collected and maintained by the non-U.S. person that performs the functions of an SDR within the United States confidential[729] and whether the Commission would have access to data collected and maintained by such non-U.S. person.[730] The Commission anticipates that it would consider other matters, including, for example, whether the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction and whether a supervisory and enforcement MOU or other arrangement would be in the public interest.[731] The Commission preliminarily believes that, in lieu of requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission, the condition in the SDR Exemption is appropriate to address the Commission's interest in having access to security-based swap data involving U.S. persons and U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and protecting the confidentiality of such security-based swap data involving U.S. persons and U.S. market participants.

Request for comment

The Commission requests comment on all aspects of the Commission's proposed interpretive guidance and the SDR Exemption, including the following:

- Is the Commission's proposed interpretive guidance and the SDR Exemption appropriate and sufficiently clear? Why or why not? Do you agree with the Commission's proposed interpretive guidance and SDR Exemption? Is it overly broad or narrow? If so, why? Is there a better alternative?
- Under the Commission's proposed interpretive guidance and SDR Exemption, will SDRs be subject to duplicative regulatory requirements? If so, will the Commission's proposed interpretive guidance and SDR Exemption reduce the costs of compliance with duplicative regulatory requirements? Why or why not?
- How may the Commission's proposed interpretive guidance and SDR Exemption affect the duplicative reporting of security-based swap data? Would the Commission's ability to exercise oversight of our registrants be compromised if it did not have the ability to learn and/or obtain all security-based swap data from non-U.S. persons that perform the functions of an SDR within the United States that have chosen not to register with the Commission and that are not subject to a substituted compliance order? Why or why not?
- Are there any circumstances where a U.S. person performing the functions of an SDR should not be required to register with the Commission? If so, what are those circumstances?
- Should the Commission require all non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission? Why or why not?
- Non-U.S. persons that perform the functions of an SDR within the United States may rely on the SDR Exemption. Are there any circumstances where non-U.S. persons that perform the functions of an SDR within the United States should be required to register with the Commission? If so, what are those circumstances? Do any of the following facts and circumstances, either individually or in combination, warrant requiring non-U.S. persons that perform

III.B.5(b)ii, *supra.* As a result, under the interpretation proposed in Section VI.B.3(a) above, such person would be required to register as an SDR with the Commission.

[726] The Commission notes that a non-U.S. person that performs the functions of an SDR may choose to register with the Commission as an SDR to enable that person to accept data from persons that are reporting a security-based swap pursuant to the reporting requirements of Title VII and re-proposed Regulation SBSR. *See* 15 U.S.C. 78m(m)(1)(G) and 78m–1(a)(1), as added by Sections 763(i) and 766(a) of the Dodd-Frank Act and Section VIII, *infra* (discussing re-proposed Regulation SBSR). The Commission may consider also granting, pursuant to its authority under Section 36 of the Exchange Act, 15 U.S.C. 78mm, exemptions to such non-U.S. person that registers with the Commission from certain of the SDR Requirements on a case-by-case basis. In determining whether to grant such an exemption, the Commission may consider, among other things, whether there are overlapping requirements in the Exchange Act and applicable foreign law.

[727] *See* discussion of Regulation SBSR in Section VIII, *infra,* and discussion of substituted compliance in Section XI.D, *infra.*

[728] *See* Section VI.B.2, *supra* (summarizing comment letters concerning the registration of SDRs in the cross-border context).

[729] The Commission contemplates that the relevant authority would keep data collected and maintained by such non-U.S. person confidential in a manner that is consistent with Section 24 of the Exchange Act and Rule 24c–1 thereunder. *See* 15 U.S.C. 78x and 17 CFR 240.24c–1.

[730] The Commission contemplates that the Commission's access to data collected and maintained by such non-U.S. person would be in a manner that is consistent with Section 13(n)(5)(D) of the Exchange Act and previously proposed Rule 13n–4(b)(5) thereunder. *See* 15 U.S.C. 78m(n)(5)(D), as added by Section 763(i) of the Dodd-Frank Act.

[731] The Commission has previously entered numerous cooperative agreements with foreign authorities. *See* Cooperative Arrangements with Foreign Regulators, *available at: http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.* Based on the Commission's experience with negotiating MOUs and other agreements with foreign authorities, the Commission believes that the MOU or agreement described in proposed Rule 13n–12(b) could, in many cases, be negotiated in a timely manner based on existing confidentiality and information sharing agreements so that the exemptive relief provided under proposed Rule 13n–12(b) would be available before the registration of an SDR seeking to claim the exemption would be required.

the functions of an SDR within the United States to register with the Commission: maintaining security-based swap data pertaining to a U.S. person or U.S. financial product; facilitating or supporting in the United States the submission of security-based swap data by U.S. persons; having any operations within the United States; entering into contracts, such as user or technical agreements, in order to accept security-based swap data from U.S. persons? If so, which one(s) and why? If not, why not? What types of activities and SDR functions performed within the United States do not warrant requiring a non-U.S. person that performs the functions of an SDR within the United States to be registered with the Commission? What if, for example, a non-U.S person that performs the functions of an SDR within the United States accepts only data from persons that are ''U.S. persons'' solely because they are foreign branches of U.S. persons?

• Does the proposed definition of ''U.S. person'' or ''non-U.S. person'' in the SDR Exemption need to be clarified or modified? If so, which terms and how should they be defined?

• Do you agree with the proposed condition in the SDR Exemption? Why or why not? Should the condition include additional requirements? If so, what requirements would be appropriate? Are the Commission's estimates of the time required to establish an MOU reasonable? Why or why not? Should the condition apply only to certain non-U.S. persons that perform the functions of an SDR within the United States? Please explain. Should the condition apply if, for example, the only connection to the United States by a non-U.S. person that performs the functions of an SDR within the United States is that it maintains a back-up server physically located in the United States? Should the condition apply only to non-U.S. persons that perform the functions of an SDR within the United States that collect security-based swap data from a reporting side that includes at least one counterparty that is a U.S. person?

• Do you believe that most, if not all, non-U.S. persons that perform the functions of an SDR within the United States will maintain at least some security-based swap data involving U.S. persons or U.S. market participants? Why or why not?

• Is the Commission's reference in the SDR Exemption to a ''non-U.S. person that performs the functions of a security-based swap data repository'' sufficiently clear? If not, what is a better alternative? Should the Commission replace, for example, ''non-U.S. person'' with ''non-resident security-based swap data repository,'' as defined in previously proposed Rule 13n–1(a)(2) under the Exchange Act, instead? Why or why not? Are there circumstances that would be covered by using ''non-U.S. person that performs the functions of a security-based swap data repository'' in the SDR Exemption rather than using ''non-resident security-based swap data repository that performs the functions of a security-based swap data repository'' in the SDR Exemption, and vice versa? If so, what circumstances and does it matter for practical purposes?

• Is the SDR Exemption's reference to ''within the United States'' sufficiently clear? What are the implications of this reference in the SDR Exemption?

• Are there any other factors that the Commission should consider in our interpretive guidance or the SDR Exemption, but that are not addressed above? If so, please explain.

• What would be the market impact of proposed approach to the registration of SDRs? How would the application of proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

C. Relevant Authorities' Access to Security-Based Swap Information and the Indemnification Requirement

Section 13(n)(5)(G) of the Exchange Act [732] and previously proposed Rule 13n–4(b)(9) thereunder provide that an SDR shall on a confidential basis, pursuant to Section 24 of the Exchange Act, and the rules and regulations thereunder, upon request, and after notifying the Commission of the request (''Notification Requirement''), make available all data obtained by the SDR, including individual counterparty trade and position data, to each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, the Department of Justice, the Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate, including, but not limited to, foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries. Further, Section 13(n)(5)(H) of the Exchange Act [733] and previously proposed Rule 13n–4(b)(10) provide that before sharing information with any entity described in Section 13(n)(5)(G) [734] or previously proposed Rule 13n–4(b)(9),[735] respectively, an SDR must obtain a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Exchange Act,[736] and the rules and regulations thereunder, relating to the information on security-based swap transactions that is provided; in addition, the entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act [737] and the rules and regulations thereunder (''Indemnification Requirement'').

The Commission believes that the goals of Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act [738] are, among other things, to obligate SDRs to make available security-based swap information to relevant authorities and maintain the confidentiality of such information. More broadly, the goal of the Dodd-Frank Act is, among other things, to promote the financial stability of the U.S. by improving accountability and transparency in the financial system.[739]

As discussed further below, the Commission recognizes that the Indemnification Requirement raises a number of concerns, including, among other things, the inability of certain relevant authorities to provide, as a matter of law or practice, an open-ended indemnification agreement and the possibility of security-based swap data being fragmented among trade repositories globally if foreign authorities establish trade repositories

[732] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[733] 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act.

[734] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[735] Proposed Rules 13n–4(b)(9) and (10) essentially repeat the requirements of Sections 13(n)(5)(G) and (H) of the Exchange Act, respectively, with the exception of the addition in proposed Rule 13n–4(b)(9) of the Federal Deposit Insurance Corporation to the relevant authorities specified in Section 13(n)(5)(G) of the Exchange Act.

[736] 15 U.S.C. 78x.

[737] *Id.*

[738] 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act.

[739] *See* note 4, *supra.*

in their jurisdictions to ensure access to data that they need to perform their regulatory mandates and legal responsibilities.[740]

In this section, the Commission will first describe the alternatives to the Notification Requirement and Indemnification Requirement that were discussed in the SDR Proposing Release. The Commission will then summarize the comments received, primarily in response to the SDR Proposing Release. Finally, the Commission will discuss our proposed interpretive guidance regarding relevant authorities' access to security-based swap information and our proposed exemptive relief from the Indemnification Requirement.

1. Information Sharing Under Sections 21 and 24 of the Exchange Act

In the SDR Proposing Release, the Commission highlighted two alternative ways for relevant authorities to obtain data maintained by SDRs directly from the Commission (rather than directly from SDRs) without providing an indemnification agreement.[741] Specifically, the Commission noted that there is existing independent authority in the Exchange Act for certain domestic and foreign authorities to obtain data maintained by SDRs directly from the Commission (rather than directly from SDRs) pursuant to Sections 21(a) and 24(c) of the Exchange Act[742] in certain circumstances and without application of the Indemnification Requirement.[743]

Section 21(a)(2) of the Exchange Act[744] provides that the Commission may provide assistance to a foreign securities authority. The term ''foreign securities authority'' is broadly defined in Section 3(a)(50) of the Exchange Act[745] to include ''any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.'' The Commission may provide assistance under Section 21(a)(2) of the Exchange Act[746] to the foreign securities authority in connection with an investigation being conducted by the foreign securities authority to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the authority administers or enforces. Section 21(a)(2) further provides that, as part of this assistance, the Commission may conduct an investigation to collect information and evidence pertinent to the foreign securities authority's request for assistance.[747] The Commission believes that Section 21(a)(2) provides the Commission with independent authority to assist foreign securities authorities in certain circumstances by, for example, collecting security-based swap data from an SDR and providing such authorities with the data.

Pursuant to Section 24(c) of the Exchange Act[748] and Rule 24c–1 thereunder,[749] the Commission may share nonpublic information[750] in our possession with, among others, any ''federal, state, local, or foreign government, or any political subdivision, authority, agency or instrumentality of such government . . . [or] a foreign financial regulatory authority.''[751] Because the Exchange Act provides the Commission with the statutory authority to share information in our possession with other authorities, the Commission is of the view that if security-based swap transaction data is in our possession, then it may share this information with other authorities. In this regard, the Commission notes that the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Exchange Act[752] does not apply to the Commission, and would be inapplicable to the Commission's provision of security-based swap data to relevant authorities pursuant to our independent authority in Section 24(c) of the Exchange Act.[753]

2. Comment Summary

Four commenters submitted comments relating to relevant authorities' access to security-based swap information, three of which were in response to the SDR Proposing Release and one of which was in response to a joint public roundtable regarding the cross-border application of Title VII held by the Commission and the CFTC on August 1, 2011.[754] Commenters were generally supportive of relevant authorities having access to security-based swap data maintained by SDRs when such access is within the scope of the authorities' mandate, but these commenters expressed particular concerns relating to the Indemnification Requirement and relevant authorities' unfettered access to security-based swap data.

As a general matter, one commenter stated that an SDR should be able to provide: (i) Enforcement authorities with necessary trading information; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information on market-wide activity and aggregate gross and net open interest for publication; and (iv) real-time reporting from SB SEFs and bilateral counterparties and related dissemination.[755] The same commenter supported relevant authorities' access to reports from SDRs that are scheduled on a regular basis or triggered by certain events, and believed that the Commission's regulatory model regarding regulatory access should be ''location agnostic, without preferential access for [a] prudential regulator, except to perform its prudential duties.''[756] The commenter also believed that ''it is important to preserve [the] spirit of cooperation and coordination between regulators around the world'' in the context of ensuring

[740] *See* Section VI.C.3(c), *infra*.

[741] *See* SDR Proposing Release, 75 FR 77319.

[742] 15 U.S.C. 78u(a) and 15 U.S.C. 78x(c).

[743] Section 13(n)(5)(H) of the Exchange Act, 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act. *See* SDR Proposing Release, 75 FR 77319. The Indemnification Requirement does not apply to requests for information made pursuant to Sections 21(a) and 24(c) of the Exchange Act. Further, since relevant authorities requesting information under these provisions would go directly to the Commission, the Notification Requirement would also be inapplicable. Thus, these requirements would not apply to requests by relevant authorities for security-based swap data when the Commission is exercising its independent statutory authority to assist relevant authorities pursuant to Section 21(a) or 24(c) of the Exchange Act.

[744] 15 U.S.C. 78u(a)(2).

[745] 15 U.S.C. 78c(a)(50).

[746] 15 U.S.C. 78u(a)(2).

[747] Section 21(a)(2) of the Exchange Act requires that, in considering whether to provide assistance to a foreign securities authority, the Commission determine whether the requesting authority has agreed to provide reciprocal assistance in securities matters to the United States, and whether compliance with the request would prejudice the public interest of the United States.

[748] 15 U.S.C. 78x(c).

[749] 17 CFR 240.24c–1.

[750] Under Rule 24c–1 under the Exchange Act, the term ''nonpublic information'' means ''records, as defined in Section 24(a) of the [Exchange] Act, and other information in the Commission's possession, which are not available for public inspection and copying.'' 17 CFR 240.24c–1.

[751] Section 3(a)(52) of the Exchange Act defines ''foreign financial regulatory authority'' to mean ''any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.'' 15 U.S.C. 78c(a)(52).

[752] 15 U.S.C. 78m(n)(5)(H)(ii).

[753] 15 U.S.C. 78x(c).

[754] *See* Cleary Letter IV at 30–31; DTCC Letter I at 2 and III at 22–23; ESMA Letter at 2; MFA Letter I at 3.

[755] DTCC Letter IV at 5.

[756] DTCC Letter III at 12.

global regulators' access to security-based swap data.[757]

Two commenters concurred with the Commission's statements in the SDR Proposing Release that relevant authorities will likely be unable to agree to provide SDRs and the Commission with indemnification, as required by Section 13(n)(5)(H)(ii) of the Exchange Act prior to receiving security-based swap data maintained by SDRs.[758] One of these commenters described the Indemnification Requirement as contravening the purpose of SDRs by diminishing transparency if regulators are not allowed to have ready access to information and thereby jeopardizing market stability.[759] Specifically, the commenter believed that the Indemnification Requirement should not apply where relevant authorities are carrying out their regulatory responsibilities, in accordance with international agreements and while maintaining the confidentiality of data provided to them.[760] Recognizing that the Indemnification Requirement is mandated by the Dodd-Frank Act, however, the commenter suggested that in order to ensure consistent application of the requirement and to ''minimize any disruption to the global repository framework,'' the Commission should provide model indemnification language for all SDRs to use.[761] Further, the commenter believed that ''any indemnity should be limited in scope to minimize the potential reduction in value of registered SDRs to the regulatory community.'' [762]

In discussing the Indemnification Requirement, another commenter reiterated the notion that relevant authorities must ensure the confidentiality of security-based swap data provided to them.[763] The commenter believed that the Indemnification Requirement ''undermines the key principle of trust according to which exchange of information [among relevant authorities] should occur.'' [764] Thus, the commenter recommended that the Commission's rules help streamline the Indemnification Requirement for an ''efficient exchange of information.'' [765]

One commenter voiced concerns about unfettered access to security-based swap information by regulators, including foreign financial supervisors, foreign central banks, and foreign ministries, beyond their regulatory authority and mandate.[766] This commenter was concerned that the statutory language incorporated in previously proposed Rule 13n–4(b)(9), which provides that in addition to the entities specifically listed in the rule, an SDR could make available data to ''any other person that the Commission determines to be appropriate,'' is vague and could result in an SDR providing access to persons without proper authority.[767] The commenter suggested that the Commission adopt an approach similar to the CFTC's proposed Rule 49.17(d),[768] and that the Commission and the CFTC ''endeavor to adopt similar procedures to control regulator requests for security-based swap information.'' [769]

3. Proposed Guidance and Exemptive Relief

Consistent with the goals of the Dodd-Frank Act [770] and the purposes of SDRs,[771] and after considering the comments received to date, the Commission is proposing additional guidance regarding relevant authorities' access to security-based swap information and proposing exemptive relief from the Indemnification Requirement. For the reasons discussed further below, the Commission preliminarily believes that our proposed guidance and exemption from the Indemnification Requirement is necessary or appropriate to, among other things, further the goals of the Dodd-Frank Act and the purposes of SDRs while preserving the confidentiality of the security-based swap information maintained by SDRs, as necessary. The Commission also preliminarily believes that our proposed guidance and exemption will, as one commenter suggested, help provide for an ''efficient exchange of information.'' [772]

(a) Notification Requirement

Section 13(n)(5)(G) of the Exchange Act requires an SDR, upon request, to ''make available all data obtained by the SDR, including individual counterparty trade and position data,'' to certain specified relevant authorities, as well as ''other persons that the Commission determines to be appropriate.'' [773] However, the SDR may make such data available only ''after notifying the Commission of the request.'' [774] The Commission preliminarily believes that an SDR can fulfill its obligation to notify ''the Commission of the request'' under Section 13(n)(5)(G) of the Exchange Act [775] and previously proposed Rule 13n–4(b)(9) by notifying the Commission, upon the initial request for security-based swap data by a relevant authority, of the request for security-based swap data from the SDR, and maintaining records of the initial request and all subsequent requests.[776]

[757] *Id.* at 12 (discussing the spirit of cooperation and coordination between regulators in the context of implementation of guidance provided by the ODRF regarding global regulators' access to security-based swap data maintained by a trade repository in the United States).

[758] *See* DTCC Letter I at 3; Cleary Letter IV at 31; *see also* SDR Proposing Release, 75 at 77318–19 (''With respect to the indemnification provision, the Commission understands that regulators may be legally prohibited or otherwise restricted from agreeing to indemnify third parties, including SDRs as well as the Commission. The indemnification provision could chill requests for access to data obtained by SDRs, thereby hindering the ability of others to fulfill their regulatory mandates and responsibilities.'').

[759] *See* DTCC Letter I at 3 (discussing how the Indemnification Requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators' ability to carry out oversight functions).

[760] DTCC Letter III at 12.

[761] *Id.*

[762] *Id.*

[763] ESMA Letter at 2.

[764] *Id.*

[765] *Id.*

[766] MFA Letter I at 3.

[767] *Id.* at 4.

[768] As adopted, CFTC Rule 49.17(d) requires any ''Appropriate Domestic Regulator'' or ''Appropriate Foreign Regulator'' requesting access to swap data obtained and maintained by a swap data repository to first file a request for access with the swap data repository and certify the statutory authority for such request. The swap data repository then must promptly notify the CFTC of such request and the swap data repository subsequently would provide access to the requested swap data. CFTC Rule 49.17(b)(1) defines ''Appropriate Domestic Regulator'' and CFTC Rule 49.17(b)(2) provides that ''Appropriate Foreign Regulators'' are those that have an existing memorandum of understanding with the CFTC or otherwise as determined through an application process. *See* CFTC Final Rule, Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011) (''CFTC SDR Adopting Release'').

[769] MFA Letter I at 4.

[770] Dodd-Frank Act, Public Law 111–203 at Preamble (goals include promoting ''the financial stability of the United States by improving accountability and transparency in the financial system'').

[771] *See* SDR Proposing Release, 75 FR 77307 (stating that ''SDRs are intended to play a key role in enhancing transparency in the [security-based swap] market by . . . providing effective access to [security-based swap transaction] records to relevant authorities. . . .'').

[772] *See* ESMA Letter at 2.

[773] Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act (specifying each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, and the Department of Justice); *see also* proposed Rule 13n–4(b)(9) under the Exchange Act (adding the Federal Deposit Insurance Corporation).

[774] Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(9) under the Exchange Act.

[775] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[776] Pursuant to previously proposed Rule 13n–7(b) under the Exchange Act, the SDR would be required to maintain records of the initial request and all subsequent requests, including details of any on-line access by relevant authorities to security-based swap data maintained by the SDR,

The Commission would consider the notice provided and records maintained as satisfying the Notification Requirement.[777] The Commission preliminarily believes that this approach is an efficient way for an SDR to satisfy its statutory notification obligation.[778]

(b) Determination of Appropriate Regulators

Section 13(n)(5)(G) of the Exchange Act requires an SDR, upon request, to ''make available all data obtained by the [SDR], including individual counterparty trade and position data,'' to certain specified relevant authorities, as well as ''each appropriate prudential regulator'' and ''other persons that the Commission determines to be appropriate,'' including, but not limited to, foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries.[779] The Commission contemplates that a relevant authority will be able to request that the Commission make a determination that the relevant authority is appropriate for requesting security-based swap data from an SDR. The Commission preliminarily believes that it will make such a determination through the issuance of a Commission order.

In making such a determination, the Commission expects that we would consider a variety of factors, and our order may include, among other things, conditions on determining that a relevant authority is appropriate for purposes of receiving security-based swap data directly from SDRs. The Commission preliminarily believes that such determination will likely be conditioned on a supervisory and enforcement MOU or other arrangement between the Commission and the relevant authority.[780] Given the necessity of maintaining the confidentiality of the proprietary and highly sensitive data maintained by an SDR, such an MOU or arrangement [781] would be designed to protect the confidentiality of the security-based swap data provided to the relevant authority by an SDR.[782] The Commission anticipates that in determining whether to enter into such an MOU or other arrangement with a relevant authority, the Commission may consider whether, among other things, the relevant authority needs security-based swap information from an SDR to fulfill its regulatory mandate or legal responsibilities and the relevant authority agrees to protect the confidentiality of the security-based swap information provided to it. The Commission preliminarily believes that this MOU or arrangement could also satisfy the condition in proposed Rule 13n–4(d)(3) for an SDR to avail itself of the Indemnification Exemption, which is discussed below.[783]

In addition, the Commission preliminarily believes that in making the determination, it would be reasonable for the Commission to consider whether the relevant authority has a legitimate need for access to the security-based swaps maintained by an SDR in order to help safeguard such information.[784] Confirming that the relevant authority has a legitimate need could reduce the risk of unauthorized disclosure, misappropriation, or misuse of security-based swap data. In this regard, the Commission would be furthering the objectives of the Dodd-Frank Act, which created a number of protections for proprietary and highly sensitive data, including ''individual counterparty trade and position data,'' maintained by an SDR.[785] The Commission, therefore, preliminarily believes that a reasonable approach for our determination of an appropriate authority is for the Commission to consider the scope of the relevant authority's regulatory mandate and legal responsibilities. The Commission preliminarily believes that our consideration of these factors will further the Dodd-Frank Act's objective to safeguard security-based swap data and should address a commenter's concerns over unfettered access to such proprietary data.[786] The Commission also anticipates considering, among other things, whether the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction, and whether such a determination would be in the public interest. The Commission may take into account any other factors as the Commission determines are appropriate in making our determination.

In addition, the Commission preliminarily believes that it is not necessary to prescribe by rule—as one commenter suggested [787]—a specific process such as the one proposed by the

by such relevant authority. *See* proposed Rule 13n–7(b) under the Exchange Act (requiring, among other things, keeping at least one copy of all documents required under the Exchange Act and records made or received by the SDR in the course of its business as such for not less than five years, and promptly furnishing such documents to any representative of the Commission upon request).

[777] One commenter stated that ''regulators want direct electronic access to data in SDRs where that data is needed to fulfill regulatory responsibilities'' rather than access ''by request, with notice to another regulatory authority.'' *See* DTCC Letter III at 11–12. The Commission preliminarily believes that SDRs can provide direct electronic access to relevant authorities under its interpretation. In such a case, the SDR would have to provide the Commission with actual notification upon the initial time that the relevant authority accesses the SDR's security-based swap data, and retain records of any electronic access by the relevant authority.

[778] As discussed in the SDR Proposing Release, an SDR must keep its notifications to the Commission and requests by relevant authorities confidential. *See* SDR Proposing Release, 75 FR 77318. Failure by an SDR to treat such notifications and requests confidential could render ineffective or could have adverse effects on the underlying basis for the requests. *See id.* If, for example, a regulatory use of the data is improperly disclosed, such disclosure could possibly signal a pending investigation or enforcement action, which could have detrimental effects. *See id.*

[779] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act. *See also* proposed Rule 13n–4(b)(9) under the Exchange Act.

[780] Similarly, the CFTC requires ''appropriate foreign regulator[s]'' to have an MOU or similar type of arrangement with the CFTC or, as determined by the CFTC on a case-by-case basis. CFTC Rule 49.17(b)(2), 17 CFR 49.17(b)(2).

[781] This MOU or other arrangement is separate from the written agreement under Section 13(n)(5)(H)(i) of the Exchange Act and previously proposed Rule 13n–4(b)(10) thereunder, both of which require the SDR to receive a written agreement from each relevant authority pertaining to the confidentiality of the security-based swap transaction information that is provided by the SDR. The MOU or other arrangement is between the Commission and the relevant authority, whereas the written agreement is between the SDR and the relevant authority.

[782] The CFTC requires certain foreign regulators ''to provide sufficient facts and procedures to permit the [CFTC] to analyze whether the [foreign regulator] employs appropriate confidentiality procedures and to satisfy itself that the information will be disclosed only as permitted by Section 8(e) of the [Commodity Exchange Act].'' CFTC Rule 49.17(b)(2), 17 CFR 49.17(b)(2). The Commission expects that the relevant authority will need to provide to the Commission similar information before the Commission will enter into the MOU or other arrangement.

[783] *See* Section VI.C.3(c), *infra.*

[784] *See* MFA Letter I at 3 (voicing concerns about unfettered access to security-based swap information by regulators, including foreign financial supervisors, foreign central banks, and foreign ministries, beyond their regulatory authority and mandate).

[785] *See* Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act (directing SDRs to provide data, including individual counterparty trade and position data, on a confidential basis only to circumscribed list of authorities or other persons that the Commission determines to be appropriate); Section 13(n)(5)(H)(i) of the Exchange Act, 15 U.S.C. 78m(n)(5)(H)(i), as added by Section 763(i) of the Dodd-Frank Act (requiring that, prior to an SDR sharing such information, the SDR must receive a written agreement from each entity stating that the entity shall abide by certain confidentiality requirements); and Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that they receive from a security-based swap dealer, counterparty, or any other registered entity).

[786] *See* MFA Letter I at 3.

[787] *See* MFA Letter I at 4 (suggesting that the Commission adopt an approach similar to the CFTC's proposed Rule 49.17(d)).

CFTC[788] that sets forth criteria for relevant authorities and the SDR to use in order to facilitate relevant authorities' access to security-based swap data maintained by the SDR. The Commission preliminarily believes that our determination of an appropriate authority, pursuant to the process described above, represents a reasonable approach to provide appropriate access by relevant authorities, while at the same time providing safeguards against access by persons without proper authority.[789] The Commission also preliminarily believes that SDRs should have the flexibility to consider whether to provide relevant authorities with access to requested security-based swap data.[790] The Commission preliminarily believes that a specific rule that delineates a process governing relevant authorities' access requests, as suggested by the commenter, would limit the flexibility of SDRs in considering whether to provide relevant authorities with access to requested security-based swap data.

The Commission contemplates that, in our sole discretion, we would determine whether to grant or deny a request for a determination that the relevant authority is appropriate for purposes of requesting security-based swap data from an SDR.[791] In addition, the Commission could revoke our determination at any time.[792] For example, the Commission may revoke a determination or request additional information from a relevant authority to support continuation of the determination if a relevant authority fails to keep confidential security-based swap data provided to it by an SDR.

(c) Option for Exemptive Relief from the Indemnification Requirement

i. Impact of the Indemnification Requirement

As noted above, Section 13(n)(5)(G) of the Exchange Act[793] and previously proposed Rule 13n–4(b)(9) thereunder provide that an SDR shall on a confidential basis, pursuant to Section 24 of the Exchange Act, and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the SDR to each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, the Department of Justice, the Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate. Section 13(n)(5)(H)(ii) of the Exchange Act requires that before an SDR shares security-based swap information with a relevant authority requesting such information from the SDR, the relevant authority must ''agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 24 [of the Exchange Act].''[794] Based on the Commission's understanding that certain relevant authorities may be unable to agree to indemnify any SDR and the Commission, the Commission preliminarily believes that the Indemnification Requirement could significantly frustrate the purpose of Section 13(n)(5)(G) of the Exchange Act[795] by preventing SDRs from making available security-based swap information to relevant authorities.

As stated in the SDR Proposing Release, ''under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the [security-based swap] market by retaining complete records of [security-based swap] transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs.''[796] Commenters[797] as well as relevant authorities, however, have expressed concerns about how the Indemnification Requirement would contravene the purposes of the Dodd-Frank Act, and more specifically, the statutory purposes of SDRs.[798] The Commission preliminarily believes that the Indemnification Requirement should not be applied rigidly so as to frustrate such purposes.

Specifically, the Commission recognizes that certain domestic authorities, including some of those expressly identified in Section 13(n)(5)(G) of the Exchange Act[799] and the Commission, cannot, as a matter of law, provide an open-ended indemnification agreement. For example, the Antideficiency Act prohibits certain U.S. federal agencies from obligating or expending federal funds in advance or in excess of an appropriation, apportionment, or certain administrative subdivisions of those funds (*e.g.,* through an unlimited or unfunded indemnification).[800] Similarly, the Commission understands that foreign authorities may also be prohibited under applicable foreign laws from satisfying the Indemnification Requirement.[801] As such, the Commission agrees with three commenters' views that the Indemnification Requirement could hinder the ability of relevant authorities

[788] *See* CFTC Notice of Proposed Rulemaking: Swap Data Repositories, 75 FR 80898 (Dec. 23, 2010). The CFTC has since adopted CFTC Rule 49.17(d), 17 CFR 49.17(d), which does not include several of its proposed requirements, such as requiring relevant authorities to detail the basis for their requests. *See* CFTC SDR Adopting Release, 76 FR 54538.

[789] *See* MFA Letter I at 4 (voicing concern that vague standard could result in an SDR providing access to persons without proper authority).

[790] The Commission preliminarily believes that an SDR's consideration of whether to provide relevant authorities with access to requested security-based swap data is implicitly subsumed in an SDR's statutory duty to maintain the privacy of security-based swap information that it receives. *See* Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n–9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property).

[791] The Commission may issue a determination order that is for a limited time.

[792] As a general matter, the Commission provides a list of MOUs and other arrangements on its Web site, which is one way for an SDR to monitor and determine whether a relevant authority has entered into an applicable MOU or other arrangement. The MOUs and other arrangements can be found at the following link: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.*

[793] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[794] 15 U.S.C. 78m(n)(5)(H)(ii), as added by Section 763(i) of the Dodd-Frank Act.

[795] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[796] SDR Proposing Release, 75 FR 77307.

[797] *See, e.g.,* Cleary Letter IV at 31 (''[T]he indemnification requirement could be a significant impediment to effective regulatory coordination, since non-US regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.''); DTCC Letter I at 3 (discussing how the Indemnification Requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators' ability to carry out oversight functions); ESMA Letter at 2 (noting that the Indemnification Requirement ''undermines the key principle of trust according to which exchange of information [among relevant authorities] should occur'').

[798] *See, e.g.,* DTCC Letter IV at 5 (noting that SDRs should be able to provide, among other things, enforcement authorities with necessary trading information and regulatory agencies with certain counterparty-specific information). As stated above, the Commission believes that the goal of Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act is, among other things, to obligate SDRs to make available security-based swap information to relevant authorities, provided that the confidentiality of the information is preserved.

[799] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[800] 31 U.S.C. 1341, 1517(a).

[801] *See* Cleary Letter IV at 31; DTCC Letter I at 3; ESMA Letter at 2.

to fulfill their regulatory mandates and legal responsibilities.[802]

Moreover, the Commission understands from foreign authorities that their regulatory regimes will require them to have direct access to data maintained by trade repositories, including SDRs registered with the Commission, in order to fulfill their regulatory mandates and legal responsibilities.[803] Many foreign regulators[804] and market participants have indicated, however, that because foreign authorities cannot, as a matter of law or practice, comply with the Indemnification Requirement, the practical effect of having an open-ended indemnification requirement may be the fragmentation of security-based swap data across multiple SDRs, as foreign authorities establish trade repositories in their jurisdictions to ensure access to data that they need to perform their regulatory mandates and legal responsibilities.[805] Such fragmentation may lead to duplicative reporting requirements in multiple jurisdictions, higher reporting costs for market participants, and less transparency in the security-based swap market.[806] In light of these concerns, the Commission preliminarily believes that an exemption from the Indemnification Requirement may be necessary or appropriate, as a practical matter, to minimize fragmentation of security-based swap data that could otherwise be consolidated and reduce duplicative reporting requirements.[807]

ii. Proposed Rule 13n–4(d): Indemnification Exemption

The Commission is proposing, pursuant to our authority under Section 36 of the Exchange Act,[808] a tailored exemption from the Indemnification Requirement. To avoid a result that could significantly frustrate the purpose of Section 13(n)(5)(G) and the purpose of SDRs, the Commission preliminarily believes that the Indemnification Exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors,[809] particularly given that the exemption is narrowly tailored and could be applied in only limited circumstances.

Specifically, the Commission is proposing Rule 13n–4(d) (''Indemnification Exemption''), which states as follows: ''A registered security-based swap data repository is not required to comply with the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the [Exchange] Act and [Rule 13n–4(b)(9) thereunder] with respect to disclosure of security-based swap information by the security-based swap data repository if: (1) [a]n entity described in [Rule 13n–4(b)(9)] requests security-based swap information from the security-based swap data repository to fulfill a regulatory mandate and/or legal responsibility of the entity; (2) [t]he request of such entity pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the entity; and (3) [s]uch entity has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.''

In proposing the Indemnification Exemption, the Commission is mindful of the comments received. The Commission intends for the Indemnification Exemption to—as one commenter suggested—''preserve [the] spirit of cooperation and coordination between regulators around the world'' in the context of ensuring global regulators' access to security-based swap data.[810] By identifying specific conditions that are applicable to requests by any relevant authority, the Commission also intends for the Indemnification Exemption to be—as one commenter suggested—''location agnostic,''[811] whereby relevant authorities are treated similarly regardless of whether they are domestic authorities or foreign authorities.[812] In addition, the Indemnification Exemption is consistent with one commenter's suggestion that the Commission should not apply the Indemnification Requirement where relevant authorities are carrying out their regulatory responsibilities, in accordance with international agreements and while maintaining the confidentiality of data provided to them.[813] In order for an SDR to share security-based swap information with a relevant authority without an indemnification agreement, the three proposed conditions specified in the Indemnification Exemption, as discussed further below, must be met.

First, the relevant authority's request for security-based swap information from an SDR must be for the purpose of fulfilling the relevant authority's regulatory mandate and/or legal responsibility. The Commission preliminarily believes that this condition is aligned with the Dodd-Frank Act's requirements to protect security-based swap information, including proprietary and highly sensitive data, maintained by an SDR from unauthorized disclosure, misappropriation, or misuse of security-based swap information.[814] In

[802] *See* Cleary Letter IV at 31; DTCC Letter I at 3; ESMA Letter at 2.

[803] For example, in the case of Europe, under European Market Infrastructure Regulation (''EMIR''), trade repositories established in third countries that provide services to entities established in the European Union must apply for recognition by ESMA, which conditions its approval on, among other things, ''[European] Union authorities, including ESMA, hav[ing] immediate and continuous access'' to information in such trade repositories. Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, 2012 O.J. (L 201) 1, 49.

[804] *See* CFTC and SEC, Joint Report on International Swap Regulation (Jan. 31, 2012) (noting that the indemnification provisions have ''caused concern among foreign regulators, some of which have expressed unwillingness to register or recognize [a swap data repository] unless [they are] able to have direct access to necessary information'' and that foreign regulators ''are considering the imposition of a similar requirement that would restrict the CFTC's and SEC's access to information at [trade repositories] abroad'').

[805] *See* Section XV.H.2(b)iii, *infra* (discussing the potential effects of fragmentation of security-based swap data among trade repositories across multiple jurisdictions).

[806] *See, e.g.,* Cleary Letter IV at 31 (The Indemnification Requirement ''could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions'').

[807] The Commission preliminarily believes that the Indemnification Requirement does not apply when an SDR is registered with the Commission and is also registered or licensed with a foreign authority and that authority is obtaining security-based swap information directly from the SDR pursuant to that foreign authority's regulatory regime.

[808] 15 U.S.C. 78mm (providing the Commission with general exemptive authority * * * ''to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors'').

[809] 15 U.S.C. 78mm.

[810] *See* DTCC Letter III at 12 (discussing implementation of guidance provided by the ODRF regarding global regulators' access to security-based swap data maintained by a trade repository in the United States).

[811] *See* DTCC Letter III at 12 (suggesting that the Commission's regulatory model regarding regulatory access should be ''location agnostic'').

[812] The Commission intends for the Indemnification Exemption to provide relief for both foreign authorities and domestic authorities that require access to security-based swap data maintained by SDRs in order to fulfill a regulatory mandate or legal responsibility. The Commission preliminarily believes that an SDR may rely on the Indemnification Exemption in connection with requests from relevant authorities, including SROs, registered futures associations, and international financial institutions.

[813] *See* DTCC Letter III at 12.

[814] *See* Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that they receive from a

Continued

particular, the Commission preliminarily believes that this condition is consistent with an SDR's statutory duty to maintain the privacy of security-based swap information that it receives.[815] In complying with its duty to maintain the privacy of security-based swap information, an SDR would need to determine when it can or cannot provide security-based swap information to others. The Commission preliminarily believes that, for the limited purposes of satisfying the Indemnification Exemption, it is appropriate for the SDR to include in its consideration of whether to provide security-based swap information to relevant authorities whether a relevant authority's specific request for security-based swap information is indeed within its regulatory mandate or legal responsibilities before the SDR provides the information to the relevant authority.[816] Finally, the Commission notes that establishing such a condition in the Indemnification Exemption is consistent with guidelines that one commenter indicated that it followed on a voluntary basis in providing relevant authorities with access to security-based swap information.[817]

Second, the relevant authority's request must pertain to a person or financial product subject to that authority's jurisdiction, supervision, or oversight. If, for instance, the relevant authority requests information on a security-based swap that pertains to a counterparty or underlier that is subject to the authority's jurisdiction, supervision, or oversight, then this condition to the Indemnification Exemption would be satisfied. The Commission preliminarily believes that the person or financial product need not be registered or licensed with the authority in order for this condition to be satisfied. Similar to the first condition of the Indemnification Exemption, the Commission preliminarily believes that this condition is aligned with the Dodd-Frank Act's requirements to protect security-based swap information, including proprietary and highly sensitive data, maintained by an SDR from unauthorized disclosure, misappropriation, or misuse of security-based swap information.[818] In particular, the Commission preliminarily believes that the second condition is consistent with an SDR's statutory duty to maintain the privacy of security-based swap information that it receives.[819] In complying with its duty to maintain the privacy of security-based swap information, an SDR would need to determine when it can or cannot provide security-based swap information to others. The Commission preliminarily believes that, for the limited purposes of satisfying the Indemnification Exemption, it is appropriate for the SDR to include in its consideration of whether to provide security-based swap information to relevant authorities whether a relevant authority's specific request pertains to a person or financial product that is subject to the authority's jurisdiction, supervision, or oversight.[820] Finally, the Commission notes that establishing such a condition in the Indemnification Exemption is consistent with guidelines that one commenter indicated that it followed on a voluntary basis in providing relevant authorities with access to security-based swap information.[821]

Third, the requesting relevant authority must enter into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.[822] For those entities not expressly identified in Section 13(n)(5)(G) of the Exchange Act[823] or the rules thereunder, such an MOU or other arrangement can be entered into during the Commission's determination process, as discussed in Section VI.C.3(b) above. On the other hand, entities expressly identified in Section 13(n)(5)(G) of the Exchange Act and the rules thereunder, which are not subject to the Commission's process to determine appropriate regulators, would need to enter into such an MOU or other arrangement to satisfy this condition of the Indemnification Exemption. The Commission anticipates that in determining whether to enter into such a supervisory and enforcement MOU or other arrangement with a relevant authority, the Commission will consider whether, among other things, the

security-based swap dealer, counterparty, or any other registered entity); Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act (directing SDRs to provide data, including individual counterparty trade and position data, on a confidential basis only to circumscribed list of authorities or other persons that the Commission determines to be appropriate); and Section 13(n)(5)(H)(i) of the Exchange Act, 15 U.S.C. 78m(n)(5)(H)(i), as added by Section 763(i) of the Dodd-Frank Act (requiring that, prior to an SDR sharing such information, the SDR must receive a written agreement from each entity stating that the entity shall abide by certain confidentiality requirements).

[815] *See* Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n–9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property).

[816] The Commission preliminarily believes that in complying with an SDR's statutory privacy duty, the SDR has the flexibility to consider whether to provide relevant authorities with access to requested security-based swap data and will most likely decide that it is reasonable to consider whether a relevant authority's request for security-based swap information is within its regulatory mandate or legal responsibilities before the SDR provides the information.

[817] *See* DTCC Letter III at 12 (stating that it ''routinely provides [swap] transaction data to U.S. regulators (and . . . routinely provides data related to [swap] transactions in the U.S. by U.S. persons on European underlyings to European regulators), as contemplated by the ODRF'' guidelines that provide guidance on relevant authorities' information needs and level of access to data); *see also* DTCC Letter IV at 7–8.

[818] *See* Sections 13(n)(5)(F), (G), and (H)(i) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), (G), and (H)(i), as added by Section 763(i) of the Dodd-Frank Act.

[819] *See* Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n–9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property).

[820] The Commission preliminarily believes that in complying with an SDR's statutory privacy duty, the SDR has the flexibility to consider whether to provide relevant authorities with access to requested security-based swap data and will most likely decide that it is reasonable to consider whether a relevant authority's request for security-based swap information pertains to a person or financial product that is subject to the authority's jurisdiction, supervision, or oversight before the SDR provides the information.

[821] *See* DTCC Letter III at 12 (stating that it ''routinely provides [swap] transaction data to U.S. regulators (and . . . routinely provides data related to [swap] transactions in the U.S. by U.S. persons on European underlyings to European regulators), as contemplated by the ODRF'' guidelines that provide guidance on relevant authorities' information needs and level of access to data); *see also* DTCC Letter IV at 7–8.

[822] As a general matter, the Commission provides a list of MOUs and other arrangements on its Web site, which is one way for an SDR to monitor and determine whether a relevant authority has entered into an applicable MOU or other arrangement for purposes of satisfying the third condition of the Indemnification Exemption. The MOUs and other arrangements can be found at the following link: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml*.

[823] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

relevant authority needs security-based swap information from an SDR to fulfill its regulatory mandate or legal responsibilities; the relevant authority agrees to protect the confidentiality of the security-based swap information provided to it; the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction; and a supervisory and enforcement MOU or other arrangement would be in the public interest.

The Commission preliminarily believes that the third condition in the Indemnification Exemption is—as one commenter suggested—an effective way to streamline the Indemnification Requirement for an ''efficient exchange of information.'' [824] The Commission also preliminarily believes that the third condition in the Indemnification Exemption is appropriate to help protect the confidentiality of the security-based swap data provided to relevant authorities, and also to further the purposes of the Dodd-Frank Act. In this regard, the Commission preliminarily believes that where a relevant authority cannot agree to indemnification, a supervisory and enforcement MOU or other arrangement, which a relevant authority can legally enter into, may be a reasonable alternative because, similar to an indemnification agreement, a supervisory and enforcement MOU or other arrangement would serve as another mechanism to protect the confidentiality of security-based swap data provided to a relevant authority by committing the authority to maintain such confidentiality.[825] In light of the confidentiality agreement required under Section 13(n)(5)(H)(i) of the Exchange Act and previously proposed Rule 13n–4(b)(10) [826] as well as the importance of maintaining good relations and trust among relevant authorities, the Commission also preliminarily believes that a relevant authority will have strong incentives to take reasonable measures and precautions to comply with its obligation to protect the confidentiality of the security-based swap information received from an SDR. In lieu of providing an indemnification agreement, a supervisory and enforcement MOU or other arrangement would provide an SDR and the Commission with an additional layer of protection in maintaining the confidentiality of security-based swap information shared by the SDR.[827]

For the reasons stated above, the Commission preliminarily believes that the Indemnification Exemption is a reasonable alternative to the Indemnification Requirement. The Commission recognizes, however, that a supervisory and enforcement MOU or other arrangement would not necessarily provide SDRs that invoke the exemption with the same level of protection that an indemnification agreement would provide (*i.e.,* coverage for any expenses arising from litigation relating to information provided to a relevant authority) and thus, an SDR may prefer the benefits of the Indemnification Requirement rather than rely on the Indemnification Exemption. Therefore, under the Commission's proposed exemption, an SDR would have the option to require an indemnification agreement from a relevant authority should the SDR choose to do so rather than rely on the Indemnification Exemption.

The Commission expects that where an SDR seeks to obtain an indemnification agreement from a relevant authority, the SDR should negotiate in good faith an indemnification agreement. In this regard, the Commission agrees with one commenter's view that ''any indemnity should be limited in scope'' [828] and expects that an SDR will not unreasonably hinder the ability of relevant authorities to obtain security-based swap information from the SDR.[829] Regarding the same commenter's suggestion that the Commission provide model indemnification language,[830] the Commission does not believe that it is appropriate to prescribe by rule specific language that an SDR would be required to use when requesting indemnification from relevant authorities. Because such language could vary on a case-by-case basis depending on various factors, such as the laws applicable to the relevant authority, the Commission preliminarily believes that it is appropriate to allow for flexibility in negotiation of an indemnification agreement.

Request for comment

The Commission requests comment on all aspects of the proposed guidance, interpretation, and the Indemnification Exemption, including the following:

- Is the Commission's proposed interpretation of the Notification Requirement appropriate and sufficiently clear? Why or why not? Is it overly broad or narrow? If so, why? Does the Commission's proposed interpretation provide the Commission with sufficient information to fulfill our responsibilities?
- Should the Commission require SDRs to provide the Commission with actual notice of all of requests for security-based swap data by relevant authorities? Why or why not? If so, what should such notice include? Why?
- What would be the advantage of requiring SDRs to provide actual notice to the Commission of requests for security-based swap data by relevant authorities before making the data available to the relevant authorities?
- With regard to the Notification Requirement, should the Commission adopt a rule that is consistent with the approach taken by the CFTC in its Rule 49.17(d)(4), 17 CFR 49.17(d)(4), which requires a swap data repository to promptly notify the CFTC regarding any request received by an appropriate foreign or domestic regulator to gain access to the swap data maintained by such swap data repository? Why or why not?
- Should the Commission provide an exemption from the Notification Requirement similar to the Indemnification Exemption? Why or why not? For example, should proposed Rule 13n–4(d) be revised to begin with ''[a] registered security-based swap data repository is not required to comply with the notification requirements set forth in Section 13(n)(5)(G) of the Act and paragraph (b)(9) of this section and the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Act and paragraph (b)(10) of this section . . .''? Why or why not?

[824] *See* ESMA Letter at 2 (recommending an MOU between the Commission and relevant authorities to address duplicative regulatory regimes and facilitate cooperation among authorities from different jurisdictions).

[825] *See* 15 U.S.C. 8325(a), as added by Section 752 of the Dodd-Frank Act (providing that the Commission and foreign regulators ''may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest . . . .'').

[826] As stated above, the MOU or other arrangement is separate from the written agreement under Section 13(n)(5)(H)(i) of the Exchange Act and previously proposed Rule 13n–4(b)(9) thereunder stating that the relevant authority shall abide by the confidentiality requirements described in Section 24 of the Exchange Act relating to the information on security-based swap transactions that is provided by the SDR. The MOU or other arrangement is between the Commission and the relevant authority, whereas the written agreement is between the SDR and the relevant authority.

[827] The Commission notes that the MOU or other arrangement would not constitute a waiver on the part of the Commission or SDR to pursue legal action against a relevant authority and liability, if any, will be determined in accordance with applicable law. The Commission also does not interpret the indemnification as extending to an SDR's own wrongful acts.

[828] *See* DTCC Letter III at 12.

[829] For example, the Commission does not expect that an indemnification agreement would include a provision requiring a relevant authority to indemnify the SDR from the SDR's own wrongful or negligent acts.

[830] *See* DTCC Letter III at 12.

• Should the Commission propose a rule with regard to the application of the Notification Requirement? Why or why not? If so, what should the rule stipulate?

• In determining whether a person is appropriate to obtain security-based swap data from SDRs, should the Commission establish the process set forth in this release for persons to request a Commission determination? Why or why not? Should the Commission make such a determination by order? Why or why not? Should the Commission delegate this determination to the staff? Why or why not?

• In determining whether a person is appropriate to obtain security-based swap data from SDRs, should the Commission require a supervisory and enforcement MOU or other arrangement? Why or why not? If so, what matters should be addressed in the MOU or other arrangement? What factors should the Commission take into consideration when determining whether to enter into an MOU or other arrangement with the person?

• In determining whether a person is appropriate to obtain security-based swap data from SDRs, does the Commission need to understand the scope of a relevant authority's regulatory mandate or legal responsibilities? Why or why not? What other factors should the Commission take into account in making such a determination?

• Should the Commission's process for determining whether a person is appropriate to obtain security-based swap data from SDRs be memorialized in a rule? If so, what should the rule stipulate?

• Should the Commission require by rule or in our determination orders that SDRs not provide relevant authorities with access to security-based swap data beyond their regulatory mandates or legal responsibilities? Why or why not? Should the Commission adopt a process such as the one adopted by the CFTC in its Rule 49.17(d), 17 CFR 49.17(d), which requires certain regulators seeking to gain access to the swap data maintained by a swap data repository to certify that they are acting within the scope of their jurisdiction?

• Are there any reasons why the Commission should determine a person appropriate to obtain security-based swap data from one or more SDRs, but not all SDRs? If so, what are they?

• Should the Commission, when it determines that a person is appropriate to obtain security-based swap data from SDRs, include limitations on such determination? Why or why not? For example, should the Commission limit the determination to a certain period of time or to certain individual persons at a relevant authority?

• Under what circumstances should the Commission be able to revoke our determination order? Under what circumstances would it be appropriate for the Commission to request a relevant authority to provide additional information in order to maintain such a determination?

• Should the Commission provide additional clarification with respect to how parties comply with the confidentiality requirements in Section 24 of the Exchange Act? In what aspect would clarification be helpful?

• Is the Commission's proposed interpretation of the Indemnification Requirement appropriate and sufficiently clear? Should the Commission interpret the Indemnification Requirement more broadly or narrowly? If so, explain.

• Should the Commission interpret the Indemnification Requirement to be limited to the liability that a relevant authority otherwise would have to an SDR pursuant to the laws applicable to that relevant authority, such as the Federal Tort Claims Act, which is applicable to domestic authorities?

• Is the Commission's Indemnification Exemption appropriate and sufficiently clear? If not, what would be a better alternative? Please also explain the costs and benefits of any alternative, including how the alternative would be consistent with and further the goals of Title VII.

• Is the Indemnification Exemption overly broad or narrow? If so, what would be a better alternative? Please also explain the costs and benefits of any alternative, including how the alternative would be consistent with and further the goals of Title VII.

• Are there ways to narrowly tailor the Indemnification Exemption further without hindering a relevant authority's ability to obtain security-based swap data information from SDRs?

• Should the SDRs have the option to require a relevant authority to provide an indemnification agreement even if the three conditions in the Indemnification Exemption can be satisfied? Why or why not? Does providing SDRs with such an option raise any competiveness concerns?

• If the Commission were to modify the Indemnification Exemption so that SDRs do not have the option to require an indemnification agreement pursuant to Section 13(n)(5)(H)(ii) of the Exchange Act even if the three conditions in the exemption are satisfied, would this be appropriate and consistent with the Indemnification Requirement?

• What is the likelihood of an SDR not availing itself of the Indemnification Exemption even if the three conditions are met? Are there any measures that the Commission should take to address or mitigate this scenario? Are there any restrictions that the Commission should impose on an SDR that requires an indemnification agreement even if it can avail itself of the Indemnification Exemption?

• Should an SDR be required to make and keep records of its decision to rely on the Indemnification Exemption?

• Are the Indemnification Exemption and the Commission's proposed interpretive guidance sufficient to address the possibility that SDRs may be registered with ESMA and national regulators at the European Union (''EU'') member state level will obtain security-based swap information from ESMA? Are there any regulatory regime or circumstances that the Commission should take into consideration that is not addressed by the Indemnification Exemption or the Commission's interpretive guidance? Please explain.

• Will organizations such as FINRA and other self-regulatory organizations, the National Futures Association, the IMF, and the International Bank for Reconstruction and Development be able to meet the three conditions of the Indemnification Exemption? Why or why not? If not, should the Indemnification Exemption be modified to explicitly exempt such organizations from the Indemnification Requirement? Why or why not? If so, which organizations and why?

• Does the Indemnification Exemption adequately address the concerns of relevant authorities with respect to the Indemnification Requirement? Are there any circumstances that would warrant an exemption from the Indemnification Requirement, but that would not satisfy all the conditions in the Indemnification Exemption? If so, how could the Indemnification Exemption be modified and narrowly tailored to capture such circumstances so as not to have the effect of nullifying the Indemnification Requirement?

• Is it appropriate to provide SDRs with the flexibility to determine, on a case-by-case basis, whether a relevant authority that is requesting security-based swap information is acting within the scope of its regulatory mandate or legal responsibilities? Why or why not?

• Should the Commission impose any additional requirements on SDRs to confirm that a relevant authority is requesting security-based swap

information for the purpose of fulfilling its regulatory mandate or legal responsibilities? For example, should the Commission prescribe, as a condition in the Indemnification Exemption, that the SDR obtain a written confirmation from the requesting relevant authority that it is acting within its regulatory mandate or legal responsibilities?

• Should the Commission impose any additional requirements on SDRs to confirm that a relevant authority is requesting security-based swap information that pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the authority? For example, should the Commission prescribe, as a condition in the Indemnification Exemption, that the SDR obtain a written confirmation from the requesting relevant authority that its request pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the authority?

• Would an MOU between the Commission and a relevant authority in lieu of an indemnification agreement provide protection of security-based swap information shared with the relevant authority comparable to that of an indemnification agreement? If not, why not?

• Should the Commission specify in the Indemnification Exemption any other matters that may be in a supervisory and enforcement MOU or other arrangement? If so, what?

• On January 25, 2012, the European Commission proposed reforms to strengthen online privacy rights and to modernize the principles set forth in the EU's 1995 Data Protection Directive (''EU Directive'') to protect personal data. Will the EU Directive affect the ability of SDRs to provide security-based swap data to other relevant authorities, including the Commission? If so, please explain. Will the EU Directive affect the ability of the EU and its member countries to provide reciprocal assistance in securities matters, as contemplated by the supervisory and enforcement MOU or other arrangement discussed above? If so, please explain.

• Should the Commission impose any additional conditions in the Indemnification Exemption? If so, what? Are there any conditions in the Indemnification Exemption that the Commission should not require? If so, what conditions and why?

• For the purpose of satisfying the Indemnification Exemption, should an SDR be required to maintain policies and procedures setting forth how to determine (i) whether security-based swap information being requested is needed to fulfill a regulatory mandate and/or legal responsibility of the requesting entity, (ii) whether a relevant authority's requests pertain to a person or financial product subject to the authority's jurisdiction, supervision, or oversight, or (iii) whether the requesting relevant authority has entered into a supervisory and enforcement MOU or other arrangement with the Commission? To the extent such policies and procedures require each requesting relevant authority to provide a written representation with respect to one or more of the conditions in the Indemnification Exemption, should such written representations be considered sufficient to satisfy the relevant conditions in the Indemnification Exemption?

• Are there better ways that the Commission could address the Indemnification Requirement besides the Indemnification Exemption that would be consistent with and further the goals of Title VII? Please explain the costs and benefits of any alternative.

• What is the likely impact of the Indemnification Exemption on the security-based swap market? Would the Indemnification Exemption potentially promote or impede the establishment of SDRs?

• Is the Commission's proposed interpretation of how the Indemnification Requirement applies to SDRs dually registered with the Commission and a foreign regulator appropriate and sufficiently clear? If not, why not? Should the Commission apply the Indemnification Requirement when an SDR is registered with the Commission and is also registered or licensed with a foreign authority and that foreign authority is obtaining information from the SDR pursuant to its regulatory regime? Why or why not? Should there be any additional conditions in such instances? If so, what conditions and why?

• Should the Commission provide guidance on what it means for a ''person or financial product'' to be ''subject to [an] authority's jurisdiction, supervision, or oversight''? Why or why not?

• What would be the market impact of the proposed approach to providing an exemption from the Indemnification Requirement? How would the proposed application of the Indemnification Requirement, including the proposed exemption, affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the Indemnification Requirement? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

VII. Security-Based Swap Execution Facilities

A. Introduction

As discussed throughout this release, the market for security-based swaps is global in scope, with transactions in security-based swaps often involving counterparties in different jurisdictions. The Commission recognizes that, as a result, there may be uncertainty regarding the application of our proposed SB SEF registration requirements for a security-based swap market whose principal place of business is outside of the United States. The Commission believes, therefore, that guidance and clarification on the application of our proposed registration requirements would be useful with respect to security-based swap markets operating in the cross-border context.

Under the Dodd-Frank Act, new Section 3D(a)(1) of the Exchange Act provides that ''no person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section.'' [831] In our release proposing rules governing SB SEFs,[832] the Commission expressed the view that the registration requirement of Section 3D(a)(1) would apply only to a facility that meets the definition of ''security-based swap execution facility'' in Section 3(a)(77) of the Exchange Act.[833] The SB SEF Proposing Release, however, did not explicitly address the circumstances under which a foreign [834]

[831] 15 U.S.C. 78c–4(a)(1).

[832] *See* SB SEF Proposing Release, 76 FR 10948. The proposed rules governing SB SEFs are contained in proposed Regulation SB SEF.

[833] *See* SB SEF Proposing Release, 76 FR 10949 n.10. Section 3(a)(77) of the Exchange Act defines ''security-based swap execution facility'' to mean ''a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of security-based swaps between persons and (B) is not a national securities exchange.'' 15 U.S.C. 78c(a)(77).

[834] In using the terms ''foreign'' and ''non-resident'' in connection with a security-based swap

Continued

security-based swap market would be required to register with the Commission under Section 3D of the Exchange Act.[835] As discussed below, the Commission herein proposes to interpret when the registration requirements of Section 3D of the Exchange Act would apply to a foreign security-based swap market.[836] The Commission also discusses below the circumstances under which it may consider granting an exemption from registration for a foreign security-based swap market.

The proposed interpretations described below represent the Commission's proposed approach to applying the SB SEF registration requirements to foreign security-based swap markets. We recognize that other approaches may achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposal described below, and each proposed interpretation contained therein, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of each proposed interpretation and potential alternative approaches would be particularly useful to the Commission in evaluating modifications to the proposals.

B. Registration of Foreign Security-Based Swap Markets

As noted above, in our SB SEF Proposing Release, the Commission expressed the view that the registration requirement of Section 3D(a)(1) would apply only to a facility that meets the definition of ''security-based swap execution facility'' in Section 3(a)(77) of the Exchange Act.[837] A ''security-based swap execution facility'' is defined as ''a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of security-based swaps between persons and (B) is not a national securities exchange.'' [838]

As outlined further below, the Commission preliminarily believes that, when evaluating whether a foreign security-based swap market would have to register under Section 3D(a)(1), activities by the foreign security-based swap market that provide U.S. persons, or non-U.S. persons located in the United States, the ability to directly execute or trade security-based swaps on the foreign security-based swap market or facilitate the execution or trading of security-based swaps by U.S. persons, or non-U.S. persons located in the United States, on the foreign security-based swap market should be considered.[839] The Commission also preliminarily believes that, if a foreign security-based swap market takes affirmative actions to induce the execution or trading of security-based swaps on its market by U.S. persons, or non-U.S. persons located in the United States, including by inducing such execution or trading through marketing its services relating to the ability to execute or trade security-based swaps on its market to U.S. persons, or non-U.S. persons located in the United States, or otherwise initiating contact with such persons for the purpose of inducing such execution or trading, then those activities could be viewed as facilitating the execution or trading of security-based swaps on its market and could cause the foreign security-based swap market to fall within the scope of the registration requirements of Section 3D of the Exchange Act.

The Commission believes that it would be useful to provide some discussion of the types of activities that it preliminarily believes would place a foreign security-based swap market within the scope of Section 3D of the Exchange Act under the Commission's proposed interpretation. Given the constant innovation of trading mechanisms and methods, as well as technological and communication developments, however, it would not be possible to provide a comprehensive, final discussion of every activity for which a foreign security-based swap market would be considered to be providing U.S. persons or non-U.S. persons located in the United States the ability to execute or trade security-based swaps, or to be facilitating the execution or trading of security-based swaps, on its market, thereby triggering the requirement to register as a SB SEF under Section 3D(a)(1).

The Commission preliminarily believes that when a foreign security-based swap market provides U.S. persons, or non-U.S. persons located in the United States, with the direct ability to trade or execute security-based swaps on the foreign security-based swap market by accepting bids and offers made by one or more participants on the foreign security-based swap market, then such market would be required to register as a SB SEF. The Commission notes that a foreign security-based swap market could grant such direct access to U.S. persons, and non-U.S. persons located in the United States, through a variety of means, such as (i) providing proprietary electronic screens, market terminals, monitors or other devices for trading security-based swaps on its market; (ii) granting direct electronic access to the foreign security-based swap market's trading system or network, including by providing data feeds or codes for use with software operated through the computer of a U.S. person, or non-U.S. person located in the United States, or by allowing such persons to access the foreign security-based swap market through third-party service vendors or public networks (such as the Internet); or (iii) allowing its members or participants to provide U.S. persons or non-U.S. persons located in the United States with direct electronic access to trading in security-based swaps on the foreign security-based swap market.

The Commission also preliminarily believes that, if a foreign security-based swap market were to grant membership or participation in the foreign security-based swap market to U.S. persons, or non-U.S. persons located in the United States, which would provide such persons with the ability to directly execute or trade security-based swaps by accepting bids and offers made by one or more participants on the foreign security-based swap market, then such market would be required to register as a SB SEF.

Although the Commission preliminarily believes that the foregoing activities are the types of activities that would warrant application of the registration requirement of Section 3D, the Commission emphasizes that these activities are not intended to be an exclusive or exhaustive discussion of all the activities that could trigger the registration requirements of Section 3D by a foreign security-based swap market. In addition, as trading and

market, the Commission intends that these terms refer to a security-based swap market that is not a U.S. person.

[835] In the SB SEF Proposing Release, the Commission contemplated that non-resident persons may apply for registration as a SB SEF. In this regard, the Commission proposed Rule 801(f) of Regulation SB SEF, which would require any non-resident person applying for registration as a SB SEF to certify and provide an opinion of counsel that it can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by representatives of the Commission. *See* SB SEF Proposing Release, 76 FR 11001.

[836] Entities that do not meet the definition of SB SEF may nonetheless be required to register in another capacity under the Exchange Act.

[837] *See* note 833 and accompanying text, *supra.*

[838] 15 U.S.C. 78c(a)(77).

[839] *See id.* Non-U.S. persons located in the United States could include, for example, U.S. branches of foreign entities.

communication mechanisms and methods evolve, other activities that aim at providing U.S. persons, or non-U.S. persons located in the United States, the ability to directly execute or trade security-based swaps by accepting bids and offers made by multiple participants on a foreign security-based swap market, or that aim to facilitate the execution or trading of security-based swaps by U.S. persons or non-U.S. persons located in the United States on a trading platform or system operated by a foreign security-based swap market, could cause a foreign security-based swap market to fall within the ambit of the registration requirements of Section 3D.[840]

The Commission anticipates that some U.S. persons or non-U.S. persons located in the United States may choose to transact on a foreign security-based swap market on an indirect basis through a non-U.S. person that is not located in the United States and that is a member or participant of a foreign security-based swap market. The Commission preliminarily believes that, to the extent that the U.S. person, or non-U.S. person located in the United States, initiates the contact and the foreign security-based swap market does not attempt to solicit such business, such a transaction would not on its own warrant requiring the foreign security-based swap market to register under Section 3D of the Exchange Act.[841] However, as discussed above, to the extent that a foreign security-based swap market initiates contacts with U.S. persons or non-U.S. persons located in the United States to induce or facilitate the execution or trading of security-based swaps by such persons on its market, such activity would trigger the requirement to register under Section 3D.[842]

The Commission also anticipates that, given the global nature of the security-based swap business, a foreign security-based swap market could, at some point, seek to enter into a business combination with a registered SB SEF. Under the Commission's proposed interpretation, such business combination also could trigger the registration requirements of Section 3D of the Exchange Act for the foreign security-based swap market, depending on the nature and extent of integration of the entities' operations and activities. In this regard, the Commission's experience in recent years with national securities exchanges that have engaged in cross-border combinations may be illustrative for these purposes. Several national securities exchanges in recent years have entered into transactions to combine under common ownership with certain non-U.S. markets, such as NYSE Group, Inc.'s transaction with Euronext N.V. to form NYSE Euronext in 2007;[843] Eurex Frankfurt AG's acquisition of the International Securities Exchange, LLC in 2007;[844] and The Nasdaq Stock Market, Inc.'s transaction with Borse Dubai Limited to form NASDAQ OMX Group, Inc. in 2008.[845] In each case, the U.S. and the foreign markets, under their respective parent companies, generally have continued to operate as separate legal entities, maintained separate liquidity pools in their respective jurisdictions without integrating trading interest among markets under common ownership, and continued to be regulated subject to their own home country's requirements. Similarly, a registered SB SEF and a foreign security-based swap market could come under common ownership but continue to be separate legal entities, maintain separate liquidity pools for their security-based swap businesses without integrating trading interest among affiliated markets, and be separately regulated in their own home jurisdictions. However, if a registered SB SEF and foreign security-based swap market were to integrate their security-based swap trading facilities, for example, by the foreign security-based swap market providing direct access to the SB SEF's participants, or by the foreign security-based swap market and the registered SB SEF integrating their liquidity pools,[846] under the Commission's proposed interpretation, such actions would trigger the registration requirements of Section 3D of the Exchange Act for the foreign security-based swap market because the market would then be operating a facility for trading security-based swaps within the United States.

C. Registration Exemption for Foreign Security-Based Swap Markets

The prior section discusses when a foreign security-based swap market would be required to register as a SB SEF under Section 3D of the Exchange Act. The Commission recognizes, however, that the security-based swap market is global in nature and therefore one or more foreign security-based swap markets may seek relief from the Commission to allow some of the activities discussed above that would trigger the SB SEF registration requirement to continue without the foreign security-based swap market having to register as a SB SEF under Section 3D of the Exchange Act.

Following the publication of the SB SEF Proposing Release, the Commission received comments from the public expressing concerns about the implications of the proposed rules and the requirements of Section 3D of the Exchange Act for foreign security-based swap markets and the global markets for security-based swaps generally.[847] Several commenters urged the Commission to work with foreign regulators to develop harmonized rules for the trading of security-based swaps.[848] Some commenters believed that harmonization or flexibility with regard to foreign security-based swap markets would help reduce the risk of regulatory arbitrage.[849] One commenter stated that such harmonization would reduce the burdens of duplicative or conflicting requirements that could be faced by security-based swap markets operating in multiple jurisdictions.[850]

Although a number of foreign jurisdictions are in the process of developing standards for the regulation of security-based swaps and security-based swap markets, at this time few foreign jurisdictions have enacted legislation or adopted standards for the regulation of security-based swap

[840] In the alternative, the foreign security-based swap market could elect to apply for registration as a national securities exchange. *See* 15 U.S.C. 78f.

[841] The U.S. person or non-U.S. person located in the United States may, however, be required to register as a broker under Section 15(a)(1) of the Exchange Act. *See* 15 U.S.C. 78o(a)(1).

[842] For example, if a foreign security-based swap market were to allow its members or participants to provide U.S. persons, or non-U.S. persons located in the United States with direct electronic access to trading in security-based swaps on the foreign security-based swap market, this access would be considered direct access by a U.S. person, or a non-U.S. person located in the United States and, as noted above, would require the foreign security-based swap market to register.

[843] *See* Exchange Act Release No. 55293 (Feb. 14, 2007), 72 FR 8033 (Feb. 22, 2007).

[844] *See* Exchange Act Release No. 56955 (Dec. 13, 2007), 72 FR 71979 (Dec. 19, 2007).

[845] *See* Exchange Act Release No. 57099 (Jan. 4, 2008), 73 FR 1901 (Jan. 10, 2008).

[846] An integrated trading pool for security-based swaps would indicate that there is a unitary market for the security-based swaps. In such a scenario, persons with direct access to or membership in the registered SB SEF effectively would have the same direct access or membership privileges in the foreign security-based swap market by virtue of their access to the integrated trading pool, and thus would have the ability to directly execute or trade security-based swaps on the foreign security-based swap market.

[847] *See, e.g.,* Thomson Letter at 3–4, Blackrock Letter at 12–13, Bloomberg Letter at 6–7, ISDA/SIFMA II Letter at 2, WMBAA Letter at 10–11, Cleary Letter III at 4, and Cleary Letter IV at 5, 13.

[848] *See* Thomson Letter, BlackRock Letter, ISDA/SIFMA Letter II, and WMBAA Letter.

[849] *See* Thomson Letter, Bloomberg Letter, and WMBAA Letter.

[850] *See* Bloomberg Letter.

markets.[851] The Commission, however, is in discussions with its foreign counterparts to explore steps toward harmonizing standards for such regulation in the future.[852] In the meantime, the Commission is considering how best to address commenters' concerns about the risks of regulatory arbitrage and duplicative regulatory burdens on security-based swap markets that operate on a cross-border basis, in a manner consistent with the requirements of the Dodd-Frank Act and the federal securities laws generally.

The Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative approach to SB SEF registration depending on the nature or scope of the foreign security-based swap market's activities in, or the nature or scope of the contacts the foreign security-based swap market has with, the United States. Exemptions that are carefully tailored to achieve the objectives of Section 3D could help to improve security-based swap market supervision overall by allowing the Commission to focus our resources on areas where it has a substantial interest, while reducing duplication of efforts in areas where our interests are aligned with those of other regulators.

The Commission could exempt from the registration requirements of Section 3D a foreign security-based swap market that is subject to comparable, comprehensive supervision and regulation under appropriate governmental authorities in its home country.[853] The availability of such an exemption could serve to reduce any potential duplicative regulatory burdens faced by security-based swap markets that operate on a cross-border basis and that otherwise would be required to register both in the United States and in a non-U.S. jurisdiction.

Before the Commission would consider issuing an exemption from the registration requirements of Section 3D for a particular foreign security-based swap market, the Commission could consider whether the foreign security-based swap market is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in its home country, as compared to the supervision and regulation of SB SEFs under the Dodd-Frank Act and the Commission's implementing regulations. This process could include a review of the foreign jurisdiction's laws, rules, regulatory standards and practices governing the foreign security-based swap market and would entail consultation and cooperation with the foreign security-based swap market's home country governmental authorities.

The Commission expects that any such registration exemption could be subject to appropriate conditions that could include, but not be limited to, requiring a foreign security-based swap market to certify that it would provide the Commission with prompt access to its books and records, including, for example, data relating to orders, quotes, and transactions, as well as provide an opinion of counsel that, as a matter of law, it is able to provide such access. The Commission also could require, as a condition to receiving an exemption from registration, that a foreign security-based swap market would appoint an agent for service of process in the United States who is not an employee or official of the Commission. These potential conditions would be consistent with the proposed requirements for non-resident registered SB SEFs [854] and would allow the Commission to exercise, as necessary or appropriate, supervisory oversight of a foreign security-based swap market that receives an exemption from Section 3D's registration requirements. The Commission also could require that, before issuing an exemption from registration, the Commission and the appropriate financial regulatory authority or authorities in the foreign security-based swap market's home jurisdiction enter into a MOU that addresses the oversight and supervision of that market.

In certain cases, the Commission also could require, as a condition to granting such an exemption, that a foreign security-based swap market meet some of the requirements applicable to registered SB SEFs. Such a condition may be useful where the Commission is unable to make a determination regarding the broader comparability of the home jurisdiction's regulation and supervision, but where there is comparability with respect to some of the requirements applicable to registered SB SEFs and to a foreign security-based swap market (or class of security-based swap markets) in its home country. Therefore, the terms and conditions of any exemption that the Commission may grant to a foreign security-based swap market (or class of security-based swap markets) could depend on the degree to which the foreign jurisdiction's laws, rules, regulatory standards, and practices governing security-based swaps ''compare'' to those of the United States.

In considering the above, the Commission may consider any requirements of the home country that would conflict with the requirements applicable to SB SEFs under the Dodd-Frank Act. For example, Section 3D of the Exchange Act seeks to ensure fair and open access to SB SEFs by requiring that a SB SEF establish and enforce rules that include means to provide market participants with impartial access to the market.[855] The Commission also could consider whether a home country regulator imposes a regulation or policy limiting fair and open access to its security-based swap markets.

The Commission notes that security-based swap market structure and security-based swap market supervision and regulation could vary in other jurisdictions and could affect the Commission's ability to make a comparability determination. In addition, such differences in supervision and regulation would necessitate that each exemption request be reviewed on a jurisdiction-by-jurisdiction basis by the Commission. The conditions to any such exemption also would be based on the differences in the market structure and supervisory regime in the jurisdiction under consideration in comparison to U.S. oversight of SB SEFs.

As noted above, few foreign jurisdictions have adopted a comprehensive framework for the regulation of security-based swap markets and the Commission has not yet adopted rules governing SB SEFs. Thus, the Commission believes that it is premature to specify the precise criteria that the Commission may use for our evaluation and comparison of the regulatory and supervision programs for foreign security-based swap markets, should the Commission choose to consider exempting from registration as a SB SEF a foreign security-based swap market that becomes subject to regulation in its home country at a future date. Nonetheless, the Commission believes that it is useful now to elicit comment from interested

[851] *See* FSB Progress Report April 2013 at 1 (''While progress has been made in moving [OTC derivatives] markets towards centralized infrastructure, less than half of the FSB member jurisdictions currently have legislative and regulatory frameworks in place to implement the G20 commitments and there remains significant scope for increases in trade reporting, central clearing and exchange and electronic platform trading in global OTC derivatives markets.'').

[852] *See* Section I.C, *supra*.

[853] Any such exemption would be issued by order pursuant to the Commission's authority under Section 36 of the Exchange Act. 15 U.S.C. 78mm.

[854] *See* SB SEF Proposing Release, 76 FR 11001, proposed Rule 801(f), and proposed Form SB SEF.

[855] 15 U.S.C. 78c–4(d)(2)(B).

persons regarding our proposed approach, should it choose to consider providing such an exemption.

The Commission preliminarily believes that the proposed approach, which may condition any exemption for a foreign security-based swap market on the existence of comparable, comprehensive supervision and regulation under the appropriate financial regulatory authority or authorities in the foreign security-based swap market's home country, should provide comparable regulatory oversight and supervision as that afforded by the Commission's regulation and supervision of SB SEFs. The standard of ''comparability'' discussed above should allow the Commission sufficient flexibility to make exemption determinations based on the similarity of the requirements and practices of the foreign jurisdiction's regulatory program governing security-based swaps. In this regard, the Commission preliminarily believes that the comparability standard could extend not only to the written laws and rules of the foreign jurisdiction, but also to the jurisdiction's comprehensive supervision and regulation of its security-based swap markets, including the jurisdiction's oversight of its markets and enforcement of its laws and rules. The breadth of the proposed comparability standard (*i.e.,* to consider actual practices as well as written laws and rules) could help ensure that the regulatory protections provided in the foreign jurisdiction's security-based swap markets are substantially realized by sufficiently vigorous supervision and enforcement.

Finally, as discussed below,[856] the Commission proposes to permit substituted compliance, under certain circumstances, with respect to the mandatory trade execution requirement in Section 3C(h)(1) of the Exchange Act, if the Commission finds that a foreign-based security-based swap market (or class of security-based swap markets) is subject to comparable, comprehensive supervision and regulation by a foreign financial regulatory authority in such foreign jurisdiction.[857] While the proposed comparability standard for our granting an exemption from SB SEF registration could be similar to the proposed comparability standard for a substituted compliance determination with respect to the mandatory trade execution requirement, which is discussed below, the factors that the Commission could find relevant to a comparability determination with respect to SB SEF registration would not necessarily be the same factors that it would consider when making a comparability determination with respect to mandatory trade execution. This is because Section 3D of the Exchange Act is focused on the registration of SB SEFs and compliance by registered SB SEFs with the 14 enumerated core principles governing SB SEFs,[858] whereas Section 3C(h)(1) of the Exchange Act is focused on the circumstances where execution of a security-based swap on a SB SEF (or an exchange) is required.[859] However, the Commission solicits comment on the appropriateness or feasibility of our proposed approach.

Request for Comment

The Commission generally requests comment on the discussion regarding SB SEFs, including the following:

- The Commission requests comment on all aspects of our discussion regarding when a foreign security-based swap market would be required to register as a SB SEF under Section 3D and on the non-exhaustive discussion of the types of activities, noted above, that would trigger registration of the foreign security-based swap market as a SB SEF. The Commission also requests comment on all aspects of our proposal to consider requests for an exemption from SB SEF registration for a foreign security-based swap market under certain circumstances.
- The Commission seeks commenters' views on the potential impact of applying the proposed SB SEF registration requirements to foreign security-based swap markets that engage in activities that would require such markets to register as a SB SEF. Are there aspects of the proposed SB SEF rules and registration requirements that present issues for foreign security-based swap markets that would be required to register as a SB SEF? If so, please explain in detail.
- The Commission requests commenters' views on whether the non-exhaustive discussion of the types of activities, noted above, which would trigger the application of Section 3D registration requirements to a foreign security-based swap market, is appropriate to aid foreign security-based swap markets in assessing whether they would be required to register as a SB SEF. Are there other activities that foreign security-based swap markets currently engage in that should be evaluated for consideration as to whether those activities would trigger Section 3D registration requirements? If so, please describe those activities in detail. Are there specific items set forth in the non-exhaustive discussion of the types of activities noted above or any other specific activities engaged in by foreign security-based swap markets that should not trigger Section 3D registration requirements? If so, commenters should describe those activities in detail and explain their rationale. Does the proposed interpretation regarding the application of Section 3D and the proposed non-exhaustive discussion of the types of activities provide sufficient guidance for a foreign security-based swap market to assess whether it would have to register, or seek an exemption from registration, as a SB SEF? If not, what kind of further guidance would be helpful for making that determination? Does the proposed approach provide sufficient guidance to a foreign security-based swap market that may seek an exemption? If not, what kind of further guidance would be helpful?
- The Commission seeks comment on the appropriateness of the proposed interpretation that the registration requirements of Section 3D should be triggered by certain activities directed at ''U.S. persons, or non-U.S. persons located in the United States.'' Are the categories of persons captured by this proposed approach too broad? Too narrow? Please specify and explain. For example, foreign branches would be included by the proposed approach, such that a foreign security-based swap market's provision of direct access or participation in its market to a foreign branch, or activities facilitating execution or trading of security-based swaps on its market by such a foreign branch, would trigger the Section 3D registration requirement. Do commenters agree with this approach? If not, why not? What would be a better approach? If so, how so?
- The Commission requests comment on what would be the appropriate circumstances under which the Commission should consider granting an exemption from the registration requirements of Section 3D. Should the Commission consider granting an exemption from registration for a foreign security-based swap market when the nature or scope of its activities in the United States are limited? If so, why? Or should the Commission also consider granting an exemption for a foreign security-based swap market when the nature or scope of its activities in the United States are more extensive? Why or why not? What would be the advantages and disadvantages of either

[856] *See* Section XI.F, *infra.*

[857] *See* proposed Rule 3Ch–2 under the Exchange Act.

[858] *See* 15 U.S.C. 78c–4.

[859] *See* 15 U.S.C. 78c–3(h)(1).

approach? What would be the appropriate criteria for the Commission to apply when it considers whether to grant an exemption from the registration requirements of Section 3D? Please specify and explain.

• The Commission seeks comment on whether the proposed standard of comparability is an appropriate standard for the Commission to determine whether to grant an exemption from Section 3D's registration requirements for a foreign security-based swap market. Should a different standard be used? If so, what should be the standard and why? Should it be stricter or more lenient than the proposed standard? If it should be stricter or more lenient, in what respects and in what manner? Why or why not? As proposed, when making a comparability determination, the Commission would look not just at the rules of a foreign jurisdiction, but also at the comprehensiveness of the supervision and regulation by the appropriate governmental authorities of that jurisdiction. Is the Commission's holistic approach to making a comparability determination appropriate? Why or why not? Comment also is requested regarding whether the Commission should put in place a more detailed standard for granting an exemption, for example, by providing specific criteria that the Commission would look to in determining whether there is comparable, comprehensive regulation and supervision of a foreign security-based swap market by the appropriate financial regulatory authority or authorities in the home country. If so, what criteria should the Commission include and why? Commenters also are requested to explain how the Commission should develop such criteria in the absence of existing regulations in other jurisdictions at the present time. Are there specific procedures or comparability considerations that commenters believe that the Commission would find useful to incorporate in our proposed exemption approach at this time? If so, please describe. What would be the advantages of adopting such measures now? What would be the disadvantages of adopting such measures now?

• The Commission solicits comment on the appropriateness or feasibility of distinguishing between the comparability determination for purposes of an exemption from registration as a SB SEF and for purposes of substituted compliance for the mandatory trade execution requirement. Should the Commission consider the same factors in making a comparability determination for mandatory trade execution and a comparability determination for SB SEF registration? If so, what factors would be relevant and appropriate to both determinations? Please describe. What factors, if any, would only be relevant or appropriate to a comparability determination for SB SEF registration or a comparability determination for mandatory trade execution, respectively? Please describe.

• The Commission seeks comment on the proposed process for granting an exemption from Section 3D's registration requirements for a foreign security-based swap market. Is the process explained in a sufficiently clear manner? Does the process provide foreign security-based swap markets with an efficient method for obtaining exemptions? If not, what aspects of the process would be burdensome for foreign security-based swap markets? Are there other ways to streamline the exemption process? Please describe.

• What would be the market impact of the proposed approach to the registration of foreign security-based swap markets? How would the proposed application of the SB SEF registration requirement affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach to the registration of foreign security-based swap markets? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

VIII. Regulation SBSR—Regulatory Reporting and Public Dissemination of Security-Based Swap Information

A. Background

Section 13A(a)(1) of the Exchange Act [860] provides that all security-based swaps that are not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act [861] provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act [862] generally provides that transaction, volume, and pricing data of all security-based swaps shall be publicly disseminated in real time, except in the case of block trades.[863] On November 19, 2010, the Commission proposed Regulation SBSR to implement these requirements.[864]

Rule 908 of Regulation SBSR as initially proposed was designed to clarify the application of Regulation SBSR to cross-border security-based swaps. Proposed Rule 908(a) would require a security-based swap to be reported and publicly disseminated if the security-based swap: (i) Has at least one counterparty that is a U.S. person; (ii) was executed in the United States or through any means of interstate commerce; or (iii) was cleared through a registered clearing agency having its principal place of business in the United States. Proposed Rule 908(b) provided that, notwithstanding any other provision of Regulation SBSR, no counterparty to a security-based swap would incur any obligation under Regulation SBSR unless it is: (i) A U.S. person; (ii) a counterparty to a security-based swap executed in the United States or through any means of interstate commerce; or (iii) a counterparty to a security-based swap cleared through a clearing agency having its principal place of business in the United States. Thus, under the Commission's initial proposal, a security-based swap—wherever it is executed or cleared—would be required to be reported pursuant to Regulation SBSR if at least one counterparty were a U.S. person. Furthermore, a security-based swap—even if both counterparties were non-U.S. persons—would be required to be reported if the security-based swap were executed in the United States or through any means of interstate commerce, or cleared through a clearing agency having its principal place of business in the United States.

Rule 901(a)(1), as initially proposed, also provided that, where only one counterparty to a security-based swap is a U.S. person, the U.S. person would be the ''reporting party'' (*i.e.,* the party that incurs the duty to report the security-based swap pursuant to Regulation SBSR). Rule 901(a)(3), as initially proposed, provided that, where neither

[860] 15 U.S.C. 78m–1(a)(1).

[861] 15 U.S.C. 78m(m)(1)(G).

[862] 15 U.S.C. 78m(m)(1)(C).

[863] Section 13(m)(1)(E) of the Exchange Act, 15 U.S.C. 78(m)(1)(E), provides that, with respect to cleared security-based swaps, the rule promulgated by the Commission related to public dissemination shall contain provisions that ''specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular market and contracts'' and ''specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public.''

[864] *See* Regulation SBSR Proposing Release, 75 FR 75208.

counterparty to a security-based swap that must be reported is a U.S. person, the counterparties must select which of them would be the reporting party.

To date, the Commission has received 48 comment letters specifically in response to proposed Regulation SBSR, many of which raised issues relating to the cross-border aspects of the proposal. The Commission has received other letters that, while not specifically referencing proposed Regulation SBSR, raised cross-border issues that are germane to proposed Regulation SBSR.[865] In response to these comments—which are described further herein—and upon further consideration of issues related to cross-border security-based swap transactions across all of the various areas of Title VII, the Commission is proposing various modifications to proposed Regulation SBSR, particularly Rule 908 thereof, which address cross-border transactions.

One significant modification being proposed here would take into account situations in which a U.S. person, although not a ''direct counterparty,'' as defined below, to a security-based swap, guarantees the performance of one of the direct counterparties. As discussed above,[866] the Commission is proposing to apply various Title VII provisions to the security-based swap transactions of non-U.S. persons that are guaranteed by U.S. persons—including the regulatory reporting and public dissemination requirements of Regulation SBSR, as discussed below.[867] A second significant modification is to propose a ''substituted compliance'' regime. As explained in more detail below, the Commission is now proposing a framework that would allow certain Title VII requirements to be satisfied by compliance with the rules of a foreign jurisdiction rather than the specific requirements under U.S. rules. Below, the Commission describes the circumstances under which compliance with the rules of such a foreign jurisdiction could, under re-proposed Regulation SBSR, be ''substituted'' for compliance with the specific regulatory reporting and public dissemination requirements of Regulation SBSR.[868]

A number of new definitions are being added to re-proposed Rule 900 in light of the changes being proposed.[869] For example, new paragraph (g) of Rule 900 would define the term ''counterparty'' to mean ''a person that is a direct counterparty or indirect counterparty of a security-based swap.'' A direct counterparty would be ''a person that enters directly with another person into a contract that constitutes a security-based swap.'' An indirect counterparty would be ''a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.'' Although a guarantor is not a direct counterparty to the security-based swap, the duties to be performed under the security-based swap, and thus the risks associated with the security-based swap, ultimately fall to the guarantor.[870] Therefore, the Commission preliminarily believes that it is appropriate to deem a guarantor to be a counterparty to the security-based swap for purposes of the regulatory reporting requirements of Title VII and the rules proposed thereunder. As discussed in detail below, the concept of ''reporting party'' used in Regulation SBSR as initially proposed would be replaced by the newly proposed term ''reporting side,'' to reflect the fact that reporting obligations could attach to both direct and indirect counterparties.[871]

The Commission has received and continues to consider comments on the Regulation SBSR Proposing Release that address areas other than those relating to cross-border security-based swap activity. In this release, the Commission is re-proposing only changes relating to cross-border security-based swap activity, technical and conforming changes necessitated by these larger revisions, and certain other minor changes that would help to clarify these re-proposed revisions (such as numbering each definition in re-proposed Rule 900, so that each defined term can more readily be identified). Changes to Regulation SBSR in other areas could, if appropriate, be addressed in a future release.[872]

Regulation SBSR, as re-proposed today, represents the Commission's preliminary views regarding the application of Title VII's provisions relating to regulatory reporting and public dissemination of cross-border security-based swap transactions, and how those provisions would apply to non-U.S. persons who act in capacities regulated under the Dodd-Frank Act. The Commission invites comment regarding all aspects of the approaches taken by the Commission and each provision of re-proposed Regulation SBSR, including potential alternative approaches. In particular, data and comment from market participants and other interested parties regarding the likely effect of each re-proposed rule regarding application of a specific Title VII requirement, the effect of such proposed application in the aggregate, and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to re-proposed Regulation SBSR.

B. Modifications to the Definition of ''U.S. Person''

Rule 900 of re-proposed Regulation SBSR contains a revised definition of ''U.S. person.'' As initially proposed, ''U.S. person'' was defined as ''a natural person that is a U.S. citizen or U.S. resident or a legal person that is organized under the corporate laws of any part of the United States or has its principal place of business in the United States.'' Two persons who commented specifically on the Regulation SBSR proposal[873] argued that ''U.S. person'' as used in the Commission's Title VII rules should have the same definition as in Regulation S.[874]

Proposed Regulation SBSR was the only one of the Commission's proposals for implementing Title VII to propose to use and define the term ''U.S. person.'' Because the Commission is now addressing cross-border issues across multiple Title VII rules, the Commission has given further thought to the definition of ''U.S. person'' as initially

[865] All such letters are cited in Appendix D.

[866] *See* Section II.B.2(d), *supra.*

[867] *See* Sections VIII.C and VIII.D, *infra.*

[868] *See* Section XI.D, *infra.*

[869] In some cases, a definition used in Rule 900 would cross-reference a term defined elsewhere in the Commission's Title VII rules. In other cases, a definition might be specific to Regulation SBSR and not be used elsewhere in the Commission's Title VII rules.

[870] *See* Section II.B.2(d), *supra.*

[871] Re-proposed Rule 900(ee) would define ''side'' as ''a direct counterparty and any indirect counterparty that guarantees the direct counterparty's performance of any obligation under a security-based swap.'' Re-proposed Rule 900(cc) would define ''reporting side'' as ''the side of a security-based swap having the duty to report information in accordance with [Regulation SBSR] to a security-based swap data repository, or if there is no security-based swap data repository that would receive the information, to the Commission.''

[872] For example, the Commission in the Regulation SBSR Proposing Release did not propose how to define a ''block trade.'' As noted in Regulation SBSR Proposing Release, the Commission intends to do so in a separate proposal. *See* Regulation SBSR Proposing Release, 75 FR 75228.

[873] *See* Cleary Letter III at 2, 6–9; Davis Polk Letter I at note 6 (arguing that using the existing Regulation S definition, rather than creating a new definition, ''would avoid confusion and also provide consistency of application'').

[874] 17 CFR 230.901 *to 230.905.*

proposed in Regulation SBSR. The Commission now believes that using a single definition of ''U.S. person'' in all Title VII rulemaking would promote consistency and transparency in understanding and complying with these various rules. However, as described above,[875] the Commission preliminarily believes that the Regulation S definition of ''U.S. person'' is not appropriate for Title VII rules. Proposed Rule 900(pp) would define ''U.S. person'' to have the same meaning as in proposed Rule 3a71–3(a)(7) under the Exchange Act.[876]

Under both the proposed and re-proposed definitions of ''U.S. person,'' a natural person resident in the United States would be a U.S. person, as would a legal person that is organized or incorporated under the laws of the United States or having its principal place of business in the United States. Furthermore, under both definitions, a foreign branch of a U.S. person would not be recognized as having an existence separate from the U.S. person.[877] The proposed rule also would cover partnerships, trusts, and other legal persons, as set forth in proposed Rule 3a71–3(a)(7) under the Exchange Act. The re-proposed definition of ''U.S. person'' also would clarify certain situations that were not specifically addressed in the initial proposal. For example, the initially proposed definition of ''U.S. person'' did not address whether—and, if so, when—an account would be considered a U.S. person. The re-proposed definition would provide that an account, whether discretionary or non-discretionary, of a U.S. person would be a U.S. person.

New paragraph (q) of re-proposed Rule 900 would define the term ''non-U.S. person'' as a person that is not a U.S. person.

Request for Comment

The Commission requests comment on all aspects of the re-proposed definition of ''U.S. person'' in Regulation SBSR. In particular:

- Should the definition of ''U.S. person'' in Regulation SBSR be consistent with that proposed for the Commission's other Title VII rules? Why or why not? If so, what should that definition be and why? Would having a different definition of ''U.S. person'' in Regulation SBSR create ambiguity or conflict with other Title VII rules being issued by the Commission? If not, why not?

C. Additional Modifications to Scope of Regulation SBSR

1. Revisions to Proposed Rule 908(a)

Rule 908(a), as initially proposed, provided that a security-based swap would be subject to regulatory reporting and public dissemination under Regulation SBSR if the security-based swap: (i) Has at least one counterparty that is a U.S. person; (ii) is executed in the United States or through any means of interstate commerce; or (iii) is cleared through a registered clearing agency having its principal place of business in the United States. Thus, Rule 908(a), as originally proposed, would not impose reporting or public dissemination requirements in connection with a security-based swap solely because the obligations of one of the direct counterparties is guaranteed by a U.S. person. As noted above, the re-proposed definition of ''U.S. person''—like the initially proposed definition—would not treat a direct counterparty that is guaranteed by a U.S. person as itself, solely due to the existence of the guarantee, a U.S. person. However, as noted below, the Commission is concerned about instances where—because of a guarantee extended by a U.S. person—the risk of a transaction resides in the United States, even if the direct counterparties of the transaction are domiciled outside the United States. Thus, upon further consideration, the Commission is now proposing to apply Title VII's regulatory reporting requirements to security-based swaps having at least one counterparty, whether direct or indirect, that is a U.S. person.

Guarantees provided by U.S. persons to their foreign affiliates or other non-U.S. persons could have the effect of concentrating significant risks within the United States that may rise to the systemic level. If a U.S. person guarantees the performance of a non-U.S. person, the financial resources of that U.S. person could be called upon to satisfy the contract. This activity is capable of posing risks to the stability of the U.S. financial system. The Commission preliminarily believes that, if it does not require regulatory reporting of security-based swaps that are guaranteed by U.S. persons, in addition to security-based swaps having a U.S. person direct counterparty, the Commission and other federal financial regulators would be less likely to detect the build-up of potentially significant risks within individual institutions or more widespread systemic risks to the U.S. financial system. The Dodd-Frank Act is intended to promote the financial stability of the United States by, among other things, reducing risks to the U.S. financial system by allowing regulators better access to necessary market data.[878]

In addition, the Commission is now proposing to require regulatory reporting of all security-based swaps entered into by non-U.S. person security-based swap dealers and major security-based swaps participants, wherever they may be executed.[879] This is a change from how the initial proposal applied to a security-based swap executed by a non-U.S. person security-based swap dealer or major security-based swap participant. Under the initial proposal, such a security-based swap would not be required to be reported solely based on an entity's status as a security-based swap dealer or major security-based swap participant, unless the security-based swap was executed in the United States or through any means of interstate commerce, or was cleared by a clearing agency having its principal place of business in the United States.

A non-U.S. person security-based swap dealer or major security-based swap participant generally would be subject to all rules applicable to security-based swap dealers or major security-based swaps participants, regardless of its principal place of business or where it is organized.[880] Having access to all of the security-based swap transactions entered into by a security-based swap dealer or major security-based swap participant is an important aspect of understanding its compliance with the applicable Title VII requirements, including without limitation, compliance with the capital, margin, and other applicable entity-level and transaction-level requirements. The Commission notes that Section 15F(f)(1)(a) of the Exchange Act provides that each registered security-based swap dealer and major

[875] *See* Section III.B.10, *supra.*

[876] *See* Section III.B.5, *supra.*

[877] *See* Regulation SBSR Proposing Release, 75 FR 75240 (''The Commission intends for this proposed definition [of U.S. person] to include branches and offices of U.S. persons''). *See also* Section III.B.5(b)ii, *supra* (proposing that an entity's status as a U.S. person would be determined at the legal-entity level and thus apply to the entire legal entity, including any foreign operations such as branches that are part of the U.S. legal entity).

[878] *See, e.g.,* S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176, at 32 (''As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and *reporting* will provide safeguards for American taxpayers and the financial system as a whole'') (emphasis added); note 4, *supra.*

[879] *See* re-proposed Rule 908(a)(1)(iii) of Regulation SBSR.

[880] *See* Sections III.C and IV.D, *supra.*

security-based swap participant shall make such reports as are required by the Commission, by rule or regulation, regarding the transactions and financial condition of the registered security-based swap dealer or major security-based swap participant.[881] Therefore, the Commission is now proposing to require that all security-based swaps of all security-based swap dealers and major security-based swap participants, regardless of where such security-based swaps are executed or where these entities have their principal place of business or are organized, be subject to regulatory reporting to a registered SDR.[882]

To reflect these changes and to reincorporate other provisions that are not being substantially revised, the Commission is re-proposing Rule 908(a) as follows. The rule would be divided into two subparagraphs, (1) and (2), which would address regulatory reporting and public dissemination, respectively. Specifically, re-proposed Rule 908(a)(1) would provide that a security-based swap transaction would be subject to regulatory reporting if:

(i) The security-based swap is a transaction conducted within the United States;

(ii) There is a direct or indirect counterparty that is a U.S. person on either side of the transaction;

(iii) There is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction; or

(iv) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Re-proposed Rule 908(a)(1)(i) would preserve the principle from the original proposal that a security-based swap would be subject to regulatory reporting if it is executed in the United States.[883] As noted above,[884] the concept of a security-based swap transaction being solicited, negotiated, executed, or booked in the United States has been integrated into the new term ''transaction conducted within the United States,'' which also is being used in other Title VII proposals of the Commission. Proposed Rule 3a71–3(a)(5) under the Exchange Act would define ''transaction conducted within the United States'' as ''a security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction.'' [885]

The Commission received no comments that specifically addressed our use of the phrase ''through any means of interstate commerce'' in three places in Regulation SBSR, as initially proposed.[886] However, upon further consideration, the Commission is concerned that this language could unduly require a security-based swap to be reported if it had only the slightest connection with the United States. Therefore, the Commission has decided to delete the phrase ''through any means of interstate commerce'' from re-proposed Regulation SBSR. Instead, the Commission is proposing to require reporting of a security-based swap that falls within the definition of ''transaction conducted within the United States,'' which would describe more precisely the nature of the activities in the United States that could result in a security-based swap becoming subject to Regulation SBSR. The Commission generally believes that security-based swaps that are solicited, negotiated, executed, or booked within the United States—by or on behalf of either counterparty to the transaction, and regardless of the location, domicile, or residence status of either counterparty to the transaction—generally should be subject to Regulation SBSR.

Re-proposed Rule 908(a)(1)(ii)—which would require regulatory reporting of any security-based swap if there is a direct or indirect counterparty that is a U.S. person on either side of the transaction—embodies the principle in the initial proposal that a security-based swap, wherever executed, must be reported if it has at least one counterparty that is a U.S. person. This revised prong, however, also would apply the reporting requirement to any security-based swap, wherever executed, that has at least one indirect counterparty [887] that is a U.S. person, even when no direct counterparty is a U.S. person. The original proposal, because it did not include guarantors as counterparties, would not have required regulatory reporting in such case. As discussed above, the Commission now preliminarily believes that—to satisfy Congressional intent that security-based swaps be subject to regulatory reporting, thereby informing the Commission and other financial regulators of potential systemic risks—any security-based swap having at least one direct counterparty that is a U.S. person should be reported. The Commission also preliminarily believes that, because guarantees extended by U.S. persons create risk to the U.S. financial system, regulatory reporting of security-based swaps should extend to any security-based swap transaction in which one or both direct counterparties is guaranteed by a U.S. person. In the absence of regulatory reporting of such security-based swaps, the Commission's ability to detect and analyze potentially significant sources of risk to the U.S. financial system could be limited.

Re-proposed Rule 908(a)(1)(iii) would, for reasons described above, require regulatory reporting of any security-based swap executed by a security-based swap dealer or major security-based swap participant, regardless of the entity's place of domicile and regardless of the place of execution.

Re-proposed Rule 908(a)(1)(iv) would preserve the principle from the original proposal that a security-based swap would be subject to regulatory reporting if it is cleared through a clearing agency having its principal place of business in the United States.[888] As noted in the Regulation SBSR Proposing Release, the Commission preliminarily believes that, if a security-based swap is cleared by a clearing agency having its principal place of business in the United States, U.S. regulators should have access to information regarding the security-based swap through a registered SDR.[889] This approach is premised on the view that, when a security-based swap is cleared through a clearing agency, the initial transaction is novated and two new transactions take its place, with the clearing agency becoming the seller to the buyer and the buyer to the seller. If the clearing agency is located within the

[881] 15 U.S.C. 78o–8(f)(1)(A). The Commission further notes that Section 15F(f)(2) of the Exchange Act, 15 U.S.C. 78o–8(f)(2), requires the Commission to ''adopt rules governing reporting and recordkeeping for security-based swap dealers and major security-based swap participants.''

[882] As discussed below, however, the Commission is proposing that certain security-based swaps of non-U.S. person security-based swap dealers and major security-based swap participants would *not* be subject to public dissemination. In addition, certain security-based swaps that would otherwise be subject to regulatory reporting and public dissemination under Regulation SBSR could qualify for substituted compliance. *See* Section XI.D, *infra.*

[883] *See* Rule 908(a)(2) of Regulation SBSR, as originally proposed.

[884] *See* Section III.B.6, *supra.*

[885] *See* note 308, *supra* (explaining that the word ''counterparty'' as used within this term has the same meaning as ''direct counterparty'' in re-proposed Rule 900(j) of Regulation SBSR).

[886] *See* Rules 900 (definition of ''participant''), 908(a), and 908(b) of Regulation SBSR, as initially proposed.

[887] ''Indirect counterparty'' would be defined as ''a guarantor of a direct counterparty's performance of any obligation under a security-based swap.'' *See* re-proposed Rule 900(o) of Regulation SBSR.

[888] *See* Rule 908(a)(3) of Regulation SBSR, as originally proposed.

[889] *See* Regulation SBSR Proposing Release, 75 FR 75240.

United States, the new transactions necessarily would be executed within the United States.[890]

While subparagraph (1) of re-proposed Rule 908(a) would address when a security-based swap would be subject to regulatory reporting, subparagraph (2) would address when a security-based swap would be subject to public dissemination. Re-proposed Rule 908(a)(2) would provide that a security-based swap shall be subject to public dissemination if:

(i) The security-based swap is a transaction conducted within the United States;

(ii) There is a direct or indirect counterparty that is a U.S. person on each side of the transaction;

(iii) At least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch [891]);

(iv) One side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer; or

(v) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

The Commission notes that Section 13(m)(1)(B) of the Exchange Act [892] ''authorize[s] the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.'' Re-proposed Rule 908(a)(2) reflects the Commission's revised preliminary determination regarding an appropriate way to enhance price discovery in the U.S. market for security-based swaps. As noted below, since issuing the Regulation SBSR Proposing Release, the Commission has obtained and analyzed more extensive data regarding the overlap between the U.S. market and the global market for security-based swaps.[893] These data suggest that a vast majority of security-based swap transactions directly involved at least one non-U.S. domiciled counterparty.[894] Furthermore, these transactions frequently may be conducted with one direct counterparty located in one jurisdiction with the other direct counterparty located in another jurisdiction, further suggesting that no easy distinction can be made between the U.S. market and foreign or global markets. The Commission is concerned that limiting the application of Title VII's public dissemination requirement only to transactions that are wholly conducted within the United States or to transactions where both direct counterparties are U.S. persons would significantly reduce the potential benefits of post-trade transparency in the security-based swap market. The Commission stated in the Regulation SBSR Proposing Release that, ''[b]y reducing information asymmetries, post-trade transparency has the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the [security-based swap] market.'' [895] The Commission also noted that, ''[i]n other markets, greater post-trade transparency has increased competition among market participants and reduced transaction costs.'' [896]

Re-proposed Rule 908(a)(2) eliminates use of the term 'interstate commerce'' and instead incorporates the new concept of ''transaction conducted within the United States,'' which is being used throughout the Commission's proposed Title VII cross-border rules, to help delineate precisely the types of security-based swap transactions that would be subject to public dissemination under Regulation SBSR. Furthermore, re-proposed Rule 908(a)(2) is designed to achieve the goal of improving the transparency, fairness, and efficiency of the U.S. security-based swap market, as reflected in Section 13(m)(1)(B) of the Exchange Act. Re-proposed Rule 908(a)(2) also is designed, as far as practicable, to minimize competitive disparities that might result under the proposed public dissemination regime, as well as to minimize incentives for market participants to structure their operations for the purpose of evading Regulation SBSR.[897] Each individual subparagraph of re-proposed Rule 908(a)(2) is discussed below.

Re-proposed Rule 908(a)(2)(i), similar to re-proposed Rule 908(a)(1)(i), generally would preserve the principle from the original proposal that a security-based swap would be subject to public dissemination if it were executed in the United States.[898] That concept has been integrated into the new term ''transaction conducted within the United States,'' which also is being used in the Commission's other Title VII proposals.

Re-proposed Rule 908(a)(2)(ii) would provide that a security-based swap would be subject to public dissemination if there is a direct or indirect counterparty that is a U.S. person on *each* side of the transaction. Under the initial proposal, a security-based swap involving two non-U.S. person direct counterparties, but where each direct counterparty is guaranteed by a U.S. person, would not be required to be publicly disseminated. The Commission now preliminarily believes that, where U.S. persons have an interest on both sides of the transaction, even if indirectly, the transaction generally should be viewed as part of the U.S. security-based swap market and, as such, should be subject to Title VII's public dissemination requirement. Moreover, to the extent that U.S. persons might be incented to structure their trading operations through guaranteed foreign subsidiaries to avoid public dissemination that otherwise would apply to trades executed between U.S. person direct counterparties, the Commission seeks to minimize that incentive by re-proposing Rule 908(a)(2)(ii) to require public dissemination of a security-based swap transaction if a U.S. person is present on

[890] *See id.* (noting that the concept of being ''executed in the United States or through any means of interstate commerce'' includes being cleared through a clearing agency having its principal place of business in the United States).

[891] The term ''foreign branch'' would be defined in re-proposed Rule 900(n) of Regulation SBSR to cross-reference the definition in proposed Rule 3a71–3(a)(1) under the Exchange Act. *See* Section III.B.7, *supra,* for a definition of that term.

[892] 15 U.S.C. 78m(m)(1)(B).

[893] *See* Section XIV.F.2(d)ii, *infra.*

[894] *See* Section II.A.1, *supra.*

[895] Regulation SBSR Proposing Release, 75 FR 75224.

[896] *Id.* at 75225 (citing studies of the impact of TRACE (Trade Reporting and Compliance Engine) on the corporate bond market).

[897] We preliminarily believe that the proposed approach with respect to regulatory reporting and public dissemination is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Section 30(c). *See* Sections II.B.2(a)–II.B.2(d), *supra.* However, the Commission also preliminarily believes that the proposed approach with respect to regulatory reporting and public dissemination is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the approach and prophylactically will help ensure that the purposes those provisions of the Dodd-Frank Act are not undermined. *See* Section II.B.2(e), *supra; see also* Section II.B.2(d), *supra.*

For example, if the reporting requirements do not apply to transactions among non-U.S. persons that receive guarantees from U.S. persons and foreign branches of U.S. banks, then U.S. persons would have an incentive to evade the reporting requirements by conducting transactions with other U.S. persons through guaranteed foreign affiliates or foreign branches. Altering the form of the transaction in this manner would allow U.S. persons to continue to avail themselves of transparency in the U.S. security-based swap market while themselves evading the requirements intended to enhance that transparency, even though the substance of the transaction remains unchanged.

[898] *See* Rule 908(a)(2) of Regulation SBSR, as originally proposed. *See also* Regulation SBSR Proposing Release, 75 FR 75239–40.

each side, whether directly or indirectly.

Re-proposed Rule 908(a)(2)(iii) would provide that a security-based swap would be subject to public dissemination if at least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch [899]). This prong generally reincorporates the original proposal's approach that a security-based swap executed anywhere in the world and having just one U.S. person counterparty would be subject to public dissemination. The Commission generally believes that a security-based swap transaction having even just one U.S. person direct counterparty generally should be viewed as part of the U.S. security-based swap market and, as such, should be subject to Title VII's public dissemination requirement. The Commission preliminarily believes that the benefits of requiring public dissemination of all security-based swaps involving at least one U.S. person direct counterparty would inure to other U.S. persons that transact in the same or similar instruments.

However, re-proposed Rule 908(a)(2)(iii) would provide a limited exception to the general rule that any transaction involving a U.S. person direct counterparty would be subject to public dissemination; re-proposed Rule 908(a)(2)(iii) would not apply if the transaction is conducted through a foreign branch.[900] The Commission is concerned that, if it did not take this approach, non-U.S. market participants might avoid entering into security-based swaps with the foreign branches of U.S. banks so as to avoid their security-based swaps being publicly disseminated. The Commission notes that registration with the local regulatory authority to engage in banking business is inherent in the proposed definition of ''foreign branch.'' This approach would restrict the proposed exception to public dissemination for transactions conducted through a foreign branch.[901] The Commission further notes that the proposed exclusion for transactions conducted through a foreign branch is equivalent to the proposed approach for transactions conducted by foreign affiliates that are guaranteed by a U.S. person. In the case of a security-based swap transaction executed outside the United States between a non-U.S. person and either the guaranteed foreign affiliate or the foreign branch of the U.S. bank, re-proposed Rule 908(a)(2) would not require public dissemination of the transaction. Re-proposed Rule 908(a)(2)(iii) would not require public dissemination if the transaction were conducted through a foreign branch. Re-proposed Rule 908(a)(2)(ii) would not require public dissemination if the only U.S. person involved in the transaction were the U.S. person providing the guarantee.

Re-proposed Rule 908(a)(2)(iv) would provide that a security-based swap would be subject to public dissemination if one side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer, as defined in Section 3(a)(71) of the Exchange Act and the rules and regulations thereunder. The Commission notes that re-proposed Rule 908(a)(2)(ii) would require public dissemination of a transaction if both sides include a U.S. person. Under re-proposed Rule 908(a)(2)(iv), however, public dissemination would be required when only one side includes a U.S. person, provided the other side includes a non-U.S. person security-based swap dealer. The Commission preliminarily believes that both types of transaction generally should be considered part of the U.S. security-based swap market and, as such, should be subject to Title VII's public dissemination requirement. As the Commission has previously stated, post-trade transparency of security-based swap transactions would reduce information asymmetries and could have the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the security-based swap market.[902] Post-trade transparency of security-based swap transactions also has the potential to improve valuation models and thereby contribute to more efficient capital allocation.[903] The Commission preliminarily believes that *not* subjecting transactions between U.S. persons (whether directly or indirectly) or between a U.S. person and a non-U.S. person security-based swap dealer to post-trade transparency would undermine these goals. The fact that both sides of the transaction include a U.S. person, or that one side includes a U.S. person and the other side includes a person that conducts enough U.S. business to warrant requiring it to register with the Commission, suggests that they are engaging in the types of transactions that might be engaged in by other U.S. persons or others who are required to register with the Commission. Furthermore, in the absence of re-proposed Rule 908(a)(2)(iv), a non-U.S. person security-based swap dealer could encourage foreign affiliates that are guaranteed by a U.S. parent to transact business with it outside the United States in order to evade the public dissemination requirement.[904] If re-proposed Rule 908(a)(2)(iv) applied, all transactions between a security-based swap dealer (regardless of whether it is a U.S. person) and a U.S. person (whether as a direct or indirect counterparty), would be required to be publicly disseminated, regardless of where such transactions are conducted. Finally, the Commission notes that Section 13(m)(1)(D) of the Exchange Act gives the Commission authority to require registered entities—such as security-based swap dealers—regardless of whether or not they are U.S. persons, to publicly disseminate security-based swap transaction and pricing data.

However, the Commission notes that re-proposed Rule 908(a)(2) would not require public dissemination of a security-based swap transacted outside the United States between two non-U.S. persons that are security-based swap dealers (assuming that neither side is guaranteed by a U.S. person). Non-U.S. person security-based swap dealers are likely to have significant operations in foreign security-based swap markets. A transaction between two such non-U.S. person security-based swap dealers conducted outside the United States is less likely than a transaction conducted within the United States or a transaction

[899] The term ''transaction conducted through a foreign branch'' would be defined in re-proposed Rule 900(hh) of Regulation SBSR to cross-reference the definition of that term in proposed Rule 3a71–3(a)(4) under the Exchange Act, as discussed in Section III.B.7 above.

[900] However, a security-based swap having a direct counterparty that is a foreign branch could be subject to public dissemination for other reasons—*e.g.,* if the transaction included a U.S. person on the other side. *See* re-proposed Rule 908(a)(2)(ii) of Regulation SBSR.

[901] Thus, for example, a security-based swap involving a U.S. person that sends staff to a foreign country to negotiate and execute the transaction but does not have a recognized foreign branch in that country would be required to be publicly disseminated, and would not qualify for the proposed exclusion in re-proposed Rule 908(a)(2)(iii) for transactions conducted through a foreign branch.

[902] *See* Regulation SBSR Proposing Release, 75 FR 75267.

[903] *See id.* at 75267–68.

[904] The Commission notes that re-proposed Rule 908(a)(2)(iii) of Regulation SBSR would require public dissemination if only one direct counterparty is a U.S. person, regardless of the status, nationality, or place of domicile of the other direct counterparty. Thus, re-proposed Rule 908(a)(2)(iii) already would require public dissemination in the case of a security-based swap between a non-U.S. person security-based swap dealer and a U.S. person *direct* counterparty. Re-proposed Rule 908(a)(2)(iv) of Regulation SBSR would, in addition, require public dissemination in the case of a security-based swap between a non-U.S. person security-based swap dealer and a U.S. person *indirect* counterparty.

involving a U.S. person on the other side to affect the U.S. security-based swap market. Therefore, the Commission is not proposing to require public dissemination of transactions conducted outside the United States between two non-U.S. person security-based swap dealers.

Re-proposed Rule 908(a)(2)(v) would preserve the principle from the original proposal that a security-based swap would be subject to public dissemination if it is cleared through a clearing agency having its principal place of business in the United States.[905] As noted in the Regulation SBSR Proposing Release, the Commission preliminarily believes that, if non-U.S. persons determined to clear a security-based swap transaction through a clearing agency having its principal place of business in the United States, this suggests that the clearing agency has made the security-based swap eligible for clearing because at least some U.S. counterparties might wish to trade the security-based swap as well.[906] The Commission preliminarily believes, therefore, that requiring public dissemination of the security-based swap transaction would promote price discovery for market participants in the United States and elsewhere.[907]

A security-based swap transaction would need to meet only one prong of re-proposed Rule 908(a)(2) to trigger the public dissemination requirement. For example, assume a security-based swap is solicited, negotiated, executed, and cleared in London between (A) the London branch of a U.S. financial institution and (B) a London-based firm (*i.e.,* a non-U.S. person) that has registered with the Commission as a security-based swap dealer. Re-proposed Rule 908(a)(2)(i) would not apply, because the transaction is not conducted within the United States. Re-proposed Rule 908(a)(2)(v) would not apply, because the security-based swap is not cleared in the United States. Re-proposed Rule 908(a)(2)(ii) would not apply, because there is not a direct or indirect counterparty that is a U.S. person on both sides of the transaction. Re-proposed Rule 908(a)(2)(iii) would not apply because neither side includes a direct counterparty that is a U.S. person that would trigger public dissemination; here, the U.S. person direct counterparty is acting through a foreign branch, which is carved out of re-proposed Rule 908(a)(2)(iii). However, this transaction would be subject to public dissemination under re-proposed Rule 908(a)(2)(iv): one side includes a U.S. person (in this case, the London branch of the U.S. bank) and the other side includes a non-U.S. person security-based swap dealer. The result would be the same if, instead of a London branch of a U.S. financial institution, one of the direct counterparties were the London-based affiliate of a U.S. person that guarantees the performance of the London subsidiary (*i.e.,* the transaction is between, on one side, a security-based swap dealer and, on the other side, an indirect counterparty that is a U.S. person).

Request for Comment

The Commission requests comment on all aspects of the re-proposed Rule 908(a), including the following:

- Do you agree with the approach taken in re-proposed Rule 908(a) that a security-based swap should be subject to regulatory reporting and public dissemination regardless of the nationality or place of domicile of the counterparties if it is a transaction conducted in the United States? Why or why not? Do you agree with the Commission's use of the term ''transaction conducted within the United States'' in re-proposed Rule 908? Why or why not?
- Do you agree with the approach taken in re-proposed Rule 908(a) that a security-based swap cleared through a clearing agency having its principal place of business in the United States should be subject to the regulatory reporting and public dissemination requirements? Why or why not?
- Do you agree with the Commission's general approach of treating guarantors as counterparties for purposes of security-based swap trade reporting requirements? Why or why not? Do you believe that a security-based swap should be subject to regulatory reporting solely because one side includes a guarantor that is a U.S. person? Why or why not? Would the Commission's ability to exercise prudential and regulatory oversight of the securities markets be compromised if it did not have the ability to learn about all security-based swap positions held by U.S. persons, including guarantors? Why or why not?
- Do you believe that a security-based swap should be subject to regulatory reporting solely because one side includes a security-based swap dealer or major security-based swap participant, regardless of the nationality or place of domicile of that entity? Why or why not? Would the Commission's ability to exercise prudential and regulatory oversight of entities registered with it be compromised if it did not have the ability to learn about all security-based swap positions held by such entities? Why or why not?
- In general, do you agree with how re-proposed Rule 908(a) would apply to security-based swaps entered into by non-U.S. person security-based swap dealers and major security-based swap participants? Why or why not?
- Do you agree with the requirement, in re-proposed Rule 908(a)(2)(ii), that a security-based swap should be subject to public dissemination if there is a direct or indirect counterparty that is a U.S. person on each side of the transaction? Why or why not? What would be the benefits of requiring public dissemination in this scenario? What would be the costs? Please be specific.
- Do you agree with the requirement, in re-proposed Rule 908(a)(2)(iii), that a security-based swap should be subject to public dissemination if at least one direct counterparty is a U.S. person, even if the transaction is not conducted within the United States? Why or why not? What would be the benefits of requiring public dissemination in this scenario? What would be the costs? Please be specific. Do you agree with the exception to this general rule for transactions conducted through a foreign branch of a U.S. person? Why or why not? Should the exception be limited to foreign branches? Why or why not? Are there any alternatives that the Commission should consider? If so, what are they?
- Do you agree with the requirement, in re-proposed Rule 908(a)(2)(iv), that would provide that a security-based swap, even if not a transaction conducted within the United States, would be subject to public dissemination if one side includes a U.S. person and the other side includes a non-U.S. person security-based swap dealer? Why or why not? What would be the benefits of requiring public dissemination in this scenario? What would be the costs? Please be specific.
- Should the Commission require public dissemination of security-based swaps cleared by any clearing agency registered with the Commission, even if its principal place of business is outside the United States? Why or why not?
- In general, do you agree the distinctions drawn in the scenarios set forth in re-proposed Rule 908(a) regarding which security-based swaps would be subject to the regulatory reporting and public dissemination? Why or why not?

[905] *See* Rule 908(a)(3) of Regulation SBSR, as originally proposed.

[906] *See* Regulation SBSR Proposing Release, 75 FR 75240.

[907] *See id.*

2. Revisions to Proposed Rule 908(b)

In the initial proposal, the Commission explained when duties would be imposed on non-U.S. person counterparties of security-based swaps when some connection to the United States might be present. Rule 908(b), as initially proposed, provided that no duties would be imposed on a counterparty unless one of the following conditions were true:

- The counterparty is a U.S. person;
- The security-based swap is executed in the United States or through any means of interstate commerce; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Under the initial proposal, if none of these conditions were true, a foreign counterparty ''would not become a 'participant' of an SDR and would not become subject to proposed Regulation SBSR'' [908]—even if the security-based swap itself and its counterparty were subject to Regulation SBSR.

In light of other revisions being made to Regulation SBSR discussed above, the Commission is now proposing several conforming revisions to proposed Rule 908(b). First, consistent with the other revisions described above, Rule 908(b) is being re-proposed to account for the possibility that a non-U.S. person security-based swap dealer or major security-based swap participant could incur a duty to report. Second, consistent with the broader conceptual framework set forth in this release, the ''interstate commerce clause,'' used in the initial proposal to describe a security-based swap that may generate reporting duties for counterparties under Regulation SBSR,[909] is being replaced with the new concept of a ''transaction conducted within the United States'' that is being used throughout the Commission's proposed cross-border rules.[910] Therefore, re-proposed Rule 908(b) would provide that a direct or indirect counterparty to a security-based swap would not incur any obligation under Regulation SBSR unless the counterparty were:

- A U.S. person;
- A security-based swap dealer or major security-based swap participant; or
- A counterparty to a transaction conducted within the United States.[911]

Request for Comment

The Commission requests comment on all aspects of the re-proposed Rule 908(b), including the following:

- Do you agree with the removal of the ''interstate commerce clause'' contained in Rules 908(a)(2) and 908(b)(2), as originally proposed, and its replacement with the new concept of ''transaction conducted within the United States''? Does this new concept provide additional clarity? If not, what alternative formulations of the concept should the Commission consider, and why? Please be specific.

D. Modifications to ''Reporting Party'' Rules and Assigning Duty To Report

The Commission also is re-proposing aspects of Regulation SBSR that would specify who must report the security-based swap. Rule 900, as initially proposed, would define ''reporting party'' as ''the counterparty to a security-based swap with the duty to report information in accordance with [Regulation SBSR] to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.'' Because the Commission is now proposing to extend the reporting requirement to security-based swaps executed outside the United States if the performance of one or both direct counterparties under the security-based swap is guaranteed by a U.S. person,[912] the Commission also is re-proposing the rules that would assign the duty to report in a number of ways. Overall, these revisions are designed to assign the responsibility to report a security-based swap transaction to persons that the Commission preliminarily believes have greater capacity to fulfill that responsibility, and in a manner consistent with the reporting hierarchy set forth in Section 13A(a)(3) of the Exchange Act.[913]

First, the Commission is revising the proposed term ''reporting party'' to ''reporting side.'' A ''side'' would be defined in new paragraph (ee) of re-proposed Rule 900 to mean ''a direct counterparty and any indirect counterparty.'' ''Reporting side'' would be defined as ''the side of a security-based swap having the duty to report information in accordance with §§ 242.900–911 to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.'' Under this formulation, if a side has the duty to report a security-based swap transaction, any counterparty on that side—direct or indirect—would have responsibility for carrying out the reporting obligation. The Commission preliminarily believes that it would be impractical and unnecessarily complicated to attempt to assign the reporting duty to either the direct or indirect counterparty specifically, and is instead proposing to assign the duty to the side jointly.[914]

Furthermore, the Commission is revising our proposed approach to assigning the reporting duty to minimize consideration of the domicile of the counterparties, and to focus more on their status (*i.e.,* whether or not a counterparty is a security-based swap dealer or major security-based swap participant). The initial proposal laid out three scenarios for assigning the reporting duty: Both direct counterparties are U.S. persons, only one direct counterparty is a U.S. person, and neither direct counterparty is a U.S.

[908] Regulation SBSR Proposing Release, 75 FR 75240.

[909] *See* Rule 908(b)(2) of Regulation SBSR, as originally proposed.

[910] *See* Section III.B.6, *supra* (discussing the proposed definition of ''transaction conducted within the Unites States'').

[911] In addition, the Commission is re-proposing the definition of the term ''participant'' in Rule 900 to make changes conforming to re-proposed Rule 908(b) of Regulation SBSR. The term ''participant'' was designed to include any counterparty to a security-based swap that might incur duties under Regulation SBSR. Rule 906(a) of Regulation SBSR, as proposed and re-proposed, would impose certain duties on participants other than those required to initially report the transaction. The originally proposed definition of ''participant'' would track proposed Rule 908(b) and include a U.S. person that is a counterparty to a security-based swap that is required to be reported to a registered SDR, or a non-U.S. person that is a counterparty to a security-based swap that is: (i) Required to be reported to a registered SDR; or (ii) executed in the United States or through any means of interstate commerce, or cleared through a clearing agency having its principal place of business in the United States. As re-proposed, ''participant'' would be defined simply as ''a person that is a counterparty to a security-based swap that meets the criteria of [Rule 908(b)].'' This would include both direct and indirect counterparties.

[912] The Commission notes that, under both the initial and current proposals, security-based swaps would be subject to Regulation SBSR if they are executed within the United States, regardless of who the counterparties are or whether they are guaranteed by U.S. persons.

[913] 15 U.S.C. 78m–1(a)(3). Section 13A(a)(3) of the Exchange Act assigns to specific kinds of counterparties the duty to report uncleared security-based swaps to an SDR or to the Commission.

[914] The Commission anticipates that the direct counterparty and any indirect counterparty on the reporting side would decide which of them would carry out the duty to report the transaction. Alternately, the direct and indirect counterparties on the reporting side could elect to have a third party carry out the duty to report on their behalf, although the direct and indirect counterparties on the reporting side—not the agent—would incur legal liability for the agent's failure to report the transaction in a timely and complete manner.

person.[915] The definition of ''U.S. person''—as proposed and re-proposed—does not include a security-based swap dealer or major security-based swap participant that is organized under the laws of a foreign jurisdiction and has its principal place of business outside the United States, even though it is a security-based swap dealer or major security-based swap participant under Title VII. Thus, under the initial proposal, for a security-based swap between (A) an end user or other counterparty that is a U.S. person and is not a security-based swap dealer or major security-based swap participant (a ''non-registered U.S. counterparty'') and (B) a security-based swap dealer or major security-based swap participant that is a non-U.S. person, the non-registered U.S. counterparty would have been the reporting party.

Several commenters argued that this requirement would unfairly place the reporting burden on the non-registered U.S. counterparty. These commenters generally argued that, due to their status as security-based swap dealers and major security-based swap participants, even security-based swap dealers and major security-based swap participants that are not U.S. persons have greater technological capability than non-registered U.S. counterparties to carry out the reporting function.[916] These commenters generally maintained that non-registered U.S. counterparties would incur significant costs to build the systems necessary to report security-based swaps.[917] Certain commenters noted the unequal treatment and potential consequences that could result if non-registered U.S. counterparties incurred the reporting obligation for security-based swaps that they entered into with non-U.S. security-based swap dealers and non-U.S. major security-based swap participants.[918] One commenter specifically recommended that security-based swap dealers and major security-based swap participants that are not U.S. persons be subject to the same regulatory reporting responsibilities as security-based swap dealers and major security-based swap participants that are U.S. persons, when transacting with non-registered U.S. counterparties.[919]

The Commission generally agrees with these arguments. The Commission preliminarily believes that non-U.S. person security-based swap dealers and major security-based swap participants, like U.S. person security-based swap dealers and major security-based swap participants, have greater technological capability than non-registered U.S. persons to carry out the reporting function. Furthermore, the Commission preliminarily sees no reason not to assign the duty to report to non-U.S. person security-based swap dealers and major security-based swap participants in appropriate circumstances. Although such entities are not U.S. persons, the fact that they are security-based swap dealers and major security-based swap participants necessarily implies that they have substantial contacts with the U.S. security-based swap market and thus could incur significant regulatory duties arising from their U.S. business. Accordingly, the Commission is re-proposing Rule 901(a) to provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases. Re-proposed Rule 901(a) now provides as follows:

- If both sides of the security-based swap include a security-based swap dealer, the sides would be required to select the reporting side.
- If only one side of the security-based swap includes a security-based swap dealer, that side would be the reporting side.
- If both sides of the security-based swap include a major security-based swap participant, the sides would be required to select the reporting side.
- If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant would be reporting side.
- If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) if both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side; and (ii) if only one side includes a U.S. person, that side would be the reporting side.

Re-proposed Rule 901(a)(2) would preserve the reporting hierarchy of proposed Rule 901(a), while additionally taking into account the possibility that a direct counterparty to a security-based swap might have a guarantor that is better suited for carrying out the reporting duty. Thus, the newly proposed approach set forth in re-proposed Rule 901(a) looks to the status of each person on a side (*i.e.,* whether it is a security-based swap dealer or major security-based swap participant), not the status of only the direct counterparties. Under the initial proposal, if a non-U.S. person were a direct counterparty to a security-based swap executed outside the United States, that non-U.S. person would under no circumstances have had a duty to report the security-based swap, even if it were guaranteed by a U.S. person or if it were a security-based swap dealer or major security-based swap participant. The Commission is now proposing to refocus the reporting duty primarily on the status of the counterparties, rather than on their nationality or place of domicile.

Under re-proposed Rule 901(a), the only time that the domicile of the counterparties could determine who must report is if neither side includes a security-based swap dealer or major security-based swap participant. In such case, if one side includes a U.S. person while the other side does not, the side with the U.S. person would be the reporting side. Similar to the initial proposal, however, if both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side.

These proposed revisions to Regulation SBSR are designed to more efficiently align the duty to report with the entities that the Commission preliminarily believes are best suited to carrying out that duty. The Commission has previously noted that it ''understands that many reporting parties already have established linkages to entities that may register as SDRs, which could significantly reduce the out-of-pocket costs associated with

[915] *See* Rules 901(a)(1), (2), and (3) of Regulation SBSR, as originally proposed. *See also* Regulation SBSR Proposing Release, 75 FR 75211.

[916] *See* DTCC I at 8; ICI Letter at 5 (stating that security-based swap dealers are the only market participants that currently have the standardization necessary to report the required security-based swap data); ISDA/SIFMA Letter I at 19; SIFMA Letter I at 3 (arguing that an end user should not incur higher transaction costs or potential legal liabilities depending on the domicile of its counterparty); Vanguard Letter at 6 (stating that non-U.S. security-based swap dealers and major security-based swap participants would be more likely to have appropriate systems in place to facilitate reporting).

[917] *See* DTCC I at 27; ICI Letter at 5 (stating that investment funds would incur significant costs to build the necessary systems); Vanguard Letter at 6 (stating that end users would be required to commit significant capital and resources to build out their reporting systems). *See also* MarkitSERV Letter I at 9 (suggesting that, in light of capacity and resource constraints, a non-registered U.S. counterparty would seek to delegate any reporting obligations).

[918] *See* ISDA/SIFMA Letter I at 19 (requiring end users to report could result in end users declining to trade with non-U.S. security-based swap dealers, which could increase systemic risk by decreasing liquidity and further concentrating the U.S. security-based swap market); Cleary Letter II at 18 (requiring end users to report could result in their declining to trade with non-U.S. security-based swap dealers, thereby potentially reducing price competition).

[919] *See* SIFMA Letter I at 2.

establishing the reporting function.'' [920] These proposed revisions also are designed to minimize the burdens faced by non-registered U.S. counterparties that might enter into security-based swaps with non-U.S. person security-based swap dealers or major security-based swap participants, as well as to clarify and simplify the reporting rules more generally.

The following examples explain the operation of re-proposed Rule 901(a).

- *Example 1.* A non-registered U.S. counterparty executes a security-based swap with a security-based swap dealer that is a non-U.S. person. Neither side has a guarantor. The security-based swap dealer would be the reporting side.
- *Example 2.* Same facts as Example 1, except that the non-registered U.S. counterparty is guaranteed by a security-based swap dealer. Because both sides include a person that is a security-based swap dealer, the sides would be required to select which is the reporting side.
- *Example 3.* A security-based swap is executed in London between a foreign subsidiary of a U.S. person and a French hedge fund. The performance of the foreign subsidiary is guaranteed by its U.S. parent, a major security-based swap participant. The side consisting of the major security-based swap participant and its foreign subsidiary would be the reporting side.
- *Example 4.* The New York branch of a German bank executes, in New York, a security-based swap with the New York branch of a Brazilian bank. Neither foreign bank is a security-based swap dealer or a major security-based swap participant and neither direct counterparty is guaranteed by a U.S. person. The sides must select which would be the reporting side.
- *Example 5.* A U.S. hedge fund executes a security-based swap in London with a foreign bank that is registered as a dealer in its home jurisdiction, but is not a security-based swap dealer or major security-based swap participant under Title VII. Neither direct counterparty is guaranteed by a U.S. person. The U.S. hedge fund would be the reporting side, because its side includes the only U.S. person.

Request for Comment

The Commission generally requests comment on all aspects of issues regarding cross-border inter-affiliate transactions, including the following:

- Do you agree with the proposed definitions for ''counterparty,'' ''direct counterparty,'' and ''indirect counterparty''? Why or why not?
- Do you agree with the new proposed definitions of ''side'' and ''reporting side''? Why or why not? If you disagree with these proposed definitions, what alternative formulations should the Commission consider, and why?
- Do you believe that the re-proposed provisions would appropriately reduce the potential reporting burdens of non-registered U.S. counterparties? Why or why not?
- Do you agree with the shifting of reporting burdens as detailed in re-proposed Rule 901(a)? Why or why not? Do you believe it is appropriate to require a security-based swap dealer or major security-based swap participant that is not a U.S. person to incur the duty to report a security-based swap? Why or why not?
- Should re-proposed Rule 901(a) focus only on the status of the direct counterparties (*i.e.,* whether or not they are security-based swap dealers or major security-based swap participants) rather than also taking into account the status of any indirect counterparties? Why or why not?
- Do you agree, as provided in re-proposed Rule 901(a), that the domicile of the counterparties should determine who must report only if neither side includes a security-based swap dealer or major security-based swap participant? Why or why not?
- Do you believe that Rule 901(a), as re-proposed, would more efficiently align the burdens of reporting with the entities having the greatest technological capability to carry out the reporting function? If not, how could the Commission more efficiently align the burdens of reporting with the operational capabilities of security-based swap counterparties? Please be specific.
- Are the examples provided sufficiently clear to inform entities of their reporting obligations? Would additional examples be helpful? If so, please provide specific examples that should be addressed by the Commission.

E. Other Technical and Conforming Changes

In connection with the new provisions of re-proposed Regulation SBSR discussed above, the Commission is proposing to make various minor technical and conforming changes to other parts of the regulation. These changes are described below.

Rule 902(a), as initially proposed, would require a registered SDRs to publicly disseminate a transaction report of any security-based swap immediately upon receipt of information about the security-based swap, except in the case of a block trade. Re-proposed Rule 908, however, contemplates situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated.[921] Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would not have an obligation to publicly disseminate a transaction report for any such security-based swap.

Similarly, Rule 910(b)(4), as initially proposed, would provide that, in Phase 4 of the Regulation SBSR compliance schedule, ''[a]ll security-based swaps reported to the registered security-based swap data repository shall be subject to real-time public dissemination as specified in § 242.902.'' As noted above, under the re-proposal of Rule 908, certain security-based swaps would be subject to regulatory reporting but not public dissemination requirements. Therefore, the Commission is re-proposing Rule 910(b)(4) to provide that, ''All security-based swaps received by the registered security-based swap data repository shall be treated in a manner consistent with §§ 242.902, 242.905, and 242.908.'' [922]

In addition, the Commission is proposing certain changes to proposed Rules 901(c) and 901(d), which address the data elements to be reported to a registered SDR, to reflect that, under the re-proposal, certain security-based swaps may be subject to regulatory reporting but not public dissemination. Rule 901(c), as initially proposed, was titled ''Information to be reported in real time.'' Under Rule 902(a), as originally proposed, the registered SDR to which such information was reported would be required to promptly disseminate to the public such information (except in the

[920] Regulation SBSR Proposing Release, 75 FR 75265.

[921] This could occur in the case of a security-based swap between (i) a foreign branch of a U.S. bank, a non-U.S. person security-based swap dealer, or a non-U.S. person that has a guarantee from a U.S. person, and (ii) a non-U.S. person that is not guaranteed by a U.S. person; and further provided that neither side solicits, negotiates, executes, books, or submits to clear the transaction within the United States. *See* Section VIII.C, *supra.*

[922] Re-proposed Rules 902 and 908 of Regulation SBSR, when read together, would provide that certain security-based swaps reported to a registered SDR would not be publicly disseminated. The Commission also is adding the reference to Rule 905 here to provide that, after Phase 4, a registered SDR must publicly disseminate not only *initial* transaction reports (consistent with re-proposed Rules 902 and 908), but also *corrected* transaction reports (consistent with re-proposed Rule 905).

case of a block trade). However, the Commission preliminarily believes that, if a security-based swap were subject to regulatory reporting but not public dissemination, there is no need to require that information about the security-based swap be reported in real time. Therefore, the introductory language to Rule 901(c) is being re-proposed as follows: ''For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section.'' In addition, re-proposed Rule 901(c) would be retitled ''Primary trade information,'' thus eliminating the reference to real-time reporting—since the information required to be reported under Rule 901(c) would no longer in all cases be required to be reported in real time. Furthermore, re-proposed Rule 901(d) would be retitled ''Secondary trade information.'' [923]

The Commission also is re-proposing Rule 905(b)(2) to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to public dissemination.[924]

Rule 901(c)(10), as initially proposed, provided that the following data element would be required to be reported: ''If both counterparties to a security-based swap are security-based swap dealers, an indication to that effect.'' As the Commission stated in the Regulation SBSR Proposing Release: ''Prices of transactions involving a dealer and a non-dealer are typically 'all-in' prices that include a mark-up or mark-down, while interdealer transaction prices typically do not. Thus, the Commission believes that requiring an indication of whether a [security-based swap] was an interdealer transaction or a transaction between a dealer and a non-dealer counterparty would enhance transparency by allowing market participants to more accurately assess the reported price for a [security-based swap].'' [925] The Commission is now re-proposing Rule 901(c)(10) as follows: ''If both sides of the security-based swap include a security-based swap dealer, an indication to that effect.'' The re-proposed rule would clarify that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap. The Commission continues to believe that, in either case, a security-based swap having a security-based swap dealer on each side could, all other things being equal, be priced differently than a security-based swap having a security-based swap dealer on only one side. Therefore, the Commission continues to believe that the existence of a security-based swap dealer on each side should be reported to the registered SDR and made known to the public.

The Commission is re-proposing Rule 901(d)(1)(ii) to require reporting of the broker ID, desk ID, and trader ID, as applicable, only of the *direct* counterparty on the reporting side. The Commission preliminarily believes that it would be impractical and unnecessary to report such data elements with respect to an indirect counterparty, as such elements might not be applicable to an indirect counterparty.[926] Similarly, Rule 901(d)(1)(iii) is being re-proposed to require reporting of a description of the terms and contingencies of the payment streams only of each *direct* counterparty to the other. The Commission is including the word ''direct'' to avoid extending Rule 901(d)(1)(iii) to indirect counterparty relationships, where payments generally would not flow to or from an indirect counterparty.

Proposed Rule 901(e) set forth provisions for reporting life cycle events of a security-based swap. The basic approach set forth in proposed Rule 901(e) was that, generally, the original reporting party of the initial transaction would have the responsibility to report any subsequent life cycle event; this approach remains unchanged in the re-proposal. However, if the life cycle event were an assignment or novation that removed the original reporting party, either the new counterparty or the original counterparty would have to be the reporting party. Further, Rule 901(e), as initially proposed, would provide that the new counterparty would be the reporting party if it were a U.S. person, whereas the other counterparty would be the new reporting party if the new counterparty were not a U.S. person.

However, as discussed above, the Commission is now proposing the concept of a ''reporting side,'' which would include the direct and any indirect counterparty. Further, as discussed above, the Commission is proposing that non-U.S. person security-based swap dealers or major security-based swap participants would, in certain instances, incur a duty to report. Thus, the Commission is re-proposing Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant (references to which are being added to Rule 901(e)). The Commission preliminarily believes that, if the new side includes a security-based swap dealer or major security-based swap participant, the new side should retain the duty to report. This approach is designed to align reporting duties with the market participants that the Commission preliminarily believes are better suited to carrying them out because non-U.S. person security-based swap dealers and major security-based swap participants likely have already taken significant steps to establish and maintain the systems, processes and procedures, and staff resources necessary to report security-based swaps currently.[927]

Request for Comment

The Commission generally requests comment on all aspects of all the technical and conforming changes in re-proposed Regulation SBSR, including the following:

- Do you disagree with any of the technical and conforming changes in the re-proposed rules? If so, why?
- Do you agree with the proposed change to Rule 902(a) which provides that a registered SDR would not have an obligation to publicly disseminate a transaction report for any security-based swap that is required to be reported but not publically disseminated? Why or why not?
- Do you agree with the proposed change to Rule 910(b)(4) that would remove the requirement that ''[a]ll security-based swaps reported to the registered security-based swap data

[923] In the original proposal, Rule 901(d) of Regulation SBSR was titled ''Additional information that must be reported.'' This additional information would be for regulatory purposes only and would not be publicly disseminated.

[924] Re-proposed Rule 905(b)(2) of Regulation SBSR also substitutes the word ''counterparties''—which is a defined term in Regulation SBSR—for the word ''parties,'' which was used in the initial proposal but was not a defined term.

[925] Regulation SBSR Proposing Release, 75 FR 75214.

[926] An indirect counterparty typically would not have a desk or trader involved in the transaction, or engage the services of a broker, in the same manner as a direct counterparty.

[927] *See* Section VIII.D, *supra* (explaining rationale for proposing to align reporting duties with greater capability to carry out such duties).

repository [] be subject to real-time public dissemination as specified in § 242.902'' and replace it with the requirement that ''[a]ll security-based swaps received by the registered security-based swap data repository [] be treated in a manner consistent with §§ 242.902, 242.905, and 242.908''? Are there any alternative formulations of the re-proposed rule text that the Commission should consider? If so, what are they? Please be specific.

• Do you agree with the proposed changes to the data elements initially contained in proposed Rules 901(c) and 901(d)? Specifically, do you agree with the reformulation of the introductory language contained in re-proposed Rule 901(c) to reflect situations in which a security-based swap could be subject to regulatory reporting but not public dissemination? Why or why not? Do you agree with the retitling of re-proposed Rule 901(c) to ''Primary trade information'' to eliminate the reference to real-time reporting? Why or why not?

• Do you agree with the proposed change to re-proposed Rule 905(b)(2) to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to public dissemination? Why or why not?

• Do you agree with the proposed change to re-proposed Rule 901(c)(10) to clarify that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap? Why or why not?

• Do you agree with the proposed change to re-proposed Rule 901(d)(1)(ii) to require the reporting of the broker ID, desk ID, and trader ID only of the direct counterparty on the reporting side? Why or why not? Similarly, do you agree with the requirement in re-proposed Rule 901(d)(1)(iii) for reporting of a description of the terms and contingencies of the payment streams only of each *direct* counterparty to the other in order to avoid extending the rule to indirect counterparty relationships? Why or why not?

• Do you agree with the proposed change to re-proposed Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person or a security-based swap dealer or major security-based swap participant? Why or why not?

• Are there any other technical and conforming changes that the Commission should make to re-proposed Regulation SBSR?

F. Cross-Border Inter-Affiliate Transactions

Commenters raised concerns about applying Title VII reporting or dissemination requirements to cross-border inter-affiliate security-based swaps.[928] One commenter argued that, for a foreign entity registered as a bank holding company and subject to the consolidated supervision of the Federal Reserve, the reporting of inter-affiliate transactions would be superfluous because the Federal Reserve has ''ample authority to monitor transactions among affiliates.'' [929] The second commenter expressed concern about duplicative or conflicting regulation of inter-affiliate transactions. It stated that, for example, inter-affiliate security-based swaps ''could be required to be publicly reported in multiple jurisdictions, even though they are not suitable for reporting in any jurisdiction.'' [930] A third commenter argued that inter-affiliate security-based swaps generally—not referencing cross-border inter-affiliate transactions in particular—should not be subject to public dissemination requirements, stating that ''public reporting could confuse market participants with irrelevant information and raise the costs to corporate groups of managing risk internally.'' [931]

The Commission preliminarily believes that regulatory reporting and public dissemination serve different purposes and, while these two requirements are related, their application to cross-border inter-affiliate transactions should be considered separately. The Commission notes that the statutory provisions that require regulatory reporting and public dissemination of security-based swap transactions state that ''each'' security-based swap shall be reported; these statutory provisions do not by their terms distinguish such reporting based on particular characteristics (such as being negotiated at arm's length). Section 13A(a)(1) of the Exchange Act [932] provides that each security-based swap that is not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act [933] provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act [934] generally provides that transaction, volume, and pricing data of security-based swaps shall be publicly disseminated. With respect to regulatory reporting of cross-border inter-affiliate security-based swaps, the Commission preliminarily believes that regulators should have ready access to information about the precise legal entities that hold risk positions in all security-based swaps. While it is true that the Federal Reserve or perhaps other regulators might exercise consolidated supervision over a group, this might not provide regulators with current and specific information about security-based swap positions taken by the group's subsidiaries. As a result, it would likely be more difficult for the Commission to conduct general market analysis or surveillance of market behavior, and could create particular problems during a crisis situation when having accurate and timely information about specific risk exposures could be crucial. Therefore, the Commission continues to believe that each cross-border inter-affiliate security-based swap that otherwise satisfies any of the criteria in re-proposed Rule 908(a)(1) should be subject to regulatory reporting.

With respect to public dissemination of cross-border inter-affiliate transaction data, the Commission preliminarily believes that the analysis of this issue in the cross-border context is in many ways similar to the analysis of dissemination of inter-affiliate transaction data in the domestic context. In particular, many of the issues raised by commenters with respect to the public dissemination of inter-affiliate transactions generally appear to be relevant whether a transaction is conducted within the United States or conducted on a cross-border basis. These general issues include a concern about information distortion, market confusion, and interference with internal risk management of a corporate group.

First, commenters stated that inter-affiliate transactions—whether cross-border or not—are typically risk transfers with no market impact. They believe that the market-facing transactions already would have been publicly reported, so requiring that inter-affiliate transactions also be publically reported would duplicate information already known to the public. The commenters express the concern that such ''double counting'' would distort information that is critical for price discovery and measuring liquidity, the depth of trading, and

[928] *See* Japanese Banks Letter at 5; Multiple Associations Letter IV at 11–12.

[929] Japanese Banks Letter at 5.

[930] Multiple Associations Letter IV at 16.

[931] Cleary Letter II at 17–18.

[932] 15 U.S.C. 78m–1(a)(1).

[933] 15 U.S.C. 78m(m)(1)(G).

[934] 15 U.S.C. 78m(m)(1)(C).

exposure to swaps in the market.[935] They also believe that it would distort the establishment of regulatory thresholds and analysis, as well as enforcement activities that require an accurate assessment of the swaps market.[936]

Second, commenters stated that affiliates often enter into an inter-affiliate transaction on terms linked to an external trade being hedged, which they are concerned could create confusion in the market if publicly reported. If markets move because of the external trade before the inter-affiliate transaction is entered into on a SEF or reported as an off-exchange trade, market participants could misconstrue the market's true direction and depth simply because of the disconnect in timing between the two offsetting trades.[937]

Third, commenters stated that public dissemination of inter-affiliate transactions could interfere with the internal risk management practices of a corporate group. For example, one entity in a group may be better positioned to take on a certain type of risk, even though another entity must, for unrelated reasons, actually enter into the transaction with an external counterparty. Public disclosure of a transaction between affiliates could prompt other market participants to act in a way that would prevent the corporate group from following through with its risk management strategy by, for instance, causing adverse price movements in the market that the risk-carrying affiliate would use to hedge.[938]

Beyond these concerns regarding the public dissemination of inter-affiliate transactions, commenters addressing the public reporting of cross-border inter-affiliate transactions focused more generally on duplicative and conflicting regulations. Using public dissemination as an example, one commenter stated that inter-affiliate security-based swaps ''could be required to be publicly reported in multiple jurisdictions, even though they are not suitable for reporting in any jurisdiction.'' [939] However, the Commission is not aware of any commenter proposing a treatment of cross-border inter-affiliate transactions under public dissemination requirements that differs substantively from proposals for the treatment of other inter-affiliate transactions.

The Commission has considered the issues raised by these commenters both with respect to inter-affiliate transactions generally and in the cross-border context. The common thread of the issues identified by commenters to date is that public dissemination should not be required for a security-based swap that is undertaken to transfer the risk of an initial security-based swap (between X and Y) to an affiliate (*i.e.,* from X to XA) because it would have no price discovery value or could even give market observers a false understanding of the nature of the transaction.[940] The Commission acknowledges that the initial security-based swap between X and Y likely would have more price discovery value than the subsequent inter-affiliate transaction between X to XA, all else being equal. In this hypothetical, the initial transaction presumably represents the mutual agreement of parties operating on an arm's-length basis to execute a trade at a particular price, while the latter transaction generally would not involve negotiation of the terms, particularly as regards to price. It may not follow, however, that the subsequent inter-affiliate transaction would have no price discovery value whatsoever, particularly in a cross-border context where multiple public dissemination requirements may be involved. Arguing that an inter-affiliate security-based swap has no price discovery value appears to presuppose that the initial, arm's-length security-based swap had been publicly disseminated. This could be the case if the initial security-based swap were subject to the rules of a jurisdiction having public dissemination requirements.[941] However, if the initial security-based swap had not been publicly disseminated, public dissemination of the cross-border inter-affiliate transaction, assuming it were subject to Rule 908(a)(2) of re-proposed Regulation SBSR,[942] might be the only way for the market to obtain any pricing information about the series of transactions. These circumstances could be present if the initial security-based swap were not subject to the rules of a jurisdiction having public dissemination requirements. In this case, public dissemination of the cross-border inter-affiliate transaction, assuming it were subject to Rule 908(a)(2) of re-proposed Regulation SBSR,[943] might be the only way for the market to obtain any pricing information about the series of transactions.

As described above, commenters also raised a general concern about the potential for duplicative and conflicting regulation of cross-border inter-affiliate transactions. The Commission is sensitive to these concerns both generally and in the context of public dissemination.[944] The treatment of these issues in connection with public dissemination is not dissimilar to their treatment in other contexts under Title VII, including the context of regulatory reporting. Accordingly, the Commission preliminarily believes that the concern expressed by the commenters should be addressed by the proposed substituted compliance policy and framework discussed in detail below, as well as when the Commission considers the adopting release for public dissemination, which the Commission anticipates will address the issue of dissemination of inter-affiliate transactions.[945]

In light of these considerations, the Commission preliminarily believes that cross-border inter-affiliate security-based swaps should not be excluded from the public dissemination requirements to the extent that inter-affiliate security-based swaps are not excluded as a general matter. The Commission preliminarily believes that the considerations regarding whether or not to exclude inter-affiliate cross-border security-based swaps from public dissemination on the grounds that they could be misleading or have no price discovery value are similar to the considerations regarding whether or not to exclude inter-affiliate security-based swaps generally. Similarly, the Commission preliminarily believes that any steps short of exclusion that could be taken to maximize the price discovery value that inter-affiliate cross-border security-based swaps may have (while minimizing any concern that they might mislead the market) are similar to the steps that could be taken with respect to inter-affiliate security-based swaps generally. Although the Commission is not in this release re-proposing any provisions of Regulation SBSR regarding the public dissemination of inter-affiliate security-

[935] *See* Multiple Associations Letter IV at 11–12.

[936] *See id.*

[937] *See id.* at 12.

[938] Cleary Letter II at 17.

[939] *See* note 930, *supra.*

[940] *See* Cleary Letter II at 17–18; Multiple Associations Letter IV at 16.

[941] *See* Multiple Associations Letter IV at 12 (''The market-facing swaps already will have been reported and therefore, to require that inter-affiliate swaps also be reported will duplicate information'').

[942] Re-proposed Rule 908(a)(2) of Regulation SBSR would describe when a cross-border security-based swap would be subject to public dissemination.

[943] *See id.*

[944] Duplicative and conflicting regulation is one of the considerations the Commission takes into account in proposing the approach to application of Title VII requirements to security-based swap transactions in the cross-border context. *See* Section II.C, *supra.*

[945] *See* Section XI, *infra.*

based swaps generally (whether or not cross-border),[946] as previously stated, the Commission invites public comment on whether there are specific concerns or reasons to support different treatment or analysis of public dissemination of cross-border inter-affiliate transactions from the treatment or analysis of the same issue in the domestic context, and, in particular, why cross-border inter-affiliate transactions may not be suitable for public dissemination.

For example, the concerns about the potentially limited price discovery value of inter-affiliate security-based swaps may be able to be addressed through the public dissemination of relevant data that may be indicative of such limitations, rather than suppressing these transactions entirely. In the Regulation SBSR Proposing Release, the Commission proposed to require a registered SDR to ''publicly disseminate a transaction report of a security-based swap immediately upon receipt of information about the security-based swap from a reporting party.'' [947] As the Commission noted in the Regulation SBSR Proposing Release, ''[t]he transaction report that is disseminated would be required to consist of all the information reported by the reporting party pursuant to proposed Rule 901(c).'' [948] One of the data elements enumerated in proposed Rule 901(c) would be ''[i]f applicable, an indication that the transaction does not accurately reflect the market.'' [949] Such data element should send a message to the market that the transaction was not conducted at arm's length on the open market.[950] Market participants could take such information into account when interpreting or analyzing the publicly-disseminated inter-affiliate transaction pricing information.

As noted above, one commenter expressed concern that public dissemination of an inter-affiliate transaction could interfere with the internal risk management of a corporate group by causing adverse price movements in the market that the risk-carrying affiliate might use to hedge. The commenter did not explain why the corporate group might be unable or might choose not to hedge the risk when the initial transaction is executed, or why the impact of the public dissemination of the subsequent inter-affiliate transaction might be different from the impact of the public dissemination of the initial transaction. The Commission preliminarily believes that, assuming that the corporate group does not hedge at the time the initial transaction was executed, a concern about the potential impact of public dissemination of the inter-affiliate transaction on the ability to hedge the position would be similar to the concern that commenters have expressed generally about public dissemination of block trades.[951] This concern about a potential impact of the public dissemination—either of the original transaction or the subsequent inter-affiliate transaction—may be addressed by delayed dissemination instead of suppressing dissemination of these transactions entirely. The broader issue of how to treat block trades, including how to define what is a block trade, is one that the Commission continues to evaluate. In addition, public dissemination of relevant data indicating the inter-affiliate nature of the transaction separately may help address concerns about potential impact on markets on which a hedge might if occur if such markets are made aware that there may be special considerations that should be taken into account when assessing the extent to which the transaction may reflect the current market.

Regulation SBSR would require registered SDRs, in their policies and procedures, to enumerate the specific data elements of a security-based swap or life cycle event that would be required to be reported, and to specify one or more acceptable data formats, connectivity requirements, and other protocols for submitting information.[952] The Commission itself did not propose to specify each data element that would have to be reported, but instead identified broad categories of information that must be reported.[953] Furthermore, the Commission initially proposed to require, in Rule 907(a)(4), that a registered SDR have policies and procedures ''[d]escribing how reporting parties shall report and, consistent with the enhancement of price discovery, how the registered security-based swap data repository shall publicly disseminate . . . security-based swap transactions that do not involve an opportunity to negotiate any material terms, other than the counterparty; and any other security-based swap transactions that, in the estimation of the registered security-based swap data repository, do not accurately reflect the market.'' [954] However, the Commission invites public comment on whether concerns about the inter-affiliate security-based swaps not accurately reflecting the market can be addressed in the policies and procedures of registered SDRs that would be required under re-proposed Rule 907(a)(4).

For example, such policies and procedures could be designed to maximize the price discovery value of cross-border (or other) inter-affiliate security-based swaps and to minimize their ability to mislead. These policies and procedures could require not only that reporting sides mark whether a security-based swap is an inter-affiliate transaction, but also whether the initial security-based swap was executed in a jurisdiction with public dissemination requirements.[955] Further, these policies and procedures also could require the reporting side to indicate the approximate time when the initial

[946] *See* Regulation SBSR Proposing Release, 75 FR 75215 (proposing that inter-affiliate security-based swaps should not be suppressed from the public data feed, but rather should be disseminated and appropriately tagged).

[947] *See* Rule 902(a) of Regulation SBSR, as originally proposed. If the SDR were closed when the reporting party submitted its transaction report, the SDR would be required to publicly disseminate the transaction report immediately upon re-opening. *See id.*

[948] Regulation SBSR Proposing Release, 75 FR 75228.

[949] Rule 901(c)(11) of Regulation SBSR, as originally proposed.

[950] The Commission preliminarily disagrees with the commenter that argued that ''inclusion of these swaps in swaps market data will distort the establishment of position limits, analysis of open interest, determinations of block trade thresholds and performance of other important regulatory analysis, functions and enforcement activities that require an accurate assessment of the swaps market.'' Multiple Associations Letter IV at 11–12. Security-based swaps that have been appropriately marked as inter-affiliate transactions also could be excluded from certain aggregated market data, depending on the purpose for which those data are being used.

[951] Specifically, if the corporate group hedges the initial transaction at the time of execution, there would appear to be no need to hedge at the time of the inter-affiliate transaction, and thus no concern about the impact of the dissemination of the inter-affiliate transaction on the market in which the hedge is put on. Furthermore, if the corporate group chooses not hedge the position until the time of the inter-affiliate transaction, the Commission questions why the concern about the impact of the disclosure of that transaction would be different than a concern about the dissemination of the original transaction.

[952] *See* Rules 907(a)(1) and 907(a)(2) of Regulation SBSR, as originally proposed.

[953] For example, the Commission proposed to require the reporting of ''[i]nformation that identifies the security-based swap instrument''—*see* Rule 901(c)(2) of Regulation SBSR, as originally proposed—but did not specify the exact manner in which such information must be reported, instead proposing to allow SDRs discretion to set such specifications in their policies and procedures. However, the Commission did propose to require reporting of certain discrete data elements. *See, e.g.,* Rule 901(d)(vi) of Regulation SBSR (requiring reporting of the name of the clearing agency, if the security-based swap will be cleared).

[954] Rule 907(a)(4) of Regulation SBSR, as originally proposed.

[955] This could be either the United States or another jurisdiction that imposes post-trade transparency requirements similar to those in re-proposed Regulation SBSR.

security-based swap was executed.[956] This would permit market observers to gauge how much price discovery value to assign to the price provided in the inter-affiliate security-based swap transaction report that would be publicly disseminated under Rule 902 of re-proposed Regulation SBSR. Information about an initial trade done less than 24 hours before (obtained indirectly from the later-appearing trade report of the inter-affiliate cross-border security-based swap) could have significant price discovery value, while information from an initial trade executed over a week before could, all things being equal, have less.[957] The Commission invites public comment on these approaches to the treatment of inter-affiliate security-based swaps generally, as well as their relative advantages and disadvantages. In particular, the Commission invites public comment on how these approaches would affect the internal risk management practices of a corporate group. In addition, as previously stated, the Commission invites public comment on whether there are specific concerns or reasons to support different treatment or analysis of public dissemination of cross-border inter-affiliate transactions from the treatment or analysis of the same issue in the domestic context.

Request for Comment

The Commission generally requests comment on all aspects of issues regarding cross-border inter-affiliate security-based swaps, including the following:

- Do you believe that cross-border inter-affiliate security-based swaps should be excluded from the regulatory reporting requirements of Regulation SBSR? If so, under what circumstances should such security-based swaps be excluded, and why? What would be the harm of having such inter-affiliate security-based swaps reported to a registered SDR? What are the risks of not requiring regulatory reporting of inter-affiliate security-based swaps?
- Do you believe that cross-border inter-affiliate security-based swaps should be analyzed differently from domestic inter-affiliate security-based swaps? Why or why not?
- Do you believe that cross-border inter-affiliate security-based swaps should be excluded from the public dissemination requirements of Regulation SBSR? Why or why not? What are the risks or benefits of *not* requiring public dissemination of inter-affiliate security-based swaps? How should the Commission balance these risks and benefits?
- Does your view about public dissemination for cross-border inter-affiliate security-based swaps change depending on whether an initial, arm's-length security-based swap was executed and publicly disseminated in a jurisdiction having public dissemination requirements? Why or why not? On what basis could or should the Commission exclude the cross-border inter-affiliate security-based swap from the public dissemination requirements if the initial, arm's-length security-based swap was executed and publicly disseminated in a jurisdiction having no public dissemination requirements, or public dissemination requirements that are not comparable to those in the United States?
- Does your view on the application of regulatory reporting and public dissemination requirements to inter-affiliate security-based swaps change if the affiliates are subject to consolidated supervision? If so, please explain.
- Can you suggest any additions to the policies and procedures of registered SDRs that could maximize the price discovery value, and minimize any potentially misleading aspects, of public trade reports of cross-border inter-affiliate security-based swaps? If so, what are they? Should the Commission more clearly specify in Rule 907(a)(4) how inter-affiliate security-based swaps should be publicly disseminated so as to maximize their price discovery value and minimize their potential for misleading market observers? If so, how?
- Do you have any other concerns about public dissemination of cross-border inter-affiliate security-based swaps so long as they are appropriately marked?

G. Foreign Privacy Laws Versus Duty To Report Counterparty ID

Rule 901(d), as initially proposed, set forth the data elements that would constitute the required regulatory report of a security-based swap (*i.e.,* information for use only by regulators that would not be included in the publicly disseminated report). One such element is the ''participant ID'' of the counterparty.[958] The Title VII provisions relating to security-based swap trade reporting and proposed Regulation SBSR that would implement those provisions contemplate only one counterparty to a security-based swap having a duty to report. However, the Commission preliminarily believes that being able to assess the positions and behavior of both counterparties to the security-based swap would facilitate our ability to carry out our regulatory duties for market oversight.[959] Because only one party would be required to report, the only way to obtain the identity of the non-reporting party counterparty would be to require the reporting party to disclose its counterparty's identity.[960]

Three comments on proposed Regulation SBSR cautioned that U.S. persons may be restricted from complying with such a requirement in cases where a security-based swap is executed outside the United States.[961] One commenter stated that the London branch of a U.S. person would need its counterparty's consent to identify that

[956] For example, there could be indicators for the initial security-based swap having been executed within the past 24 hours, between one and seven days before, or longer than seven days before.

[957] However, even information about a trade done over a week ago (or more) could have price discovery value for security-based swap instruments that trade infrequently.

[958] *See* Rule 901(d)(1)(i) of Regulation SBSR, as initially proposed. *See also* Regulation SBSR Proposing Release, 75 FR 75217.

[959] U.S. regulators have a strong interest in being able to monitor the risk exposures of U.S. persons, particularly those involved in the security-based swap market, as the failure or financial distress of a U.S. person could impact other U.S. persons and the U.S. economy as a whole. U.S. regulators also have an interest in obtaining information about non-U.S. counterparties that enter into security-based swaps with U.S. persons, as the ability of such non-U.S. counterparties to perform their obligations under those security-based swaps could impact the financial soundness of U.S. persons. *See, e.g.,* S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176, at 32 (''As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and *reporting* will provide safeguards for American taxpayers and the financial system as a whole.'') (emphasis added).

[960] Once the identity of the opposite counterparty to a security-based swap is known by a registered SDR, the SDR would be required to obtain certain additional information from that counterparty. *See* proposed Rule 906(a), which is not being revised by this re-proposal.

[961] In addition, two comments on the Commission's interim final temporary rule on the reporting of security-based swaps entered into before July 21, 2010, Securities Exchange Act Release No. 63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010), made similar points. *See* Deutsche Bank Letter at 5 (''In some cases, dissemination or disclosure of [counterparty] information could lead to severe civil or criminal penalties for those required to submit information to an SDR pursuant to the Interim Final Rules. These concerns are particularly pronounced because of the expectation that Reportable Swap data will be reported, on a counterparty identifying basis, to SDRs, which will be non-governmental entities, and not directly to the Commissions.''); ISDA Letter II at 6 (''In many cases, counterparties to cross-border security-based swap transactions will face significant legal and reputational obstacles to the reporting of such information. Indeed, disclosure of such information may lead to civil penalties in some jurisdictions and even criminal sanctions in other jurisdictions.'').

party under U.K. law.[962] The commenter added that, under French law, consent is required each time a report is made identifying the counterparty, and this restriction cannot be resolved by changes to the firm's terms of business.[963] Another commenter urged the Commission to ''consider carefully and provide for consistency with, foreign privacy laws, some of which carry criminal penalties for wrongful disclosure of information,''[964] but did not provide further detail. A third commenter argued that allowing substituted compliance when both parties are not domiciled in the United States could avoid problems with foreign privacy laws conflicting with U.S. reporting requirements.[965]

The Commission seeks to understand more precisely if—and, if so, how—requiring a counterparty to report the transaction pursuant to Regulation SBSR (including disclosure of the counterparty's identity to a registered SDR) might cause it to violate local law in a foreign jurisdiction where it operates. Before determining whether any exception to reporting the counterparty's identity might be necessary or appropriate, the Commission seeks to obtain additional information about any such foreign privacy laws.

Request for Comment

The Commission generally requests comment on all aspects of issues relating to foreign privacy laws with respect to proposed Regulation SBSR, including the following:

- What jurisdictions have laws that might affect a reporting side's ability to report the participant ID of its counterparty? Please cite and describe specifically for each such law: To whom such restrictions would apply and under what circumstances; how the law might restrict reporting (*e.g.,* what data elements that otherwise would be required to be reported under Regulation SBSR would be restricted); whether any exceptions under the law, particularly but not limited to consent provisions and provisions relating to compliance with applicable law, might be available to a reporting side that otherwise would be required to comply with re-proposed Rule 901(d)(1)(i), or explain why none of the exceptions would be available.
- If no such exceptions are available under the local law and you believe that an exception by rule from re-proposed Rule 901(d)(1)(i) would be appropriate, how should that exception be crafted? Please suggest appropriate rule text.
- How, if at all, would a substituted compliance regime for regulatory reporting avoid problems with foreign privacy laws? Would the Commission and other U.S. financial regulators be able to obtain information about security-based swap counterparties from foreign trade repositories or foreign regulatory authorities to which such transactions had been reported?

H. Foreign Public Sector Financial Institutions

Six commenters expressed concern about applying the requirements of Title VII to the activities of FPSFIs, such as foreign central banks and multilateral development banks.[966] One commenter, the European Central Bank (''ECB''), noted that security-based swaps entered into by the Federal Reserve Banks are excluded from the CEA's definition of ''swap'' [967] and that the functions of foreign central banks and the Federal Reserve are broadly comparable. The ECB argued, therefore, that security-based swaps entered into by foreign central banks should likewise be excluded from the definition of ''swap.'' [968] A second commenter, the World Bank (representing the International Bank for Reconstruction and Development, the International Finance Corporation, and other multilateral development institutions of which the United States is a member) also argued generally that the term ''swap'' should be defined to exclude any transaction involving a multilateral development bank.[969] The World Bank further noted that the EMIR—which is intended to serve as the E.U. counterpart to Title VII of the Dodd-Frank Act—would expressly exclude multilateral development banks from its coverage.[970]

The ECB and BIS stated that foreign central banks enter into security-based swaps solely in connection with their public mandates, which require them to act confidentially in certain circumstances.[971] The ECB argued in particular that public disclosure of its market activities could compromise its ability to take necessary actions and ''could cause signaling effects to other market players and finally hinder the policy objectives of such actions.'' [972] Another commenter, the Council of Europe Development Banks (''CEB''), while opposing application of Title VII requirements to multilateral development banks generally, did not object to the CFTC and SEC preserving their authority over certain aspects of swaps activity, including reporting requirements.[973] Similarly, the World Bank believed that the definition of ''swap'' could be qualified by a requirement that counterparties would treat such transactions as swaps solely for reporting purposes.[974]

The Commission preliminarily believes that security-based swaps to which an FPSFI is a counterparty (''FPSFI trades'') should not, for that fact alone, be exempt from regulatory reporting.[975] Under Regulation SBSR, as initially proposed, an FPSFI trade would be required to be reported to a registered SDR if the counterparty were a U.S. person. The Commission continues to believe that, if an FPSFI executes a security-based swap with a counterparty that is a U.S. person, the security-based swap should be subject

[962] *See* DTCC Letter II at 21.

[963] *See id.*

[964] ISDA/SIFMA Letter I at 20.

[965] *See* Cleary Letter II at 17–18.

[966] *See* BIS Letter *passim;* CEB at 2, 4; ECB Letter *passim;* ECB Letter II *passim;* EIB Letter *passim;* Nordic Investment Bank Letter at 1; World Bank Letter II *passim.*

[967] Section 1a(47)(B)(ix) of the CEA excludes from the definition of swap any agreement, contract, or transaction a counterparty of which is a Federal Reserve Bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States. A security-based swap includes any swap, as defined in the CEA, that is based on, among other things, a narrow-based index or a single security or loan. *See* Section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c3(a)(68). *See also* Product Definitions Adopting Release, 77 FR 48208.

[968] *See* ECB Letter I at 2; ECB Letter II at 2. *See also* EIB Letter at 1; Nordic Development Bank at 1.

[969] *See* World Bank Letter II at 6–7.

[970] *See id.* at 4. *See also* EIB Letter at 7 (''As a matter of comity, actions by U.S. financial regulators should be consistent with the laws of other jurisdictions that provide exemption from national regulation for government-owned multinational developments such as the [EIB]'').

[971] *See* BIS Letter at 4–5; ECB Letter I at 3.

[972] ECB Letter I at 3. *See also* ECB Letter II at 2.

[973] *See* CEB Letter at 4. However, the CEB did not state a view as to whether FPSFI trades should be subject to post-trade transparency.

[974] *See* World Bank Letter II at 7.

[975] The Commission notes that all FPSFIs, even FPSFIs that are based in the United States, would be deemed non-U.S. persons under the Commission's Title VII rules. *See* proposed Rule 3a71–3(a)(7)(ii) (''The term 'U.S. person' does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates, and pension plans, and any other similar international organizations, their agencies, affiliates, and pension plans''). *See also* Section III.B.5, *supra* (discussing proposed definition of ''U.S. person''). As with any other security-based swap transaction having a direct counterparty that is a non-U.S. person, a transaction involving an FPSFI as a direct counterparty would be subject to Regulation SBSR's regulatory reporting requirements only if it met one of the conditions in re-proposed Rule 908(a)(1), and would be subject to Regulation SBSR's public dissemination requirements only if it met one of the conditions in re-proposed Rule 908(a)(2).

to regulatory reporting. Under re-proposed Regulation SBSR, an FPSFI trade also would be required to be reported if the counterparty were a non-U.S. person security-based swap dealer or major security-based swap participant. In either case, without a regulatory report of such security-based swaps, the Commission would have an incomplete view of the risk positions held by security-based swap market participants that are U.S. persons or registered with the Commission. Regulatory reporting of such security-based swaps, despite the fact that an FPSFI is a counterparty, would facilitate the Commission's ability to carry out our regulatory oversight responsibilities with respect to registered entities and the security-based swap market. The Commission notes that this approach was endorsed by two commenters.[976]

Furthermore, the Commission believes that, at this time, a sufficient basis does not exist to support an exemption from public dissemination for FPSFI trades. The Commission preliminarily understands that FPSFI participation in the *security-based* swap market—rather than the swap market generally—may be limited. Comments submitted by FPSFIs generally were addressed to both the Commission and the CFTC and addressed participation in the swap market generally; it is unclear the extent to which these comments should be read to apply to the security-based swap market.[977] Furthermore, to the extent that FPSFI trades are subject to public dissemination under Regulation SBSR (*e.g.,* because the direct counterparty is a U.S. person other than a foreign branch of a U.S. bank), such trades could provide useful price discovery information to other market participants.

The Commission is seeking more information with respect to the basis for the claim that public dissemination of FPSFI trades, as contemplated by re-proposed Regulation SBSR, would ''hinder the policy objectives'' [978] of FPSFIs. The Commission notes that proposed Regulation SBSR contains provisions relating to public dissemination that are designed to protect the identity of security-based swap counterparties [979] and prohibit a registered SDR (with respect to uncleared security-based swaps) from disclosing the business transactions and market positions of any person.[980] Furthermore, to the extent that an FPSFI trade is small enough not to constitute a block trade, the Commission questions the extent to which market observers would be able to distinguish the trade as having been conducted by an FPSFI. Given these provisions of Regulation SBSR, which are designed to prevent adverse market impacts due to disclosure of a counterparty's identity or the public dissemination of a block trade, the Commission preliminarily does not see a basis to exempt FPSFI trades from public dissemination. However, the Commission is open to receiving further information that might support an exemption.

Request for Comment

As noted above, certain FPSFI commenters stated that carrying out their policy mandates would require confidentiality in certain circumstances.[981] The Commission seeks additional information to assist our analysis of this issue, and requests answers to the following questions. In responding, please focus on the *security-based* swap market, not the market for other swaps. In addition, commenters are requested to answer only with respect to security-based swap activity that would be subject to Regulation SBSR, and not with respect to activity that, because of the place where the transaction is conducted or the nationality of the counterparties, would not be subject to Regulation SBSR in any case:

- How many FPSFIs engage in security-based swap activity with U.S. persons? How active are they in the security-based swap market generally?
- What policy goals might an FPSFI be attempting to carry out by participating in the security-based swap market?
- What trading strategies might an FPSFI conduct in the security-based swap market?
- Are there any characteristics of FPSFI activity in the security-based swap market that could make it easier for market observers to detect an FPSFI as a counterparty, or that could make it easier to detect an FPSFI's business transactions or market positions? If so, are there steps the Commission could take to minimize such information leakage short of suppressing all FPSFI trades from public dissemination? If so, what are they?
- Do FPSFIs typically trade standardized or more bespoke security-based swap instruments? If the former, would market observers be less likely to detect the participation of an FPSFI in the security-based swap market?
- What sizes do FPSFIs typically transact in? Does the size impact any concerns with publicly disseminating FPSFI trades? If so, how? Could the concerns of FPSFIs be addressed by crafting appropriate block thresholds and dissemination delays rather than by suppressing all FPSFI trades from public dissemination? Why or why not?
- Do you believe that FPSFI trades *should* be included in public dissemination? Why or why not? To what extent, and how, would price transparency and market efficiency be affected if FPSFI trades were suppressed from public dissemination?

I. Summary and Additional Request for Comment

The provisions of re-proposed Regulation SBSR discussed above represent the Commission's preliminary views regarding the application of Title VII's provisions relating to regulatory reporting and public dissemination of security-based swap transactions in the cross-border context. This re-proposal reflects a particular balancing of the principles and applicable requirements described above,[982] informed by, among other things, the particular nature of the security-based swap market, the structure of security-based swap dealing activity, and the Commission's experience in applying the federal securities laws in the cross-border context. The Commission recognizes that other approaches are possible and might more effectively achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, the Commission invites comment regarding all aspects of re-proposed Regulation SBSR, and each re-proposed rule contained therein, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of each re-proposed rule and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposals.

The Commission requests comment on any other cross-border issues relating to regulatory reporting and public dissemination of security-based swaps that may not have been addressed above. In particular, the Commission requests comment on how the Commission's re-proposal addressing

[976] *See* CEB Letter at 4; World Bank Letter II at 7 (stating that, although swaps involving FPSFIs as counterparties generally should be exempt from the definition of ''swap,'' they should be treated as swaps solely for reporting purposes).

[977] *But see* BIS Letter at 3 (stating that the BIS generally does not transact security-based swaps such as credit default swaps or equity derivatives).

[978] ECB Letter I at 3.

[979] *See* Rule 902(c)(1), as initially proposed.

[980] *See* Rule 902(c)(2), as initially proposed.

[981] *See* BIS Letter at 5; ECB Letter at 3.

[982] *See* Section II, *supra.*

cross-border issues related to regulatory reporting and public dissemination might differ from the CFTC's cross-border guidance on these matters.[983] For example, the CFTC Cross-Border Proposal provides that a swap between two unregistered non-U.S. persons, each of which is guaranteed by a U.S. person, would not be subject to regulatory reporting or public dissemination requirements.[984] The Commission, on the other hand, is proposing that a security-based swap between two such direct counterparties *would* be subject to both regulatory reporting and public dissemination requirements.[985] Furthermore, the CFTC Cross-Border Proposal provides that a swap between, on one side, an unregistered non-U.S. person that is guaranteed by a U.S. person and, on the other side, an unregistered non-U.S. person that is not guaranteed by a U.S. person also would not be subject to regulatory reporting or public dissemination requirements.[986] The Commission is proposing that a security-based swap between two such direct counterparties would be subject to regulatory reporting[987] (but, in accord with the CFTC's proposal, not subject to public dissemination). Please describe any other differences that you believe might exist and what would be the impact of any such differences.

In addition, the Commission requests comment on the market impact of the approach to re-proposed Regulation SBSR. For example, how would the application of re-proposed Regulation SBSR affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would re-proposed Regulation SBSR place any market participants at a competitive disadvantage or advantage? If so, please explain. Would re-proposed Regulation SBSR be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement re-proposed Regulation SBSR?

IX. Mandatory Security-Based Swap Clearing Requirement

A. Introduction

Section 3C(a)(1) of the Exchange Act provides that it ''shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under [the Exchange] Act or a clearing agency that is exempt from registration under [the Exchange] Act if the security-based swap is required to be cleared.'' [988] In this section, we are proposing a rule to specify when persons engaging in cross-border security-based swap transactions would be required to comply with a mandatory clearing determination.[989] Consistent with the approach we have taken elsewhere in this release,[990] the proposed rule is designed in general to help ensure that the mandatory clearing requirement applies to persons that engage in security-based swap transactions within the United States and who may pose financial or operational risk to the U.S. financial system that may be mitigated by requiring transactions to be centrally cleared.[991] The proposed rule also is designed to help avoid limiting the access of U.S. persons that conduct security-based swap activity through foreign branches or guaranteed non-U.S. persons to foreign security-based swap markets. To address concerns regarding the clearance and settlement of security-based swaps subject to the mandatory clearing requirement, as well as the potential for conflicting mandatory clearing requirements in different jurisdictions, we discuss under what circumstances the Commission would permit substituted compliance with the mandatory clearing requirement in Section XI.E below.[992]

Our proposed approach reflects a particular balancing of the principles discussed above.[993] We recognize that other approaches may achieve the goals of the Dodd-Frank Act and Section 17A of the Exchange Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposed rule described here, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of the proposed rule and of potential alternative approaches will be particularly useful to the Commission in

[983] *See* note 21, *supra.*

[984] *See* CFTC Cross-Border Proposal, 77 FR 41237–38.

[985] *See* re-proposed Rules 908(a)(1)(ii) and 908(a)(2)(ii) of Regulation SBSR.

[986] *See* CFTC Cross-Border Proposal, 77 FR 41237–38.

[987] *See* re-proposed Rule 908(a)(1)(ii) of Regulation SBSR.

[988] 15 U.S.C. 78c–3(a)(1). Section 3C of the Exchange Act further requires the Commission to review each security-based swap (or any group, category, type, or class of security-based swaps) to make a determination that such security-based swap (or group, category, type, or class of security-based swap) should be required to be cleared. 15 U.S.C. 78c–3(b). The Commission has adopted final rules regarding process for submissions for review of security-based swaps for mandatory clearing and notice filing requirements for clearing agencies. *See* Clearing Procedures Adopting Release, 77 FR 41602. The proposed application of the mandatory clearing requirement in the cross-border context does not address, in any respect, our obligation to review security-based swaps and make mandatory clearing determinations under Section 3C(b) of the Exchange Act.

[989] The mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act will not apply unless and until the Commission makes a determination that a security-based swap is required to be cleared, and the Commission has not yet made any such determinations. In addition, the registration requirement for security-based swap clearing agencies in Section 17A(g) of the Exchange Act is not yet effective because further rulemaking is required regarding registration of and standards for security-based swap clearing agencies. *See* 15 U.S.C. 78q-1(i) and (j). The Commission recently adopted rules to establish minimum requirements for registered clearing agency risk management practices and operations. The rules identify certain minimum standards for all clearing agencies, including clearing agencies that clear security-based swaps. *See* Clearing Agency Standards Adopting Release, 77 FR 66220. The Commission continues to consider additional standards for adoption, including standards for confidentiality of trading information, conflicts of interest, and members of clearing agency boards of directors or committees, as outlined in the proposing release for clearing agency standards. *See* Exchange Act Release No. 64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011). Any new rules governing security-based swap clearing agencies could also affect counterparties that are required to clear security-based swaps.

[990] *See, e.g.,* Section V, *supra* (discussing the registration requirement in Section 17A(g) of the Exchange Act for security-based swap clearing agencies); *see also* the general discussion of the Commission's approach to applying Title VII to cross-border activities in Section II.B, *supra.*

[991] *See* Testimony Regarding Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market Before the Subcomm. on Secs., Ins., & Inv., of the S. Comm. on Banking, Hous., & Urban Affairs, 110th Cong. (2008) (statement of James A. Overdahl, Chief Economist, Commission), *available at: http://www.sec.gov/news/testimony/2008/ts070908jao.htm* (''The 1975 Amendments [to the Exchange Act] were in direct response to the Paperwork Crisis of the late 1960's that nearly brought the securities industry to a standstill and directly or indirectly resulted in the failure of large numbers of broker-dealers. The causes of the Paperwork Crisis are similar to the issues that we have been trying to resolve in the OTC derivatives market. The crisis resulted from a combination of sharply increased volume and inattention to securities processing. As a result, the industry's clearance and settlement procedures were inefficient and lacked automation, thus implicating the finances of the securities firms. Today, almost forty years later, increasing automation in the processing of OTC derivatives transactions is one of the key goals of the OTC confirmations initiative, in which the Commission is a very active participant . . .''); *see also* CPSS, New Developments in Clearing and Settlement Arrangements for OTC Derivatives, at 9, 39 (Mar. 2007), *available at: http://www.bis.org/publ/cpss77.pdf* (noting ''increasing concern about the size and rapid growth of confirmation backlogs for credit derivatives'' and the growing importance of ''operational reliability'' to ''safe and efficient clearing and settlement'' as the ''market infrastructure moves further in the direction of centralised processing of trades and post-trade events'').

[992] Under the Commission's proposal, substituted compliance may be permitted for cross-border security-based swap transactions subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act to enable counterparties to clear and settle such transactions at a clearing agency that is neither registered with the Commission nor exempt from registration, under certain conditions. *See* Section XI.E, *infra.*

[993] *See* Section II.C, *supra.*

evaluating potential modifications to the proposal.

B. Summary of Comments

The Commission has published several rulemaking proposals under Title VII of the Dodd-Frank Act that relate to clearing security-based swaps.[994] The Commission solicited public comment on each of these proposals. The Commission also solicited public comment on regulatory initiatives under the Dodd-Frank Act related to clearing security-based swaps.[995] Generally, these commenters requested that the Commission take actions to limit duplicative or conflicting regulations with respect to clearing security-based swaps.[996]

Two commenters highlighted the global nature of the security-based swap market and raised concerns about the possible effect of foreign regulations on U.S. participants in the security-based swap market.[997] These commenters requested that U.S. and foreign regulators identify possible areas where rulemaking may overlap or conflict and actively coordinate to harmonize both the substance of related regulations and the timing of their implementation.[998] The commenters argued that, without such coordination, ''the development of the swap markets will be vulnerable to false starts, significant revisions and inefficiencies, and possible regulatory arbitrage across, or the flight to, other jurisdictions.'' [999]

Commenters representing several foreign banks requested that the Commission adopt implementing regulations under the Dodd-Frank Act ''that enable and encourage foreign banks engaged in swap dealing activities to book their swaps businesses in a single well-capitalized, highly rated foreign-based banking institution.'' [1000] These commenters did not comment specifically on the proposed rules, but rather argued in favor of a regulatory framework that relies on home country supervision where regulations operate at the entity level, and that relies on Title VII of the Dodd-Frank Act with respect to ''U.S. swap transactions,'' where regulations operate at the transaction level.[1001] In particular, these entities believe that the mandatory clearing requirement should not apply to ''foreign swap transactions'' (*i.e.,* transactions they defined as not involving a U.S. counterparty) or, more broadly, to transactions that a counterparty thereto is required to submit for clearing pursuant to foreign law.[1002]

Commenters representing foreign financial institutions submitted a second, supplemental comment letter to elaborate on the above comments.[1003] In this letter, these commenters requested that the Commission modify the proposed definition of ''security-based swap dealer'' to make clear that ''a security-based swap which is required to be cleared under foreign law (including by virtue of the fact that any counterparty thereto is required under foreign law to submit the same for clearing) is not required to be cleared under the [Dodd-Frank] Act.'' [1004]

Moreover, commenters representing Japan's three largest bank groups requested that the Commission ''adopt implementing regulations under the Dodd-Frank Act with the effect that Japanese banks, including their U.S. branches, are not made subject to the application of Title VII requirements.'' [1005] Should the Commission not take such action, these commenters requested that the regulations issued pursuant to Title VII: (i) Not apply to transactions between affiliates of a bank group regulated as a bank holding company [1006] and (ii) not apply to ''a foreign dealer''—particularly one that is ''subject to comprehensive home country regulation''—with respect to transactions entered into by the foreign dealer with a U.S.-based dealer regulated as a swap dealer or security-based swap dealer pursuant to Title VII.[1007]

In addition, multiple commenters endorsed the use of mandatory clearing generally to further the goals of the Dodd-Frank Act. One commenter described mandatory clearing as ''the centerpiece of reform embodied in Title VII of the Dodd-Frank Act'' that, accordingly, should be subject to ''only a very few, narrow, and limited exceptions.'' [1008] Another commenter similarly urged the Commission to ''prioritize the finalization and implementation of clearing-related rules.'' [1009] Another stated that the Commission's ''top priority should be to

[994] *See* Exchange Act Release Nos. 63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) (proposing a rule governing the end-user exception to the mandatory clearing requirement); 63107 (Oct. 14, 2010), 75 FR 65881 (Oct. 26, 2010) (proposing Regulation MC which would in part set ownership limitations and governance requirements for clearing agencies); *see also* notes 988 and 989, *supra* (discussing final rules adopted in the Clearing Procedures Adopting Release and rules proposed and adopted relating to clearing agency standards).

[995] *See* Exchange Act Release Nos. 63435 (Dec. 6, 2010), 75 FR 76705 (Dec. 9, 2010) (joint roundtable with CFTC regarding capital and margin requirements); 63112 (Oct. 15, 2010), 75 FR 64710 (Oct. 20, 2010) (joint roundtable with CFTC regarding issues related to clearing); 62864 (Sept. 8, 2010), 75 FR 55574 (Sept. 13, 2010) (joint roundtable with CFTC regarding swap execution facilities); 62725 (Aug. 16, 2010), 75 FR 51305 (Aug. 19, 2010) (joint roundtable with CFTC regarding governance and conflicts of interest).

[996] *See, e.g.,* Davis Polk Letter I at 8 (''First, requiring foreign swap transactions to be cleared through a U.S.-regulated clearinghouse may conflict with any applicable foreign law that requires such transactions to be cleared at a home country (non-U.S.) clearinghouse. Second, such an approach would also legally compel a disproportionate amount of global swaps clearing to be conducted through U.S.-regulated clearinghouses. Third, such a requirement would also concentrate risk that is non-U.S. (because the transactions are with non-U.S. persons) in the U.S.-regulated clearinghouses, which would cause them and the U.S. financial system to bear additional non-U.S. risks.''); Davis Polk Letter II at 21–22 (proposing rule modifications that ''would avoid imposing unnecessarily duplicative and inconsistent clearing and trade reporting obligations on swap dealers and their counterparties''); Cleary Letter IV at 27 (noting swaps between non-U.S. persons ''are, in many cases, likely to be subject to local clearing requirements (which may (practically or legally) require use of a local clearing organization and so, in some cases, could conflict with Dodd-Frank's clearing requirement)''); Japanese Banks Letter at 4 (''We believe that future Japanese regulation of swap activities of Japanese banks will render regulation of such banks subject to Title VII superfluous at best and potentially subject such banks to inconsistent regulations under U.S. and Japanese law.''); Multiple Associations Letter I at 9–10 (''We believe that [the Commission] and other U.S. regulatory agencies should anticipate where the rulemaking may overlap, and possibly conflict, and make every effort to actively coordinate with each other and with foreign regulators both as to harmonizing the substance of related regulations and the timing of their implementation. Otherwise, the development of the Swap markets will be vulnerable to false starts, significant revisions and inefficiencies, and possible regulatory arbitrage across, or the flight to, other jurisdictions.''); Multiple Associations Letter II at 2 (stating that it is ''essential that rules be appropriately tailored, work in tandem, and avoid unduly impairing market liquidity or adversely impacting investors'' and that [i]t is not enough to phase-in implementation if the final rules themselves are unworkable or in conflict'').

[997] *See* Multiple Associations Letter I at 9 (''[I]t is unclear to what extent foreign regulation, in addition to regulation by the Commissions, may affect U.S. Swap market participants.''); Multiple Associations Letter II at 1 (noting that ''an iterative approach to rulemaking has been taken when rules have an unusually large impact on market structure and participants'').

[998] Multiple Associations Letter I at 9.

[999] *Id.* at 9–10.

[1000] *See* Davis Polk Letter I at 2.

[1001] *Id.*

[1002] *Id.;* Cleary Letter IV at 27.

[1003] *See* Davis Polk Letter II.

[1004] *Id.* at 4–5.

[1005] *See* Japanese Banks Letter at 4.

[1006] *Id.*

[1007] *Id.* at 5.

[1008] Better Markets Letter at 10.

[1009] Citadel Letter at 2 (further noting that ''anything less needlessly inhibits transparency and competition in the SB swaps markets and will leave US financial markets vulnerable, damage American competitiveness, and weaken our long-term prospects for sound economic growth''); *see also* MFA Letter IV at 4 (urging the Commission to prioritize clearing rules to ''lay the regulatory groundwork for more informed implementation'' of other final rules planned under the Dodd-Frank Act).

implement requirements that reduce systemic risk, such as the use of centralized Swap clearinghouses.'' [1010]

C. Application of Title VII Mandatory Clearing Requirements to Cross-Border Transactions

1. Statutory Framework

By its terms, the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act applies to any person that ''engage[s] in a security-based swap . . . if the security-based swap is required to be cleared.'' [1011] We are proposing to apply the statutory language ''engage in a security-based swap'' to mean any transaction in which a U.S. person is a counterparty [1012] to a security-based swap or guarantees the performance of a non-U.S. person under a security-based swap because of the involvement of a U.S. person in the transaction.[1013] We also are proposing to apply the statutory language ''engage in a security-based swap'' to include any transaction in which a person performs any of the activities that are key stages in a security-based swap transaction (*i.e.,* solicitation, negotiation, execution, or booking of the transaction) [1014] within the United States. As we noted above, a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5), includes soliciting, negotiating, executing, or booking a security-based swap transaction.[1015] Accordingly, subject to certain statutory exceptions [1016] and certain other exceptions described below,[1017] we are proposing to apply the mandatory clearing requirement to any person that engages in a security-based swap transaction in which at least one of the counterparties to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person, or if the transaction is a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act.[1018]

We preliminarily believe our proposed approach to the mandatory clearing requirement, including the interpretation of the statutory language discussed above and further discussed below, is consistent with the purposes of the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act. The Dodd-Frank Act is intended to promote the financial stability of the United States by, among other things, reducing risks to the U.S. financial system by ensuring that, whenever possible and appropriate, derivatives contracts are centrally cleared rather than traded exclusively in the OTC market.[1019] In making our mandatory clearing determination, the Commission is required to take into account certain factors, including, among other things, ''the availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure'' in clearing agencies to support clearing of the product in question, and ''the effect on the mitigation of systemic risk.'' [1020] The Commission preliminarily believes that the proposed approach generally would help to ensure that the goals of the Dodd-Frank Act to increase the use of available centralized market infrastructures to reduce operational risks and mitigate systemic risk are achieved,[1021] while not unnecessarily limiting the access of U.S. persons that conduct security-based swap activity through foreign branches or guaranteed non-U.S. persons to foreign security-based swap markets.

2. Proposed Rule

In light of the interpretation of the statutory language ''engage in a security-based swap'' and the policy concerns discussed above, we are proposing a rule that would apply the mandatory clearing requirement to a person that engages in a security-based swap transaction if a counterparty to the transaction is (i) a U.S. person or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person.[1022] We also are proposing a rule that would apply the mandatory clearing requirement to a person that engages in a security-based swap transaction if such transaction is a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act.[1023] To limit

[1010] Multiple Associations Letter I at 2.

[1011] Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1).

[1012] The use of the term ''counterparty'' in the proposed rule is intended to refer to the direct counterparty to the security-based swap transaction, not a party that provides a guarantee on the performance of the direct counterparty under the security-based swap. As discussed in Section VIII.C, *supra,* re-proposed Rules 900(j) and (o) under the Exchange Act would define the term ''direct counterparty'' as ''a person that enters directly with another person into a contract that constitutes a security-based swap,'' and an ''indirect counterparty'' as ''a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.''

[1013] *See* Section II.B.2(d), *supra* (discussing the Commission's treatment of guarantees).

[1014] As noted above, solicitation, negotiation, execution, and booking are activities that represent key stages in a potential or completed security-based swap transaction. *See* note 310 and accompanying text, *supra.* Persons that conduct any of these activities would be considered to be ''engaged in a security-based swap'' under the Commission's proposed interpretation.

[1015] *See* Section III.B.6, *supra.*

[1016] The Exchange Act provides an exception from the mandatory clearing requirement in connection with security-based swaps that involve persons that are not financial entities and that use the security-based swaps to hedge or mitigate commercial risk. *See* Section 3C(g) of the Exchange Act, 15 U.S.C. 78c–3(g). The Exchange Act also provides exemptions from the clearing requirement for security-based swaps entered into prior to the enactment of the Dodd-Frank Act, and for security-based swaps entered into prior to the application of the clearing requirement, so long as those instruments are reported to a registered SDR. *See* Sections 3C(e)(1) and (f)(1) of the Exchange Act, 15 U.S.C. 78c–3(e)(1) and (f)(1) (pre-enactment security-based swaps); Sections 3C(e)(2) and (f)(2) of the Exchange Act, 15 U.S.C. 78c–3(e)(2) and (f)(2) (post-enactment security-based swaps entered into prior to the application of the clearing requirement).

[1017] *See* Sections IX.C.3(a)ii and IX.C.3(b)ii, *infra.*

[1018] Proposed Rule 3Ca–3(a) under the Exchange Act.

[1019] *See, e.g.,* S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176, at 32 (''As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole.''); *id.* at 34 (''Some parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.'').

[1020] Section 3C(b)(4)(B) of the Exchange Act, 15 U.S.C. 78c–3(b)(4)(B).

[1021] The purpose of central clearing is to mitigate counterparty credit risk by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from each other's potential failures. Central clearing also requires that mark-to-market pricing and margin requirements be applied in a consistent manner. CCPs generally use liquid margin collateral to manage the risk of a CCP member's failure, and rely on their margin calculations and their access to that liquid collateral to protect against sudden movements in market prices, including movements in market value after a counterparty's default. A CCP that stands between counterparties for OTC derivatives is generally perceived to decrease systemic risk. Further, the use of CCPs may lead to standardization of contracts and processes, which improve market efficiency and reduce the operational risks attributable to human and processing errors. *See, e.g.,* Wellink, *supra* note 110, at 132–33; Culp, *supra* note 111, at 15–16; Manmohan Singh, ''Collateral, Netting and Systemic Risk in the OTC Derivatives Market,'' IMF Working Paper (2010), at 9–13, *available at: http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf.*

[1022] Proposed Rule 3Ca–3(a)(1) under the Exchange Act. Under proposed Rule 3Ca–3(c) under the Exchange Act, the term ''U.S. person'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5, *supra.*

[1023] Proposed Rule 3Ca–3(a)(2) under the Exchange Act. Under proposed Rule 3Ca–3(c) under the Exchange Act, the term ''transaction conducted within the United States'' would have the same

Continued

the scope of the proposal, we are proposing exceptions to the mandatory clearing requirement in the following two scenarios:

- If the security-based swap transaction is not a ''transaction conducted within the United States,'' the proposed rule would not apply the mandatory clearing requirement if one counterparty to the transaction is (i) a foreign branch of a U.S. bank [1024] or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,[1025] and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.[1026]
- If the security-based swap transaction is a ''transaction conducted within the United States,'' the proposed rule would not apply the mandatory clearing requirement if (i) neither counterparty to the transaction is a U.S. person; (ii) neither counterparty's performance under the security-based swap is guaranteed by a U.S. person; and (iii) neither counterparty to the transaction is a foreign security-based swap dealer.[1027]

We discuss below the proposed rule regarding the application of the mandatory clearing requirement in more detail.

3. Discussion

(a) Security-Based Swap Transactions Involving U.S. Persons or Non-U.S. Persons Receiving Guarantees From U.S. Persons

i. Proposed Rule

The proposed rule would apply the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act, and the rules and regulations thereunder, to a person that engages in a security-based swap transaction if a counterparty to the transaction is (i) a U.S. person or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,[1028] subject to certain exceptions.[1029]

As discussed above,[1030] a U.S. person that is a counterparty to a security-based swap transaction bears the ongoing risk of the transaction. It is the financial resources of that U.S. person that will be called upon in performing any obligations pursuant to that transaction, and this activity is capable of posing risks to the stability of the U.S. financial system. Because these obligations and risks reside in the United States, the Commission preliminarily believes that when a U.S. person is a counterparty to a security-based swap transaction, such person necessarily engages in a security-based swap within the United States and, therefore, would be subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act and the rules and regulations thereunder.

In the case of a non-U.S. person guaranteed by a U.S. person (''U.S. guarantor''), the guarantee provides the counterparty of the guaranteed entity direct recourse to the U.S. guarantor with respect to any obligations owed by the guaranteed entity under the security-based swap, and the U.S. guarantor exposes itself to the security-based swap risk as if it were a direct counterparty [1031] to the security-based swap through the security-based swap activity engaged in by the guaranteed entity. In many cases, the counterparty would not enter into the transaction (or would not do so on the same terms) with the guaranteed entity, and the guaranteed entity would not be able to engage in any security-based swaps, without the guarantee. Given the reliance by both the guaranteed entity and its counterparty on the creditworthiness of the guarantor in the course of engaging in security-based swap transactions and for the duration of the transaction, we preliminarily believe that a security-based swap transaction in which one of the counterparties is a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person is a transaction that is engaged in within the United States by virtue of the involvement of the U.S. guarantor in the security-based swap.[1032] Our proposed rule, therefore, would subject transactions involving at least one counterparty whose performance under the security-based swap is guaranteed by a U.S. person to the mandatory clearing requirement,[1033] subject to certain exceptions discussed below.[1034]

We recognize that this proposed approach would subject certain security-based swap transactions with non-U.S. persons to the mandatory clearing requirement if a U.S. person is a counterparty to the transaction (*e.g.,* U.S. dealer to foreign dealer transactions). We preliminarily believe that such an approach is appropriate, as a significant proportion of the risk borne by U.S. persons, and, therefore, the risk to the U.S. financial system as a result of the U.S. persons' security-based swap activity, arises from transactions entered into with non-U.S. persons.[1035] Even where a U.S person's security-based swap activity occurs in part outside the United States (*e.g.,* the transaction is negotiated or executed outside the United States), this activity may pose risk to the U.S. financial system because security-based swap transactions give rise to ongoing obligations on the part of the U.S. person and credit risk exposures to its non-U.S. counterparties. Therefore, subjecting a transaction in which a U.S. person is a counterparty to the transaction to the mandatory clearing requirement would further the purposes of Title VII by ensuring that security-based swaps involving persons whose security-based swap activities create risk that Title VII is intended to address would be centrally cleared through a CCP.[1036]

meaning as set forth in proposed Rule 3a71–3(a)(5) under the Exchange Act, as discussed in Section III.B.5, *supra.*

[1024] Under proposed Rule 3Ca–3(c) under the Exchange Act, the term ''foreign branch'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(1) under the Exchange Act. *See* discussion in Section III.B.7, *supra.* A security-based swap transaction conducted through a foreign branch, as defined in proposed Rule 3a71–3(a)(4) under the Exchange Act, would be specifically excluded from the proposed definition of ''transaction conducted within the United States.'' *See* proposed Rule 3a71–3(a)(5)(ii) under the Exchange Act.

[1025] A security-based swap transaction involving a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person would not be a ''transaction conducted within the United States'' by virtue of the guarantee alone under proposed Rule 3a71–3(a)(5) under the Exchange Act, unless the transaction is solicited, negotiated, executed, or booked within the United States. We would consider such transaction to be engaged in within the United States, however, by virtue of the guarantee from the U.S. person, who acts as an ''indirect counterparty'' to the transaction. *See* note 1012, *supra.*

[1026] Proposed Rule 3Ca–3(b)(1) under the Exchange Act. Proposed Rule 3Ca–3(c) defines the term ''foreign security-based swap dealer'' by cross-reference to the definition of that term in proposed Rule 3a71–3(a)(3) of the Exchange Act (defining ''foreign security-based swap dealer'' to mean ''a security-based swap dealer, as defined in section 3(a)(71) of the [Exchange] Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person'').

[1027] Proposed Rule 3Ca–3(b)(2) under the Exchange Act.

[1028] Proposed Rules 3Ca–3(a)(1)(i) and (ii) under the Exchange Act.

[1029] Proposed Rule 3Ca–3(b) under the Exchange Act.

[1030] *See* Section II.A.6, *supra.*

[1031] *See* note 1012, *supra.*

[1032] *See* note 1025, *supra.*

[1033] Proposed Rule 3Ca–3(a)(1)(ii) under the Exchange Act.

[1034] Proposed Rule 3Ca–3(b) under the Exchange Act.

[1035] *See* Section II.A.6, *supra.*

[1036] We preliminarily believe that the proposed approach to the mandatory clearing requirement is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Section 30(c). *See* Section II.B.2(b), *supra.* However, the Commission also preliminarily believes that the proposed approach to the mandatory clearing requirement is necessary or

ii. Proposed Exception for Certain Transactions Involving Foreign Branches of U.S. Banks and Guaranteed Non-U.S. Persons

The Commission is proposing an exception from the mandatory clearing requirement described above for certain transactions that involve foreign branches of a U.S. bank or guaranteed non-U.S. persons, provided the transactions are not conducted within the United States. Specifically, under the proposed rule, the mandatory clearing requirement would not apply to a security-based swap transaction if one counterparty to the transaction is a foreign branch of a U.S. bank [1037] or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.[1038] Such exception would not apply if the security-based swap transaction were a transaction conducted within the United States, as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act.[1039]

Without such an exception, U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons may have less access to foreign security-based swap markets because non-U.S. person counterparties may be less willing to enter into security-based swap transactions with them if such transactions are subject to a mandatory clearing requirement. We recognize that imposing the mandatory clearing requirement on a foreign branch of a U.S. bank or on a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person would be consistent with the view that a foreign branch of a U.S. bank is part of a U.S. person [1040] and that a U.S. guarantor is an indirect counterparty [1041] to the transaction entered into by the guaranteed non-U.S. person. We also recognize that such transactions pose risk to the U.S. financial system. At the same time, however, imposing the mandatory clearing requirement on U.S. persons that conduct their foreign security-based swap dealing activity through foreign branches or guaranteed non-U.S. persons, without any exceptions, could put such U.S. persons at a significant competitive disadvantage to non-U.S. persons who conduct security-based swap business in the same foreign local market and thereby limit the access of such U.S. persons to foreign security-based swap markets.[1042] After balancing the various policy considerations, including the Dodd-Frank Act's goal of mitigating risk to the U.S. financial system, we have preliminarily concluded that the proposed exception from the mandatory clearing requirement for transactions by U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons with non-U.S. persons whose performance under the security-based swap is not guaranteed by a U.S. person is appropriate, provided that it is not a transaction conducted within the United States.[1043]

This exception from the mandatory clearing requirement would not apply under the proposed rule, however, when the non-U.S. person counterparty of the foreign branch of the U.S. bank or the guaranteed non-U.S. person is a foreign security-based swap dealer.[1044] As discussed above, a non-U.S. person would be required to register as a foreign security-based swap dealer if its transactions with U.S. persons or otherwise conducted within the United States, connected with its dealing capacity, exceed the *de minimis* threshold in the security-based swap dealer definition.[1045] Thus, a foreign security-based swap dealer would necessarily have a significant connection with the U.S. security-based swap market. As a result, the Commission preliminarily believes that it is not appropriate to provide an exception for U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons when they enter into security-based swaps with foreign security-based swap dealers.

We are not proposing to provide an exception from mandatory clearing for U.S. persons generally, however, although we recognize that such exception could increase access to foreign security-based swap markets for all U.S. persons. The Commission preliminarily believes that such a broad exception to the mandatory clearing requirement, in a market as global as the security-based swap market,[1046] would undermine the goal of the mandatory clearing requirement to reduce financial risk to the U.S. financial system. In light of the statutory goal, we preliminarily do not believe that the benefit of providing U.S. persons greater access to foreign security-based swap markets warrants expanding the exception beyond the scope we are proposing here. In this regard, we also note that a uniform mandatory clearing requirement for all U.S. persons other than foreign branches and guaranteed non-U.S. persons should facilitate the development of central clearing infrastructures and encourage the standardization of contract terms.[1047]

appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. *See* Section II.B.2(e), *supra; see also* Section II.B.2(d), *supra.*

For example, if the mandatory clearing requirement does not apply to transactions among non-U.S. persons that receive guarantees from U.S. persons and foreign branches of U.S. banks, then U.S. persons would have an incentive to conduct transactions with other U.S. persons through guaranteed foreign affiliates or foreign branches to avoid the mandatory clearing requirement, even though altering the form of the transactions would not alter the substance of the risk to U.S. markets that the Dodd-Frank Act was enacted to address and thus could undermine the purposes of the Dodd-Frank Act. *See* Section II.A.6, *supra.*

[1037] *See* note 1024, *supra.*

[1038] Proposed Rule 3Ca–3(b)(1) under the Exchange Act. *See* note 1026, *supra.*

[1039] Proposed Rule 3Ca–3(b)(1) under the Exchange Act.

[1040] *See* Section III.B.5, *supra.*

[1041] *See* note 1012, *supra.*

[1042] *See, e.g.,* Sullivan & Cromwell Letter at 14 (''The jurisdictional scope of the swaps entity definitions is critical to the ability of U.S. banking organizations to maintain their competitive position in foreign marketplaces. Imposing the regulatory regime of Title VII on their Non-U.S. Operations would place them at a disadvantage to their foreign bank competitors because the Non-U.S. Operations would be subject to an additional regulatory regime which their foreign competitors would not.''); Cleary Letter IV at 7 (''Subjecting such non-U.S. branches and affiliates to U.S. requirements could effectively preclude them from, or significantly increase the cost of, managing their risk in the local financial markets, since local financial institutions may be required to comply with Dodd-Frank to provide those services.'').

[1043] In this regard, we note that such transaction may be subject to a mandatory clearing requirement in a foreign jurisdiction. *See* Section XI.E, *infra* (discussing substituted compliance).

[1044] Proposed Rule 3Ca–3(b)(1)(ii)(B) under the Exchange Act. Like U.S. persons conducting security-based swap activity out of foreign branches or guaranteed non-U.S. persons, a foreign security-based swap dealer would not be subject to the mandatory clearing requirement when it engages in a security-based swap transaction with a non-U.S. person, provided neither party's performance under the security-based swap is guaranteed by a U.S. person and the transaction is not conducted within the United States. Such a transaction would not be captured by proposed Rule 3Ca–3(a) under the Exchange Act (and, therefore, it is not necessary for such transaction to be included as an exception in paragraph (b) of Rule 3Ca–3).

[1045] *See* Section III.B.4, *supra.*

[1046] *See* Section II.A.1, *supra* (discussing the global nature of the security-based swap market).

[1047] *See, e.g.,* note 991, *supra.* A robust infrastructure for clearing of security-based swaps should reduce operational risks resulting from backlogs and processing errors. *See* FMI Principles at 20, 94 (describing operational risk as the ''risk that deficiencies in information systems or internal processes, human errors, management failures, or

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(b) Transactions Conducted Within the United States

i. Proposed Rule

Under the proposed rule, a security-based swap transaction that is a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act, would be subject to the mandatory clearing requirement.[1048] The Commission preliminarily believes that engaging in a security-based swap includes the performance by a person of any of the activities that represent key stages in a security-based swap transaction, including solicitation, negotiation, execution, or booking of a security-based swap transaction. As we have noted above, a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5), includes soliciting, negotiating, executing, or booking a security-based swap transaction.[1049] Accordingly, we preliminarily would interpret engaging in a security-based swap within the United States to encompass the same types of activities that characterize a transaction conducted within the United States, as that term is defined in proposed Rule 3a71–3(a)(5).[1050]

ii. Proposed Exception for Transactions Conducted Within the United States by Certain Non-U.S. Persons

The Commission recognizes that transactions between two non-U.S. persons whose performances under a security-based swap are not guaranteed by a U.S. person do not pose the same risk to the U.S. financial system that is posed by transactions with U.S. person counterparties or transactions in which a U.S. person provides a guarantee. In particular, while the operational risks associated with the transaction may reside in the United States and would potentially be reduced by required use of the central market infrastructure available to clear the products in question, we preliminarily believe that because the financial risks of the transaction would reside with non-U.S. persons outside the United States, it is not necessary to apply the mandatory clearing requirement to a transaction between two non-U.S. persons solely because the transaction is a ''transaction conducted within the United States'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act. Accordingly, the Commission is proposing an exception from the mandatory clearing requirement for security-based swap transactions that are ''transactions conducted within the United States'' when no counterparty to the transaction is (i) a U.S. person; (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or (iii) a foreign security-based swap dealer.[1051]

The Commission preliminarily believes it is appropriate to limit the exception from the mandatory clearing requirement when one or both of the non-U.S. person counterparties is a foreign security-based swap dealer. Non-U.S. persons whose transactions arising from dealing activity with U.S. persons or otherwise conducted within the United States exceed the *de minimis* threshold in the security-based swap dealer definition have a sufficient connection to the U.S. security-based swap market to lead the Commission to preliminarily conclude that it would not be appropriate to except transactions involving them from the mandatory clearing requirement when they conduct security-based swap transactions within the United States. Permitting non-U.S. persons to engage in security-based swap transactions within the United States with foreign security-based swap dealers without being subject to the mandatory clearing requirement would potentially limit the access of U.S. persons to foreign security-based swap markets because non-U.S. persons seeking to engage in security-based swaps within the United States may prefer to engage in security-based swaps with foreign security-based swap dealers rather than U.S. persons to avoid the mandatory clearing requirement.

Request for Comment

The Commission seeks comment on the proposed rule in all aspects. In addition, the Commission seeks comment on the following specific questions:

- Should the mandatory clearing requirement apply to all transactions conducted by a U.S. person, including transactions conducted out of a foreign branch, or by a guaranteed non-U.S. person? Why or why not? Should the mandatory clearing requirement apply to such transactions unless, for example, they are conducted in a foreign regime that has a mandatory clearing regime that is comparable to the mandatory clearing regime under the Dodd-Frank Act? In assessing comparability under this approach, to what extent should results of mandatory clearing determinations under the foreign regime be taken into account? Should the determinations with respect to ''local'' products be viewed differently than products that are subject to mandatory clearing determinations in one or more other jurisdictions, *i.e.,* ''global'' products? Would some other standard for assessing a foreign regime in these circumstances be appropriate?
- Is the proposed approach over-broad or over-narrow? If so, why? Should a security-based swap that is required to be cleared under foreign law not be required to be cleared pursuant to Section 3C, as some commenters stated? If so, why?
- When the conduct occurring in the United States is limited only to negotiating or soliciting a transaction, does the transaction carry risk into the U.S. financial system? If not, is application of the mandatory clearing requirement to such transactions appropriate?
- How should the Commission weigh the operational risks that arise from requiring mandatory clearing? To what extent do the exceptions to the mandatory clearing requirement undermine the development of a central clearing infrastructure that will facilitate the prompt and accurate clearance and settlement of security-based swaps? Are persons excepted from the mandatory clearing requirement likely to develop the same operational capacity and safeguards to facilitate clearing as persons not excepted? If not, to what extent does this increase operational risk to the national system for clearance and settlement? To what extent, if any, should the exceptions to the mandatory clearing requirement be limited to minimize operational risks and market risks that may be experienced in the United States?
- Are there other rationales besides risk mitigation that justify imposing the mandatory clearing requirement? If so, what are they and why? Do these alternative rationales support a different application of the requirement to U.S. persons and non-U.S. persons? As regards foreign branches of U.S. banks? As regards non-U.S. persons who receive guarantees from U.S. persons and non-U.S. persons who do not receive guarantees from U.S. persons? As regards security-based swap dealers?
- How should the mandatory clearing requirement treat members of clearing agencies registered with the Commission? For instance, to what extent should the mandatory clearing requirement apply to members of clearing agencies registered with the

disruptions from external events will result in the reduction, deterioration, or breakdown of services'' and noting that operational risks ''can be a source of systemic risk.'').

[1048] Proposed Rule 3Ca–3(a)(2) under the Exchange Act.

[1049] *See* Section III.B.6, *supra.*

[1050] Proposed Rule 3Ca–3(a)(2) under the Exchange Act.

[1051] *Id.*

Commission if the member is not a U.S. person, does not have its performance guaranteed by a U.S. person, is not a security-based swap dealer, or is not conducting the transaction within the United States? Please be specific.

• How should the mandatory clearing requirement treat counterparties who are swap dealers? For instance, should non-U.S. persons who are swap dealers and whose performance under the swap is not guaranteed by a U.S. person be excepted from the mandatory clearing requirement in any circumstances? If so, under what circumstances? How should other financial entities be treated? How should major swap participants and major security-based swap participants be treated under the proposed rule? Should they be excepted from the mandatory clearing requirement, in certain circumstances, as we have proposed?

• Are the proposed exceptions from the mandatory clearing requirement appropriate? Should other transactions also be excepted? If so, which? Should other categories of persons also be excepted? If so, whom?

• Should any transactions conducted within the United States be subject to any exception from the mandatory clearing requirement? If so, why? For instance, should a transaction between two non-U.S. persons neither of whom is guaranteed by a U.S. person and neither of whom are security-based swap dealers, as excepted from the mandatory clearing requirement under proposed Rule 3Ca–3(b)(2), be subject to mandatory clearing? If so, why?

• Should any transactions where one counterparty is a U.S. person be subject to an exception from the mandatory clearing requirement? If so, which transactions and why? For instance, should transactions not conducted in the United States in which one counterparty is a foreign branch of a U.S. bank be subject to any exceptions, such as the exception in proposed Rule 3Ca–3(b)(1)?

• To what extent might the exceptions described in proposed Rule 3Ca–3(b) create competitive disparity between similarly situated persons competing in the same market? For instance, for transactions conducted within the United States, to what extent, if any, might proposed Rule 3Ca–3(b)(2) create competitive disparity between U.S. persons and non-U.S. persons? For transactions not conducted within the United States, to what extent, if any, might proposed Rule 3Ca–3(b)(1) create competitive disparity between counterparties who are security-based swap dealers and foreign branches of U.S. banks?

• Should the Commission impose any conditions to the exceptions from the mandatory clearing requirement? What conditions would be appropriate?

• If the proposed rule overlaps with a foreign mandatory clearing requirement, in what ways are the requirements likely to conflict? What would be the effects on efficiency, competition and capital formation in the event that there are overlapping or duplicative mandatory clearing requirements or varying exceptions to such requirements across multiple jurisdictions?

• What provisions of Section 3C, or the Exchange Act and rules thereunder generally, would a counterparty be unable to comply with if the security-based swap transaction was subject to more than one mandatory clearing requirement? What categories of transactions are likely to be subject to such multiple mandatory clearing requirements? To what extent, if any, would a counterparty's membership in a clearing agency that clears security-based swaps affect the likelihood that multiple mandatory clearing requirements would apply to a security-based swap transaction? To what extent, if any, would a guaranteed non-U.S. person be subject to multiple mandatory clearing requirements? To what extent, if any, does the home country of the reference entity under a security-based swap affect the likelihood that multiple mandatory clearing requirements would apply to the transaction? Does proposed Rule 3Ca–3 provide sufficient regulatory guidance regarding such transactions? Why or why not?

• What would be the market impact of proposed Rule 3Ca–3? How would the proposed application of the mandatory clearing requirement affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed rule place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed rule be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the mandatory clearing requirement? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

X. Mandatory Security-Based Swap Trade Execution Requirement

A. Introduction

Section 3C(h)(1) of the Exchange Act requires, with respect to transactions involving security-based swaps subject to the clearing requirement in Section 3C(a)(1) of the Exchange Act, that counterparties execute such transactions on an exchange or a security-based swap execution facility that is registered under Section 3D of the Exchange Act or exempt from registration under Section 3D(e) of the Exchange Act (the ''mandatory trade execution requirement'').[1052] Section 3C(h) thus provides that security-based swap transactions subject to the mandatory trade execution requirement cannot be executed on an OTC basis, but must instead be executed on an exchange or security-based swap execution facility that is registered or exempt from registration under the Exchange Act, unless an exception applies.[1053] As such, the mandatory trade execution requirement is important in helping to bring the trading of security-based swaps onto transparent, regulated markets, from more opaque OTC markets.[1054]

Because transactions in security-based swaps are often conducted globally with counterparties and intermediaries from multiple jurisdictions,[1055] we recognize uncertainty may exist regarding how to apply the mandatory trade execution requirement to cross-border security-based swap transactions.[1056] The

[1052] 15 U.S.C. 78c–3(h)(1).

[1053] 15 U.S.C. 78c–3(h). Section 3C(h)(2) of the Exchange Act provides two exceptions to compliance with the mandatory trade execution requirement: (i) If no exchange or security-based swap execution facility makes the security-based swap available to trade; or (ii) if the security-based swap transaction is subject to the clearing exception under Section 3C(g) of the Exchange Act. 15 U.S.C. 78c–3(h)(2). In this release, we are not addressing either of these exceptions, as they pertain to whether a particular security-based swap is subject to the mandatory trade execution requirement. Our focus here is on the obligations of the counterparties to a transaction involving a security-based swap that is subject to the mandatory execution requirement where neither of these exceptions applies.

[1054] *See* SB SEF Proposing Release, 76 FR 10949 (''The current market for [security-based] swaps is opaque, with little, if any, pre-trade transparency (the ability of market participants to see trading interest prior to a trade being executed) or post-trade transparency (the ability of market participants to see transaction information after a trade is executed). A key goal of the Dodd-Frank Act is to bring trading of [security-based] swaps onto regulated markets . . . .'').

[1055] *See* Section II.A.1, *supra.*

[1056] One commenter, writing on behalf of a group of various market participants, asked for clear guidance regarding the application of the mandatory trade execution requirement for cross-border transactions in security-based swaps. *See* Cleary Letter III and Cleary Letter IV. The commenter recommended that the mandatory trade execution requirement should only apply to transactions where at least one counterparty is a U.S. person. *See* Cleary Letter IV at 27. This commenter also argued that the mandatory trade

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Commission is proposing Rule 3Ch–1 under the Exchange Act to specify the applicability of the mandatory trade execution requirement with respect to cross-border security-based swap transactions. Our proposed approach follows the territorial approach described above [1057] and imposes the mandatory trade execution requirement on transactions that would be subject to the mandatory clearing requirement [1058] unless they qualify for an exception.[1059] We discuss substituted compliance with the mandatory trade execution requirement in Section XI.F below.[1060]

We recognize that other approaches are possible to achieve the goals of the Dodd-Frank Act, in whole or in part. Accordingly, we invite comment regarding all aspects of the proposal described below, including potential alternative approaches. Data and comment from market participants and other interested parties regarding the likely effect of the proposed rule and potential alternative approaches will be particularly useful to the Commission in evaluating possible modifications to the proposal.

B. Application of the Mandatory Trade Execution Requirement to Cross-Border Transactions

1. Statutory Framework

Section 3C(h) of the Exchange Act provides that if a transaction is subject to the mandatory clearing requirement, counterparties shall execute the transaction on an exchange or on a registered or exempt SB SEF, unless an exception applies.[1061] Section 3C(a)(1) of the Exchange Act provides that it shall be unlawful for any person ''to engage in a security-based swap unless that person submits such security-based swap for clearing . . . if the security-based swap is required to be cleared.'' [1062] As discussed above, we are proposing to apply the statutory mandatory clearing requirement to any person who engages in a security-based swap transaction within the United States.[1063] We preliminarily believe that, to the extent that a cross-border transaction is subject to the mandatory clearing requirement under the proposed approach described above, it also would be subject to the mandatory trade execution requirement unless it qualifies for an exception.[1064] This approach is consistent with the statutory framework of Title VII of the Dodd-Frank Act, because a security-based swap transaction first must be subject to the mandatory clearing requirement before the counterparties to the transaction must comply with the mandatory trade execution requirement, unless an exception to the mandatory trade execution requirement applies. Thus, to the extent that we are proposing not to apply the mandatory clearing requirement to a particular transaction, the mandatory trade execution requirement would not apply to such transaction.

2. Proposed Rule

Consistent with our proposed rule applying the mandatory clearing requirement [1065] and our general approach in applying Title VII in the cross-border context,[1066] the Commission is proposing Rule 3Ch–1 under the Exchange Act. Under the proposed rule, the mandatory trade execution requirement would apply to any person that engages in a security-based swap transaction in which at least one of the counterparties to the transaction is (i) a U.S. person [1067] or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person.[1068] We also are proposing to apply the mandatory trade execution requirement to any person that engages in a security-based swap if such transaction is a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act.[1069]

To limit the scope of the proposal, we are proposing exceptions to the mandatory trade execution requirement in the following two scenarios: [1070]

- If the security-based swap transaction is not a ''transaction conducted within the United States,'' the proposed rule would not apply the mandatory trade execution requirement if one counterparty to the transaction is (i) a foreign branch of a U.S. bank [1071] or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,[1072] and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.[1073]
- If the security-based swap transaction is a ''transaction conducted within the United States,'' the proposed rule would not apply the mandatory trade execution requirement if (i) neither counterparty to the transaction

execution requirement should not apply to transactions involving two non-U.S. persons that utilize U.S. persons to carry out the transaction. We discuss this comment below.

[1057] *See, e.g.,* Section VII, *supra* (discussing the registration of foreign security-based swap markets); *see also* the general discussion of the Commission's territorial approach in Section II.B, *supra.*

[1058] *See* Section IX, *supra* (discussing the scope of the mandatory clearing requirement).

[1059] *See* note 1053, *supra.*

[1060] Under the Commission's proposal, substituted compliance would be permitted for certain cross-border security-based swap transactions that would be subject to the mandatory trade execution requirement in Section 3C(h) of the Exchange Act and the rules and regulations thereunder. *See* discussion in Section XI.F, *infra.*

[1061] *See* 15 U.S.C. 78c–3(h).

[1062] *See* 15 U.S.C. 78c–3(a)(1).

[1063] In Section IX above, the Commission proposes Rule 3Ca–3 under the Exchange Act. Subject to certain exceptions, proposed Rule 3Ca–3 would apply the mandatory clearing requirement to any person that engages in a security-based swap transaction in which at least one of the counterparties to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person, or if the transaction is a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act. *See* Section IX.C, *supra,* and Section III.B.6, *supra* (discussing proposed Rule 3a71–3(a)(5)).

[1064] *See* note 1053, *supra.*

[1065] *See* proposed Rule 3Ca–3 under the Exchange Act.

[1066] *See* Section II.B, *supra.*

[1067] Under proposed Rule 3Ch–1(c) under the Exchange Act, the term ''U.S. person'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(7) under the Exchange Act, as discussed in Section III.B.5 below.

[1068] Proposed Rule 3Ch–1(a)(1) under the Exchange Act.

[1069] Proposed Rule 3Ch–1(a)(2) under the Exchange Act.

[1070] Consistent with our intent to apply the mandatory trade execution requirement in the same way as the mandatory clearing requirement, these exceptions are identical to the exceptions from the mandatory clearing requirement. *See* proposed Rule 3Ca–3(b) under the Exchange Act, as discussed in Section IX, *supra.*

[1071] Under proposed Rule 3Ch–1(c) under the Exchange Act, the term ''foreign branch'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(1) under the Exchange Act. *See* discussion in Section III.B.7, *supra.* A security-based swap transaction conducted through a foreign branch, as defined in proposed Rule 3a71–3(a)(4) under the Exchange Act, would be specifically excluded from the proposed definition of ''transaction conducted within the United States.'' *See* proposed Rule 3a71–3(5)(ii) under the Exchange Act, as discussed in Section III.B.6, *supra.*

[1072] A security-based swap transaction involving a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person would not be a ''transaction conducted within the United States'' by virtue of the guarantee alone because providing a guarantee on a transaction is not one of the factors that would cause a transaction to be a transaction conducted within the United States under proposed Rule 3a71–3(a)(5) under the Exchange Act. We would consider such transaction to be engaged in within the United States, however, by virtue of the guarantee from the U.S. person, who acts as an ''indirect counterparty'' to the transaction.

[1073] Proposed Rule 3Ch–1(b)(1) under the Exchange Act. Proposed Rule 3Ch–1(c) under the Exchange Act defines the term ''foreign security-based swap dealer'' by cross-reference to the definition of that term in proposed Rule 3a71–3(a)(3) of the Exchange Act (defining ''foreign security-based swap dealer'' to mean ''a security-based swap dealer, as defined in section 3(a)(71) of the [Exchange] Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person'').

is a U.S. person; (ii) neither counterparty's performance under the security-based swap is guaranteed by a U.S. person; and (iii) neither counterparty to the transaction is a foreign security-based swap dealer.[1074] We discuss below the proposed rule regarding the application of the mandatory trade execution requirement in more detail.

3. Discussion

In considering how to apply the mandatory trade execution requirement, we have relied primarily on the express statutory relationship between the mandatory clearing requirement and the mandatory trade execution requirement. The statutory text, in our view, indicates that Congress viewed the clearing and trade execution requirements as complementary, since a security-based swap transaction that is subject to the mandatory clearing requirement is subject to the mandatory trade execution requirement, absent circumstances that trigger one of the exceptions to the mandatory trade execution requirement. In the following, we discuss the proposed rule regarding the application of the mandatory trade execution requirement in more detail.

(a) Security-Based Swap Transactions Involving U.S. Persons or Non-U.S. Persons Receiving Guarantees From U.S. Persons

i. Proposed Rule

The proposed rule would apply the mandatory trade execution requirement to transactions in which one of the counterparties is (i) a U.S. person or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person,[1075] subject to certain exceptions.[1076] We preliminarily believe that applying the mandatory trade execution requirement to transactions in which U.S. persons are counterparties or provide guarantees of the performance of non-U.S. persons under a security-based swap would be consistent with the purposes of the Dodd-Frank Act to improve transparency in the U.S. financial system.[1077] As noted above, the mandatory trade execution requirement in Title VII is critical to this goal because this requirement is designed promote the trading of security-based swap transactions on transparent, regulated markets.[1078] Therefore, by applying the mandatory trade execution requirement to transactions in which U.S. persons are counterparties or provide guarantees of the performance of non-U.S. persons under a security-based swap, the proposed rule would further the goals of the Dodd-Frank Act to improve the transparency of the U.S. financial system.[1079]

ii. Proposed Exception for Certain Transactions Involving Foreign Branches of U.S. Banks and Guaranteed Non-U.S. Persons

Consistent with the Commission's proposed approach to the mandatory clearing requirement discussed above,[1080] the Commission is proposing an exception from the mandatory trade execution requirement described above for certain transactions that involve foreign branches of U.S. banks or guaranteed non-U.S. persons, provided the transactions are not conducted within the United States. Specifically, under proposed Rule 3Ch–1(b)(1), the mandatory trade execution requirement would not apply to a security-based swap transaction if one counterparty to the transaction is (i) a foreign branch of a U.S. bank [1081] or (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person and if the other counterparty to the transaction is a non-U.S. person (i) whose performance under the security-based swap is not guaranteed by a U.S. person and (ii) who is not a foreign security-based swap dealer.[1082] Such exception would not apply if the security-based swap transaction were a transaction conducted within the United States, as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act.[1083]

The Commission preliminarily believes that imposing the mandatory trade execution requirement on all security-based swap transactions in which a U.S. person is a counterparty or in which a U.S. person provides a guarantee to a non-U.S. person counterparty may adversely affect the ability of U.S. persons to access foreign security-based swap markets because non-U.S. persons may be less willing to enter into transactions with them if such transactions are subject to the mandatory trade execution requirement. Accordingly, we are proposing an exception from the mandatory trade execution requirement for transactions in which a counterparty to the transaction is a foreign branch of a U.S. bank or a non-U.S. person who receives a guarantee from a U.S. person on its performance under the security-based swap and the other counterparty is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person and who is not a foreign security-based swap dealer.[1084]

We recognize that imposing the mandatory trade execution requirement on a foreign branch of a U.S. bank or on a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person would be consistent with the view that a foreign branch of a U.S. bank is part of a U.S. person [1085] and that a U.S. guarantor is an indirect counterparty [1086] to the transaction entered into by the guaranteed non-U.S. person. We also recognize that subjecting such transactions to the mandatory trade execution requirement could help to bring the trading of security-based swaps onto transparent, regulated markets, from more opaque OTC market. At the same time, however, imposing the mandatory trade execution requirement on U.S. persons that conduct their foreign security-based swap dealing activity through foreign branches or guaranteed non-U.S. persons, without any exceptions, could put such U.S. persons at a significant

[1074] Proposed Rule 3Ch–1(b)(2) under the Exchange Act.

[1075] Proposed Rules 3Ch–1(a)(1)(i) and (ii) under the Exchange Act.

[1076] Proposed Rule 3Ch–1(b) under the Exchange Act. *See also* note 1053, *supra.*

[1077] *See* Section II.B.2(d), *supra* (discussing guarantees in the cross-border context).

[1078] *See* note 1054, *supra.*

[1079] We preliminarily believe that the proposed approach with respect to the mandatory trade execution requirements is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Section 30(c). *See* Section II.B.2(b), *supra.* However, the Commission also preliminarily believes that the proposed approach with respect to the mandatory trade execution requirements is necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act that are being implemented by the approach and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined. *See* Section II.B.2(e), *supra; see also* Section II.B.2(d), *supra.*

For example, if the mandatory trade execution requirement does not apply to a transaction among non-U.S. persons that receive guarantees from U.S. persons and foreign branches of U.S. banks, then U.S. persons would have an incentive to evade the mandatory trade execution requirement by conducting transactions with other U.S. persons through guaranteed foreign affiliates or foreign branches. Altering the form of the transaction in this manner would allow U.S. persons to continue to avail themselves of transparency in the U.S. security-based swap market while evading the requirements intended to enhance that transparency, even though the substance of the transaction remains unchanged. *See* note 1054 and accompanying text, *supra.*

[1080] *See* Section IX, *supra.*

[1081] *See* note 1071, *supra.*

[1082] Proposed Rule 3Ch–1(b)(1) under the Exchange Act. *See also* note 1073, *supra.*

[1083] Proposed Rule 3Ch–1(b)(1) under the Exchange Act.

[1084] *Id.*

[1085] *See* Section III.B.5, *supra.*

[1086] *See* note 1012, *supra.*

competitive disadvantage to non-U.S. persons who conduct security-based swap business in the same foreign local market and thereby limit the access of such U.S. persons to foreign security-based swap markets. After balancing the various policy considerations, including the Dodd-Frank Act's goal of promoting trading on transparent, regulated markets, we have preliminarily concluded that the proposed exception from the mandatory trade execution requirement for transactions by U.S. persons conducting security-based swap activity out of foreign branches, or transactions by guaranteed non-U.S. persons, with non-U.S. persons whose performance under the security-based swap is not guaranteed by a U.S. person (and who is not a foreign security-based swap dealer) is appropriate, provided that it is not a transaction conducted within the United States.

This exception from the mandatory trade execution requirement would not apply under the proposed rule, however, when the non-U.S. person counterparty of the foreign branch of the U.S. bank or the guaranteed non-U.S. person is a foreign security-based swap dealer.[1087] The reason for this proposed carve-out from the exception from the mandatory trade execution requirement is similar to the reason discussed above in the context of the mandatory clearing requirement. Because a foreign security-based swap dealer would necessarily have a significant connection with the U.S. security-based swap market because its dealing activity with U.S. persons or within the United States would trigger registration requirements, we preliminarily believe it is not appropriate to provide an exception for U.S. persons conducting security-based swap activity out of foreign branches or for guaranteed non-U.S. persons when they enter into security-based swaps with foreign security-based swap dealers.

(b) Transactions Conducted Within the United States

i. Proposed Rule

Under the proposed rule, a security-based swap transaction that is a transaction conducted within the United States, as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act, would be subject to the mandatory trade execution requirement.[1088] As we have noted above, a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5), includes soliciting, negotiating, executing, or booking a security-based swap transaction.[1089] The Commission believes that applying the mandatory trade execution requirement to a security-based swap transaction when the activities that are key stages in that transaction are conducted within the United States furthers a goal of the mandatory trade execution requirement, namely, to bring the trading of security-based swaps within the United States onto regulated markets, unless an exception applies. Furthermore, such an approach is consistent with our proposed approach to the mandatory clearing requirement discussed above.[1090]

ii. Proposed Exception for Transactions Conducted Within the United States by Certain Non-U.S. Persons

We recognize that one commenter has recommended that transactions between two non-U.S. persons that utilize U.S. agents should not be subject to the mandatory trade execution requirement.[1091] The commenter noted that it is common for non-U.S. persons to utilize U.S. agents because of their expertise in the relevant market (such as in the case of a swap with an underlying U.S. security) or because of logistical matters (such as the time zones in which the parties conduct business).[1092] The commenter argued that applying the mandatory trade execution requirement to these transactions could curtail the use of U.S. agents to negotiate trades and encourage personnel in the United States to relocate elsewhere.[1093]

Consistent with our proposed approach to applying the mandatory clearing requirement to transactions conducted within the United States by non-U.S. persons, the Commission is proposing an exception from the mandatory trade execution requirement for security-based swap transactions that are transactions conducted within the United States when no counterparty to the transaction is (i) a U.S. person; (ii) a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or (iii) a foreign security-based swap dealer.[1094]

The Commission preliminarily believes that it is appropriate to limit the exception from the mandatory trade execution requirement when one or both of the non-U.S. person counterparties is a foreign security-based swap dealer. Non-U.S. persons whose transactions arising from dealing activity with U.S. persons or otherwise conducted within the United States exceed the *de minimis* threshold in the security-based swap dealer definition have a sufficient connection to the U.S. security-based swap market to lead the Commission to preliminarily conclude that it would not be appropriate to except transactions involving them from the mandatory trade execution requirement when they conduct security-based swap transactions within the United States. Permitting non-U.S. persons to engage in security-based swap transactions within the United States with foreign security-based swap dealers without being subject to the mandatory trade execution requirement would potentially limit the access of U.S. persons to foreign security-based swap markets because non-U.S. persons seeking to engage in security-based swaps within the United States may prefer to engage in security-based swaps with foreign security-based swap dealers rather than U.S. persons to avoid the mandatory trade execution requirement.

Request for Comment

The Commission seeks comment on all aspects of proposed Rule 3Ch–1, including the following:

- Should the mandatory trade execution requirement apply to all transactions conducted by a U.S. person, including transactions conducted out of a foreign branch of a U.S. bank or a non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person? Why or why not?
- Is it appropriate for the application of the mandatory trade execution requirement in the cross-border context to follow our approach to the mandatory clearing requirement? If not, why not? What alternative approach would better suit the relationship between these two requirements under the statute? Please explain.
- Is the proposed rule appropriate and sufficiently clear? Should additional details be included as to any aspect of the proposed rule? If so, what additional details should be provided and why?

[1087] Proposed Rule 3Ch–1(b)(1)(ii)(B) under the Exchange Act.

[1088] Proposed Rule 3Ch–1(a)(2) under the Exchange Act.

[1089] *See* Section III.B.6, *supra.*

[1090] As discussed above, the statutory language for the mandatory clearing requirements apply to any person that ''engages in a security-based swap,'' which the Commission proposes to interpret to include any transaction in which a person performs any of the activities that are key stages in a security-based swap transaction (*i.e.,* solicitation, negotiation, execution, or booking of the transaction). *See* Section IX.C, *supra; see also* Section 3C(a)(1) of the Exchange Act.

[1091] *See* Cleary Letter IV at 27–28.

[1092] *See id.*

[1093] *See id.*

[1094] Proposed Rule 3Ch–1(b)(2).

• As discussed above, under proposed Rule 3Ch–1(a), the mandatory trade execution requirement would apply to a person that engages in a security-based swap transaction if such person is a U.S. person, such person is a non-U.S. person whose performance under such security-based swap transaction is guaranteed by a U.S. person, or such security-based swap transaction is a transaction conducted within the United States. Are the circumstances in which the Commission proposes to apply the mandatory trade execution requirement sufficiently clear? If not, why not? Are these the appropriate circumstances in which to apply the mandatory trade execution requirement? If not, why not? Are there additional types of counterparties or security-based swap transactions to which the mandatory trade execution requirement should be applied? If so, who or what are they, and why? Are there types of counterparties or security-based swap transactions that should not be covered by the proposed rule? If so, why not?

• Would the proposed rule apply the mandatory trade execution requirement in ways that appropriately promote the goals of Title VII? Would any objectives of Title VII be hindered by applying the mandatory trade execution requirement as proposed? Would there be any regulatory gaps created by the proposed rule? Please provide detail.

• By requiring transactions conducted within the United States to be subject to the mandatory trade execution requirement, would the proposed rule appropriately create competitive parity between U.S. and non-U.S. persons that act as intermediaries within the United States to conduct transactions in security-based swaps? Why or why not? Please explain. Please provide specific recommendations and explain how any recommended approach would better promote competition than the proposed rule. More generally, should security-based swap transactions be subject to the mandatory trade execution requirement solely because a transaction was solicited or negotiated within the United States?

• Under proposed Rule 3Ch–1(b), certain security-based swap transactions by foreign branches and guaranteed non-U.S. persons that are not conducted within the United States would be excluded from the mandatory trade execution requirement. The Commission generally solicits comments on the appropriateness of excluding the security-based swap transactions described in proposed Rule 3Ch–1(b) from the application of the mandatory trade execution requirement. Should additional types of transactions be excluded from the application of the mandatory trade execution requirement? Should some or all of the transactions covered by proposed Rule 3Ch–1(b) not be excluded? If so, in either case, please explain why. Does proposed Rule 3Ch–1(b) appropriately balance the competitiveness of U.S. persons in the global security-based swaps market and the goals of Title VII? If not, how could this balance be better achieved? Should proposed Rule 3Ch–1(b) also apply to non-U.S. persons that are security-based swap dealers? Why or why not?

• What would be the market impact of proposed Rule 3Ch–1? How would the proposed application of the mandatory trade execution requirement affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed rule place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed rule be a more general burden on competition? If so, please explain. Would any burdens on competition be effectively mitigated by the proposed exception to mandatory trade execution in proposed Rule 3Ch–1(b)? Please explain. What other measures should the Commission consider to implement the mandatory trade execution requirement? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

XI. Substituted Compliance

A. Introduction

As noted above, we are proposing to establish a policy and procedural framework pursuant to rules under the Exchange Act in which the Commission would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements in the Exchange Act, and rules and regulations thereunder, relating to security-based swaps (*i.e.,* substituted compliance). As proposed, under a Commission substituted compliance determination, a person would be able to satisfy relevant requirements in the Exchange Act, and the rules and regulations thereunder, by substituting compliance with corresponding requirements under a foreign regulatory system. A person relying on a substituted compliance determination still would be subject to the particular Exchange Act requirement that is the subject of the substituted compliance determination, but would be permitted to comply with such requirement in an alternative fashion. Failure of a person to comply with the applicable foreign regulatory requirements would mean that such person would be in violation of the requirements in the Exchange Act.

The Commission is proposing to consider making substituted compliance determinations with respect to four distinct categories of requirements, each of which raises separate issues and will be discussed separately below. These categories are as follows: (i) Requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act and the rules and regulations thereunder; (ii) requirements relating to regulatory reporting and public dissemination of information on security-based swaps; (iii) requirements relating to clearing for security-based swaps; and (iv) requirements relating to trade execution for security-based swaps.

With respect to each of these categories of requirements, the Commission is proposing a ''comparability'' standard as the basis for making a substituted compliance determination. Generally, the Commission would endeavor to take a holistic approach in making substituted compliance determinations—that is, we would ultimately focus on regulatory outcomes as a whole with respect to the requirements within the same category rather than a rule-by-rule comparison. As noted above,[1095] efforts to regulate the derivatives market are underway, not only in the United States, but also in other jurisdictions. Since their 2009 statement, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform. And, as described above,[1096] the Commission has participated in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives and foreign regulatory reform efforts. We recognize that foreign regulatory systems differ in their approaches to achieving particular regulatory outcomes, and that foreign regulatory requirements may differ from those ultimately adopted by the Commission, but may nonetheless achieve regulatory outcomes comparable with the regulatory outcomes of the relevant provisions of the Exchange Act added by Title VII of the Dodd-Frank Act. In addition, we recognize that different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more—or fewer—specific requirements than the

[1095] *See* Section I.C., *supra.*

[1096] *Id.*

Commission. For example, under certain circumstances, a foreign regulatory system may be able to achieve one of those regulatory outcomes in the absence of one or more specific requirements that the Commission has implemented under a particular set of provisions of the Dodd-Frank Act.

Accordingly, we do not envision that the Commission, in making a comparability determination, would look to whether a foreign jurisdiction has implemented specific rules and regulations that are comparable to rules and regulations adopted by the Commission. Rather, the Commission would determine whether the foreign regulatory system in a particular area, taking into consideration any relevant principles, regulations, or rules in other areas of the foreign regulatory system to the extent they are relevant to the analysis, achieves regulatory outcomes that are comparable to the regulatory outcomes of the relevant provisions of the Exchange Act. If it does, the Commission preliminarily believes that a comparability determination would be appropriate, notwithstanding differences in or the absence of specific requirements of particular regulatory provisions.

In addition, the Commission recognizes that other regulatory systems are informed by the business and market practices present in the foreign jurisdictions where those systems apply, and that such practices may differ in certain respects from practices described in this release. More broadly, other regulatory systems are informed by the characteristics of the markets for which they were designed, including the number and nature of their market participants to which they apply. In making a comparability determination, the Commission recognizes that it may need to take into account such practices and characteristics in understanding the design and application of another regulatory system and whether and how it may achieve regulatory outcomes comparable to the regulatory outcomes of the relevant provisions of the Exchange Act.

As explained below, how the Commission would find a foreign regulatory system ''comparable'' would vary depending on the category of requirements. Because the Commission is proposing to make substituted compliance determinations with respect to each of the aforementioned categories of requirements, it is possible that a foreign regulatory system would be comparable with respect to some, but not all, categories of requirements. For instance, a foreign regulatory system may impose requirements on non-U.S. dealers that achieve regulatory outcomes comparable to the requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act, but the same foreign regulatory system may not achieve comparable regulatory outcomes regarding public reporting of trade information for security-based swaps. Similarly, a foreign regulatory system may impose requirements on clearing agencies that achieve regulatory outcomes comparable to the requirements applicable to registered security-based swap clearing agencies under Section 17A of the Exchange Act, but may not provide for comparable regulation of SB SEFs. By assessing each of these categories separately, the Commission would have the flexibility to make a substituted compliance determination with respect to one category of requirements but not another. However, the Commission would also retain the flexibility to consider the extent to which principles, regulations, or rules in one category may bear on a determination with respect to another category. Such an approach also would allow substituted compliance in certain categories to address competition and market efficiency concerns when a foreign regime is not comparable across the full range of Title VII policy objectives.

In addition, as described below, in making substituted compliance determinations, the Commission would consider a variety of factors that the Commission deems appropriate, including the nature of the global security-based swap market and the scope and objectives of the relevant foreign regulatory requirements. As part of this holistic review, the Commission would consider the various ways in which a foreign regulatory system achieves its overall goals and purposes, including those undertaken in response to the G20 commitments. As noted above, the Commission would also consider the extent to which applicable principles, regulations, or rules in one category may bear on a determination with respect to another category. In addition, the Commission recognizes that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority.

More specifically, the proposed policy and procedural framework for substituted compliance recognizes the potential, in a market as global as the security-based swap market, for market participants who engage in cross-border security-based swap activity to be subject to conflicting or duplicative compliance obligations. As a result of the efforts to implement the G20 commitments in various jurisdictions described above, in some cases of cross-border activity, market participants may be subject to compliance obligations in a foreign jurisdiction that are similar to those imposed by the Exchange Act. The proposed framework would allow the Commission to provide for substituted compliance to address the effect of conflicting or duplicative regulations on competition and market efficiency and to facilitate a well-functioning global security-based swap market. In other cases, however, market participants may not be subject to conflicting or duplicative regulation because the foreign jurisdiction has not enacted comprehensive regulation of the security-based swap markets or is still in the process of implementing regulatory reforms that have been enacted. It also may be that the foreign jurisdiction's regulation does not apply to the market participant or entity or the foreign jurisdiction has established regulations that differ, in material respects, from requirements in the Exchange Act (*e.g.,* requirements relating to real-time public reporting) and do not achieve comparable regulatory outcomes. In such cases, there would be less justification for allowing substituted compliance.

One alternative to making substituted compliance determinations by looking at separate categories of requirements would be to provide substituted compliance across the entire set of security-based swap requirements with respect to regimes that have implemented regulations consistent with the overall objectives of the G20 commitments. Preliminarily, however, we believe that making substituted compliance determinations on a regime-wide basis would be unworkable in light of the Commission's responsibility to implement the specific statutory provisions of the Exchange Act added by Title VII of the Dodd-Frank Act. While these provisions of the Exchange Act are consistent with the G20 commitments, they also contain provisions designed to achieve particular regulatory outcomes that may not be part of another jurisdiction's regulatory system. Thus, while the Commission would certainly consider the broader regulatory landscape in a foreign jurisdiction—including its approach to the G20 commitments—before making a substituted compliance

determination, the Commission would also need to consider the particular regulatory outcomes achieved under the Exchange Act provisions added by Title VII of the Dodd-Frank Act.

In the following, we propose rules and interpretive guidance addressing the policy and procedural framework under which we would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps, with respect to each of the aforementioned categories of requirements.

Request for Comment

The Commission requests comment on all aspects of our general approach to substituted compliance, including the following questions:

- Should the Commission make substituted compliance determinations on a regime-wide basis for a jurisdiction rather than with respect to categories of requirements? If so, should the finding that the regulatory outcomes of a foreign regulatory system are not comparable with respect to the regulatory outcomes of one category of the Exchange Act requirements cause the Commission to find the entire foreign regulatory regime to be not comparable as a whole? More specifically, under a regime-wide approach, how should the Commission make substituted compliance determinations with respect to foreign regulatory systems that do not achieve regulatory outcomes comparable to the regulatory outcomes with respect to certain categories of the Exchange Act requirements, taking into account the Commission's responsibility and statutory authority to implement the requirements of the Exchange Act added by Title VII of the Dodd-Frank Act?
- Should the Commission take into consideration the various ways in which a foreign regulatory system achieves its overall goals and purposes that are consistent with the G20 commitments in making a substituted compliance determination with respect a category of the Exchange Act requirements added by Title VII of the Dodd-Frank Act? Why or why not?
- Should the Commission take a more granular approach to substituted compliance determinations, for example, conducting a rule-by-rule or requirement-by-requirement comparison? Why or why not?
- Should the Commission identify more or less categories in our framework for substituted compliance? If so, how should those categories be demarcated?

B. Process for Making Substituted Compliance Requests

The Commission is proposing to amend our Rules of General Application to establish procedures pursuant to which it would consider applications for substituted compliance determinations with respect to each of the aforementioned categories of requirements.[1097] These procedures are similar to those now used by the Commission in considering exemptive order applications under Section 36 of the Exchange Act.[1098] All supporting documentation submitted pursuant to the proposed amendment would be made public.

Specifically, the proposed amendment would add new Rule 0–13 under the Exchange Act setting forth the general procedures for submission of requests for substituted compliance determinations. These procedures include the requirement that all applications for substituted compliance determinations must be in writing in the form of a letter, must include any supporting documents necessary to make the application complete, and otherwise must comply with 17 CFR 240.0–3 (Filing of Material with the Commission).[1099] All applications must be submitted to the Office of the Secretary of the Commission, and may be submitted either electronically[1100] or in paper format.[1101] In addition, all filings and supporting documentation filed pursuant to this proposed rule must be in the English language.[1102] If an application is incomplete, the Commission may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit promptly the omitted materials.[1103]

The Commission would not consider hypothetical or anonymous requests for a substituted compliance order.[1104] Consistent with this position, every application (electronic or paper) must contain the name, address, telephone number, and email address of each applicant and the name, address, telephone number, and email address of a person to whom any questions regarding the application should be directed.[1105] In addition, each applicant must provide the Commission with any supporting documentation it believes necessary for the Commission to make the requested substituted compliance determination, including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with, and enforce, such requirements.[1106] Applicants also should cite to and discuss applicable precedent related to a substituted compliance determination.[1107] Any amendments to an application would be required to be prepared and submitted as set forth in the proposed procedures and marked to show what changes were made.[1108]

Under the proposed rule, after the filing of an application for a substituted compliance determination is complete, Division of Trading and Markets staff would review the application and make a recommendation to the Commission.[1109] After consideration of the recommendation by the Commission, the Commission's Office of the Secretary would issue an appropriate response and would notify the applicant.[1110] As part of our review, the Commission may, in our sole discretion, schedule a hearing on the

[1097] Proposed Rule 0–13 under the Exchange Act.

[1098] *See* 17 CFR 240.0–12. *Cf.* 17 CFR 30.10 (Petitions for Exemptions), including Appendices A and C (CFTC's procedures for application by foreign persons with respect to foreign futures and foreign options transactions).

[1099] Proposed Rule 0–13(a) under the Exchange Act. In 17 CFR 240.0–3, the Commission sets forth general procedures for filing materials with the Commission.

[1100] Proposed Rule 0–13(b) under the Exchange Act.

[1101] Proposed Rule 0–13(d) under the Exchange Act.

[1102] Proposed Rule 0–13(c) under the Exchange Act. If a filing or submission filed pursuant to this rule requires the inclusion of a document that is in a foreign language, a party must submit instead a fair and accurate English translation of the entire foreign language document. A party may submit a copy of the unabridged foreign language document when including an English translation of a foreign language document in a filing or submission filed pursuant to this rule. A party must provide a copy of any foreign language document upon the request of Commission staff. *Id.*

[1103] Proposed Rule 0–13(a) under the Exchange Act.

[1104] Proposed Rule 0–13(e) under the Exchange Act.

[1105] *Id.*

[1106] *Id.*

[1107] *Id.*

[1108] Proposed Rule 0–13(f) under the Exchange Act.

[1109] As with other matters, the Division of Trading and Markets would work with the Office of General Counsel, the Division of Risk, Strategy, and Financial Innovation, the Office of International Affairs, the Office of Compliance Inspections and Examinations, and the Division of Enforcement, as well as other divisions and offices within the Commission, in reviewing and making a recommendation regarding substituted compliance determinations.

[1110] Proposed Rule 0–13(g) under the Exchange Act.

matter addressed by the application.[1111] The Commission also may, in our sole discretion, choose to publish in the **Federal Register** a notice that the application has been submitted which invites public comment on the application.[1112] Requestors may, however, seek confidential treatment of their applications for substituted compliance determinations.[1113]

The Commission preliminarily believes that these proposed procedures would provide sufficient guidance regarding the process whereby persons may seek to make a request for a substituted compliance determination with respect to each of the categories of requirements, as described more fully below.

Request for Comment

The Commission seeks comment on all aspects of the proposed rule, including the following:

- Do the proposed procedures give sufficient guidance to persons regarding the procedures for making a substituted compliance determination? If not, why not? What other procedures should the Commission adopt?
- Should the substituted compliance framework contemplate foreign regulatory authorities, rather than or in addition to market participants, submitting substituted compliance determination requests? Why or why not?

C. Security-Based Swap Dealer Requirements

1. Proposed Rule—Commission Substituted Compliance Determinations

The Commission is proposing a rule that would establish a framework in which the Commission may make a substituted compliance determination permitting a foreign security-based swap dealer that is registered with the Commission to satisfy requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, by complying with the corresponding rules and regulations established in a foreign jurisdiction.[1114] Specifically, the proposed rule would provide that the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign financial regulatory system that compliance with specified requirements under such foreign financial regulatory system by a registered foreign security-based swap dealer (or class thereof) [1115] may satisfy the corresponding requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer (or class thereof).[1116] The proposed framework would permit the Commission to make a substituted compliance determination only if we find that the requirements of such foreign financial regulatory system are comparable to otherwise applicable requirements, taking into account factors that the Commission determines appropriate, such as, for example, the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of such foreign security-based swap dealer (or any class thereof).[1117]

In making a substituted compliance determination, as noted above, the Commission's determination would focus on the similarities in regulatory objectives, rather than requiring that the foreign jurisdiction's rules be identical. Depending on our assessment of the comparability of the foreign regulatory regime, the Commission could condition the substituted compliance determination by limiting it to a particular class or classes of registrants in the foreign jurisdiction.[1118] For instance, if the foreign jurisdiction imposes different levels of supervisory oversight with respect to classes of entities conducting security-based swap dealing activity, the Commission could limit a substituted compliance determination to permit only certain classes of supervised foreign security-based swap dealers to rely on a substituted compliance determination. The Commission would determine what conditions are appropriate on a case-by-case basis.

The proposed rule would require that, before making a substituted compliance determination, the Commission must have entered into a supervisory and enforcement MOU or other arrangement with the appropriate financial regulatory authority or authorities in that jurisdiction addressing oversight and supervision of applicable security-based swap dealers subject to the substituted compliance determination.[1119] Through such MOU or other arrangement, the Commission and the foreign financial regulatory authority or authorities would express their commitment to cooperate with each other to fulfill their respective regulatory mandates.

Although we intend generally to take a category-by-category approach to substituted compliance, under the proposed rule, the Commission could make a substituted compliance determination with respect to one Title VII requirement applicable to registered security-based swap dealers but not another.[1120] However, consistent with our category-by-category approach, we believe that certain requirements are interrelated such that the Commission would expect to make a substituted compliance determination for the entire group of related requirements. For example, the core entity-level requirements relate to the regulation of an entity's capital and margin. But certain other entity-level requirements (such as risk management, general recordkeeping and reporting, and diligent supervision) are so

[1111] Proposed Rule 0–13(i) under the Exchange Act.

[1112] Proposed Rule 0–13(h) under the Exchange Act. The notice would provide that any person may, within the period specified therein, submit to the Commission any information that relates to the Commission action requested in the application. The notice also would indicate the earliest date on which the Commission would take final action on the application, but in no event would such action be taken earlier than 25 days following publication of the notice in the **Federal Register**. *Id.*

[1113] Proposed Rule 0–13(a) under the Exchange Act. Requests for confidential treatment would be permitted to the extent provided under 17 CFR 200.81. *Id.*

[1114] Proposed Rule 3a71–5 under the Exchange Act.

[1115] The Commission is proposing a framework under which it may consider making substituted compliance determinations applicable to bona fide foreign security-based swap dealers. This proposed approach would not extend to entities organized outside of the United States for the purpose of evading U.S. regulation. The Commission would consider a variety of factors to confirm the bona fide nature of a foreign security-based swap dealer for these purposes, including the location of management and risk controls related to such entity's security-based swap dealing activities and the nature of the counterparties.

[1116] Proposed Rule 3a71–5(a)(1) under the Exchange Act.

[1117] Proposed Rule 3a71–5(a)(2)(i) under the Exchange Act. In assessing oversight, the Commission would consider not only overall oversight activities, but also oversight specifically directed at conduct and activity that would be relevant to the substituted compliance determination. For example, it would be difficult for the Commission to make a comparability determination if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.

[1118] Proposed Rule 3a71–5(a)(1) under the Exchange Act (permitting the Commission to make the substituted compliance determination ''conditionally or unconditionally'').

[1119] Proposed Rule 3a71–5(a)(2)(ii) under the Exchange Act. The Commission expects that any existing supervisory or enforcement MOU or other arrangement would need to be re-negotiated during the substituted compliance determination process to reflect the particulars of a determination.

[1120] Proposed Rule 3a71–5(a) under the Exchange Act.

interconnected with capital and margin oversight that we would expect to make substituted compliance determinations, where warranted with regard to capital and margin rules, on the entire package of entity-level regulations.

The proposed rule also would permit the Commission, on our own initiative, to modify the terms of, or withdraw, a substituted compliance determination for a particular foreign jurisdiction, after appropriate notice and opportunity for comment.[1121] For instance, due to changes in the foreign regulatory regime, or a failure of a foreign regulator to exercise its supervisory or enforcement authority in an effective manner, the Commission may determine to modify the terms of, or withdraw, a previous substituted compliance determination. The Commission also would have the ability to periodically review the substituted compliance determinations it has granted and decide whether the substituted compliance determination should continue to apply.

In addition, the proposed rule would permit a foreign security-based swap dealer to rely on an applicable substituted compliance determination by the Commission with regard to a particular jurisdiction to satisfy the specified requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, as applicable, by complying with the corresponding requirements established in the foreign jurisdiction.[1122] The proposed rule would require a foreign security-based swap dealer relying on a substituted compliance determination to satisfy the conditions of the Commission's substituted compliance determination.[1123]

Finally, the proposed rule would address the situation in which a foreign security-based swap dealer seeks to rely on the rules and regulations of a foreign jurisdiction to satisfy Commission requirements but the Commission has not previously made a substituted compliance determination with respect to that jurisdiction. In such a case, the proposed rule would permit the foreign security-based swap dealer, or a group of foreign security-based swap dealers, to request pursuant to the procedures set forth in proposed Rule 0–13 under the Exchange Act, that the Commission make a substituted compliance determination for the foreign jurisdiction with respect to specified requirements in Section 15F of the Exchange Act.[1124] The proposed rule would require that the foreign security-based swap dealer (or foreign security-based swap dealers) be directly supervised by one or more financial regulatory authorities in that jurisdiction with respect to requirements similar to those in Section 15F of the Exchange Act, and the rules and regulations thereunder,[1125] and provide the certification and opinion of counsel as described in proposed Rule 15Fb2–4(c) under the Exchange Act.[1126]

Although the request for a substituted compliance determination could come from a particular foreign security-based swap dealer or group of dealers, the Commission would make such a determination, under the proposed rule, on a class or jurisdiction basis, depending on the regulator(s) and the foreign regulatory regime (rather than on a firm-by-firm basis).[1127] As a result, once the Commission has made a substituted compliance determination with respect to a particular foreign jurisdiction, it would apply to every foreign security-based swap dealer in the specified class or classes registered and regulated in that jurisdiction, subject to the conditions specified in the Commission's substituted compliance order.

The proposed rule would not provide for substituted compliance with respect to registration requirements described in Sections 15F(a)–(d) of the Exchange Act and the rules and regulations thereunder.[1128] As an initial matter, the registration process serves two important notice functions for the Commission. First, it is through the submission of a registration application that security-based swap dealers notify the Commission that they are engaged in dealing activity in excess of the *de minimis* threshold. Second, the registration application process is how foreign security-based swap dealers notify the Commission that they intend to seek or to rely on an existing substituted compliance determination.[1129] In addition to these key notice functions, the registration process provides the Commission with information that is essential to the Commission's ability to provide effective oversight of foreign security-based swap dealers, particularly for those relying on substituted compliance determinations to satisfy their obligations under Section 15F requirements.[1130] As a result, we are not proposing to allow substituted compliance for the registration requirements in Section 15F of the Exchange Act.

2. Discussion

The goal of the proposed rule is to increase the efficiency of the security-based swap market and promote competition by helping to avoid subjecting foreign security-based swap dealers to potentially conflicting or duplicative compliance obligations, while still achieving the policy objectives of Title VII of the Dodd-Frank Act. The Commission preliminarily believes that the proposed rule, by requiring that a substituted compliance determination be made on a class or jurisdictional basis and that a foreign jurisdiction's requirements be comparable to otherwise applicable U.S. requirements, is consistent with this goal.

[1121] Proposed Rule 3a71–5(a)(4) under the Exchange Act.

[1122] Proposed Rule 3a71–5(b) under the Exchange Act.

[1123] Proposed Rule 3a71–5(b)(2) under the Exchange Act.

[1124] Proposed Rule 3a71–5(c)(1) under the Exchange Act.

[1125] Proposed Rule 3a71–5(c)(2)(i) under the Exchange Act.

[1126] Proposed Rule 3a71–5(c)(2)(ii) under the Exchange Act. Proposed Rule 15Fb2–4 under the Exchange Act, as discussed in the Registration Proposing Release, 76 FR 65799–801, would require that a nonresident security-based swap dealer provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. *See* Section III.C.3(b)ix, *supra.* The Commission preliminarily believes that, before a foreign security-based swap dealer should be permitted to make a substituted compliance request, it should assure the Commission that it can provide the Commission with prompt access to books and records and submit to onsite inspection and examination because we expect that access to books and records and the ability to inspect and examine a foreign security-based swap dealer will be essential conditions of any substituted compliance determination.

[1127] Proposed Rule 3a71–5(a) under the Exchange Act. Because, under the proposed approach, all requests for substituted compliance determinations must come directly from a foreign security-based swap dealer, foreign financial regulatory authorities may not themselves request such a determination.

[1128] Proposed Rule 3a71–5(a)(3) under the Exchange Act.

[1129] *See* Section III.E, *supra* (discussing the process by which foreign security-based swap dealers would be required to notify the Commission of their reliance on substituted compliance determinations).

[1130] As part of the registration process, nonresident security-based swap dealers must (i) appoint an agent for service of process in the United States, (ii) furnish the Commission with the identity and address of its agent for services of process, (iii) certify that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission, and (iv) provide the Commission with an opinion of counsel concurring that the firm can, as a matter of law, provide the Commission with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. *See* proposed Rule 15Fb2–4 under the Exchange Act, as discussed in the Registration Proposing Release, 77 FR 65799–801

In addition, the Commission preliminarily believes that such an approach is consistent with the global nature of the security-based swap market and may be less disruptive of entity business arrangements than not permitting substituted compliance. At the same time, the Commission recognizes that U.S. security-based swap dealers may be put at a competitive disadvantage with their foreign counterparts if they are subject to, for example, more stringent capital or margin requirements than foreign security-based swap dealers. For instance, all other things being equal, a foreign security-based swap dealer that is subject to lower capital requirements would be able to enter into a security-based swap with a customer at a more competitive price than a U.S. security-based swap dealer that is subject to a higher capital requirement. Of course, more stringent capital or margin requirements could equally be viewed as a source of competitive advantage, with counterparties having greater confidence in the financial stability of U.S. counterparties.

One alternative to the proposed approach would be to impose uniform compliance on all registered security-based swap dealers rather than permitting substituted compliance for registered foreign security-based swap dealers. If the Commission were to adopt a uniform approach to the application of Section 15F requirements to registered U.S. and foreign security-based swap dealers without allowing for substituted compliance, foreign security-based swap dealers may find that complying with the Commission's capital, margin, and other entity-level rules would subject them to duplicative or conflicting requirements and may put them at a competitive disadvantage as a result.

As discussed above, the Dodd-Frank Act divides the entity-level regulatory oversight of security-based swap dealers between the Commission and prudential regulators.[1131] This statutory division of authority means that the Commission is not responsible for the capital and margin regulation of bank security-based swap dealers and, therefore, does not have the authority to make substituted compliance determinations in those areas for dealers that are banks. As a result, the Commission's provision of substituted compliance for capital and margin requirements only would extend to nonbank security-based swap dealers, whereas the Commission's substituted compliance determinations for all other entity-level requirements would apply to both bank and nonbank security-based swap dealers.

In addition to this statutory limitation on the Commission's ability to provide for substituted compliance in certain areas, the Commission also may consider the rationale for different capital treatment of banks and nonbanks in the United States. As discussed above, the Commission's proposed capital rules for nonbank security-based swap dealers differ from those that would be applicable to bank dealers as proposed by the prudential regulators in that the Commission's proposed capital standards are principally focused on the retention of highly liquid assets that can be distributed to customers.[1132] Assuming that the Commission adopts capital standards for nonbank security-based swap dealers as proposed, the Commission's comparability determinations regarding entity-level requirements would likely analyze separately the capital treatment of nonbank entities in jurisdictions that do not impose a comparable net liquid assets test. In performing such an analysis, the Commission would take into account the other principles, rules, and regulations of the foreign jurisdiction that may be relevant to the analysis. It also would consider whether nonbank dealers in that jurisdiction are permitted to hold more illiquid assets as regulatory capital compared to the assets permitted to be held under the capital rules adopted by the Commission and, if so, whether nonbank dealers in that jurisdiction have access to sufficient liquidity at the entity level to support the liabilities they incur out of their business activity.[1133] Similarly, the Commission would need to consider the impact of any reduced liquidity associated with the application of foreign capital standards on the ability of nonbank dealers in such jurisdiction to wind down operations quickly and distribute assets to customers.[1134] As this example illustrates, however, even when separately analyzing capital requirements, the Commission's focus would remain on ensuring not that the foreign jurisdiction has identical rules but on ensuring that a foreign jurisdiction that applies capital rules that do not impose a comparable net liquid assets test to nonbank security-based swap dealers can achieve the regulatory outcomes comparable to those intended under the Dodd-Frank Act.

Similarly, consistent with our category-based approach, the Commission's comparability determination with respect to the requirements set forth in Section 15F of the Exchange Act generally would not depend on the comparability of the goals achieved by foreign jurisdiction's capital and margin requirements taken alone but also would, in light of the interconnectedness of capital and margin with related entity-level requirements, take into account regulatory outcomes of other aspects of the jurisdiction's requirements. Although we believe that capital and margin requirements are at the core of a robust internal risk controls system at a firm, equally foundational to the financial integrity of a firm are effective internal risk management procedures and the effectiveness of other relevant foreign regulatory requirements that are connected to an entity's financial integrity. As noted above, the Commission is proposing to permit substituted compliance, not only with capital and margin requirements, but also with such other related entity-level requirements as the Commission finds appropriate.[1135] The Commission preliminarily believes that this approach to substituted compliance in the context of entity-level requirements will benefit foreign security-based swap dealers by allowing them to comply, where possible, with a single set of entity-level requirements where a substituted compliance determination is deemed appropriate, while ensuring that all registered security-based swap dealers are subject to robust entity-level oversight.

Request for Comment

The Commission requests comment on all aspects of the proposed rule establishing a policy and procedural framework for making substituted compliance determinations for registered foreign security-based swap dealers, including the following:

- What, if any, are the likely competitive effects, within the U.S. security-based swap market and among U.S. security-based swap dealers, of the proposed approach for application of substituted compliance for foreign security-based swap dealers? Please describe the specific nature of any such effects.
- The Commission generally solicits comments on the appropriateness and clarity of the proposed rule. Should

[1131] *See* Section III.C.3(b), *supra.*

[1132] *See* Section III.C.3(b)(1), *supra.*

[1133] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70304.

[1134] *See id.*

[1135] *See* Section XII.B.1, *supra.*

additional details be included regarding any aspects of the proposed rule?

• As discussed above, in making a substituted compliance determination, the Commission would ultimately focus on the comparability of regulatory outcomes rather than a rule-by-rule comparison. Is this holistic approach to making a substituted compliance determination appropriate? If not, why not?

• Is the comparability standard appropriate and sufficiently clear? Should additional detail be provided as to what would and would not satisfy this standard? If so, what additional detail should be provided? Should a different standard be used? If so, what should be the standard and why?

• As discussed above, in making a substituted compliance determination, the Commission would consider factors such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised. Are these factors appropriate? Are the enumerated factors too broad or too narrow? What other factors should the Commission consider?

• When assessing the effectiveness of a foreign jurisdiction's supervisory compliance program should the Commission consider factors such as the existence of a dedicated examination program, the expertise of examiners, the existence of a risk monitoring framework and an examination plan, and the existence of a disciplinary program to enforce compliance with laws? Similarly, when assessing the effectiveness of a foreign jurisdiction's enforcement program, should the Commission consider factors such as whether the program is actively administered, resourced, and transparent?

• As discussed above, the Commission could condition a substituted compliance determination by limiting it to a particular class or classes of registrants in the foreign jurisdiction, in which case the Commission would determine what conditions are appropriate on a case-by-case basis. What, if any, are the competitive effects of the proposed approach with respect to conditional substituted compliance determinations?

• As discussed above, the proposed rule permits the Commission, on our own initiative, to modify or withdraw a substituted compliance determination for a particular foreign jurisdiction, after appropriate notice and opportunity for comment. In the event that the Commission determines that a previous substituted compliance determination needs to be further conditioned or even withdrawn, how much advance notice would be sufficient to permit market participants to adjust their activities to reflect the modification or withdrawal? For example, would 60 days be appropriate? Should the opportunity for comment be made public? Why or why not?

• Should a review period or ''sunset provision'' to revisit a previous substituted compliance determination be required? If so, what should the appropriate time period be for such review period or sunset provision?

• Should the ability of a foreign security-based swap dealer to take advantage of substituted compliance be conditioned on it not transacting with certain classes of U.S. counterparties, such as persons that do not meet the definition of qualified institutional buyer, as defined in Securities Act Rule 144A (17 CFR 230.144A(a)(1)) (''QIB''), or some other threshold, such as qualified investor, as defined in Section 3(a)(54) of the Exchange Act? Would such counterparties be less able to appreciate the differences between engaging in security-based swap transactions with a security-based dealer subject to relevant provisions of Title VII versus a security-based swap dealer complying with comparable foreign regulations than a QIB or qualified investor? Would such an approach result in meaningful safeguards that would justify adopting such an approach? Is the use of such a substituted compliance regime likely to have a disparate impact on any particular class of counterparties? What are the potential advantages or disadvantages (including in terms of risk, competition, and counterparty protection) to counterparties, foreign security-based swap dealers, and U.S. security-based swap dealers in restricting the use of substituted compliance to transactions involving certain classes of U.S. counterparties?

• As discussed above, the proposed rule permits a foreign security-based swap dealer or group of foreign security-based swap dealers to submit a request that the Commission make a substituted compliance determination for the foreign jurisdiction with respect to specified requirements in Section 15F of the Exchange Act. Is the proposed procedure for submitting such requests sufficiently clear? Should additional details be included regarding any aspects of the proposed procedure?

• Do the proposed substituted compliance rules appropriately reflect the goal to increase the efficiency of the security-based swap market and promote competition by avoiding (as appropriate) subjecting foreign security-based swap dealers to potentially conflicting or duplicative compliance obligations? Would it be more appropriate to make substituted compliance determinations on a firm-by-firm basis rather than a class or jurisdictional basis? If so, why?

• Should entity-level requirements be treated separately for purposes of substituted compliance determinations, or should they be considered as a package of regulations?

• Should the Commission permit substituted compliance with respect to external business conduct standards in Section 15F(h) of the Exchange Act and the rules and regulations thereunder? Would allowing substituted compliance impair the Commission's ability to enforce the business conduct standards that the Dodd-Frank Act added to the Exchange Act?

• Should the Commission permit substituted compliance in transactions between registered non-U.S. dealers and U.S. persons?

• Should the Commission permit substituted compliance in transactions by registered non-U.S. dealers within the United States?

• Would allowing substituted compliance impair the Commission's ability to enforce the business conduct standards that the Dodd-Frank Act added to the Exchange Act relating to counterparty protection, particularly with respect to ''special entities''?

• Should the Commission not permit substituted compliance with respect to the conflicts of interest duties described in Section 15F(j)(5) of the Exchange Act and the rules and regulations thereunder? Why or why not? In particular, would allowing substituted compliance with respect to these requirements impair the Commission's ability to enforce these counterparty protections that the Dodd-Frank added to the Exchange Act? Why or why not? Should the foreign dealing subsidiaries of U.S. parents be allowed to take advantage of substituted compliance for entity-level requirements if they engage in U.S. Business?

• Should there be a threshold requirement that foreign security-based swap dealers engage in a predominately foreign business in order to rely on substituted compliance? If so, how should the ''predominantly foreign business'' threshold be measured? Should it be based on the relative notional amount of the security-based swap business of foreign security-based swap dealers with U.S. persons compared to the notional amount of their security-based swap business with

non-U.S. persons? If so, what should the threshold be (*e.g.,* 80% Foreign Business by notional amount? More than 50%?)?

• Should the Commission consider providing substituted compliance determinations related to capital regulation in jurisdictions that apply Basel-based capital standards to nonbank security-based swap dealers? Why or why not?

• In what ways are Basel-based capital standards as applied to nonbank security-based swap dealers consistent with the Commission's own capital standards for nonbank security-based swap dealers? In what ways are they inconsistent?

• While the Commission is determining whether to make an initial set of substituted compliance determinations, should the Commission delay compliance with the requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swap dealers for foreign security-based swap dealers? Are there some requirements that would be appropriate for delayed compliance? If so, please specify which ones and explain why. Are there other regulatory or market interests that the Commission should consider in determining the scope of the delayed compliance provision? If so, please describe those interests and how the proposed rule should address them.

• What would be the market impact of the proposed policy and procedural framework for making substituted compliance determinations for registered foreign security-based swap dealers? How would the application of the proposed policy and procedural framework affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed policy and procedural framework? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

• Should the Commission permit substituted compliance in transactions between registered non-U.S. dealers and U.S. persons?

• Should the Commission permit substituted compliance in transactions by registered non-U.S. dealers within the United States?

D. Regulatory Reporting and Public Dissemination

As initially proposed, Regulation SBSR did not contemplate that the reporting and public dissemination requirements associated with cross-border security-based swaps could be satisfied by complying with the rules of a foreign jurisdiction instead of U.S. rules. Thus, counterparties to a security-based swap would be required to comply with proposed Regulation SBSR even if the security-based swap also was, for example, reported to a foreign data repository or a foreign regulatory authority.

In response to this proposed approach, several commenters stated that requiring counterparties to report cross-border security-based swaps in more than one jurisdiction could result in duplicative or inconsistent reporting, unnecessary expense and administrative burden, and potential conflicts with another jurisdiction's confidentiality requirements.[1136] Commenters suggested various ways to address these issues. Some recommended generally that the Commission coordinate our trade reporting regime with those of other jurisdictions.[1137] Two commenters urged regulators to encourage the development of a single, global trade repository for each asset class.[1138] One of these commenters also stated that, in the absence of a global trade repository, regulators should implement internationally compatible reporting systems so that cross-border security-based swaps would not have to be reported twice.[1139] Another commenter suggested that the Commission define the term ''security-based swap'' to exclude a transaction that is reported to a non-U.S. trade repository, which would have the effect of eliminating any U.S. reporting requirement because the transaction would not be a security-based swap.[1140] Several commenters recommended that the Commission refrain from imposing any reporting requirements on security-based swaps that are reported pursuant to comparable rules of another jurisdiction.[1141]

The Commission is sympathetic to the desire to avoid redundant or conflicting reporting requirements, to the extent consistent with applicable statutory requirements. The Commission participates in a number of international organizations and initiatives that seek to coordinate regulation of the global OTC derivatives market, and the Commission staff has engaged in ongoing bilateral discussions with a number of foreign regulators on the subject of cross-border security-based swap activity. The Commission preliminarily believes that regulatory reporting of security-based swap transaction data is crucial to allow it and other regulators more effectively to carry out their statutorily assigned functions, which include the assessment of systemic risks.[1142] In addition, the Commission preliminarily believes that public dissemination generally would increase efficiency and price competition in the security-based swap market.[1143] The Commission preliminarily believes, therefore, that our own efforts to promote these goals should be implemented as quickly as practicable.

It is possible that other jurisdictions will implement reporting and dissemination regimes for security-based swap transactions that are comparable to the one set forth in Title VII and Regulation SBSR. In anticipation of that possibility, the Commission is now proposing rules regarding substituted compliance relating to regulatory reporting and public dissemination of security-based swaps, which are described below.

1. General

Proposed Rule 908(c)(2)(i) would provide that the Commission could, conditionally or unconditionally, by

[1136] *See, e.g.,* AIMA Letter at 6; DTCC Letter II at 21; ISDA/SIFMA Letter I at 18. While not specifically addressing reporting requirements, another commenter believed generally that the U.S. branches of Japanese banks should not be subject to Title VII requirements, because such banks will be subject to comprehensive regulation under Japanese law. *See* Japanese Banks Letter at 4 (arguing that application of Title VII would be ''superfluous at best'' and could subject foreign banks to potentially inconsistent requirements).

[1137] *See* AIMA Letter at 6; ISDA/SIFMA Letter I at 18 (urging the Commission to ''consult with foreign regulators before establishing the extra-territorial scope of the rules promulgated under Title VII''); Markit Letter III at 2 (arguing that the SEC and CFTC should ''harmonize their regulations with those of international regulators to the extent possible'').

[1138] *See* AIMA Letter at 6; ISDA Letter at 14.

[1139] *See* ISDA Letter at 13.

[1140] *See* Davis Polk Letter II at 21.

[1141] *See, e.g.,* Cleary Letter II at 17; Davis Polk Letter I at 2 (urging the Commission to implement Title VII in a way that relies on home country supervision), 7 (arguing that a transaction required to be reported to a foreign trade repository should not also be required to be reported to an SDR); Davis Polk Letter II at 21–22; ISDA Letter at 14 (stating that, in the absence of a single international trade repository, regulators should recognize trade repositories in other jurisdictions); Société Générale Letter I at 11 (recommending deference to foreign regulators that have a comparable regulatory scheme).

[1142] *See* Regulation SBSR Proposing Release, 75 FR 75262–64.

[1143] *See* Regulation SBSR Proposing Release, 75 FR 75280–82 (discussing anticipated impact of proposed Regulation SBSR on efficiency, competition, and capital formation).

order, make a substituted compliance determination with respect to regulatory reporting and public dissemination in a foreign jurisdiction if such foreign jurisdiction imposes a comparable system for the regulatory reporting and public dissemination of all security-based swaps.

Section 13A(a)(1) of the Exchange Act [1144] provides that all security-based swaps that are not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act [1145] provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act [1146] generally provides that transaction, volume, and pricing data of all security-based swaps shall be publicly disseminated. However, these statutory provisions do not address whether, or the extent to which, these requirements should apply to cross-border security-based swaps. Reporting security-based swap transactions pursuant to the regimes of both the United States and a foreign jurisdiction could be duplicative and potentially burdensome. Re-proposed Rule 908(c)(2)(i) would provide generally that compliance with a comparable system of a foreign jurisdiction for the regulatory reporting and public dissemination of all security-based swaps could, if certain conditions are met, be substituted for compliance with U.S. rules to satisfy the goals and objectives of these Title VII requirements.

2. Security-Based Swaps Eligible and Not Eligible for Substituted Compliance

The Commission preliminarily believes that, if a foreign jurisdiction applies a comparable system for the regulatory reporting and public dissemination of an entity's security-based swaps, it would be appropriate not to apply the U.S. requirements in addition to the requirements of that foreign jurisdiction. Where the Commission has found that a foreign jurisdiction's reporting and public dissemination requirements are comparable to those implemented by the Commission, we expect to make a substituted compliance determination with respect to such jurisdiction for these requirements. The Commission is re-proposing Rule 908(c)(1) to provide that compliance with the regulatory reporting and public dissemination requirements in Sections 13(m) and 13A of the Exchange Act, and the rules and regulations thereunder, may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a substituted compliance order issued by the Commission, provided that, with respect to at least one of the direct counterparties to the security-based swap:

(i) Such counterparty is either a non-U.S. person or a foreign branch; *and*

(ii) No person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of such counterparty.

The Commission preliminarily believes that, if at least one direct counterparty to a security-based swap is a non-U.S. person (even if the non-U.S. person is a security-based swap dealer or major security-based swap participant, or is guaranteed by a U.S. person) and no person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of that counterparty, the security-based swap should be eligible for substituted compliance with respect to regulatory reporting and public dissemination. Thus, substituted compliance with respect to regulatory reporting and public dissemination could apply even in the instance of a security-based swap with a direct counterparty that is operating from within the United States, so long as the other direct counterparty is a non-U.S. person and no person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of that non-U.S. person. This approach is designed to limit disincentives for non-U.S. persons to transact security-based swaps with U.S. persons by allowing compliance with the rules of a foreign jurisdiction to be substituted for compliance with U.S. rules when the non-U.S. person transacts with a U.S. person.

The Commission also preliminarily believes that the approach proposed above with respect to non-U.S. persons should be extended to the foreign branches of U.S. banks. As a result, we are proposing to allow the possibility of substituted compliance with respect to regulatory reporting and public dissemination if at least one counterparty of a security-based swap is the foreign branch of a U.S. bank, as long as no person within the United States is directly involved in executing, soliciting, or negotiating the terms of the security-based swap on behalf of such foreign branch.[1147] This approach is designed to promote access of foreign branches of U.S. banks to the local markets in which those branches are located. Assume, for example, that a substituted compliance determination with respect to regulatory reporting and public dissemination applied to a foreign jurisdiction and a transaction involved, on one side, a local, non-U.S. person market participant, and the security-based swap is required to be reported and publicly disseminated under the rules of that foreign jurisdiction regardless of whether the counterparty on the other side is a local dealer or a foreign branch of a U.S. bank. If substituted compliance with respect to regulatory reporting and public dissemination were in effect, the fact that the foreign branch is a counterparty would not cause the transaction to have to be reported pursuant to U.S. rules in addition to the foreign jurisdiction's rules.

Consistent with the factors described above, the Commission preliminarily believes that certain kinds of security-based swaps should *not* be eligible for substituted compliance with respect to regulatory reporting and public dissemination, even if they might be subject to reporting and public dissemination requirements in a foreign jurisdiction.[1148] As noted above, re-proposed Rule 908(c)(1) would provide that a security-based swap would be eligible for substituted compliance with respect to regulatory reporting and public dissemination where both of the following conditions apply to at least one direct counterparty to the transaction: (i) such counterparty is either a non-U.S. person or a foreign branch; and (ii) the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty. Thus, a security-based swap between *two U.S. persons* would *not* be eligible for substituted compliance with respect to regulatory reporting and public dissemination, even if the security-based swap were solicited, negotiated, and executed outside the United States.[1149]

[1144] 15 U.S.C. 78m–1(a)(1).

[1145] 15 U.S.C. 78m(m)(1)(G).

[1146] 15 U.S.C. 78m(m)(1)(C).

[1147] *See* Section III.B.6, *supra* (discussing the definition of ''foreign branch'' in proposed Rule 3a71–3(a)(1) under the Exchange Act).

[1148] If the rules of a foreign jurisdiction would not apply to the security-based swap, there would be no need to consider the possibility of substituted compliance, because there would be no foreign rules that could substitute for the applicable U.S. rules.

[1149] This assumes that neither U.S. person is acting through a foreign branch. If either U.S. person were acting through a foreign branch, the

Continued

Furthermore, re-proposed Rule 908(c)(1) would not allow for the possibility of substituted compliance with respect to regulatory reporting and public dissemination if both direct counterparties (or their agents)—regardless of place of domicile—solicit, negotiate, or execute a security-based swap from within the United States. The Commission preliminarily believes that U.S. rules for regulatory reporting and public dissemination should apply to transactions where all or the major part of actions associated with the security-based swap, on both sides of the transaction, are performed within the United States.

The following examples explain the operation of re-proposed Rule 908(c)(1). In all examples, assume that the Commission has issued a substituted compliance order with respect to regulatory reporting and public dissemination that applies to the foreign jurisdiction:

• *Example 1.* A bank in country X—solely through personnel located in country X—executes a security-based swap over the phone with a U.S. person located in New York, and no person within the United States is directly involved in soliciting, negotiating, or executing the terms of the security-based swap on behalf of the foreign bank. The security-based swap is not cleared. The security-based swap would be eligible for substituted compliance, regardless of whether the foreign bank is registered in any capacity with the Commission.

• *Example 2.* A foreign branch of a U.S. bank located in country X executes a security-based swap over the phone with a U.S. person located in New York. The foreign branch uses staff located solely in country X to solicit, negotiate, and execute the security-based swap. The security-based swap is not cleared. The security-based swap would be eligible for substituted compliance.

• *Example 3.* Two foreign branches of U.S. banks, both located in country X, execute a security-based swap in country X. The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of either counterparty. The security-based swap would be eligible for substituted compliance.

• *Example 4.* Two New York branches of foreign banks execute a security-based swap. Persons acting on behalf of each bank are located within the United States and are involved in soliciting, negotiating, and executing the terms of the security-based swap. The security-based swap would not be eligible for substituted compliance.

• *Example 5.* Same facts as Example 4, except that one foreign bank, instead of soliciting, negotiating, or executing the security-based swap using persons associated with its New York branch, uses only persons located in its home office to perform such functions. The security-based swap would be eligible for substituted compliance.

• *Example 6.* A foreign subsidiary (C1) of a U.S. person executes a security-based swap with a U.S. person (C2). No person within the United States solicits, negotiates, or executes the security-based swap on behalf of the foreign subsidiary C1. The security-based swap would be eligible for substituted compliance, regardless of the location of persons who executed, solicited, or negotiated the security-based swap on behalf of the U.S. person C2, and regardless of whether the foreign subsidiary C1 is guaranteed by a U.S. person.

3. Requests for Substituted Compliance

Proposed Rule 908(c)(2)(ii) would provide that any person that executes a security-based swap that would, in the absence of a substituted compliance order, be required to be reported pursuant to Regulation SBSR may file an application, pursuant to the procedures set forth in proposed Rule 0–13,[1150] requesting that the Commission make a substituted compliance determination regarding regulatory reporting and public dissemination with respect to a foreign jurisdiction the rules of which also would require reporting and public dissemination of the security-based swap. Proposed Rule 908(c)(2)(ii) would further provide that such application shall include the reasons therefor and such other information as the Commission may request. The Commission would consider those reasons as well as information derived from other sources in considering whether to grant a substituted compliance order with respect to regulatory reporting and public dissemination.

4. Findings Necessary for Substituted Compliance

Re-proposed Rule 908(c)(2)(iii) would provide that, in making a substituted compliance determination with respect to a foreign jurisdiction, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign financial regulatory authority to support oversight of its regulatory reporting and public dissemination system for security-based swaps. Furthermore, the Commission would not make a substituted compliance determination with respect to regulatory reporting and public dissemination unless the Commission found that:

(A) The data elements that are required to be reported pursuant to the rules of the foreign jurisdiction are comparable to those required to be reported pursuant to § 242.901;

(B) The rules of the foreign jurisdiction require the security-based swap to be reported and publicly disseminated in a manner and a timeframe comparable to those required by §§ 242.900–911;

(C) The Commission has direct electronic access [1151] to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction; and

(D) Any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains required transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements imposed on SDRs by sections 240.13n–5 to 240.13n–7 of the Exchange Act.

As noted above, the Commission preliminarily believes that compliance with a foreign jurisdiction's rules for reporting and public dissemination of security-based swaps should be a substitute for compliance with the U.S. rules only when the foreign jurisdiction has a reporting and public dissemination regime comparable to that of the United States. Thus, re-proposed Rule 908(c)(2)(iii)(A) would provide that the data elements required to be reported pursuant to the rules of the foreign jurisdiction must be comparable to those required to be reported pursuant to Rule 901 of Regulation SBSR. If the data elements required by the foreign jurisdiction were

security-based swap between those U.S. persons *would* be eligible for substituted compliance.

[1150] *See* Section XI.B, *supra*.

[1151] New paragraph (k) of re-proposed Rule 900 would define the term ''direct electronic access'' to have the same meaning as in proposed Rule 13n–4(a)(5) under the Exchange Act, as proposed in the SDR Proposing Release, 75 FR 77318.

not comparable, certain important data elements about a security-based swap might not be captured by the foreign trade repository or foreign regulatory authority.

Furthermore, re-proposed Rule 908(c)(2)(iii)(B) would provide that the rules of the foreign jurisdiction must require security-based swaps to be reported and publicly disseminated in a manner and a timeframe comparable to those required by Regulation SBSR. The Commission preliminarily believes that, given the Title VII requirements that all security-based swaps be reported to an SDR and that all security-based swaps be publicly disseminated in real time (except for block trades), allowing substituted compliance with the rules of a foreign jurisdiction that has standards significantly different from those in the United States would run counter to the objectives and requirements of Title VII. Thus, for example, the Commission would not, under re-proposed Rule 908(c), permit substituted compliance with respect to regulatory reporting and public dissemination if the foreign jurisdiction did not (among other things) impose public dissemination requirements on a trade-by-trade basis; dissemination of trade information on an aggregate basis would not be sufficient. Furthermore, the Commission would not permit substituted compliance under re-proposed Rule 908(c) with respect to regulatory reporting and public dissemination if security-based swaps of non-block size were publicly disseminated in other than real time, as required under Section 763 of the Dodd-Frank Act.

Re-proposed Rule 908(c)(2)(iii)(C) would also provide that, to grant a substituted compliance order with respect to regulatory reporting and public dissemination, the Commission must have direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction. This requirement stems from the fact that the regulatory reporting provisions of Title VII are premised on the idea that the Commission will have direct electronic access to all the reported data. Not having direct electronic access could reduce the Commission's ability to effectively and efficiently monitor the U.S. security-based swap market and provide timely and complete data to other U.S. financial regulatory agencies. Thus, the Commission preliminarily believes that direct electronic access to the foreign trade repository or foreign regulatory authority to which security-based swap transactions are reported in the foreign jurisdiction should be a prerequisite to issuing a substituted compliance order with respect to regulatory reporting and public dissemination applying to that jurisdiction.

An alternative to this proposed requirement would be to permit substituted compliance with respect to regulatory reporting and public dissemination if, instead, there existed an information-sharing agreement between the Commission and an appropriate body in the foreign jurisdiction that would permit the Commission to request and obtain transaction information from the foreign trade repository or foreign regulatory authority that otherwise would be reported to a registered SDR pursuant to Regulation SBSR. The Commission preliminarily believes, however, that it would be more appropriate to require direct electronic access to such data before allowing substituted compliance with respect to regulatory reporting and public dissemination. Without direct electronic access, the Commission could face substantial delays before a foreign entity, even acting expeditiously, could compile a substantial volume of data relating to a substantial volume of transactions. Delays in obtaining such data could compromise the ability of the Commission to supervise security-based swap market participants, and to share information with other U.S. financial regulators, in a timely fashion.

Re-proposed Rule 908(c)(2)(iii)(D) would provide that, to grant a substituted compliance order regarding regulatory reporting and public dissemination, the Commission must be able to find that any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements that the Commission would impose on SDRs. The Commission has proposed certain requirements for SDRs relating to data collection and maintenance;[1152] systems capacity, resiliency, and security;[1153] and recordkeeping.[1154] These requirements are designed, among other things, to enhance the ability of SDRs to effectively receive and maintain security-based swap transaction data that are reported to them. Without appropriate system security, for example, the data held by an SDR could be destroyed or rendered unusable by a hacker attack or computer virus. Therefore, the Commission preliminarily believes that, to allow substituted compliance for regulatory reporting and public dissemination with respect to a foreign jurisdiction, any entity in that foreign jurisdiction that is required to receive and maintain security-based swap transaction data should be required to have comparable protections.

Re-proposed Rule 908(c)(2)(iv) would specify that, before issuing a substituted compliance order pursuant to this section, the Commission shall have entered into a supervisory and enforcement MOU or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing oversight and supervision of the applicable security-based swap market under the substitute compliance determination.

5. Modification or Withdrawal of Substituted Compliance Order

Re-proposed Rule 908(c)(2)(v) would provide that the Commission may, on our own initiative, modify or withdraw a substituted compliance order with respect to regulatory reporting and public dissemination in a foreign jurisdiction, at any time, after appropriate notice and opportunity for comment. Such a modification or withdrawal could result from a situation where, after the Commission issues an order recognizing the reporting and public dissemination regime of a foreign jurisdiction as eligible for substituted compliance, the basis for that order ceases to be true. For example, if the foreign jurisdiction did not sufficiently enforce its reporting and public dissemination rules, compliance with the foreign rules might no longer be deemed an effective substitute for compliance with the U.S. rules. Therefore, the Commission preliminarily believes that it would be appropriate to establish a mechanism whereby it could, at any time and on our own initiative, modify or withdraw a previously issued substituted compliance order with respect to regulatory reporting and public dissemination, after appropriate notice and opportunity for comment.

[1152] *See* proposed Rule 13n–5 under the Exchange Act.

[1153] *See* proposed Rule 13n–6 under the Exchange Act.

[1154] *See* proposed Rule 13n–7 under the Exchange Act.

6. Regulatory Reporting and Public Dissemination Considered Together in the Commission's Analysis of Substituted Compliance

The Commission has considered, but has determined not to propose, treating regulatory reporting and public dissemination separately for purposes of allowing substituted compliance. Under such an approach, for example, the Commission could allow substituted compliance for regulatory reporting with respect to a particular foreign jurisdiction without permitting substituted compliance for public dissemination. The Commission preliminarily believes that this approach would not implement Title VII's regulatory reporting and public dissemination requirements as effectively as considering these requirements together for purposes of analyzing requests for substituted compliance determinations.

One example of a potential problem with viewing these two requirements separately relates to the public dissemination of security-based swap transaction information. If the Commission were to permit substituted compliance for regulatory reporting but not for public dissemination, certain transactions could be reported to a foreign trade repository in lieu of an SDR that is registered with the Commission. However, the Commission has proposed that registered SDRs would be the entities charged with publicly disseminating information about security-based swap transactions. A registered SDR could carry out that function only if data about individual transactions are reported to it. If data about certain transactions were reported instead to a foreign trade repository, it would be impractical if not impossible for the SDR to publicly disseminate data about those transactions. The Commission also preliminarily believes that it would be impractical and unduly complicated to devise an alternate method for public dissemination of such transactions that did not involve registered SDRs.[1155] The Commission preliminarily concludes, therefore, that transactions should be required to be reported to a registered SDR even if there are comparable foreign rules that would provide for reporting of such transactions to a foreign trade repository, unless the foreign rules also provide for public dissemination of such transactions in a manner comparable to Regulation SBSR. In such case, the Commission could, under re-proposed Rule 908(c), issue a substituted compliance order for both regulatory reporting and public dissemination with respect to that foreign jurisdiction.

The Commission notes that, under re-proposed Rules 908(a) and 908(b), certain security-based swap transactions would be subject to regulatory reporting but not public dissemination. The Commission also has considered, but has determined not to propose, treating regulatory reporting and public dissemination separately for purposes of allowing substituted compliance with respect to such transactions, even though Regulation SBSR would not require public dissemination of such transactions in any case. The Commission preliminarily believes that this approach could introduce unnecessary operational complexity for cross-border market participants and might yield few if any efficiency gains. Assume that a foreign branch of a U.S. bank is operating in a jurisdiction where a substituted compliance order were in effect for transactions that otherwise would be required to be reported but not publicly disseminated. With each transaction, the foreign branch would be required to determine whether the transaction was such that regulatory reporting but not public dissemination would be required under Regulation SBSR, in which case substituted compliance could apply and the transaction could instead be reported to the foreign trade repository, or whether both regulatory reporting and public dissemination would be required under Regulation SBSR, in which case substituted compliance would not apply and the transaction would be required to be reported to a registered SDR. The determination of the appropriate place to send the trade report would depend on the nature of the counterparty.[1156] While market participants could be expected to develop the appropriate compliance systems to report through the appropriate channel depending on the circumstances, the Commission preliminarily sees only limited benefit to requiring market participants to do so. The Commission preliminarily believes instead that it would be simpler to permit substituted compliance for a foreign jurisdiction only when that foreign jurisdiction has rules for regulatory reporting *and* public dissemination that are comparable to Regulation SBSR. This approached is designed to minimize the necessity of determining, on a transaction-by-transaction basis, which jurisdiction's rules would apply.

Request for Comment

The Commission is re-proposing Regulation SBSR in a manner that would set forth when a security-based swap generally would be required to be reported and publicly disseminated, and when reporting and dissemination requirements could be satisfied by substituting compliance with the rules of a foreign jurisdiction for compliance with U.S. rules. The public is invited to comment on all aspects of these proposed rules. In particular, the Commission invites responses to the following questions about our proposed rules relating to substituted compliance:

- Should the Commission make determinations of substituted compliance for regulatory reporting separately from public dissemination? Why or why not? If so, how could a security-based swap transaction be publicly disseminated if substituted compliance were in effect for regulatory reporting but not for public dissemination?
- Do you believe the Commission, as proposed in Rule 908(c)(2)(i), should have the ability to conditionally or unconditionally, by order, make a substituted compliance determination with respect to regulatory reporting and public dissemination in a foreign jurisdiction if such foreign jurisdiction imposes a comparable system for the regulatory reporting and public dissemination of all security-based swaps? Why or why not? Should the Commission allow for substituted compliance determinations under more limited circumstances? Why or why not? Under what other circumstances should the Commission consider substituted compliance? Please be specific.
- How should the Commission evaluate whether a foreign system is ''comparable'' for purposes of regulatory reporting and public dissemination? Please be specific.

[1155] A reporting side could be required to report to a registered SDR the data elements required by re-proposed Rule 901(c), which are those that would be publicly disseminated, but not be required to report the elements required by re-proposed Rule 901(d), which are the additional elements required for regulatory reporting. However, reporting the transaction to both a registered SDR and to a foreign trade repository (which it would be required to do by the rules of the foreign jurisdiction) would negate the effect of the substituted compliance order.

[1156] For example, if the foreign branch transacted with another foreign branch of a U.S. bank or with a non-U.S. person that was guaranteed by a U.S. person, the transaction would be subject to public dissemination (*see* re-proposed Rule 908(b)(2)(ii)) and substituted compliance would not apply. Thus, the transaction would have to be reported to an SDR registered with the Commission. However, if the foreign branch transacted outside the United States with a non-U.S. person that was not guaranteed by a U.S. person, public dissemination would not be required under Regulation SBSR. *See* re-proposed Rule 908(b)(2). Therefore, the transaction could be reported instead to the foreign trade repository.

• The Commission stated that our approach is designed to put the foreign branches of U.S. banks on a level playing field with non-U.S. persons in foreign jurisdictions where those branches are located. Do you believe that the proposed formulation would accomplish this goal? Why or why not? How should the Commission restructure re-proposed Rule 908(c)(1) to accomplish this goal? Please be specific.

• Do you believe that the examples provided adequately describe the situations under which security-based swap transactions should and should not be eligible for substituted compliance? Why or why not? What additional situations should the Commission consider? Please be specific.

• Do you agree with the Commission proposal, in re-proposed Rule 908(c)(2)(ii), that any person that executes security-based swaps that would be required to be reported to Regulation SBSR be eligible to file an application requesting substituted compliance? Why or why not? Should any other entities (*i.e.,* foreign regulators or industry associations) be eligible to file such an application? Why or why not?

• Do you agree with the factors the Commission would take into account when making a substituted compliance determination? Why or why not? What additional factors should the Commission take into account? Should a trade repository be subject to requirements that are comparable to all of Section 13(n) of the Exchange Act and the rules and regulations thereunder as a condition to a substituted compliance determination?

• Do you agree with the proposed findings that the Commission would be required to make pursuant to re-proposed Rule 908(c)(2)(iii)? Why or why not? Are there any other findings the Commission should be required to make? Please be specific.

• Do you agree, as detailed in re-proposed Rule 908(c)(2)(iv), that the Commission should have the ability, on our own initiative, to modify or withdraw a substituted compliance order at any time, after appropriate notice and opportunity for comment? Why or why not?

• The Commission is not at this time proposing that a duty to report and publicly disseminate a security-based swap would depend on the domicile of the issuer of the loan or security underlying the security-based swap. Should the Commission's rules for reporting and public dissemination take this factor into consideration? Why or why not?

• If a foreign jurisdiction has some form of public dissemination but the Commission does not believe that the foreign jurisdiction's rules are comparable to those of the United States to allow substituted compliance with respect to regulatory reporting and public dissemination, what would be the effect of having transaction reports of security-based swaps publicly disseminated in multiple jurisdictions? Do you believe that situation would impact price discovery or the market for such security-based swaps generally? If so, how, to what extent, and why? If not, why not? How practical would it be, and what would be the cost, for private actors to consolidate transaction reports of those security-based swaps emanating from potentially multiple feeds across multiple jurisdictions?

• Should the Commission permit substituted compliance with respect to regulatory reporting and public dissemination even if it does not have direct electronic access to the security-based swaps transactions reported to the foreign trade repository or foreign regulatory authority? If yes, how could the Commission ensure that it has timely access to the security-based swap transaction data held by the foreign entity that otherwise would have been reported pursuant to Regulation SBSR? If there were delays associated with obtaining data from the foreign entity, how long could those delays be for substituted compliance to still be appropriate? In addition to delays, do you foresee any other potential obstacles to the Commission obtaining this information from foreign entities?

• The Commission's re-proposed rules relating to substituted compliance for regulatory reporting and public dissemination requirements differ in certain respects from the CFTC's cross-border guidance. For example, the CFTC guidance provides that a swap between a U.S. person swap dealer and a non-U.S. person guaranteed by a U.S. person would be subject to public dissemination requirements, and that these requirements *could not* be satisfied through substituted compliance.[1157] The Commission, on the other hand, is proposing that public dissemination of a security-based swap between two such direct counterparties *could* be satisfied by substituted compliance (assuming that no person is soliciting, negotiating, or executing the security-based swap within the United States on behalf of the non-U.S. person that is guaranteed by a U.S. person).[1158] Please describe any other differences that you believe might exist and what would be the impact of any such differences.

• When making a comparability determination, the Commission would look not just at the rules of a foreign jurisdiction, but also at the comprehensiveness of the supervision and regulation by the appropriate governmental authorities of that jurisdiction. When assessing the effectiveness of a foreign jurisdiction's supervisory compliance program, should the Commission consider factors such as the existence of a dedicated examination program, the expertise of examiners, the existence of a risk monitoring framework and an examination plan; and the existence of a disciplinary program to enforce compliance with laws? Similarly, when assessing the effectiveness of a foreign jurisdiction's enforcement program, should the Commission consider factors such as whether the program is actively administered, resourced, and transparent?

• Is the Commission's holistic approach to making a comparability determination appropriate? Why or why not? Are there specific procedures or comparability considerations that would be useful for the Commission to incorporate in our proposed substituted compliance approach? If so, please describe. What would be the advantages of adopting such measures now? What would be the disadvantages of adopting such measures now?

• What would be the market impact of proposed approach to substituted compliance for regulatory reporting and public dissemination? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

• In making substituted compliance determinations for reporting, should the Commission require direct electronic access to data maintained at foreign SDRs or should we only require an information sharing arrangement? Why or why not?

[1157] *See* 77 FR 41237.

[1158] *See* re-proposed Rule 908(c)(1) of Regulation SBSR.

E. Clearing Requirement

Section 3C(a)(1) of the Exchange Act requires a security-based swap that is subject to the mandatory clearing requirement to be cleared at a clearing agency that is either registered with the Commission or exempt from registration.[1159] The Commission recognizes, however, that in some circumstances counterparties may seek to clear security-based swaps subject to mandatory clearing at a clearing agency that is neither registered with the Commission nor exempt from registration, which would fail to satisfy the Title VII mandatory clearing requirement. This scenario may occur where counterparties seek either due to their own preference or regulatory requirements in a foreign jurisdiction to clear a transaction through a clearing agency that does not have any U.S. members and does not clear transactions conducted within the United States, because this type of clearing agency would not be required to register with the Commission or obtain an exemption from registration under the Commission's proposed interpretation of the clearing agency registration requirement in Section 17A(g), discussed in Section V above.

In recognition of this situation and the potential for duplicative or conflicting clearing requirements, the Commission preliminarily believes that it would be appropriate in certain circumstances to permit substituted compliance in this area. Specifically, the Commission is proposing to use our authority, under Section 36 of the Exchange Act,[1160] to exempt persons from the clearing mandate in Section 3C of the Exchange Act if a relevant transaction is submitted to a foreign clearing agency that is the subject of a substituted compliance determination by the Commission. Because such clearing agencies would not be engaged in activities that trigger the registration requirement, such substituted compliance determination would not be subject to the procedure outlined in Section 17A(k) to obtain an exemption from clearing agency registration, but would instead be considered in the context of an exemption from the clearing mandate. We preliminarily believe that providing substituted compliance in this area could help to facilitate the clearance and settlement of cross-border security-based swaps, while also promoting compliance with clearing mandates.

Under the proposed approach, upon the Commission's issuance of an order making a substituted compliance determination with respect to a particular foreign clearing agency, a counterparty to a security-based swap transaction that is subject to the mandatory clearing requirement would be able to rely on the Commission's substituted compliance determination to satisfy the mandatory clearing requirement by clearing such transaction on the specified foreign clearing agency.

The Commission's proposed approach to substituted compliance for clearing would be limited to foreign clearing agencies that have no U.S. person members or activities in the United States. A foreign clearing agency that meets these two threshold requirements could initiate the process of making a substituted compliance determination by filing an application, pursuant to the procedures set forth in proposed Rule 0–13,[1161] requesting that the Commission make a substituted compliance determination. Such application would need to include the reasons therefor and such other documentation as the Commission may request. To provide the Commission with enough information to make a substituted compliance determination, the application would have to include sufficiently comprehensive information regarding the clearing agency and the foreign regime such that the Commission has an adequate basis to make the substituted compliance determination.

In making a substituted compliance determination, the Commission expects that our review in such cases would include seeking appropriate assurances from the foreign clearing agency regarding the absence of U.S. person members and relevant activity in the United States, including the volume of clearing activity originating in the United States. In addition, the review would look at the scope and objectives of the applicable foreign jurisdiction's regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities to support the oversight of such clearing agency. Thus, the Commission's determination would take into account a foreign jurisdiction's overall regulatory framework, and would focus on the similarity of regulatory objectives in addition to the presence or absence of similar rules. We expect that our review of substituted compliance applications in this area would be aided by the resources available to the Commission as a result of cooperative relationships with other authorities that we expect would allow us to assess the risk characteristics of such foreign clearing agencies on an ongoing basis.[1162]

Subsequent to making a substituted compliance determination, the Commission would be able to modify or withdraw, at any time, an order containing such determination, after appropriate notice and opportunity for comment. This would allow the Commission to take action in the event that a foreign clearing agency, for any reason, is no longer suitable for substituted compliance.

The Commission's proposed approach to substituted compliance with respect to the mandatory clearing requirement differs from other Title VII categories where substituted compliance would be permitted in that we are not proposing a specific rule related to substituted compliance. We preliminarily do not believe that a rule is necessary in the clearing space, although we are soliciting comment on the issue in the request for comments below. This belief

[1159] If a counterparty qualifies for the end-user clearing exception, then the security-based swap would not be required to be cleared unless the end user elects that it be cleared. *See* 15 U.S.C. 78c–3(g)(2) (providing that application of the exception is solely at the discretion of the counterparty to security-based swaps that meets the conditions of the exception in Section 3C(g)(1) of the Exchange Act).

[1160] *See* 15 U.S.C. 78mm. Section 36 of the Exchange Act provides that, subject to certain exceptions, the Commission ''by rule, regulation, or order may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of person, securities, or transactions from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.''

[1161] *See* Section XI.B, *supra*.

[1162] *See, e.g.,* FMI Principles, note 687, *supra.* Systemically important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories (''Financial Market Infrastructures'') are expected to observe the standards as soon as possible, and CPSS and IOSCO members are seeking to adopt the standards in their respective jurisdictions by the end of 2012. CPSS and IOSCO have also proposed assessment methodologies to oversee implementation of the FMI Principles, including self-assessments and external assessments, such as those conducted by the International Monetary Fund and the World Bank under the Financial Sector Assessment Program. *See* CPSS and Technical Committee of IOSCO, Assessment Methodology for the Principles for FMIs and the Responsibilities of Authorities (April 2012), *available at: http://www.bis.org/publ/cpss101b.pdf.* In addition, CPSS and the Technical Committee of IOSCO proposed a disclosure framework to ensure that disclosures made by FMIs are clear and comprehensive. *See* CPSS and Technical Committee of IOSCO, Disclosure Framework for Financial Market Infrastructures (April 2012), *available at: http://www.bis.org/publ/cpss101c.pdf.* Finally, see Basel III for a discussion of the preferential capital treatment that exposures to a central counterparty will receive if such central counterparty is supervised in a manner consistent with the FMI Principles.

stems in part from the fact that we do not expect a large number of requests for substituted compliance in this area due to the small number of security-based swap clearing agencies in the market. In addition, the Title VII clearing agency registration regime already contains a category of exempt security-based swap clearing agencies, and clearing security-based swaps through these entities satisfies the mandatory clearing requirement. As a result, we preliminarily believe that the proposed approach to substituted compliance in this area, whereby we are proposing a policy and procedural framework for the use of our exemptive authority in Section 36 of the Exchange Act, is sufficient to promote Title VII's clearing mandate while addressing the regulatory complexities that stem from the global scope of the security-based swaps market.

Request for comment

The Commission requests comment on all aspects of the proposed interpretation, including the following:

- Is substituted compliance related to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act needed to prevent conflict with mandatory clearing requirements under foreign law? If so, is the proposed approach to substituted compliance sufficient to address the potential conflicts?
- Should the Commission apply Section 17A(k) of the Exchange Act under such circumstances to exempt particular foreign security-based swap clearing agencies to permit such clearing agencies to be used by counterparties subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act? Are investor protection considerations sufficiently addressed if transactions are permitted to be cleared on a CCP that is not registered or exempt from registration? What conditions would need to be included to ensure the policy goals in the Dodd-Frank Act regarding central clearing are fulfilled? Should the conditions identified in Section 17A(k) that the clearing agency be available for inspection by the Commission and make available information requested by the Commission apply? Why or why not?
- Should the Commission codify the proposed approach to substituted compliance in the mandatory clearing space? Or is the proposed approach's reliance on the Commission's exemptive authority in Section 36 of the Exchange Act, and the procedures set forth in proposed Rule 0–13, sufficient? Why or why not?
- Are the conditions limiting the potential availability of substituted compliance to foreign clearing agencies that have no U.S. persons as members or activities in the United States appropriate? Are there other approaches that the Commission should consider? Should the Commission only consider a foreign clearing agency's CCP activities with regard to securities based swaps, or all type securities, in making a substituted compliance determination?
- What would be the market impact of the proposed approach to substituted compliance for the mandatory clearing requirement? How would the proposed approach affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed approach place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed approach be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

F. Trade Execution Requirement

Under the Commission's proposal, substituted compliance would be permitted for certain cross-border security-based swap transactions that would be subject to the mandatory trade execution requirement of Section 3C(h) of the Exchange Act. Specifically, under proposed Rule 3Ch–2(b)(1), the Commission could, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign jurisdiction to permit a person subject to the mandatory trade execution requirement to execute such transaction, or have such transaction executed on their behalf, on a security-based swap market (or class of markets) that is neither registered under the Exchange Act nor exempt from registration under the Exchange Act if the Commission determines that such security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by a foreign financial regulatory authority or authorities in such foreign jurisdiction. Upon the Commission's issuance of an order making a substituted compliance determination with respect to a particular foreign jurisdiction under proposed Rule 3Ch–2(b), a counterparty to a security-based swap transaction that is subject to the mandatory trade execution requirement would be able to rely on the substituted compliance determination by the Commission to satisfy the mandatory trade execution requirement by executing such transaction on a security-based swap market in such foreign jurisdiction, if such security-based swap market is covered by, or is in a class of markets that is covered by, the Commission's order.[1163]

Only transactions that meet the requirements of proposed Rule 3Ch–2(a), however, would be eligible for substituted compliance with respect to the mandatory trade execution requirement. Specifically, with respect to a foreign security-based swap market (or class of markets) for which the Commission has made a substituted compliance determination pursuant to proposed Rule 3Ch–2(b)(1), substituted compliance would only be available for security-based swap transactions where both of the following conditions apply to at least one counterparty to the transaction: (i) the counterparty is either a non-U.S. person or foreign branch of a U.S. bank;[1164] and (ii) the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.

Proposed Rule 3Ch–2(a) is designed to extend the availability of substituted compliance only to security-based transactions where one counterparty to the transaction is not acting directly or through an agent within the United States. The Commission preliminarily believes that transactions in which both counterparties utilize a U.S. person to act on their behalf to execute, solicit, or negotiate the transaction should not be eligible for substituted compliance and that it is appropriate to apply the mandatory trade execution requirement of Section 3C(h) of the Exchange Act to these transactions, and not foreign law. This approach should help mitigate any potential competitive advantage that non-U.S. intermediaries operating within the United States may have over U.S. intermediaries when facilitating security-based swap transactions on behalf of non-U.S. persons. It also should promote regulatory parity for U.S. and non-U.S. counterparties when they enter into security-based swap transactions within the United States. The Commission, however, solicits comments on this approach.

[1163] Proposed Rule 3Ch–2(a) under the Exchange Act.

[1164] Under proposed Rule 3Ch–1(c) under the Exchange Act, the term ''foreign branch'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(1) under the Exchange Act. *See* Section III.B.7, *supra.*

By contrast, for transactions involving at least one counterparty that is a foreign branch or a non-U.S. person and for which no person within the United States is directly involved in executing, soliciting or negotiating the transaction on behalf of such non-U.S. person or foreign branch, the Commission preliminarily believes that such transactions should be eligible for substituted compliance in the foreign jurisdiction. The Commission believes that limiting eligibility for substituted compliance to such cross-border security-based swap transactions would promote the Title VII goals of transparency, access, competition, and anti-manipulation with respect to transactions that impact U.S. markets and market participants, and address the regulatory complexities that stem from the global scope of the security-based swaps market.

Under proposed Rule 3Ch–2(b)(2), in making a substituted compliance determination, the Commission would take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the applicable foreign jurisdiction's regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities to support the oversight of such security-based swap market (or class of markets). Thus, the Commission's determination would take into account a foreign jurisdiction's overall regulatory framework, and would focus on the similarity of regulatory objectives in addition to the presence or absence of similar rules. In addition, in making a substituted compliance determination with respect to a foreign jurisdiction, the Commission's determination could be with respect to a single security-based swap market within such jurisdiction, or a class of security-based swap markets within the jurisdiction. For instance, if a foreign jurisdiction imposes different levels of supervisory oversight with respect to different classes or categories of security-based swap markets, the Commission could apply a substituted compliance determination to an entire class of security-based swap markets in the foreign jurisdiction, enabling each security-based swap market of that class within such jurisdiction to rely on the substituted compliance determination.

Furthermore, under proposed Rule 3Ch–2(b)(3) under the Exchange Act, before issuing a substituted compliance order pursuant to proposed Rule 3Ch–2(b)(1) under the Exchange Act, the Commission would be required to have entered into a supervisory and enforcement MOU or other arrangement with the relevant foreign financial regulatory authority or authorities addressing oversight and supervision of the security-based swap market (or class of markets) under the substituted compliance determination.

Under proposed Rule 3Ch–2(b)(4) under the Exchange Act, the Commission also would be able to modify or withdraw, at any time, an order containing a substituted compliance determination, after appropriate notice and opportunity for comment. This would allow the Commission to take action in the event that a security-based swap market (or class of markets), for any reason, is no longer suitable for substituted compliance.

The Commission notes that the factors the Commission would consider in making a substituted compliance determination with respect to mandatory trade execution would not necessarily be the same factors that the Commission would find relevant to a comparability determination for purposes of an exemption from registration as a SB SEF.[1165] The Commission preliminarily believes that possible factors, among others, it could consider when assessing the effectiveness of a foreign jurisdiction's supervisory compliance program may include the existence of a dedicated examination program; examiners with proper expertise; the existence of a risk monitoring framework and an examination plan; and a disciplinary program to enforce compliance with laws. The Commission, for example, could find the presence or absence of certain regulatory requirements in a particular foreign jurisdiction to be more relevant to a determination of whether a security-based swap market in that foreign jurisdiction should be exempt from registration as a SB SEF than to a substituted compliance determination with respect to mandatory trade execution. Accordingly, the Commission preliminarily believes that allowing substituted compliance with respect to mandatory trade execution for a foreign security-based swap market (or class of markets) would not necessarily result in a determination to exempt that foreign market (or class of markets) from registration as a SB SEF. However, the Commission generally solicits comments on the appropriateness or feasibility of this approach.

Proposed Rule 3Ch–2(c) under the Exchange Act provides that one or more security-based swap markets could initiate the process of making a substituted compliance determination by filing an application, pursuant to the procedures set forth in proposed Rule 0–13,[1166] requesting that the Commission make a substituted compliance determination. Such application would need to include the reasons therefor and such other documentation as the Commission may request. To provide the Commission with enough information to make a substituted compliance determination, the application would have to include sufficiently comprehensive information regarding the security-based swap market and the foreign regime such that the Commission has an adequate basis to make the substituted compliance determination set forth in proposed Rule 3Ch–2(b) under the Exchange Act.

Request for Comment

The Commission seeks comment on all aspects of proposed Rule 3Ch–2, including the following:

- The Commission generally solicits comments on the appropriateness and clarity of the proposed rule. Should additional details be included as to any aspect of this proposed rule? If so, for what aspects of the proposed rule would additional details be useful and why?
- As discussed above, under proposed Rule 3Ch–2(a) under the Exchange Act, substituted compliance would be permitted only for security-based swap transactions that have at least one counterparty that is a non-U.S. person or a foreign branch and the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty. The Commission generally solicits comments on the appropriateness of permitting substituted compliance for the transactions described in proposed Rule 3Ch–2(a). Is the Commission's approach to defining the transactions that qualify for substituted compliance appropriate? If not, why not? Should some or all of the transactions described by the proposed rule not be eligible for substituted compliance? Should additional transactions not covered by the proposed rule be eligible for substituted compliance? In either case, please describe the transactions that should be eligible or ineligible for substituted compliance and provide the rationale for each.
- Does the proposed substituted compliance rule appropriately promote

[1165] *See* Section VII.C, *supra.*

[1166] *See* Section XI.B, *supra.*

the statutory objectives of the mandatory trade execution requirement, as well as the goal of international coordination? If not, how could this be better achieved? Would the objectives of Title VII be hindered by permitting persons to seek substituted compliance for the eligible transactions? If so, how?

• What is the likelihood that cross-border transactions would be subject to the mandatory trade execution requirements of foreign jurisdictions that conflict with the mandatory trade execution requirement of Section 3C(h) of the Exchange Act? For such transactions, would the complications stemming from such conflicting mandatory trade execution requirements be adequately addressed by permitting substituted compliance for the transactions described in the proposed rule? If not, why not? Please describe the complications, if any, that might still ensue even with substituted compliance. Would any conflicts likely arise for security-based swaps transactions not covered by the proposed substituted compliance rule? If so, please describe those conflicts and how they would arise.

• Under proposed Rule 3Ch–2(b)(1), under the Exchange Act, the Commission may permit substituted compliance with respect to the mandatory trade execution requirement if a security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by the relevant foreign financial regulatory authority or authorities. Is this comparability standard appropriate and sufficiently clear? Should additional detail be provided as to what would and would not satisfy this standard? If so, what additional detail should be provided? Should a different standard be used? If so, what should be the standard and why?

• In making a substituted compliance determination, under proposed Rule 3Ch–2(b)(2) under the Exchange Act, the Commission would consider such factors it determines are appropriate, such as the factors enumerated in proposed Rule 3Ch–2(b)(2) under the Exchange Act. Are these factors appropriate to such a determination? Are the enumerated factors too broad? Too narrow? Please explain. Should certain of these factors not be considered or should certain additional factors be enumerated in the proposed rule?

• As discussed above, in making a substituted compliance determination, the Commission would focus on the similarity of regulatory objectives in addition to the presence or absence of similar rules. Is this holistic approach to making a substituted compliance determination appropriate? Why or why not? If not, what approach should the Commission take and why?

• As discussed above, the Commission preliminarily believes that the factors relevant to the Commission's substituted compliance determination for mandatory trade execution purposes would not necessarily be the same as the factors that the Commission would find relevant to a comparability determination for purposes of an exemption from registration as a security-based swap execution facility. The Commission generally solicits comments on the appropriateness of distinguishing the two determinations. Should the Commission consider the same factors in making a substituted compliance determination for mandatory trade execution and a comparability determination with respect to an exemption from registration as a security-based swap execution facility? If not, what factors would be relevant and appropriate to both determinations? Please describe. What factors would only be relevant or appropriate to a substituted compliance determination for mandatory trade execution or a comparability determination for an exemption from registration as a security-based swap execution facility, respectively? Please describe.

• Under proposed Rule 3Ch–2(c) under the Exchange Act, one or more security-based swap markets may file an application with the Commission to request that the Commission make a substituted compliance determination with respect to the mandatory trade execution requirement. Should persons other than security-based swap markets be permitted to file such substituted compliance applications? Why or why not? If so, what other types of persons should be permitted to file such applications? Please explain.

• What would be the market impact of proposed Rule 3Ch–2? How would the application of the proposed rule affect the competitiveness of U.S. entities in the global marketplace (both in the United States as well as in foreign jurisdictions)? Would the proposed rule place any market participants at a competitive disadvantage or advantage? If so, please explain. Would the proposed rule be a more general burden on competition? If so, please explain. What other measures should the Commission consider to implement the proposed approach? What would be the market impacts and competitiveness effects of alternatives to the proposed approach discussed in this release?

Antifraud Authority

The provisions of the proposed rules and interpretive guidance, discussed above, relate solely to the applicability of the registration and mandatory reporting, clearing, and trade execution requirements under Title VII. The proposed rules and interpretive guidance do not limit the cross-border reach of the antifraud or other provisions of the federal securities laws to these entities.

In Section 929P(b) of the Dodd-Frank Act, Congress added provisions to the federal securities laws confirming the Commission's broad cross-border antifraud authority. Congress enacted Section 929P(b) in response to the Supreme Court's decision in *Morrison* v. *National Australia Bank,*[1167] which created uncertainty about the Commission's cross-border enforcement authority under the antifraud provisions of the federal securities laws. Prior to *Morrison,* the federal courts of appeals for nearly four decades had construed the antifraud provisions to reach cross-border securities frauds when the fraud either involved significant conduct within the United States causing injury to overseas investors, or had substantial foreseeable effects on investors or markets within the United States.[1168] With respect to the Commission's enforcement authority, Section 929P(b) codified the court of appeals' prior interpretation both as to the scope of the antifraud provisions' cross-border reach and the nature of the inquiry as one of subject-matter jurisdiction.[1169]

[1167] *See* 130 S. Ct. 2869, 2888 (2010) (holding in a Section 10(b) class action that ''it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies'').

[1168] *See, e.g., Schoenbaum* v. *Firstbrook,* 405 F.2d 200, 206 (2d Cir. 1968), *modified on other grounds,* 405 F.2d 215 (1968) (*en banc*).

[1169] *See* 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski, author of Section 929P(b)) (''In the case of *Morrison* v. *National Australia Bank,* the Supreme Court last week held that section 10(b) of the Exchange Act applies only to transactions in securities listed on United States exchanges and transactions in other securities that occur in the United States. In this case, the Court also said that it was applying a presumption against extraterritoriality. This bill's provisions concerning extraterritoriality, however, are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department. Thus, the purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States, when the conduct within the United States is significant

Continued

Specifically, the Commission's antifraud enforcement authority under Section 17(a) of the Securities Act and the antifraud provisions of the Exchange Act—including Sections 9(j) and 10(b)—extends to ''(1) conduct within the United States that constitutes significant steps in furtherance of [the antifraud violation], even if the securities transaction occurs outside the United States and involves only foreign investors,'' and ''(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'' [1170] Similarly, the Commission's enforcement authority under Section 206 of the Investment Advisers Act applies broadly to reach ''(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors,'' and ''(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'' [1171]

The Commission's broad antifraud enforcement authority reflects the strong interest of the United States in applying the antifraud provisions to cross-border frauds that implicate U.S. territory, U.S. markets, U.S. investors or other U.S. market participants, or other U.S. interests.[1172] Doing so is necessary to ensure honest securities markets and high ethical standards in the U.S. securities industry, and thereby to promote confidence in our securities markets among both domestic and foreign investors. Cross-border application of the antifraud provisions is also critical for the protection of U.S. investors from securities frauds executed outside of the United States, but that threaten to produce, foreseeably do produce, or were otherwise intended to produce effects upon U.S. markets, U.S. investors or other U.S. market participants, or other U.S. interests.

XIII. General Request for Comment

A. General Comments

In responding to the specific requests for comment above, interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to proposed rule text. Responses that are supported by data and analysis provide great assistance to the Commission in considering the practicality and effectiveness of proposed new requirements as well as assessing the benefits and costs of proposed requirements. In addition, commenters are encouraged to identify in their responses a specific request for comment by indicating the section number of the release.

The Commission also seeks comment on the proposals as a whole. In particular, the Commission seeks comment on the following questions:

- How would the proposals integrate with provisions in other Titles and Subtitles of the Dodd-Frank Act and any domestic or global regulations or proposed regulations under those other Titles and Subtitles of the Dodd-Frank Act? For example, the Commission invites comment on how certain aspects of the proposals, such as registration and regulation of foreign security-based swap dealers and major security-based swap participants, and application of the transaction-level requirements, would integrate with regulation of systemically important financial institutions in Title I of the Dodd-Frank Act, regulation of registered broker-dealers and investment advisers, regulation of bank holding companies in the Bank Holding Company Act, and regulation of global systemically important financial institutions in other jurisdictions.
- For what aspects of the proposal should the Commission consider invoking our authority under Section 30(c) of the Exchange Act to prevent evasion? Please explain.

B. Consistency with CFTC's Cross-Border Approach

The CFTC has proposed interpretative guidance and a policy statement describing the cross-border application of certain swaps provisions of the CEA that were enacted by Title VII, and the CFTC's regulations promulgated thereunder.[1173] Specifically, the proposal addresses the registration requirement for swap dealers and major swap participants that are not U.S. persons, the application of Title VII requirements appurtenant to such registered entities, and the application of the clearing, trade execution, and certain reporting provisions under the CEA to cross-border swap transactions involving counterparties that are not swap dealers or major swap participants.

Understanding that the Commission and the CFTC regulate different products, participants, and markets, and have different statutory authority, and thus, appropriately may take different approaches to various issues, we nevertheless are guided by the objective of establishing consistent and comparable requirements to U.S. market participants. Accordingly, we request comments generally on (i) the impact of any differences between the Commission and CFTC approaches to the application of Title VII to cross-border activities, including the application of registration requirements and the substantive requirements of Title VII, (ii) whether the Commission's proposed application of Title VII in the cross-border context should be modified to conform to the proposals made by the CFTC, and (iii) whether any cross-border interpretations proposed by the CFTC, but not proposed by the Commission (whether as interpretations or rules), should be adopted by the Commission.

XIV. Paperwork Reduction Act

A. Introduction

The Paperwork Reduction Act of 1995 (''PRA'') [1174] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any ''collection of information.'' [1175] 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. In addition, 44 U.S.C. 3507(a)(1)(D) provides that before adopting (or revising) a collection of information requirement, an agency must, among other things, publish a notice in the **Federal Register** stating that the agency has submitted the proposed collection

or when conduct outside the United States has a foreseeable substantial effect within the United States.''). *See also* 156 Cong. Rec. S5915–16 (daily ed. July 15, 2010) (statement of Senator Reed).

[1170] Section 22 of the Securities Act, 15 U.S.C. 77v(a); Section 27 of the Exchange Act, 15 U.S.C. 78aa.

[1171] Section 214 of the Investment Advisers Act, 15 U.S.C. 80b–14.

[1172] *See generally* Restatement (Third) of Foreign Relations Law of the United States section 402 (1987), stating that ''the United States has authority to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory; the status of persons, or interests in things, present within its territory'' and ''conduct outside its territory that has or is intended to have substantial effect within its territory'').

[1173] The CFTC's guidance interprets Section 2(i) of the Commodity Exchange Act (''CEA''), as revised by Section 722(d) of the Dodd-Frank Act. Section 2(i) provides that Title VII's provisions relating to swaps, ''(including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the [Dodd-Frank Act].''

[1174] 44 U.S.C. 3501 *et seq.*

[1175] 44 U.S.C. 3502(3).

of information to the Office of Management and Budget (''OMB'') and setting forth certain required information, including: (1) A title for the collection of information; (2) a summary of the collection of information; (3) a brief description of the need for the information and the proposed use of the information; (4) a description of the likely respondents and proposed frequency of response to the collection of information; (5) an estimate of the paperwork burden that shall result from the collection of information; and (6) notice that comments may be submitted to the agency and director of OMB.[1176]

Certain provisions of proposed Rule 3a71–3, proposed Rule 3a71–5, proposed Rule 3Ch–2, re-proposed Forms SBSE, SBSE–A, and SBSE–BD, proposed Rule 18a–4, and re-proposed Rules 242.900 through 242.911 of Regulation SBSR contain ''collection of information requirements'' within the meaning of the PRA. Accordingly, the Commission is submitting these requirements to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of these collections are [''Registration Rules for Security-Based Swap Entities,'' ''Disclosures by Certain Foreign Security-Based Swap Dealers and Major Security-Based Swap Participants,'' ''Reliance on Counterparty Representations Regarding Activity Within the United States,'' ''Requests for Cross-Border Substituted Compliance Determinations,'' and ''Reporting and Dissemination of Security-Based Swap Information.''] We are applying for OMB Control Numbers for the collections listed above in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13.

B. Re-proposal of Form SBSE, Form SBSE–A, and Form SBSE–BD

1. Summary of Collection of Information

On October 24, 2011, the Commission proposed Rules 15Fb1–1 through 15Fb6–1 and Forms SBSE, SBSE–A, SBSE–BD, SBSE–C, and SBSE–W to facilitate registration of, certification by, and withdrawal of SBS Entities, as required by Section 15F of the Exchange Act.[1177] In light of the Commission's proposed rules regarding substituted compliance, the Commission is re-proposing Forms SBSE, SBSE–A, and SBSE–BD to add three questions to Form SBSE and Form SBSE–A, one question to Form SBSE–BD, and to amend Schedule F to those Forms as described in more detail below.[1178] The Commission is not proposing to amend any of the other Forms, or any of the rules, proposed in the Registration Proposing Release. The burden estimates described below are designed to update our burden estimates for proposed Forms SBSE and SBSE–A to account for the revisions we are proposing to those two re-proposed forms. For information regarding the other burdens associated with proposed Rules 15Fb1–1 through 15Fb6–1 and Forms SBSE, SBSE–A, SBSE–BD, SBSE–C, and SBSE–W, please refer to the Registration Proposing Release.[1179]

Pursuant to paragraph (a) of proposed Rule 15Fb2–1, each SBS Entity would be required to file an application to register with the Commission.[1180] The Commission sought to reduce burdens and costs associated with the application process by providing alternate registration forms for certain types of SBS Entities (including Forms SBSE–A and SBSE–BD). Each SBS Entity would only need to research, complete, and file one of the proposed Forms.

Proposed Rule 15Fb2–3 would require that SBS Entities promptly amend their applications if they find that the information contained therein has become inaccurate.[1181] While SBS Entities may need to update their Forms periodically, each firm would only need to amend that aspect of the Form that has become inaccurate.

Proposed Rules 15Fb1–1 through 15Fb6–1 and re-proposed Forms SBSE, SBSE–A, and SBSE–BD would require that each respondent retain certain records and information for three years.[1182]

2. Proposed Use of Information

Re-proposed Forms SBSE, SBSE–A, and SBSE–BD, as applicable, are applications through which SBS Entities would register with the Commission. Information collected through these re-proposed Forms SBSE, SBSE–A, and SBSE–BD would allow the Commission to determine whether applicants meet the standards for registration, including provisions regarding substituted compliance, and would help the Commission to fulfill our oversight responsibilities.

The Commission intends to make the information collected pursuant to proposed Rule 15Fb1–1 through 15Fb6–1 and re-proposed Forms SBSE, SBSE–A, and SBSE–BD public.

Any collections of information required pursuant to proposed Rules 15Fb1–1 through 15Fb6–1 and re-proposed Forms SBSE, SBSE–A, and SBSE–BD would be mandatory to permit the Commission to determine whether applicants meet the standards for registration, and to fulfill our oversight responsibilities.

3. Respondents

In the Intermediary Definitions Adopting Release and Registration Proposing Release the Commission staff estimated, based on data obtained from DTCC and conversations with market participants, that approximately 50 entities would fit within the definition of a security-based swap dealer.[1183] The Commission staff also estimated in the Registration Proposing Release that up to five entities fit within the definition of major security-based swap participant.[1184] The Commission sought comment on the reasonableness and accuracy of our estimates, but received no comments regarding these estimates.

Of the 55 entities likely to be either security-based swap dealers or major security-based swap participants, the Commission staff estimates that 18 entities will be registered foreign security-based swap dealers, as defined in proposed Rule 3a71–3(a)(3) or foreign major security-based swap participants, as defined in proposed Rule 3a67–10(a)(1) (collectively, ''Nonresident SBS Entities'').[1185] The Commission staff expects that most registered Nonresident SBS Entities will be based in one of a small number of non-U.S. jurisdictions; however, the Commission understands that approximately 19 jurisdictions are in the process of developing regulations and/or infrastructure for swaps, security-based

[1176] 44 U.S.C. 3507(a)(1)(D) (internal formatting omitted); *see also* 5 CFR 1320.5(a)(1)(iv).

[1177] *See* Registration Proposing Release, 76 FR 65784.

[1178] *See* Proposed Rule 3a71–5(c) under the Exchange Act; *see also* Section III.C, *supra.* The Commission is not proposing any changes to Form SBSE–BD, Form SBSE–C, or Form SBSE–W.

[1179] *See* Registration Proposing Release, 76 FR 65807.

[1180] *Id.* at 65820–21.

[1181] *Id.* at 65822.

[1182] *See id.* at 65821.

[1183] *See* Intermediary Definitions Adopting Release, 77 FR 30725; Registration Proposing Release, 76 FR 65808; *see also* Trade Acknowledgment Proposing Release, 76 FR 3868; External Business Conduct Standards Proposing Release, 76 FR 46668.

[1184] *See* Registration Proposing Release, 76 FR 65821; *see also* Intermediary Definitions Proposing Release, 75 FR 80209 n.188; Trade Acknowledgment Proposing Release, 76 FR 3868; External Business Conduct Standards Proposing Release, 76 FR 46668.

[1185] While the Commission estimated in the Registration Proposing Release that 22 non-resident entities would likely register with the Commission as SBS Entities (*see* Registration Proposing Release, 76 FR 65807–12), our estimates have changed based on the staff's further analysis of the cross-border issues and likely respondents.

swaps, and other OTC derivatives.[1186] In addition, the Commission anticipates that a small number of security-based swap market participants could be based in other jurisdictions. As a result, the Commission staff estimate that cross-border issues may arise in connection with security-based swap market participants and transactions in and between up to 30 discrete jurisdictions.[1187]

In the Registration Proposing Release, Commission staff further estimated, based on its experience and understanding of the swap and security-based swap markets that of the firms that may register as SBS Entities, approximately 35 also will register with the CFTC as swap dealers or major swap participants, approximately 16 would also be registered with the Commission as broker-dealers, and approximately 4 firms not otherwise registered with the CFTC or the Commission will seek to become an SBS Entity.[1188] The Commission sought comment on the reasonableness and accuracy of our estimates, but has received no comments regarding these estimates to date.

The Commission again seeks comment on the reasonableness and accuracy of our estimates as to the number of participants in the security-based swap market that will be required to register with the Commission through the use of re-proposed Forms SBSE, SBSE–A, and SBSE–BD, including the number of registered foreign security-based swap dealers. The Commission also seeks comment on our estimate of the number of jurisdictions with security-based swap participants or infrastructure that may transact with or be used by U.S.-regulated entities.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

(a) Paperwork Burden Associated With Filing Application Forms

As indicated in the Registration Proposing Release, proposed Rule 15Fb2–1 would require that each SBS Entity register with the Commission by filing an application on Form SBSE, Form SBSE–A, or Form SBSE–BD, as appropriate. Each SBS Entity would only need to research, complete, and file one form.[1189] The Commission is not proposing to amend this rule, but is re-proposing the Forms that would be filed to facilitate registration. The modifications to re-proposed Forms SBSE, SBSE–A, and SBSE–BD would add two questions to Form SBSE and Form SBSE–A, add one question to all three Forms, and would modify Schedule F to all the Forms.

The Commission staff does not believe that the addition of these questions will significantly increase the burdens associated with the filing of these forms. In the Registration Proposing Release, the Commission staff estimated that approximately four firms would need to register using proposed Form SBSE and that the total paperwork burden associated with filing each proposed Form SBSE (including the Schedules [1190] and disclosure reporting pages (''DRPs'')) would be approximately 40 hours for each firm that would use this Form.[1191] The Commission staff acknowledged that it is likely that the time necessary to complete these forms would vary depending on the nature and complexity of an entity's business.[1192] The Commission staff believes, based on its experience with Form BD, that the addition of three new questions to Form SBSE included in the re-proposed Form SBSE could increase the amount of time it would take for an SBS Entity to complete this form by about two hours. Thus, the Commission staff estimates that it would take all 4 SBS Entities who may use Form SBSE to register with the Commission a total of approximately 168 hours to register using re-proposed Form SBSE.[1193] As each SBS Entity would only be required to file 1 complete form once, this would be a one-time burden associated with registration [1194] (the burden associated with amendments to the form are discussed below).

As proposed, Form SBSE–A contains fewer questions than the proposed Form SBSE and is available only to firms that are (or will be) familiar with the registration process because they are registered (or will be registering) with the CFTC as a swap dealer or major swap participant. As a result, the Commission staff estimated in the Registration Proposing Release that it would take SBS Entities filing proposed Form SBSE–A approximately 80% of the time that it would take for an unregistered entity to research, complete, and file proposed Form SBSE (including the Schedules and DRPs).[1195] Accordingly, the Commission staff estimated that the total paperwork burden associated with filing each proposed Form SBSE–A across 35 firms would be approximately 32 hours for each firm who would use this Form.[1196] The Commission staff believes, based on its experience with Form BD, that the addition of 3 new questions to Form SBSE–A included in the re-proposed Form SBSE–A could increase the amount of time it would take for an SBS Entity to complete this form by about two hours. Thus, the Commission staff estimates that it would take all 35 SBS Entities who may use Form SBSE–A to register with the Commission a total of approximately 1,190 hours to register using re-proposed Form SBSE–A.[1197] As each SBS Entity would only be required to file 1 complete form once, this would be a one-time burden associated with registration [1198] (the burden associated with amendments to the form are discussed below).

As proposed, Form SBSE–BD contains fewer questions than both the proposed Form SBSE and Form SBSE–A and is available only to firms that are (or will

[1186] *See* FSB Progress Report April 2013. These 19 jurisdictions are: Argentina, Australia, Brazil, Canada, China, the European Union, Hong Kong, India, Indonesia, Japan, Mexico, the Republic of Korea, Russia, Saudi Arabia, Singapore, South Africa, Switzerland, Turkey, and the United States. *See also* notes 35 and 36, *supra.*

[1187] The European Union is regulating OTC derivatives reporting, clearing, and bilateral risk management on a pan-European basis. Accordingly, the Commission may treat the European Union as a single jurisdiction for purposes of certain cross-border issues. However, the Commission notes that there may be variation between individual European countries even within this consolidated approach (*e.g.,* privacy laws or supervisory oversight or enforcement may differ in various European countries).

[1188] *See* External Business Conduct Standards Proposing Release, 76 FR 46668.

[1189] *Id.* at 65820–21.

[1190] Except Schedule G (which we are not proposing to amend) and Schedule F (which is dealt with separately below).

[1191] Registration Proposing Release, 76 FR 65808.

[1192] *Id.*

[1193] 42 hours * 4 firms = 168 hours.

[1194] While it is possible that another firm may choose to register as an SBS Entity at some future time, we presently estimate for purposes of this PRA that no additional firms will register in the next three years. This is because the Dodd-Frank Act imposed regulation on an existing industry and we expect those industry participants presently engaged in this business to either register when the rules become effective or decide to withdraw from this business. In addition, the costs to start-up an SBS Entity will likely be high, which may discourage new entrants. Finally, as the Commission has not yet promulgated rules to register or regulate these entities and we have no experience with the registration trends of SBS Entities over time, any estimate regarding the number of possible new entrants over time would be speculative.

[1195] Registration Proposing Release, 76 FR 65808. This estimate assumes that an entity that is familiar with an analogous registration process would require approximately 20% less time to complete Form SBSE–A compared to an unregistered entity completing Form SBSE.

[1196] *Id.*

[1197] 34 hours * 35 firms = 1,190 hours.

[1198] *See* note 1194, *supra.*

be) familiar with the registration process because they are registered (or will be registering) with the Commission as a broker-dealer. As a result, the Commission staff estimated in the Registration Proposing Release that it would take SBS Entities filing proposed Form SBSE–BD approximately 25% of the time that it would take for an unregistered entity to research, complete, and file proposed Form SBSE (including the Schedules and DRPs).[1199] Accordingly, the Commission staff estimated that the total paperwork burden associated with filing each proposed Form SBSE–BD across sixteen firms would be approximately ten hours for each firm that would use this Form.[1200] The Commission staff believes, based on its experience with Form BD, that the addition of one new question to Form SBSE–BD included in the re-proposed Form SBSE–BD could increase the amount of time it would take for an SBS Entity to complete this form by about one half hour. Thus, the Commission staff estimates that it would take all sixteen SBS Entities that may use Form SBSE–BD to register with the Commission a total of approximately 168 hours to register using re-proposed Form SBSE–BD.[1201] As each SBS Entity would only be required to file one complete form once, this would be a one-time burden associated with registration[1202] (the burden associated with amendments to the form are discussed below).

(b) Paperwork Burden Associated With Amending Schedule F

As indicated in the Registration Proposing Release, proposed Rule 15Fb2–4 would require that each nonresident SBS Entity file an additional schedule (Schedule F) with its Form SBSE, Form SBSE–A, or Form SBSE–BD, as appropriate, to identify its U.S. agent for service of process and to certify that the firm can, as a matter of law, provide the Commission with access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission.[1203] The Commission is not proposing to amend this rule, but is re-proposing Schedule F. The modifications to re-proposed Schedule F would divide Schedule F into two sections. Section I would include the full text of the originally proposed Schedule F. Section II would elicit additional information regarding foreign regulators with which the applicant may be registered or that otherwise have jurisdiction over the applicant.

The Commission staff does not believe that the addition of this new Section would significantly increase the burdens associated with the filing of Schedule F because information regarding the foreign regulators with jurisdiction over the entity should be known and readily available. In the Registration Proposing Release, the Commission staff estimated, based on its experience relative to the securities industry and Form BD, that the average time necessary for each Nonresident SBS Entity to complete and file Schedule F would be approximately one hour.[1204] The Commission staff believes, based on its experience with Form BD, that adding the new section to Schedule F could increase the amount of time it would take for an SBS Entity to complete this form by about one-half hour. Thus, the Commission staff estimates that it would take all 18 Non-resident SBS Entities who may use Schedule F to register with the Commission a total of approximately 27 hours complete Schedule F.[1205] As each SBS Entity would only be required to file Schedule F once, this would be a one-time burden associated with registration[1206] (the burden associated with amendments to the form—including the schedules—are discussed below).

(c) Paperwork Burden Associated With Amending Application Forms

As discussed in the Registration Proposing Release, proposed Rule 15Fb2–3 would require that SBS Entities amend their applications if they find that information contained in a prior filing has become inaccurate.[1207] The Commission is not proposing to amend this rule; however, the addition of three questions to proposed Forms SBSE and SBSE–A, the addition of one question to Form SBSE–BD, and the revisions to Schedule F would provide additional information that could change over time and require amendment of these Forms. As indicated in the Registration Proposing Release, the staff does not expect that the requirement to amend these Forms would impose a significant burden because each SBS Entity would have already completed proposed Forms SBSE, SBSE–A, or SBSE–BD, as applicable, and would only need to amend those aspects of the Forms that may become inaccurate. In the Registration Proposing Release, the staff estimated, based on the number of amendments the Commission receives annually on Form BD, that each SBS Entity would file approximately three amendments annually.[1208] The staff also estimated in the Registration Proposing Release that, although the time necessary to file an amendment to proposed Forms SBSE, SBSE–A, or SBSE–BD, as applicable, would vary depending on the nature and complexity of the amendment, the Commission staff estimates the average total annual burden associated with amending proposed Forms SBSE, SBSE–A, and SBSE–BD would be approximately one hour for each amendment.[1209] The staff does not believe the addition of 3 questions included in each of re-proposed Forms SBSE and SBSE–A, the addition of one new question to re-proposed Form SBSE–BD, and the revision of Schedule F would increase either the number of amendments each firm may be required to file or the amount of time it would take for a firm to file an amendment.[1210] Thus we continue to believe the annual burden for associated with Rule 15Fb2–3 would be approximately 165 hours.[1211]

As indicated in the Registration Proposing Release, the collection of information relating to Forms SBSE, SBSE–A, SBSE–BD and Schedule F would be mandatory, and the Commission intends to make the information provided through these forms and Schedule F public.

5. Request for Comment on Paperwork Burden Estimates

The Commission seeks comment on the paperwork burdens associated with proposed Rules 15Fb1–1 through 15Fb6–1 and re-proposed Forms SBSE, SBSE–A, and SBSE–BD, as applicable.

- What burdens, if any, would respondents incur with respect to system design, programming, expanding systems capacity, and establishing compliance programs to comply with re-proposed Forms SBSE, SBSE–A, and SBSE–BD, as applicable?

[1199] Registration Proposing Release, 76 FR 65808.

[1200] *Id.*

[1201] 10½; hours * 16 firms = 168 hours.

[1202] *See* note 1194, *supra.*

[1203] Registration Proposing Release, 76 FR 65822.

[1204] *Id.* at 65811.

[1205] 1½; hours * 18 Non-resident SBS Entities = 27 hours.

[1206] *See* note 1194, *supra.*

[1207] Registration Proposing Release, 76 FR 65809.

[1208] *Id.*

[1209] *Id.*

[1210] The estimated number of amendments filed by each SBS Entity in the Registration Proposing Release was based on the number of amendments to Form BD filed annually by broker-dealers. *See* Registration Proposing Release, 76 FR 65809. We did not base our estimate on a comparison of the number or content of the questions, because we have no data upon which to base that type of estimate and we believe it would be too speculative.

[1211] 1 hour * 3 amendments per year * 55 SBS Entities = 165 hours.

• Is it likely that SBS Entities would complete re-proposed Forms SBSE, SBSE–A, and SBSE–BD, as applicable, themselves or is it more likely that they would obtain assistance in completing these forms from some outside entity (*e.g.,* outside counsel)? If an SBS Entity obtains assistance in completing the forms from an outside entity, what type of entity may be utilized and what may the relative costs to employ such an entity for this purpose be?

• The Commission estimates that no new SBS Entities will register after year 1 because the security-based swap market is already well-developed and because of potentially significant barriers to entry for prospective market participants. Is this estimate accurate? If not, how many SBS Entities will register after year 1?

• Would there be different or additional paperwork burdens associated with the collection of information under re-proposed Forms SBSE, SBSE–A, and SBSE–BD, as applicable, that a respondent does not currently undertake in the ordinary course of business that the Commission has failed to identify? If so, please both describe and quantify any additional burden(s).

C. Disclosures by Certain Foreign Security-Based Swap Dealers and Major Security-Based Swap Participants

1. Summary of Collection of Information

A registered foreign security-based swap dealer must disclose to any counterparty that is a U.S. person, prior to accepting any assets from, for, or on behalf of such counterparty to margin, guarantee, or secure a security-based swap, the potential treatment of any assets segregated by the registered foreign security-based swap dealer pursuant to Exchange Act Section 3E in an insolvency proceeding under U.S. bankruptcy law and any applicable foreign insolvency laws.[1212]

2. Proposed Use of Information

The required disclosures would give U.S. counterparties important information regarding the treatment of their collateral and the role of U.S. and foreign law in any insolvency proceedings. The Commission preliminarily believes that this information would promote transparency and help counterparties in fully assessing the risks associated with their transactions. Moreover, without these disclosures, the Commission preliminarily believes that there is a risk that some U.S. counterparties could assume, incorrectly, that any security-based swap transaction with a registered foreign security-based swap dealer or major security-based swap participant is automatically and fully subject to Title VII and other potentially applicable U.S. laws (*e.g.,* U.S. bankruptcy law). These disclosures would make such confusion less likely and, as a result, help to ensure that U.S. counterparties conduct appropriate due diligence when transacting with foreign security-based swap dealers.

The disclosures required pursuant to proposed Rule 18a–4(e) under the Exchange Act would be mandatory for all registered foreign security-based swap dealers that enter into security-based swaps with counterparties that are not U.S. persons.

Registered foreign security-based swap dealers are required to disclose information pursuant to proposed Rule 18a–4(e) to their U.S. counterparties. Therefore, the Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives confidential information pursuant to proposed Rule 18a–4(e) through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.[1213]

3. Respondents

As discussed in Section B.3 above, the Commission staff estimates that there will be 18 Nonresident SBS Entities and that most of these firms will be based in one of a small number of non-U.S. jurisdictions.[1214] In addition, the Commission staff anticipates that a small number of security-based swap market participants could be based in other jurisdictions.[1215] As a result, the Commission staff estimates that cross-border issues may arise in connection with security-based swap market participants and transactions in and between up to 30 discrete jurisdictions.[1216]

4. Total Initial and Annual Reporting Burdens

The estimates in this section reflect the Commission's experience with burden estimates for similar disclosure requirements and our staff's discussions with market participants.[1217] Pursuant to proposed Rule18a–4(e)(3), registered foreign security-based swap dealers would be required to provide disclosures to their U.S. counterparties. The Commission believes that, in most cases, these disclosures would be made through amendments to the registered foreign security-based swap dealer's existing trading documentation. Because these disclosures relate to new regulatory requirements, the Commission anticipates that all registered foreign security-based swap dealers would need to incorporate new language into their existing trading documentation with U.S. counterparties. Disclosure of the potential treatment of segregated assets in insolvency proceedings under U.S. bankruptcy law and foreign insolvency laws pursuant to proposed Rule 18a–4(e)(3) would likely vary depending on the counterparty's jurisdiction. Accordingly, the Commission expects that these disclosures often may need to be tailored to address the particular circumstances of each trading relationship. However, in some cases, trade associations or industry working groups may be able to develop standard disclosure forms that can be adopted by foreign security-based swap dealers with little or no modification. In either case, the paperwork burden associated with developing new disclosure language and incorporating this language into a registered foreign security-based swap dealer's trading documentation will vary depending on: (1) the number of non-U.S. counterparties with whom the registered foreign security-based swap dealer trades; (2) the number of jurisdictions represented by the registered foreign security-based swap dealer's counterparties; and (3) the availability of standardized disclosure language. To the extent standardized disclosures become available, the paperwork burden on registered foreign security-based swap dealers would be limited to amending existing trading

[1212] Proposed Rule 18a–4(e)(3) under the Exchange Act.

[1213] *See, e.g.,* 5 U.S.C. 552 (Exemption 4 of the Freedom of Information Act provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepare by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8)).

[1214] *See* Section XIV.B.3, *supra.*

[1215] *Id.*

[1216] *Id.*

[1217] *See* External Business Conduct Standards Proposing Release, 76 FR 42396; *see also* Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information about Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Securities Act Release No. 7386 (Jan. 31, 1997), 62 FR 6044 (Feb. 10, 1997).

documentation to incorporate the standardized disclosures. Conversely, more time will be necessary where a greater degree of customization is required to develop the required disclosures and incorporate this language into existing documentation.

The Commission estimates the maximum total paperwork burden associated with developing new disclosure language would be approximately 2,700 hours, plus $2.1 million for all 18 foreign security-based swap dealers and 30 jurisdictions.[1218] This estimate assumes little or no reliance on standardized disclosure language. In addition, the Commission estimates the total paperwork burden associated with incorporating new disclosure language into each foreign security-based swap dealer's trading documentation would be approximately 9,000 hours for all 18 foreign security-based swap dealers.[1219]

The Commission expects that the majority of the paperwork burden associated with the new disclosure requirements will be experienced during the first year as language is developed, whether by individual foreign security-based swap dealers or through collaborative efforts, and trading documentation is amended. After the new disclosure language is developed and incorporated into trading documentation, the Commission believes that the ongoing burden associated with proposed Rule 18a–4(e) would be limited to periodically updating the disclosures to reflect changes in the applicable law or to incorporate new jurisdictions with security-based swap counterparties. The Commission estimates that this ongoing paperwork burden would not exceed 100 hours per year for all 18 foreign security-based swap dealers (approximately 5 hours per foreign security-based swap dealer per year).

5. Request for Comment on Paperwork Burden Estimates

The Commission seeks comment on the paperwork burdens associated with proposed Rule18a–4(e).

- Is it likely that foreign security-based swap participants will have more than 50 active non-U.S. counterparties?
- In how many discrete jurisdictions do most foreign security-based swap participants have counterparties?
- In general, is the proposed collection of information necessary for the proper performance of the Commission's functions? Will the proposed collection of information have practical utility to the Commission and Commission staff?
- Are the Commission's estimates of the paperwork burden of the proposed collection accurate?
- Is the Commission's estimate of the expected ongoing burden associated with updating and maintaining the disclosures in proposed Rule 18a–4(e) reasonable? If not, why?
- Are there ways for the Commission to enhance the quality, utility, and clarity of the information collected? Are there ways for the Commission to minimize the paperwork burden of the proposed collection of information (*e.g.,* through the use of automated collection techniques or other forms of information technology)? If so, please describe.

D. Reliance on Counterparty Representations Regarding Activity Within the United States

1. Summary of Collection of Information

When determining whether a security-based swap is a ''transaction conducted through a foreign branch,'' as defined in proposed Rule 3a71–3(a)(4)(i) under the Exchange Act, a party may rely on a representation from its counterparty indicating that ''no person within the United States is directly involved in soliciting, negotiating, or executing'' the transaction on behalf of the counterparty, unless the party receiving the representation knows that it is not accurate.[1220] Similarly, when determining whether a security-based swap is a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5)(i), a party may rely on a representation from its counterparty indicating that the transaction ''is not solicited, negotiated, executed, or booked within the United States by or on behalf of such counterparty,'' unless the party receiving the representation knows that it is not accurate.[1221]

2. Proposed Use of Information

Under the proposed rules, certain Title VII requirements would not apply to cross-border transactions conducted through a foreign branch of a U.S. bank where the foreign branch is the named counterparty to the transaction and no person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap on behalf of the foreign branch or its counterparty. For example, under the proposed rules, a non-U.S. person would not be required to count toward the *de minimis* threshold in the security-based swap dealer definition its transactions with the foreign branch of a U.S. bank. Conversely, certain Title VII requirements would apply to transactions conducted within the United States, even if both counterparties are non-U.S. persons.

The Commission acknowledges that verifying whether a security-based swap falls within the definition of a ''transaction conducted through a foreign branch'' or a ''transaction conducted within the United States'' could require significant due diligence. The Commission preliminarily believes that the representations described in proposed Rule 3a71–3(a)(4)(ii) and proposed Rule 3a71–3(a)(5)(ii) would mitigate the operational difficulties that could arise in connection with investigating the activities of a counterparty to ensure compliance with the corresponding rules.

The representations described in proposed Rule 3a71–3(a)(4)(ii) and proposed Rule 3a71–3(a)(5)(ii) would be provided voluntarily by the counterparties to certain security-based swap transactions; therefore, the Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives confidential information described in proposed Rule 3a71–3(a)(4)(ii) or proposed Rule 3a71–3(a)(5)(iii) through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.[1222]

[1218] The Commission staff estimates the total paperwork burden associated with developing new disclosure language for each foreign security-based swap dealer would be 150 hours of in-house counsel time (5 hours of in-house counsel time * up to 30 potential jurisdictions), plus $120,000 (based on 10 hours of outside counsel time * $400 * up to 30 potential jurisdictions).

[1219] The Commission staff estimate that the average Nonresident SBS Entity will have 50 active non-U.S. counterparties. Accordingly, the Commission staff estimates the cost of incorporating new disclosure language into the trading documentation of an average foreign security-based swap participant would be 500 hours per foreign security-based swap participant (based on 10 hours of in-house counsel time * 50 active non-U.S. counterparties).

[1220] Proposed Rule 3a71–3(a)(4)(ii) under the Exchange Act.

[1221] Proposed Rule 3a71–3(a)(5)(ii) under the Exchange Act.

[1222] *See, e.g.,* 5 U.S.C. 552 (Exemption 4 of the Freedom of Information Act provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are ''contained in or related to examination, operating, or condition

Continued

3. Respondents

Based on our understanding of the OTC derivatives markets, including the size of the market, the number of counterparties that are active in the market, and how market participants currently structure security-based swap transactions, the Commission preliminarily estimates that 50 entities may include a representation that a security-based swap is a ''transaction conducted through a foreign branch'' in their trading relationship documentation (*e.g.,* the schedule to a master agreement). Similarly, the Commission preliminarily estimates that 250 entities may include a representation that a security-based swap is not a ''transaction conducted within the United States.'' [1223]

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The estimates in this section reflect the Commission's experience with burden estimates for similar requirements and our discussions with market participants.[1224] Pursuant to proposed Rules 3a71–3(a)(4)(ii) and 3a71–3(a)(5)(iii), parties to security-based swaps would be permitted to rely on certain representations from their counterparties when determining whether a transaction falls within the definition of a ''transaction conducted through a foreign branch'' or a ''transaction conducted within the United States.'' The Commission preliminarily believes that, in most cases, these representations would be made through amendments to the parties' existing trading documentation (*e.g.,* the schedule to a master agreement).[1225] Because these representations relate to new regulatory requirements, the Commission anticipates that counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission's security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that parties would be able to adopt, where appropriate, standardized language across all of their security-based swap trading relationships. This language may be developed by individual firms or through a combination of trade associations and industry working groups.

The Commission estimates the maximum total paperwork burden associated with developing new representations would be, for each entity, no more than approximately three to five hours, plus between $1,200 and $2,000 for the services of outside professionals, for a maximum of approximately 1,500 hours and $600,000 across all security-based swap counterparties.[1226] This estimate assumes little or no reliance on standardized disclosure language. In addition, the Commission estimates the total paperwork burden associated with incorporating new disclosure language would be no more than approximately three to five hours per counterparty, for a maximum of approximately 15,000 hours across all applicable security-based swap counterparties.[1227]

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission believes that the annual paperwork burden associated with this requirement would be no more than approximately 10 hours per counterparty for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 3,000 hours across all applicable security-based swap counterparties.[1228]

5. Request for Comment on Paperwork Burden Estimates

The Commission seeks comment on the paperwork burdens associated with proposed Rules 3a71–3(a)(4)(ii) and 3a71–3(a)(5)(ii).

- Are the Commission's estimates of the numbers of market participants that will include a representation that a security-based swap is a ''transaction conducted through a foreign branch'' or not a ''transaction conducted within the United States'' reasonable? Are these estimates likely to become incorrect as a result of changes in the OTC derivatives markets? If so, how?
- Is the Commission's estimate that a representation that a security-based swap is a ''transaction conducted through a foreign branch'' or not a ''transaction conducted within the United States'' will be made in a schedule to a master agreement rather than in individual confirmations reasonable? If not, where will these representations be made?
- In general, is the proposed collection of information necessary for the proper performance of the Commission's functions? Will the proposed collection of information have practical utility to the Commission and Commission staff?
- Are the Commission's estimates of the paperwork burden of the proposed collection accurate?
- Is the Commission's estimate of the cost of outside counsel reasonable?
- Are there ways for the Commission to enhance the quality, utility, and clarity of the information collected? Are there ways for the Commission to minimize the paperwork burden of the proposed collection of information (*e.g.,* through the use of automated collection techniques or other forms of information technology)? If so, please describe.

E. Requests for Cross-Border Substituted Compliance Determinations

1. Summary of Collection of Information

The Commission is proposing to apply various Title VII provisions to SBS Entities and related market infrastructures on a cross-border basis. However, as noted above, the Commission would permit, in appropriate circumstances, compliance

reports prepare by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8)).

[1223] For a more detailed discussion, see discussion of the number of market participants that may be reporting counterparties in Section XIV.F.2.d.ii, *infra.*

[1224] *See* External Business Conduct Standards Proposing Release, 76 FR 42396.

[1225] The Commission preliminarily believes that because trading relationship documentation is established between two counterparties, whether one or both counterparties is able to represent that it is entering into a ''transaction conducted through a foreign branch'' or a ''transaction conducted within the United States'' would not change on a transaction-by-transaction basis and, therefore, such representations would generally be made in the schedule to a master agreement, rather than in individual confirmations.

[1226] Because the representations will be short and based on facts that should be known and readily available to the entity making the representation, the Commission staff estimates the paperwork burden associated with developing new representations would range from three to five hours of in-house counsel time, plus $1,200 to 2,000 for the services of outside professionals (based on three to five hours of outside counsel time * $400)). The Commission staff estimates that the burden for counterparties that only require one of the two representations would be at the lower end of this range.

[1227] The Commission staff estimates that the average security-based swap counterparty (including security-based swap dealers and buy-side counterparties) will have no more than 10 active counterparties able to represent that a transaction is conducted through a foreign branch, not conducted within the United States, or both. Accordingly, the Commission staff estimates the total burden associated with incorporating new disclosure language into the relevant trading documentation would be 15,000 hours (based on five hours per counterparty * 300 respondents * 10 applicable security-based swap counterparties).

[1228] The Commission staff estimates that this burden would consist of 10 hours of in-house counsel time for each security-based swap market participant.

with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with certain requirements of the Exchange Act, and rules and regulations thereunder, relating to security-based swaps. As proposed, the Commission would consider making substituted compliance determinations with respect to four distinct categories of rules: (1) requirements applicable to registered foreign security-based swap dealers under Section 15F of the Exchange Act and the rules and regulations thereunder pursuant to proposed Rule 3a71–5(c) under the Exchange Act; (2) requirements relating to regulatory reporting and public dissemination of security-based swaps pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR; (3) requirements relating to clearing for security-based swaps;[1229] and (4) requirements relating to trade execution for security-based swaps pursuant to proposed Rule 3Ch–2(c) under the Exchange Act.

Requests for a substituted compliance determination would come from registered foreign security-based swap dealers or other persons.[1230] However, under the proposed rules noted above, the Commission would make any determinations with respect to particular requirements on a class or jurisdiction basis, depending on the specific characteristics of the foreign regulatory regime, rather than on a firm-by-firm basis.[1231] Once the Commission has made a substituted compliance determination, other similarly situated market participants would be able to rely on that determination to the extent applicable and subject to any corresponding conditions. Accordingly, the Commission expects that requests for a substituted compliance determination would be made only where an entity seeks to rely on particular requirements of a foreign jurisdiction that have not previously been the subject of a substituted compliance request. The Commission believes that this approach would substantially reduce the burden associated with requesting substituted compliance determinations for an entity that relies on a previously issued determination, and, therefore, complying with the Commission's rules and regulations more generally.[1232]

When applying for a substituted compliance determination under one of the proposed rules, an entity would be required to provide the Commission with any supporting documentation as the Commission may request, in addition to information that the entity believes is necessary for the Commission to make a determination, such as information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with those requirements. A foreign security-based swap dealer (or a group of foreign security-based swap dealers of the same class) seeking a substituted compliance determination with respect to one or more requirements in Section 15F of the Exchange Act and the rules and regulations thereunder also must demonstrate that it is directly supervised by the foreign financial regulatory authority (with respect to requirements relating to the applicable requirements in Section 15F of the Exchange Act) and provide the certification and opinion of counsel, as described in Rule 15Fb2–4(c).[1233]

The Commission is proposing that applicants follow the procedures set forth in proposed Rule 0–13 under the Exchange Act for an application requesting a substituted compliance determination.[1234]

2. Proposed Use of Information

The Commission would use the information collected pursuant to proposed Rule 3a71–5(c) under the Exchange Act to evaluate requests for substituted compliance with respect to requirements applicable to registered security-based swap dealers (or classes thereof) under Section 15F of the Exchange Act and the rules and regulations thereunder. The Commission would use the information collected pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR to evaluate requests for substituted compliance with regard to requirements applicable to regulatory reporting and public dissemination of security-based swaps. Finally, the Commission would use the information collected pursuant to proposed Rule 3Ch–2(c) under the Exchange Act to evaluate requests for substituted compliance with regard to requirements relating to trade execution for security-based swaps.

The requests for substituted compliance determinations in proposed Rule 3a71–5, re-proposed Rule 242.908(c)(2)(ii), and proposed Rule 3Ch–2(c) under the Exchange Act are required when a person seeks a substituted compliance determination.

The Commission intends to make public the information submitted to it pursuant to any request for a substituted compliance determination under proposed Rules 3a71–(5), re-proposed Rule 242.908(c)(2)(ii), and proposed Rule 3Ch–2(c) under the Exchange Act, including supporting documentation provided by the requesting party.

3. Respondents

As discussed in Section XIV.B.3 above, the Commission preliminarily estimates that there will be 22 Nonresident SBS Entities and that most of these firms will be based in one of a small number of non-U.S. jurisdictions.[1235] In addition, the Commission staff anticipates that a small number of security-based swap market participants could be based in other jurisdictions.[1236] As a result, the Commission staff estimates that requests for substituted compliance determinations may arise in connection with security-based swap market participants and transactions in and between up to 30 discrete jurisdictions.[1237]

4. Total Initial and Annual Reporting and Recordkeeping Burdens

Proposed Rule 3a71–5 under the Exchange Act, proposed Rule 3Ch–2(c) under the Exchange Act, and re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would require submission of certain information to the Commission to the extent entities elect to request a substituted compliance determination with respect to one or more areas where the Commission has issued rules under the Dodd-Frank Act.

(a) Proposed Rule 3a71–5

Proposed Rule 3a71–5(c) under the Exchange Act would apply only to registered foreign security-based swap dealers (or classes thereof) that request a substituted compliance determination with regard to one or more requirements

[1229] The Commission is not proposing a rule regarding the substituted compliance process for the mandatory clearing requirement. *See* Section XI.E, *supra.*

[1230] As discussed above, the Commission is not proposing to permit substituted compliance for registered foreign major security-based swap participants.

[1231] Requests for substituted compliance determinations under proposed Rule 3a71–5(c) under the Exchange Act must come directly from a foreign security-based swap dealer (or a group of such dealers); foreign financial regulatory authorities may not request such a determination. Proposed Rule 3a71–5(c) under the Exchange Act.

[1232] The paperwork burden associated with requesting substituted compliance determinations is discussed in detail in Section XIV.E.4 below.

[1233] Proposed Rule 3a71–5(c); *see also* Section XIV.B, *supra.*

[1234] *See* Section XI.B, *supra* (discussing proposed Rule 0–13 under the Exchange Act).

[1235] *See* Section XIV.B.3, *supra.*

[1236] *Id.*

[1237] *Id.*

in Section 15F of the Exchange Act and the rules and regulations thereunder. As discussed above, in connection with each request, a registered foreign security-based swap dealer would be required to provide the Commission with any supporting documentation it believes necessary for the Commission to make a determination that its foreign financial regulatory authority or authorities have established requirements that are comparable to requirements otherwise applicable to a U.S. security-based swap dealer. Among other things, a foreign security-based swap dealer would be required to provide the Commission with information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. All such supporting documentation would be made public.[1238]

A registered foreign security-based swap dealer would not be required to make a request with respect to rules and regulations of a foreign jurisdiction that have previously been the subject of a substituted compliance determination. Given that only a relatively small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission estimates that it will receive no more than 50 requests for substituted compliance determinations pursuant to proposed Rule 3a71–5.[1239] This estimate accounts for the fact that the Commission may receive multiple requests from each jurisdiction (*e.g.,* separate requests from bank and nonbank entities).[1240] Because the Commission preliminarily expects that registered foreign security-based swap dealers will seek to rely on substituted compliance upon registration, the Commission believes that these requests will be made during the first year following the effective date.[1241]

The Commission staff estimates that the total paperwork burden associated with preparing and submitting a request for a substituted compliance determination pursuant to proposed Rule 3a71–5(c) would be approximately 4,000 hours, plus $4 million for the services of outside professionals for all 50 requests.[1242] These total costs include all collection burdens associated with the proposed rule, including burdens associated with analyzing and comparing the regulatory requirements of the foreign jurisdiction with the requirements in Section 15F of the Exchange Act and the rules and regulations thereunder.

(b) Re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR

Re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would apply to any person that requests a substituted compliance determination with respect to a foreign jurisdiction's rules regarding regulatory reporting and public dissemination of security-based swaps. In connection with each request, the requesting party would be required to provide the Commission with any supporting documentation that the entity believes is necessary for the Commission to make a determination, including information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with those requirements.[1243] The Commission preliminarily estimates that the total paperwork burden associated with submitting a request for a substituted compliance determination with respect to regulatory reporting and public dissemination would be approximately 1,120 hours, plus $1,120,000 for 14 requests.[1244] This estimate includes all collection burdens associated with the request, including burdens associated with analyzing whether the regulatory requirements of the foreign jurisdiction impose a comparable, comprehensive system for the regulatory reporting and public dissemination of all security-based swaps. Furthermore, this estimate assumes that each request would be prepared *de novo,* without any benefit of prior work on related subjects. The Commission notes, however, that as such requests are developed with respect to certain jurisdictions, the cost of preparing such requests with respect to other foreign jurisdictions could decrease.

Because only a small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission preliminarily estimates that it would receive approximately 10 requests in the first year for substituted compliance determinations with respect to regulatory reporting and public dissemination pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR. Assuming 10 requests in the first year, the Commission staff estimates an aggregated burden for the first year would be 800 hours, plus $800,000 for the services of outside professionals.[1245] The Commission preliminarily estimates that it would receive 2 requests for substituted compliance determinations pursuant to re-proposed Rule 242.908(c)(2)(ii) in each subsequent year. Assuming the same approximate time and costs, the aggregate burden for each year following the first year would be up to 160 hours of company time and $160,000 for the services of outside professionals.[1246]

(c) Proposed Rule 3Ch–2(c)

Finally, proposed Rule 3Ch–2(c) under the Exchange Act would apply to any person who requests a substituted compliance determination with respect to the rules of a foreign jurisdiction relating to trade execution for security-based swaps. In connection with each request, the requesting party would be required to provide the Commission

[1238] *See* Section XIV.B, *supra.*

[1239] *See* Section XIV.B.3, *supra.*

[1240] The Commission preliminarily estimates that is may receive requests for substituted compliance determinations for up to 30 different jurisdictions. In approximately two-thirds of those jurisdictions, the Commission preliminarily estimates that it may receive requests from more than one type of market participant (*e.g.,* a bank and a non-bank security-based swap dealer).

[1241] For purposes of this estimate, the Commission has assumed that proposed Rules 3a71–3 and 3a71–5 will be implemented contemporaneously. If the Commission requires registration before certain substituted compliance determinations are finalized, the Commission staff may receive requests for substituted compliance determinations pursuant to proposed Rule 3a71–5 after the first year following the effective date.

[1242] The Commission staff estimates that the paperwork burden associated with making each substituted compliance request pursuant to proposed Rule 3a71–5 would be approximately 80 hours of in-house counsel time, plus $80,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400). The paperwork burden associated with the opinion of counsel referenced in proposed Rule 3a71–5 is discussed in the Registration Proposing Release in connection with proposed Rule 15Fb2–4(c). *See* Registration Proposing Release, 76 FR 65811.

[1243] *See* Section VIII.C, *supra.*

[1244] The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would be approximately 80 of in-house counsel time, plus $80,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400).

[1245] The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would be up to approximately 800 hours (80 hours of in-house counsel time * 10 respondents), plus $800,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400 * 10 respondents).

[1246] The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR would be up to approximately 160 hours (80 hours of in-house counsel time * two respondents) + plus $160,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400 * two respondents).

with certain supporting information.[1247] However, a person would not be required to make a request with respect to rules and regulations of a foreign jurisdiction related to trade execution that have previously been the subject of a substituted compliance determination. As discussed above, because only a relatively small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission estimates that it will receive no more than 25 requests for substituted compliance determinations pursuant to proposed Rule 3Ch–2(c).[1248] Moreover, because market participants will likely seek to rely on substituted compliance upon registration, the Commission believes that many of these requests will be made during the first year following the effective date. However, because some jurisdictions may not fully implement their trade execution requirements in the immediate future, the Commission staff estimates that it may receive requests for substituted compliance determinations pursuant to proposed Rule 3Ch-2(c) for several years following the effective date.[1249]

The Commission preliminarily believes that the total paperwork burden associated with preparing and submitting a request for a substituted compliance determination pursuant to proposed Rule 3Ch–2(c) will be 2,000 hours and associated costs of $2 million for the services of outside professionals, including attorneys.[1250] These total costs include all collection burdens associated with the proposed rule, including burdens associated with analyzing whether the regulatory requirements of the foreign jurisdiction impose a comparable, comprehensive system for the regulatory reporting and public dissemination of all security-based swaps.

Assuming 17 requests in the first year, the Commission staff estimates an aggregated burden for the first year would be 1,360 hours, plus approximately $1,360,000 for the services of outside professionals.[1251] The Commission preliminarily estimates that it would receive 4 requests for substituted compliance determinations pursuant to re-proposed Rule 3Ch–2(c) in each subsequent year. Assuming the same approximate time and costs, the aggregate burden for each year following the first year would be up to 320 hours of company time and $320,000 for the services of outside professionals.[1252]

Request for Comment

The Commission seeks comment on the paperwork burdens associated with proposed Rules 3a71–5(c) under the Exchange Act, re-proposed Rule 242.908(c)(2)(ii) of Regulation SBSR, and proposed Rule 3Ch–2(c) under the Exchange Act.

- Are the Commission's estimates of the numbers of substituted compliance determinations reasonable? Are these estimates likely to become incorrect as a result of changes in the OTC derivatives markets? If so, how?
- In general, is the proposed collection of information necessary for the proper performance of the Commission's functions? Will the proposed collection of information have practical utility to the Commission and Commission staff?
- Are the Commission's estimates of the paperwork burden of the proposed collection accurate? Is the Commission's estimate of the cost of outside counsel reasonable?
- Are there ways for the Commission to enhance the quality, utility, and clarity of the information collected? Are there ways for the Commission to minimize the paperwork burden of the proposed collection of information (*e.g.,* through the use of automated collection techniques or other forms of information technology)? If so, please describe.

F. Reporting and Dissemination of Security-Based Swap Information

1. Background on the Re-proposed Rules

The Commission is re-proposing Regulation SBSR to address a number of cross-border issues, many of which were discussed in comments to the cross-border provisions of the initial proposal. The changes made between the proposed and re-proposed versions of Regulation SBSR, and the Commission's preliminary estimates of the paperwork burdens that would result from re-proposed Regulation SBSR, are described below.

2. Modifications to ''Reporting Party'' Rules

Proposed Rule 901 of Regulation SBSR, as amended herein, contains ''collection of information requirements'' within the meaning of the PRA. The title of this collection is ''Rule 901—Reporting Obligations.''

(a) Summary of Collection of Information

Under Rule 901(a), as initially proposed, a non-U.S. person security-based swap dealer or major security-based swap participant might incur the duty to report only if the security-based swap was executed in the United States or through any means of interstate commerce, or was cleared through a clearing agency having its principal place of business in the United States. If a non-U.S. person security-based swap dealer or major security-based swap participant entered into a swap with an unregistered U.S. person, the unregistered U.S. person would have incurred the duty to report. As set forth in more detail above, the Commission is re-proposing Rule 901(a) to provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases. Re-proposed Rule 901(a) now provides as follows:

- If both sides of the security-based swap include a security-based swap dealer, the sides would be required to select the reporting side.
- If only one side of the security-based swap includes a security-based swap dealer, that side would be the reporting side.
- If both sides of the security-based swap include a major security-based swap participant, the sides would be required to select the reporting side.
- If one side of the security-based swap includes a major security-based

[1247] *See* Section XIV.E.1, *supra.*

[1248] *See* Section XIV.B.3, *supra.* The Commission notes that it may not receive requests for substituted compliance determinations pursuant to proposed Rule 3Ch-2(c) from every jurisdiction will have a security-based swap market that is potentially eligible for such a determination.

[1249] The Commission notes that certain jurisdictions may implement OTC derivatives reforms incrementally. Accordingly, the Commission's estimates in this section are based on the assumption that certain jurisdictions may implement trade execution requirements later in time than other OTC derivatives reforms (*e.g.,* dealer regulation, reporting, and mandatory clearing requirements).

[1250] The Commission staff estimates that the paperwork burden associated with making each substituted compliance request pursuant to proposed Rule 3Ch–2(c) would be approximately 2,000 hours of in-house counsel time (80 hours * 25 respondents), plus $2,000,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400 * 25 respondents).

[1251] The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to proposed Rule 3Ch–2(c) would be up to approximately 1,360 hours (80 hours of in-house counsel time * 17 respondents), plus approximately $1,360,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400 * 17 respondents).

[1252] The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to proposed Rule 3Ch–2(c) would be up to approximately 320 hours (80 hours of in-house counsel time * four respondents), plus $320,000 for the services of outside professionals (based on 200 hours of outside counsel time * $400 * four respondents).

swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant would be reporting side.

• If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) If both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side; and (ii) If only one side includes a U.S. person, that side would be the reporting side.

In addition, in re-proposed Rule 901, the Commission is proposing certain technical or conforming changes. Specifically, the Commission is proposing certain changes to proposed Rules 901(c) and 901(d), which address the data elements to be reported to a registered SDR, to reflect that, under the re-proposal, certain security-based swaps might be subject to regulatory reporting but not public dissemination. Rule 901(c), as initially proposed, was titled ''Information to be reported in real time.'' Under Rule 902(a), as originally proposed, the registered SDR to which such information was reported would be required to promptly disseminate to the public such information (except in the case of a block trade). However, the Commission preliminarily believes that, if a security-based swap were subject to regulatory reporting but not public dissemination, there is no need to require that information about the security-based swap be reported in real time. Therefore, the introductory language to Rule 901(c) is being re-proposed as follows: ''For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section.'' In addition, re-proposed Rule 901(c) would be retitled ''Primary trade information,'' thus eliminating the reference to real-time reporting—since the information required to be reported under Rule 901(c) would no longer in all cases be required to be reported in real time. Furthermore, re-proposed Rule 901(d) would be retitled ''Secondary trade information.''

Rule 901(c)(10), as initially proposed, provided that the following data element would be required to be reported: ''If both counterparties to a security-based swap are security-based swap dealers, an indication to that effect.'' As the Commission stated in the Regulation SBSR Proposing Release: ''Prices of transactions involving a dealer and a non-dealer are typically 'all-in' prices that include a mark-up or mark-down, while interdealer transaction prices typically do not. Thus, the Commission believes that requiring an indication of whether a [security-based swap] was an interdealer transaction or a transaction between a dealer and a non-dealer counterparty would enhance transparency by allowing market participants to more accurately assess the reported price for a [security-based swap].''[1253] The Commission is now re-proposing Rule 901(c)(10) as follows: ''If both sides of the security-based swap include a security-based swap dealer, an indication to that effect.'' The re-proposed rule clarifies that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap. The Commission continues to believe that, in either case, a security-based swap having a security-based swap dealer on each side could, all other things being equal, be priced differently than a security-based swap having a security-based swap dealer on only one side. Therefore, the Commission continues to believe that the existence of a security-based swap dealer on each side should be reported to the registered SDR and made known to the public.

The Commission is re-proposing Rule 901(d)(1)(ii) to require reporting of the broker ID, desk ID, and trader ID, as applicable, only of the *direct* counterparty on the reporting side. The Commission preliminarily believes that it would be impractical and unnecessary to report such data elements with respect to an indirect counterparty, as such elements might not be applicable to an indirect counterparty. Similarly, Rule 901(d)(1)(iii) is being re-proposed to require reporting of a description of the terms and contingencies of the payment streams only of each *direct* counterparty to the other. The Commission is including the word ''direct'' to avoid extending Rule 901(d)(1)(iii) to indirect counterparty relationships, where payments might not (except in unusual circumstances) flow to or from an indirect counterparty.

Proposed Rule 901(e) set forth provisions for reporting life cycle events of a security-based swap. The basic approach set forth in proposed Rule 901(e) was that, generally, the original reporting party of the initial transaction would have the responsibility to report any subsequent life cycle event; this approach remains unchanged in the re-proposal. However, if the life cycle event were an assignment or novation that removed the original reporting party, either the new counterparty or the original counterparty would have to be the reporting party. Further, Rule 901(e), as initially proposed, would provide that the new counterparty would be the reporting party if it were a U.S. person, whereas the other counterparty would be the new reporting party if the new counterparty were not a U.S. person.

However, as discussed above, the Commission is now proposing the concept of a ''reporting side,'' which would include the direct and any indirect counterparty. Further, as discussed above, the Commission is proposing that non-U.S. person security-based swap dealers or major security-based swap participants would, in certain instances, incur a duty to report. Thus, the Commission is re-proposing Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant (references to which are being added to Rule 901(e)). The Commission preliminarily believes that, if the new side includes a registered person such as a security-based swap dealer or major security-based swap participant, the new side should retain the duty to report. This approach is designed to align reporting duties with the market participants that the Commission preliminarily believes are better suited to carrying them out because non-U.S. security-based swap dealers and major security-based swap participants likely have already taken significant steps to establish and maintain the systems, processes and procedures, and staff resources necessary to report security-based swaps currently.[1254]

Aside from some technical changes to the titles of Rules 901(c) and (d) and to the introductory language to Rule 901(c) noted above, the Commission is not proposing to add or delete any data elements from Rules 901(c) and 901(d). Therefore, no revisions to the Commission's paperwork estimates are being made to increase or decrease paperwork burdens because of more or fewer required data elements to be reported. However, other changes to the

[1253] *See Regulation SBSR Proposing Release,* 75 FR 75214.

[1254] *See* note 913 and accompanying text, *supra; see also* 15 U.S.C. 78m–1(a)(3).

paperwork burdens initially proposed for Rule 901 are necessitated by the other changes to the proposed rule noted above.

(b) Proposed Use of Information

As described by the Commission in the Regulation SBSR Proposing Release, the security-based swap transaction information required to be reported pursuant to re-proposed Rule 901 would be used by SDRs, market participants, the Commission, and other regulators. The information reported by reporting parties pursuant to re-proposed Rule 901 would be used by SDRs to publicly disseminate real-time reports of security-based swap transactions, as well as to offer a resource for regulators to obtain detailed information about the security-based swap market. Market participants would use the public market data feed, among other things, to assess the current market for security-based swaps and to mark their own positions. The Commission and other regulators would use information about security-based swap transactions reported to and held by SDRs to monitor and assess prudential and systemic risks, as well as to examine for improper behavior and to take enforcement actions, as appropriate.

(c) Respondents

Re-proposed Rule 901(a) would designate which side of a security-based swap transaction would be the reporting side.[1255] In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that up to 1,000 entities could incur duties to report transactions under proposed Rule 901(a), and that it was reasonable to use the figure of 1,000 respondents for estimating collection of information burdens under the PRA.[1256] As discussed in more detail below, the Commission now preliminarily estimates there would be 300 respondents to re-proposed Rule 901.

In the Regulation SBSR Proposing Release, the Commission noted that proposed Rule 901 would impose certain duties on SDRs. The Commission preliminarily estimated that the number of SDRs would not exceed 10. The Commission continues to believe that it is reasonable to use 10 as an estimate of the number of SDRs for the purpose of estimating collection of information burdens for re-proposed Regulation SBSR.

(d) Total Initial and Annual Reporting and Recordkeeping Burdens

i. Baseline Burdens

In the Regulation SBSR Proposing Release, the Commission estimated that respondents would face 3 categories of burdens to comply with proposed Rule 901. First, each entity that would incur a duty to report security-based swap transactions pursuant to Regulation SBSR would have to develop an internal order and trade management system (''OMS'') capable of capturing the relevant transaction information. Second, each reporting party would have to implement a reporting mechanism. Third, each reporting party would have to establish an appropriate compliance program and support for the operation of the OMS and reporting mechanism. In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that the initial, aggregate annualized burden associated with proposed Rule 901 would be 1,438 hours per reporting party—for a total of 1,438,300 hours for all reporting parties—in order to develop an OMS, implement a reporting mechanism, and establish an appropriate compliance program and support system.[1257] The Commission preliminarily estimated that the ongoing aggregate annualized burden associated with proposed Rule 901 would be 731 hours per reporting party, for a total of 731,300 hours for all reporting parties.[1258] The Commission further estimated that the initial aggregate annualized dollar cost burden on reporting parties associated with Rule 901 would be $201,000 per reporting party, for a total of $201,000,000 for all reporting parties.[1259]

ii. Re-Proposed Burdens

For the reasons discussed above, the Commission now believes that it is appropriate to re-propose those aspects of Regulation SBSR that would set out who must report security-based swaps. First, the Commission is proposing to redefine the counterparties to a security-based swap. Specifically, ''counterparty'' would be defined as ''a direct or indirect counterparty of a security-based swap.'' Re-proposed Rule 900 would define ''direct counterparty'' as ''a person that enters directly with another person into a contract that constitutes a security-based swap'' and ''indirect counterparty'' as ''a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.'' Second, proposed Rule 900 would revise the term ''reporting party'' to ''reporting side'' and would further define ''reporting side'' as ''the side of a security-based swap having the duty to report information in accordance with re-proposed rules 242.900–911 of Regulation SBSR to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.'' ''Side'' would be defined as ''a direct counterparty and any indirect counterparty that guarantees the direct counterparty's performance of any obligation under a security-based swap.''

As re-proposed, Rule 901(a) would provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases, as detailed above. The Commission preliminarily believes that no aspect of the re-proposal would significantly affect the burdens that an entity with a duty to report would incur to establish the systems, policies and procedures, and staff resources necessary to comply with Regulation SBSR. Therefore, the Commission is not revising these initial infrastructure-related burdens on a per-entity basis.

However, the Commission is revising our initial estimate of the total infrastructure-related burdens of re-proposed Rule 901(a) due to a reduction in the estimate of the number of reporting counterparties. In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that up to 1,000 respondents could be reporting parties under proposed Rule 901(a), and that it was reasonable to use the figure of 1,000 respondents for estimating collection of information burdens under the PRA.[1260] Since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the security-based swap market from DTCC–TIW. These historical data suggest that approximately 30 counterparties—which are likely to be

[1255] *See* Section VIII.D, *supra* (discussing the use of the term ''reporting side'').

[1256] *See* Regulation SBSR Proposing Release, 75 FR 75247.

[1257] *See id.* at 75250.

[1258] *See id.*

[1259] *See id.* The Commission notes that the Regulation SBSR Proposing Release incorrectly stated this total as $301,000 per reporting party. The correct number is $201,000 per reporting party ($200,000 + $1,000).

[1260] *See* Regulation SBSR Proposing Release, 75 FR 75247. The Commission did not receive any comments related to its preliminary belief that up to 1,000 respondents could be reporting parties under proposed Rule 901(a) of Regulations SBSR.

required to register with the Commission as security-based swap dealers—account for the vast majority of recent security-based swap transactions and transaction reports. These data further suggest that there are only a limited number of security-based swap transactions that do not include at least one of these larger counterparties on either side. In other words, the vast majority of recent transactions have included a larger counterparty that reports the transaction currently, and that would likely be required to report a similar transaction in the future.

In addition, the Commission is attempting in re-proposed Regulation SBSR to further align reporting obligations to larger market participants that are better able to bear them. As a result of all of these factors, and to the extent that recent security-based swap market activity may be indicative of future activity, the Commission preliminarily believes that the more appropriate estimate of reporting counterparties is 300, 700 fewer than in the original proposal.[1261] This revised estimate continues to include some smaller counterparties to security-based swaps that would incur a reporting duty, but many fewer than estimated in the PRA of the initial Regulation SBSR proposal.

As a result of the revision to the number of reporting counterparties, the Commission preliminarily believes that the one-time burdens of Regulation SBSR could decrease by 1,006,600 aggregated hours and $140,700,000.[1262] In addition, the Commission preliminarily believes that the annual ongoing burden of Regulation SBSR could decrease by 511,700 aggregated hours and $140,700,000.[1263] The Commission seeks comment on and data to quantify these potential cost reductions.

Although re-proposed Rule 901(a) could result in a significant reduction in aggregate costs due to reduction in the number of reporting counterparties that would be required to establish the systems, policies and procedures, and staff resources to carry out the reporting function, the Commission preliminarily believes that there may be a slight increase in burden for certain individual reporting counterparties due to a re-allocation of reportable security-based swap transactions among those reporting counterparties that continue to be covered. Specifically, small unregistered counterparties that may have been required to report a small number of security-based swaps under the original proposal would be less likely to incur the reporting duty under re-proposed Rule 901(a). Thus, the counterparties that would continue to have the reporting duty under re-proposed Rule 901(a), primarily security-based swap dealers and major security-based swap participants, would likely incur the reporting duty for most of these transactions. Consequently, re-proposed Rule 901(a) could result in each reporting counterparty being required to report, on average, a larger percentage of the total security-based swap transactions than envisioned under the original proposal. In the Regulation SBSR Proposing Release, the Commission estimated that, collectively, the reporting parties would spend 77,300 hours reporting specific security-based swap transactions to a registered SDR, as required by proposed Rule 901.[1264] Nonetheless, as explained below, the Commission's estimate of the anticipated number of security-based swap transactions to be reported pursuant to Regulation SBSR is being revised significantly downward.

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that 15.5 million security-based swap transactions per year would be required to be reported.[1265] In addition to revising our estimate of the number of reporting sides from 1,000 to 300, as discussed above, the Commission is now also revising our estimate of the number of reportable security-based swap transactions covered by re-proposed Regulation SBSR, for the following reasons. First, the Commission notes that the Regulation SBSR Proposing Release inadvertently overstated the number of historical security-based swap transactions such that the number of security-based swap transactions based on data available at the time of the Regulation SBSR Proposing Release should have been stated as approximately 2,200,000.[1266] Second, since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the credit default swap market from DTCC–TIW. These more recent data further suggest that the Commission initially overestimated both the number of reporting counterparties and the number of security-based swap transactions that would be reportable to DTCC–TIW. As a result, the Commission now estimates that 300 reporting sides would be required to report approximately 5 million new security-based swaps and life cycle events (collectively, ''reportable events'') under re-proposed Regulation SBSR per year.[1267]

[1261] The Commission is basing this new estimate on CDS data from the DTCC–TIW, but not from data from data repositories for other security-based swap asset classes, which are not currently available to the Commission. The Commission preliminarily believes that entities that are likely to incur obligations to report security-based swaps in other asset classes are already likely to be reporting CDS transactions to DTCC–TIW. The Commission also preliminarily believes that, to avoid duplicative compliance costs, such entities are likely to leverage their existing infrastructure for reporting CDS transactions to carry out reporting obligations for other asset classes, even though these other asset classes might be booked in different affiliated entities. The Commission preliminarily estimates that these other security-based swap asset classes consist of less than one-fifth of the overall security-based swap market. Therefore, the Commission preliminarily believes that reporting counterparties across all security-based swap asset classes should not exceed the estimate of 300 derived from the DTCC–TIW CDS data. *See* note 1301, *infra.*

[1262] The Commission estimates: ((1,000 reporting parties − 300 reporting sides) * 1,438 hours) = 1,006,600 burden reduction for all reporting counterparties. The Commission estimates: ((1,000 reporting parties −300 reporting sides) * $201,000) = $140,700,000 burden reduction for all reporting counterparties.

[1263] The Commission estimates: ((1,000 reporting parties − 300 reporting sides) * 731 hours) = 511,700 burden reduction for all reporting counterparties. The Commission estimates: ((1,000 reporting parties − 300 reporting sides) * $201,000) = $140,700,000 burden reduction for all reporting counterparties.

[1264] *See* Regulation SBSR Proposing Release, 75 FR 75248–49. In arriving at this figure, the Commission preliminarily estimated that 1,000 reporting parting would be responsible for reporting 15,458,824 security-based swap transactions. The Commission further estimated that each transaction would take 0.005 hours to report for a total burden of 77,300 hours, or 77.3 burden hours per reporting party. The Commission preliminarily believes that the hourly burden of reporting individual security-based swap transactions would not change.

[1265] *See* Regulation SBSR Proposing Release, 75 FR 75248.

[1266] *See id.* at 75248 nn. 182–85 and accompanying text. Specifically, in the SBSR Proposing Release, the Commission misinterpreted weekly CDS volume data as daily volume data. Based on the weekly data available at the time, a more accurate estimate for the number of CDS transactions per year would have been 1,872,000. This number is based on the following: (36,000 (estimated CDS transactions per week) * 52 (weeks/year)) = 1,872,000 CDS transactions/year. Based on the Commission's preliminary assumption in the SBSR Proposing Release that CDS transactions represent approximately eight- to nine-tenths of all security-based swap transactions, a more accurate estimate for the number of security-based swap transactions per year would have been 2,202,353. This number was based on the following: (1,872,000 (number of CDS transactions per year)/0.85) = 2,202,353 security-based swap transactions/year.

[1267] The Commission now estimates that single-name CDS transactions for 2012 were approximately 4 million transactions. The data studied by the Commission cover CDS transactions, which the Commission continues to preliminarily believe account for approximately eight- to nine-tenths of the security-based swap market. As a result, and to the extent that recent security-based swap market activity may be indicative of future activity, the Commission preliminarily estimates that 300 reporting sides will have the duty to report 5 million security-based swap transactions (*i.e.,* 4,000,000/0.82 = 4,878,049 reportable events). *See also* note 1641, *infra.*

The Commission notes that the change in the estimate of the number of reportable events per year since the initial proposal of Regulation SBSR from more than 2,000,000 to approximately 5 million may be due to better and more precise data available from the industry on the scope, size, and composition of the security-based swap market. As a result, and to the extent that the available data regarding recent security-based swap market activity may be indicative of future activity, the Commission now preliminarily believes that a more appropriate estimate of the number of reportable events would be approximately 5 million per year.

The Commission preliminarily believes that, once a respondent's reporting infrastructure and compliance systems are in place, the burden of reporting a single reportable event would be *de minimis* when compared to the burdens of establishing the reporting infrastructure and compliance systems.[1268] The Commission now preliminarily estimates that re-proposed Regulation SBSR would result in total burden hours of 5,080 attributable to the reporting to security-based swap data repositories all reportable events over the course of a year.[1269] The Commission preliminarily believes that many reportable events would be reported through electronic means and that the ratio of electronic reporting to manual reporting is likely to increase over time. The Commission further preliminarily believes that the bulk of the burden hours estimated above would be attributable to manually reported transactions. Thus, reporting counterparties that capture and report transactions electronically would likely incur bear fewer burden hours than those reporting counterparties that capture and report transactions manually.

iii. Summary of Re-Proposed Burdens

Based on the foregoing, the Commission preliminarily estimates that re-proposed Regulation SBSR would impose an estimated total first-year burden of approximately 1,444 hours[1270] per reporting counterparty for a total first-year burden of 433,200 hours for all reporting counterparties.[1271] The Commission preliminarily estimates that re-proposed Regulation SBSR would impose ongoing annualized aggregate burdens of approximately 737 hours[1272] per reporting counterparty for a total aggregate annualized cost of 221,100 hours for all reporting counterparties.[1273] The Commission further estimates that re-proposed Regulation SBSR would impose initial and ongoing annualized dollar cost burdens of $201,000 per reporting counterparty, for total aggregate initial and ongoing annualized dollar cost burdens of $60,300,000.[1274]

The Commission does not preliminarily believe that the proposed changes to Regulation SBSR would have any material impact on SDRs not discussed in Regulation SBSR, as originally proposed. The changes discussed herein do not impact the previously estimated burdens for SDRs. The Commission preliminarily believes that re-proposed Rule SBSR would not result in the registration of additional SDRs, and would not require existing SDRs to bear the burden of connecting to additional reporting counterparties. SDRs would already be required under proposed Regulation SBSR to have established mechanisms to receive and process security-based swap transaction reports, and none of the costs identified in the Regulation SBSR Proposing Release relating to SDRs were dependent upon the number of security-based swap transactions or the number of reporting counterparties.

iv. Recordkeeping Requirements

Concurrently with proposed Regulation SBSR, the Commission issued the SDR Proposing Release, which includes (among other things) recordkeeping requirements for security-based swap transaction data received by a registered SDR pursuant to proposed Regulation SBSR. Specifically, proposed Rule 13n–5(b)(4) under the Exchange Act would require a registered SDR to maintain the transaction data that it collects for not less than five years after the applicable security-based swap expires, and historical positions and historical market values for not less than five years.[1275] Accordingly, security-based swap transaction reports received by a registered SDR pursuant to proposed Rule 901 would be required to be retained by the registered SDR for not less than five years.

(e) Collection of Information Is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

(f) Confidentiality

Re-proposed Rule 901(a) would not affect the confidentiality of responses to the collection of information provided under Rule 901 of Regulation SBSR as originally proposed. As described in the Regulation SBSR Proposing Release, information collected pursuant to proposed Rule 901(c) would be widely available to the public to the extent it is incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to proposed Rule 902. A registered SDR, pursuant to Sections 13(n)(5) of the Exchange Act and proposed Rule 13n–9 thereunder, would be under an obligation to maintain the confidentiality of any information reported pursuant to proposed Rule 901(d) of Regulation SBSR. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of applicable law.

Request for Comment

The Commission requests public comment on our analysis of burdens associated with re-proposed Rule 901(a) and proposed Rule 901 generally. The Commission also seeks comment on the following:

- Would re-proposed Rule 901(a) impose burdens on parties additional to those imposed by Rule 901, as originally

[1268] In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that reporting specific security-based swap transactions to a registered SDR would impose an annual aggregate cost of approximately $5,400,000. *See* Regulation SBSR Proposing Release, 75 FR 75265. The Commission further estimated that Regulation SBSR would impose an aggregate total first-year cost of approximately $1,039,000,000 and an ongoing annualized aggregate cost of approximately $703,000,000. *See id.* at 75280.

[1269] The Commission estimates: ((5 million * 0.005)/(300 reporting sides)) = 83.3 burden hours per reporting side or 25,000 total burden hours. Since the number of respondents would decline from 1,000 reporting parties to 300 reporting sides, the transaction based reporting burden would be concentrated among fewer respondents.

[1270] The Commission derived its estimate from the following: (1,438 (Regulation SBSR Proposing Release estimated total burden) – 77.3 (Regulation SBSR Proposing Release estimated transaction reporting burden) + 83.3 (revised estimated transaction reporting burden)) = 1,444 hours. *See* Section XIV.F.2(d)ii.

[1271] The Commission derived its estimate from the following: (1,444 * 300 reporting counterparties) = 433,200 hours.

[1272] The Commission derived its estimate from the following: (731 (Regulation SBSR Proposing Release estimated total burden) – 77.3 (Regulation SBSR Proposing Release estimated transaction reporting burden) + 83.3 (revised estimated transaction reporting burden)) = 737 hours. *See* Section XIV.F.2(d)ii, infra.

[1273] The Commission derived its estimate from the following: (737 * 300 reporting counterparties) = 221,000 hours.

[1274] The Commission derived its estimate from the following: ($201,000 * 300 reporting counterparties) = $60,300,000.

[1275] *See* SDR Proposing Release, 75 FR 77369.

proposed? If so, what are these additional burdens? Please describe fully and quantify to the extent possible.

• Would re-proposed Rule 901(a) reduce overall burdens by aligning the security-based swap transaction reporting obligation with those market participants better able to carry out the reporting function? Why or why not?

• Are there any methods to enhance Rule 901 while minimizing the overall burdens associated with that rule?

• Would re-proposed Rule 901(a) reduce the total number of entities potentially subject to the reporting requirements? Is the Commission's revised estimate of 300 reporting sides reasonable?

• Would re-proposed Rule 901(a) have any impact on the burden imposed on SDRs? Are those costs dependent upon the number of reporting counterparties or the number of transactions submitted to SDRs?

3. Rules 902, 905, 906, 907, and 909

Regulation SBSR, as originally proposed, contained certain proposed rules, each of which was considered a ''collection of information'' within the meaning of the PRA, but that now either remains unchanged—or contains only technical, or conforming changes—as a result of re-proposed SBSR.

(a) Rule 902

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 902 contained ''collection of information requirements'' within the meaning of the PRA.[1276] As such, the Commission preliminarily estimated certain burdens resulting from the proposed rule.[1277]

As set forth in more detail above, the Commission is now proposing technical or conforming revisions to proposed Rule 902.

Rule 902(a), as initially proposed, would require a registered SDR to publicly disseminate a transaction report of any security-based swap immediately upon receipt of information about the security-based swap, except in the case of a block trade. Re-proposed Rule 908, however, contemplates situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated.[1278] Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would not have an obligation to publicly disseminate a transaction report for any such security-based swap.

(b) Rule 905

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 905 contained ''collection of information requirements'' within the meaning of the PRA.[1279] As such, the Commission preliminarily estimated certain burdens resulting from the proposed rule.[1280]

As set forth in more detail in Section VIII above, in re-proposed Regulation SBSR, the Commission has proposed technical or conforming revisions to proposed Rule 905. Rule 905(b)(2) is being re-proposed to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to public dissemination.[1281] In addition, re-proposed Rule 905 conforms the rule language to incorporate the use of the term ''side.''

(c) Rule 906

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 906 contained ''collection of information requirements'' within the meaning of the PRA.[1282] As such, the Commission preliminarily estimated certain burdens on reporting parties and SDRs resulting from the proposed rule.[1283]

As set forth in more detail above, the Commission is now proposing technical revisions to proposed Rule 906. Re-proposed Rule 906 conforms the rule language to incorporate the use of the term ''side.''

(d) Rule 907

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 907 contained ''collection of information requirements'' within the meaning of the PRA.[1284] As such, the Commission preliminarily estimated certain burdens on reporting parties and SDRs resulting from the proposed rule.[1285]

As set forth in more detail above, the Commission is now proposing technical or conforming revisions to proposed Rule 907. Re-proposed Rule 907(a)(6) would require a registered SDR to establish and maintain written policies and procedures ''[f]or periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any other participant(s) which the *counterparty* is affiliated, using ultimate parent IDs and participant IDs'' (emphasis added). The Commission now is re-proposing Rule 907(a)(6) with the word ''participant'' in place of the word ''counterparty.'' Re-proposed Rule 907 also conforms the rule language to incorporate the use of the term ''side.''

(e) Rule 909

In the Regulation SBSR Proposing Release, the Commission stated our preliminary belief that certain provisions of proposed Rule 909 contained ''collection of information requirements'' within the meaning of the PRA.[1286] As such, the Commission preliminarily estimated certain burdens SDRs resulting from the proposed rule.[1287]

i. Impact of Re-Proposed Rules 902, 905, 906, 907, and 909 on the Commission's PRA Analysis

Since re-proposed Rules 902, 905, 906, 907, and 909 of Regulations SBSR either remain unchanged from the Regulation SBSR Proposing Release or contain only technical or conforming changes, the Commission preliminarily believes that our original PRA analysis, as set forth in the Regulation SBSR Proposing Release, continues to apply. The Commission preliminarily believes that our original analysis does not require revision, in part, because the burdens described in the Regulation SBSR Proposing Release are not dependent upon the number of respondents or the number of security-based swap transactions that would be reported to a registered SDR. In addition, the Commission preliminarily believes that the burdens described in relation to Rule 906 would not change because the number of reports required under and the universe of respondents subject to Rule 906 would not change. Furthermore, the Commission preliminarily believes that these re-proposed rules would not result in a

[1276] *See* Regulation SBSR Proposing Release, 75 FR 75251.

[1277] *See id.* at 75251–52.

[1278] *See* Section VIII.C, *supra.*

[1279] *See* Regulation SBSR Proposing Release, 75 FR 75254.

[1280] *See id.* at 75254–56.

[1281] Re-proposed Rule 905(b)(2) of Regulation SBSR also substitutes the word ''counterparties''—which is a formally defined term in the regulation—for the word ''parties,'' which was used in the initial proposal but was not a formally defined term.

[1282] *See* Regulation SBSR Proposing Release, 75 FR 75256.

[1283] *See id.* at 75256–58.

[1284] *See id.* at 75258.

[1285] *See id.* at 75258–60.

[1286] *See id.* at 75260.

[1287] *See id.* at 75260–61.

change in the Commission's original estimate of SDRs.

The Commission requests public comment on our analysis of burdens associated with these re-proposed rules, and whether re-proposed Rule 902, 905, 906, 907, or 909 would impose any collection of information requirements that the Commission has not considered. If so, please describe them.

4. Rules 900, 903, 908, 910, and 911

Regulation SBSR, as originally proposed, contained certain proposed rules that were not considered a ''collection of information'' within the meaning of the PRA.

(a) Modification of the Definition of ''U.S. Person''

In the Regulation SBSR Proposing Release, the Commission stated our belief that proposed Rule 900, since it contains only definitions of relevant terms, would not be a ''collection of information'' within the meaning of the PRA.[1288] Rule 900 of re-proposed Regulation SBSR contains a revised definition of ''U.S. person'' that cross-references proposed Rule 3a71–3(a)(7) under the Exchange Act. Re-proposed Rule 900 also contains definitions for new terms such as ''side,'' ''reporting side,'' and ''direct electronic access.'' The Commission continues to believe that, because Rule 900 contains only definitions of relevant terms, it would not be a ''collection of information'' within the meaning of the PRA.

(b) Rule 903

In the Regulation SBSR Proposing Release, the Commission stated our belief that proposed Rule 903 would not be a ''collection of information'' within the meaning of the PRA because the rule would merely permit reporting parties and SDRs to use codes in place of certain data elements, subject to certain conditions.[1289] Re-proposed Rule 903 conforms the rule language to incorporate the use of the term ''side.'' Because these are only technical changes to the proposed rule, the Commission continues to believe that re-proposed Rule 903 would not be a ''collection of information'' within the meaning of the PRA.

(c) Re-proposed Rules 908(a) and 908(b)

Rule 908(a), as initially proposed, provided that a security-based swap would be subject to regulatory reporting and public dissemination under Regulation SBSR if the security-based swap: (1) has at least one counterparty that is a U.S. person; (2) is executed in the United States or through any means of interstate commerce; or (3) is cleared through a registered clearing agency having its principal place of business in the United States. Thus, original Rule 908(a) would not impose reporting requirements in connection with a security-based swap solely because one of the counterparties were guaranteed by a U.S. person or were a non-U.S. person security-based swap dealer or major security-based swap participant.

The Commission stated our preliminary belief that proposed Rule 908 would not be a ''collection of information'' within the meaning of the PRA, as the rule merely described the jurisdictional reach of proposed Regulation SBSR.

As set forth in more detail above, the Commission now believes that, where a security-based swap is executed outside the United States by a non-U.S. person direct counterparty but performance of any duties under that security-based swap is guaranteed by a U.S. person, the security-based swap should be subject to Title VII regulatory reporting requirements.[1290] In addition, a security-based swap dealer or major security-based swap participant that is a non-U.S. person would, under Rule 908(a) of re-proposed Regulation SBSR, be required to report a security-based swap executed outside the United States with a non-U.S. person counterparty (assuming no guarantee extended by a U.S. person).

Re-proposed Rule 908(a) is now divided into subparagraphs (1) and (2), which address regulatory reporting and public dissemination, respectively. The Commission also is re-proposing Rule 908(a) to require reporting and public dissemination in certain cases not required by the original proposal, and to make certain other changes described above (such as eliminating the ''interstate commerce clause''). Because re-proposed Rule 908(a) continues merely to describe the situations to which proposed Regulation SBSR would apply, the Commission continues to believe that re-proposed Rule 908(a) would not be a ''collection of information'' within the meaning of the PRA. However, to the extent that additional types of security-based swaps would be subject to regulatory reporting and public dissemination under re-proposed Regulation than under the initial proposal, the additional burdens on respondents are considered under re-proposed Rule 901 above.

Rule 908(b), as initially proposed, described when duties would be imposed on foreign counterparties of security-based swaps when some connections to the United States might be present. Rule 908(b), as initially proposed, provided that no duties would be imposed on a counterparty unless one of the following conditions were true: (1) the counterparty is a U.S. person; (2) the security-based swap is executed in the United States or through any means of interstate commerce; or (3) the security-based swap is cleared through a clearing agency having its principal place of business in the United States.

The Commission stated our preliminary belief that proposed Rule 908 would not be a ''collection of information'' within the meaning of the PRA, as the rule merely described the jurisdictional reach of proposed Regulation SBSR.

As set forth in more detail above, the Commission is proposing several technical revisions to proposed Rule 908(b). Specifically, Rule 908(b) is being revised to account for the possibility that a non-U.S. person registered with the Commission as a security-based swap dealer or major security-based swap participant could incur a duty to report. Moreover, the ''interstate commerce clause'' is being replaced with the new concept of a ''transaction conducted within the United States.''

Since re-proposed Rule 908(b) continues merely to describe the jurisdictional reach of Regulation SBSR, the Commission continues to believe that re-proposed Rule 908(b) would not be a ''collection of information'' within the meaning of the PRA. However, the Commission notes that re-proposed Rule 908(b) could result in a non-U.S. person security-based swap dealer or major security-based swap participant incurring a duty to report. To the extent that this could result in a change in the number of reporting counterparties, such burdens are considered in connection with re-proposed Rule 901 above.

The Commission requests public comment on our analysis of burdens associated with re-proposed Rules 908(a) and 908(b) generally. In particular:

- Would re-proposed Rules 908(a) and 908(b) impose any collection of information requirements that the Commission has not considered? If so, please describe.

Re-proposed Rule 908 contains a new subparagraph (c), dealing with substituted compliance, a subject that

[1288] *See id.* at 75246.

[1289] *See id.* at 75252–53.

[1290] However, as discussed above, the Commission preliminarily believes that certain of these cross-border security-based swaps need not be subject to Title VII's public dissemination requirements. *See* Section VIII.C.1, *supra.*

was not addressed in the original proposal. The PRA analysis for re-proposed Rule 908(c) is provided elsewhere, together with the PRA analysis of the substituted compliance provisions of the other Title VII proposed rules described in this release.[1291]

(d) Rule 910

As originally proposed, the Commission stated our belief that proposed Rule 910 would not be a ''collection of information'' within the meaning of the PRA, as it merely describes when a registered SDR and its participants would be required to comply with the various parts of proposed Regulation SBSR, and would not create any additional collection of information requirements.

As set forth in more detail above, the Commission is now proposing technical, or conforming revisions to proposed Rule 910. Rule 910(b)(4), as originally proposed, would provide that, in Phase 4 of the Regulation SBSR compliance schedule, ''[a]ll security-based swaps reported to the registered security-based swap data repository shall be subject to real-time public dissemination as specified in § 242.902.'' As noted above, under re-proposed Rule 908, certain security-based swaps would be subject to regulatory reporting but not public dissemination requirements. Therefore, the Commission is re-proposing Rule 910(b)(4) to provide that, ''All security-based swaps received by the registered security-based swap data repository shall be treated in a manner consistent with §§ 242.902, 242.905, and 242.908.'' Re-proposed Rule 910 also conforms the rule language to incorporate the use of the term ''side.''

The Commission continues to believe that re-proposed Rule 910 would not be a ''collection of information'' within the meaning of the PRA.

(e) Rule 911

Rule 911, as originally proposed, would restrict the ability of a reporting party to report a security-based swap to one registered SDR rather than another, but would not otherwise create any duties or impose any collection of information requirements beyond those already required by proposed Rule 901. Therefore, the Commission stated our belief that proposed Rule 911 would not be a ''collection of information'' within the meaning of the PRA.[1292] As set forth in more detail above, the Commission is now proposing technical revisions to proposed Rule 911. Re-proposed Rule 911 conforms the rule language to incorporate the use of the term ''side.'' The Commission continues to believe that re-proposed Rule 911 would not be a ''collection of information'' within the meaning of the PRA.

G. Request for Comments by the Commission and Director of OMB

Pursuant to 44 U.S.C. 3505(c)(2)(B), the Commission solicits comment to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information shall have practical utility;
2. Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
3. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
4. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File Number S7–02–13, and File Numbers S7–34–10 (Regulation SBSR) and/or S7–40–11 (registration of security-based swap dealers and major security-based swap participants), as applicable. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–02–13, and File Numbers S7–34–10 (Regulation SBSR) and/or S7–40–11 (registration of security-based swap dealers and major security-based swap participants), as applicable, and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Operations, 100 F Street NE., Washington, DC 20549–2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

XV. Economic Analysis

A. Introduction

The Commission is sensitive to the economic consequences and effects, including costs and benefits, of our rules. In proposing the rules and interpretations in this release, the Commission has been mindful of the economic consequences of the decisions it makes regarding the scope of application of the Title VII requirements to cross-border activities pursuant to the proposed rules. The Commission has taken into account the costs and benefits associated with applying the Title VII regulatory requirements to cross-border transactions and market participants who would be required to register pursuant to these proposed rules and interpretations, as well as the costs associated with determining whether Title VII applies to a specific person or transaction, which we refer to as direct assessment costs these rules and interpretations would impose on market participants, if adopted as proposed. Some of these economic consequences and effects stem from statutory mandates, while others are affected by the discretion we exercise in implementing the mandates. Further, Section 3(f) of the Exchange Act requires the Commission, whenever we engage in rulemaking pursuant to the Exchange Act and are required 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.[1293] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[1294] The Commission requests comment on all aspects of the economic analysis of the proposed rules, including their costs and benefits, as well as any effect these rules may have on competition, efficiency, and capital formation.

As stated above, the Commission is proposing rules and interpretations regarding the application of Title VII to cross-border activities holistically in a single proposing release to provide market participants, foreign regulators, and other interested parties with an opportunity to consider, as an integrated

[1291] *See* Section XIV.E.4, *supra*.

[1292] *See* Regulation SBSR Proposing Release, 75 FR 75261.

[1293] 15 U.S.C. 78c(f).

[1294] 15 U.S.C. 78w(a)(2).

whole, the Commission's proposed approach to the application of various Title VII requirements to cross-border security-based swap transactions and to persons whose cross-border security-based swap activity is regulated under Title VII.[1295]

In analyzing the economic consequences and effects of the rules and interpretations proposed in this release, the Commission has been guided by the objectives of the Dodd-Frank Act to mitigate risks to the U.S. financial system, promote counterparty protection, increase swap market transparency, and facilitate financial stability. We have also taken into account the importance of maintaining a well-functioning security-based swap market. In evaluating these rules the Commission has considered the importance of avoiding unnecessary market disruption, and preserving market participants' access to liquidity irrespective of geography. This analysis also reflects the importance of regulatory harmonization and maintaining consistent international standards. In this regard, we recognize that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority.

In addition, the Commission is aware of the development of OTC derivatives regulatory reform in other jurisdictions. In particular, the EU and certain other G20 members have taken various steps to develop and implement new regulations with respect to OTC derivatives.[1296] Moreover, market participants, foreign regulators, and other interested parties have provided views on the application of Title VII requirements to cross-border activities through both written comment letters to the Commission and/or the CFTC and meetings with Commissioners and Commission staff.[1297] These developments, comments, and discussions have been informative in the Commission's consideration of our proposed approach to the application of Title VII in the cross-border context and the economic consequences of the proposed rules and interpretations.

B. Economic Baseline

1. Overview

To assess the economic impact of the proposed rules described in this release, the Commission is using as our baseline the security-based swap market as it exists at the time of this proposal, including applicable rules adopted by the Commission but excluding the rules and interpretations proposed here. The analysis incorporates the statutory and regulatory provisions that currently govern the security-based swap market pursuant to the Dodd-Frank Act. Many of the resulting costs and benefits are difficult to quantify with any degree of certainty, especially as the practices of market participants are expected to evolve and adapt to changes in technology and market developments.

In assessing the economic impact of the rules, we refer to the broader costs and benefits associated with the application of the proposed rules and interpretations as ''programmatic'' costs and benefits. These include the costs and benefits of applying the substantive Title VII requirements to transactions by market participants active in the cross-border context, as well as to the functions performed by infrastructure participants (clearing agencies, SDRs, and SB SEFs) in the global security-based swap market. In several places we also consider how the programmatic costs and benefits might change when comparing the proposed approach to the other alternatives suggested by industry comment letters and the other regulators. Our analysis also considers ''assessment costs.''

Our analysis also recognizes that certain market participants may be subject to Title VII requirements under the proposed rules and interpretations while potentially also being subject to another set of foreign regulatory requirements. Concurrent, and potentially duplicative or conflicting, regulatory requirements could be imposed on persons because of their resident or domicile status or because of the place their security-based swap transactions are conducted. In certain circumstances, the Commission is proposing to consider permitting substituted compliance subject to certain conditions. In determining whether to propose rules that would permit market participants to seek substituted compliance determinations for particular requirements in certain circumstances, the Commission has considered the programmatic benefits intended by the specific Title VII requirements with respect to which substituted compliance may be permitted, the programmatic costs associated with such Title VII requirements when they become fully effective, and the relevant assessment costs.[1298]

The proposed rules and interpretations reflect the Commission's preliminary determination regarding which participants and transactions in the security-based swap market warrant regulation under Title VII, and in making this determination, we have focused on whether a market participant is incorporated or resident, or has its principal place of business, within the United States and whether a transaction occurs within the United States. The economic impact of these proposed rules and interpretations will occur predominantly through the application in a cross-border context of the substantive requirements outlined in other releases, without, as a general matter, altering the nature of those substantive requirements.[1299] We have already analyzed many of the costs and benefits of the proposed substantive requirements in separate proposing and adopting releases. As a result, the following analysis focuses on the economic impacts and trade-offs of application of these substantive requirements in a cross-border context, that is, the economic implications of the decisions to include certain persons that reside or are organized (or have their principal place of business), or transactions that occur, within the United States within the scope of Title VII and the economic effects arising from that inclusion.

To the extent that future adopting releases implementing the substantive requirements under Title VII reflect substantive changes to the proposals, those releases will incorporate the

[1295] *See* Section I, *supra.*

[1296] *See* Section I and notes 35–35, *supra.*

[1297] *See* Section I and notes 24–25, *supra.*

[1298] The Commission is proposing to permit market participants to seek a substituted compliance determination in connection with certain requirements—it has not yet made any such specific determinations. The Commission does not believe it is possible at this point to estimate the number of such determinations that it is likely to make for any given set of requirements, as such estimate would depend on information that is generally not yet available. However, the maximum programmatic benefits and costs associated with substituted compliance could occur in circumstances where the Commission grants every substituted compliance request. This does not in any way indicate that the Commission will make any number of substituted compliance determinations. Accordingly, the following analysis does not assume that such substituted compliance will be allowed. Where appropriate, however, we do discuss the economic implications if such substituted compliance were ultimately to be allowed.

[1299] We recognize that we are re-proposing Regulation SBSR in this release, which would have an impact on the security-based swap reporting obligations beyond the cross-border context, and we discuss these effects in our economic analysis of the re-proposal below.

relevant economic analysis. We also expect that our respective adopting releases for each of these substantive areas will discuss the economic consequences of the final substantive rules together with our final rules on the application of those rules in the cross-border context.

2. Current Security-Based Swap Market

Our analysis of the state of the current security-based swap market is based on data obtained from DTCC–TIW, especially data regarding the activity of market participants in the single-name credit default swap (or CDS) market during the years of 2008 to 2011. Because of the lack of market data in the context of total return swaps on equity and debt, we do not have the same amount of information regarding those products (or other products that are security-based swaps) as we have in connection with the present market for single-name CDS. With the exception of the analysis regarding the level of security-based swap clearing, we did not consider data regarding index credit default swaps for purposes of the analysis below. The data for index CDS encompasses both broad-based security indices and narrow-based security indices, and ''security-based swap'' in relevant part encompasses swaps based on single securities or on narrow-based security indices.[1300] We previously noted that the definition of security-based swaps is not limited to single-name CDS but we believed that the single-name CDS data are sufficiently representative of the market to help inform the analysis of the state of the current security-based swap market.[1301]

We believe that the data underlying our analysis here provide reasonably comprehensive information regarding the single-name CDS transactions and composition of the single-name CDS market participants. In our analysis of market participants and their domiciles in subsections (a) and (c) below, we base our analysis on firms and accounts that have engaged in one or more trades with a U.S.-person counterparty or involving a U.S. reference entity according to data obtained from DTCC–TIW. Our analysis of trading activity in the security-based swap market in subsections (b) and (d) focuses on transactions involving a single-name CDS referencing a U.S. entity (''U.S. single-name CDS''). We note that the data available to us from DTCC–TIW do not encompass those CDS transactions that both: (i) do not involve U.S. counterparties; and (ii) are based on non-U.S. reference entities. Notwithstanding this limitation, we preliminarily believe that the DTCC–TIW data provides sufficient information to identify the types of market participants active in the security-based swap market and the general pattern of deal flow within that market.

(a) Security-Based Swap Market Participants

Although most security-based swap activity is concentrated among a relatively small number of dealer entities,[1302] there are thousands of security-based swap market participants, including, but not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies.[1303] In the analysis below, we observe that most end users of security-based swaps do not engage directly in the trading of swaps, but use dealers, banks, or investment advisers as agents to establish their positions. Based on an analysis of the counterparties to trades reported to the DTCC–TIW, there were 1,489 entities [1304] engaged in trading of single-name CDS shortly after the enactment of the Dodd-Frank Act. Table 1, below, highlights that nearly three-quarters of these entities (DTCC-defined ''firms'' shown in DTCC–TIW, which we refer to here as ''transacting agents'') were identified as investment advisers, of which 40% (30% of all transacting agents) were registered investment advisers under the Investment Advisers Act.[1305] Although investment advisers comprise the vast majority of transacting agents, the transactions they executed account for only 10.2% of all single-name CDS trading activity reported to the DTCC–TIW, measured by number of transaction-sides (each transaction has two transaction sides, *i.e.,* two transaction counterparties). The vast majority of transactions (83.7%) measured by number of transaction-sides were executed by ISDA-recognized dealers.[1306]

TABLE 1—NUMBER OF TRANSACTING AGENTS BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOVEMBER, 2006 THROUGH OCTOBER, 2010, REPRESENTED BY EACH COUNTERPARTY TYPE

Transacting agents	Number	Percent	Transaction share (percent)
Investment advisers	1,099	73.8	10.2
—SEC registered	*446*	*30.0*	*5.3*
Banks	239	16.1	4.9

[1300] *See* Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A).

[1301] According to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of June 2012 was $1.88 trillion. The notional amount outstanding in single-name CDS was approximately $15.57 trillion, in multi-name index CDS was approximately $9.73 trillion, and in multi-name, non-index CDS was approximately $1.63 trillion. *See* Semi-annual OTC derivatives statistics at end-June 2012 (Nov. 2012), Table 19, *available at: http://www.bis.org/statistics/otcder/dt1920a.pdf.* For the purposes of this analysis, we assume that multi-name index CDS are not narrow-based index CDS and therefore, do not fall within the security-based swap definition. *See* Section 3(a)(68)(A) of the Exchange Act; *see also* the Product Definitions Adopting Release, 77 FR 48208. We also assume that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Therefore, single-name CDS appear to constitute roughly 82% of the security-based swap market. Although the BIS data reflects the global OTC derivatives market, and not just the U.S. market, we have no reason to believe that these ratios differ significantly in the U.S. market.

[1302] *See* Intermediary Definitions Adopting Release, 77 FR 30636–37, 30740, and the accompanying notes 485 and 1573.

[1303] Staff of the Division of Risk, Strategy, and Financial Innovation review of DTCC-defined ''firms'' shown in DTCC–TIW as transaction counterparties.

[1304] The 1,489 entities included all DTCC-defined ''firms'' shown in DTCC–TIW as transaction counterparties that report at least one transaction to DTCC–TIW as of October, 2010. The staff in the Division of Risk, Strategy, and Financial Innovation classified these firms that are shown as transaction counterparties by machine matching names to known third-party databases and by manual classification. Manual classification included searching the EDGAR and Bloomberg databases, the SEC's Investment Adviser Public Disclosure database, and the firm's public Web site or the public Web site of the account represented by the firm. The staff also referred to ISDA protocol adherence letters available on the ISDA Web site. All but 52 of the 1,489 DTCC-defined ''firms'' were identified and classified.

[1305] As identified through matches to Form ADV.

[1306] For the purpose of this analysis, the ISDA-recognized dealers are those defined as G14 by ISDA. *See http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf.* G14 refers to JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribus, HSBC Bank, Lehman Brothers, and Société Générale.

TABLE 1—NUMBER OF TRANSACTING AGENTS BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOVEMBER, 2006 THROUGH OCTOBER, 2010, REPRESENTED BY EACH COUNTERPARTY TYPE—Continued

Transacting agents	Number	Percent	Transaction share (percent)
Pension Funds	23	1.5	0.0
Insurance Companies	22	1.5	0.3
ISDA-Recognized Dealers	16	1.1	83.7
Other	90	6.0	0.8
Total	1,489	100.0	100.0

The staff's further analysis of the ''accounts'' in DTCC–TIW shows that transaction agents classified in Table 1 represent over 8,500 accounts and funds who are the principal risk holders of the transactions. Table 2, below, classifies these ''accounts'' or principal risk holders by their counterparty type and whether they are represented by a registered or unregistered investment adviser.[1307] For instance, 239 banks in Table 1 allocated transactions to 353 accounts, of which 29 were represented by investment advisers and 324 were represented directly by banks, while 16 ISDA-recognized dealers in Table 1 allocated transactions to 69 accounts.

Among the accounts, there are over 1,400 Dodd-Frank Act-defined special entities and 482 investment companies registered under the Investment Company Act of 1940.[1308] Private funds comprise the largest type of account holders that we were able to classify, and although not verified through a recognized database, most of the funds we were not able to classify appear to be private funds. The data analyzed here largely predate the effectiveness of our rules implementing the Dodd-Frank Act's requirement that previously exempt advisers to hedge funds and certain other private investment funds register with the Commission.[1309]

TABLE 2—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE SECURITY-BASED SWAP MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT, FROM NOVEMBER 2006 THROUGH OCTOBER 2010

Account holders by type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent [1310]	
Private Funds	2,154	952	44%	1,202	56%	0	0%
DFA Special Entities	1,474	1,359	92%	46	3%	69	5%
Registered Investment Companies	482	477	99%	5	1%	0	0%
Banks (non G14)	353	25	7%	4	1%	324	92%
Insurance Companies	192	145	76%	19	10%	28	15%
ISDA-recognized Dealers	69	0	0%	0	0%	69	100%
Foreign Sovereigns	53	35	66%	6	11%	12	23%
Non-financial Corporations	37	26	70%	1	3%	10	27%
Finance Companies	7	1	14%	0	0%	6	86%
Other/unclassified	3,746	2,522	67%	1,158	31%	66	2%
All	8,567	5,542	65%	2,441	28%	584	7%

(b) Levels of Security-Based Swap Trading Activity

CDS contracts make up the vast majority of security-based swap products and most are written on corporate issuers, corporate securities, sovereign countries, or sovereign debt (reference entities and reference securities).[1311] Figure 1 below describes the percentage of global, notional transaction volume [1312] in U.S. single-name CDS reported to the DTCC–TIW between January 2008 and December 2011, separated by whether transactions are between two ISDA-recognized dealers (interdealer transactions) or whether a transaction has at least one non-dealer counterparty.

[1307] Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act, and may include investment advisers registered with a state or a foreign authority.

[1308] There remain 3,746 DTCC ''accounts'' unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

[1309] *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011), 76 FR 42950 (July 19, 2011).

[1310] This column reflects the number of participants who are also trading on their own accounts.

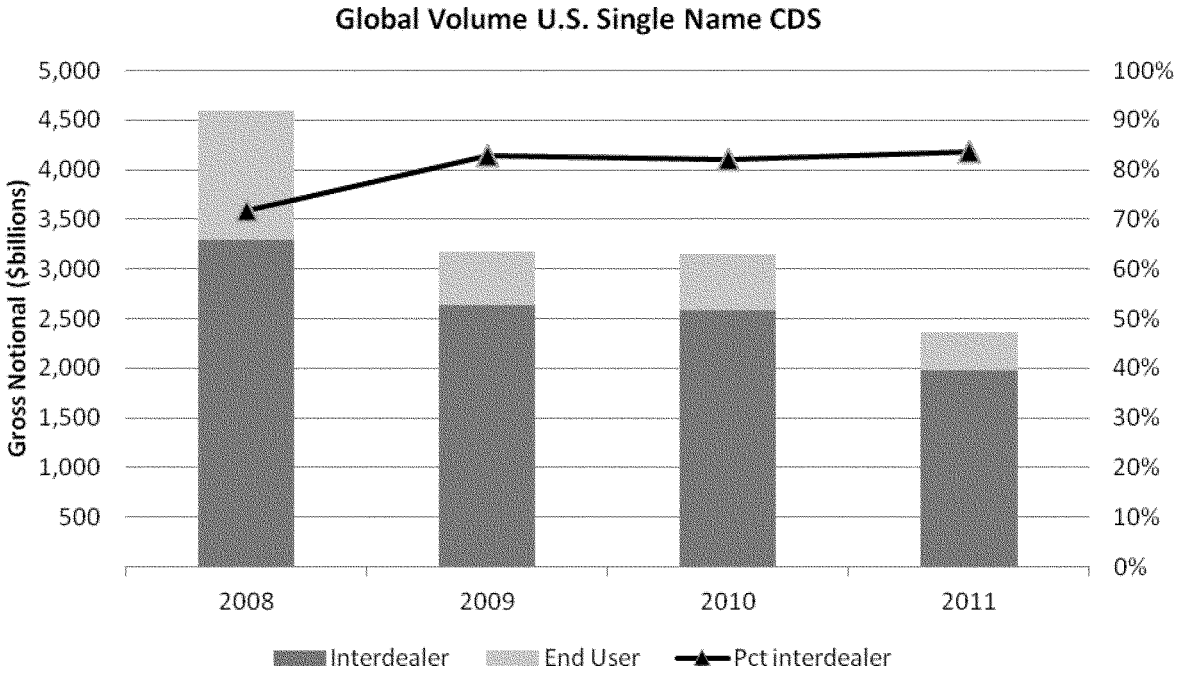
[1311] *See* Intermediaries Adopting Release, 77 FR 30636 n.476. *See also* Chen, Kathryn, Michael Flemming, John Jackson, Ada Li, and Asani Sarkar, ''An Analysis of CDS Transactions: Implications for Public Reporting,'' Federal Reserve Bank of New York Staff Report, No. 517 (Sep. 2011) (decomposing single-name CDS contracts into corporate, sovereign, and other).

[1312] This volume includes all price-forming CDS transactions (trades, assignments, and terminations) on U.S.-based reference entities reported to the DTCC–TIW during calendar years 2008 through 2011, including those executed between two foreign counterparties. ''Price-forming transactions'' include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades.

The level of trading activity with respect to U.S. single-name CDS in terms of notional volume has declined from more than $5 trillion in 2008 to less than $2.5 trillion in 2011. The start of this decline predates the enactment of the Dodd-Frank Act and the rules proposed thereunder. For the purpose of establishing an economic baseline, this seems to indicate that CDS market demand shrank prior to the enactment of the Dodd-Frank Act, and therefore the causes of trading volume declines may be independent of those related to the development of security-based swap market regulation. If the security-based swap market experiences further declines in trading activity, it would be difficult to isolate the effects of the newly-developed security-based swap market regulation and to identify whether the changes in trading activity are due to natural market forces or the anticipation of (or reaction to) proposed (or adopted) Title VII requirements.

Although notional volume had declined over the past four years, the percentage of interdealer transactions has remained fairly constant, at a little more than 80% of the total notional volume. This is consistent with the 83.7% of transactions involving ISDA-recognized dealers on one side of the transactions executed from November 2006 through October 2010 as shown in Table 1.

Figure 1. Global, notional trading volume in U.S. single-name CDS by calendar year and the fraction of volume that is interdealer.



(c) Market Participant Domiciles

In analyzing data to identify an economic baseline of trading activity for purposes of this proposal, we found that there has been a distinct shift in country of domicile since the enactment of the Dodd-Frank Act. Prior to the enactment of the Dodd-Frank Act, the majority of the funds and accounts [1313] that were allocated CDS transactions reported to the DTCC–TIW were domiciled within the United States, according to self-reported registered office location recorded by the DTCC–TIW.[1314] Since the enactment of Dodd-Frank Act, there has been a significant shift in reported domiciles, with far fewer funds and accounts reporting a U.S. domicile. Figure 2, left, shows that more than two-thirds of funds and accounts in existence as of October of 2010 reported a U.S. domicile.[1315] Figure 2, right, reports the domicile of the more than 2,600 new funds and accounts that were allocated trades reported to the DTCC–TIW for the first time since October 2010. For these funds and accounts, only 43% report a registered office location in the United States, a decline of 25 percentage points. While the fraction of foreign domiciled funds increases by nine percentage points, most of the shift in domicile is a result of funds and accounts reporting a foreign registered office location while being managed by an adviser in the United States, or a result of accounts of foreign branches of U.S. banks or subsidiaries of U.S. entities, an increase from 3% prior to the enactment of the Dodd-Frank Act to 19% after the enactment of the Dodd-Frank Act.[1316]

[1313] The DTCC accounts are not the same as entities. One entity may have multiple accounts and, depending on where accounts are located, may report multiple domicile locations. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches. The self-reported registered office location for the U.S. headquarters account is different from that for the foreign branch account.

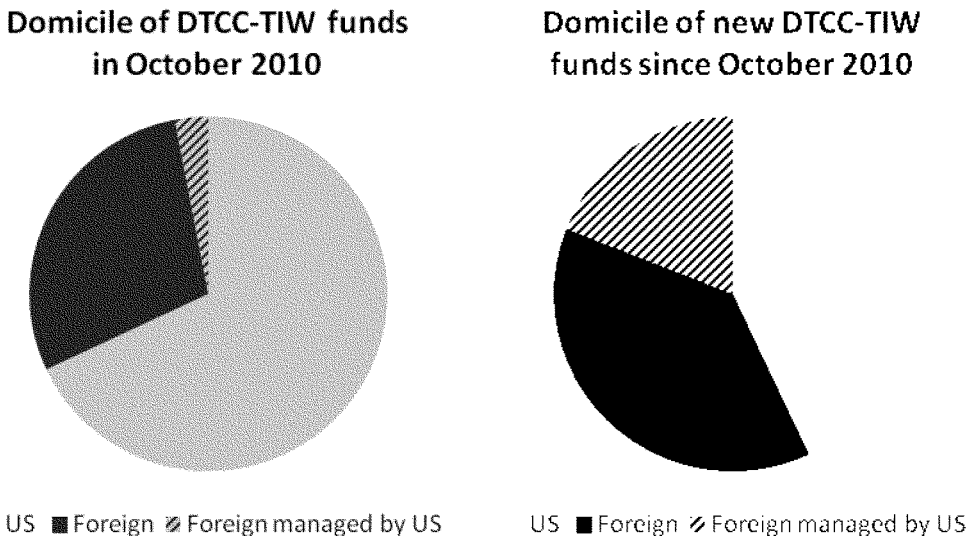
[1314] Following the Warehouse Trust Guidance on CDS data access (see text accompanying notes 83–85, *supra*), the DTCC–TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.,* where the account is incorporated as a legal entity). This is designated the registered office location. For purposes of this discussion, we have assumed that the registered office location reflects the place of domicile for the fund or account.

[1315] When the fund does not report a registered office location, we assume that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile.

[1316] In these instances, the fund or account lists a non-U.S. registered office location while the investment adviser, U.S. bank, or U.S. parent lists the United States as its settlement country.

While it is likely that some of the shift in domicile is in reaction to development of the new Title VII regulatory regime, with many funds shifting their registered office locations offshore in anticipation of potential future compliance costs and burdens, some of the activity could be attributed to more precise reporting of domicile by funds and accounts relative to information that was on record for older funds and accounts. In particular, prior to the enactment of the Dodd-Frank Act, funds and accounts did not formally report their domicile because there was no systematic requirement to do so. Since Dodd-Frank Act enactment, the DTCC–TIW has collected the account or fund registered office location, which is self-reported and voluntary.[1317] Among funds and accounts that signed up for DTCC–TIW services for the first time after October 2010, most have self-reported domiciles that are outside the United States (57% of first-time DTCC–TIW users), but a sizeable proportion of these are managed from within the United States (19% of all first-time DTCC–TIW users).

Figure 2. The fraction of (1) accounts and funds with domicile in the United States (referred to as "US"), (2) accounts and funds with domicile outside the United States (referred to below as "Foreign"), and (3) funds outside the United States but managed by a U.S. entity, account of a foreign branch of a U.S. bank, and account of a foreign subsidiary of a U.S. entity (collectively referred to below as "Foreign managed by US"). Left chart represents all funds as of October 2010; Right chart represents all new funds created between October 2010 and December 2011.

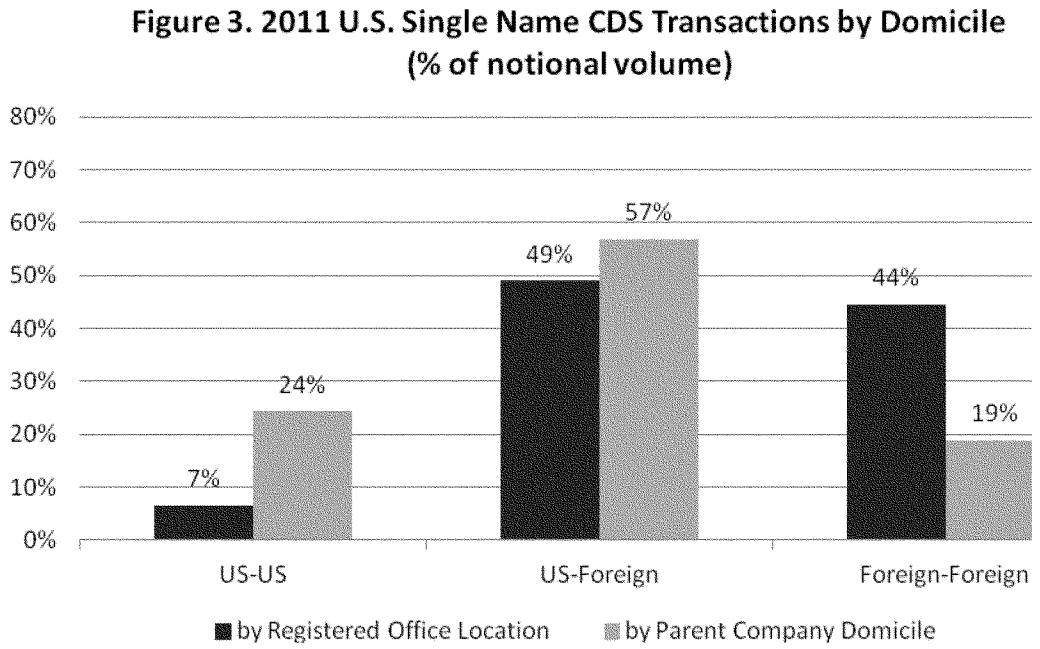


(d) Level of Current Cross-Border Activity in Single-Name CDS

About half of the trading activity in U.S. single-name CDS reflected in the set of data we analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad. When counterparty domicile is based on the registered office location [1318] of the DTCC–TIW accounts, only 7% of the global transaction volume by notional volume in 2011 was between two U.S.-domiciled counterparties, compared to 49% entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 44% entered into between two foreign-domiciled counterparties (see figure 3). When the domicile locations of DTCC–TIW accounts are defined according to the domicile of their ultimate parent, headquarters or home office (*e.g.,* classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 25%, and to 57% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.

[1317] SEC Staff discussions with DTCC.

[1318] DTCC–TIW collects certain information from its users, including registered office location, which is defined as the ''place of organization of the legal entity.'' DTCC, ''Multifund User Agreement Form & Key Contacts,'' at 5, *available at: http://www.dtcc.com/customer/membership/derivserv/derivserv.php.*



By either definition of domicile, the data indicate that a large fraction of U.S. single-name CDS transaction volume is entered into between counterparties domiciled in two different jurisdictions or between counterparties domiciled outside the United States. For the purpose of establishing an economic baseline, this observation indicates that a large fraction of security-based swap activity would be affected by the scope of any cross-border approach we could propose to take in applying the Title VII requirements. The large fraction of U.S. single-name CDS transactions between U.S.-domiciled and foreign-domiciled counterparties also highlights the extent to which security-based swap activity transfers risk across geographical boundaries. Moreover, the legal domicile of a counterparty may not represent the only location of risk.

(e) Levels of Security-Based Swap Clearing

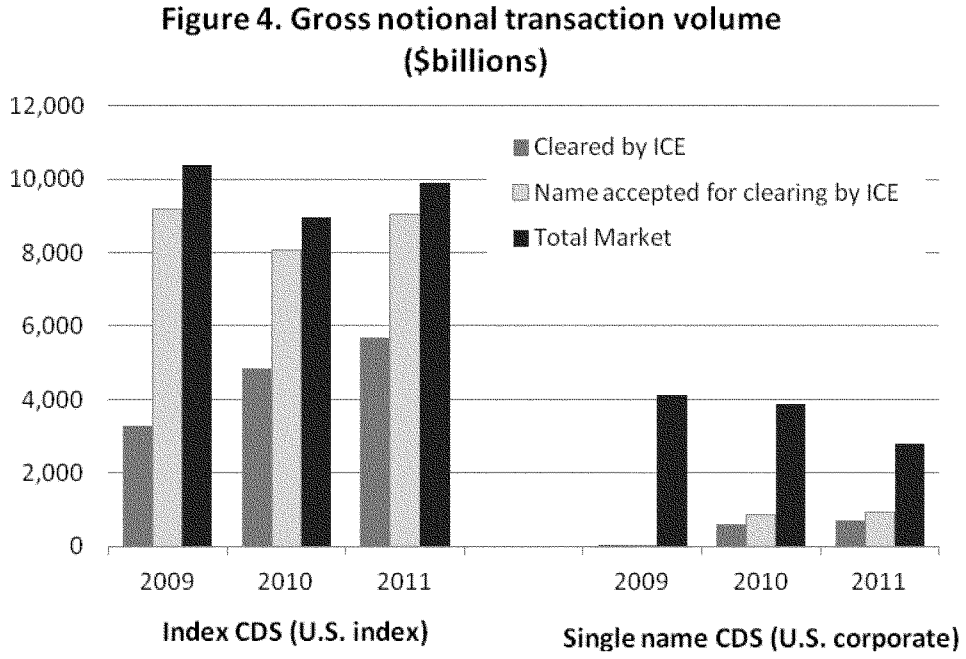
Although no mandatory clearing regime yet exists, a substantial proportion of single name CDS and index CDS are cleared on a voluntary basis. Voluntary clearing of security-based swaps in the United States is currently limited to CDS products, including single-name CDS and index CDS. At present, there is no central clearing in the United States for security-based swaps that are not CDS products.

The analysis below is based on information reported by ICE Clear Credit on its public Web site and is based on price-forming transactions,[1319] which includes the clearing of transactions on the same day as the transaction was executed as well as the clearing of transactions submitted for clearing on a retroactive basis. The data presented here do not include transactions that result from the compression [1320] of transactions previously submitted for clearing.

Figure 4 shows that index CDS in U.S. names account for the bulk of current voluntary clearing activity. The proportion of transactions in names accepted for clearing that are ultimately cleared also appears to be higher in index CDS in U.S. names than in single-name CDS referencing U.S. corporate issuers or securities. In calendar years 2010 and 2011, Figure 4 indicates that 90% of the total notional volume of transactions is in index names that are accepted for clearing as of the end of each calendar year and that cleared index transactions correspond to more than 50% of the total notional volume during the same period. By contrast, the figure suggests that the proportion of transactions in single-name corporate CDS referencing names that were accepted for clearing was only 33% of the total single-name CDS during 2011, with cleared transactions during the same year totaling only 25% of all the single-name CDS executed during the same period.

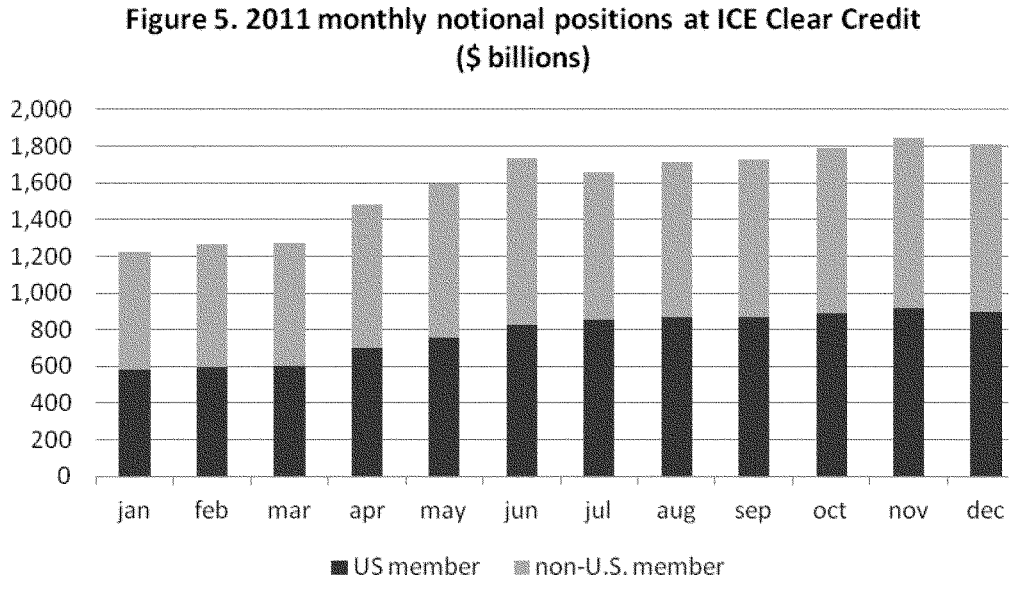
[1319] *See* note 1312, *supra.* Transactions reported to the DTCC–TIW used for this analysis reflect all global activity, including transactions between two foreign counterparties. *See* Clearing Procedures Adopting Release, 77 FR 41636–37.

[1320] In compression, counterparties agree to terminate or change the notional amount of some or all of their outstanding contracts and replace any terminated contracts with new contracts. Compression reduces counterparties' gross notional amount, while leaving their net notional amount unchanged. Transactions entered into in connection with a compression exercise are not considered price-forming and are therefore excluded from the analysis here.



*Source: DTCC-TIW

While a large fraction of CDS trading activity continues to settle bilaterally, particularly in light of limited eligibility to clear among market participants, clearing activity has steadily increased alongside the Title VII rulemaking process, and in advance of mandatory clearing requirements.[1321] Figure 5 shows that member positions at ICE Clear Credit in the United States are roughly half held by foreign-domiciled dealing members.[1322] Hence, there is considerable credit exposure between ICE Clear Credit and these foreign-domiciled clearing members, in both directions.



[1321] *See* Clearing Procedures Adopting Release, 77 FR 41636–38.

[1322] Positions represent each side of an original swap contract such that the aggregated numbers reported here are twice the amount of the notional exposure from the original contract.

C. Analysis of Potential Effects on Efficiency, Competition, and Capital Formation

1. Introduction

In developing our approach to the application of Title VII to cross-border activities, we have focused on meeting the goals of Title VII, including the promotion of the financial stability of the United States by improving accountability and transparency in the U.S. financial system, the reduction of systemic risk, and the protection of counterparties to security-based swaps.[1323] We also have sought to take into account a range of principles relevant to regulation of this market, as described above.[1324] As reflected in our discussion of the various policy choices we are proposing above [1325] and of the potential costs and benefits associated with our proposed approach in the economic analyses below,[1326] we also have considered effects on competition, efficiency, and capital formation.[1327]

In this section, we focus particularly on these effects. Given the complexity and inter-relatedness of the potential effects of the proposed rules—both on a rule-by-rule basis and taken together as a whole—on the market for security-based swaps, we provide a framework for a general analysis of the effects of the proposed rules on competition, efficiency, and capital formation. We then use this framework to engage in an analysis of the possible effects of our proposed approach.

In developing the general analytical framework for considering the effects of our proposed cross-border approach on competition, efficiency, and capital formation, we have noted certain distinct analytical issues. First, various proposed rules may give rise to similar or overlapping effects. Second, each proposed rule or interpretation is a component of the Title VII regulatory framework and operates in tandem with the other Title VII components to form a comprehensive regulatory regime. To the extent that the proposed rules interact with each other, it is appropriate to broaden the analysis beyond a single rule. For example, although each of the rules and interpretations regarding registration of security-based swap dealers and the application of the public dissemination, regulatory reporting, mandatory clearing, and mandatory trade execution requirements in the cross-border context serve distinct regulatory purposes,[1328] together they may have combined effects on dealer participation in the U.S. security-based swap market and on the ability of certain market participants to access other parts of the global security-based swap market.

The analytical framework we establish here for considering the effects of our proposed approach to analyzing effects related to competition, efficiency, and capital formation is premised upon our understanding of the existing state of the security-based swap market. Two important features of the security-based swap market inform our analysis.

First, the security-based swap market is global in nature, and dealers and other market participants are highly interconnected within this global market. While most end users have only a few counterparties, dealers can have hundreds of counterparties, consisting of both end users and other dealers.[1329] This interconnectedness provides a myriad of paths for liquidity and risk to move throughout the financial system. As a result, it can be difficult to attribute liquidity and risk to a particular entity. The interconnected nature of the global security-based swap market contributes to an increased potential for sequential counterparty failures, liquidity shocks, and market dislocation during times of financial market stress.[1330]

In other words, the failure of one firm can have consequences beyond the firm itself, and the loss of trading confidence and willingness to trade in one market can have consequences beyond the firm's home jurisdiction or market. If firms consider the implications of security-based swap activity only on their own operations, without considering aggregate financial sector risk, including lack of liquidity and market disruption or the possibility of spillover effects, the financial system may end up bearing more risk than the aggregate capital of the intermediaries in the system can support and may cease to function normally.[1331]

Second, the security-based swap market developed as an over-the-counter market, without transparent pricing or volume information.[1332] In markets without transparent pricing, access to information confers a competitive advantage. Within the security-based swap market, large dealers and other large market participants with a large share of order flow have an informational advantage over smaller dealers and end users who observe a smaller subset of the market. Greater private order flow enables better assessment of current market values that dealers may use to extract rents from counterparties who are less informed.[1333] End users are aware of this information asymmetry, and certain end users—particularly larger entities who transact with many dealers—may be able to obtain access to competitive pricing. Typically, however, the value of private information will be captured by those who have the information—in this case, predominantly dealers who observe the greatest order flow.

In sum, the security-based swap market is a global market characterized

[1323] *See* note 4, *supra.*

[1324] *See* Section II.C, *supra.*

[1325] *See* Sections III–XI, *supra.*

[1326] *See* Sections XV.D–I, *infra.*

[1327] As noted above, Section 3(f) of the Exchange Act requires that whenever pursuant to the Exchange Act the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f). In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2).

[1328] For example, registration of security-based swap dealers is intended, among other things, to increase the safety and soundness of security-based swap dealers and improve the stability of the U.S. financial system, while application of the public dissemination and mandatory trade execution requirements in the cross-border context are intended, among other things, to increase the transparency of the U.S. security-based swap market.

[1329] *See* Section XV.B.2(a), *supra* (discussing current security-based swap market participants). In addition, based on an analysis of 2011 transaction data by staff in the Division of Risk, Strategy, and Financial Innovation, the entities recognized by ISDA as dealers had on average 292 counterparties, with a minimum of 17 and a maximum of 695. All other entities (*i.e.,* those more likely to be end users), averaged 4 counterparties, with a minimum of 1 and a maximum of 52.

[1330] ''Rethinking the financial network,'' speech by Andrew G. Haldane, Executive Director for Financial Stability at the Bank of England, delivered to Financial Student Association, Amsterdam (Apr. 28, 2009), *available at: http://www.bis.org/review/r090505e.pdf?frames=0.*

[1331] *See* Viral V. Acharya, Lasse H. Pedersen, Thomas Philippon, and Matthew Richardson, ''Measuring Systemic Risk'' (May 2010), *available at: http://vlab.stern.nyu.edu/public/static/SR-v3.pdf.* The authors use a theoretical model of the banking sector to show that, unless the external costs of their trades are considered, financial institutions will have an incentive to take risks that are borne by the aggregate financial sector). Under this theory, in the context of Title VII, the relevant external cost is systemic risk (*i.e.,* the potential for risk spillovers and sequential counterparty failure), leading to an aggregate systemic capital shortfall and breakdown of financial intermediation in the financial sector.

[1332] *See* SB SEF Proposing Release, 76 FR 10949.

[1333] Martin D. D. Evans and Richard K. Lyons, ''Exchange Rate Fundamentals and Order Flow,'' NBER Working Paper No. 13151 (June 2007), *available at: http://128.97.165.17/media/files/evans_lyons.pdf.* Using data on end-user currency trades, the authors find evidence that transaction flows forecast future macro variables such as output growth, money growth, and inflation.

by a high level of interconnectedness and spillover risk and by significant information asymmetries that result from the opacity of the OTC market. The global nature of this market, combined with the interconnectedness of market participants, means that it is difficult to isolate risk and liquidity problems to one geographical segment of the market, or to one asset class. Because U.S. market participants and transactions regulated under Title VII are a subset of the overall global security-based swap market, concerns surrounding these types of spillovers are part of the framework in which we analyze the competitive effects of our proposed rules and interpretations.

The interconnectedness of this market also highlights the need for coordination among international regulators.[1334] Because liquidity and risk spillovers, even from entities that engage in security-based swap activity entirely outside the United States, have the potential to put the U.S. market at risk, consistent regulation of the security-based swap market across jurisdictions may be necessary to effectively reduce those risks. However, the regulatory developments in various jurisdictions are not necessarily consistent in pace and scope, which may result in certain types of risks being addressed in different ways.

In our assessment of the economic effects of the proposed rules and interpretations, we also are mindful that these differences in scope and timing may affect the behavior of some market participants. In particular, the United States being first-mover in many areas of security-based swap market regulation presents unique challenges to maintaining high regulatory standards and avoiding disruptions in the global security-based swap market.

We also recognize that regulations designed to mitigate systemic risk and improve transparency can impose a barrier to entry and access for foreign participants, which could have an effect on liquidity in the security-based swap market. For example, regulatory requirements in the U.S. that conflict with foreign laws may preclude foreign entities from participating in U.S. markets. We also recognize that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and are faced with a similar tradeoff between preserving market access and reducing risks to their financial systems. Our proposed application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address this tradeoff under their authority.

Regulatory differences among jurisdictions in the global security-based swap markets driven by lack of coordination could create incentives for business restructuring solely for the purposes of operating outside of Title VII regulation. Furthermore, barriers to market access may produce competitive distortions and lead to fragmented markets.[1335] We also note that the potential effects of our proposed application of Title VII in the cross-border context on competitive frictions and market fragmentation would be moderated or amplified by the substantive requirements ultimately adopted by the Commission. The Commission is reopening the comment periods for our outstanding rulemaking releases that concern security-based swaps and security-based swap market participants and were proposed pursuant to certain provisions of the Exchange Act, as amended by Title VII of the Dodd-Frank Act.[1336]

2. Competition

The proposed rules and interpretations discussed in this release will likely affect competition in the U.S. security-based swap market and potentially change the set of available counterparties that would compete for business and provide liquidity to U.S. market participants. Some of these proposed rules and interpretations will likely enhance competition and participation in the U.S. market, as application of Title VII requirements to entities that are engaged in security-based swap activity conducted with U.S. persons or otherwise conducted within the United States will likely promote safety and soundness, transparency, and competition within the U.S. security-based swap market and the U.S. financial system as a whole. At the same time, these proposed rules and interpretations may impose certain costs or other burdens that may reduce the level of competition in this market.

Assessing the net effect of these proposed rules and interpretations on competition is particularly complicated in the cross-border context. As already noted, cross-border activity involving market participants domiciled in different jurisdictions accounts for the vast majority of transactions in the security-based swap market. U.S. persons routinely enter into security-based swap transactions with market participants located in other jurisdictions or have operations outside the United States that engage in security-based swap activity; similarly, non-U.S. persons routinely enter into transactions with U.S. persons and maintain operations within the United States. The global nature of the market and of market participants' operations may lead to differences in the application of Title VII to firms active in the global security-based swap market and may create incentives for firms to restructure their operations to minimize contact with the United States that would be less likely in a less global market.

In our preliminary view, there are three key factors that will contribute to the effects our proposed cross-border rules and interpretations will have on competition in the security-based swap market: (1) how Title VII requirements apply to U.S. persons and non-U.S. persons when they transact security-based swaps within the United States; (2) how these requirements apply to U.S. persons and non-U.S. persons when they transact security-based swaps outside the United States; and (3) whether the regulatory requirements that foreign jurisdictions impose on U.S. persons and non-U.S. persons are comparable to those that we are proposing in this release. In addition, as noted above, the magnitude of any competitive effects flowing from our proposed application of the Title VII requirements described in this release will also be determined by the substantive rules we ultimately adopt to implement Title VII.

For example, in response to our proposal to impose Title VII requirements on non-U.S. persons that engage in security-based swap activity with U.S. persons or within the United States, some non-U.S. persons may seek to restructure their operations to minimize their contact with the United States in an effort to avoid having to comply with Title VII; some non-U.S. persons may determine to exit the U.S. market entirely. Similarly, to the extent that our proposed rules treat the foreign business of U.S. persons and non-U.S.

[1334] The Commission has entered into bilateral and multilateral discussions with foreign regulatory authorities concerning the regulation of OTC derivatives. *See* Section I and notes 34 and 35, *supra.*

[1335] *See, e.g.,* Arnoud W.A. Boot, Silva Dezelan, and Todd T. Milbourn, ''Regulatory Distortions in a Competitive Financial Services Industry,'' J. of Fin. Serv. Res., Vol. 17, No. 1 (2000) (showing that, in a simple industrial organization model of bank lending, a change in the cost of capital resulting from regulation results in a greater loss of profits when regulated banks face competition from non-regulated banks than when regulations apply equally to all competitors). *See also* Victor Fleischer, ''Regulatory Arbitrage,'' 89 Tex. L. Rev. 227 (Mar. 4, 2010) (discussing how, when certain firms are able to choose their regulatory structure, regulatory burdens are shifted onto those entities that cannot engage in regulatory arbitrage).

[1336] *See* note 29, *supra.*

persons differently from their U.S. business, these entities may have incentives to restructure their business to separate their foreign and U.S. operations. Both of these potential responses to our proposal may result in lessened competition in the security-based swap market within the United States. The decision to restructure and move operations outside the United States does not necessarily indicate reduction of the exposures of the U.S. financial system to systemic risk if, for example, the foreign operations are supported by a guarantee provided by a U.S. person, which provides a path for the transmission of risk to transmit to the United States.

The competitive effects of our proposal will also be affected by whether entities potentially subject to Title VII are also subject to similar regulations in foreign jurisdictions when they transact security-based swaps or perform infrastructure functions in the security-based swap market, and, if so, whether those regulations are inconsistent with, or duplicative of applicable Title VII regulations. Many other jurisdictions are implementing reforms of the OTC derivatives market (including those products defined as security-based swaps within the United States), but this regulation can be expected to develop along different timelines and impose different substantive requirements.

To the extent that these timelines or requirements are different, market participants may have the opportunity to take advantage of these differences by making strategic choices, at least in the short term, with respect to their transaction counterparties and operating business models. For example, at a larger scale, firms may choose whether to withdraw from, or participate in the U.S. security-based swap market. This may change the number of participants in the U.S. market and could have a direct impact on competition in the U.S. market. In addition, differences in regulatory requirements may make it difficult for U.S. dealers to provide competitive spreads relative to foreign dealers. While we do not anticipate that this disadvantage would cause U.S. dealers to exit foreign markets, it could have a direct effect on competition in foreign markets unless U.S. dealers restructure their business to conduct foreign transactions through subsidiaries that satisfy the requirements to be considered non-U.S. persons.

In developing the approach we are proposing in this release, we have considered the potential for competitive distortions as a result of these inconsistencies. At the same time, the Commission believes that, while the potential of regulatory arbitrage is real, the effects of these strategic choices may be mitigated to some extent as regulators in other jurisdictions implement the G20 commitments.[1337] Efforts are underway to achieve robust derivatives market regulation, including regulations of the security-based swap markets, in various jurisdictions.[1338] As jurisdictions progress toward full implementation of the G20 commitments, competitive distortions should decline to some extent, blunting the incentives for this type of strategic behavior.

(a) Security-Based Swap Dealers

Our proposed approach would generally apply dealer registration and other Title VII requirements to entities that conduct dealing activity with U.S. persons [1339] or in the United States.[1340] Because the full range of Title VII requirements are applied generally to activity in the United States regardless of the counterparty's U.S.-person status,[1341] persons choosing to transact a security-based swap in the United States may have no incentive to favor a non-U.S. counterparty over a U.S. counterparty.[1342]

At the same time, some entities may determine that the compliance costs arising from the requirements of Title VII warrant exiting the security-based swap market in the United States. Non-U.S. persons may find this option more attractive than U.S. persons because they may find it easier to structure their foreign business so as to prevent it from falling within the scope of Title VII. To the extent that entities engaged in dealing activity exit the U.S. security-based swap market, the level of competition in the market may decline. These exits could result in higher spreads and affect the ability and willingness of end users to engage in security-based swaps.[1343]

We noted in the Intermediary Definitions Adopting Release that the registration requirement would impose dealer registration costs on entities that engage in the bulk of dealing activity in the market, while the *de minimis* threshold would allow persons who account for a small portion of dealing activity to avoid incurring these costs to obtain what would likely be comparatively modest benefits, given the small size of these dealers.[1344] We noted in that release that the *de minimis* threshold may mitigate some of the potential competitive burdens that could fall on entities engaged in a smaller amount of dealing activity without leaving an undue amount of dealing activity outside of the ambit of dealer regulation.[1345]

In the cross-border context, the proposed *de minimis* exception [1346] could reduce the number of entities likely to exit the U.S. market because it would enable an established foreign entity to transact a *de minimis* amount of security-based swap dealing activity in the U.S. market before it determines whether to expand its U.S. business [1347] and become a registered security-based swap dealer. However, since the ability of smaller entities to access the U.S. security-based swap market without registration would be limited to conducting dealing activity below the *de minimis* threshold, these entities

[1337] *See* note 32 and accompanying text, *supra.*

[1338] *See, e.g.,* Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market, *available at: http://www.sec.gov/news/press/2012/2012–251.htm.*

[1339] See the proposed definition of ''U.S. person'' in proposed Rule 3a71–3(a)(7) under the Exchange Act.

[1340] See the proposed definition of ''transaction conducted within the United States'' in proposed Rule 3a71–3(a)(5) under the Exchange Act.

[1341] See the proposed *de minimis* rule in proposed Rule 3a71–3(b) under the Exchange Act, the proposed application of the mandatory clearing requirement to cross-border security-based swap transactions in proposed Rule 3Ca–3, as discussed in Section IX above; the proposed application of the mandatory trade execution requirement to cross-border security-based swap transactions in proposed Rule 3Ch–1, as discussed in Section X above; and the proposed application of the regulatory reporting and public dissemination requirements in proposed Rule 908 of Regulation SBSR, as discussed in Section VIII above.

[1342] This is in general the case, however, proposed Rules 3Ca–3(b) and 3Ch–1(b) would not apply the mandatory clearing and mandatory trade execution requirements to transactions between two non-U.S. persons who are not security-based swap dealers and whose performances under security-based swaps are not guaranteed by a U.S. person, even though such transactions are conducted in the United States.

[1343] Barclay, Michael, William G. Christie, Jeffrey H. Harris, Eugene Kandel and Paul H. Schultz, ''Effects of Market Reform on the Trading Costs and Depths of Nasdaq Stocks,'' Journal of Finance, Vol. 54, No. 1 (Feb. 1999) (measuring the impact of rules designed to enhance public competition with Nasdaq dealers, and observing evidence of lower quoted and effective spreads without adverse effects on market quality).

[1344] *See* Intermediary Definitions Adopting Release, 77 FR 30741.

[1345] *See id.*

[1346] The proposed application of the *de minimis* exception would allow a U.S. and foreign dealing entity to conduct dealing activity in the U.S. security-based swap market without registering as a security-based swap dealer so long as their trailing 12-month notional volume of transactions with U.S. persons and transactions conducted within the United States in its dealing capacity is below the *de minimis* threshold. *See* proposed Rule 3a71–3(b) under the Exchange Act.

[1347] *See* proposed Rule 3a71–3(a)(6) under the Exchange Act.

would have an incentive to curtail their security-based swap dealing activity with U.S. persons as they approach the *de minimis* threshold to avoid having to register as a dealer. To the extent that such entities choose to operate in the U.S. market at levels below the *de minimis* threshold, the net effect on competition of their decision to remain in the U.S. market is likely to be small and unlikely to deter the accumulation of market power by a relatively smaller number of large dealing entities than are currently active in the U.S. market.

On the other hand, Title VII regulatory requirements may allow registered dealers to credibly signal high quality, better risk management, and better counterparty protection relative to unregistered dealers that compete for the same order flow. End users in the U.S. market may be willing to pay higher prices for higher-quality services from registered entities.[1348] These regulatory benefits could mitigate the competitive burdens imposed by the proposed cross-border rules and substantive Title VII requirements applicable to registered security-based swap dealers by, for example reducing incentives for firms to exit the market.

The proposed approach to application of Title VII requirements to dealing activities outside the United States may also have distinct competitive effects that interact with the effects just described. Because we are proposing to take a different approach to the application of Title VII to dealing activity outside the United States from the application of Title VII to dealing activity in the United States, certain dealing entities may have incentives to restructure their existing dealing business [1349] in order to prevent all or part of their security-based swap business from becoming subject to Title VII. For example, a foreign dealing entity conducting its U.S. Business [1350] in excess of the *de minimis* threshold may be motivated to separate its U.S. Business from its Foreign Business into two or more distinct entities.[1351] Such a firm may conduct U.S. Business and Foreign Business through two separate entities and confine its U.S. Business in an entity registered as security-based swap dealer, potentially allowing the firm to insulate its Foreign Business from Title VII requirements. Alternatively, some foreign dealing entities may choose to exit the U.S. market entirely.

Similarly, application of the transaction-level requirements for public dissemination, mandatory clearing, and mandatory trade execution may generally be triggered, in part, by the choice of non-U.S. persons to conduct security-based swap transactions within the United States.[1352] This may give foreign security-based swap dealers and other market participants an incentive to restructure their operations or otherwise avoid using an agent in the United States to conduct security-based swap transactions in order to avoid the transaction-level requirements.[1353]

For example, a foreign security-based swap dealer operating within the United States whose performance under security-based swaps are not guaranteed by a U.S. person (''foreign non-guaranteed security-based swap dealer'') would be required to comply with the mandatory clearing requirement with respect to a security-based swap with a non-U.S. person counterparty whose security-based swap transaction is not guaranteed by a U.S. person (''non-U.S. non-guaranteed counterparty''). However, the same security-based swap between a foreign non-guaranteed security-based swap dealer and a non-U.S. non-guaranteed counterparty would not be subject to mandatory clearing if the transaction were conducted outside the United States. Therefore, foreign non-guaranteed security-based swap dealers and non-U.S. non-guaranteed counterparties may be motivated to avoid using their U.S. operations, such as a sales and trading desk in the United States, to conduct security-based swaps with non-guaranteed non-U.S. counterparties in order to avoid application of the mandatory clearing, public dissemination, and trade execution requirements under Title VII. They may be further motivated to move part of their operations, such as the sales and trading desk in the United States that currently conducts security-based swaps with non-guaranteed non-U.S. counterparties to a location outside the United States.

These potential restructurings may impact competition in the U.S. market. On one hand, the ability to restructure one's business rather than exit the U.S. market entirely to avoid application of Title VII to an entity's non-U.S. operations may reduce the number of entities that exit the market, thus mitigating the negative effects on competition described above. On the other hand, U.S. end users may find that the only foreign security-based swap dealers that are willing to deal with them are those whose security-based swap business is sufficiently large to afford the costs of restructuring and of registration as well as the ensuing compliance costs associated with applicable Title VII requirements. To the extent that smaller dealers continue to have an incentive to exit the market, the overall level of competition in the market may decline.

Moreover, regardless of the response of dealers to our proposed approach, we cannot preclude the possibility that large end users in the United States who have the resources to restructure their business also may pursue restructuring and move part of their business offshore in order to transact with dealers outside the reach of Title VII. This may reduce liquidity within the U.S. market and provide additional incentives for U.S. persons and non-U.S. persons to shift a higher proportion of their security-based swap business off-shore, further reducing the level of competition within the United States. In this scenario, the competitive frictions caused by the application, in the cross-border context, of a *de minimis* threshold for dealing activity may affect the ability of small end users of security-based swaps to access the security-based swap market more than large ones, as smaller end

[1348] *Cf.* Carl Shapiro, ''Investment, Moral Hazard, and Occupational Licensing,'' The Review of Economic Studies, Vol. 53, No. 5 (1986) (using a theoretical model to show ''that licensing and certification tend to benefit consumers who value quality highly at the expense of those who do not''). Oren Fuerst, ''A Theoretical Analysis of the Investor Protection Regulations Argument for Global Listing of Stocks,'' Working Paper (1998) (using a theoretical model of the listing decision to show how managers of high quality firms signal their quality more effectively in a strict regulatory regime). Craig Doidge, G. Andrew Karolyi and Rene M. Stulz, ''Why are Foreign Firms Listed in the U.S. Worth More?'' Journal of Financial Economics, Vol. 71, Issue 2 (2004) (hypothesizing that firms cross-listed in the United States are better able to take advantage of growth opportunities, and finding that ''expected sales growth is valued more highly for firms listed in the U.S. and that this effect is greater for firms from countries with poorer investor rights'').

[1349] *See* Section II.A.2, *supra* (describing the dealing structures used by dealing entities to conduct global security-based swap business).

[1350] *See* proposed Rule 3a71–3(a)(6) under the Exchange Act.

[1351] *See* proposed Rule 3a71–3(a)(2) under the Exchange Act.

[1352] This is in general the case, however, proposed Rules 3Ca-3(b) and 3Ch-1(b) would not apply the mandatory clearing and mandatory trade execution requirements to transactions between two non-U.S. persons who are not security-based swap dealers and whose performances under security-based swaps are not guaranteed by a U.S. person, even though such transactions are conducted in the United States.

[1353] This is especially the case with respect to the public dissemination requirement; however, with respect to mandatory clearing and mandatory trade execution requirements, this incentive would not exist with respect to a non-U.S. person who is not a security-based swap dealer and whose performance under security-based swaps is not guaranteed by a U.S. person, if such non-U.S. person transacts with another non-U.S. person that is not a security-based swap dealer and is not guaranteed by a U.S. person. *See* note 1352, *supra.*

users are less likely to have the resources that would enable or justify a restructuring of their business.

To reduce the likelihood of market fragmentation and increase U.S. persons' access to foreign markets, we are proposing not to require non-U.S. persons to count transactions with foreign branches of U.S. banks toward their *de minimis* threshold if the transactions are conducted outside the United States.[1354] We preliminarily believe that this would reduce the incentives of non-U.S. person dealers to avoid engaging in security-based swap dealing activity with foreign branches of U.S. banks. In addition, we are proposing not to apply certain market-wide transaction-level requirements (*i.e.,* mandatory clearing, public dissemination, and mandatory trade execution requirements) to foreign branches and non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person, when foreign branches and guaranteed non-U.S. persons transact with non-U.S. persons whose performance under security-based swap transactions is not guaranteed by a U.S. person and who are not registered security-based swap dealers. This approach to transaction-level requirements reduces the likelihood of conflicting regulations for foreign branches of U.S. banks and guaranteed non-U.S. persons operating in foreign jurisdictions as these jurisdictions adopt regulatory requirements for security-based swap participants.

Finally, our proposed cross-border approach includes a substituted compliance policy framework that allows market participants to request substituted compliance. Substituted compliance, if granted, would allow certain security-based swap transactions or participants to satisfy their compliance obligations with respect to the applicable Title VII requirements by complying with the rules of a foreign jurisdiction. This should reduce market participants' compliance costs by reducing the effects of duplicative regulation. Substituted compliance could encourage foreign firms' participation in the U.S. market and U.S. firms' access to the global market. This might result in increased competition between both U.S. and foreign intermediaries without compromising the regulatory benefits intended by the applicable Title VII requirements.

Conflicting regulations may impose a legal barrier to entry that goes beyond firms' willingness to participate in U.S. markets as a result of duplicative compliance costs. In these cases, substituted compliance determinations may remove this legal barrier, even if offered conditionally, and allow market participants to more easily access U.S. markets. This may also facilitate U.S. participants' access to foreign liquidity. Access to more liquidity providers and infrastructure services, as well as the general benefits of increased market participation, should promote competition in the security-based swap market.

The overall effects of the proposed approach described in this release on competition among dealing entities in the U.S. security-based swap market will depend on the way market participants respond to these different elements of our proposal. For example, suppose the proposed application of the security-based swap dealer registration requirement increases concentration among security-based swap dealers providing services to U.S. end users. Application of market-wide transaction-level requirements that facilitate competition (as discussed further below) may offset any competitive effects caused by increased concentration. Fewer dealing entities may lead to decreased competition and wider spreads in the security-based swap market; however, implementation of the public dissemination and mandatory trade execution requirements would increase pre-trade and post-trade transparency, making it more difficult for dealing entities to post wider spreads.[1355]

(b) Security-Based Swap Market Infrastructure Requirements

i. Registration of Clearing Agencies, SDRs and SB SEFs

The Commission has considered the effects of the proposed application in the cross-border context, of the registration requirements with respect to clearing agencies, SDRs, and SB SEFs on competition in the U.S. security-based swap market.

The proposed approach to applying the registration requirements with respect to security-based swap market infrastructures is based on whether a CCP, a data repository, or a security-based swap trading facility has performed the type of activity in the United States or with respect to U.S. persons that constitutes clearing services, data repository services, or trading facility services within the meaning of the Exchange Act that would trigger the registration requirement. One of the indicators of performing security-based swap infrastructure services in the United States is to provide such services to a U.S. person. In the case of clearing services, this would include accepting a U.S. person as a member of a CCP. Similar to our analysis of the effects of the proposed application of the security-based swap dealer registration requirement on competition in the cross-border context, we are mindful that the proposed approach would directly affect the total number of clearing agencies, SDRs, and SB SEFs that would be required to register with the Commission. Registration would trigger certain Title VII requirements, which would entail compliance costs. Certain CCPs, data repositories, or security-based swap trading facilities may choose to withdraw from the U.S. market to avoid registration.

However, the burden on competition imposed by the proposed approach to infrastructure registration requirements would likely be less acute than the security-based swap dealer registration requirement. Clearing, trade reporting, and execution on trading platforms are relatively recent services for the security-based swap market, and only a limited number of CCPs, trade repositories, and execution facilities currently perform these services[1356] and may therefore be required to register under the Dodd-Frank Act. In addition, the proposed interpretation with respect to availability of an exemption from registration for foreign SB SEFs should reduce or eliminate the duplicative regulatory costs for foreign SB SEFs subject to comparable regulatory requirements and increase the likelihood that foreign SB SEFs will enter the United States, which, in turn, would increase competition.

Nonetheless, the proposed application of Title VII regulation in the cross-border context generates competitive frictions similar to those discussed above in the context of dealers. Broadly, providers of security-based swap infrastructure may seek to limit their exposure to the U.S. portion of the market in order to avoid Title VII

[1354] *See* proposed Rule 3a71–3(b) under the Exchange Act.

[1355] Michael A. Goldstein, Edith S. Hotchkiss, and Erik R. Sirri, ''Transparency and Liquidity: A Controlled Experiment on Corporate Bonds,'' Review of Financial Studies, Vol. 20, No. 2 (2007) (using a controlled experiment in the BBB bond market to show how, in some cases, spreads on newly post-trade transparent bonds decline relative to bonds that remain opaque).

[1356] *See* Clearing Agency Standards Adopting Release, 77 FR 66258 (estimating that between seven and 10 entities would be likely to register as CCPs); SDR Proposing Release, 75 FR 77347 n.207 (estimating that 10 entities would be likely to register as SDRs); SB SEF Proposing Release, 76 FR 11023 (estimating that up to 20 entities could seek to register as SB SEFs).

regulation. For example, a foreign CCP that does not otherwise perform clearing services in the United States may refuse to accept U.S. persons as members to avoid registration and compliance costs, which would limit U.S. persons' access to foreign clearing services to correspondent arrangements. Similar arguments apply to U.S. persons' access to execution venues and data repositories.

The Commission also has considered the ways in which the structure of the market for infrastructure services may affect the benefits that flow from certain Title VII regulations. Providing incentives for entry of SDRs could result in fragmentation of regulatory data across multiple repositories, which would complicate oversight of the security-based swap market and require that regulators take additional steps to consolidate data sets.[1357] In this release, the Commission has proposed the availability of conditional exemptive relief for non-U.S. persons performing SDR functions that potentially reduces the number of SDRs that would receive regulatory data.[1358] thnsp; Further, the proposed indemnification exemption may discourage the establishment of SDRs on jurisdictional lines.[1359]

Similarly, a single CCP serving the entire security-based swap market may result in more effective netting of offsetting positions among members, potentially reducing aggregate counterparty risk borne by the CCP and making risk management less costly.[1360] Indeed, high fixed costs and low variable costs associated with the provision of clearing services may contribute to a natural monopoly in this market. A second benefit of a single CCP is that it would preclude the possibility that risk management standards could erode as CCPs compete for clearing business. However, if the market evolves so that a single CCP emerges, it could require additional regulatory monitoring to address issues associated with natural monopolies.[1361]

These arguments are less clear in the case of SB SEFs. Evidence from equity markets seems to indicate benefits from both consolidation and fragmentation.[1362] On the one hand, some research supports the conclusion that consolidation of order flow onto a small number of trading venues may facilitate efficient matching between supply and demand, reduce price volatility within the trading venue,[1363] and reduce spreads.[1364] On the other hand, other researchers have found that the competitive effects flowing from multiple trading venues can outweigh the effects of fragmentation, resulting in more efficient pricing and narrower spreads.[1365]

The Commission has considered the above effects and proposed a cross-border approach that would require a CCP or execution facility to register if it performs clearing agency function in the United States or operates a facility for the trading or processing of security-based swaps in the United States or with respect to U.S. persons. Similarly, the Commission has proposed an approach that would require a trade repository to register if it performs SDR functions within the United States. The Commission preliminarily believes that this approach would promote transparency, improve systemic risk management, and allow better regulatory oversight, which in turn, would encourage broader market participation in the U.S. security-based swap market.

ii. Application of Mandatory Clearing, Public Dissemination, Regulatory Reporting, and Trade Execution Requirements in the Cross-Border Context

The proposed application of the market-wide transaction-level requirements to cross-border activities may have significant effects on competition in the U.S. security-based swap market. As noted above, the Commission is proposing an approach that would generally apply Title VII transaction-level requirements evenly to persons who conduct security-based swap activity with U.S. persons or within the United States.[1366] Because these requirements are generally applied evenly and expansively in the United States, a foreign person who wishes to avoid clearing, public dissemination, or pre-trade transparency requirements would have to avoid either transacting with U.S. persons or involving a U.S. person as agent in negotiating, soliciting, or executing security-based swap transactions on its behalf within the United States.[1367]

Notwithstanding a possible reduction in competition, the Commission believes that these market-wide transaction-level requirements should be applied to such transactions because they reduce systemic risk, promote transparency, and improve regulatory oversight. All of these contribute to the integrity and efficiency of the U.S. security-based swap market and should increase competition among those who choose to participate under Title VII.

The proposed cross-border approach would generally not apply the market-wide transaction-level requirements to foreign branches and non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person, when foreign branches and guaranteed non-U.S. persons transact with non-U.S. persons whose performance under security-based swap transactions is not guaranteed by a U.S. person and who are not registered security-based swap dealers. As stated in the competition analysis with respect to security-based swap dealers,[1368] this proposed approach would facilitate U.S.-based dealing entities' access to foreign markets and help prevent market fragmentation. However, the guarantees provided by U.S. persons remain a conduit for systemic risk to be transmitted to the United States.

However, the Commission is mindful that, in the near term and until full implementation of transparency requirements in the other jurisdictions that are comparable to the U.S. market-wide transaction-level requirements, if

[1357] *See* Section VI.B, *supra.*

[1358] *See* Section XV.H.1(a)(ii), *infra.*

[1359] *See* Section XV.H.2, *infra.*

[1360] *See* Craig Pirrong, ''The Economics of Central Clearing: Theory and Practice,'' ISDA Discussion Papers Series, No. 1 (2011). Concentration of risk in a CCP can itself also become a source of systemic risk. *See* Section II.A.6.(c), *supra.*

[1361] *See, e.g.,* Section 17A(b)(3)(D) of the Exchange Act, 15 U.S.C. 78q–1(b)(3)(D) (requiring that the rules of a ''clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants''). *See also* Kenneth Train, ''Optimal Regulation: The Economic Theory of Natural Monopoly,'' Cambridge: The MIT Press (1991) (discussing price regulation of natural monopolies).

[1362] *See* Haim Mendelson, ''Consolidation, Fragmentation and Market Performance,'' Journal of Financial and Quantitative Analysis, Vol. 22, Issue 2 (1987) (using a theoretical model to examine the tradeoffs between consolidation and fragmentation). *See also* James L. Hamilton, ''Marketplace Fragmentation, Competition, and the Efficiency of the Stock Exchange,'' Journal of Finance, Vol. 34, Issue 1 (1979) (examining data from the NYSE and showing that off-board trading that competes with specialists tends to reduce spreads more than the fragmentation of trade tends to increase them).

[1363] *See* Mendelson, note 1362, *supra.*

[1364] *See* Pankaj Jain, ''Institutional Design and Liquidity at Stock Exchanges around the World,'' Working Paper (2003). Using data on institutional features of stock exchanges around the world, the author observes that consolidated order flow is associated with lower spreads.

[1365] *See* Hamilton, note 1362, *supra.*

[1366] See the proposed definition of ''transaction conducted within the United States'' in proposed Rule 3a71–3(a)(5) under the Exchange Act and notes 1340 and 1341 above.

[1367] However, with respect to the mandatory clearing and mandatory trade execution requirements, transactions between two non-U.S. persons whose performance of obligations under security-based swaps is not guaranteed by U.S. persons and who are not security-based swap dealers would not be subject to mandatory clearing and mandatory trade execution even though these transactions are conducted within the United States. *See* proposed Rules 3Ca–3 and 3Ch–1 under the Exchange Act.

[1368] *See* Section XV.C.2(a), *supra.*

any part of the global market is left opaque without either public dissemination or pre-trade transparency, there may be opportunities for market participants to restructure and move their transactions to the OTC part of the global market. The value of transparency in the U.S. market would be reduced to the extent that liquidity migrates to less-transparent jurisdictions.

3. Efficiency

As noted above, in proposing the rules and interpretations discussed in this release, we are required to consider whether these actions would promote efficiency. In significant part, the effects of our proposed cross-border approach on efficiency are linked to the effects on competition. Minimizing impediments to access to the security-based swaps not only promotes competition, but also encourages participants to express their true valuation for security-based swaps and, as a result, is expected to promote efficiency. Generally, rules and interpretations that delineate an appropriate scope of application of the Title VII requirements can be expected to promote the efficient allocation of risk, capital, and other resources by facilitating price discovery and reducing costs associated with dislocations in the market for security-based swaps.

The proposed application of Title VII rules to cross-border transactions potentially increases the volume of transactions that will take place on transparent venues. For example, while the proposed rules allow exceptions to the mandatory trade execution requirement for certain transactions involving a foreign branch of a U.S. bank or a guaranteed non-U.S. person as one counterparty, these exceptions do not apply when a foreign security-based swap dealer is the other counterparty to the transactions, and such transactions would be exposed to pre-trade transparency on SB SEFs or exchanges. As stated above, the OTC security-based swap market is characterized by search frictions and asymmetric information.[1369] Currently, in order to trade, market participants must contact intermediaries on a bilateral basis to locate counterparties. Intermediaries may capture these search costs by behaving less competitively. Search-based inefficiencies in the bilateral OTC market manifest explicitly in the costs of matching with counterparties and are implicit in the somewhat wider spreads that dealers might quote as a strategic response to customer search costs.[1370] In addition, large intermediaries who observe vast volumes of order flows from the breadth of their customer base have an informational advantage over customers or small dealers who observe less order flow. This means that end users potentially face adverse selection in addition to search costs which may reduce their willingness to participate in the security-based swap market even when they might benefit from increased risk-sharing.

In markets with impartial access, such as those characterized by our proposed regime for SB SEFs, participants would face lower search costs when they decide to enter or exit a security-based swap position. Moreover, access to the security-based swap market would be available to more participants, increasing the likelihood of efficient reallocation of risks carried by security-based swap contracts.[1371] At the same time, pre- and post-trade transparency requirements under Title VII reduce dealers' ability to benefit from private information that comes from observing order flow.[1372] This change may increase the willingness of market participants to lay off risks they are relatively less-equipped to bear. Increased liquidity in a transparent security-based swap market should facilitate price discovery.[1373]

Increased price efficiency in the security-based swap market, in turn, produces important externalities. Transparency in the security-based swap market could result in more accurate valuation of security-based swaps generally, as all market participants would have the benefit of knowing how counterparties to a security-based swap valued the security-based swap at a specific moment in time.[1374] Especially with complex instruments, investment decisions generally are predicated on a significant amount of due diligence to value the instrument properly. A post-trade transparency system permits other market participants to derive at least some informational benefit from obtaining the views of the two counterparties who traded that instrument. Finally, central clearing of security-based swaps could make it easier for market participants who observe prices to disentangle the default risk of counterparties from the fundamental risks priced into the underlying contract. This has the benefit of enhancing the incremental price discovery already associated with the transparency requirements.

Better valuations could have a significant impact on efficiency and capital allocation. In particular, under the pre-trade and post-trade transparency regimes contemplated by Title VII, persons outside the security-based swap market could use information produced and aggregated by the security-based swap market as an input to both real investment decisions as well as financial investments in related markets for equity and debt.[1375] By helping asset valuations move closer to their fundamental values, transparency encourages efficient capital allocation.[1376]

In the cross-border context, our proposed approach generally applies the full range of Title VII requirements (including mandatory clearing, regulatory reporting, public dissemination, and mandatory trade execution requirements) to transactions with U.S. persons and transactions conducted within the United States,[1377] with the objective of promoting

[1369] *See* SB SEF Proposing Release, 76 FR 10949.

[1370] *See* Darrell Duffie, Nicolae Garleanu, and Lasse Heje Pedersen, ''Over-the-Counter Markets,'' Econometrica, Vol. 73, Issue 6 (2005) (using a theoretical model of an over-the-counter market to show a reduction in spreads when investors have easier access to multiple counterparties).

[1371] *See* John Cochrane, Asset Pricing, Princeton University Press, Princeton, NJ (2001). Chapter 3 discusses the role of securities markets, new securities, and financial innovation in allowing individuals to share and diversify risks.

[1372] We recognize that intermediaries' informational advantage may not be completely eliminated by the mandatory trade execution and public dissemination requirements. For example, intermediaries would have the advantage of seeing order flows or inquiries that are not ultimately executed and disseminated. In addition, the executing intermediary still has informational advantage from knowing the counterparty's identity, and intermediaries may know about an order or inquiry before anyone else in the market.

[1373] *See* Terrence Hendershott and Charles M. Jones, ''Island Goes Dark: Transparency, Fragmentation, and Regulation,'' Review of Financial Studies, Vol. 18, No. 3 (2005) (showing that a decrease in limit order book transparency on Island was followed by substantial price discovery movement from the ETF market to the futures market). *See also* Bengt Holmstrom and Jean Tirole, ''Market Liquidity and Performance Monitoring,'' Journal of Political Economy, Vol. 101, No. 4 (1993) (using a theoretical model to show how increased liquidity can increase the marginal value of information and the informativeness of stock prices).

[1374] *See* Regulation SBSR Proposing Release, 75 FR 75281.

[1375] *See* Philip Bond, Alex Edmans, and Itay Goldstein, ''The Real Effects of Financial Markets,'' Annual Review of Financial Economics, Vol. 4 (Oct. 2012) (reviewing the theoretical literature on the feedback between financial market price and the real economy). *See also* Sugato Chakravarty, Huseyin Gulen, and Stewart Mayhew, ''Informed Trading in Stock and Option Markets,'' Journal of Finance, Vol. 59, No. 3 (2004) (estimating that the proportion of information about underlying stocks revealed first in option markets ranges from 10 to 20 percent).

[1376] *See* Regulation SBSR Proposing Release, 75 FR 75281.

[1377] *See* note 1367, *supra*.

transparency and efficiency in the U.S. security-based swap market. For example, as noted above,[1378] the Commission is re-proposing certain provisions of Regulation SBSR to, among other things, extend the scope of security-based swaps that would be subject to regulatory reporting and public dissemination. As a result of the re-proposal, more transactions with a nexus to the United States would be reported to SDRs and thus would be made available to regulators.[1379] Furthermore, by possessing more comprehensive data on security-based swap transactions, regulators will be able to observe pockets of risk in the global marketplace that heretofore would not have been accessible to them. Early awareness of such risks provided by access to such data may enable regulators to respond by taking actions to mitigate the potential impact of such risks on the market, which could in turn prevent the deterioration of market conditions that could result if such risks remain hidden.

Besides impacts on price efficiency and the efficient allocation of capital, the Commission also has considered more generally the impact of the rules and interpretations in this release on the efficient use of resources. In our re-proposal of Regulation SBSR, the Commission is revising our approach to assigning the reporting duty to place less emphasis on the domicile of the counterparties, and to focus more on their status (*i.e.,* whether or not a counterparty is a security-based swap dealer or major security-based swap participant).[1380] We preliminarily believe that the revisions in the re-proposal reallocate the reporting burden to those entities that face a relatively lower cost of reporting, thus promoting efficiency. These revisions are designed to assign the responsibility to report a security-based swap transaction to persons that the Commission preliminarily believes are more easily able to fulfill that responsibility, and in a manner consistent with the reporting hierarchy set forth in Section 13A(a)(3) of the Exchange Act.[1381] In addition, the Commission expects any transaction reporting systems implemented by security-based swap dealers and major security-based swap participants to be automated.

However, we recognize that certain aspects of our proposal may reduce efficiency in the U.S. security-based swap market. Increasing market transparency, in some instances, may cause certain market participants to abstain from trading that would otherwise be efficient. For example, market participants might be less willing to trade on centralized, transparent markets if it means exposing their trading strategies to their competitors.[1382]

Further, as we noted in our competition analysis, various jurisdictions are developing transparency rules at different paces. If stringent regulation under Title VII results in less access for U.S. persons to foreign segments of the security-based swap market, opportunities for efficient risk-sharing may correspondingly decline. Furthermore, to the extent that we have implemented the transparency requirements and the other jurisdictions have not (or to the extent that the scope of the transparency requirement among various jurisdictions is not comparable), market participants may have an incentive to restructure their business in order to move transactions to opaque corners of the global security-based swap market.

If such restructuring results in a large and opaque market outside the reach of Title VII at the expense of liquidity in a transparent market regulated under Title VII, the efficiency benefits of Title VII would be undermined, in terms of price efficiency, efficient risk-sharing, and the efficient allocation of capital across real and financial assets. Moreover, insofar as the types of restructuring contemplated above purely constitute attempts at regulatory arbitrage, they represent a use of resources that could potentially be put to more productive uses. In addition, the effect of the proposed application of the Title VII requirements described in this release on efficiency also would be affected by the substantive rules we ultimately adopted to implement the relevant Title VII requirements.

In the cross-border context, we try to strike a balance between promoting efficiency in the U.S. security-based swap market and mitigating potential disruptions to other parts of the global market by including certain carve-outs in our proposed application of market-wide transaction-level requirements.[1383] These exceptions are designed to enable foreign branches and foreign affiliates whose performance under security-based swaps is guaranteed by a U.S. person to maintain access to other parts of the global security-based swap markets when they transact with non-U.S. persons whose performance under security-based swaps is not guaranteed by a U.S. person. This should help ensure that U.S. banks operating through foreign branches and foreign affiliates of U.S. persons are able to continue to access global liquidity. However, as stated in our analysis of competition effects, the tradeoff is that the guarantees provided by U.S. persons represent a conduit for systemic risk to flow to the United States.

By seeking to minimize, where appropriate, interruption to existing relationships of U.S. banks and foreign affiliates of U.S. persons with foreign market participants, the Commission's proposed cross-border approach could help preserve existing conduits for global risk-sharing. We considered this benefit and the efficiency costs that may result because these transactions are not occurring in the transparent market envisioned under Title VII.

Finally, recognizing that the U.S. security-based swap market is an integral part of the global security-based swap market, the Commission has proposed exemptive relief from registration for foreign SB SEFs and SDRs in certain cases. The Commission's proposal to consider an exemption from SB SEF registration for foreign security-based swap markets may facilitate the consolidation of global order flow onto certain particular trading venues for security-based swap contracts written on certain reference

[1378] *See* Section VIII, *supra.*

[1379] Due to corresponding impacts on the market not realized under Rule 908(a) as originally proposed, under the re-proposal, security-based swap transactions executed outside the United States by a non-U.S. person direct counterparty but performance of which is guaranteed by a U.S. person would now be subject to regulatory reporting.

[1380] *See* Section VIII, *supra* (describing the Regulation SBSR re-proposal).

[1381] 15 U.S.C. 78m–1(a)(3). Section 13A(a)(3) of the Exchange Act assigns to specific kinds of counterparties the duty to report uncleared security-based swaps to an SDR or to the Commission. The Commission previously noted that it ''understands that many reporting parties already have established linkages to entities that may register as [SDRs], which could significantly reduce the out-of-pocket costs associated with establishing the reporting function.'' *See* Regulation SBSR Proposing Release, 75 FR 75249 n. 193. The Commission preliminarily believes that the additional cost for non-U.S. person security-based swap dealers and major security-based swap participants absorbing the costs of reporting these additional transactions should be *de minimis,* since these larger market participants have likely already taken significant steps to establish and maintain the systems, processes, and procedures, and have likely devoted staff resources to report security-based swaps currently to existing data repositories. *See* Section XV.H.3(a)(ii), *infra.*

[1382] *See, e.g.,* Ananth Madhavan, *et al.,* ''Should Securities Markets Be Transparent?'' J. of Fin. Markets, Vol. 8 (2005) (finding that an increase in pre-trade price transparency leads to lower liquidity and higher execution costs, because limit-order traders are reluctant to submit orders given that their orders essentially represent free options to other traders).

[1383] *See* proposed Rule 3Ca–3(b), proposed Rule 3Ch–1(b), and re-proposed Rule 908(a)(2) under the Exchange Act.

entities. The Commission believes this may promote participation in the transparent market and, in turn, market efficiency, without sacrificing the benefits of requiring SB SEF registration.

The proposed exemptive relief for non-U.S. persons performing the functions of SDRs within the United States would allow non-U.S. persons to continue to receive data reported pursuant to the reporting requirements of a foreign jurisdiction without registering with the Commission as an SDR, subject to a condition that would help ensure that the confidentiality of the data and Commission access to data is maintained. The potential for exemptive relief from SDR registration requirements might reduce the incentive for market participants to restructure their operations to avoid triggering registration requirements.[1384] Further, the potential for an Indemnification Exception, proposed in this release, could reduce the potential for SDRs to be established along purely jurisdictional lines.[1385]

Similarly, the proposed cross-border approach permits substituted compliance in certain circumstances if the Commission determines that the applicable foreign regulatory requirements are comparable to the related Title VII requirements. By allowing certain security-based swap transactions or participants to satisfy their compliance obligations with respect to the applicable Title VII requirements by complying with the rules of a foreign jurisdiction, duplicative compliance costs could be reduced and compliance burdens minimized. This could allow security-based swap counterparties to operate more efficiently, as by allocating resources to other activities, such as improving operational efficiency or engaging in other investment activity. Therefore, the possibility of substituted compliance would encourage foreign firms' participation in the U.S. market and would help preserve U.S. firms' access to the other parts of the global market, while helping to ensure that substantially equivalent regulatory benefits are generated by meeting foreign regulatory standards comparable to Title VII.

(4) Capital Formation

The Commission preliminarily believes that many aspects of the proposed cross-border approach are likely to promote capital formation. As mentioned above,[1386] a security-based swap market with pre-trade and post-trade price transparency, and enhanced regulatory oversight may facilitate entry by a wide range of market participants seeking to engage in a broad range of hedging and trading activities. However, we recognize that, to the extent that Title VII imposes barriers to entry and access, or results in market fragmentation, it may impair capital formation and result in a redistribution of capital across jurisdictional boundaries.

As stated above, pre- and post-trade transparency should result in more accurate valuation, which should promote efficient allocation of capital.[1387] In general, market participants benefit from knowing how counterparties to a security-based swap transaction value the security-based swap at a specific moment in time; information revealed through pre- and post-trade transparency allows market participants to derive more-informed assessments with respect to asset valuations, leading to more efficient capital allocation. This should be true for the underlying assets as well. That is, information learned from security-based swap quoting and trading provides signals not only about security-based swap valuation, but also about the value of the reference assets underlying the swap. Similarly, we expect pre- and post-trade transparency to benefit the real economy as well. Transparent prices provide better signals about the quality of a business investment, promoting capital formation in the real economy by helping managers to make more-informed decisions and making it easier for firms to obtain financing for new business opportunities.[1388]

Furthermore, as discussed above, our proposed cross-border approach strives to address the disruptions that implementation of Title VII may cause to the foreign branch of U.S. banks and foreign affiliates of U.S. persons by proposing certain exceptions to the application of the *de minimis* exception to security-based swap dealer registration[1389] and the market-wide transaction-level requirements.[1390] We preliminarily believe that by doing so, our proposed cross-border approach to application of the Title VII requirements, as a whole, would address the disruptions to the global security-based swap market. Integrated markets provide more risk-sharing opportunities, which encourages efficient risk-sharing and capital allocation; the more integrated U.S. participants are into the global security-based swap market, the more access, liquidity, and participation we would expect to see in both the U.S. security-based swap market and the global security-based swap market as a whole.

Similarly, the proposed policy framework of substituted compliance should encourage foreign firms' participation in the U.S. security-based swap market and facilitate U.S. firms' access to the other parts of the global market while helping to ensure that the regulatory benefits of the applicable Title VII requirements are achieved by requiring the related foreign regulatory standards to be comparable to the requirements of Title VII. Substituted compliance is designed to accommodate the global nature of the security-based swap market and, therefore, should similarly help the security-based swap market continue to integrate various segments or subparts of the markets. As stated above, the integration of the U.S. market into the global market should encourage efficient global risk-sharing, which should, in turn, potentially free up more capital for investment in real assets.

Request for Comment

The Commission generally requests comment about our preliminary analysis of the effects of our proposal on efficiency, competition, and capital formation. In particular, the Commission requests comment on any effect the proposed rules, rule amendments, and interpretations may have on efficiency, competition, and capital formation, including the competitive or anticompetitive effects the proposed rule may have on market participants.

D. Economic Analysis of Proposed Rules Regarding ''Security-Based Swap Dealers'' and ''Major Security-Based Swap Participants''

To promote the goals of reduced risk, increased transparency, and improved market integrity in the financial system, Title VII of the Dodd-Frank Act requires, among other things, registration and regulation of security-based swap dealers and major security-based swap participants. The Commission and the CFTC jointly adopted final rules in 2012 to further define ''security-based swap dealer'' and ''major security-based swap

[1384] *See* Section XV.H.1(b)(i), *infra.*

[1385] *See* Section XV.H.2, *infra.*

[1386] *See* Section XV.C.3, *supra* (discussing the effects of our proposed cross-border approach on efficiency).

[1387] *See id.*

[1388] *See* Bond, *et al.* and Chakravarty, *et al.,* note 1211, *supra.*

[1389] *See* proposed Rule 3a71–3(b), proposed Rule 3Ca-3(b), proposed Rule 3Ch-1(b), and re-proposed Rule 908(a)(2) under the Exchange Act. *See also* Section XV.C.3, *supra* (discussing the effects of our proposed cross-border approach on efficiency).

[1390] *See* Sections VIII.C, IX.C, and X.B.3, *supra.*

participant.'' [1391] Of particular importance is the *de minimis* exception to dealing activity, which excepts a dealer in security-based swaps from the definition and designation of ''security-based swap dealer'' if the notional amount of its dealing activity in the trailing 12-month period is below a particular threshold. As discussed in the Intermediary Definitions Adopting Release, the costs and benefits of the dealer and participant definitions fall into two categories. First, there are costs and benefits associated with identifying a subset of current and future market participants as either security-based swap dealers or major security-based swap participants (*i.e.,* the assessment costs). Second, there are costs and benefits associated with subjecting that subset to a complete, fully effective complement of Title VII statutory and regulatory requirements (*i.e.,* the programmatic costs and benefits).

In the Intermediary Definitions Adopting Release, the Commission estimated that, out of more than 1,000 entities engaged in CDS activity worldwide in 2011, 166 had worldwide CDS activity at a level high enough such that they would perform the dealer-trader analysis prescribed under the security-based swap dealer definition. Furthermore, based on an analysis of trading activity using DTCC–TIW data, the Commission estimated that, based on their global trading volumes, potentially 50 of these entities would exceed the *de minimis* threshold and thus ultimately have to register as security-based swap dealers. Similarly, based on position data from DTCC–TIW, the Commission estimated that, based on positions arising from their worldwide CDS activity, as many as 12 entities would perform substantial position and substantial counterparty exposure tests prescribed under the major security-based swap participant definition.

These estimates represent a baseline against which the Commission can analyze the costs and benefits of the proposed application of the intermediary definitions to cross-border activities. More specifically, because the proposed cross-border rules would allow non-U.S. persons to exclude from the *de minimis* and major participant thresholds certain transactions and positions with non-U.S. counterparties, the ultimate number of entities that would exceed the dealer *de minimis* or the major participant thresholds will likely be lower than estimated in the Intermediary Definitions Adopting Release, and this decline will have a corresponding impact on the programmatic costs and benefits associated with these definitions. On the other hand, the cross-border rules are likely to increase assessment costs, as certain non-U.S. persons may need to determine which transactions and positions may be excluded from the thresholds. These costs and benefits are discussed more fully below.

1. Programmatic Costs and Benefits

(a) Registration of Security-based Swap Dealers and Major Security-Based Swap Participants

Title VII requires the registration of security-based swap dealers and major security-based swap participants in accordance with rules promulgated by the Commission.[1392] The Commission proposed rules and forms to facilitate registration of security-based swap dealers and major security-based swap participants in the Registration Proposing Release.[1393] In that release, the Commission provided an economic analysis relating to the proposed registration requirements and forms.[1394] As discussed in more detail therein, the Commission expects that dealers engaging in security-based swap activity exceeding the *de minimis* amount will incur costs associated with registration.[1395] In addition, persons who are not security-based swap dealers but hold substantial security-based swap positions that create an especially high level of risk that could have systemic impact on the U.S. financial system will incur costs associated with registration as a major securities-based swap participant.[1396] Registration will provide the Commission with information regarding security-based swap dealers and major security-based swap participants, which will enable the Commission to oversee these registered entities with respect to their security-based swap activity and oversee compliance with the substantive requirements applicable to them. The Commission believes that the revisions included in re-proposed Forms SBSE, SBSE–A, and SBSE–BD would not significantly impact our analysis of the costs and benefits of the rules and forms to facilitate registration of security-based swap dealers and major security-based swap participants.

(b.) Security-Based Swap Dealers—*De Minimis* Exception

Title VII requires entities engaged in security-based swap dealing activity to register as security-based swap dealers unless such transactions constitute only ''a *de minimis* quantity of security-based swap dealing'' and the dealer, therefore, is sufficiently small not to warrant regulation as a security-based swap dealer.[1397] The statutory *de minimis* exception is silent on its application to the cross-border security-based swap dealing activity of U.S. persons and non-U.S. persons, and the Commission did not address this issue in the Intermediary Definitions Adopting Release. The Commission proposes Rule 3a71–3(b) under the Exchange Act in this release to address this issue.

Proposed Rule 3a71–3(b)(1) under the Exchange Act sets forth the application of the *de minimis* exception to the activities of U.S. persons and non-U.S. persons, describing which security-based swap transactions conducted in a dealing capacity should be counted for purposes of the *de minimis* exception. Because proposed Rule 3a71–3(b)(1) under the Exchange Act would exclude certain transactions from the *de minimis* calculation and thereby may allow certain entities to remain below the *de minimis* threshold, it affects the programmatic benefits and costs of security-based swap dealer regulation under Title VII,[1398] as these programmatic costs depend on the number of persons that will ultimately be required to register as security-based swap dealers as well as the substantive requirements that are to be adopted in connection with the security-based swap dealer regime.

This does not mean, however, that there would be a one-to-one relationship between the exclusion of any particular person as a security-based swap dealer as a result of the *de minimis* exception and any change in the programmatic benefits and costs that would be associated with the non-regulation of that person. In other words, although Proposed Rule 3a71–3(b)(1) may allow certain entities to remain below the *de minimis* threshold, it does not follow that the programmatic costs and benefits will change by an amount proportional

[1391] *See* Intermediary Definitions Adopting Release, 77 FR 30596.

[1392] *See* Section 15F(b)(5) of the Exchange Act, 15 U.S.C. 78o–10(b)(5).

[1393] *See* Registration Proposing Release, 76 FR 65784.

[1394] *Id.* at 65812–19.

[1395] In the Registration Proposing Release, the Commission described the costs we expect security-based swap dealers and major security-based swap participants to incur in connection with completing and filing forms, providing related certifications, addressing additional requirements in connection with associated persons, as well as certain additional costs. *See* Registration Proposing Release, 76 FR 65812–19.

[1396] *Id.*

[1397] *See* Section III.C.3(b)(2), *supra; see also* Section 3(a)(71)(D) of the Exchange Act, 15 U.S.C. 78c(a)(71)(D), and 17 CFR 240.3a71–2.

[1398] *See* Intermediary Definitions Adopting Release, 77 FR 30596.

to the volume of those entities' dealing activity. As the Commission explained in the Intermediary Definitions Adopting Release, some of the costs and benefits of regulating an intermediary may be fixed, while other costs and benefits of regulation may be variable, depending on a particular person's security-based swap dealing activity.[1399] For example, the programmatic benefits associated with the registration and regulation of persons engaged in security-based swap dealing activity—in other words, the expected mitigation of risks to the stability and transparency of the U.S. financial system and to the protection of counterparties in the United States—will likely vary depending on the type and nature of those persons' dealing activity. Estimating the *de minimis* exception's effects on the programmatic costs and benefits (through including or excluding any particular person within the intermediary definition) will be further complicated by the other proposed rules regarding application of the entity-level and transaction-level requirements, as discussed more fully below.

Given the same limitations on our ability to conduct a quantitative assessment of the programmatic costs and benefits associated with intermediary definitions as stated in the Intermediary Definitions Adopting Release,[1400] we believe the methodology used in the Intermediary Definitions Adopting Release is appropriate and potentially most illustrative in demonstrating our consideration of programmatic costs and benefits associated with proposed Rule 3a71–3(b) under the Exchange Act regarding application of the *de minimis* exception in the definition of security-based swap dealer.

In the Intermediary Definitions Adopting Release, we sought to identify a subset of entities that appear to be the types of entities for which the statutory requirements of Title VII were created based on the volume of their dealing activity. We then sought to adopt definitions that would capture these entities, as Title VII required us to do, without imposing the costs of Title VII on those entities for which regulation currently may not be justified in light of those purposes. In developing Rule 3a71–2, which establishes the *de minimis* threshold for security-based swap dealers, we took into account data regarding the security-based swap market and especially data regarding the activity—including activity that may be suggestive of dealing behavior—of participants in the single-name CDS market.[1401] Based on the CDS Data Analysis,[1402] we estimated in the economic analysis of the *de minimis* exception to the dealer definition in the Intermediary Definitions Adopting Release that 50 or fewer entities ultimately may have to register as security-based swap dealers.[1403]

In developing proposed Rule 3a71–3(b), we have applied a methodology and analytical framework similar to that employed in the Intermediary Definitions Adopting Release to ensure that our proposed cross-border approach captures only those entities that we believe are likely, because activity relevant to the statutory dealer definition as interpreted in the Intermediary Definitions Adopting Release occurs with U.S. persons or otherwise within the United States, to raise the types of concerns with respect to the U.S. financial system that Title VII was intended to address, including stability, transparency, and counterparty protection. We continue to believe that entities engaged in such activity at levels above the *de minimis* threshold may be expected to raise these concerns and, therefore, warrant regulation under Title VII as security-based swap dealers. Conversely, we do not believe that entities engaged in dealing activity wholly outside the United States directly raise these types of concerns with respect to the U.S. financial system, and our proposed approach would not require non-U.S. persons engaged in dealing activity wholly

[1399] *See id.* at 30724 (''Some of the costs of regulating a particular person as a dealer or major participants, such as costs of registration, may largely be fixed. At the same time, other costs associated with regulating that person as a dealer or major participant (*e.g.,* costs associated with margin and capital requirements) may be variable, reflecting the level of the person's security-based swap activity. Similarly, the regulatory benefits that would arise from deeming that person to be a dealer or major participant (*e.g.,* benefits associated with increased transparency and efficiency, and reduced risks faced by customers and counterparties), although not quantifiable, may be expected to be variable in a way that reflects the person's security-based swap activity.'').

[1400] The limitations stated in the Intermediary Definitions Adopting Release are those related to (i) the data available to us and (ii) the set of data we use to draw inferences from in order to estimate the number of dealers. *See* Section XV.B, *supra.*

With respect to the availability of data, we have taken into account data obtained from DTCC–TIW, especially data regarding the activity of participants in the single-name credit default swap market. *See* Intermediary Definitions Adopting Release, 77 FR 30635. We also have considered more limited publicly available data regarding equity swaps. *Id.* at 30636 n.476, and 30637 n.485. The lack of market data is significant in the context of total return swaps on equity and debt. We do not have the same amount of information regarding those products as we have in connection with the present market for single name CDS. *Id.* at 30724 n.1456. We did not consider data regarding index CDS for purposes of the economic analysis of the security-based swap dealer definition because the data for index CDS encompasses both broad-based security indices and narrow-based security indices, and ''security-based swap'' in relevant part encompasses swaps based on single securities or on narrow-based security indices. *See* Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A); *see also* Intermediary Definitions Adopting Release, 77 FR 30635 n.472. We noted that the definition of security-based swaps is not limited to single-name CDS but we believed that the single-name CDS data are sufficiently representative of the market to help inform the analysis. *See* Section XV.B.2 and note 1278, *supra,* and accompanying text.

With respect to the dataset we use, we have based, in part, our economic analysis of the security-based swap dealer definition on certain data addressed by an analysis regarding the market for single-name CDS performed by the SEC's Division of Risk, Strategy, and Financial Innovation made available to the public. *See* ''Information regarding activities and positions of participants in the single-name credit default swap market'' (Mar. 15, 2012), *available at: http://www.sec.gov/comments/s7-39-10/s73910-154.pdf* (''CDS Data Analysis''). As stated in the Intermediary Definitions Adopting Release, we believe that the data underlying the CDS Data Analysis provides reasonably comprehensive information regarding the CDS activities and positions of U.S. market participants, but we noted that the data does not encompass those CDS that both: (i) do not involve U.S. counterparties; and (ii) are based on non-U.S. reference entities. We also noted that the CDS Data Analysis contains transactions reflecting both dealing activity and non-dealing activity, including transactions by persons who may engage in no dealing activity whatsoever. *Id.* at 30635–36.

We also recognized in the Intermediary Definitions Adopting Release, and in our discussion of the limitations of this data above, that the CDS Data Analysis may be imperfect as a tool for identifying dealing activity, given that the presence or absence of dealing activity ultimately turns upon the relevant facts and circumstances of an entity's security-based swap transactions, as informed by the dealer-trader distinction. Nonetheless, various criteria used in the CDS Data Analysis appear to be useful for identifying apparent dealing activity in the absence of full analysis of the relevant facts and circumstances. *Id.* at 30636.

[1401] *See* Intermediary Definitions Adopting Release, 77 FR 30635.

[1402] *See* CDS Data Analysis.

[1403] *See* Intermediary Definitions Adopting Release, 77 FR 30725 and n.1457. We stated that this estimate of 50 security-based swap dealers that would be required to register was a ''conservative'' estimate. *See id.* In establishing the *de minimis* threshold in that release, we analyzed the percentage of the market activity that would likely be attributable to registered security-based swap dealers under various thresholds and various screens designed to identify entities that are engaged in dealing activity. *See* Intermediary Definitions Adopting Release, 77 FR 30636; CDS Data Analysis at 8–21. Our analysis placed particular weight on the screen that identified entities that engaged in security-based swap transactions with three or more counterparties that themselves were not identified as dealers by ISDA. *See* Intermediary Definitions Adopting Release, 77 FR 30636. Twenty-eight firms and corporate groups satisfied this criterion, and 25 of these entities also engaged in trading activity over the $3 billion threshold. *See id.* Based on this analysis, together with our expectation that some of the included corporate groups would register more than a single security-based swap dealer and that new entrants may be likely to enter the market, we estimated that as many as 50 entities would ultimately be required to register as a security-based swap dealer. *See* Intermediary Definitions Adopting Release, 77 FR 30725 n.1457.

outside the United States to register as security-based swap dealers.

We recognize that security-based swap activity outside the United States, including the activity of foreign persons that engage in security-based swap dealing activity wholly outside the United States, may affect the U.S. financial system either because the foreign person's positions are guaranteed by a U.S. person or through risk spillover effects that may arise from, for example, counterparty defaults, asset fire sales, capital shortfalls, and asymmetric information about the positions of unregistered persons active in the global network of security-based swap market participants. However, to the extent that the risks presented by an entity engaged in security-based swap dealing activity to the U.S. financial system arise solely from such guarantees or from these spillover effects, rather than from the entity engaging in relevant activity within the United States, we preliminarily do not believe that Title VII dealer registration provides the appropriate mechanism for addressing these risks.

As we have already discussed, we believe that Title VII's dealer registration requirements are intended to apply to those entities that pose risks to the U.S. financial system or to counterparties in the United States or to the transparency of the U.S. financial market by virtue of their dealing activity within the United States. To the extent that an entity engaged in dealing activity wholly outside the United States poses risks to the U.S. financial system, we preliminarily believe that subjecting it to dealer registration and the related requirements would not generate the types of programmatic benefits that Title VII dealer regulation is intended to produce, as the dealing activity of such entity poses risks to counterparties outside the United States.

Our proposed Rule 3a71–3 identifies the types of transactions that U.S. persons and non-U.S. persons engaged in dealing activity within the United States, and that may therefore be expected to raise Title VII concerns, must count toward their *de minimis* threshold. As described above,[1404] because dealing activity engaged in by U.S. persons generally involves activity within the United States and results in risks being borne by a person within the United States, proposed Rule 3a71–3(b)(1)(i) would require U.S. persons to count toward their *de minimis* threshold all transactions that they enter into in a dealing capacity, regardless of the location or U.S.-person status of the counterparty, including any such transactions that the dealing entity conducts through a foreign branch. Similarly, as we discuss above, because security-based swap dealing activity conducted entirely outside the United States with non-U.S. persons will generally not give rise to the concerns addressed by security-based swap dealer regulation under Title VII within the United States, proposed Rule 3a71–3(b)(1)(ii) would require non-U.S. persons to include in their *de minimis* calculation only those transactions arising out of their dealing activity with U.S. persons or otherwise conducted within the United States.

As discussed above, our proposed rule allows non-U.S. persons to exclude transactions with foreign branches of U.S. banks from their *de minimis* threshold, if those transactions are conducted outside the United States.[1405] Although requiring non-U.S. persons to count these transactions toward the *de minimis* threshold would be consistent with the view that a foreign branch is part of a U.S. person, we are proposing not to require non-U.S. persons to count these transactions. As noted above, since U.S. banks are U.S. persons subject to certain exemptions, foreign branches that engage in security-based swap activity will generally be subject to applicable provisions of Title VII (*e.g.,* mandatory clearing, mandatory trade execution, public dissemination, and SDR reporting requirements) regardless of whether their non-U.S. person counterparty is a registered security-based swap dealer. If a foreign branch engages in security-based swap activity in a dealing capacity with non-U.S. persons outside the United States exceeding the *de minimis* level, the bank (including the foreign branch) will be required to register as a security-based swap dealer and the entire bank will be subject to the entity-level and transaction-level requirements discussed above.[1406]

The security-based swap transactions excepted from the *de minimis* calculation of non-U.S. persons take place outside the United States. Requiring non-U.S. persons to count these transactions occurring in their foreign local markets could discourage non-U.S. persons from transacting with foreign branches, which could increase the likelihood of market disruption and fragmentation, including liquidity and order flow fragmentation, while decreasing the ability of U.S. banks to access foreign markets and foreign liquidity. Therefore, we preliminarily believe that the proposed approach to excepting non-U.S. persons' transactions with foreign branches outside the U.S. from the *de minimis* calculation would have the benefit of minimizing disruption to U.S. banks' access to foreign markets without significantly diminishing the benefits that flow from Title VII dealer regulation and the proposed application of the *de minimis* exception in the cross-border context.

As stated above, the most significant programmatic effects of the *de minimis* exception result from how it changes the number of entities that are required to register as security-based swap dealers. We preliminarily believe that under our proposed Rule 3a71–3(b) under the Exchange Act, the number of entities that may have to register with the Commission may be somewhat smaller than the upper bound of 50 that we estimated in the Intermediary Definitions Adopting Release and in any case should not exceed that previous estimate of 50 or fewer entities.[1407] The

[1404] *See* Section III.B.3, *supra.*

[1405] *See* Section III.B.7, *supra.*

[1406] *See* Sections III.C.3 and 4, *supra.*

[1407] *See* note 1218, *supra.* After further experience with the data used in the CDS Data Analysis, we have estimated the trading activity and number of counterparties of firms within a corporate group, which allows us to conduct a more granular analysis of the potential number of entities that will be required to register as security-based swap dealers. In the CDS Data Analysis, we estimated that 28 entities and corporate groups had three or more counterparties that are not ISDA dealers and that 25 of these entities had trailing notional transactions exceeding $3 billion. *See* CDS Data Analysis at 14. Under our refined approach, which identifies the number of entities within a corporate group that may have to register, we estimate that 46 individual firms have three or more non-ISDA-dealer counterparties; of these, we estimate that 31 firms also engaged in a total of $3 billion in worldwide security-based swap dealing activity during 2011. Of these firms, we estimate that 27 also engaged in at least $3 billion of security-based swap activity during 2011 that these entities would be required to count toward their *de minimis* threshold under proposed Rule 3a71–3(b). We further estimate that the aggregation requirement for unregistered dealers may result in an additional two firms being required to register, for a total of 29 security-based swap dealers based on the current structure of the security-based swap market.

We continue to believe that an estimate of 50 or fewer entities that would be required to register with the Commission as security-based swap dealers is reasonable in light of this analysis. As explained in note 1403 above, our estimate of as many as 50 potential registrants was consistent with our analysis showing 25 entities that had both three or more non-ISDA-dealer counterparties and $3 billion or more in trailing notional security-based swap transactions and our recognition of the potential for growth in the security-based swap market, for new entrants into the dealing space, and the possibility that some corporate groups may register more than one entity. Because our current estimate of 29 firms that may be required to register as security-based swap dealers includes individual entities within corporate groups (rather than

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entities that are not captured under our proposed approach would be those that engage in security-based swap dealing activity entirely (or almost entirely) with non-U.S. persons outside the United States.

We recognize that the U.S. market participants and transactions regulated under Title VII are a subset of the overall global security-based swap market and that there may be spillover risks arising from a foreign entity's dealing activity outside the United States. This spillover risk has the potential to affect the U.S. financial system either through that foreign entity's transactions with foreign entities, which, in turn, transact with U.S. persons (and may, as a result, be registered security-based swap dealers or major security-based swap participants) or through membership in a clearing agency which may be providing CCP services in the United States or have a U.S. person as a clearing member. We have considered these spillover risks in connection with discussing the effects of our proposed cross-border approach on efficiency, competition, and capital formation.[1408]

(c) Major Security-Based Swap Participants—''Substantial Position'' and ''Substantial Counterparty Exposure'' Thresholds

Title VII requires a person with a ''substantial position'' or ''substantial counterparty exposure'' in security-based swaps to register as a major security-based swap participant. As described in the Intermediary Definitions Adopting Release, the substantial position and substantial counterparty exposure tests prescribed by Rules 3a67–3 and 3a67–5 under the Exchange Act seek to capture persons whose security-based swap positions pose sufficient risk to counterparties and the markets generally, thus, warranting regulation as a major security-based swap participant.[1409] Furthermore, based on a review of notional positions maintained in 2011 by entities with single-name CDS positions, the Commission estimated that approximately 12 entities may reasonably find it necessary to engage in the requisite calculations, and that the number of major security-based swap participants likely will be fewer than five.[1410]

As proposed, Rule 3a67–10(c) under the Exchange Act provides that when determining whether a non-U.S. person falls within the major security-based swap participant definition, only transactions entered into with a U.S. person [1411] as the counterparty would be considered.[1412] Under this proposed rule, a non-U.S. person would calculate its security-based swap positions under the major security-based swap definition based solely on its security-based swap transactions with U.S. persons as counterparties (including foreign branches of U.S. banks), and all security-based swap transactions with non-U.S. persons would be excluded from the analysis. We recognize that there may be indirect spillover risks to the U.S. financial system resulting from the security-based swap positions entered into by non-U.S. persons with other non-U.S. person counterparties, but we preliminarily believe that such indirect risk may be more appropriately regulated by the foreign regulatory authorities with responsibilities for such non-U.S. persons. Similar to the *de minimis* exception to dealer designation and registration, the most significant programmatic effects of the application in the cross-border context of the major participant thresholds flow from the number of entities that will fall within the definition of major security-based swap participant given a particular threshold. Because non-U.S. persons must count only transactions with U.S. counterparties toward the substantial position and substantial counterparty exposure thresholds, the final number of registered major participants may be lower than the preliminary upper bound of five estimated in the Intermediary Definitions Adopting Release.

We also are proposing interpretive guidance regarding the attribution of guaranteed positions for purposes of the major security-based swap participant calculation. In the Intermediary Definitions Adopting Release, we provided interpretive guidance that requires a person that guarantees or otherwise provides direct recourse to an affiliate or guaranteed entity's security-based swap counterparties to include those transactions in its own major participant calculations.[1413] We are proposing further guidance in this release regarding the application of this interpretation in the cross-border context. As proposed, this guidance would require U.S. persons that guarantee the obligations of a non-U.S. person's security-based swap transactions to count those transactions in their major participant calculations. Our proposed guidance also would require a non-U.S. person to include in its calculations transactions of a U.S. person that it guarantees and transactions entered into by a non-U.S. person with U.S. persons that it guarantees. A non-U.S. person would not include in its calculation transactions it guarantees that are entered into by a non-U.S. person with another non-U.S. person.

We preliminarily believe that this guidance identifies the guaranteed security-based swap positions that are likely to pose risks to the U.S. financial system. Title VII envisions the establishment of a comprehensive regulatory regime that will identify, monitor, and mitigate risks to the U.S. financial system and protect counterparties in security-based swap transactions. Our proposed application of the major securities-based swap participant calculation in the cross-border context, and related guidance, is designed to include only those market participants whose security-based swap activity may directly affect the U.S. financial system in a manner relevant to the concerns of Title VII.

With respect to U.S. persons that provide a guarantee, our proposed interpretive guidance confirms that they must include in their major security-based swap participant calculations all security-based swap transactions that they guarantee, regardless of the U.S.-person status of the guaranteed person or the status of the counterparty to the transaction. Such interpretation is consistent with the rules and interpretations adopted in the Intermediary Definitions Adopting Release. We recognize that attributing security-based swap positions to the person guaranteeing another person's security-based swap transactions may increase the number of major participants and therefore affect the programmatic benefits discussed above. As stated in the Intermediary Definition Adopting Release, we do not currently possess data relating to the existence of guarantees of the security-based swap positions of other parties and thus

treating corporate groups as a single entity), it accounts for the possibility that some corporate groups may register more than one security-based swap dealer. It also accounts for the likely results of our proposed aggregation requirement. Further allowing for the possibility of additional new entrants and growth in the security-based swap market, while also recognizing the possibility that our analysis overestimates the volume of dealing activity (and thus likely dealers), we think that our analysis in this release remains consistent with our earlier estimate of 50 or fewer entities.

[1408] *See* Section XV.C.1, *supra.*

[1409] *See* Intermediary Definitions Adopting Release, 77 FR 30727.

[1410] *Id.* at 30734.

[1411] The proposed rule uses the same definition of ''U.S. person'' as developed in the context of foreign security-based swap dealer registration. *See* Section III.B.5, *supra.*

[1412] Proposed Rule 3a67–10(c) under the Exchange Act.

[1413] *See* Intermediary Definitions Adopting Release, 77 FR 30689.

cannot reasonably estimate the number of additional entities that may be brought within the ambit of major security-based swap participant regulation by virtue of the interpretation related to guarantees.[1414] However, to the extent that a guarantee provided by a U.S. person of the security-based swap positions of another person, whether such other person is a U.S. person or a non-U.S. person, creates the level of exposure—and corresponding risk to the U.S. guarantor and the U.S. financial system—that warrants regulation under Title VII, it would appear inconsistent with the purposes of the statute not to attribute all of the security-based swap positions guaranteed by a U.S. person to such U.S. person and subject such U.S. person to major participant regulation.[1415]

Our proposed interpretive guidance regarding guarantees provided by non-U.S. persons also is likely to have no effect on the programmatic costs and benefits of major security-based swap participant regulation. The proposed guidance would allow non-U.S. persons to exclude security-based swap positions guaranteed by them from their major security-based swap participant calculations if the security-based swaps giving rise to the positions are entered into by a non-U.S. person with another non-U.S. person. By contract, non-U.S. persons would be required to include security-based swap positions guaranteed by them in their major security-based swap participant calculations if the security-based swaps are entered into by a non-U.S. person with a U.S. person. To the extent that any non-U.S. persons who guarantees security-based swap positions with U.S. persons that do not rise to the major security-based swap participant thresholds, they are unlikely to pose the types of risks addressed by the major security-based swap participant definition, and, as a result, not requiring them to register should not reduce the programmatic benefits that the major security-based swap participant definition was intended to achieve.

As stated above, we do not currently possess data relating to the existence of guarantees of the security-based swap positions of other parties and thus cannot reasonably estimate the number of additional entities that may be brought within the ambit of major security-based swap participant regulation by virtue of the interpretation related to guarantees. However, any non-U.S. person that is required to register under our proposed approach because of guarantees extended to U.S. persons or to non-U.S. persons that have positions arising from transactions with U.S. persons would have security-based swap exposures of the nature and size that would raise concerns that the major security-based swap participant requirements established by Title VII were intended to address. We therefore preliminarily believe that the registration of such persons as major security-based swap participants would increase the programmatic benefits of our rule by ensuring that the risks presented by such entities to the U.S. financial system and U.S. counterparties to such transactions are regulated under the framework established by Title VII. Imposing Title VII on such entities would also increase programmatic costs, as such entities would be required to comply with the substantive requirements of Title VII.

Moreover, where a non-U.S. person's home country supervisor has adopted capital standards consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord), to the extent that such non-U.S. person's security-based swap positions are guaranteed, we preliminarily believe that it is not necessary to attribute such guaranteed security-based swap positions to the guarantor, regardless of the guarantor's U.S.-person status. To the extent that this proposed interpretive guidance reduces the number of entities that would be required to register as major security-based swap participants as estimated in the Intermediary Definitions Adopting Release, we preliminarily believe that it would not significantly reduce the programmatic benefits expected under Title VII because the risk arising from the guaranteed security-based swap positions posed to the United States, and that Title VII was intended to address, would be addressed by the foreign regulation of the non-U.S. person's capital that is consistent with the Basel Accord. At the same time, excluding such entities from the definition of major security-based swap participant would further reduce the programmatic costs associated with the various requirements that apply to major security-based swap participants.

2. Assessment Costs

(a) Security-Based Swap Dealers—*De Minimis* Exception

Because proposed Rule 3a71–3(b) explains how the dealer *de minimis* exception adopted in Rule 3a71–2(a)(1)[1416] should be applied to cross-border dealing activity, the analysis of the assessment costs relating to the proposed Rule 3a71–3(b) is closely related to the analysis of the assessment costs relating to the dealer determination described in the Intermediary Definitions Adopting Release.[1417] Our proposed approach to the *de minimis* calculation in the cross-border context would require potential registrants that are non-U.S. persons, in assessing the applicability of Title VII's dealer registration and regulation requirements, to apply the new definitions of ''U.S. person,'' ''transactions conducted within the United States,'' and ''transactions conducted through a foreign branch,'' which are used in Proposed Rule 3a71–3(b) of the Exchange Act to identify transactions that should be included in the *de minimis* calculation given the purposes of Title VII. Our proposed approach would also allow non-U.S. persons to exclude from this assessment and the *de minimis* calculation security-based swap transactions with a foreign branch of a U.S. bank, which would require them to make a separate determination that a particular counterparty satisfies the definition of ''foreign branch.''

As noted in the Intermediary Definitions Adopting Release, some market participants whose security-based swap activities exceed, or are not materially below, the *de minimis* threshold may be expected to incur assessment costs in connection with the dealer analysis.[1418] In the Intermediary Definitions Adopting Release, we estimated that 123 entities out of over 1,000 entities (U.S. and non-U.S.) that engaged in single-name CDS transactions in 2011 had more than $3 billion in single-name CDS transactions over the previous 12 months.[1419] We also assumed that the 43 entities that engaged in security-based swap activity during the trailing 12-month period totaling between $2 and $3 billion notional may opt to engage in the dealer analysis out of an abundance of caution or to meet internal compliance requirements, leading to a total of 166 entities.[1420] We concluded that this

[1414] *See* Intermediary Definitions Adopting Release, 77 FR 30730.

[1415] *Id.*

[1416] 17 CFR 240.3a71–2(a)(1).

[1417] *See* Intermediary Definitions Adopting Release, 77 FR 30731–32.

[1418] *Id.* at 30731. These assessment costs include costs associated with analyzing an entity's security-based swap activities to determine whether those activities constitute dealing activity and the costs of monitoring the volume of dealing activity against the *de minimis* threshold.

[1419] Intermediary Definitions Adopting Release, 77 FR 30731–32.

[1420] *Id.*

estimate of 166 entities represented a potential upper bound for the total assessment costs arising from security-based swap dealer determinations.[1421] To the extent that all of these entities retain outside counsel to analyze their status under the security-based swap dealer definition, including the *de minimis* exception, we estimated that the assessment costs may approach $4.2 million.[1422]

In considering the assessment costs associated with the proposed Rule 3a71–3(b), we hold the same expectation as we noted in the Intermediary Definitions Adopting Release that market participants generally would be aware of the notional amount of their activity involving security-based swaps as a matter of good business practice. However, as discussed below, proposed Rule 3a71–3(b) introduces a few variables that may result in higher overall assessment costs associated with the dealer registration analysis for certain non-U.S. persons that may result in different aggregate assessment costs for all entities performing this dealer analysis from the figure that we estimated in the Intermediary Definitions Adopting Release.

Because non-U.S. persons would be required to count toward the dealer *de minimis* threshold only those transactions they enter into, in a dealing capacity, with U.S. persons (other than foreign branches of U.S. banks) or otherwise conducted within the United States, we believe that such persons would likely implement systems to identify transactions that involve U.S. persons or that are conducted within the United States [1423] and monitor the notional amount of dealing activity reflected in such transactions.[1424] We preliminarily believe that the costs of establishing a system capable of identifying the volume of transactions with U.S. persons or within the United States should be similar to the costs estimated in the Intermediary Definitions Adopting Release for a system to monitor positions for purposes of the major security-based swap participant thresholds because such a system would involve monitoring the total volume of an entity's dealing transactions in a system capable of flagging those transactions that involve U.S. persons or otherwise occur within the United States. We preliminarily believe that this system would have similar functionality and requirements to the system that potential major security-based swap participants would be likely to adopt in order to track their exposures for purposes of the major security-based swap participant thresholds. In the Intermediary Definitions Adopting Release, we noted that entities establishing such a system would likely incur one-time programming costs of $15,287 and ongoing annual systems costs of $17,040.[1425]

The Commission preliminarily believes that market participants would also incur costs arising from the need to identify and maintain records concerning the U.S.-person status of their counterparties and the location of their transactions. We anticipate that potential dealers are likely to request representations from their transaction counterparties to determine the counterparties' U.S.-person status and whether the transaction was conducted within the United States. Therefore, the Commission preliminarily believes that the assessment costs associated with determining the status of counterparties and the location of transactions should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations. The Commission preliminarily believes that such one-time costs would be approximately $15,160.[1426] The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures described above regarding security-based swap sales and trading practices and should not result in separate assessment costs.[1427]

The Commission also considers it likely that market participants will implement modifications to the system described above to monitor counterparty status for purposes of future trading of

[1421] *Id.*

[1422] *Id.* We estimated that the per-entity cost of the dealer analysis would be approximately $25,000. Our estimate of aggregate industry-wide costs of $4.2 million reflects the costs that may be incurred by all 166 entities. *See id.*

[1423] *See* proposed Rule 3a71–3(a)(5) under the Exchange Act. ''Transactions conducted within the United States'' refers to security-based swap transactions that are solicited, negotiated, or executed within the United States.

[1424] Given the ability of non-U.S. persons under our proposed rule to exclude certain transactions from their *de minimis* calculation, we expect that potentially all 166 of the entities identified in our Intermediary Definitions Adopting Release as likely to perform the dealer analysis may engage in analysis to determine whether they are U.S. persons. Because our proposed definition of U.S. person is relatively straightforward to apply, we believe that any market participant should be able readily to identify its U.S.-person status by referring to its residence status, its principal place of business, or its organizational documents. To the extent that an entity seeks the assistance of outside counsel, we expect that the cost of this analysis will be encompassed in the $25,000 in assessment costs that we have estimated in the Intermediary Definitions Adopting Release. *See* Intermediary Definitions Adopting Release, 77 FR 30732.

[1425] In the Intermediary Definitions Adopting Release, we estimated that the one-time programming costs of $13,692 per entity and annual ongoing assessment costs of $15,268. *See* Intermediary Definitions Adopting Release, 77 FR 30734–35 and accompanying text (providing an explanation of the methodology used to estimate these costs). The hourly cost figures in the Intermediary Definitions Adopting Release for the positions of Compliance Attorney, Compliance Manager, Programmer Analyst, and Senior Internal Auditor were based on data from SIFMA's Management & Professional Earnings in the Securities Industry 2010. For purposes of the cost estimates in this release, we have updated these figures with more recent data as follows: the figure for a Compliance Attorney is $310/hour, the figure for a Compliance Manager is $269/hour, the figure for a Programmer Analyst is $234/hour, and the figure for a Senior Internal Auditor is $217/hour, each from SIFMA's Management & Professional Earnings in the Securities Industry 2011, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. We also have updated the Intermediary Definitions Adopting Release's $464/hour figure for a Chief Financial Officer, which was based on 2011 data. Using the consumer price index to make an inflation adjustment to this figure, we have multiplied the 2011 estimate by 1.02 and arrived at a figure of $473/hour for a Chief Financial Officer in 2012. Incorporating these new cost figures, the updated one-time programming costs based upon our assumptions regarding the number of hours required in the Intermediary Definitions Adopting Release would be $15,287 per entity, *i.e.,* (Compliance Attorney at $310 per hour for 2 hours) + (Compliance Manager at $269 per hour for 8 hours) + (Programmer Analyst at $234 per hour for 40 hours) + (Senior Internal Auditor at $217 per hour for 8 hours) + (Chief Financial Officer at $473 per hour for 3 hours) = $15,287, and the annual ongoing costs would be $17,040 per entity, *i.e.,* ((Senior Internal Auditor at $217 per hour for 16 hours) + Compliance Attorney at $310 per hour for 4 hours) + (Compliance Manager at $269 per hour for 4 hours) + (Chief Financial Officer at $473 per hour for 4 hours) + (Programmer Analyst at $234 per hour for 40 hours) = $17,040.

[1426] This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the Commission staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

[1427] There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within programmatic costs associated with the security-based swap dealer definition.

security-based swaps. The Commission preliminarily believes that there would be one-time programming costs associated with the system implementation by market participants to maintain a record of counterparty status for purposes of performing the dealer *de minimis* calculation and estimates such programming costs to be $12,870.[1428]

Based on the foregoing discussion, the Commission estimates the total one-time per-entity costs for non-U.S. persons engaged in dealing activity within the United States associated with the *de minimis* calculation would be $43,317.[1429] Estimated annual ongoing costs would be $17,040. Based on available data provided by the DTCC–TIW, we preliminarily believe that as many as 70 of the firms with over $2 billion in total worldwide notional trading activity in single-name CDS during 2011 may be non-U.S. persons under our proposed rule and thus will likely incur these costs. Assuming that each of these 70 entities perceived the need to monitor the status of its counterparties and the location of its transactions to perform the dealer *de minimis* calculation, we preliminarily believe that the total annual one-time industry-wide costs associated with establishing such systems would amount to $3,032,190. Total annual ongoing costs would amount to $1,192,800.

In addition to assessment costs discussed above associated with determining the volume of U.S.-facing transactions, market participants would also incur assessment costs relating to performing the analysis as to whether certain security-based swaps involve dealing activity. At the same time, some non-U.S. persons that establish such systems may be expected to forgo the costs of performing the dealing activity analysis. As noted above, we assumed in the Intermediary Definitions Adopting Release that only entities with more than $2 billion in security-based swap transactions over the previous 12 months would be likely to engage in the full dealer analysis. We believe that it similarly is unlikely that non-U.S. persons with less than $2 billion in U.S.-facing security-based swap transactions over the previous 12 months would engage in the dealer analysis. Available data from the Trade Information Warehouse shows that 39 of these 70 non-U.S. persons had total U.S.-facing security-based swap transactions under $2 billion in 2011. We preliminarily believe that, under our proposed rule, these entities would not engage in the full dealer analysis and thus would not be likely to incur the $25,000 in assessment costs described in the Intermediary Definitions Adopting Release, reducing the estimated assessment costs in that release by approximately $975,000. The combined effect of our proposed rule on non-U.S. persons, therefore, should result in a net increase in assessment costs over those estimated in the Intermediary Definitions Adopting Release of approximately $2,057,190.[1430]

(b) Major Security-Based Swap Participants—''Substantial Position'' and ''Substantial Counterparty Exposure'' Thresholds

Proposed Rule 3a67–10(c) and the proposed interpretive guidance regarding the attribution of guaranteed positions, which is discussed below, together identify the security-based swap positions that entities would be required to include in determining whether they exceed the major security-based swap participant thresholds that were established in the Intermediary Definitions Adopting Release. We preliminarily believe that entities that perceive the need to perform the threshold calculations associated with the major security-based swap definition will incur only relatively minor incremental costs to those described in the Intermediary Definitions Adopting Release as a result of our proposed rule and interpretive guidance applying these thresholds in the cross-border context.

In the Intermediary Definitions Adopting Release, we estimated that certain market participants could be expected to incur costs in connection with the determination of whether they have a ''substantial position'' in security-based swaps or pose ''substantial counterparty exposure'' in connection with security-based swaps in connection with their determination as to whether or not they are a major security-based swap participant.[1431]

Based on the data available at that time, we estimated that as many as 12 entities might perceive the need to perform these calculations, given the size of their security-based swap positions.[1432] We further estimated that each of these entities would likely incur annual one-time costs of $15,287 and ongoing annual costs of $17,040 in monitoring these positions and performing the necessary calculations.[1433]

Our proposal would require non-U.S. persons to include in these calculations only transactions they enter into directly with, or that they guarantee, that involve U.S.-person counterparties. As noted above, Proposed Rule 3a67–10(c) would require a non-U.S. person that performs the major security-based swap participant calculation to identify the U.S.-person status of its counterparties. Our proposed interpretive guidance would further clarify that a non-U.S. person must

[1428] This is based on an estimate of the time required for a programmer analyst to modify the software to track the U.S. person status of a counterparty and to record and classify whether a transaction is a transaction conducted within the United States, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to proposed definitions of U.S. person and transaction conducted within the United States. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at $310 per hour for 2 hours) + (Compliance Manager at $269 per hour for 4 hours) + (Programmer Analyst at $234 per hour for 40 hours) + (Senior Internal Auditor at $217 per hour for 4 hours) + (Chief Financial Officer at $473 per hour for 2 hours) = $12,870. *See* note 1425, *supra* (for source of the estimated per hour costs).

[1429] The estimated one-time costs of $43,317 represent the costs for programming a system to monitor the dealing activity of a non-U.S. person ($15,287), the costs for programming a system to monitor the U.S.-person status of its counterparties and the location of its dealing activity ($12,870), and the costs for establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures ($15,160).

[1430] As noted above, in the Intermediary Definitions Adopting Release, we estimated total annual one-time industry-wide costs associated with the dealer analysis to be $4.2 million. *See* note 1422, *supra.* According to the analysis above, non-U.S. persons are likely to incur additional annual one-time industry-wide costs of $3,032,190 associated with new systems to monitor the volume of dealing activity, while annual one-time industry-wide costs associated with the dealing activity analysis may decline by $975,000. We therefore estimate the annual one-time industry-wide costs associated with the dealer analysis for both U.S. persons and non-U.S. persons to be $6,257,190 ($4,200,000 + $3,032,190 − $975,000 = $6,257,190), or $2,057,190 more than our initial estimate of $4.2 million.

We have not separately estimated the assessment costs that market participants may incur associated with identifying the special entity status of their counterparties. The Intermediary Definitions Adopting Release noted that the *de minimis* threshold for dealing activity involving special entities would cause market participants to incur costs independent of those associated with the general *de minimis* threshold based on the CDS Data Analysis, which showed that all entities engaged in security-based swap transactions with special entities appeared to also engage in more than $8 billion in security-based swap transactions in 2011. *See* CDS Data Analysis at 21 n.8 and Intermediary Definitions Adopting Release, 77 FR 30732 n.1510.

[1431] *See* Intermediary Definitions Adopting Release, 77 FR 30734–36.

[1432] *See* Intermediary Definitions Adopting Release, 77 FR 30734.

[1433] *See* note 1425, *supra.*

include in its calculation all transactions of other entities that it guarantees where a U.S. person has direct recourse to the non-U.S. person performing the major security-based swap participant calculation.[1434] A non-U.S. person performing this calculation would therefore be required to identify the U.S.-person status of its counterparties, and the counterparties of transactions it guarantees, and monitor the positions arising from transactions involving U.S. person as counterparties.

The Commission preliminarily believes that market participants would request representations from their transaction counterparties to determine the U.S. person status of their counterparties. Therefore, the Commission preliminarily believes that the one-time assessment costs associated with the counterparty status should be limited to the costs of establishing a practice or compliance procedure or requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately $15,160.[1435]

The Commission also considers it likely that market participants will implement systems to keep track of counterparty status for purposes of future trading of security-based swaps. The Commission preliminarily believes that there would be one-time programming costs associated with the system implementation by market participants to maintain a record of counterparty status for purposes of assessing the major security-based swap participant status and estimates such programming costs to be $12,870.[1436] Therefore, the Commission estimates the total one-time costs per entity associated with the proposed Rule 3a67–10(c) and the interpretive guidance regarding guarantee could be $28,030.[1437] This is in addition to the estimate of ongoing annual costs of $17,040 associated with performing the major security-based swap participant threshold calculations and the one-time programming costs of $15,287 related to establishing an automated system or modifying the existing automated system to perform the major participant threshold calculations as described in the Intermediary Definitions Adopting Release.[1438]

Request for Comment

The Commission generally requests comment about our preliminary estimates of the number and composition of dealing entities and major participants that may be required to register as security-based swap dealers as a result of the proposed application of the *de minimis* exception in the cross-border context. The Commission also requests comments about our estimates of the effect of our proposed approach on programmatic costs and benefits and assessment costs. The Commission requests that commenters provide data and sources of data to support any comments.

- Are the Commission's estimates regarding the number of U.S.-person and non-U.S. persons active as dealers in security-based swaps, both in the United States and worldwide, and the number of these that engage in security-based swap dealing transactions above the *de minimis* threshold reasonable in light of the proposed rule?
- Are the Commission's estimates of assessment costs associated with the dealer registration analysis, including the costs associated with the determination of the status of counterparties as U.S. persons, non-U.S. persons, foreign branches and the costs associated with the determination of transactions conducted within the United States reasonable?
- Are the Commission's estimates of the number of U.S. persons and non-U.S. persons whose security-based swap positions may rise to the major security-based swap participant level reasonable, both in the United States and worldwide?
- Are the Commission's estimates of the number of U.S. persons and non-U.S. persons whose security-based swap positions may be attributed to other persons because of guarantees and whether such attribution may result in such persons becoming major security-based swap participants reasonable?
- Is the Commission's estimate that the revisions included in re-proposed Form SBSE and re-proposed Form SBSE–A would not significantly impact the costs and benefits associated with the rules and forms to facilitate registration accurate?
- Has the Commission accurately explained the relationship between the proposed application of the dealer *de minimis* threshold (including the definition of U.S. person) and the programmatic effects and the programmatic costs and benefits of our dealer definition?
- Has the Commission appropriately accounted for the programmatic benefits and costs of subjecting (or not subjecting) certain entities to the security-based swap dealer or major security-based swap participant requirements under the proposed approach?
- Does the Commission's analysis of the proposed treatment of non-U.S. persons who are guaranteed by U.S. persons adequately reflect the expected programmatic costs and benefits associated with this treatment?
- Has the Commission properly analyzed the programmatic costs and benefits associated with requiring U.S. persons to include dealing activity

[1434] Our proposed interpretive guidance also would clarify that U.S. persons performing the major security-based swap participant calculation must include all positions entered into by other parties where it guarantees the transaction. Because this interpretive guidance would not change the scope of the transactions that a U.S. person must consider in performing this calculation, we do not expect it to have any effect on the assessment costs incurred by such persons.

[1435] This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

Similar to our analysis of the assessment costs associated with the *de minimis* exception relating to the definition of the security-based swap dealer, we preliminarily believe that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures described above regarding security-based swap sales and trading practices. There would be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these costs would be compliance costs encompassed within programmatic costs associated with the major security-based swap participant definition.

[1436] This is based on an estimate of the time required for a programmer analyst to modify the software to track the U.S. person status of a counterparty and to record and classify whether a transaction is a transaction conducted within the United States, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to proposed definitions of U.S. person and transaction conducted within the United States. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at $310 per hour for 2 hours) + (Compliance Manager at $269 per hour for 4 hours) + (Programmer Analyst at $234 per hour for 40 hours) + (Senior Internal Auditor at $217 per hour for 4 hours) + (Chief Financial Officer at $473 per hour for 2 hours) = $12,870. For the source of the estimated per hour costs. *See* note 1263, *supra.*

[1437] The $28,030 per entity cost is derived from $15,160 cost of establishing a written compliance policy and procedures regarding obtaining counterparty representations and plus $12,870 one-time programming cost relating to system implementation to maintain counterparties representations and track the U.S. person status of each counterparty in the system.

[1438] *See* note 1433, *supra.*

conducted through a foreign branch in their dealer *de minimis* calculations?

• Has the Commission properly analyzed the programmatic costs and benefits associated with permitting non-U.S. persons not to count dealing transactions with a foreign branch toward their *de minimis* threshold?

• Is the Commission's estimate of the assessment costs associated with determining whether one falls within the security-based swap dealer or major security-based swap participant definitions accurate? Do the Commission's estimates reflect reasonable assumptions about the types of systems that would be necessary to perform the required analyses?

• Does the Commission's estimate of assessment costs appropriately reflect the cost to an entity of determining its U.S.-person status? Does it appropriately reflect the cost of determining whether its counterparty is a U.S. person or is engaging in a transaction conducted within the United States?

• Has the Commission accurately estimated the costs associated with identifying and maintaining records concerning the U.S.-person status of counterparties and the location of transactions?

3. Alternatives Considered

(a) *De Minimis* Exception

As stated above, market participants, foreign regulators and other interested parties have provided views on the application of Title VII requirements in the cross-border context through written comment letters (on other proposed rulemakings by the Commission and on the cross-border interpretive guidance proposed by the CFTC) and meetings with the Commission and our staff.[1439] In particular, commenters have provided their views on how the term ''U.S. person'' should be defined and how the *de minimis* exception in the security-based swap dealer definition should be applied in the cross border context.[1440] These comments have been informative in the Commission's development of our proposed approach to the application of the *de minimis* exception in the cross-border context, and our understanding of the economic consequences of the proposed U.S. person definition and the proposed *de minimis* exception. In this section, we briefly describe our analysis of the economic impact of these alternative approaches suggested by the commenters.

i. Alternatives to the Proposed Definition of U.S. Person

The proposed definition of U.S. person plays a central role in the application of Title VII in the cross-border context. It directly affects the number of entities that will have to register as security-based swap dealers: A potential security-based swap dealer performing its *de minimis* calculation must first determine its own U.S.-person status and then, if it is a non-U.S. person, identify the U.S.-person status of its counterparties in transactions arising out of its dealing activity.[1441] We also propose to use the U.S. person definition in determining the applicability of certain transaction-level requirements under Title VII.[1442] As a result, the U.S. person definition in the proposed rule directly affects the scope of the application of Title VII requirements to the cross-border security-based swap market and, in particular, the number of entities that will be required to register as security-based swap dealers.[1443]

As explained above, our proposed definition of U.S. person is designed to identify those market participants whose security-based swap activity may be particularly likely to affect the U.S. market in a manner relevant to the concerns of Title VII or that may warrant the protections of Title VII. In our view, the security-based swap activity of a person that has its place of residence, incorporation, or its principal place of business within the United States may be particularly likely to warrant the application of Title VII because its security-based swap activity is likely to result in risks being borne by the person within the United States or because its activity raises other concerns that Title VII is intended to address, such as the stability or transparency of the U.S. financial system or the protection of counterparties. Consistent with this view, we have proposed a definition of U.S. person that looks to the location of the person's residence, incorporation, or principal place of business.

In developing our proposed definition of U.S. person, we have considered two alternative definitions: One suggested by commenters, and one proposed by the CFTC in its own cross-border guidance proposal.[1444] In the discussion that follows, we briefly describe these alternatives and the related benefits and costs. A more in-depth analysis of the programmatic costs and benefits of these alternatives will continue in the following sections, in which we analyze the role that these definitions play in the specific application of our proposed approach to the *de minimis* calculations to different types of entities.

Several commenters suggested that we consider the definition of U.S. person found in Regulation S of the Securities Act, noting that at least some market participants would find the definition familiar and easy to apply.[1445] As explained above, we declined to take this approach because we believe that the U.S. person definition in Regulation S addresses specific concerns associated with the offshore offering of unregistered securities that are different from the concerns of Title VII.[1446] Regulation S, among other things, provides safe harbors for offshore offerings of unregistered securities, and a central concern of Regulation S is ensuring that unregistered securities offered abroad do not come to rest within the United States.[1447] Given this concern, the definition of U.S. person used in the Regulation S safe harbors appropriately focuses on the location of the person making the decision to purchase unregistered securities.[1448]

On the other hand, as already noted, Title VII addresses the potential impact of swap and security-based swap transactions on the stability of the U.S. financial system, market transparency, and counterparty protection.[1449] In this

[1439] *See* Section I, *supra.*

[1440] *See, e.g.,* Cleary Letter IV at 2, 6–9; Davis Polk Letter I at 6 n.6.

[1441] *See* proposed Rule 3a71–3(b) under the Exchange Act, as discussed in Section III.B.3, *supra.*

[1442] *See* Sections VIII—X, *supra* (discussing the application of the reporting and public dissemination of security-based swap information, mandatory clearing, and mandatory trade execution requirements). As further discussed in these sections, the U.S. person definition plays a significant role in determining whether a particular transaction is subject to transaction-level requirements.

[1443] *See* Section XV.C.1, *supra* (discussing economic analysis of the proposed *de minimis* exception).

[1444] *See, e.g.,* Cleary Letter IV at 2; SIFMA Letter at 5; *see also* CFTC Cross-Border Proposal, 77 FR 41218) (discussing the definition of U.S. person proposed by the CFTC).

[1445] *See* SIFMA Letter at 5. Regulation S provides, among other things, certain safe harbors regarding registration requirements as they relate to the offshore offering of securities. *See* Offshore Offers and Sales, Final Rules, 55 FR 18306 (May 2, 1990). Under Regulation S, an entity's U.S.-person status is a relevant factor in determining whether certain of the safe harbors are available to a specific offering or sale of securities. *See* 17 CFR 230.902(o) (defining ''U.S. person'').

[1446] *See* Section III.B.4, *supra.*

[1447] *See* Regulation S Adopting Release, 55 FR 18308. Whether securities come to rest in the United States or abroad is relevant to whether the interests served by the registration requirement are affected by the securities offering.

[1448] *See* 17 CFR 230.902(o).

[1449] *See* note 4, *supra.*

context and in light of the nature of the risk arising from such transactions, the location of the person making the decision to enter into a security-based swap appears to us to be less relevant than the location of the person bearing the risk of the transaction. For example, as discussed further below, if the definition of U.S. person in Regulation S were used to determine whether a potential security-based swap dealer should be registered or whether a security-based swap should be subject to Title VII transaction-level requirements, a dealer may not be required to register as a security-based swap dealer based on its dealing activity conducted through its foreign branch, despite the fact that such transactions generally create the same risks for the dealing entity as any other security-based swap activity that it conducts directly from its headquarters. Excluding foreign branches from the definition of U.S. person could result in U.S. banks engaging in significant levels of security-based swap dealing activity, and bearing the risk of such activity, entirely outside the requirements of Title VII, including the registration requirements. This result would reduce the programmatic benefits that the Title VII security-based swap dealer definition or the security-based swap dealer registration requirement is intended to achieve, which are to subject to regulation those dealing entities that we believe are likely, by virtue of engaging in dealing activity within the United States, to pose risk to the U.S. financial system that Title VII was intended to regulate.[1450] Therefore, the definition of U.S. person in Regulation S, with its focus on the location of the person making the investment decision and not on the person bearing the risk of the transaction, is ill-suited to address these types of concerns.

We also considered the interpretation of U.S. person proposed by the CFTC in its cross-border interpretive guidance.[1451] The CFTC definition resembles our proposed definition in many respects, as it also focuses on the location of the person bearing the risk of the transaction. However, we have declined to include in our proposed definition certain categories of entities (or their equivalent in the security-based swap market) that the CFTC has defined as U.S. persons. Most significant of these are (i) entities ''in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person''; (ii) certain investment vehicles, wherever organized or incorporated, ''of which a majority ownership is held, directly or indirectly, by a U.S. person;'' and (iii) certain investment vehicles ''the operator of which would be required to register as a commodity pool operator with the CFTC.'' [1452] The Commission has preliminarily determined not to include within the definition of ''U.S. person'' any entity that is not resident, organized, or incorporated within the United States or does not have its principal place of business in the United States, regardless of any ownership interest by a U.S. person.

We are proposing this approach because we preliminarily believe that Title VII is primarily concerned about security-based swap activity that raises the types of concerns—including the stability of the U.S. financial system, swap market transparency, and counterparty protection—within the United States that Title VII was intended to address.[1453] If U.S. residents or U.S.-based entities suffer losses from their investments in investment vehicles or their investments in entities organized, incorporated, or having the principal place of business located outside the United States, such losses are generally limited to their investments in the form of equity or debt securities. Such investment risks are not related to security-based swaps, and the protection of U.S. investors with respect to investments in equity, debt securities, or investment vehicles, as well as investment management or investment advisory activity, is addressed by other provisions of U.S. securities law pertaining to issuances and offerings of equity or debt securities.

Therefore, the Commission does not believe that it would advance the programmatic benefits of Title VII to include foreign entities or foreign investment vehicles in the U.S. person definition because U.S.-based entities or U.S. residents own them or because a U.S.-based entity is responsible for the foreign entities' liabilities (as proposed by the CFTC). Furthermore, given our focus on reducing risk to, and promoting transparency in, the U.S. security-based swap market, we do not think the U.S.-person status of a commodity pool operator or fund adviser (as opposed to the fund actually entering into the transaction) is in itself relevant in determining whether security-based swap activity occurs within the United States and should therefore be subject to the full range of Title VII requirements because those entities do not bear the risk of the transactions.[1454]

Finally, the Commission preliminarily believes that the alternative definition of U.S. person in Regulation S and the definition of U.S. person proposed by the CFTC would likely cause potential security-based swap dealers and end users to incur higher assessment costs. For example, Regulation S classifies accounts differently depending on whether they are discretionary or non-discretionary,[1455] while our proposed definition would focus on the status of the counterparty to a security-based swap transaction.[1456] The Regulation S definition specifies the U.S. person status of more types of entities than does our proposed definition and would introduce a level of complexity into the definition that is not relevant to the purposes of Title VII. Similarly, the CFTC's proposed interpretation likely would increase assessment costs compared to our proposed definition by, for example, requiring investment funds or their counterparties to determine the U.S.-person status of the direct and indirect owners of such funds. It may be operationally costly and otherwise impracticable to identify the indirect ownership of an investment vehicle given the legal structure of the

[1450] Similarly, under the definition of U.S. person in Regulation S, certain dealers may not be required to register as a security-based swap dealer based on their dealing activity with an investment manager located outside the United States who manages a discretionary account on behalf of a U.S. person, even though the resulting transactions are with that U.S. person and that U.S. person bears the risk arising out of that transaction.

[1451] *See* CFTC Cross-Border Proposal, 77 FR 41218.

[1452] *Id.*

[1453] *See* Section III.B.3, *supra.* As noted above, we do not believe that Title VII's security-based swap dealer registration requirements are the appropriate mechanism for addressing the potential for spillover effects caused by non-U.S. persons that engage in security-based swap dealing activity or other security-based swap activity wholly outside the United States.

[1454] We also note that, to the extent that the commodity pool operator or fund advisor enters into a security-based swap transaction that is conducted within the United States, Title VII would generally apply to that transaction. *See* proposed Rule 3a71–3(a)(5) under the Exchange Act (defining ''transaction conducted within the United States''), as discussed in Section III.B.5, *supra.* However, proposed Rules 3Ca–3(b)(2) and 3Ch–1(b)(2) would not apply the mandatory clearing and mandatory trade execution requirements to transactions between two non-U.S. persons who are not security-based swap dealers and whose performances under security-based swaps are not guaranteed by a U.S. person, even though such transactions are conducted in the United States.

[1455] *Cf.* 17 CFR 230.902(o)(1)(vi), (vii) (defining certain types of accounts to be U.S. persons) with 17 CFR 230.902(o)(2) (defining certain types of accounts not to be U.S. persons).

[1456] Proposed Rule 3a71–3(a)(7)(iii) under the Exchange Act (defining an account as a U.S. person by looking at the status of the account holder or owner), as discussed in Section III.B.4, *supra.*

investment vehicle and the beneficial ownership in book-entry form, and it is unnecessary as those entities bear risks only to the amount of their investment (as opposed to the open-ended risks that can be associated with security-based swap positions). We expect that this complexity could significantly raise assessment costs for market participants.

Based on the above, we preliminarily believe that our proposed definition appropriately focuses on the types of entities that are likely to be actively engaged in the security-based swap market and on the specific categories of such entities whose security-based swap activity has the potential to impact the U.S. financial system. We do not believe that following either the Regulation S approach or the CFTC's proposed interpretation would achieve the benefits of Title VII. We also believe that either approach would result in higher assessment costs.[1457]

ii. Alternatives to the Proposed Rule Regarding Application of the De Minimis Exception

As described above, our proposal also includes a proposed rule regarding the application of the *de minimis* exception in the cross-border context.[1458] This rule prescribes how a person's transactions arising out of its dealing activity must be included in its *de minimis* calculation, depending on whether it is a U.S. person or non-U.S. person. The definition of U.S. person, described above, is central to this rule, as it is used to identify both the status of the person engaged in security-based swap dealing activity and, with respect to a non-U.S. person engaged in dealing activity, the status of its counterparties in transactions connected to dealing activity.

In this section, we will describe certain alternatives to our proposed application of the *de minimis* exception and explain how these alternatives would have affected the programmatic costs and benefits of Title VII. Some of these alternatives have been considered in our discussions of the U.S. person definition.

a. Calculation of U.S. Persons' Transactions for *De Minimis* Exception

Our proposed approach would require a U.S. person to count toward the *de minimis* threshold all transactions it enters into in a dealing capacity, including those it conducts through a foreign branch, regardless of the location of the counterparty to the transaction.[1459] Some commenters suggested that the Commission lacks the authority to subject the dealing activity of a foreign branch of a U.S. bank to Title VII, including our registration requirements, to the extent that it does business only with counterparties that are not U.S. persons outside the United States.[1460] As noted above, commenters generally took the view that the Commission should consider using the Regulation S definition of U.S. person for purposes of applying the *de minimis* exception in the cross border context, as Regulation S specifically excludes from its definition of U.S. person foreign branches of U.S. banks.[1461] Presumably, under the approach suggested by some commenters, the headquarters of a U.S. bank would be designated a U.S. person, whereas each of its foreign branches would be classified as a separate non-U.S. person for purposes of Title VII.

For the reasons already noted above,[1462] we are not proposing to follow this approach. Because of the nature of the risks posed by security-based swaps, which are borne by the entire legal entity even if the transaction is entered into by a foreign branch of such entity, consistent with the Commission's approach to the meaning of ''person'' in the security-based swap dealer definition, as discussed above,[1463] we are proposing to define the term ''U.S. person'' to include the entire entity, including its foreign branches. In addition, such separation is inconsistent with the focus in Title VII on the effect of a person's dealing activity on the U.S. financial system, including the risks such person bears as a result of its dealing activity. Although we recognize that certain U.S.-based banks have chosen to conduct some or all of their foreign security-based swap business through foreign branches,[1464] we preliminarily believe that, given Title VII's goal of addressing potential dealing risk to the U.S. financial system caused by security-based swap dealing activity, the *de minimis* exception should apply to all security-based swap dealing activity of a person that has its principal place of business within, or is incorporated or organized within, the United States, regardless of which part of such person carries out such dealing activity wherever its counterparties are located, even if elements of that activity occur outside the United States.

We preliminarily believe that the alternative approach suggested by commenters could reduce the programmatic benefits of security-based swap dealer registration under Title VII and the ensuing substantive requirements applicable to registered security-based swap dealers if the *de minimis* calculation for U.S. persons engaged in dealing activity does not include the entire volume of such persons' dealing activity. Drawing a distinction between the branches, desks, or offices of a U.S. person and the entity as a whole would be inconsistent with the fact that the U.S. person as a whole bears the risk of all security-based swap transactions that it enters into, including those transactions conducted through a foreign branch or office with non-U.S. person counterparties located outside the United States.[1465]

Even if the headquarters of a U.S. bank were already registered by virtue of its own security-based swap dealing activity in the United States, the commenters' suggested approach would presumably allow the same bank, through its foreign branches, to engage in unlimited dealing activity with non-U.S. persons outside the United States without registering those branches.[1466] We do not view such disparate regulatory treatment of two parts of the same legal entity to be consistent with the purposes of Title VII, particularly given that this approach would appear to place entirely outside the scope of regulation under Title VII transactions that pose risks to a U.S. bank that are indistinguishable from those arising from transactions done directly from the home office of that bank.[1467] We believe that excluding transactions conducted through foreign branches from the *de minimis* calculations would not achieve the programmatic benefits intended by

[1457] We will discuss the relative costs and benefits of these alternatives in more detail in the context of our analysis of alternatives to proposed rules that use the U.S. person definition in the following sections.

[1458] *See* Proposed Rule 3a71–3(b) under the Exchange Act, as discussed in Section III.B.3, *supra*. *See also* 17 CFR 240.3a71–2.

[1459] *See* proposed Rule 3a71–3(b)(1)(i) under the Exchange Act, as discussed in Section III.B.3, *supra*.

[1460] See, e.g., Sullivan & Cromwell Letter at 2.

[1461] *See* notes 218 and 219, *supra*.

[1462] *See* Section III.B.3, *supra*

[1463] *See* Section III.B.4, *supra*.

[1464] *See* Sections II.A.2 and III.B.6, *supra* (discussing the dealing structures used by U.S.-based entities).

[1465] *See* Section II.A.3, *supra* (discussing the example of AIG FP).

[1466] For example, treating the branch differently may remove the branch entirely from Title VII's rules. This could prevent regulation of capital adequacy and other risk mitigating requirements, even though all of the risk from the transaction is residing within the entity as a whole, creating risk for the U.S. financial system.

[1467] Security-based swap activity conducted through a foreign branch poses risks to the entire entity to which the branch belongs that are generally indistinguishable from those posed by security-based swap activity conducted through an office. The experience of AIG FP demonstrates that the security-based swap activity of a foreign office can lead to the default of the entire entity. *See* Section II.A.3, *supra*.

the Title VII requirements because it would leave unaddressed risks associated with security-based swap dealing activity that occurs within the United States and therefore raises the types of concerns with respect to the U.S. market that Title VII's dealer requirements were intended to address.

b. Calculation of Non-U.S. Persons' Transactions for De Minimis Exception (including transactions conducted within the United States)

Our proposed application of the *de minimis* exception to non-U.S. persons engaged in security-based swap dealing activity would require them to include in their *de minimis* calculations any transactions with U.S. persons or any transactions otherwise conducted within the United States, to the extent they are entered into in a dealing capacity. Given the focus on Title VII on the stability and transparency of the U.S. financial system and the protection of counterparties,[1468] we preliminarily believe that it is appropriate to require non-U.S. persons that engage in dealing activity within the United States and therefore are likely to raise these types of concerns to count such dealing activity toward their *de minimis* thresholds. To the extent that the aggregate notional amount of transactions arising from a non-U.S. person's dealing activity involving U.S. persons or otherwise conducted within the United States exceeds the *de minimis* threshold in the trailing 12-month period, we would require a non-U.S. person to register as a security-based swap dealer.

In developing our proposed application of the *de minimis* threshold to non-U.S. persons, we have considered alternatives suggested by commenters or proposed by the CFTC. We declined to incorporate these alternatives into our approach.

Some commenters suggested that a non-U.S. person that engages in dealing activity with U.S.-person counterparties through an affiliated U.S. intermediary should be permitted to register in a limited capacity or should not be required to register as a security-based swap dealer.[1469] Specifically, some commenters suggested that the Commission adopt an approach that is modeled on the Commissions' existing regimes, permitting non-U.S. security-based swap dealers to transact with U.S. persons without registering in the United States if those transactions are intermediated by a U.S.-registered security-based swap dealer.[1470]

We preliminarily believe that the above alternative suggested by commenters would potentially reduce the programmatic benefits intended by Title VII. To the extent that a non-U.S. person engages in security-based swap dealing entirely with U.S. persons or within the United States, that person's security-based swap activity raises the concerns that security-based swap dealer regulation under Title VII intends to address: First, the entity's dealing activity raises customer protection concerns, which the external business conduct standards and segregation requirements of Title VII are intended to address; second, the entity's dealing activity raises financial responsibility concerns, which Title VII's entity-level requirements applicable to registered security-based swap dealers are intended to address; finally, the entity's dealing activity raises transparency, regulatory oversight, counterparty risk and systemic risk concerns, which Title VII intends to address through its regulatory reporting, public reporting, mandatory clearing, and mandatory trade execution requirements. Although the Commission recognizes that some of these concerns might be addressed by regulating the intermediary, as in the broker-dealer context, we preliminarily believe that only if the non-U.S. person dealer itself is subject to Title VII would it be possible to address the entire range of concerns that Title VII dealer regulation is intended to address.[1471]

The CFTC has proposed that non-U.S. persons that are guaranteed by U.S. persons be required to include in their *de minimis* calculation all transactions carried out in a dealing capacity with any counterparty, wherever that counterparty is located, just as a U.S. person acting in a dealing capacity would be required to do.[1472] As discussed above, the Commission recognizes that such guarantees of the security-based swap transactions of non-U.S. persons may pose risk to the U.S. financial system; however, the Commission does not believe that the security-based swap dealer regulation in Title VII is the appropriate vehicle for regulating the dealing activity of non-U.S. persons occurring outside the United States with other non-U.S. persons.[1473] As discussed above, the Commission preliminarily believes that the risk posed to the U.S. markets by the dealing activity of non-U.S. persons outside the United States whose performance under security-based swaps is guaranteed by a U.S. person does not necessarily raise the full range of concerns that Title VII dealer regulation is intended to address. Such activity may give rise to security-based swap positions that raise concerns within the United States that are relevant to the purposes of Title VII if those positions are large enough to affect the stability of the institution providing the guarantee and potentially the stability of the U.S. financial system more generally. This risk, however, arises from attribution of security-based swap positions to the guarantor due to the guarantee rather than the dealing activity per se. In these circumstances, we preliminarily believe that the risks relating to these positions warrant registration only to the extent that the positions exceed the thresholds established for major security-based swap participant registration.[1474]

In light of the foregoing, we do not believe that requiring a non-U.S. person that is guaranteed by a U.S. person to count every transaction entered into in a dealing capacity toward its *de minimis* threshold and to register as a security-based swap dealer even if it engaged in no dealing activity with U.S. persons or otherwise within the United States would materially increase the programmatic benefits of the dealer registration requirements. Although it is likely that such an approach would cause more entities to register as dealers than does our proposed approach, to the extent that these entities were required to register as security-based swap dealers even though they engaged in dealing activity only with non-U.S. persons outside the United States, we preliminarily believe that this alternative would impose programmatic costs on these entities without a corresponding increase of the programmatic benefits to the U.S. security-based swap markets that are intended by the security-based swap dealer requirements in Title VII, as we

[1468] Pub. L. No. 111–203 Preamble. *See* Section I and note 4, *supra.*

[1469] *See, e.g.,* Société Générale Letter II; Cleary Letter IV.

[1470] *See, e.g.,* Davis Polk Letter I at 11 n.17 (''This model is similar to the mode of operation permitted by Rule 15a–6 under the Securities Exchange Act of 1934, pursuant to which foreign broker-dealers interface with U.S. customers under arrangements with affiliated or non-affiliated broker-dealers without themselves registering as broker-dealers in the U.S.''); Cleary Letter IV at 22 (''Accordingly, as one alternative, we suggest that the Commissions adopt an approach that is modeled on the Commissions' existing regimes, permitting non-U.S. swap dealers to transact with U.S. persons without registering in the U.S. if those transactions are intermediated by a U.S.-registered swap dealer. This would be consistent with the approach adopted by the SEC under Rule 15a–6 and prior interpretative precedents with respect to non-U.S. securities dealers.'').

[1471] *See* Section III.B.4, *supra.*

[1472] *See* CFTC Cross-Border Proposal, 77 FR 41221.

[1473] *See* Section III.B.7, *supra.*

[1474] *Id.*

do not believe that the dealing activity of such persons (to the extent that it involves only non-U.S. counterparties outside the United States) raises the types of concerns within the United States that Title VII dealer registration was intended to address.

Another alternative to our proposed approach would be not to require non-U.S. persons that engage in dealing activity with other non-U.S. persons through transactions conducted within the United States to include such transactions in their *de minimis* calculations.[1475] As noted above, Title VII is intended to promote accountability and transparency in the U.S. financial system,[1476] and to do so, it is necessary to ensure that security-based swap dealing activity that occurs within the United States is subjected to the requirements of Title VII,[1477] including those related to external business conduct protections and other transaction-level requirements. Even if a non-U.S. person located outside the United States is engaging in dealing activity with non-U.S. persons located in the United States, it is, among other things, providing liquidity in the U.S. security-based swap market and thus engaging in dealing activity within the United States. Excluding such dealing activity from Title VII would reduce the programmatic benefits of security-based swap dealer regulation because it would reduce the transparency of the U.S. market and deprive counterparties within the United States of the protections of Title VII. We recognize that the ultimate programmatic benefits discussed here associated with the application of the security-based swap dealer regulation in the cross-border context would be affected by the substantive rules adopted by the Commission. The Commission is reopening the comment periods for our outstanding rulemaking releases that concern security-based swaps and security-based swap market participants and were proposed pursuant to certain provisions of the Exchange Act, as amended by Title VII of the Dodd-Frank Act.

iii. Aggregation of Affiliate Dealing Activity

Our proposed rule regarding the application of the *de minimis* exception in the cross-border context also requires a U.S. person who enters into security-based swap transactions in a dealing capacity, or non-U.S. person who enters into security-based swap transactions with U.S. persons or transactions conducted within the United Sates in a dealing capacity, to count toward such person's *de minimis* threshold certain transactions of its affiliates. Specifically, such persons would be required to include in the *de minimis* calculation the notional amount of (1) the transactions entered into in a dealing capacity by all of their commonly controlled affiliates who are U.S. persons and (2) the transactions with U.S. persons or transactions conducted within the United States entered into in a dealing capacity by all of its commonly controlled affiliates who are non-U.S. persons. However, such calculation would exclude any affiliate that is a registered security-based swap dealer if such person who relies on the *de minimis* exception maintains separate operations independent of any affiliate who is a registered security-based swap dealer and does not involve, or act in concert with, any affiliate that is a registered security-based swap dealer in any stage of a security-based swap transaction that arises out of its dealing activity.[1478]

In developing this rule, we considered the approach proposed by the CFTC, which we understand to permit non-U.S. persons to aggregate only the transactions carried out in a dealing capacity by their commonly controlled affiliates that are also non-U.S. persons, rather than including all such transactions by all commonly controlled affiliates, wherever located. As noted above,[1479] we declined to follow the CFTC's proposal in part out of concern that doing so could confer competitive advantages on affiliated corporate groups that engage in security-based swap dealing activity through both U.S. and foreign affiliates by allowing them to operate with an effective *de minimis* threshold twice higher than the threshold applicable to security-based swap dealers operating solely within the United States or solely in one or more foreign-based affiliates.

We recognize that our approach may require some persons to register that might not be required to register under the CFTC's approach and thus would impose programmatic costs on those entities that they might not otherwise incur. It may also require more firms to engage in assessment, as even those with activity levels far below the threshold will probably perform these calculations, if they are part of a larger corporate family with a number of security-based swap dealers. However, we believe that those corporate groups operating a centralized booking model or centralized risk management should be able to have the central booking entity or central risk management location perform the *de minimis* aggregation calculation for the entire corporate group. For purposes of this analysis, we have assumed that corporate groups are likely to perform such assessments centrally.[1480]

We preliminarily conclude that our proposed application of the aggregation requirement to the *de minimis* calculation in the cross-border context is appropriate in light of the purposes of Title VII and of dealer regulation in particular. The aggregation requirement is designed to discourage evasion of the dealer registration requirement by a corporate group by engaging in large volumes of dealing activity through multiple affiliates, none of which engages in activity exceeding the *de minimis* threshold.[1481] Therefore, we have preliminarily determined that a corporate group's dealing activity should be considered as a whole.

Similarly, to be entitled to rely on the *de minimis* exception, an unregistered affiliate within a corporate group must have an independent operation separate from any affiliate who is a registered security-based swap dealer and must not act in concert with the registered affiliate in any stage of a security-based swap transaction. The Commission preliminarily believes that this requirement would have the benefit of preventing evasion.

(b) Major Security-Based Swap Participants

Several commenters suggested that foreign government-related entities, such as sovereign wealth funds and multilateral development institutions,

[1475] The CFTC's proposed guidance does not trigger application of Title VII requirements based on the location of the security-based swap activity.

[1476] *See* Section II, *supra.*

[1477] *See* proposed Rule 3a71–3(a)(5) under the Exchange Act (defining ''transaction conducted within the United States''), as discussed in Section III.B.5, *supra.*

[1478] *See* proposed Rule 3a71 under the Exchange Act. This approach is consistent with the aggregation requirement described in the Intermediary Definitions Release. *See* Intermediary Definitions Release, 77 FR 30631 (requiring aggregation of dealing activity by commonly controlled affiliates for purposes of *de minimis* calculation).

[1479] *See* Section III.B.4.(c), *supra.*

[1480] We understand, based on comment letters and our staff's discussion with market participants, that many market participants keep a global swap book and operate a central booking model. *See, e.g.,* Cleary Letter I at 9. If this is not the case with respect to a particular market participant, then the number of entities that need to perform the *de minimis* calculation would increase. The Commission currently does not have available information with respect to the number of market participants active in the security-based swap market that utilize a central booking model.

[1481] *See* Intermediary Definitions Release, 77 FR 30631.

should be excluded from the major security-based swap participant definition.[1482] By potentially capturing fewer major security-based swap participants, this alternative approach would correspondingly decrease the programmatic costs and benefits associated with Title VII regulation of major security-based swap participants. We preliminarily believe that security-based swap transactions entered into by these types of foreign government-related entities with U.S. persons pose the same risks to the U.S. security-based swap markets as transactions entered into by entities that are not foreign-government related. Moreover, as noted above,[1483] based upon our conversations with market participants we understand that foreign government-related entities rarely enter into security-based swap transactions (as opposed to other types of swap transactions) in amounts that would trigger the obligation to register as a major security-based swap participant. Therefore, we preliminarily believe that the proposed approach considering only security-based swap transactions entered into with a U.S. person as counterparty in determining a non-U.S. person's status as a major security-based swap participant, regardless of whether such non-U.S. person is a foreign government-related entity, is more appropriately tailored to the objectives of Title VII.

Request for Comment

The Commission requests comments on all aspects of the economic analysis of the alternatives to the proposed definition of U.S. person, the proposed application of the *de minimis* exception and the proposed application of the major security-based swap participant definition in the cross-border context. The Commission requests that commenters provide data and sources of data to support any comments. In addition, the Commission requests commenters' views on the following:

- Has the Commission appropriately considered the costs and benefits associated with adopting the definition of U.S. person found in Regulation S? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with adopting the same definition of U.S. person as proposed by the CFTC? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with adopting a rule to permit foreign branches of U.S. banks to exclude transactions conducted through a foreign branch from their *de minimis* calculations? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with not requiring a non-U.S. person to count its transactions conducted within the United States with non-U.S. persons towards its *de minimis* threshold? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with requiring a non-U.S. person whose performance under security-based swaps is guaranteed by a U.S. person to count all transactions connected to its security-based swap dealing activity toward its *de minimis* threshold, even though such non-U.S. person only conducts dealing activity with non-U.S. persons outside the United States? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Has the Commission appropriately considered the costs and benefits associated with the proposed rule regarding aggregation of security-based swap transactions entered into in a dealing capacity by a person and its affiliates under common control and requiring that such aggregated notional amount be included in such person's *de minimis* calculation? If not, please explain why and provide information on how such costs and benefits should be assessed. Should the Commission require operational independence, from the cost and benefit point of view, as a condition to excluding transactions of an affiliate that is a registered security-based swap dealer from a person's *de minimis* calculation?
- Has the Commission appropriately considered the costs and benefits associated with excluding foreign government-related entities, such as sovereign wealth funds and multilateral development institutions, from the definition of major security-based swap participant? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Should the Commission take into account the potential impact of the Push-Out Rule and the Volcker Rule in considering the approach to application of the Title VII requirements to foreign branches of the U.S. banks? For example, what would the costs and benefits be with respect to requiring foreign branches of U.S. banks to include transaction conducted through a foreign branch in its *de minimis* calculation, or requiring a non-U.S. person to include its transactions with foreign branches in its major security-based swap participant calculation, after taking into account the effects of the Push-Out Rule and the Volcker Rule on U.S. banks? Please explain how such costs and benefits should be assessed.

E. Economic Analysis of the Proposed Application of the Entity-Level and Transaction-Level Requirements to Security-Based Swap Dealers and Major Security-Based Swap Participants

As stated above, persons who fall within the statutory definitions of security-based swap dealer and major security-based swap participant, as further defined by the rules adopted in the Intermediary Definition Adopting Release, will be required to register with the Commission and comply with a host of ensuing substantive requirements.[1484] These requirements include entity-level requirements [1485] and transaction-level requirements [1486] set forth in Sections 15F and 3E of the Exchange Act and rules and regulations thereunder.[1487]

1. Entity-Level Requirements

Section 764(a) of the Dodd Frank Act adds a new Section 15F(e) to the Exchange Act, which imposes capital and margin requirements on security-based swap dealers and major security-based swap participants.[1488] These requirements are designed to reduce the probability of these institutions' failure, mitigate the consequences of these institutions failures, protect customer assets, and contribute to the stability of the security-based swap market in particular and the U.S. financial system more generally.[1489] The benefits of the capital and margin requirements for security-based swap dealers are expected to include enhancing protection of customer assets and mitigation of the consequences of a firm failure, while allowing security-based swap dealers appropriate flexibility in how they conduct their security-based swaps business.[1490] Similarly, the

[1482] *See* note 382, *supra.*

[1483] *See* Section IV.C.3, *supra.*

[1484] *See* Section XV.D.1, *supra.*

[1485] *See* Section III.C.3(a), *supra.*

[1486] *See* Section III.C.3(b), *supra.*

[1487] *See* Section 15F of the Exchange Act, 15 U.S.C. 78o-8, and Section 3E of the Exchange Act, 15 U.S.C. 78c–4.

[1488] *See* Section 15F(e) of the Exchange Act, 15 U.S.C. 78o–10(e).

[1489] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70218 and 70303.

[1490] *See id.* at 70218.

benefits of the capital and margin requirements for major security-based swap participants are expected to include neutralization of the credit risk between a major security-based swap participant and a counterparty, which would lessen the impact on the counterparty if the major security-based swap participant failed.[1491] We believe the capital and margin requirements strengthen the financial system by reducing the potential for defaults by entities engaging in security-based swap activity and mitigating the impact of such defaults, including the adverse spillover or contagion effect of a default by security-based swap dealers and major security-based swap participants.[1492]

In addition, registered security-based swap dealers and major security-based swap participants are required to establish robust risk management systems adequate for managing their day-to-day business,[1493] keep books and records and maintain daily trading records of the security-based swaps they enter into,[1494] establish internal systems and controls,[1495] diligently supervise the security-based swap business,[1496] designate a chief compliance officer,[1497] and keep books and records open to inspection and examination by the Commission.[1498]

The programmatic costs and benefits associated with the entity-level requirements applicable to security-based dealers and major security-based swap participants under Title VII are (or will be) addressed in more detail in connection with the applicable rulemakings implementing Title VII.[1499]

With respect to the application of the entity-level requirements in the cross-border context, as stated above, the Commission preliminarily believes that it would be consistent with the objective of Title VII to ensure the safety and soundness of registered security-based swap dealers [1500] to require foreign security-based swap dealers to comply with the entity-level requirements.[1501] Similarly, the Commission preliminarily does not believe that foreign major security-based swap participants should be excluded from the application of any entity-level requirements.[1502] However, the Commission recognizes the concerns raised by commenters regarding the possibility that foreign security-based swap dealers may be subject to conflicting or duplicative regulatory requirements and proposes to mitigate the costs associated with the potential duplicative compliance obligations through the Commission's proposed approach to substituted compliance.[1503] We have considered the effect of the proposed rules regarding substituted compliance on its effect on efficiency, competition and capital formation above [1504] and will discuss the economic considerations of the proposed rules regarding substituted compliance more fully below.[1505]

Alternative

The CFTC proposed to treat Title VII margin requirements with respect to non-cleared swaps as transaction-level requirements and would not apply the margin requirements to foreign non-bank swap dealers (including foreign affiliates of U.S. persons regardless of whether such foreign affiliates' performance obligations under swaps are guaranteed by U.S. persons) when they transact swaps with non-U.S. person counterparties whose performance obligations under the swaps are not guaranteed by U.S. persons.[1506] The prudential regulators' margin proposal does not apply Title VII margin requirements to a foreign covered swap entity [1507] with respect to foreign non-cleared swaps or foreign non-cleared security-based swaps.[1508] In practice, the Commission's proposed treatment of the margin requirements as an entity-level requirement differs from the CFTC's and the Prudential regulators' proposals in that non-bank foreign security-based swap dealers (regardless of whether their performance of obligations under security-based swaps are guaranteed by U.S. persons) would be subject to the margin requirements with respect to their transactions with non-U.S. person counterparties whose performance obligations under the security-based swaps are not guaranteed by U.S. persons.

The Commission could have taken the CFTC's approach to treat margin requirements as transaction-level requirements by proposing not to apply margin to non-bank foreign security-based swap dealers with respect to their transactions with non-U.S. person counterparties whose performance obligations under the security-based swaps are not guaranteed by U.S. persons. We also could have taken the prudential regulators' approach by proposing not to apply margin to foreign non-bank security-based swap dealers

[1491] *Id.*

[1492] These spillover effects could create instability for the financial markets more generally, such as by limiting the willingness of market participants to extend credit to each other, and thus substantially reduce liquidity and valuations for particular types of financial instruments. *See, e.g.,* Markus K. Brunnermeier and Lasse Heje Pedersen, ''Market Liquidity and Funding Liquidity,'' Review of Financial Studies (2009); Denis Gromb and Dimitri Vayanos, ''A Model of Financial Market Liquidity,'' Journal of the European Economic Association (2010).

[1493] *See* Section 15F(j)(2) of the Exchange Act, 15 U.S.C. 78o–10(j)(2); *see also* Section III.C.3(b)(3), *supra.*

[1494] *See* Sections 15F(f) and (g) of the Exchange Act, 15 U.S.C. 78o–10(f) and (g); *see also* Section III.C.3(b)(4), *supra.*

[1495] *See* Sections 15F(j)(3) and (4) of the Exchange Act, 15 U.S.C. 78o–10(j)(3) and (4); Section III.C.3(b)(5), *supra. See also* proposed Rule 15Fh–3(i)(2)(iv) under the Exchange Act.

[1496] *See* Section 15F(h)(1)(B) of the Exchange Act, 15 U.S.C. 78o–10(h)(1)(B). The Commission has proposed a rule that would establish supervisory obligations that incorporates principles from Section 15(b) of the Exchange Act and existing SRO rules. Proposed Rule 15fh–3(i) under the Exchange Act, as discussed in the External Business Conduct Standards Proposing Release, 76 FR 42419–21. *See also* Section IIIC.3(b)(6), *supra.*

[1497] *See* Section 15F(k) of the Exchange Act, 15 U.S.C. 78o–10(k); *see also* Section III.C.3(b)(7), *supra.*

[1498] *See* Section 15F(l)(C) of the Exchange Act, 15 U.S.C. 78o–10(l)(C); *see also* Section III.C.3(b)(8), *supra.*

[1499] *See, e.g.,* Capital, Margin, and Segregation Proposing Release, 77 FR 70214.

[1500] *See* Section 15F(e)(3)(A) of the Exchange Act, 15 U.S.C. 78o–8(e)(3)(A) (''To offset the greater risk to the security-based swap dealer . . . and the financial system arising from the use of security-based swaps that are not cleared, the requirements imposed under paragraph (2) shall—(i) help ensure the safety and soundness of the security-based swap dealer . . . .'').

[1501] *See* Section III.C.5, *supra.*

[1502] *Id.*

[1503] *See* Section XI, *supra* (discussing the Commission's overall proposed approach to substituted compliance in the context of Title VII).

[1504] *See* Section XV.C, *supra.*

[1505] *See* Section XV.I, *infra.*

[1506] *See* CFTC Cross-Border Proposal, 77 FR 41226, 41228, and 41237.

[1507] A ''foreign covered swap entity'' is defined as any entity prudentially regulated by the prudential regulators and required to register as a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant under section 4s of the Commodity Exchange Act or section 15F of the Exchange Act that (i) is not a company organized under the laws of the United States or any State; (ii) is not a branch or office of a company organized under the laws of the United States or any State; (iii) is not a U.S. branch, agency or subsidiary of a foreign bank; and (iv) is not controlled, directly or indirectly, by a company that is organized under the laws of the United States or any State. *See* Prudential Regulator Margin and Capital Proposal, 76 FR 27581.

[1508] A ''foreign non-cleared swap or foreign non-cleared security-based swap'' is defined as a non-cleared swap or non-cleared security-based swap with respect to which: (i) The counterparty to the foreign covered swap entity is not a company organized under the laws of the United States or any State, not a branch or office of a company organized under the laws of the United States or any State, and not a person resident in the United States; and (ii) performance of the counterparty's obligations to the foreign covered swap entity under the swap or security-based swap has not been guaranteed by an affiliate of the counterparty that is a company organized under the laws of the United States or any State, a branch of a company organized under the laws of the United States or any State, or a person resident in the United States. *See* Prudential Regulator Margin and Capital Proposal, 76 FR 27581.

that are not controlled by a U.S. person with respect to their transactions with non-U.S. person counterparties whose performance obligations under the security-based swaps are not guaranteed by U.S. persons. Either approach would not treat margin as an entity-wide requirement.

The Dodd-Frank Act seeks to address the counterparty credit risk exposures arising from OTC derivatives by, among other things, imposing mandatory clearing and margin requirements for non-cleared security-based swaps.[1509] The margin requirements established by the Commission with respect to non-cleared security-based swaps will operate in tandem with mandatory clearing provisions in the Dodd-Frank Act.[1510] Registered clearing agencies that operate as CCPs manage credit and other risks through a range of controls and methods, including prescribed margin rules for their participants.[1511] Thus, the mandatory clearing requirements in effect will establish margin requirements for cleared security-based swaps and, thereby, complement the margin requirements for non-cleared security-based swaps established by the Commission and the prudential regulators.[1512]

In addition, margin requirements, along with the capital standards and segregation requirements, are an integral part of the proposed financial responsibility requirements for security-based swap dealers that are intended to enhance the financial integrity of these entities.[1513] The margin requirements proposed by the Commission are intended to work in tandem with the capital requirements to strengthen the financial system by reducing the potential for default to an acceptable level and limiting the amount of leverage that can be employed by security-based swap dealers and other market participants.[1514] For example, with respect to cleared security-based swaps, for which margin requirements will not be established by the Commission, the Commission proposed a capital charge that would apply if a nonbank security-based swap dealer collects margin collateral from a counterparty in an amount that is less than the deduction that would apply to the security-based swap if it was a proprietary position of the non-bank security-based swap dealer.[1515] In addition, the Commission proposed capital charges to address exceptions from the margin collection requirements with respect to non-cleared security-based swaps, as an alternative to margin collateral by requiring a non-bank security-based swap dealer to hold sufficient net capital to enable it to withstand losses if a counterparty defaults.[1516]

In the context of the statutory framework and the Commission's proposed financial responsibility program for non-bank security-based swap dealers, if the Commission were to treat margin as a transaction-level requirement and apply margin to certain non-cleared transactions but not others, any credit risk of such other transactions that are not collateralized by mutually agreed contractual arrangement between a security-based swap dealer and its counterparty would need to be addressed by imposing capital charges, which would increase the amount of net capital a non-bank security-based swap dealer is required to set aside. While the increased liquid capital would provide an additional buffer for a non-bank security-based swap dealer to withstand losses resulting from a default of its counterparties, it also would increase business costs. Depending on the size of a foreign security-based swap dealers' foreign business that is not collateralized, the size of the increased amount of the capital charge may be very large. As discussed in the Capital, Margin, and Segregation Proposing Release, if security-based swap dealers are required to maintain an excessive amount of capital, that amount may result in certain costs for the markets and the financial system, including the potential for the reduced availability of security-based swaps for market participants who would otherwise use such transactions to hedge the risks of their business, or engage in other activities that would promote capital formation.[1517] End users also may incur increased transaction costs in connection with the increased capital charges as security-based swap dealers are likely to pass on the financial burden of any increased capital requirements to customers.[1518] If the transaction costs are too high, end users may seek other cheaper alternatives, such as cleared security-based swaps or voluntary collateral posting to reduce transaction pricing, or they may decide not to transact security-based swaps at all.

In the cross-border context, the Commission is proposing not to apply the mandatory clearing requirement to transactions between a foreign security-based swap dealer and non-U.S. person counterparties whose performance obligations under security-based swaps are not guaranteed by U.S. persons. Therefore, a foreign security-based swap dealer's exposure to counterparty credit risk arising from its transactions with these non-U.S. person counterparties would not be addressed by the Title VII mandatory clearing requirement. If margin requirements do not apply to these transactions, the counterparty credit risk arising from such transactions may be left uncollateralized. In the event that non-U.S. counterparties experience financial difficulties, and the foreign security-based swap dealer's uncollateralized exposures to such counterparties have grown exponentially due to severe market movement, the uncollateralized foreign credit exposures may jeopardize the safety and soundness of the foreign security-based swap dealer, whose failure would have negative impact on the U.S. security-based swap market and present risk to the U.S. financial system. Such uncollateralized credit risk could be addressed by imposing capital charges under the Commission's proposed capital rule, but taking this approach would result in increased costs and higher barrier for new foreign entrants into the U.S. security-based swap market. To mitigate the cost of increased capital charges, a foreign security-based swap dealer may choose to enter into credit support arrangements and request some or all counterparties to post collateral. This would be particularly the case when a foreign security-based swap dealer is transacting in a foreign market where collateral posting is a common market practice to manage counterparty credit risk or in a foreign jurisdiction that

[1509] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70258; *see also* Section 3C(a)(1) and Section 15F(e)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1) and 78o–10(e)(1).

[1510] *See* Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1) (requiring that security-based swaps must be cleared through a registered clearing agency unless an exception to mandatory clearing exists).

[1511] *See* Clearing Agency Standards Adopting Release, 77 FR 66230–32.

[1512] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70259; *see also* Prudential Regulator Margin and Capital Proposal, 76 FR 27567 (''In the derivatives clearing process, central counterparties (CCPs) manage the credit risk through a range of controls and methods, including a margining regime that imposes both initial margin and variation margin requirements on parties to cleared transactions. Thus, the mandatory clearing requirement established by the Dodd-Frank Act for swaps and security-based swaps will effectively require any party to any transaction subject to the clearing mandate to post initial and variation margin to the CCP in connection with that transaction.'').

[1513] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70303 and 70259.

[1514] *See id.* at 70304.

[1515] *See id.* at 70245–46.

[1516] *See id.* at 70246.

[1517] *See id.* at 70306.

[1518] *Id.*

imposes margin requirements because the foreign security-based swap dealer would encounter less resistance to posting margin from foreign counterparties. To the extent that the costs of capital charges drive foreign security-based swap dealers to voluntarily collateralize their exposures to counterparty credit risks, the differences in the economic consequences between treating margin as an entity-level requirement as opposed to a transaction-level requirement would narrow.

By contrast, under the proposed approach, the counterparty credit exposures arising from a foreign non-bank security-based swap dealers transactions with non-U.S. persons whose performance of obligations under non-cleared security-based swaps are not guaranteed by U.S. persons would be collateralized but the collateral would not be segregated.[1519] The collateral received would protect the foreign security-based swap dealer against the default risk of the foreign counterparty and reduce the probability of the failure of the foreign security-based swap dealer and the spillover and contagion risk of a foreign counterparty's default that may impact the U.S. financial system. In addition, such collateral could finance the business needs of the foreign security-based swap dealer and increase its liquidity. The Commission preliminarily believes that the proposed treatment of margin as an entity-level requirement would generate the benefit of offsetting the greater risk to the foreign security-based swap dealer and the U.S. financial system arising from the use of non-cleared security-based swaps and help ensure the safety and soundness of the security-based swap dealers [1520] without imposing excessive capital charges at the same time, which may raise the barrier for foreign dealers to enter the U.S. security-based swap market. The proposed treatment of margin also may increase funds available to finance a foreign security-based swap dealer's business activity, which would decrease the borrowing needs and lower the costs of business.

Commenters raised concerns about the potential costs and burdens of applying duplicative margin collection requirements to foreign transactions.[1521] The Commission preliminarily believes that the costs of complying with duplicative margin requirements can be addressed by the proposed substituted compliance framework. As stated in our cost and benefit analysis with respect to substituted compliance below, the Commission preliminarily believes that substituted compliance would not substantially change the programmatic benefits intended by the entity-level requirements in Section 15F of the Exchange Act, including margin requirements; however, to the extent that substituted compliance eliminates duplicative compliance costs, registered foreign security-based swap dealers that are eligible for a substituted compliance determination may incur lower programmatic costs associated with implementation or compliance with the specified Title VII requirements (including margin requirements).[1522]

Request for Comment

The Commission requests comments on all aspects of the economic analysis of the alternatives to the proposed definition of U.S. person, the proposed application of the *de minimis* exception and the proposed application of the major security-based swap participant definition in the cross-border context. The Commission requests that commenters provide data and sources of data to support any comments. In addition, the Commission requests commenters' views on particular issues below. Responses that are supported by empirical data and analysis provide great assistance to the Commission in considering the economic consequences of the proposed treatment of certain requirements as entity-level and other requirements as transaction-level requirements.

- Has the Commission appropriately considered the costs and benefits associated with an approach that would treat all the requirements set forth in Section 15F of the Exchange Act, and rules and regulations thereunder, as entity-level requirements and apply them on an entity-wide basis, except for the external business conduct standards and segregation requirements? Has the Commission appropriately estimated the costs and benefits associated with requiring a foreign security-based swap dealer to conform its capital and risk management practices to the rules proposed by the Commission? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Are there any requirements that are treated as entity-level in the Commission's cross-border proposal that should be treated as transaction-level requirements from the cost and benefit point of view? If so, please explain how such treatment would affect the costs and benefits of the proposed approach.
- Has the Commission appropriately considered the costs and benefits associated with treating margin as an entity-level requirement, taking into account the interplay between the minimum capital requirement and margin requirement? If not, please explain why and provide information on how such costs and benefits should be assessed. What would be the economic impact of treating margin as an entity-level requirement? Should the Commission adopt the CFTC's approach by treating margin as a transaction-level requirement, given the costs and benefits of this alternative? Should the Commission adopt the prudential regulators' approach to exclude certain foreign security-based swaps from application of the margin requirement, given the costs and benefits of this alternative?

2. Transaction-Level Requirements

With respect to the application of these transaction-level requirements to security-based swap dealers active in the cross-border context, the Commission proposes Rule 3a71–3(c) under the Exchange Act regarding application of customer protection requirements to security-based swap dealers,[1523] Rule 18a–4(e) regarding application of segregation requirements to foreign security-based swap dealers,[1524] Rule 3a67–10(b) regarding application of customer protection requirements to foreign major security-based swap participants,[1525] and Rule 18a–4(f) regarding application of segregation requirements to foreign major security-based swap participants.[1526] In the following sections, we discuss the economic considerations of these proposed rules regarding application of transaction-

[1519] A foreign security-based swap dealer that is not a registered broker-dealer would not be required to segregate assets held as collateral received from a non-U.S. person counterparty with respect to non-cleared security-based swap transactions. A foreign security-based swap dealer that is a registered broker-dealer would be required to segregate margin collateral received from all counterparties. *See* proposed Rule 18a–4(e)(1) under the Exchange Act and discussion in Section III.C.4(b).ii, *supra.*

[1520] *See* Section 15F(e)(3)(A) of the Exchange Act, 15 U.S.C. 78o–10(e)(3)(A).

[1521] *See* Cleary Letter IV at 18 (''If non-U.S. margin requirements are essentially the same, or are merely different, but not significantly different, it is not obvious how the Agencies could justify their proposal or *ex ante* cost-benefit analysis.'')

[1522] *See* Section XV.I, *infra.*

[1523] *See* proposed Rule 3a71–3(c) under the Exchange Act, as discussed in Section III.C.4(b).i, *supra.*

[1524] *See* proposed Rule 18a–4(e) under the Exchange Act, as discussed in Section III.C.4(b).ii, *supra.*

[1525] *See* proposed Rule 3a67–10(b) under the Exchange Act, as discussed in Section IV.D.1(b), *supra.*

[1526] *Id.*

level requirements to security-based swap dealers or major security-based swap participants in the cross-border context.

(a) Proposed Rule 3a71–3(c)—Application of Customer Protection Requirements

Title VII imposes certain external business conduct requirements on registered security-based swap dealers that govern their interactions with counterparties to security-based swap transactions.[1527] These provisions are intended to protect the counterparties of registered dealers in such transactions by ensuring that security-based swap dealers, among other things, provide adequate disclosures to their counterparties about the risks of the transaction.[1528]

Proposed Rule 3a71–3(c) provides that registered security-based swap dealers, with respect to their Foreign Business, shall not be subject to the requirements relating to business conduct standards described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder, other than Section 15F(h)(1)(B) of the Exchange Act, and the rules and regulations thereunder. We are proposing to define ''Foreign Business'' as security-based swap transactions entered into, or offered to be entered into, by or on behalf of a foreign security-based swap dealer or a U.S. security-based swap dealer in a dealing capacity that are not its ''U.S. Business.'' [1529]

''U.S. Business'' would be defined separately for foreign security-based swap dealers and U.S. security-based swap dealers. With respect to a foreign security-based swap dealer, ''U.S. Business'' would include any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than a foreign branch), or any transaction conducted within the United States.[1530] With respect to a U.S. security-based swap dealer, ''U.S. Business'' would include any transaction by or on behalf of the U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.[1531] With the exception of the exclusion of transactions conducted through a foreign branch from the definition of a U.S. security-based swap dealer's U.S. Business, these definitions closely track the application of the *de minimis* exception to the transactions of U.S. persons and non-U.S. persons under proposed Rule 3a71–3(b) under the Exchange Act. Moreover, whether a transaction occurs within the United States or with a U.S. person, which are key elements of the Foreign Business and U.S. Business definitions, would turn on the same factors that are used to determine whether the *de minimis* exception applies to the security-based swap activity of a non-U.S. person engaged in dealing activity.[1532]

In the External Business Conduct Standards Proposing Release, we have considered the expected benefits and costs of the proposed rules regarding external business conduct standards as they apply to dealers generally, and we expect to discuss the benefits and costs associated with the final rules in our adopting release. In the proposing release, we noted that these rules may be expected to benefit security-based swap dealers and other market participants in a number of ways. For example, the requirement for security-based swap dealers to provide a daily mark should enable counterparties to have a clearer picture of their relationship with security-based swap dealers, including by providing a meaningful reference point for calculating variation margin.[1533] Similarly, our proposed rules regarding security-based swap dealers' obligations to know their counterparties may be expected to help ensure that security-based swap dealers recommend only transactions that are appropriate to the needs and resources of their counterparties.[1534] Proposed rules regarding the standards of conduct in transactions involving special entities should likewise help ensure that such business is awarded on the merits of the transaction.[1535]

We also noted that the proposed external business conduct rules would be likely to impose certain costs on security-based swap dealers and other market participants. For example, they would require security-based swap dealers to make various disclosures and establish systems for monitoring compliance with these requirements.[1536]

Because this proposing release does not change the substantive external business conduct requirements but only potentially reduces the number of registered security-based swap dealers and the number of transactions involving registered security-based swap dealers that would be subject to the external business conduct requirements, our discussion below focuses on how proposed Rule 3a71–3(c) affects the scope of application of these rules. This change in scope will directly affect the resulting programmatic benefits and costs. We also discuss the assessment costs associated with distinguishing Foreign Business from U.S. Business.

i. Programmatic Benefits and Costs

Our proposed rules may affect the programmatic costs and benefits associated with requirements regarding external business conduct standards in two ways. First, we are proposing rules regarding application of the *de minimis* exception in the cross-border context that may be expected to reduce the number of non-U.S. persons that would otherwise be required to register as security-based swap dealers.[1537] Because the business conduct and conflict-of-interest rules apply only to registered dealers, reducing the number of registered dealers would reduce the number of entities required to comply with these dealer-specific rules. Second, we are proposing not to require foreign or U.S. security-based swap dealers to comply with requirements relating to external business conduct standards with respect to their Foreign Business, which would reduce the proportion of registered dealers' transactions that are required to comply with these rules. We preliminarily believe that these proposed rules will not significantly affect the programmatic benefits of the rules but should reduce programmatic costs that they impose on market participants.

As already noted, Title VII is concerned directly with risk to the U.S. financial system, transparency, and the protection of investors,[1538] and we preliminarily believe that our proposed

[1527] *See* Sections 15F(h) and 15F(j)(5) of the Exchange Act.

[1528] *See* Section III.C.3(a)i, *supra.*

[1529] Proposed Rule 3a71–3(a)(2) under the Exchange Act, as discussed in Section III.C.4.(a), *supra.*

[1530] Proposed Rule 3a71–3(a)(6)(i) under the Exchange Act, as discussed in Section III.C.4.(a), *supra.*

[1531] Proposed Rule 3a71–3(a)(6)(ii) under the Exchange Act, as discussed in Section III.C.4.(a), *supra.*

[1532] *See* proposed Rule 3a71–3(b)(1)(i) under the Exchange Act (identifying transactions that U.S. persons and non-U.S. persons must include in their *de minimis* calculations); proposed Rule 3a71–3(a)(2) under the Exchange Act (defining ''Foreign Business''); proposed Rule 3a71–3(a)(6) under the Exchange Act (defining ''U.S. Business'').

[1533] External Business Conduct Standards Proposing Release, 76 FR 42449.

[1534] *See id.* at 42450.

[1535] *See id.* at 42450.

[1536] *See id.* at 42443–448.

[1537] *See* proposed Rule 3a71–3(b) under the Exchange Act, as discussed in Section III.B.3, *supra.*

[1538] *See* note 4, *supra.*

approach to applying requirements related to external business conduct standards is consistent with these goals. As noted above in our discussion of the programmatic costs and benefits associated with our application of the *de minimis* exception in the cross-border context, we believe that our proposed approach to the *de minimis* calculation appropriately identifies those entities whose dealing activity poses the type of stability, transparency, and counterparty-protection concerns that Title VII is intended to address.[1539] To the extent that the number of entities required to comply with these requirements relating to external business conduct standards decline because the number of registered foreign security-based swap dealers declines, we do not believe that there will be a significant change in programmatic benefits, as foreign security-based swap dealers whose transactions with U.S. persons and transaction conducted within the United States falls below the *de minimis* threshold raise concerns no different from those posed by U.S. security-based swap dealers whose security-based swap activity falls below the threshold. We see no reason, therefore, for treating these two types of entities differently.

We also preliminarily believe that our proposal not to require compliance with these requirements with respect to Foreign Business, even if a security-based swap dealer is registered, will have an insignificant effect, if any, on programmatic benefits and should reduce programmatic costs. We recognize that our proposed rule would not require foreign and U.S. security-based swap dealers to comply with these rules with respect to a significant proportion of their transactions. However, because Title VII is directed to the promoting the stability of the U.S. financial system and protecting counterparties, we do not believe that this proposed approach would reduce the programmatic benefits of our regulatory framework, given that such transactions, including any customer-facing activity, occur entirely or in significant part outside the United States where the parties typically do not expect U.S. customer-protection requirements to apply. At the same time, our definition of U.S. Business should ensure that registered dealers are required to comply with these requirements in their transactions with those counterparties that are entitled to protection in light of the purposes of Title VII or that reasonably expect to be protected in their dealings with registered security-based swap dealers.

We preliminarily believe that our proposed approach will reduce programmatic costs for registered security-based swap dealers generally in proportion to their relative volume of Foreign Business, although certain of the costs associated with policies and procedures established to comply with these requirements are likely to remain fairly constant to the extent that a security-based swap dealer has any U.S. Business. Permitting security-based swap dealers to enter into transactions arising out of their Foreign Business without complying with these requirements should reduce the costs of compliance with Title VII for such registered security-based swap dealers and reduce the competitive effects of the Title VII dealer requirements by reducing unnecessary disparities between registered and unregistered security-based swap dealers in their foreign business.

ii. Assessment Costs

The assessment costs associated with the proposed rules regarding these requirements would primarily flow from the determination of whether a given transaction is part of a registered security-based swap dealer's U.S. Business or its Foreign Business. Both for U.S. and foreign security-based swap dealers, ''U.S. Business'' is defined to capture largely the same transactions that these entities are required to calculate in determining whether they are required to register as security-based swap dealers.[1540] Because of this overlap with the information needed to perform the *de minimis* calculation, the incremental costs of these determinations for registered security-based swap dealers should be minimal. We preliminarily believe that a registered foreign security-based swap dealer would not incur additional assessment costs above those already incurred in establishing and maintaining a system to identify and monitor the status of its counterparties and transactions for purposes of the *de minimis* calculation, as described above.[1541]

U.S. security-based swap dealers would likely not have incurred these types of systems costs in performing the *de minimis* calculation because our proposed approach would require U.S. persons to count all of their dealing transactions toward their *de minimis* threshold. However, U.S. security-based swap dealers who conduct some or all of their security-based swap business through foreign branches and seek to rely on the Foreign Business exception to the external business conduct requirement would likely establish a similar system to identify such transactions. We believe that the costs of such a system would closely track the costs associated with the systems that non-U.S. persons are likely to establish to perform the dealer *de minimis* calculation and to determine whether a foreign security-based swap dealer must comply with Title VII external business conduct requirements, as described above, as U.S. security-based swap dealers conducting business through a foreign branch will also need to classify their counterparties and transactions in order to determine whether external business conduct requirements apply.[1542] Based on a review of DTCC–TIW data relating to single-name credit default swap activity in 2011, there were no more than five U.S. security-based swap dealers that conducted dealing activity through foreign branches. Assuming that all such entities elected to establish a system to identify their Foreign Business, the total assessment costs associated with our proposed rule would be approximately $85,200 in one-time annual programming costs and $76,435 in ongoing annual costs.[1543]

iii. Alternatives

The Commission's proposed approach to the application of the requirements relating to external business conduct standards is similar to the CFTC's proposed approach in certain aspects but differs from the CFTC's proposed approach in other aspects. With respect to U.S. security-based swap dealers, both the Commission's and the CFTC's proposed approaches would not apply the requirements relating to external business conduct standards to such U.S. security-based swap dealers' transactions conducted through a foreign branch outside the United States with non-U.S. person counterparties.[1544] On the other hand,

[1539] *See* Section III.B.4, *supra.*

[1540] The sole exception is that, for U.S. security-based swap dealers, transactions conducted through a foreign branch, which would be counted toward the U.S. person's *de minimis* threshold, would not be treated as U.S. Business for purposes of applying the external business conduct requirements.

[1541] *See* Section XV.D.2, *supra.*

[1542] *See* Section XV.D.2(a), *supra.*

[1543] As noted above in connection with the calculation of the *de minimis* threshold by foreign security-based swap dealers, we estimate the per-entity one-time annual programming costs to total approximately $17,040 and the per-entity ongoing annual costs to total $15,287. *See* note 1425, *supra.*

[1544] *See* CFTC Cross-Border Proposal, 77 FR 41230 and the text accompanying note 116. However, the CFTC's cross-border proposal did not address whether external business conduct

Continued

with respect to foreign security-based swap dealers, the Commission's proposed approach would apply the requirements relating to external business conduct standards to such foreign security-based swap dealers' transactions conducted within the United States with all counterparties and transactions conducted outside the United States with foreign branches while the CFTC's proposed approach would not apply external business conduct standards to non-U.S. swap dealers' swap transactions with non-U.S. person counterparties even though such transactions are conducted within the United States.[1545]

The Commission could have proposed an approach to the application of the external business conduct standards that is the same as the CFTC's but instead, is proposing a territorial approach with a focus on counterparty protection in the United States. The Commission preliminarily believes that imposing external business conduct standards on U.S. security-based swap dealers with respect to their transactions conducted outside the United States through foreign branches would cause U.S. security-based swap dealers to incur compliance costs with respect to their foreign business [1546] conducted through foreign branches, which would not be incurred by foreign security-based swap dealers when foreign security-based swap dealers conduct security-based swap transactions outside the United States in foreign markets.

The Commission recognizes that non-bank U.S. security-based swap dealers who do not conduct transactions through foreign branches would be subject to the external business conduct standards with respect to all transactions, including transactions with non-U.S. persons. The Commission preliminarily believes that, unlike U.S. security-based swap dealers who are banks and conduct foreign business through their foreign branches, a non-bank U.S. security-based swap dealer may conduct dealing activity with non-U.S. persons directly from its U.S. location or from its foreign offices that may not have separate operations that are subject to substantive local financial regulation and may not operate for valid business reasons. Therefore, transactions conducted by a non-bank U.S. security-based swap dealer with non-U.S. persons are an inseparable part of such non-bank dealer's security-based swap business. Consistent with our traditional entity approach to the regulation of broker-dealers, the Commission preliminarily believes that it is appropriate to apply the external business conduct standards to a non-bank U.S. security-based swap dealer with respect to all transactions. To the extent that non-bank U.S. security-based swap dealers conduct dealing activity with non-U.S. persons through foreign affiliates, the proposed approach to application of the external business conduct standards would not impose burdens on non-bank U.S. security-based swap dealers' activity in the foreign security-based swap markets and would achieve the benefits of protecting investors from abusive financial services practices in the United States. The Commission requests comments on the costs and benefits associated with the proposed application of external business conduct standards to U.S. security-based swap dealers and whether the proposed approach would burden bank and non-bank U.S. security-based swap dealers' foreign dealing business.

With respect to foreign security-based swap dealers, the Commission proposes to apply the external business conduct standards to their transactions with non-U.S. persons if such transactions are conducted within the United States. As stated above, the proposed approach to application of the external business conduct standards to transactions conducted within the United States would generate the benefit of protecting investors from abusive financial services practices. To permit registered foreign security-based swap dealers not to comply with the external business conduct standards when they conduct transactions in the United States with non-U.S. person may not adequately prevent abusive financial services practices in the U.S. security-based swap market and would permit double standards in security-based swap dealings in the United States. Therefore, the Commission preliminarily believes that the proposed territorial approach with a focus on counterparty protection in the United States is appropriate.

Request for Comment

• The Commission requests data to assess the costs and benefits of the proposed rule regarding application of external business conduct standards described above. Specifically, the Commission requests comment on (1) whether the proposed rule not to require a registered U.S. bank security-based swap dealer and foreign security-based swap dealer to comply with the external business conduct standards with respect to its foreign business would compromise counterparty protection from abusive financial services practices in the United States; (2) whether the proposed rule to require a registered non-bank U.S. security-based swap dealer to comply with the external business conduct standards with respect to all transactions regardless of whether the counterparties are U.S. persons or non-U.S. persons would affect its foreign dealing business; and (3) the Commission's estimate of the assessment costs with respect to the proposed rule. Commenters should provide an assessment of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of the proposed rule. Commenters should provide analysis and empirical data to support their views on the costs and benefits associated with the proposals.

(b) Proposed Rule 18a–4(e)—Application of Segregation Requirements

i. Programmatic Benefits and Costs

a. Pre-Dodd Frank Segregation Practice

Segregation is intended to protect customer assets by ensuring that cash and securities that a registered security-based swap dealer holds for security-based swap customers are isolated from the proprietary assets of the security-based swap dealer and identified as property of such customers.[1547] Customer assets related to OTC derivatives are currently not consistently segregated from dealer proprietary assets in today's OTC derivatives markets.[1548] With respect to non-cleared derivatives, available information suggests that there is no uniform segregation practice but that collateral for most accounts is not segregated.[1549] In the absence of a

standards would apply to transactions conducted through a foreign branch or agency of a U.S. security-based swap dealer within the United States where the counterparty is a non-U.S. person.

[1545] *See* CFTC Cross-Border Proposal, 77 FR 41229 and 41237.

[1546] *See* proposed Rule 3a71–3(a)(2) and the discussion in Section III.C.4(a), *supra.*

[1547] *See* Section III.C.4.(b)(2), *supra. See also* Capital, Margin, and Segregation Proposing Release 77 FR 70274.

[1548] *See* ISDA Margin Survey 2012. *See also* Capital, Margin, and Segregation Proposing Release, 77 FR 70325.

[1549] *See generally* ISDA Margin Survey 2012. According to this survey, where an independent amount (initial margin) is collected, ISDA members reported that most (approximately 72.2%) was commingled with variation margin and not segregated, and only 4.8% of the amount received was segregated with a third party custodian. The survey also notes that while the holding of the independent amounts and variation margin together continues to be the industry standard both contractually and operationally, it is interesting to note that the ability to segregate has been made increasingly available to counterparties over the past three years on a voluntary basis, and has led to 26% of independent amount received and 27.8%

segregation requirement, the likelihood that security-based swap customers would suffer losses upon a security-based swap dealer's default may be substantially higher than may be expected if security-based swap dealers are subject to such a requirement.[1550]

b. Benefits of the Segregation Requirements

Segregation requirements would limit the potential losses for security-based swap customers if a registered security-based swap dealer fails.[1551] The extent to which assets are in fact protected by proposed Rule 18a–4(a)–(d) would depend on how effective they are in practice in allowing assets to be readily returned to customers.[1552] In the cross-border context, the effectiveness of the segregation requirement with respect to foreign security-based swap dealers in practice may depend on many factors, including the type and objective of the insolvency or liquidation proceeding and how the U.S. Bankruptcy Code, SIPA, banking regulations, and applicable foreign insolvency laws are interpreted by the U.S. bankruptcy court, SIPC, Federal Deposit Insurance Corporation, and relevant foreign authorities. In the Capital, Margin, and Segregation Proposing Release, we stated that it would be difficult to measure the benefits of the segregation requirements proposed by the Commission under Section 3E of the Exchange Act;[1553] however, we believe that Rule 15c3–3, the existing segregation rule for broker-dealers, would provide a reasonable template for crafting the segregation requirements for security-based swap dealers.[1554] The ensuing increased confidence of market participants when transacting in security-based swaps, as compared to the OTC derivatives market as it exists today, should increase the desire to trade security-based swaps and generally benefit market participants.[1555]

c. Costs of the Segregation Requirements

Segregation requirements also will impose certain costs on registered security-based swap dealers as well as other market participants. The costs associated with individual account segregation include fees charged by custodians to monitor individual account assets and to account for potential legal risks and liabilities of custodians to account beneficiaries or dealers, as well as operational costs to account for collateral on an individual customer basis.[1556] The costs associated with omnibus segregation would include operational costs and increase in costs of funds to dealers due to inability to use customer funds,[1557] compared to the baseline today that dealers in general do not segregate customer collateral for security-based swaps, and to the extent collateral is segregated, it is not done so on the terms that would be required by the segregation rules proposed by the Commission in the Capital, Margin, and Segregation Proposing Release.[1558] The operational costs include costs to establish qualifying bank accounts and to perform the calculations required to determine the amount that is required at any one time to be maintained in the reserve account.[1559] The increase in costs of funds to the extent that collateral a dealer holds that could otherwise be rehypothecated to finance business activity would no longer be permitted for that purpose could equal the borrowing costs of the dealer. The extent of the increase of cost of funds to dealers would depend on how much collateral associated with security-based swaps and held by dealers today consists of initial margin that they can rehypothecate, *i.e.,* that is not now segregated as would be required under the new Rules 18a–4(a)–(d) proposed by the Commission in the Capital, Margin and Segregation Proposing Release.[1560] The Commission currently does not have sufficient information to quantify the increase of costs of funds to dealers as a result of the proposed segregation requirement and seeks comment on the impact of the proposed application of segregation requirements on the increase of costs of funds.[1561]

d. Costs and Benefits of Proposed Rules 18a–4(e)(1) and (2) Regarding Application of Segregation Requirements to Foreign Security-Based Swap Dealers

Proposed Rules 18a–4(e)(1) and (2) would not apply segregation requirements to a foreign security-based swap dealer in certain circumstances. Specifically, with respect to non-cleared security-based swap transactions, a foreign security-based swap dealer that is not a broker-dealer would not be subject to the segregation requirements set forth in Section 3E of the Exchange Act and paragraphs (a)–(d) of the proposed Rule 18a–4 with respect to margin received from non-U.S. person counterparties.[1562] Therefore, under the proposed Rule 18a–4(e)(1)(ii), non-U.S. person counterparties to non-cleared security-based swaps with a registered foreign security-based swap dealer that is not a registered broker-dealer would not be ''customers'' of such registered foreign security-based swap dealer and would not be given the preferred priority status with respect to the segregated assets in the omnibus account maintained by such foreign security-based swap dealer in a stockbroker liquidation proceeding

of independent amount delivered being segregated in some respects. *See* ISDA Margin Survey 2012 at 10. *See also* Capital, Margin, and Segregation Proposing Release, 77 FR 70325.

[1550] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70325.

[1551] *Id.; see also* CFTC and Commission, Statement on MF Global about the deficiencies in customer futures segregated accounts held at the firm (Oct. 31, 2011).

[1552] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70325.

[1553] *Id.*

[1554] *Id.*

[1555] *Id.* at 70326.

[1556] In the Capital, Margin, and Segregation Proposing Release, we stated that a commenter to the CFTC raised concerns with the length of time and the costs to comply with an individual segregation mandate. Specifically, the commenter raised concerns regarding the number of collateral arrangements that would be required. The commenter estimated, based on discussion with its members, that ''a rough estimate of the time it would take to establish the necessary collateral arrangements is 1 year and eleven months, with an associated cost of $141.8 million, per covered swap entity.'' *See* Capital, Margin, and Segregation Proposing Release 77 FR 70326.

[1557] *See* Capital, Margin, and Segregation Proposing Release 77 FR 70326, citing SIFMA/ISDA Comment Letter to the Prudential Regulators (''First, because the collateral cannot be rehypothecated, and because the collateral amounts will be very large, CSEs will be limited to investing very large amounts of eligible collateral in assets that generate low returns.'').

[1558] *See* proposed Rules 18a–4(a)–(d) under the Exchange Act and Capital, Margin, and Segregation Proposing Release 77 FR 70274–78.

[1559] See section V.C. of the Capital, Margin, and Segregation Proposing Release for a discussion of implementation costs. In cases where an SBSD is jointly registered as a broker-dealer, the costs of adapting existing systems to account for security-based swap transactions may not be material in light of the similarities between the systems and procedures required by Rule 15c3–3 and those that would be required by proposed Rules 18a–4(a)–(d).

[1560] *See* Capital, Margin, and Segregation Proposing Release, 77 FR 70326. *See also* Manmohan Singh, ''Velocity of Pledged Collateral: Analysis and Implications,'' IMF Working Paper (Nov. 2011), *available at: http://nowandfutures.com/large/VelocityOfPledgedCollateral-wp11256(imf).pdf*; Manmohan Singh and James Aitken, ''The (sizable) Role of Rehypothecation in the Shadow Banking System,'' IMF Working Paper (July 2010), *available at: http://www.imf.org/external/pubs/ft/wp/2010/wp10172.pdf.*

[1561] The amount of initial margin collateral associated with security-based swaps posted to and held by dealers today that they can rehypothecate is unknown to the Commission.

[1562] *See* proposed Rule 18a–4(e)(1)(ii) under the Exchange Act. A foreign security-based swap dealer that is a broker-dealer shall be subject to the segregation requirements set forth in Section 3E of the Exchange Act and paragraphs (a)–(d) of the proposed Rule 18a–4 with respect to margin received from any counterparties. *See* proposed Rule 18a–4(e)(1)(i) under the Exchange Act.

under the U.S. Bankruptcy Code.[1563] With respect to a registered foreign security-based swap dealer that is not a foreign bank with a branch or agency in the United States and is not a registered broker-dealer, the proposed Rule 18a–4(e)(2)(ii) would subject such foreign security-based swap dealer to the segregation requirements with respect to any assets posted by a non-U.S. person counterparty to secure a cleared security-based swap transaction only if such foreign security-based swap dealer accepts any assets from, for, or on behalf of a U.S. person counterparty to secure a security-based swap.[1564] The proposed Rule 18a–4(e)(2)(iii) would not subject a registered foreign security-based swap dealer that is a foreign bank with a branch or agency in the United States to the segregation requirements with respect to any assets posted by a non-U.S. person counterparty to a security-based swap transaction.[1565]

As stated above, the proposed Rules 18a–4(e)(1) and (2) regarding application of the segregation requirements to foreign security-based swap dealers would focus on applying the segregation requirements to provide customer protection to U.S. person counterparties and would not extend the same customer protection to non-U.S. person counterparties unless not doing so would result in losses to U.S. person counterparties.[1566] To the extent that a foreign security-based swap dealer would not be subject to the segregation requirements, the programmatic benefits described above, such as prompt return of customer assets and limiting the potential losses for security-based swap customers in the event of a failure of a registered security-based swap dealer, would not be extended to non-U.S. person counterparties. In addition, the benefits of potential increased confidence of market participants when transacting in security-based swaps, as brought about by the segregation requirements, would not occur in the markets where such foreign security-based swap dealer transacts with non-U.S. person counterparties.

There also would be corresponding decrease in costs as a result of the proposed Rule 18a–4(e)(1)(ii) not requiring a foreign security-based swap dealer that is not a registered broker-dealer to segregate assets collected from non-U.S. person counterparties as collateral to secure non-cleared security-based swaps. A foreign security-based swap dealer would not need to provide notice required pursuant to Section 3E(f)(1)(A) of the Exchange Act to a non-U.S. person counterparty with respect to the right to elect individual account segregation.[1567] This would save operational costs to account for collateral on an individual customer basis and save fees charged by custodians as described above.[1568] A foreign security-based swap dealer that is not a registered broker-dealer also would have cost-savings associated with omnibus segregation, including less operational cost (such as the cost to perform the calculations required to determine the amount that is required at any one time to be maintained in the reserve account) as described above, and may be able to rehypothecate non-U.S. person counterparty's assets to finance its business activity, which would result in borrowing cost savings. The extent of these cost savings would depend on how much collateral posted by non-U.S. person counterparties and held by dealers today to secure security-based swaps consisting of margin that is available for dealers to use (*i.e.,* that is not now segregated).

The Commission preliminarily believes that the above decreases in benefits and costs as a result of the proposed Rule 18a–4(e)(1) and (2) are not those programmatic benefits and costs intended by the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder. Such decreases reflect the exclusion of foreign security-based swap dealers (that are not registered broker-dealers) from the segregation requirements when they transact with non-U.S. persons in the foreign markets, which we believe is consistent with the objective of the Dodd-Frank Act to protect the U.S. markets and participants in those markets.[1569]

e. Costs and Benefits of Proposed Rule 18a–4(e)(3) Regarding Disclosures

There would be new costs and benefits associated with compliance with the segregation requirements for foreign security-based swap dealers due to the disclosures requirements in the proposed Rule 18a–4(e)(3). Specifically, proposed Rule 18a–4(e)(3) would require a registered foreign security-based swap dealer to disclose to its counterparty that is a U.S. person the potential treatment of the assets segregated by such registered foreign security-based swap dealer pursuant to Section 3E of the Exchange Act, and the rules and regulations thereunder, in insolvency proceedings under U.S. bankruptcy law and any applicable foreign insolvency laws. Such disclosure shall include whether the foreign security-based swap dealer is subject to the segregation requirement set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to the assets collected from the U.S. person counterparty who will receive the disclosure, whether the foreign security-based swap dealer could be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code, whether the segregated assets could be afforded customer property treatment under the U.S. bankruptcy law, and any other relevant considerations that may affect the treatment of the assets segregated under Section 3E of the Exchange Act in insolvency proceedings of the foreign security-based swap dealer. The Commission preliminarily believes that such disclosure would greatly benefit U.S. person counterparties and assist them in evaluating the legal risk in respect of posting collateral to a foreign security-based swap dealer and the likely treatment of their assets held as collateral in the event of insolvency or liquidation of the foreign security-based swap dealer whom they transact with and post collateral to.

With respect to costs, the Commission preliminarily believes that a foreign security-based swap dealer should be able to include such disclosure in the credit support agreement pursuant to which assets would be posted to margin, guarantee, or secure a security-based swap transaction. The costs associated with such disclosure may include legal costs related to consulting bankruptcy counsels, both U.S. counsel and relevant foreign counsel, in respect of the

[1563] *See* Section III.C.4.(b)(2), *supra.*

[1564] *See* proposed Rule 18a–4(e)(2)(ii) under the Exchange Act. A registered foreign security-based swap dealer that is a registered broker-dealer shall be subject to the segregation requirements set forth in Section 3E of the Exchange Act and paragraphs (a)–(d) of the proposed Rule 18a–4 under the Exchange Act with respect to margin received from any counterparties. *See* proposed Rule 18a–4(e)(2)(i) under the Exchange Act.

[1565] *See* proposed Rule 18a–4(e)(2)(iii) under the Exchange Act.

[1566] *See* Section III.C.4.(b)(2), *supra.*

[1567] *See* Section 3E(f)(1)(A) of the Exchange Act, 15 U.S.C. 78c–5(f), and proposed Rule 18a–4(d)(1) under the Exchange Act.

[1568] Although the segregation requirements with respect to non-cleared security-based swaps described in Section 3E(f) and the proposed Rule 18a–4(a)–(d) would not apply to a foreign security-based swap dealer when such foreign security-based swap dealer transacts with a non-U.S. person counterparty, proposed Rule 18a–4(e)(1) does not prevent parties from making segregation arrangements by contractual agreement under applicable local law. If parties were to make segregation arrangements, certain benefits and costs would arise; however, these benefits and costs would be outside the Title VII regulatory regime and would not be attributable to the Title VII regulatory regime.

[1569] *See* Section III.C.4.(b)(2), *supra.*

potential treatment of the segregated assets under U.S. bankruptcy law and applicable foreign insolvency laws, the costs of drafting such disclosure, and the costs of updating such disclosure whenever there is a material change of U.S. bankruptcy law or applicable foreign laws that may render the prior disclosure inaccurate or misleading. The Commission preliminarily estimates that the average costs associated with such disclosure would be less than $2,000,000 and a narrow range could be between $760,000 and $920,000.[1570]

ii. Assessment Costs

The assessment cost associated with proposed Rule 18a–4(e)(1) and (2) should primarily be related to inquiries about a counterparty's U.S. person status, whether a security-based swap is a cleared or non-cleared transaction, whether the foreign security-based swap dealer is a registered broker-dealer, whether the foreign security-based swap dealer, whether the foreign security-based swap dealer has a branch or agency in the United States, and whether the foreign security-based swap dealer accepts any assets from, or on behalf of, a U.S. person counterparty to security a security-based swap, in order to determine whether a transaction would be subject to the segregation requirements. A security-based swap dealer should know whether it is a registered broker-dealer and whether a particular transaction is submitted for clearing and should not incur any assessment costs relating to determining whether a transaction is cleared or non-cleared security-based swap. A foreign security-based swap dealer may need to make an internal inquiry as to whether it has a branch or agency in the United States and whether it accepts collateral from, or on behalf of, a U.S. person counterparty. Such inquiry should be a factual inquiry involving consulting the corporate secretary, in-house attorney or compliance manager without the need for further research and, therefore, the cost of such inquiry should be minimal. The Commission preliminarily believes that the costs associated with inquiring about a counterparty's U.S. person status should be subsumed in the assessment costs of the *de minimis* rule and the requirements relating to the external business conduct standards since a security-based swap dealer only needs to inquire about a counterparty's U.S. person status and implement systems to record and track the counterparty status once in order to assess and comply with all the Title VII requirements that depend on such factual inquiry. Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rules 18a–4(e)(1) and (2) alone should be minimal.

The assessment cost associated with the disclosures in proposed Rule 18a–4(e)(3) would be related to inquiries about a counterparty's U.S. person status, which also would be subsumed in the assessment costs associated with proposed Rules relating to the *de minimis* exception and the requirements relating to the external business conduct standards.

Request for Comment

- Is it appropriate, from the cost and benefit point of view, not to require foreign security-based swap dealers to comply with the segregation requirements when they transact with non-U.S. person counterparties? Are there other costs and benefits not mentioned above? Specifically, the Commission requests comment on (1) whether the proposed approach to application of the segregation requirements to foreign security-based swap dealers based on their status as a broker-dealer, foreign security-based swap dealer that is a bank with a branch or agency in the United States, or foreign security-based swap dealer that is not a broker-dealer and is not a bank with a branch or agency in the United States would generate the benefit of effectively administering the segregation requirement in practice and protecting U.S. counterparties, (2) the costs of custodian fees, the operation costs and the costs associated with increased costs of funds due to inability to use customer asserts as a result of a foreign security-based swap dealer being required to comply with the segregation requirements, (3) the costs of preparing the disclosures required in proposed Rule 18a–4(e)(3) and (4) the assessment costs associated with the proposed Rule 18a–4(e).
- Is it appropriate, from the cost and benefit point of view, to require a foreign security-based swap dealer to disclose potential treatment of the assets segregated by such foreign security-based swap dealer in insolvency proceedings under U.S. bankruptcy law and any applicable foreign insolvency laws? Are there other costs and benefits not mentioned above?
- Is it appropriate, from the cost and benefit point of view, to require a foreign security-based swap dealer to disclose to its non-U.S. person counterparty that it is not subject to the segregation requirements and that funds or property provided by such non-U.S. person counterparty would not be treated as ''customer property'' as that term is defined in 11 U.S.C. 741?

F. Economic Analysis of Application of Rules Governing Security-Based Swap Clearing in Cross-Border Context

The Dodd-Frank Act amends the Exchange Act to require central clearing of security-based swaps that the Commission determines should be cleared,[1571] and it directs entities that perform clearing agency functions for security-based swaps to register with the Commission.[1572] In this section, we first discuss the costs and benefits resulting from clearing agency registration and then consider the costs and benefits associated with the proposed rule regarding application of the clearing agency registration requirement to foreign clearing agencies. Following this, we discuss the costs and benefits that result from requiring security-based swap market participants to centrally clear transactions and then examine the trade-offs associated with the proposed rule implementing the mandatory clearing requirement in the cross-border context.

[1570] This estimate is based on staff experience in undertaking legal analysis of U.S. bankruptcy law treatment of customer assets held by broker-dealers and assumes that foreign security-based swap dealers would seek outside legal counsel to prepare the disclosures described in proposed Rule 18a–4(e)(3) and that the legal analysis of the treatment of customer property under a complex foreign insolvency law regime may cost $50,000 per entity and the same legal analysis under a less complex foreign insolvency law regime or the U.S. bankruptcy law regime may cost $30,000 per entity. We recognize that the complexity of the insolvency laws relating to liquidation of a foreign security-based swap dealer may vary greatly, and that we do not have insight into various insolvency law regimes such that we could reasonably determine what insolvency law regime may be considered more or less complex for these purposes. Thus, based on our understanding of the U.S. bankruptcy law analysis relating to liquidation of a broker-dealer, taking into account the potential application of various foreign insolvency laws, we believe that an average of the costs associated with more complex and less complex insolvency law regimes equaling $40,000 per entity could reasonably approximate the average costs for a foreign security-based swap dealer to prepare the disclosures required in proposed Rule 18a–4(e)(3). We have estimated that the total number of dealers that may be required to register under the proposed *de minimis* rule is 50 or fewer entities, and if the criterion of three or more non-ISDA dealer counterparties is applied to the analysis, we estimated that the total number of dealers that may be required to register is between 27 and 31. *See* Section XV.D.1(b), *supra*. Out of these dealers, we estimated that the number of non-U.S. domiciled dealers is between 19 and 23. Therefore, the aggregate costs of the disclosure requirement could be $2,000,000 ($40,000 * 50) or less with a narrow range from $760,000 ($40,000 * 19) to $920,000 ($40,000 * 23).

[1571] *See* Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1).

[1572] *See* Section 17A(g) of the Exchange Act, 15 U.S.C. 78q–1(g).

1. Programmatic Benefits and Costs Associated With the Clearing Agency Registration

(a) Proposed Interpretive Guidance Regarding Clearing Agency Registration

(i) Current State of Clearing Agency Registration

At present, voluntary clearing of security-based swaps in the United States is limited to CDS products.[1573] It began in December of 2008, when the Commission acted to facilitate the clearing of OTC security-based swaps by permitting five clearing agencies, including three foreign clearing agencies,[1574] to clear CDS on a temporary, conditional basis.[1575] In each instance, these clearing agencies wanted to perform clearing functions with respect to CDS in the United States by providing CCP services directly to U.S. persons.[1576] The temporary exemptive orders granted to four of these clearing agencies (including two foreign clearing agencies) were extended until July 16, 2011.[1577] Title VII of the Dodd-Frank Act provides that (1) a depository institution that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act or (2) a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act is deemed registered as a clearing agency for the purposes of clearing security-based swaps (''Deemed Registered Provision'').[1578] The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, became effective on July 16, 2011.[1579] As a result, three clearing agencies, *i.e.,* ICE Clear Europe, Limited, ICE Clear Credit LLC (formerly ICE Trust US LLC), and Chicago Mercantile Exchange Inc., which were performing CCP functions with respect to CDS in the United States, were deemed registered with the Commission on July 16, 2011.[1580]

(ii) Programmatic Effect of the Proposed Interpretive Guidance

As stated above,[1581] the Commission is proposing interpretive guidance that a clearing agency performing the functions of a CCP for security-based swaps within the United States would be required to register pursuant to Section 17A(g) of the Exchange Act.[1582] Under this proposed interpretive guidance, a registration requirement pursuant to Section 17A(g) of the Exchange Act would apply only to clearing agencies that provide CCP services directly to a U.S. person with respect to security-based swaps, since these entities would be performing the functions of a CCP within the United States. Three clearing agencies currently provide CCP services directly to U.S. persons with respect to swaps and security-based swaps.[1583] All of these three clearing agencies are registered with the Commission under the Deemed Registered Provision. Therefore, the proposed interpretation would not increase the number of domestic or foreign clearing agencies required to register with the Commission until new clearing agencies desire to enter the U.S. market to provide CCP services directly to U.S. persons with respect to security-based swaps.

(iii) Costs and Benefits of the Proposed Interpretive Guidance

The Commission has considered the costs and benefits associated with the clearing agency registration requirement in Section 17A(g) of the Exchange Act[1584] in the cross-border context through the lens of a key Title VII goal: systemic risk mitigation. We discuss below the costs and benefits of the proposed interpretive guidance by looking at the role of the clearing agency in the security-based swap market and how clearing agencies transfer financial risks.

The proposed interpretive guidance regarding clearing agency registration would generate significant programmatic benefits. These benefits are tied to mandatory clearing. As explained below, clearing agency registration promotes sound management of the counterparty risk concentrated in CCPs, the importance of which is magnified by the application of a mandatory clearing requirement. Registration would provide standards for CCPs' management of financial risks, including counterparty credit risk, legal risk and liquidity risk. Mandatory clearing of security-based swaps is one means by which Title VII of the Dodd-Frank Act seeks to reduce systemic risk in the U.S. financial system. Under Title VII, security-based swaps, ''whenever possible and appropriate,''[1585] shall be centrally cleared through a clearing agency that is registered or exempt from registration under the Exchange Act.[1586] In a world of bilateral transactions in which each counterparty bears the other counterparty's credit risk, a large counterparty who transacts with many other counterparties and cumulates significant security-based swap positions may pose systemic risk when its failure would generate sequential counterparty defaults.[1587]

[1573] *See* Section XV.B.2(e), *supra.*

[1574] These three foreign clearing agencies are ICE Clear Europe Limited, Eurex Clearing AG, and LIFFE A&M and LCH Clearnet Ltd. *See* note 74, *supra.*

[1575] *See* note 74, *supra.*

[1576] *Id.*

[1577] *See* Exchange Act Release Nos. 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010) (order extending temporary conditional exemptions in connection with request on behalf of ICE Clear Europe, Limited), 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010), (order extending temporary conditional exemptions in connection with request on behalf of Eurex Clearing AG), 63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010) (order extending temporary conditional exemptions in connection with request on behalf of Chicago Mercantile Exchange, Inc.), and 63387 (Nov. 29, 2010) 75 FR 75502 (Dec. 3, 2010) (order extending and modifying temporary exemptions in connection with request of ICE Trust US LLC); LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

[1578] *See* 15 U.S.C. 78q–1(*l*). Under this Deemed Registered Provision, a clearing agency will be required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

[1579] *See* Section 774 of the Dodd-Frank Act (stating, ''[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.'').

[1580] Eurex Clearing AG did not meet the criteria in the Deemed Registered Provision and is not currently providing CCP services in the United States with respect to security-based swaps. *See, e.g.,* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of ''Security'' to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 64795 (July 1, 2011) at n. 76.

[1581] *See* Section V, *supra.*

[1582] 15 U.S.C. 78q–1(g).

[1583] *See* Clearing Agency Standards Adopting Release, 77 FR 66265. These three clearing agencies are ICE Clear Europe, Limited, ICE Clear Credit LLC, and Chicago Mercantile Exchange, Inc.

[1584] 15 U.S.C. 78q–1(g).

[1585] *See, e.g.,* S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176, at 32 (''As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole.''); *id.* at 34 (''Some parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.'').

[1586] *See* 15 U.S.C. 78c–3(a)(1).

[1587] *See* Craig Pirrong, ''The Economics of Central Clearing: Theory and Practice,'' ISDA Discussion

Central clearing through a CCP generally reduces counterparty risk by interposing a CCP as counterparty to all cleared transactions.[1588] Where security-based swaps are subject to a mandatory clearing requirement the role of the CCP becomes even more critical, as the volume of positions in which the CCP is interposed and becomes the central counterparty will likely increase.[1589]

While central clearing may make sequential counterparty defaults less likely, it does not eliminate systemic risk. CCPs concentrate counterparty risk.[1590] CCPs manage and reduce such concentrated risk by applying mark-to-market pricing and margin requirements to cleared transactions in a consistent manner [1591] and through netting (*i.e.,* by reducing the amounts of funds or other assets that must be exchanged at settlement).[1592] In the event of a clearing member's default in which the losses exceed the collateral posted to the CCP and other available funds, residual losses will be mutualized among the other non-defaulting members.[1593] By placing members under financial strain, mutualization may strain the entire financial system and create systemic impact.[1594] Even in the absence of this feature of CCPs, the default of a CCP has the potential to harm the market in all financial instruments cleared by that CCP, creating liquidity constraints with respect to such financial instruments in the market. Such liquidity constraints would affect all parties transacting in such instruments.[1595]

Given the mutualization of losses, a CCP's concentration of risk, and its responsibility for risk management, the effectiveness of a CCP's risk controls and the adequacy of its financial resources are critical aspects of the infrastructure of the market it serves.[1596] Registration and clearing agency standards are designed to address these considerations.

The Commission preliminarily believes its interpretation that a clearing agency that provides CCP services for security-based swaps directly to U.S. persons must register pursuant to Section 17A(g) of the Exchange Act [1597] generates the benefits of protecting the U.S. financial system against systemic risk that may arise from central clearing functions performed in the United States. In the case of a foreign clearing agency that provides CCP services directly to U.S. persons, the Commission preliminarily believes that requiring such foreign clearing agency to register with the Commission and comply with the Commission's regulatory regime for security-based swap clearing would generate the key benefit of reducing the magnitude of any systemic risk flowing into or within the United States originating in the activities of other members of a clearing agency.

Specifically, the clearing agency standards would provide the minimum standards for CCPs' management of financial risks, including counterparty credit risk, legal risk, and liquidity risk. For example, the clearing agency standards established by the Commission are designed to minimize the CCPs' credit risk by, among other things, establishing eligibility standards for clearing members and requiring registered clearing agencies to measure their credit exposures on a daily basis. The Commission's clearing agency standards also require a registered clearing agency that acts as a CCP to collect initial and variation margin from members, and maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions and, with respect to a registered clearing agency acting as a CCP for security-based swaps, maintain additional financial resources sufficient to withstand, at a minimum, a default by the two participant families to which it has the largest exposures in extreme but plausible market conditions.[1598] The benefits and costs of the clearing agency standards have been discussed in detail in the Clearing Agency Standards Adopting Release.[1599] The proposed interpretive guidance does not change the benefits associated with the substantive registration requirement and clearing agency standards. The aggregate programmatic benefits of the proposed interpretive guidance would flow from its programmatic effect on the number of clearing agencies registered as discussed above.

The proposed interpretive guidance would also entail certain costs, such as direct registration and compliance costs on CCPs.[1600] The proposed interpretive guidance does not change the costs associated with the substantive registration requirement and clearing agency standards. As with the programmatic benefits, the aggregate programmatic costs of the proposed interpretive guidance would flow from its programmatic effect on the number of clearing agencies registered as discussed above.

(iv) Assessment Costs

A clearing agency would incur assessment costs to determine whether it would be required to register by determining whether it provides CCP services directly to a U.S. person. Such determination may be made as part of its clearing membership application approval process. As part of the membership application, a prospective clearing member would be required to provide corporate organization documents, such as certificates of incorporation or articles of organization, which would enable the clearing agency

Papers Series, No. 1 (2011), at 6 (''Widespread defaults on derivatives contracts may harm more than the counterparties on the defaulted contracts. The losses suffered by the victims of the original defaults may be so severe as to force those victims into financial distress, which harms those who have entered into financial contracts with them—including their creditors, and the counterparties to derivatives on which they owe money. Such a cascade of defaults can result in a systemic financial crisis.'').

[1588] *See* Clearing Agency Standards Adopting Release, 77 FR 66264 (''Central clearing facilitates the management of counterparty credit risk among dealers and other institutions by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from each other's potential failures and preventing the buildup of risk in such entities, which could be systemically important.'').

[1589] *See* Clearing Procedures Adopting Release, 77 FR 41638.

[1590] *See* Clearing Agency Standards Adopting Release, 77 FR 66264–65 (stating that ''a CCP also concentrates risks and responsibility for risk management in the CCP.'').

[1591] *See* Culp, *supra* note 111. *See also* Clearing Agency Standards Adopting Release, 77 FR 66264.

[1592] *See e.g.,* Duffie and Zhu, *supra* note 110; *see also* Clearing Agency Standards Adopting Release, 77 FR 66264.

[1593] *See* Risk Management Supervision of Designated Clearing Entities (July 2011), Report by the Board of Governors of the Federal Reserve System, Securities and Exchange Commission and Commodity Futures Trading Commission to the Senate Committees on Banking, Housing, and Urban Affairs and Agriculture in fulfillment of Section 813 of Title VIII of the Dodd-Frank Act, at 12.

[1594] *See* Craig Pirrong, ''The Economics of Central Clearing: Theory and Practice,'' ISDA Discussion Papers Series, No. 1 (2011), at 34–35.

[1595] *Id. See also* Risk Management Supervision of Designated Clearing Entities (July 2011), Report by the Board of Governors of the Federal Reserve System, Securities and Exchange Commission and Commodity Futures Trading Commission to the Senate Committees on Banking, Housing, and Urban Affairs and Agriculture in fulfillment of Section 813 of Title VIII of the Dodd-Frank Act, at 8–9.

[1596] *See* Clearing Agency Standards Adopting Release, 77 FR 66265.

[1597] 15 U.S.C. 78q–1(g).

[1598] *See* 17 CFR 240.17Ad–22(b)(3); *see also* Clearing Agency Standards Adopting Release, 77 FR 66234–35 and 66274–75.

[1599] *See* Section V Economic analysis of the Clearing Agency Standards Adopting Release, 77 FR 66263–84.

[1600] The Commission previously estimated the costs for each registered clearing agency associated with compliance with clearing agency standards adopted in the Clearing Agency Standards Adopting Release could total approximately $3.7 million in initial costs and $10.1 million in annual ongoing costs. *See* Clearing Agency Standards Adopting Release, 77 FR 66273.

to determine whether a prospective clearing member is a U.S. person. Since corporate organization documents are part of the clearing membership application package,[1601] the Commission preliminarily believes that the assessment costs associated with the proposed interpretive guidance should be minimal.

(v) Alternatives

An alternative to the proposed interpretive guidance would be to require a clearing agency to register if such clearing agency provides CCP services to non-U.S. intermediaries that have U.S. persons as customers. Such an alternative would focus on the fact that intermediaries, whose financial stress or failure would mostly likely affect the U.S. financial system, are exposed to the risk of CCPs, and also transmit that risk to their U.S. customers. However, the Commission believes that the risk exposure that a U.S. customer could incur under its contractual agreements with an intermediary is generally much lower than the risk exposure a U.S. member could incur under a membership agreement with a CCP because a customer is only risking up to the full amount of property entrusted to an intermediary, but is not under any obligation to perform under the contractual agreements that the intermediary enters into with third parties. Consequently, if a clearing agency provides CCP services to an intermediary that has a U.S. person as a customer, the ripple effect of the failure of such clearing agency on the U.S. financial system may not rise to the systemic level.

Alternatively, the Commission could have proposed to require a clearing agency to register if such clearing agency has a member whose obligations under the clearing membership agreement are guaranteed by a U.S. person. The Commission recognizes that guarantees may expose the U.S. guarantor to the performance obligations under the clearing membership agreement and represent conduits through which the risks associated with foreign CCP default may transfer to the U.S. financial system. A non-U.S. member of a foreign CCP will still participate in loss mutualization in the event of member default. In the presence of a guarantee, the losses associated with mutualization may flow back to the guarantor.

However, the Commission preliminarily believes that interpreting a U.S. person providing a guarantee to a non-U.S. clearing member with respect to obligations under a clearing membership agreement as an indication of the clearing agency providing CCP services to a U.S. person may lead to a result that is over-inclusive with respect to the statutory clearing agency registration requirement. A U.S. person could guarantee its foreign affiliate's obligations under a clearing membership agreement with a foreign clearing agency that does not provide CCP services to any U.S. persons. Therefore, as a matter of policy, the Commission declines to propose such alternative interpretation at this time.

Finally, the Commission is not proposing to apply clearing agency registration requirements to a clearing agency solely based on a U.S. domicile of the clearing agency. The Commission believes that the domicile location of a clearing agency is not a sufficient indicator of whether a CCP is performing the functions of a CCP in the United States and the transmission of systemic risk across borders by providing CCP services directly to U.S. persons.

(b) Proposed Exemption of Foreign Clearing Agency From Registration

As discussed above, the Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative to application of the registration requirement to a foreign clearing agency in circumstances where the foreign clearing agency is subject to comparable, comprehensive supervision and regulation by appropriate government authorities in its home country, and the nature of the clearing agency's activities and performance of functions within the United States suggest that registration is not necessary to achieve the Commission's regulatory objectives.

The Commission preliminarily believes that the benefits of considering such exemption would be to increase the range of registered and exempt clearing agencies that could be used to satisfy the mandatory clearing requirement. Since the exemption would be considered in circumstances where the foreign clearing agency is subject to comparable, comprehensive supervision and regulation in its home country, the Commission preliminarily believes that such exemption would not compromise the programmatic benefits of the mandatory clearing requirement and at the same time may decrease the costs to market participants associated with the mandatory clearing requirement. In addition, to the extent that the exemption eliminates or decreases duplicative compliance costs, a foreign clearing agency eligible for the exemption may incur lower programmatic costs associated with implementation of, or compliance with, the clearing agency registration requirements and clearing agency standards than it would otherwise incur without the option of the proposed exemption.

On the other hand, in the case of an exemption order granted with Commission-imposed conditions, it is possible that the programmatic costs may increase because market participants would be required to incur costs to satisfy these conditions. However, the proposed availability of an exemption from registration may enable a foreign clearing agency that would, due to conflicting local laws, otherwise not be able to provide CCP services to U.S. market participants in the absence of an exemption. In such cases, an exemption with Commission-imposed conditions may increase the number of clearing agencies in the U.S. security-based swap market, contributing to the programmatic benefits and costs that flow from the clearing agency registration requirement.

(c) Programmatic Effects of Alternative Standards

As stated above,[1602] Section 17A(i) of the Exchange Act permits the Commission to adopt rules for registered clearing agencies that clear security-based swaps and conform its regulatory standards and supervisory practices to reflect evolving United States and international standards.

The Commission preliminarily believes that this approach may be appropriate where the Commission determines not to grant a general exemption from registration under Section 17A(k) of the Exchange Act, but where consistency with some regulatory standards suggests that a targeted regulatory approach is warranted. To avoid compromising the benefits of clearing agency registration discussed above, the Commission would consider the costs and benefits of applying such alternative standards when it contemplates such an action. The Commission preliminarily believes that the alternative standards approach could provide great flexibility for the Commission to promote a great range of registered and exempt clearing agencies for market participants to satisfy the mandatory clearing requirement without compromising the benefit of clearing

[1601] *See, e.g.,* Clearing membership Application Instructions and Forms, ICE Clear U.S., Inc. (Aug. 2012), *available at: https://www.theice.com/publicdocs/clear_us/Clear_US_Member_Application.pdf.*

[1602] *See* Section V.B.3, *supra.*

agency registration by considering the adoption of targeted standards when warranted by the circumstances.

2. Programmatic Benefits and Costs Associated With the Mandatory Clearing Requirement of Section 3C(a)(1) of the Exchange Act

Prior to the Dodd-Frank Act, ICE Clear Credit and ICE Clear Europe engaged in credit default swap clearing activities pursuant to exemptive orders issued by the Commission.[1603] In part, the exemptive orders were conditioned on those CCPs making certain information available to the Commission, including risk assessment reports and information regarding future changes to risk management practices.[1604]

Following the Dodd-Frank Act becoming effective, ICE Clear Credit and ICE Clear Europe were deemed to be registered with the Commission in July 2011 as clearing agencies for security-based swaps.[1605] ICE Clear Credit began clearing corporate single-name credit default swaps in December 2009,[1606] and, as of December 14, 2012, had cleared a total $1.8 trillion gross notional of single-name credit default swaps on 153 North American corporate reference entities.[1607] ICE Clear Europe began clearing credit default swaps on single-name corporate reference entities in December 2009,[1608] and, as of December 14, 2012, had cleared a total €1.5 trillion in gross notional of single-name credit default swaps on 121 European corporate reference entities.[1609] The level of clearing activity appears to have steadily increased as more CDS have become eligible to be cleared.[1610] To date, all of ICE Clear Credit's and ICE Clear Europe's security-based swap clearing activity has involved proprietary transactions between clearing members.[1611]

The economic effects of mandatory clearing may be expected to vary depending on the scope of the requirement and the financial instruments subject to mandatory clearing. Within the subset of instruments that could be subject to a mandatory clearing requirement, a broader clearing mandate may be expected generally to lead to more effective risk mitigation, but it may also increase costs to market participants. The ultimate economic impact of the mandatory clearing requirement in part will be affected by the total set of security-based swaps that will be subject to mandatory clearing, following Commission determinations pursuant to Section 3C(b) of the Exchange Act.[1612]

Accordingly, this section does not seek to address the full range of economic consequences of the mandatory clearing requirement and the proposed application of mandatory clearing in the cross-border context that may result from the Commission's determination to require certain security-based swap transactions to be subject to mandatory clearing. Instead, this section contains two subsections. The first discusses programmatic effects of the mandatory clearing requirement and the second discusses costs and benefits that result from the mandatory clearing requirement generally. We consider these programmatic costs and benefits through analyzing the potential programmatic effects of mandatory clearing based on the data of voluntary clearing activity available to us and the assumptions stated below.

(a) Programmatic Effects of the Mandatory Clearing Requirement

As stated above, voluntary clearing of security-based swaps in the United Sates is currently limited to the CDS products cleared by ICE Clear Credit and ICE Clear Europe.[1613] The level of clearing activity appears to have steadily increased over time as more products have become eligible to be cleared.[1614] The notional volume of cleared transactions reported by ICE Clear Credit for U.S.-index CDS products in 2009, 2010 and 2011 represented approximately 32%, 54% and 57% of the total notional volume of the U.S.-index CDS market, and the notional volume of cleared transactions reported by ICE Clear Credit for single-name CDS products referencing U.S. corporate in 2009, 2010 and 2011 represented approximately 0%, 16% and 25% of the total notional volume of the single-name U.S. corporate CDS market.[1615] These figures were

[1603] *See, e.g.,* Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (''ICE Clear Credit Exemptive Order''); Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) (''ICE Clear Europe Exemptive Order''). In connection with those orders, Commission staff considered a number of aspects of those CCPs' clearing practices, including, *inter alia,* their risk management methodologies.

[1604] *See* ICE Clear Credit Exemptive Order, *supra* note 1603, at 10799; ICE Clear Europe Exemptive Order, *supra* note 1603, at 37756–57.

[1605] Section 17A(l) of the Exchange Act provides in relevant part that a derivative clearing organization registered with the CFTC that clears security-based swaps would be deemed to be registered as a clearing agency under section 17A if, prior to the enactment of the Dodd-Frank Act, it cleared swaps pursuant to an exemption from registration as a clearing agency.

Both ICE Clear Credit and ICE Clear Europe also are registered with the CFTC as Designated Clearing Organizations.

[1606] *See* Exchange Act Release No. 61662 (Mar. 5, 2010), 75 FR 11589, 11591 (Mar. 11, 2010) (discussing ICE Clear Credit's CDS clearing activities as of March 2010).

ICE Clear Credit (then known as ICE US Trust LLC) began clearing index-based CDS in March 2009. *See* Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (order granting temporary exemptions under the Exchange Act on behalf of ICE US Trust LLC).

[1607] ICE Clear Credit also has cleared a total of $19.1 trillion gross notional on 59 index CDS as of December 14, 2012. *See* ICE Clear Credit, Volume of ICE CDS Clearing, *available at: https://www.theice.com/clear_credit.jhtml.*

In addition to clearing single-name CDS on North American corporate reference entities, ICE Clear Credit also clears CDS on certain non-U.S. sovereign entities, and on certain indices based on North American reference entities.

[1608] *See* Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656, 22657 (Apr. 29, 2010) (discussing ICE Clear Europe's CDS clearing activity as of April 2010).

ICE Clear Europe commenced clearing index-based CDS in July 2009. *See* Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) (order granting temporary exemptions under the Exchange Act on behalf of ICE Clear Europe).

[1609] ICE Clear Europe also has cleared a total of €9.7 trillion in gross notional on 44 index-based CDS. *See* ICE Clear Europe, Volume of ICE CDS Clearing, *available at: https://www.theice.com/clear_credit.jhtml.*

Aside from clearing single-name CDS on European corporate reference entities, ICE Clear Europe also clears CDS on indices based on European reference entities, as well as futures and instruments on OTC energy and emissions markets.

[1610] *See* Clearing Procedures Adopting Release, 77 FR 41636–38 (discussing the steady increase in the volume of cleared CDS transactions).

[1611] For purposes of the discussion here, ''clearing members,'' ''clearing participants,'' and similar terms encompass market participants that are approved by a clearing agency to become the clearing agency's counterparty when a single-name CDS is cleared.

[1612] 15 U.S.C. 78c–3(b). Section 3C(b) of the Exchange Act includes two mandatory clearing determination review processes. One is Commission-initiated review and the other is a swaps submissions review processes. The mandatory clearing determinations to be made by the Commission would have impact on the economic consequences of the mandatory clearing requirement. For example, with respect to single-name CDS on certain corporate entities that have high notional size outstanding but are not currently cleared on a voluntary basis, the determination of clearing of these single-name credit default swaps would have impact on the volume of security-based swap transactions subject to mandatory clearing.

[1613] See the discussion of levels of security-based swap clearing in Section XV.B.2(e) above. *See also* Clearing Procedures Adopting Release, 77 FR 41636 (noting that central clearing of security-based swaps began in March 2009 for index-based CDS products, in December 2009 for single-name CDS products on corporate reference entities, and in November 2011 for single-name CDS products on sovereign reference entities; also noting that at present, there is no central clearing in the United States for security-based swaps that are not CDS products, such as those based on equity securities).

[1614] *See* Clearing Procedures Adopting Release, 77 FR 41636–38 (discussing the steady increase in the volume of cleared CDS transactions).

[1615] These figures are based on information regarding names accepted for clearing reported by ICE Clear Credit on its public Web site and are calculated based on ''price forming transactions'' submitted to the DTCC–TIW. *See* Section XV.B.2(e), *supra.* These figures include the clearing of trades

Continued

calculated based on price-forming transactions submitted to the DTCC–TIW.[1616]

Our prior analysis of the level of clearing activity also demonstrated steady increases of CDS transaction volume in names accepted for clearing over time.[1617] Such analysis compared two measures of transaction volumes in names accepted for clearing within a year and across years and showed the increase in percentage from 2009 to 2011 in the volume of new transactions in names that have ''accepted for clearing'' status. See Table 1 below.

TABLE 1—CLEARED TRADES AND ACCEPTED TRADES AS A PERCENTAGE OF GROSS NOTIONAL TRANSACTION VOLUME

	U.S.-Index CDS			Single Name U.S. Corporate CDS		
	2009	2010	2011	2009	2010	2011
Notional volume ($ billions)	10,400	8,900	9,900	4,100	3,900	2,800
Percentage of Notional in Names Accepted for Clearing.						
—at calendar year end	88%	90%	91%	1%	23%	33%
—at time of trade execution	55%	87%	91%	0%	16%	29%
Cleared transactions: % of total notional volume	32%	54%	57%	0%	16%	25%

Although data suggested that clearing of security-based swaps has been increasing, significant segments of the security-based swap market remain uncleared.[1618] Due in part to this data, the Commission recognized in the Clearing Procedures Adopting Release that mandatory clearing determinations made pursuant to Section 3C(a)(1) of the Exchange Act [1619] could alter current clearing practices at the time such determinations are made. One potential consequence of mandatory clearing determinations that require mandatory clearing for certain security-based swaps could be a higher level of clearing for security-based swaps than would take place under a voluntary system.[1620] Where the amount of clearing taking place under a voluntary system is significantly different from the level of clearing that would take place if trading in a product were mandatory and where such difference marks a shift in existing market clearing practices, the mandatory clearing determination could potentially have a material economic impact.[1621]

(b) Programmatic Benefits and Costs of the Mandatory Clearing Requirement

A key benefit of mandatory clearing is reduction of counterparty credit risk. In a regime with central clearing, the CCP is the counterparty to all trades. Central clearing mitigates counterparty credit risk among dealers and other institutions by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from sequential default. CCPs require that members apply mark-to-market pricing and margin requirements in a consistent manner, and generally use liquid margin collateral to manage the risk of a member's failure. Accordingly, where CCPs operate under high standards relating to risk management, counterparty credit risk can be lower than in a regime without CCPs where counterparties can engage only in bilateral netting and face margin requirements that may vary significantly between transactions.[1622]

Although central clearing reduces counterparty risk, it is less certain whether a mandatory requirement to centrally clear security-based swap transactions reduces the overall risks to the financial system. Some have expressed the view that central clearing should be imposed wherever possible to help control systemic risk; others, by contrast, have contended that concentrating the default risk of numerous counterparties within a single CCP (or within a small number of CCPs) could introduce new risks.[1623] For

on the same day the trade was executed as well as the clearing of trades entered into in prior years and submitted for clearing on retroactive basis. These figures do not include trades that resulted from the compression of trades previously submitted for clearing. *See id.* The CME Group also clears index CDS products and has reported clearing $144 billion in gross notional volumes of transactions since inception, with $21 billion in open interest as of the end of 2011. *See* CME Group, Cleared OTC Credit Default Swaps, *available at: http://www.cmegroup.com/trading/cds/*. These volumes are small relative to total market activity and are not included in the calculation of notional volume of cleared index CDS in 2011 performed by the Commission staff in the Clearing Procedures Adopting Release. *See* Clearing Procedures Adopting Release, 77 FR 41636.

[1616] *See* Section XV.B.2(e) and note 1615, *supra.*

[1617] *See* Clearing Procedures Adopting Release, 77 FR 41637–38. The analysis there presents two measures with respect to transaction volume accepted for clearing (which ultimately may have been cleared or uncleared). The first measure includes all transaction volume in names accepted for clearing at any time during the calendar year, whether or not a trade was accepted for clearing at the time of its execution. The calculation of this measure was performed by staff in the Division of Risk, Strategy, and Financial Innovation by totaling the sum of price forming transactions reported to DTCC–TIW in the calendar year for index-based and single-name corporate CDS products that match the list of names accepted for clearing at ICE Clear Credit during the same period. *See* ICE Clear Credit, Clearing Eligible Products, *available at: https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Clearing_Eligible_Products.xls.*

The second measure includes only transaction volume in names accepted for clearing at the time of trade execution. The calculation of this measure was performed by staff in the Division of Risk, Strategy, and Financial Innovation by totaling the sum of price forming transactions reported to DTCC–TIW in the calendar year for index-based and single-name corporate CDS products that match the list of names accepted for clearing at ICE Clear Credit, including only those transactions executed following the accepted for clearing date reported by ICE Clear Credit. This measure accounts for the fact that, although transactions executed in names prior to the name being accepted for clearing can be cleared later in the same calendar year through a process referred to as ''backloading,'' names accepted for clearing towards the end of the year allow less time for this to occur. Backloading refers to the submission for clearing of pre-existing bilateral trades that were not submitted for clearing on the date of the transaction. *See* Clearing Procedures Adopting Release, 77 FR 41637–38.

[1618] Because clearing is voluntary, counterparties to the transaction have no obligation to clear and may elect not to do so for various individual reasons. Further, if the counterparties choose to transact in a reference entity that is accepted for clearing in a currency other than U.S. dollars, the transaction is no longer eligible for clearing. In addition, because clearing was performed exclusively on a backloading basis prior to April 2011, some transactions have not been cleared because they may have been subject to portfolio compression or otherwise terminated prior to when the option to submit the transactions for clearing became available. *See* Clearing Procedures Adopting Release, 77 FR 41638.

[1619] 15 U.S.C. 78c–3(a)(1).

[1620] *See* Clearing Procedures Adopting Release, 77 FR 41638.

[1621] *Id.*

[1622] *See* note 1021, *supra.*

[1623] *See* Craig Pirrong, Mutualization of Default Risk, Fungibility, and Moral Hazard: The Economics of Default Risk Sharing in Cleared and Bilateral Markets, at 5 (Univ. of Houston Working Paper, 2010), *available at: http://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/clearing_moral_hazard_1.pdf* (''Clearing of OTC derivatives has been touted as an essential component of reforms designed to prevent a repeat of the financial crisis. A back-to-basics analysis of the economics of clearing suggests that such claims are overstated, and that traditional OTC mechanisms may be more efficient for some instruments and some counterparties.''); *see also* Derivatives Clearinghouses: Opportunities and Challenges: Hearing Before the Subcomm. on Secs.,

instance, those expressing concern about the systemic effects of central clearing state that risk sharing between members of a CCP may encourage excessive risk taking because the costs of imprudent decisions by one clearing member are borne by other clearing members. This moral hazard concern may be exacerbated to the extent that CCPs are viewed as too important to fail and thus would likely be subject to bailout remedies that would benefit all CCP members.[1624]

While lower counterparty credit risk benefits the financial system as a whole, it can also make hedging less expensive for market participants. An environment in which central clearing is common may see increased participation, greater liquidity, and more efficient risk sharing that promotes capital formation. There also are circumstances under which central clearing can increase participation costs for certain participants. In certain cases where counterparties to a security-based swap transaction are exposed to one another in multiple asset markets, they may face lower costs by bilaterally clearing new contracts against existing exposures instead of clearing through a central counterparty.[1625]

Mandatory clearing can play an important role in developing a strong infrastructure for central clearing.[1626] For instance, mandatory clearing reduces operational risk by promoting the standardization of contract terms. Standardization can simplify the valuation of security-based swaps, increase the liquidity of security-based swaps contracts, and promote competition. Standardized contract terms help avoid inefficiencies in contracting that result from human and processing errors. Standardized terms also facilitate the development of infrastructure technologies that facilitate the prompt and accurate clearance and settlement of security-based swaps.[1627] Mandatory clearing may also have the effect of reducing total transaction costs by eliminating obscured margin-related pricing that customers may otherwise incur in connection with non-cleared instruments. As with standardization, this would promote inter-dealer competition. However, dealers may take other actions to offset lost revenues resulting from the shift from non-cleared to cleared instruments. Separate from these considerations, several analyses have been conducted suggesting that mandatory clearing would increase the overall margin costs associated with security-based swap transactions compared to the margin market participants would post in the absence of a clearing requirement, though the estimates of the aggregate cost to market participants vary widely.[1628]

On the other hand, mandatory clearing of certain security-based swaps may reduce the use of security-based swaps to manage the risks associated with other financial products or commercial activity. This could occur if margin requirements prove too burdensome and make cleared transactions expensive relative to alternative means of risk management.

3. Programmatic Benefits and Costs of Proposed Rule 3Ca–3

As discussed above, the Commission is proposing Rule 3Ca–3 to apply the mandatory clearing requirement of Section 3C(a)(1) of the Exchange Act[1629] to cross-border security-based swap transactions. Proposed Rule 3Ca–3(a) specifies the security-based swap transactions to which the mandatory clearing requirement would apply, and proposed Rule 3Ca–3(b) carves out certain security-based swap transactions from application of the mandatory clearing requirement.[1630]

Specifically, under proposed Rule 3Ca–3(a), the mandatory clearing requirement would apply to a person that engages in a security-based swap transaction if such person engages in a security-based swap transaction in the United States. The Commission would view a person to be engaging in a security-based swap transaction in the United States if a security-based swap transaction involves (i) a counterparty that is a U.S. person; (ii) a counterparty that is a non-U.S. person whose performance under such security-based swap transaction is guaranteed by a U.S. person (hereinafter referred to as a ''guaranteed non-U.S. person''); or (iii) such security-based swap transaction is a transaction conducted within the United States.[1631] Under proposed Rule 3Ca–3(b), the mandatory clearing requirement would not apply to (i) a security-based swap transaction described in proposed Rule 3Ca–3(a) that is not a transaction conducted within the United States if (x) one counterparty is a foreign branch or a guaranteed non-U.S. person and (y) the other counterparty to the transaction is

Ins., & Inv., of the S. Comm. on Banking, Hous., & Urban Affairs, 112th Cong. 21, 49 (2011) (statement of Chester S. Spatt, Professor of Finance, Carnegie Mellon Univ.) (stating that ''[t]he clearinghouse is subject to considerable moral hazard and systemic risk'' in part because ''there is a strong incentive for market participants to trade with weak counterparties'' and noting that ''it is unclear whether the extent of use of clearinghouses will ultimately lead to a reduction in systemic risk in the event of a future crisis.'').

[1624] *See* Pirrong, note 1623, *supra,* at 5 (''Risk sharing through a clearinghouse makes the balance sheets of the clearinghouse members public goods, and encourages excessive risk taking. That is, the clearing mechanism is vulnerable to moral hazard.'').

[1625] Duffie and Zhu, *supra* note 110, at 74–95.

[1626] *See* note 991 and accompanying text, *supra.*

[1627] *See id.*

[1628] *See* Manmohan Singh, Collateral, Netting and System Risk in the OTC Derivatives Market (IMF Working Paper, 2010), *available at: http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf* (concluding that the initial margin requirements for the central clearing of approximately two-thirds of the then estimated $36 trillion notional market for credit default swaps would amount to $40 to $80 billion, likely closer to $80 billion due to the increased jump risk associated with single-name credit default swaps even if portfolio compression is available); Daniel Heller & Nicholas Vause, Collateral Requirements for Mandatory Central Clearing of Over-the-Counter Derivatives (BIS Working Paper No. 373, Mar. 2012), *available at: http://www.bis.org/publ/work373.pdf* (concluding that margin required to clear multi-name and single-name credit default swaps held by the largest 14 derivative dealers would vary depending on market volatility, requiring $10 billion of collateral in a low volatility market, $51 billion in medium volatility, and $107 billion in high volatility; further stating that with the inclusion of non-dealer positions, margin requirements would amount to $36 billion in a low volatility market, $219 billion in medium volatility and $425 billion in high volatility; study assumed the existence of one centralized clearing entity, which produced an estimated 25 percent savings compared to a market with multiple regional clearing agencies, where the benefits of portfolio margining would be limited); Che Sidanius & Filip Zikes, OTC Derivatives Reform and Collateral Demand Impact, (Bank of England Fin. Stability Paper No. 18, Oct. 2012), *available at: http://www.bankofengland.co.uk/publications/Documents/fsr/fs_paper18.pdf* (estimating an incremental increase in total initial margin for central clearing of credit default swaps between $78 billion and $156 billion, assuming that 80 percent of credit default swaps are cleared and netting is achieved between 90 and 95 percent while noting that the presence and extent of portfolio margining available could affect the analysis); IMF, Safe Assets: Financial System Cornerstone, Global Financial Stability Report (April 2012), *available at: http://www.imf.org/external/pubs/ft/gfsr/2012/01/pdf/c3.pdf* (estimating incremental initial margin and guarantee fund contributions for central clearing of over-the-counter derivatives will amount to between $100 billion and $200 billion, and may be higher if mutual recognition is not common among CCPs); *see also* Letter from Robert Pickel, Chief Executive Officer, ISDA, and Kenneth Bentsen, EVP, Public Policy and Advocacy, SIFMA, to David Stawick, Secretary, CFTC, at 35–37, Sept. 14, 2012 (estimating that the initial margin call for all swap products would be $193 billion to financial entities and $428 billion to dealers, and that variation margin calls would total $320 billion to financial entities and $80 billion to dealers, further noting that anywhere from $20 to $228 billion in additional liquidity would be necessary to meet the variation margin calls).

[1629] 15 U.S.C. 78c–3(a)(1).

[1630] This is similar to the proposed approach for the mandatory trade execution requirement. *See* Section XV.G.4, *infra.*

[1631] *See* proposed Rule 3Ca–3(a) under the Exchange Act. The terms ''transaction conducted within the United States'' and ''U.S. person'' would have the meanings set forth in proposed Rules 3a71–3(a)(5) and (7) under the Exchange Act.

a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person (hereinafter referred to as ''non-guaranteed non-U.S. persons'') and who is not a foreign security-based swap dealer as defined in proposed Rule 3a71–3(a)(3) under the Exchange Act, and would not apply to (ii) a security-based swap transaction described in proposed Rule 3Ca–3(a) that is a transaction conducted within the United States if (x) both counterparties to the transaction are non-guaranteed non-U.S. persons and (y) neither counterparty to the transaction is a foreign security-based swap dealer, as defined in proposed Rule 3a71–3(a)(3) under the Exchange Act.[1632]

Therefore, proposed Rule 3Ca–3(a) and proposed Rule 3Ca–3(b) apply the mandatory clearing requirement to security-based swap transactions in the cross-border context based on the U.S.-person status of a counterparty, the existence of a guarantee provided by a U.S. person, the registered security-based swap dealer status of a non-U.S. person counterparty, and the location where the transaction is conducted. Taken together, proposed Rules 3Ca–3(a) and 3Ca–3(b) would not apply the mandatory clearing requirement to (i) transactions conducted outside the United States between two counterparties who are non-guaranteed non-U.S. persons, (ii) transactions conducted outside the United States between a foreign branch or a guaranteed non-U.S. person, and a counterparty who is a non-guaranteed non-U.S. person and is not a foreign security-based swap dealer, and (iii) transactions conducted within the United States between two counterparties who are non-guaranteed non-U.S. persons and are not foreign security-based swap dealers.

The Commission preliminarily believes that the combined effect of the proposed Rules 3Ca–3(a) and (b) described above would be that non-guaranteed non-U.S. persons who are not security-based swap dealers may engage in security-based swap transactions with each other both within and without the United States without being subject to the Commission's mandatory clearing requirement. These non-guaranteed non-U.S. persons that are not security-based swap dealers may include non-U.S. persons that are swap dealers, major swap participants, major security-based swap participants, commodity pools, private funds, employee benefit plans, or persons predominantly engaged in activities that are banking or financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956.[1633] Such non-U.S. persons would also be able to engage in security-based swap transactions without being subject to the mandatory clearing requirement when the transaction is conducted outside the United States with U.S. persons that are foreign branches of U.S. banks or guaranteed non-U.S. persons or transacting with a foreign security-based swap dealer whose performance under security-based swaps is not guaranteed by a U.S. person.[1634] As discussed below,[1635] the Commission preliminarily believes that the exclusion of transactions between two non-guaranteed non-U.S. persons who are not foreign security-based swap dealers could potentially reduce the aggregate programmatic costs associated with the mandatory clearing requirement. However, these non-guaranteed non-U.S. persons, despite their status of not being foreign security-based swap dealers, may be financial entities that play significant roles in the U.S. or a foreign financial system and their failure may present spillover effect on the stability of the U.S. financial system and security-based swap market.

(a) Programmatic Effect of Proposed Rule 3Ca–3

It is not possible to quantify the potential programmatic effect of proposed Rule 3Ca–3 on the future volume of security-based swap transactions when the mandatory clearing requirement becomes effective partly because the Commission has not made any mandatory clearing determinations, partly because the Commission has yet to finalize the end-user exception to the mandatory clearing requirement,[1636] and partly because we do not know future trading volumes of security-based swaps. However, the Commission has examined the data available to it to analyze the potential programmatic effects of proposed Rule 3Ca–3. In particular, the Commission has tried to analyze the effects of proposed Rule 3Ca–3 by looking at the portion of single-name U.S. reference CDS transactions that may provide an indication of the size of the security-based swap market that may be included in or excluded from the application of the mandatory clearing requirement as a result of proposed Rule 3Ca–3.

A limitation we face when analyzing the data in order to estimate the size of the security-based swap market that may be affected by proposed Rule 3Ca–3 is that the domicile classifications in the DTCC–TIW database are not identical to the counterparty status or transaction status, both of which are described in proposed Rules 3Ca–3(a) and (b) and would trigger application of, or an exception from, the mandatory clearing requirement. Although the information provided by the data in the DTCC–TIW does not allow us to identify the existence of a guarantee provided by a U.S. person with respect to a counterparty to a transaction or the location where the transaction is conducted, the Commission nevertheless preliminarily believes that the approach taken below would provide the best available estimate of the size of the security-based swap market that could be included in or excluded from the application of the mandatory clearing requirement by proposed Rule 3Ca–3.

As a starting point, the Commission has examined all transactions in single-name CDS during 2011 [1637] and estimated that the notional amount of single-name CDS transactions executed during 2011 is $2,400 billion.[1638]

[1632] *See* proposed Rule 3Ca–3(b) under the Exchange Act.

[1633] 12 U.S.C. 1843(k).

[1634] In addition, transactions that are subject to the mandatory clearing requirement by operation of the proposed Rule 3Ca–3(a) and (b) may be excepted from the mandatory clearing requirement if the end-user exception is applicable. *See* Section 3C(g)(1) of the Exchange Act, 15 U.S.C. 78c–3(g)(1). Therefore, the combined effects of the proposed Rule 3Ca–3 may be affected by the implementation of the end-user exception to the mandatory clearing requirement. The Commission has proposed, but not yet adopted, Rule 3Cg–1 under the Exchange Act regarding the end-user exception to mandatory clearing of security-based swaps. *See* End-User Exception Proposing Release, 75 FR 79992.

[1635] *See* Section XV.F.3(b), *infra* (discussing the programmatic benefits and costs of proposed Rule 3Ca–3).

[1636] *See id.*

[1637] For purposes of analyzing the programmatic effect of proposed Rule 3Ca–3, we do not consider historical data regarding the U.S. index-based CDS transactions. The statutory definition of security-based swap in relevant part includes swaps based on single securities or on narrow-based security indices. *See* Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A). The historical data regarding the U.S. index-based CDS transactions encompass broad-based index CDS transactions that do not fall within the definition of security-based swaps.

[1638] This estimate is based on the calculation by staff of the Division of Risk, Strategy and Financial Innovation of all price-forming DTCC–TIW single-name CDS transactions that are based on North American corporate reference entities, U.S. municipal reference entities, U.S. loans or mortgage-backed securities (''MBS''), using ISDA North American documentation, ISDA U.S. Muni documentation, or other standard ISDA documentation for North American Loan CDS and CDS on MBS, and are denominated in U.S. dollars and executed in 2011. Price-forming transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations

Proposed Rule 3Ca–3(a) provides that the mandatory clearing requirement shall apply to a security-based swap transaction if (i) a counterparty to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person or (ii) such transaction is a transaction conducted within the United States. In applying proposed Rule 3Ca–3(a) to the $2,400 billion single-name CDS transactions executed in 2011, the Commission uses account holders and their domicile information in the DTCC–TIW database to determine the status of the counterparties.[1639] Because the Commission's proposed definition of ''U.S. person'' is based primarily on the place of organization or principal place of business of a legal person and a legal person's principal place of business and place of organization are usually in the same country, the Commission believes that the domicile of a legal person is a reliable indicator of such person's U.S.-person status. In addition, based on the Commission's understanding that the security-based swap transactions of foreign subsidiaries of U.S. entities, unless sufficiently capitalized to have their own independent credit ratings, are generally guaranteed by the most creditworthy U.S.-based entity within the corporate group, *i.e.,* the U.S. parent, the Commission preliminarily believes that it is reasonable to assume that foreign subsidiaries of U.S.-domiciled entities are non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person. Finally, the DTCC–TIW data do not provide sufficient information for us to identify whether a transaction was conducted in the United States. Solely for purposes of this analysis, we have assumed that transactions involving a U.S.-domiciled counterparty (excluding a foreign branch) or a U.S. foreign branch counterparty were conducted in the United States.[1640]

Based on these assumptions, we estimate that the subset of the single-name U.S. reference CDS market that includes a U.S.-domiciled counterparty (excluding a foreign branch of a U.S. bank), a foreign subsidiary of a U.S.-domiciled entity, or a U.S. branch of a foreign bank as a counterparty is $1,900 billion notional amount of single-name U.S. reference CDS transactions.[1641] The Commission preliminarily believes that this figure provides an indicative level of the single-name U.S. reference CDS activity, which may present an indicative size of the security-based swap market, that could become subject to mandatory clearing under proposed Rule 3Ca–3(a) when the requirement becomes effective.[1642] In addition, we recognize that the level of the security-based swap activity that could become subject to mandatory clearing under proposed Rule 3Ca–3(a) may be affected by the final rules adopted by the Commission regarding the end-user exception to mandatory clearing of security-based swaps.[1643]

Next, we apply proposed Rule 3Ca–3(b) to the transactions described above in order to estimate the portion of the single-name U.S. reference CDS activity, which may present an indicative size of the security-based swap market, that would not be subject to the mandatory clearing requirement under the proposed rule. We restate the assumptions described above with respect to the counterparty status of a U.S. person and a non-U.S. person whose performance under security-based swap transactions is guaranteed by a U.S. person, and the assumption with respect to a transaction conducted within the United States. In addition, because of a lack of information about the location of transactions, solely for assessing the effect of proposed Rule 3Ca–3(b)(i), we have assumed that transactions between a counterparty that is a foreign branch or foreign subsidiary of a U.S.-domiciled entity and another counterparty that is a foreign-domiciled entity that is not a subsidiary of a U.S.-domiciled entity or an ISDA-recognized dealer are not transactions conducted within the United States; and solely for assessing the effect of proposed rule 3Ca–3(b)(ii), we have assumed that transactions conducted between two foreign-domiciled counterparties that are not ISDA-recognized dealers and are not foreign subsidiaries of U.S.-domiciled entities are conducted within the United States. These assumptions likely overestimate the notional volume carved-out by proposed Rule 3Ca–3(b). With respect to the counterparty status as a registered security-based swap dealer, we recognize that as yet there are no dealers designated as security-based swap dealers and subject to the registration requirement. Solely for purposes of this analysis, we have assumed that those counterparties to

of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades. *See* note 1312, *supra.*

This figure differs from the single-name CDS notional volume calculated in the Clearing Procedures Adopting Release, $2,800 billion, by $400 billion. *See* Clearing Procedures Adopting Release, 77 FR 41638; *see also* Section XV.F.2(a) (discussing the programmatic effects of the mandatory clearing requirement), *supra.* This difference is primarily a result of removing the notional amount of security-based swap terminations in 2011 from the set of $2,800 billion price-forming transactions.

[1639] For purposes of the analysis here, the determination of an account holder's domicile is based on the ''registered office location'' and the ''settlement location'' self-reported by account holders in DTCC–TIW. The registered office location typically represents the place of organization or principal place of business of a DTCC–TIW account holder. The settlement location may represent the parent, headquarter, or home office of a DTCC–TIW account holder. Staff in the Division of Risk, Strategy, and Financial Innovation has consistently observed that DTCC–TIW recorded the place of organization of an account holder that is a foreign subsidiary of a U.S. person or a foreign branch as such account holder's registered office location and the parent location or headquarter of the foreign branch (*i.e.,* the United States) as such account holder's settlement location. For purposes of identifying a counterparty's U.S. person status in the analysis here, staff in the Division of Risk, Strategy, and Financial Innovation uses the registered office location in DTCC–TIW as the domicile for a foreign subsidiary of a U.S. person and the settlement office location in DTCC–TIW as the domicile for a foreign branch. It is possible that some market participants may misclassify their ''registered office location'' and the ''settlement location'' because the databases in DTCC–TIW do not assign a unique legal entity identifier to each separate entity.

[1640] Since the origination location of a transaction is not available in DTCC–TIW, the Commission recognizes that its analysis here may undercount transactions conducted within the United States because some transactions may be solicited, negotiated, or executed within the United States by an agent other than U.S. branches of foreign banks (such as a non-U.S. person counterparty using an unaffiliated third-party agent).

[1641] Such $1,900 billion estimate does not capture transactions between two non-U.S. domiciled counterparties involving an agent to solicit, negotiate and execute security-based swaps in the United States and therefore, may be an underestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be included in the application of the mandatory clearing requirement under proposed Rule 3Ca–3(a) because of the assumption we make herein regarding transactions conducted within the United States. By the same token, the difference between the $1,900 billion subset included in the application of the mandatory clearing requirement under proposed Rule 3Ca–3(a) and the $2,400 billion total single-name U.S. reference CDS transactions (i.e., $500 billion or 20.8% of the $2,400 billion) may represent an overestimate of single-name U.S. reference CDS transactions in notional amount that are not included in the application of the mandatory clearing requirement under proposed Rule 3Ca–3(a).

[1642] The Commission recognizes that the security-based swap market includes single-name CDS, CDS based on narrow-based indices, and other non-CDS security-based swaps, primary examples of which are equity swaps and total return swaps based on single equities or narrow-based indices of equities. As previously stated, we believe that the single-name CDS data are sufficiently representative of the security-based swap market as roughly 82% of the security-based swap market, as measured on a notional basis, appears likely to be single-name CDS. *See* Section XV.B.2 and the text accompanying note 1301, *supra.*

[1643] Solely for purposes of this analysis, we assume that the end-user exception is not available for transactions included in the indicative volume estimated here.

CDS transactions that were ISDA recognized dealers [1644] would be required to register as security-based swap dealers.

Based on the above assumptions, we have estimated that approximately 2.1% of the total notional amount [1645] of single-name U.S. reference CDS transactions executed in 2011, would be excluded from the scope of the application of the mandatory clearing requirement by proposed Rule 3Ca–3(b). Therefore, we preliminarily believe that 22.9% of the total size of the single-name U.S. reference CDS transactions in 2011 presents an indicative size of the U.S. security-based swap market that could be excluded from the application of the mandatory clearing requirement under proposed Rule 3Ca–3.[1646]

The Commission preliminarily believes that this estimate provides the best available proxy for the overall programmatic effect of the application of the mandatory clearing requirement in the cross-border context in terms of the portion of the single-name U.S. reference CDS activity that may be included or excluded in the scope of the application of the mandatory clearing requirement, given the data limitations and the underlying assumptions described above.[1647] The Commission is mindful that the above analysis represents only an indicative estimate of the portion of the single-name U.S. reference CDS activity, which may present an indicative size of the security-based swap market, that may be included or excluded from the scope of the application of the mandatory clearing requirement as a result of the proposed Rule 3Ca–3. The Commission also recognizes that the above analysis represents an extrapolation from the limited data that is currently available to the Commission.

(b) Programmatic Benefits and Costs of Proposed Rule 3Ca–3

The Commission's approach to application of the mandatory clearing requirement generally focuses on any person engaging in a security-based swap in the United States. As stated above, the Commission would preliminarily interpret the statutory language ''engage in a security-based swap'' to include transactions in which a counterparty performs any of the functions that are central to carrying out a security-based swap transaction (*i.e.,* solicitation, negotiation, execution, or booking of the transaction) within the United States. The Commission proposes to interpret that a transaction in which one of the counterparties is a U.S. person is a security-based swap in the United States. The Commission also is proposing to interpret the statutory language ''engage in a security-based swap'' to include transactions in which a U.S. person provides a guarantee on a non-U.S. person's performance under a security-based swap because of the involvement of the U.S. person in the transaction. Therefore, the Commission is proposing a rule that would apply the mandatory clearing requirements to a security-based swap if (i) a counterparty to the security-based swap transaction is (x) a U.S. person or (y) a non-U.S. person counterparty whose performance of obligations under the security-based swap is guaranteed by a U.S. person, or (ii) such transaction is a transaction conducted within the United States, subject to certain exceptions.

Economically, a U.S. person's security-based swap activity poses risk to the U.S. financial system because security-based swap transactions give rise to ongoing obligations on the part of the U.S. person and at the same time the U.S. person is exposed to the credit risk of its non-U.S. counterparties. Similarly, a guarantee provided by a U.S. person gives the counterparty of the guaranteed entity direct recourse to the U.S. guarantor with respect to any obligations owed by the guaranteed entity under the security-based swap. As a result, the U.S. guarantor exposes itself to the security-based swap risk as if it were a direct counterparty. Therefore, the Commission preliminarily believes that U.S. persons and non-U.S. person whose performance in security-based swap transactions is guaranteed by U.S. persons serve as major conduits of systemic risk to the U.S. financial system, and therefore, transactions involving U.S. persons and non-U.S. persons whose performance under security-based swaps are guaranteed by U.S. persons should fall within the scope of application of the mandatory clearing requirement, regardless of where the security-based swap activity takes place.

On the other hand, as previously discussed,[1648] the Commission has acknowledged that subjecting U.S. persons and non-U.S. persons whose performance in security-based swap transactions is guaranteed by U.S. persons to these requirements may have key consequences for competition, liquidity, and efficiency, and for U.S. persons' access to the foreign security-based swap market.

To the extent that foreign law does not subject participants in the foreign security-based swap market to mandatory clearing or impose margin requirements on non-cleared security-based swaps equivalent to margin that would be required by CCPs, this requirement under Title VII may make it more costly for non-U.S. persons to transact with U.S. person and guaranteed non-U.S. person counterparties because these transactions may be subject to higher margin requirements imposed by CCPs than under foreign law. This may make it difficult for U.S. persons and guaranteed non-U.S. persons to access foreign markets and liquidity provided by non-guaranteed non-U.S. persons, and could generate incentives for U.S. persons and guaranteed non-U.S. persons to restructure their security-based swap businesses to fall outside the scope of Title VII. In such instances, the incentive to restructure operations may decrease if foreign jurisdictions impose margin requirements on non-cleared security-based swaps. If these margin requirements on non-cleared security-based swaps are economically equivalent to or higher than CCP margin

[1644] *See* note 1306, *supra.*

[1645] Based on calculations by staff of the Division of Risk, Strategy, and Financial Innovation applying the criteria provided in proposed Rule 3Ca–3(b) and the assumptions stated herein, approximately $51 billion in notional amount, constituting approximately 2.1% of the total notional amount, of single-name U.S. reference CDS transactions executed in 2011 would be excluded from the application of the mandatory clearing requirement. Because of the assumptions we make herein regarding transactions conducted within the United States and transactions conducted outside the United States, the 2.1% may be an overestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be excluded from the application of the mandatory clearing requirement under proposed Rule 3Ca–3(b) under the Exchange Act.

[1646] The 22.9% estimate is the sum of the 20.8% estimate of the single-name U.S. reference CDS transactions excluded from mandatory clearing under proposed Rule 3Ca–3(a) and the 2.1% estimate of the single-name U.S. reference CDS transactions excluded from mandatory clearing under proposed Rule 3Ca–3(b). The Commission reiterates that both 20.8% and 2.1% may overestimate the size of the single-name U.S. reference CDS transactions excluded from the application of the mandatory clearing requirement under proposed Rules 3Ca–3(a) and (b).

In addition, as stated above, this calculation is conducted using U.S. reference single-name CDS transaction data in 2011. See the text accompanying notes 1637 and 1787, supra. The Commission recognizes that the same calculation could generate a different result if both U.S. reference and non-U.S. reference single-name CDS transaction data were used. However, with respect to non-U.S. reference single-name CDS transaction data, the Commission currently does not have access to the part of such data in DTCC–TIW regarding non-U.S. reference single-name CDS transactions that do not involve a U.S. counterparty on either side of the transaction. *See* Section XV.B.2, *supra.*

[1647] The Commission reiterates that the assumptions made here are solely for purposes of this economic analysis.

[1648] *See* Section XV.C, *supra,*

requirements for cleared security-based swaps, restructuring operations would provide few private benefits for market participants.

The Commission preliminarily believes that the carve-out in Rule 3Ca–3(b)(1) excludes from the mandatory clearing requirement those transactions involving foreign branches and guaranteed non-U.S. persons who are most likely to engage in transactions under foreign law. Such a carve-out reduces potential disruption to the foreign business of U.S. persons and guaranteed non-U.S. persons in the foreign security-based swap market.[1649] These benefits come at the cost of increased systemic risk. The counterparty risk associated with non-cleared transactions that involve foreign branches and guaranteed non-U.S. persons is ultimately borne by the U.S. financial system.

The incremental increase in systemic risk would likely be small, since the carve-out in proposed Rule 3Ca–3(b)(1) does not apply to security-based swap dealers. Moreover, as mentioned before, the magnitude of these risks may be further reduced by subjecting non-cleared security-based swap positions to margin requirements that are economically equivalent to margin requirements imposed by a CCP. However, the transactions carved-out by proposed Rule 3Ca–3(b)(1) remain a route over which systemic risk may enter the United States from abroad.

In addition, the Commission recognizes that, in the case of counterparty risk and central clearing, the location of a transaction is not necessarily a proxy for the U.S. market's exposure to counterparty risk. As a result, proposed Rule 3Ca–3(b)(2) would except transactions conducted within the United States between two non-U.S. persons who are not security-based swap dealers and whose performance under security-based swap transactions are not guaranteed by U.S. persons. The Commission preliminarily believes that such an exception could potentially reduce the aggregate programmatic costs associated with the mandatory clearing requirement to non-U.S. participants that engage in security-based swap transactions within the United States. The Commission recognizes that non-guaranteed non-U.S. persons who are not foreign security-based swap dealers may include financial entities that are systemically important, such as major swap participants or major security-based swap participants, or otherwise play an important role in the U.S. or a foreign financial system or the derivatives market, such as swap dealers, commodity pools, private funds, or banking entities that are financial holding companies. The failure of such financial entities, although they are non-guaranteed non-U.S. persons, may have spillover effects on the U.S. financial system. Such spillover effects may be mitigated by the capital and margin requirements imposed on swap dealers, major swap participants, or major security-based swap participants, the prudential regulators' supervision under banking regulations, the Employee Retirement Income Security Act of 1974 [1650] or other applicable law and regulations.

On the other hand, the Commission also preliminarily believes that the proposed application of the mandatory clearing requirement in the cross-border context would still mitigate the U.S. financial system's exposure to systemic risk since the carve-out in proposed Rule 3Ca–3(b)(2) would not apply to participants that are registered security-based swap dealers and those that carry U.S. guarantees on their performance in security-based swap transactions. The Commission has separately considered the potential implications of this exception on competition and efficiency in the security-based swap market.[1651] Specifically, the Commission preliminarily believes that imposing mandatory clearing on U.S. persons, guaranteed non-U.S. persons and foreign security-based swap dealers when they conduct security-based swaps in the United States will mitigate the counterparty credit risk among trading counterparties and increase confidence in trading security-based swaps, thereby increasing competition in the U.S. security-based swap market.

(c) Alternatives

The Commission has considered several alternatives in proposing Rule 3Ca–3. First, commenters proposed an alternative framework in which transactions that are ''required to be cleared under foreign law'' not be ''required to be cleared under [Title VII].'' [1652] Commenters noted, for example, that conflicts may arise between Title VII and ''foreign laws that require swaps to be cleared through local clearinghouses.'' [1653] Another comment stated that mandatory clearing ''is not necessary to protect U.S. financial institutions, markets or customers'' where mandatory clearing requirements are imposed by foreign law because ''the risks associated with such transactions reside in the relevant foreign central clearing counterparty.'' [1654]

The Commission preliminarily believes that the commenters' proposed approach to the mandatory clearing of cross-border security-based swap transactions would not sufficiently address the risk to the U.S. financial system posed by transactions being conducted by non-U.S. persons,[1655] and accordingly seeks comment on whether this preliminary assessment is correct. Whether a security-based swap transaction that is cleared under foreign law represents a risk to the U.S. financial system depends upon whether the foreign jurisdiction has a robust legal framework for the regulation of, and maintains adequate regulatory oversight over, CCPs. Although the Commission recognizes that this alternative may reduce costs to counterparties, the Commission cannot at this time assess the quality of regulation of foreign CCPs. Rather than categorically exclude from the scope of the proposed rule any transaction required to be cleared under foreign law, the Commission preliminarily believes that such transactions should be captured by the rule to further the purposes of Title VII to, among other things, mitigate systemic risk. Determinations regarding substituted compliance and determinations imposing mandatory clearing could address whether and when to include or exclude transactions from the mandatory clearing requirement based on the particular characteristics of the foreign regulatory regime, counterparties, or swap instruments in question.

Second, the Commission could have proposed to apply the mandatory clearing requirement in the same way as the CFTC's proposed interpretive guidance. The CFTC would apply the mandatory clearing requirement to a transaction conducted outside the United States between a foreign branch and a non-guaranteed non-U.S. person. Although we recognize that the guarantees provided by U.S. persons remain a conduit for systemic risk to be transmitted to the United States, the Commission preliminarily believes that subjecting such a transaction to mandatory clearing would impede the ability of U.S.-based dealing entities to

[1649] *See* Section XV.C, *supra.*

[1650] 28 U.S.C. 1002, *et seq.*

[1651] *See* Section XV.C, *supra.*

[1652] Davis Polk Letter II at 21.

[1653] *Id.* at 22 n.92.

[1654] Davis Polk Letter I at 8.

[1655] The Commission notes that commenters' concerns regarding a potential conflict arising between foreign law requirements that security-based swaps be cleared locally and Title VII are, in part, also addressed by the registration regime for clearing agencies proposed in Section V.B above.

access foreign markets and potentially promote market fragmentation.

Finally, and in lieu of the proposed rule, the Commission could have proposed Rule 3Ca–3(a) only to apply the mandatory clearing requirement contained in Section 3C(a)(1) of the Exchange Act, without also proposing the carve-out in proposed Rule 3Ca–3(b). The Commission preliminarily believes, however, that proposed Rule 3Ca–3(a), acting alone, does not sufficiently account for the proposed approach's potential effect on competition between security-based swap market participants, as required under Section 3C(b)(4) of the Exchange Act.[1656] As discussed above, market participants seeking to avoid clearing of cross-border security-based swaps may avoid doing business with members of clearing agencies registered with the Commission, U.S. persons who provide guarantees on performance under such swaps, or the foreign branches of U.S. persons, to avoid being subject to the mandatory clearing requirement. This may also create dislocations in the security-based swap market, reducing the anticipated risk-sharing benefits of clearing. As mentioned above, the Commission preliminarily believes that these benefits would come at the cost of increased risk that counterparty failures in foreign jurisdictions generate losses to U.S. financial market participants engaging in uncleared security-based swap transactions under Rule 3Ca–3(b).

(d) Assessment Costs

The assessment costs associated with proposed Rule 3Ca–3 would be primarily related to identification of counterparty status and where the transaction was conducted in order to determine whether the mandatory clearing requirement would apply. The same assessment would be performed not only in connection with the proposed application of the mandatory clearing requirement in the cross-border context but also in connection with proposed application of the SDR reporting,[1657] real-time reporting,[1658] and mandatory trade execution requirements [1659] in the cross-border context, and therefore, would be part of overall Title VII compliance costs.

We preliminarily believe that market participants would request representations from their transaction counterparties to determine the U.S.-person status of their counterparties. In addition, if the transaction is guaranteed by a U.S. person, the guarantee would be part of the trading documentation, and therefore the existence of the guarantee would be a readily ascertainable fact. Similarly, market participants would be able to rely on their counterparty's representation as to whether a transaction is solicited, negotiated or executed by a person within the United States.[1660] Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rule 3Ca–3 should be limited to the costs of establishing a compliance policy and procedure for requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately $15,160.[1661] The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.[1662]

We also consider the likelihood that market participants may implement systems to maintain information about counterparty status for purposes of future trading of security-based swaps that are similar to, if not the same as, the systems implemented by market participants for purposes of assessing security-based swap dealer or major security-based swap participant status. As stated above, we estimated that market participants that perceived the need to perform the security-based swap dealer assessment or major security-based swap participant calculations would incur one-time programming costs of 12,870.[1663] Therefore, the Commission estimates the total one-time costs per entity associated with proposed Rule 3Ca–3 could be $28,030.[1664] To the extent that market participants have incurred costs relating to similar or the same assessments with respect to counterparty status and location of the transactions for other Title VII requirements, their assessment costs with respect to proposed Rule 3Ca–3 may be less.

Request for Comment

The costs and benefits of the proposed rule discussed above represent the Commission's preliminary view regarding the mandatory clearing requirement in the cross-border context. The Commission seeks comment on the proposed rule in all aspects. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to proposed rule text and interpretations. Responses that are supported by data and analysis provide great assistance to the Commission in considering the benefits and costs of proposed requirements, as well as considering the practicality and effectiveness of the proposed application. In addition, the Commission seeks comment on the following specific questions:

- Are there any benefits and costs not discussed herein? If so, please identify, discuss, analyze, and supply relevant

[1656] *See* 15 U.S.C. 78c–3(b)(4) (requiring the Commission, in considering whether to impose a mandatory clearing requirement for security-based swaps, to consider, among other factors, the ''effect on competition'').

[1657] *See* proposed Rule 908(a) under the Exchange Act, as discussed in Section VIII.C.1, *supra,* and Section XV.H.3(a), *infra.*

[1658] *See* proposed Rule 908(b) under the Exchange Act, as discussed in Section VIII.C.2, *supra,* and Section XV.H.3(c), *infra.*

[1659] *See* proposed Rule 3Ch–1 under the Exchange Act, as discussed in Section X.B, *supra,* and Section XV.G.4, *infra.*

[1660] *See* proposed Rules 3a71–3(a)(4)(ii) and (a)(5)(ii) under the Exchange Act, as discussed in Section III.B.6, *supra.*

[1661] This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into the form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

[1662] There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within the programmatic costs associated with substituted compliance.

[1663] This is based on an estimate of the time required for a programmer analyst to modify the software to track the U.S.-person status of a counterparty and to record and classify whether a transaction is a transaction conducted within the United States, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to proposed definitions of U.S. person and transaction conducted within the United States. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at $310 per hour for 2 hours) + (Compliance Manager at $269 per hour for 4 hours) + (Programmer Analyst at $234 per hour for 40 hours) + (Senior Internal Auditor at $217 per hour for 4 hours) + (Chief Financial Officer at $473 per hour for 2 hours) = $12,870. For the source of the estimated per hour costs. *See* note 1425, *supra.*

[1664] The $28,030 per entity cost is derived from a $15,160 cost of establishing a written compliance policy and procedures regarding obtaining counterparty representations plus a $12,870 one-time programming cost relating to system implementation to maintain counterparties representations and track the counterparty status in the system.

data, information, or statistics regarding any such costs or benefits?

• Are the benefits and costs discussed herein accurate? If not, how can the Commission most accurately assess the benefits and costs arising from the mandatory clearing requirement and the proposed rule?

• Are there quantifiable costs associated with either the mandatory clearing requirement generally or the proposed rule specifically that have not been addressed and should be? If so, identify and describe them as thoroughly as possible, using relevant data and statistics where available.

• To what extent, if any, do the benefits and costs change when comparing the application of mandatory clearing to security-based swap transactions occurring within the United States and outside the United States? Is there relevant data not considered here that would assist the Commission in assessing such potentially disparate benefits and costs? If so, supply the relevant data, information, or statistics.

• To what extent, if any, do the benefits and costs change when considering the application of mandatory clearing of security-based swap transactions to a U.S. person in comparison to a guaranteed non-U.S. person? To a non-guaranteed non-U.S. person? To a foreign branch? To a counterparty that is a security-based swap dealer? Would the benefits and costs differ significantly if we applied mandatory clearing requirements to a person who is a member of a registered clearing agency? Is there relevant data not considered here that would assist the Commission in assessing such disparate costs and benefits? If so, supply the relevant data, information, or statistics.

• (i) The CFTC has proposed to apply the mandatory clearing requirement to all transactions entered into by U.S.-based swap dealers, including foreign branches and transactions entered into by foreign affiliates of U.S. persons or non-U.S.-based swap dealer with U.S. persons or non-U.S. persons guaranteed by U.S. persons, without differentiating where the swap transactions are conducted within the United States or outside the United States. Should the Commission adopt the CFTC's approach to application of the mandatory clearing requirement in the cross-border context from the cost and benefit perspective? What are the cost and benefit considerations associated with taking the CFTC's approach? (ii) The Commission's proposed approach to application of the mandatory clearing requirement differentiates transactions conducted within the United States and transactions conducted outside the United States. Is such differentiation appropriate from the cost and benefit perspective? Has the Commission appropriately considered the costs and benefits associated with such differentiation? (iii) Are there any other approaches to application of the mandatory clearing requirement that the Commission should consider adopting from a cost and benefit perspective?

• To what extent, if any, should the Commission consider the characteristics of the underlying reference entity in assessing the benefits and costs flowing from the mandatory clearing requirement? Are there any other characteristics of a security-based swap transaction not discussed here that might affect an assessment of the benefits and costs of imposing a mandatory clearing requirement?

• Has the Commission appropriately considered the benefits and costs of the alternative approaches discussed above for application of the mandatory clearing requirement in the cross-border context? In answering this question, consider addressing whether the Commission has appropriately valued the benefits and costs of possible duplicative clearing requirements and whether the Commission has appropriately valued the benefits and costs of creating overlap in the regulatory regimes of the United States and a foreign regulator. Also consider whether the Commission has appropriately valued the benefits and costs of the possible effects on the competitiveness of persons subject to the mandatory clearing requirement and those persons carved out or otherwise excluded from the requirement.

G. The Economic Analysis of Application of Rules Governing Security-Based Swap Trading in the Cross-Border Context

A key goal of the Dodd-Frank Act is to increase the transparency and oversight of the OTC derivatives market by, among other things, bringing trading of security-based swaps onto regulated markets.[1665] Section 763 of the Dodd-Frank Act amends the Exchange Act by adding a mandatory trade execution requirement [1666] and various new statutory provisions governing SB SEFs.[1667] Specifically, Section 3D(a)(1) of the Exchange Act states that no person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a SB SEF or as a national securities exchange under that section.[1668] In addition, Section 3C(h)(1) of the Exchange Act requires, with respect to transactions involving security-based swaps subject to the mandatory clearing requirement of Section 3C(a)(1) of the Exchange Act, that counterparties execute such transactions on an exchange or a SB SEF that is registered under Section 3D of the Exchange Act or is exempt from registration under Section 3D(e) of the Exchange Act,[1669] subject to the exceptions set forth in Section 3C(h)(2) of the Exchange Act.[1670]

This portion of the economic analysis addresses the programmatic benefits and costs associated with these statutory requirements and their proposed application in the cross-border context. Specifically, this section addresses the programmatic benefits and costs of: (1) the Commission's proposed interpretation of the application of the registration requirements of Section 3D of the Exchange Act to foreign security-based swap markets; (2) the potential availability to foreign security-based swap markets of exemptive relief from the registration requirements; (3) the mandatory trade execution requirement of Section 3C(h) of the Exchange Act; and (4) proposed Rule 3Ch–1 regarding application of the mandatory trade execution requirement in the cross-border context.

[1665] *See* Public Law 111–203, preamble.

[1666] *See* Public Law 111–203, section 763 (adding Section 3C(h) of the Exchange Act).

[1667] *See* Public Law 111–203, section 763 (adding Sections 3C and 3D of the Exchange Act).

[1668] *See* Public Law 111–203, section 763(a) (adding Section 3D(a)(1) of the Exchange Act). The Commission views this requirement as applying only to facilities that meet the definition of ''security-based swap execution facility'' in Section 3(a)(77) under the Exchange Act. *See* SB SEF Proposing Release, 76 FR 10949 n.10.

[1669] *See* 15 U.S.C. 78c–3(h)(1). Section 3D(e) of the Exchange Act states that the Commission may exempt, conditionally or unconditionally, a SB SEF from registration under Section 3D if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the CFTC. 15 U.S.C. 78c–4(e).

[1670] Section 3C(h)(2) provides two exceptions to compliance with the mandatory trade execution requirement: (i) if no exchange or SB SEF makes the security-based swap available to trade; or (ii) for security-based swap transactions subject to the clearing exception under Section 3C(g) of the Exchange Act. *See* 15 U.S.C. 78c–3(h)(2). Security-based swaps that are not subject to the mandatory trade execution requirement would not have to be traded on a registered SB SEF and could be traded in the OTC market for security-based swaps. *See* SB SEF Proposing Release, 76 FR 10949 n.10.

1. Programmatic Benefits and Costs of the Proposed Application of the Registration Requirements of Section 3D of the Exchange Act to Foreign Security-Based Swap Markets

As discussed above, the Commission has proposed herein to interpret when the registration requirements of Section 3D of the Exchange Act[1671] would apply to a foreign security-based swap market.[1672] The Commission is endeavoring to draw the appropriate lines for the application of those requirements to foreign security-based swap markets when they act in capacities that meet the definition of ''security-based swap execution facility'' under the Dodd-Frank Act.[1673] As stated above, not all foreign security-based swap markets would be subject to the registration requirements of Section 3D of the Exchange Act and the rules proposed thereunder. The Commission preliminarily believes that only those foreign security-based swap markets that engage in certain activities with respect to U.S. persons, or non-U.S. persons located in the United States, would be subject to the registration requirements.[1674]

The Commission preliminarily believes that the lines the Commission is proposing to draw with respect to the application of Section 3D's registration requirements in the cross border context would result in programmatic benefits for the U.S. security-based swap market as a whole that are intended by Title VII, *i.e.,* increased pre-trade transparency, increased competition, and improved oversight.[1675] The Commission also is mindful, however, that certain costs would be associated with our proposal. The Commission's consideration and discussion of the programmatic benefits and costs of the formation and registration of a SB SEF in the SB SEF Proposing Release did not differentiate between domestic and foreign security-based swap markets. The Commission notes, however, that the SB SEF Proposing Release contemplated that foreign security-based swap markets would seek to register as SB SEFs and proposed certain requirements specifically for non-resident[1676] persons seeking to register as a SB SEF.[1677] The Commission received no comments on the SB SEF Proposing Release indicating that the benefits and costs associated with SB SEF registration would be different for foreign and domestic security-based swap markets.[1678] Accordingly, the Commission preliminarily believes that the programmatic benefits and costs associated with a security-based swap market registered with the Commission as a SB SEF and subject to the requirements set forth in Section 3D of the Exchange Act, and the proposed rules and regulations thereunder, would be substantially the same for both a domestic and a foreign security-based swap market.[1679]

(a) Programmatic Benefits

The Commission preliminarily believes that application of the statutory registration requirements and Regulation SB SEF to foreign security-based swap markets that engage in the activities noted above with respect to U.S. persons, or non-U.S. persons located in the United States,[1680] would generate programmatic benefits similar to those described in the SB SEF Proposing Release with respect to the registration and regulation of SB SEFs, *i.e.,* enhanced transparency, competition, and oversight of security-based swaps,[1681] which are discussed below. The Commission also believes that our proposed application of the statutory registration requirements and Regulation SB SEF to foreign security-based swap markets is appropriately tailored to extend these benefits to the security-based swap activity that is most likely to raise the concerns that Congress intended to address in Title VII.[1682] In the Commission's preliminary view, a different application could undermine these goals. By way of example and without limitation, if a foreign security-based swap market could provide proprietary electronic trading screens for the execution or trading of security-based swaps by, or grant membership or participation in the foreign security-based swap market to, U.S. persons, or non-U.S. persons located in the United States, without being required to register under Section 3D, there could be security-based swap trading venues available to U.S. persons, or non-U.S. persons located in the United States, that are not subject to Commission regulation and oversight. The regulatory benefits that the Commission believes Title VII intends to bring to the U.S. security-based swap market would not be fully realized in such a scenario.

Improved Transparency. The trading of security-based swaps on regulated markets, such as SB SEFs, should help bring more transparency to the U.S. marketplace for security-based swaps. Increased pre-trade transparency should help alleviate informational asymmetries that may exist today in the security-based swap market and allow an increased number of market participants to see the trading interest of other market participants prior to submitting trades, which should lead to increased price competition among market participants.[1683] As such, the Commission preliminarily believes that proposed Regulation SB SEF should lead to more efficient pricing in the security-based swap market,[1684] but is mindful that, under certain circumstances, pre-trade transparency also could discourage the provision of

[1671] 15 U.S.C. 78c–4.

[1672] *See* Section VII.B., *supra.* A foreign security-based swap market that would be subject to the registration requirement of Section 3D of the Exchange Act also would be subject to the proposed registration rules for SB SEFs, if adopted. *See* SB SEF Proposing Release, 76 FR 10949.

[1673] *See* Public Law 111–203, section 761(a) (adding Section 3(a)(77) of the Exchange Act to define ''security-based swap execution facility,'' 15 U.S.C. 78c(a)(77)). Entities that do not meet the definition of SB SEF may nonetheless be required to register in another capacity under the Exchange Act.

[1674] *See* Section VII.B, *supra,* for the non-exhaustive discussion of activities that the Commission preliminarily believes would warrant the application of the SB SEF registration requirements to a foreign security-based swap market.

[1675] *See* SB SEF Proposing Release, 76 FR 11036–38.

[1676] *See* note 834, *supra* (noting that usage of the term ''non-resident,'' as well as the term ''foreign,'' in connection with a security-based swap market refers to a security-based swap market that is not a U.S. person).

[1677] *See* note 1697, *infra,* and accompanying text.

[1678] In the SB SEF Proposing Release, the Commission estimated that as many as 20 security-based swap trading platforms or systems could seek to register with the Commission as SB SEFs. *See* SB SEF Proposing Release, 76 FR 11023. No commenter indicated that the Commission's estimate was erroneous.

[1679] A more detailed description of the benefits and costs associated with the formation and registration of SB SEFs is set forth in the SB SEF Proposing Release, 76 FR 11035–48. As set forth in the Request for Comment section below, the Commission invites comment on whether the benefits and costs associated with SB SEF registration would be the same for domestic and foreign security-based swap markets.

[1680] *See* Section VII.B, *supra.*

[1681] *See* SB SEF Proposing Release, 76 FR 11036. One commenter on the SB SEF Proposing Release stated that certain benefits would result from the trading of security-based swaps occurring on SB SEFs, including narrower bid-ask spreads and lower transaction costs as a result of increased competition and pre-trade price transparency. *See* SDMA Letter I at 8–9 and SDMA Letter II at 2; *see also* Section XXII, *infra.*

[1682] *See* Section II.B., *supra.*

[1683] *See* SB SEF Proposing Release, 76 FR 11036; *see also* Ananth Madhavan, ''Market Microstructure: A Practitioner's Guide,'' Fin. Analysts J., Vol. 58 (2002), at 38 (nondisclosure of pre-trade price information benefits dealers by reducing price competition).

[1684] *See* SB SEF Proposing Release, 76 FR 11036; *see also* Ekkehart Boehmer, *et al.,* ''Lifting the Veil: An Analysis of Pre-trade Transparency at the NYSE,'' J. of Fin., Vol. LX (2005) (greater pre-trade price transparency leads to more efficient pricing).

liquidity by some market participants, as discussed in more detail below.[1685]

Improved Competition. The Commission preliminarily believes that registration and regulation of SB SEFs, as described in the SB SEF Proposing Release, also would foster greater competition in the trading of security-based swaps by increasing access to security-based swap trading venues.[1686] The proposed SB SEF rules would require SB SEFs to permit all eligible persons that meet the requirements for becoming participants, as set forth in the SB SEF's rules, to become participants in the SB SEF.[1687] The proposed SB SEF rules would require each SB SEF to establish fair, objective and not unreasonably discriminatory standards for granting impartial access to trading on the SB SEF.[1688] These proposed requirements are designed to provide market participants with impartial access.[1689] Having impartial access should, in turn, promote greater participation by liquidity providers and increased competition on each SB SEF.[1690] Impartial access requirements also should help guard against the potential for certain participants in a SB SEF (who also might be owners of the SB SEF) to seek to limit the number of other participants in the SB SEF as a way to reduce competition and increase their own profits.[1691]

Improved Oversight. As set forth in the SB SEF Proposing Release, the proposed registration rules for SB SEFs would incorporate the requirement under the Dodd-Frank Act that a SB SEF, to be registered and maintain registration, must comply with the 14 Core Principles governing SB SEFs in Section 3D(d) of the Exchange Act[1692] (''Core Principles'') and any requirement that the Commission may impose by rule or regulation.[1693] The proposed SB SEF rules and proposed Form SB SEF are intended to implement the statutory registration requirements and assist the Commission in overseeing and regulating the security-based swap market.[1694] The information to be provided on proposed Form SB SEF (and the exhibits thereto) is designed to enable the Commission to assess whether an applicant seeking to become a registered SB SEF has the capacity and the means to perform the duties of a SB SEF and to comply with the Core Principles and other requirements governing registered SB SEFs.[1695] In addition, the amendments, supplemental information and notices that the Commission proposed to require registered SB SEFs to file pursuant to Rules 802, 803, and 804 of proposed Regulation SB SEF are designed to further the ability of the Commission to efficiently monitor SB SEFs' compliance with the provisions of the Exchange Act and to oversee the marketplace for security-based swaps and, specifically, the trading of security-based swaps on SB SEFs.[1696] Moreover, as discussed in the SB SEF Proposing Release, any non-resident persons seeking to register as a SB SEF must comply with certain requirements, including that such non-resident persons provide assurances that they are legally permitted to provide the Commission with prompt access to their books and records and to be subject to inspection and examination by the Commission.[1697]

Registration and regulation of SB SEFs would require SB SEFs to maintain an audit trail and surveillance systems to monitor trading.[1698] Proposed Regulation SB SEF also would require comprehensive reporting and recordkeeping by SB SEFs.[1699] These requirements would put in place a structure that would provide the SB SEF with information to better enable it to oversee trading on its market by its participants, including detecting and deterring fraudulent and manipulative acts.[1700] The proposed rules for SB SEFs also would provide the Commission with greater access to information on the trading of security-based swaps to support its responsibilities to oversee the security-based swap market.[1701] Further, the proposed rules for SB SEFs would enable the Commission to share that information with other federal financial regulators, including in instances of broad market turmoil.[1702]

Improved regulatory oversight could encourage participation in the U.S. security-based swap market by investors who could benefit from such participation but currently choose to avoid transacting in that market in part because the market is opaque and largely has not been subject to oversight by U.S. regulatory authorities. Indeed, to the extent that market participants consider a well-regulated market as significant to their investment decisions, trust, which is a component of investor confidence, is improved and market participants may be more willing to participate in the U.S. security-based swap market.[1703]

(b) Programmatic Costs

Although the Commission believes that application of the registration requirements of Section 3D and proposed Regulation SB SEF to foreign security-based swap markets would result in significant benefits to the U.S. security-based swap market, the Commission recognizes that foreign security-based swap markets also would incur significant costs to comply with the proposed registration requirements for foreign security-based swap markets similar to those that domestic SB SEFs would incur, as discussed in the Regulation SB SEF proposal.[1704] These costs are summarized below.

[1685] *See* SB SEF Proposing Release, 76 FR 11036; *see also* Section XV.G.1(b), *infra; see also* Ananth Madhavan, *et al.,* ''Should Securities Markets Be Transparent?'' J. of Fin. Markets, Vol. 8 (2005) (finding that an increase in pre-trade price transparency leads to lower liquidity and higher execution costs, because limit-order traders are reluctant to submit orders given that their orders essentially represent free options to other traders).

[1686] *See* SB SEF Proposing Release, 76 FR 11037–38.

[1687] *Id.* at 11037. Proposed Rule 809(a) in Regulation SB SEF would require SB SEFs to permit a person to become a participant in the SB SEF only if such person is registered with the Commission as a security-based swap dealer, major security-based swap participant, or broker (as defined in Section 3(a)(4) of the Exchange Act, 15 U.S.C. 78c(a)(4)), or if such person is an eligible contract participant (as defined in Section 3(a)(65) of the Exchange Act, 15 U.S.C. 78c(a)(65)).

[1688] *See* SB SEF Proposing Release, 76 FR 11037.

[1689] *Id.; see also* Section 3D(d)(2)(B)(i) of the Exchange Act, 15 U.S.C. 78c–4(d)(2)(B)(i).

[1690] *See* SB SEF Proposing Release, 76 FR 11037; *see also* Section XV.C.3, *supra* (stating that in markets with impartial access, security-based swaps would be available to more participants, and that fair and equal access to security-based swaps not only promotes competition, but also encourages participants to express their true valuations for security-based swaps and lowers search costs for participants deciding to enter or exit a security-based swap position).

[1691] *See* SB SEF Proposing Release, 76 FR 11037.

[1692] 15 U.S.C. 78c–4(d).

[1693] *See* SB SEF Proposing Release, 76 FR 10949.

[1694] *See id.* at 10949–50.

[1695] *See* proposed Form SB SEF under the Exchange Act; *see also* SB SEF Proposing Release, 76 FR 11004–08.

[1696] *See* proposed Rules 802–804 under the Exchange Act; *see also* SB SEF Proposing Release, 76 FR 11002–04.

[1697] *See* proposed Rule 801(f) under the Exchange Act; *see also* SB SEF Proposing Release, 76 FR 11001.

[1698] *See* proposed Rule 818(c) under the Exchange Act, which would require each SB SEF to keep audit trail records relating to all orders, requests for quotations, responses, quotations, other trading interest, and transactions that are received by, originated on, or executed on, the SB SEF; and proposed Rules 811(j), 813(a)(2) and 813(b) under the Exchange Act, which would require each SB SEF to electronically surveil its market and to maintain an automated surveillance system; *see also* SB SEF Proposing Release, 76 FR 11037–38.

[1699] *See* proposed Rule 818 under the Exchange Act; *see also* SB SEF Proposing Release, 76 FR 11037–38.

[1700] *See* SB SEF Proposing Release, 76 FR 11037.

[1701] *Id.*

[1702] *Id.*

[1703] *See id.* at 11037.

[1704] *See id.* 11040–48. A detailed breakdown of the cost estimates associated with all aspects of SB SEF formation and compliance with the rules proposed under proposed Regulation SB SEF are

Continued

SB SEF Formation. According to industry sources consulted by Commission staff in connection with the issuance of the SB SEF Proposing Release, the monetary cost of forming a SB SEF is estimated to range from approximately $15 million to $20 million per SB SEF for the first year of operation, if an entity were to establish a SB SEF without the benefit of modifying an already existing trading system.[1705] The industry sources consulted by Commission staff estimated at that time that, for the SB SEF's first year of operation, the cost of software and product development would range from approximately $6.5 million to $10.5 million per SB SEF.[1706] The technological costs would be expected to decline considerably during the second and subsequent years of operation, with an estimated range of $3 million to $4 million per year per SB SEF.[1707]

For entities that currently own and/or operate platforms for the trading of security-based swaps, the cost of forming a SB SEF would be more incremental, given that these entities already have viable technology that could be modified to comply with the requirements that the Commission may impose for SB SEFs.[1708] According to industry sources consulted by Commission staff in connection with the issuance of the SB SEF Proposing Release, the incremental costs of enhancing a trading platform to be compatible with any SB SEF requirements ultimately established by the Commission would range from as low as $50,000 to as much as $3 million per SB SEF, depending on the enhancements needed to make a particular platform compatible with the final Commission rules governing SB SEFs.[1709] As noted in the SB SEF Proposing Release, the annual ongoing cost of maintaining the technology and any improvements is estimated to be in the range of $2 million to $4 million.[1710]

In the SB SEF Proposing Release, the Commission preliminarily estimated that the cost for an applicant to file Form SB SEF, including all exhibits thereto, would be approximately $675,297 per SB SEF.[1711]

Complying with Core Principles. As is also discussed in the SB SEF Proposing Release, the regulatory requirement that SB SEFs comply with the statutory Core Principles would increase the ongoing regulatory obligations of SB SEFs with respect to their operations and oversight.[1712] Industry sources consulted by Commission staff in connection with the issuance of the SB SEF Proposing Release estimated that the cost to a SB SEF to comply with the rules relating to surveillance and oversight that they expect the Commission to propose would be in the range of $1 million to $3 million annually, with initial costs likely to be at the higher end of that range, since a SB SEF would need to create the technology necessary to monitor and surveil its market participants, as well as establish a rulebook that reflects the Core Principles and related rules.[1713] The ongoing annual compliance costs estimated by those same industry sources would be approximately $1 million, which would include the salary of a Chief Compliance Officer and at least two junior compliance personnel, who are expected to be attorneys.[1714]

Unquantifiable Costs. The Commission also has considered some costs relating to registered SB SEFs that are difficult to quantify precisely.[1715] Security-based swaps traded on registered SB SEFs may be perceived to be subject to increased costs, monetary and otherwise. For example, some industry participants expressed their belief that any proposed pre-trade transparency requirement would force market participants to reveal valuable information regarding their trading interest more broadly than they believed would be economically prudent, which in their view could discourage participation in the security-based swap market.[1716] There are perceived costs associated with frontrunning, if customers or dealers were required to show their trading interest before a trade is executed.[1717] These potential costs of pre-trade transparency could change market participants' trading strategies, which could result in their working more orders or finding ways to hide their interest.[1718]

If market participants viewed the Commission's proposed Regulation SB SEF as too burdensome with respect to pre-trade transparency, security-based swap dealers could be less willing to supply liquidity for security-based swaps that trade on SB SEFs, thus reducing liquidity and competition.[1719] On the other hand, if the requirement with respect to pre-trade transparency were too loose, the result could be that there would be no substantive change from the *status quo,* and thus no potential reduction in asymmetric information, increase in price competition, or improvement in executions, beyond the changes in response to the other requirements of the Dodd-Frank Act.[1720]

The import of this concern depends on the degree of pre-trade transparency required and the characteristics of the trading market.[1721] The proposed rules for SB SEFs are intended to provide for greater pre-trade transparency than currently exists without requiring pre-trade transparency in a manner that would cause participants to avoid providing liquidity on SB SEFs.[1722]

An additional unquantifiable cost could result if foreign security-based swap markets perceive the Commission's proposed requirements for SB SEFs as too burdensome or detrimental to their security-based swap business. A foreign security-based swap market that has such a view and that currently operates in a manner that would cause it to be subject to the SB SEF registration requirements could

contained in the SB SEF Proposing Release. *See id.* Moreover, the Commission notes that it has received comment letters on those cost estimates. *See* MarketAxess Letter and UBS Letter. One commenter remarked on the cost estimates in the SB SEF Proposing Release for many of the individual aspects of SB SEF formation, noting that, in its view, some cost estimates were high and others were low. *See* MarketAxess Letter at 15–17. The commenter stated that generally the estimates in the SB SEF Proposing Release were realistic and that accurate estimates of the true expected costs of establishing and operating a SB SEF and the hourly rates relied upon for the estimates were broadly consistent with industry standards. *Id.* Another commenter urged the Commission to consider the impact of the Regulation SB SEF proposal on broker-dealers and the potential costs that could result. *See* UBS Letter at 3. Neither of these commenters indicated that the costs associated with SB SEF formation and registration would be different for foreign security-based swap markets as compared to domestic security-based swap markets.

[1705] *See* SB SEF Proposing Release, 76 FR 11041.

[1706] *Id.*

[1707] *Id.*

[1708] *Id.* Several commenters on the SB SEF Proposing Release that currently operate swap trading facilities have indicated their intention to register as SB SEFs. *See, e.g.,* Bloomberg Letter; GFI Letter; MarketAxess Letter; and Tradeweb Letter.

[1709] *See* SB SEF Proposing Release, 76 FR 11041.

[1710] *Id.*

[1711] *Id.* A more detailed breakdown of the cost estimates associated with each exhibit to Form SB SEF, as well as with registration withdrawal and supplementation, is contained in the SB SEF Proposing Release. *See* SB SEF Proposing Release, 76 FR 11041–43.

[1712] *See* SB SEF Proposing Release, 76 FR 11041.

[1713] *Id.*

[1714] *Id.*

[1715] These unquantifiable costs are discussed more fully in the SB SEF Proposing Release. *See* SB SEF Proposing Release, 76 FR 11040.

[1716] *Id.* Several commenters on the SB SEF Proposing Release expressed concerns about pre-trade transparency requirements in the context of block trades. *See* ABC Letter at 2, 4–5; MFA Letter III at 7; ISDA SIFMA Letter II at 7; SIFMA AMG Letter II at 4–5; Blackrock Letter at 8; Cleary Letter III at 20; CME Letter at 3–4; Phoenix Letter at 3–4.

[1717] *See* SB SEF Proposing Release, 76 FR 11040.

[1718] *Id.*

[1719] *Id.*

[1720] *Id.*

[1721] *Id.*

[1722] *Id.*

decide to restructure its security-based swap business such that it would not be subject to the SB SEF registration requirements. This result could have several potential negative implications for participants in the U.S. financial system such as, among other things, fewer registered venues on which security-based swaps could be executed, less competition between the remaining SB SEFs, and thus potentially higher costs for such executions. If restructuring raises trading costs in the domestic security-based swap market, liquidity could flow away from SB SEFs and U.S. participants could find fewer trading opportunities and potentially decreased liquidity in the domestic security-based swap market.

(c) Alternatives

The Commission could have proposed a different interpretation regarding registration of foreign security-based swap markets. For example, the Commission could have interpreted Section 3D of the Exchange Act broadly to apply the registration requirement to a foreign security-based swap market that meets the definition of ''security-based swap execution facility,'' [1723] regardless of whether such foreign security-based swap market has engaged in any of the activities, discussed above, with respect to U.S. persons, or non-U.S. persons located in the United States.[1724] The Commission preliminarily believes that, if a foreign security-based swap market is not engaging in such activities with respect to U.S. persons, or non-U.S. persons located in the United States, then it would not trigger the registration requirements under Section 3D of the Exchange Act.

In addition, the Commission could have interpreted Section 3D of the Exchange Act more narrowly than proposed herein, such that, for example, the registration requirement would not apply to a foreign security-based swap market even if it meets the definition of ''security-based swap execution facility'' and provides U.S. persons, or non-U.S. persons located in the United States, with proprietary electronic trading screens or similar devices for executing or trading security-based swaps on its market. The Commission preliminarily believes that such a narrow interpretation would not accommodate the evolving technological innovation of electronic trading and the availability of global access to electronic trading platforms, and therefore could result in U.S. persons, or non-U.S. persons located in the United States, having the ability to directly execute or trade security-based swaps on a foreign security-based swap market that is not subject to the SB SEF registration requirements. As discussed above in this section, the Commission preliminarily believes that this, in turn, could result in the intended programmatic benefits of the SB SEF registration requirements, *i.e.,* increased pre-trade transparency, increased competition, and improved oversight, not being extended to all of the security-based swap activity that the Commission believes is most likely to raise the concerns that Congress intended to address in Title VII.[1725]

2. Programmatic Benefits and Costs of the Potential Availability of Exemptive Relief to Foreign Security-Based Swap Markets

As discussed above, the Commission may consider exempting a foreign security-based swap market from registration as a SB SEF under Section 3D of the Exchange Act if the foreign security-based swap market is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in its home country.[1726] Any foreign security-based swap market granted such an exemption would be subject to supervision and regulation as a registered security-based swap market in its home jurisdiction that the Commission has determined to be comparable to the supervision and regulation of registered SB SEFs. As a result, the Commission preliminarily believes that the programmatic benefits and costs, as discussed above,[1727] that would result from subjecting registered SB SEFs to the Commission's supervision and regulation also would be realized by any exempted foreign security-based swap market because of the comparable supervision and regulation of that foreign market by its home jurisdiction.

While a number of foreign jurisdictions are in the process of developing standards for the regulation of security-based swaps and the security-based swap market, few foreign jurisdictions have adopted such standards as yet.[1728] As a result, at this time, the Commission believes that it does not have a sufficient basis to provide an estimate as to how many foreign security-based swap markets would be required to register as SB SEFs and potentially be eligible for an exemption from that requirement because the Commission currently has no basis to determine whether such foreign security-based swap markets would be subject to comparable, comprehensive supervision and regulation in their home jurisdictions.

Nevertheless, the Commission believes that certain additional programmatic benefits and costs could result specifically from an exempted foreign security-based swap market not having to register as a SB SEF under Section 3D of the Exchange Act while continuing to serve U.S. security-based swap market participants. These additional benefits and costs are discussed below.

(a) Programmatic Benefits

Facilitating Cross Border Security-Based Swap Transactions. As discussed above,[1729] following the publication of the SB SEF Proposing Release, the Commission received comments from the public expressing concerns about the requirements and implications of Section 3D of the Exchange Act and the Commission's proposed rules governing SB SEFs for foreign-security-based swap markets and the global security-based swap market generally.[1730] Several commenters urged the Commission to work with foreign regulators to develop harmonized rules for the trading of security-based swaps.[1731] As noted above, the Commission currently is in discussions with its foreign counterparts to explore steps toward such harmonization.[1732] The Commission is proposing, as a means to facilitate cross-border security-based swap transactions, that it may consider exempting a foreign security-based swap market from the registration requirements under Section 3D in the circumstances described above.[1733] The Commission preliminarily believes that the potential availability of such an exemption should provide foreign security-based swap markets operating in the United States with appropriate flexibility with respect to SB SEF registration when they are subject to comparable, comprehensive supervision and regulation in their home markets. In addition, the Commission preliminarily

[1723] *See* Section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77).

[1724] *See* Section VII.B, *supra.*

[1725] *See* Section II.B, *supra.*

[1726] *See* Section VII.C, *supra.*

[1727] *See* Section XV.G.1, *supra.*

[1728] *See* Section VII.C, *supra.*

[1729] *Id.*

[1730] *See, e.g.,* Thomson Letter at 3–4; Blackrock Letter at 12–13; Bloomberg Letter at 6–7; TradeWeb Letter at 2; ISDA SIFMA Letter II at 2; WMBAA Letter at 10–11; Cleary Letter III at 4; and Cleary Letter IV at 5, 13; *see also* Section XXII., *infra.*

[1731] *See* Thomson Letter; BlackRock Letter; TradeWeb Letter; ISDA SIFMA Letter II; and WMBAA Letter; *see also* Section XXI, *infra.*

[1732] *See* Section VII.C, *supra.*

[1733] *Id.*

believes that the programmatic benefits associated with registration and other requirements for SB SEFs under Section 3D of the Exchange Act, and rules and regulations thereunder, would not be diminished as a result of the proposed exemptive relief. Therefore, those U.S. financial system participants that opt to trade on any exempted foreign security-based swap market operating in the United States would remain adequately protected because such an exempted foreign market would be subject to oversight and regulation in a manner comparable to the Commission's proposed requirements for SB SEFs.

Reduction in Programmatic Costs Associated with Registration. The Commission preliminarily believes that the availability of an exemption from SB SEF registration requirements based on comparable, comprehensive supervision and regulation in the foreign security-based swap market's home country could serve to reduce any potentially duplicative or conflicting regulatory burdens faced by security-based swap markets that operate on a cross-border basis and that otherwise would be required to register in both their home country and the United States. Therefore, to the extent that such foreign security-based swap markets would qualify for and pursue such an exemption, there could be a reduction in the programmatic costs that those foreign security-based swap markets otherwise would incur.

One commenter on the SB SEF Proposing Release stated that harmonized rules for trading security-based swaps would reduce potentially duplicative or conflicting regulatory burdens.[1734] As noted above, few foreign jurisdictions have enacted legislation or adopted standards for the regulation of security-based swaps markets, although a number of foreign jurisdictions are in the process of developing such standards.[1735] As the process of developing legislation or regulation regarding security-based swaps continues in other jurisdictions, the Commission believes that the availability of an exemption from the U.S. registration requirements is a reasonably designed measure to address the potential for conflicting or unnecessarily duplicative regulatory burdens that could arise from requiring dual registration in the United States and in a comparably regulated foreign jurisdiction.

For example, a foreign security-based swap market that is registered in a foreign jurisdiction and that provides U.S. persons, or non-U.S. persons located in the United States, the ability to execute or trade security-based swaps, or that facilitates the execution or trading of security-based swaps, on its market could be required to incur the cost of full registration twice—once to register in the foreign jurisdiction and once more to register as a SB SEF in the United States—if there was no possibility of obtaining an exemption from the U.S. registration requirements. As a further example, such a foreign security-based swap market, as a result of its registration as a SB SEF, would be required to establish rules governing the operation of its trading facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility.[1736] A conflict could arise if, for example, the U.S. requirements for SB SEFs require the foreign market's trading rules to allow trading interest in security-based swaps to be expressed or responded to in a manner that is different from, and that makes it impossible also to comply with, the foreign jurisdiction's requirements regarding trading rules. These examples are not meant to be exhaustive, but rather to be illustrative of scenarios involving potentially conflicting or unnecessarily burdensome regulation that foreign security-based swap markets could face, absent an exemption. The Commission preliminarily believes that the availability of an exemption from registration as a SB SEF should help mitigate the potential impact of such scenarios. At the same time, as discussed above, the Commission believes that granting such an exemption to a foreign security-based swap market would not reduce the programmatic benefits achieved by requiring security-based swap markets to register as a SB SEF because any exempted foreign market would be comparably supervised and regulated by its home country.

As stated above, few jurisdictions have adopted standards for the regulation of security-based swap markets and therefore the Commission does not have a sufficient basis to provide an estimate as to how many foreign security-based swap markets would request, and potentially receive, an exemption from registration.[1737] The Commission preliminarily believes that the estimate in the SB SEF Proposing Release of programmatic costs associated with registration as a SB SEF would apply equivalently to a foreign security-based swap market that is subject to Section 3D's registration requirement.

Any potential exemption from registration (even though the foreign security-based swap market would incur costs associated with compliance with the comparable regulation in its home country), could result in minimizing the burden of the programmatic costs associated with registration as a SB SEF, and so these programmatic costs constitute an upper bound for the potential cost savings from any such exemption. However, the Commission is not able to estimate the aggregate reduction in programmatic costs that would be associated with reliance on any proposed exemption by foreign security-based swap markets.

(b) Programmatic Costs

Compliance with Potential Conditions of Exemption. As discussed above, any grant of an exemption from the SB SEF registration requirements may be subject to certain appropriate conditions, which could include, but not be limited to, requiring the exempted foreign security-based swap market to provide the Commission with prompt access to its books and records, including, for example, data related to orders, quotes and transactions, as well as providing an opinion of counsel that, as a matter of law, it is able to provide such access.[1738] The Commission also could require that the foreign security-based swap market appoint an agent for service of process in the United States.[1739]

The Commission preliminarily believes that the costs associated with a commitment by the foreign security-based swap market to provide the Commission with access to books and records would be part of the Commission's $1 million to $3 million

[1734] *See* Bloomberg Letter.

[1735] *See* Section VII.C, *supra.*

[1736] *See* SB SEF Proposing Release, 76 FR 10967, 10971–73.

[1737] *See* Section VII.C, *supra.*

[1738] *Id.*

[1739] *Id.* These potential conditions of an exemption from SB SEF registration requirements for a foreign security-based swap market—granting the Commission access to its books and records, providing an opinion of counsel that such access can be granted under the foreign jurisdiction's law, and appointing a process agent in the United States—are proposed requirements of SB SEF registration. *See* SB SEF Proposing Release, 76 FR 11000. Thus, a foreign security-based swap market that is required to register as a SB SEF would incur the costs associated with complying with these requirements, which costs are included in the estimate provided in Section XV.G.1(b) above of the cost for an applicant to file Form SB SEF, including all exhibits thereto. *See id.* at 11016–17, 11041–42. A foreign security-based swap market that is granted an exemption from SB SEF registration requirements also could incur the costs of complying with these requirements to the extent that the Commission imposes them as conditions to the exemption.

estimate of the annual cost to a SB SEF to comply with the Commission's proposed rules relating to surveillance and oversight,[1740] but would be difficult to quantify separately at this time. The foreign security-based swap market would maintain books and records in the ordinary course of its business and in conformance with the requirements of its appropriate regulatory authority.[1741] If, after issuance of any such exemptive relief, the Commission considered it necessary to have access to the foreign security-based swap market's books and records, there would be costs to the foreign security-based swap market in granting such access, for example, in copying the requested books and records and supplying them to Commission staff. However, the circumstances that would prompt any Commission request for access to the foreign security-based swap market's books and records and the exact scope of any such request would not be known at the time the Commission were to grant an exemption from the requirements of Section 3D of the Exchange Act.

The Commission believes that the costs for a foreign security-based swap market to appoint an agent for service of process in the United States would be minimal in circumstances in which the foreign security-based swap market has a subsidiary or staff in the United States that is capable of receiving service of process and acting as the foreign market's appointed agent. In circumstances in which a foreign security-based swap market must appoint a third party as its process agent, Commission staff estimates, based on an industry source that provides process agent services, that the cost to do so would be approximately $400 for the first year and approximately $300 annually thereafter.

The Commission also believes that an exempted foreign market could incur costs in complying with any additional conditions that accompany the grant of the exemption, but the scope of these conditions and the costs associated with them would depend on the specific circumstances for which the exemption is granted and could vary from foreign jurisdiction to foreign jurisdiction. As a result, the Commission cannot provide an estimated dollar value of the costs that would be associated with such additional conditions at this time.

(c) Alternatives

Harmonization with Foreign Counterparts. Apart from interpreting Section 3D of the Exchange Act to apply to foreign security-based swap markets that engage in certain activities with respect to U.S. persons or non-U.S. persons located in the United States,[1742] and potentially providing an exemption from the SB SEF registration requirements for qualifying foreign security-based swap markets that are covered by Section 3D,[1743] the Commission could adopt the approach of harmonizing our rules with the rules of foreign jurisdictions. As noted above, few foreign jurisdictions have enacted legislation or adopted standards for the regulation of security-based swaps markets, although a number of foreign jurisdictions are in the process of developing such standards. Accordingly, the Commission preliminarily believes that our proposal to consider exemptive relief from SB SEF registration for foreign security-based swap markets that are subject to comparable, comprehensive supervision and regulation is a reasonable measure at this time that acknowledges the cross-border nature of the security-based swap market.

Not Consider Exemptive Relief. The Commission could have determined not to consider making exemptive relief from Section 3D's registration requirements available. In such a scenario, a foreign security-based swap market subject to Section 3D's registration requirements would be required to register as a SB SEF—and incur the costs attendant to such registration—even if it is subject to comparable, comprehensive supervision and regulation in its home jurisdiction. Moreover, without the availability of an exemption, the Commission believes that there would be a greater potential for such a dually-registered foreign security-based swap market to face duplicative or conflicting regulatory burdens. The Commission preliminarily believes that considering exemptive relief is a more cost-effective and, for the reasons stated above, reasonable measure given the cross-border nature of the security-based swap market.

(d) Assessment Costs

A foreign security-based swap market would incur costs in submitting a request or application for an exemption from the SB SEF registration requirement. The Commission estimates that the costs of submitting such a request or application would be approximately $110,320.[1744] The use of internal counsel in lieu of outside counsel would reduce this estimate.

An additional assessment cost that a foreign security-based swap market could incur in connection with submitting such an exemption request or application would be obtaining an opinion of counsel letter stating that the foreign security-based swap market is able to give access to its books and records to the Commission, if the Commission were to include such a condition in any exemptive relief. The Commission estimates that the cost associated with obtaining such a letter would be approximately $25,000.[1745]

[1740] *See* note 1713 and accompanying text, *supra,; see also* SB SEF Proposing Release, 76 FR 11041.

[1741] Prior to the issuance of any exemption the foreign security-based swap market could, however, need to incur the cost of obtaining an opinion of counsel letter stating that it is able to provide access to its books and records. *See* Section XV.G.2(d), *infra.*

[1742] *See* Section VII.B, *supra.*

[1743] *See* Section VII.C, *supra.*

[1744] The Commission preliminarily believes that the costs of submitting a request or application for the proposed exemption would be similar to the costs associated with submitting a request for a substituted compliance determination, *i.e.,* $110,320. *See* Section XV.I.3, *infra.* This estimate is based on information regarding the average costs associated with preparing and submitting an application to the Commission for a Commission order for exemptive relief under Section 36 of the Exchange Act in accordance with the procedures set forth in 17 CFR 240.0–12. The Commission estimates that preparation of the request would require approximately 80 hours of in-house counsel time and 200 hours of outside counsel time. Such estimate takes into account the time required to prepare supporting documents necessary for the Commission to make a substituted compliance determination, including, without limitation, information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379. The Commission estimates the costs for outside legal services to be $400 per hour. Accordingly, the Commission estimates the cost to be $110,320 ($30,320 (based on 80 hours of in-house counsel time * $379) + $80,000 (based on 200 hours of outside counsel time * $400)) to submit a request for a substituted compliance determination.

[1745] This estimate is based on prior Commission estimates of the cost of obtaining an opinion of counsel, and assumes that foreign security-based swap dealers would seek outside legal counsel to prepare the letter at an hourly rate of $400. *See* SB SEF Proposing Release, 76 FR 11025, 11042; Registration Proposing Release, 76 FR 65811; *see also* note 1744, *supra.* In the SB SEF Proposing Release, the Commission preliminarily estimated that the average initial paperwork cost for a non-resident SB SEF to provide an opinion of counsel that the SB SEF can, as a matter of law, provide the Commission with access to its books and records and submit to onsite inspection and examination by representatives of the Commission would be one hour and $900 in outside legal costs per non-resident SB SEF. *See* SB SEF Proposing Release, 76 FR 11025, 11042. In the Registration Proposing Release, the Commission stated that, upon further reflection, it believed that a non-resident security-

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Request for Comment

• Would the benefits and costs associated with becoming a SB SEF be the same for domestic and foreign security-based swap markets? For example, would the costs of implementing the systems and other necessary technology to operate as a SB SEF be different for foreign security-based swap markets? To the extent the benefits or costs of SB SEF registration would be different for foreign security-based swap markets as compared to domestic markets, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such different benefits or costs for foreign security-based swap markets.

• Would the costs associated with developing the other aspects of the infrastructure necessary for SB SEFs be different for foreign security-based swap markets? If so, please describe such differences and quantify them to the extent possible.

• Would the non-infrastructure costs associated with forming and operating a SB SEF be different for foreign security-based swap markets? If so, please describe such differences and quantify them.

• Are there any programmatic benefits and costs associated with the SB SEF registration requirements or the proposed availability of an exemption from those requirements that are not discussed herein? If so, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.

• Are the programmatic benefits and costs associated with the SB SEF registration requirements and the proposed availability of an exemption from those requirements that are discussed herein accurate? If not, how can the Commission more accurately estimate these costs?

• Do the benefits of the proposed availability of an exemption from the SB SEF registration requirements justify the costs? Are there quantifiable programmatic costs associated with the proposed availability of an exemption from those requirements that should be addressed? If so, please identify them. Are there any additional assessment costs not discussed herein? If so, what are they and are they quantifiable?

• Do commenters agree with the preliminary estimates of the assessment costs relating to the proposed exemption from the SB SEF registration requirement? Are the estimated costs a foreign security-based swap market would incur in submitting an application for an exemption from the SB SEF registration requirements accurate? If not, how should the Commission adjust the cost estimate? Are there other assessment costs not considered here?

3. Programmatic Benefits and Costs Associated With the Mandatory Trade Execution Requirement of Section 3C(h) of the Exchange Act

Unlike the markets for cash equity securities and listed options, the market for security-based swaps currently is characterized by bilateral negotiation in the OTC swap market and is largely decentralized.[1746] The lack of uniform rules concerning the trading of security-based swaps and the historical one-to-one nature of trade negotiation in security-based swaps has resulted in the formation of distinct types of trading venues and execution practices, ranging from bilateral negotiations carried out over the telephone,[1747] to single-dealer RFQ platforms,[1748] to multi-dealer RFQ platforms,[1749] to central limit order books,[1750] and brokerage trading.[1751] These various trading venues and execution practices provide different degrees of pre-trade transparency and different levels of access. While the Commission currently does not have sufficient information with respect to the volume of security-based swap transactions executed across these different trading venues and execution practices, a common thread to these transactions is that they have all been executed in the unregulated OTC derivatives market. Thus, for purposes of analyzing the economic impact of the statutory mandatory trade execution requirement, as well as proposed Rule 3Ch–1, the Commission is starting from a baseline in which no security-based swaps are currently traded in the United States on an exchange or on a system or platform that otherwise meets the statutory definition of ''security-based swap execution facility,'' the statutory Core Principles governing SB SEFs, and the Commission's proposed requirements governing SB SEFs, if they were to be adopted by the Commission.[1752]

based swap entity would incur, on average, approximately $25,000 in outside legal costs to obtain an opinion of counsel that a non-resident security-based swap entity could provide the Commission with access to its books and records and submit to onsite inspection and examination by the Commission. *See* Registration Proposing Release, 76 FR 65811. The Commission preliminarily believes that an estimate of $25,000 may be the more appropriate estimate of the cost that a foreign security-based swap market would incur in obtaining an opinion of counsel from outside counsel with respect to the ability to grant the Commission access to books and records given the research and legal analysis that the Commission believes would be involved in the preparation of the opinion.

[1746] *See* SB SEF Proposing Release, 76 FR 10951.

[1747] ''Bilateral negotiation'' refers to the execution practice whereby one party uses the telephone, email or other communications to contact directly a potential counterparty to negotiate and execute a security-based swap. The bilateral negotiation and execution practice provides no pre-trade or post-trade transparency because only the two parties to the transaction are aware of the terms of the negotiation and the final terms of the agreement. *See* SB SEF Proposing Release, 76 FR 10951; *see also* Section II.A.5, *supra.*

[1748] A single-dealer RFQ platform refers to an electronic trading platform where a dealer may post indicative quotes for security-based swaps in various asset classes that the dealer is willing to trade. Only the dealer's approved customers would have access to the platform. When a customer wishes to transact in a security-based swap, the customer requests an executable quote, the dealer provides one, and if the customer accepts the dealer's quote, the transaction is executed electronically. This type of platform generally provides pre-trade transparency in the form of indicative quotes on a pricing screen, but only from one dealer to its customer. *See* SB SEF Proposing Release, 76 FR 10951; *see also* Section II.A.5, *supra.*

[1749] A multi-dealer RFQ electronic trading platform refers to a multi-dealer RFQ system whereby a requester can send an RFQ to solicit quotes on a certain security-based swap from multiple dealers at the same time. After the RFQ is submitted, the recipients have a prescribed amount of time in which to respond to the RFQ with a quote. Responses to the RFQ are firm. The requestor then has the opportunity to review the responses and accept the best quote. A multi-dealer RFQ platform provides a certain degree of pre-trade transparency, depending on its characteristics. *See* SB SEF Proposing Release, 76 FR 10952; *see also* Section II.A.5, *supra.*

[1750] A limit order book system or similar system refers to a trading system in which firm bids and offers are posted for all participants to see, with the identity of the parties withheld until a transaction occurs. Bids and offers are then matched based on price-time priority or other established parameters and trades are executed accordingly. The quotes on a limit order book system are firm. In general, a limit order book system provides greater pre-trade transparency than the three platforms described above because all participants can view bids and offers before placing their bids and offers. *See* SB SEF Proposing Release, 76 FR 10952; *see also* Section II.A.5, *supra.* Currently, limit order books for the trading of security-based swaps in the United States are utilized by inter-dealer brokers for dealer-to-dealer transactions.

[1751] ''Brokerage trading'' refers to an execution practice used by brokers to execute security-based swaps on behalf of customers, often in larger sized transactions. In such a system, a broker receives a request from a customer (which may be a dealer) who seeks to execute a specific type of security-based swaps. The broker then interacts with other customers to fill the request and execute the transaction. This model often is used by dealers that seek to transact with other dealers through the use of an interdealer broker as an intermediary. In this model, there may be pre-trade transparency to the extent that participants are able to see bids and offers of other participants. *See* SB SEF Proposing Release, 76 FR 10952; *see also* Section II.A.5, *supra.*

[1752] Several commenters on the SB SEF Proposing Release that currently operate swap trading facilities have indicated their intention to register as SB SEFs. *See* note 1708, *supra.* The Commission believes that it is likely that these entities would have to revise their operations to meet the definition of ''security-based swap execution facility,'' the statutory Core Principles governing SB SEFs, and the proposed requirements set forth in

As noted above, this section XV.G.3 addresses the programmatic effect, and benefits and costs of, the mandatory trade execution requirement of Section 3C(h) of the Exchange Act generally. Section XV.G.4 further below addresses the programmatic effect, and benefits and costs of, the proposed application of this requirement to cross-border security-based swap transactions, as delineated by proposed Rule 3Ch–1. The Commission preliminarily believes that proposed Rule 3Ch–1 is appropriately tailored to extend the regulatory benefits intended by the mandatory trade execution requirement—*i. e.,* enhanced transparency and competition, which are discussed below—to the security-based swap activity that the Commission believes is most likely to raise the concerns that Congress intended to address in Title VII.[1753] In the Commission's preliminary view, a different rule, and in particular a rule that would not apply the mandatory trade execution requirement to all such security-based swap activity, could undermine these goals.

(a) Programmatic Effect of the Statutory Mandatory Trade Execution Requirement

As discussed above, to increase the transparency and oversight of the OTC derivatives market, Section 763(a) of the Dodd-Frank Act amended the Exchange Act by adding the mandatory trade execution requirement of Section 3C(h).[1754] Security-based swap transactions subject to Section 3C(h)'s mandatory trade execution requirement cannot be executed over-the-counter, but instead must be executed on an exchange or SB SEF that is registered or exempt from registration under the Exchange Act, unless an applicable exception applies.[1755] As such, the mandatory trade execution requirement is important in helping to bring the trading of security-based swaps onto more transparent, regulated markets, from the unregulated OTC swap markets.[1756]

Consequently, the Commission preliminarily believes that an overall programmatic—and positive—effect of the mandatory trade execution requirement would be the potential for a large volume of security-based swap transactions that are currently executed in the OTC market to become subject to the mandatory trade execution requirement and, therefore, be required to be executed on a regulated platform, such as an exchange or SB SEF. Moreover, because the programmatic benefits and costs attendant to the mandatory trade execution requirement, which are discussed below, would be realized for the volume of security-based swap transactions that are executed on exchanges or SB SEFs, the Commission preliminarily believes that the extent to which those benefits and costs could be realized may best be demonstrated by generating an indicative volume estimate of security-based swap transactions that may potentially be subject to the mandatory trade execution requirement.

As stated above, because the Commission currently does not have comprehensive information regarding the volume of security-based swap transactions currently executed on security-based swap trading platforms,[1757] to estimate the volume of such transactions that could become subject to the mandatory trade execution requirement, as a starting point, the Commission relies on clearing data for single-name CDS transactions, which the Commission believes is currently the best available data for providing an indicative level of security-based swap transaction volume subject to the mandatory trade execution requirement.[1758] The Commission utilizes this data regarding single-name CDS transactions to generate an indicative volume of security-based swap transactions in the U.S. security-based swap market that could be subject to the mandatory clearing requirement of Section 3C(a) of the Exchange Act.[1759] Given that the mandatory trade execution requirement of Section 3C(h) of the Exchange Act[1760] could apply to any security-based swap that is subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act,[1761] the Commission preliminarily believes that the volume of single-name CDS transactions that could be subject to the mandatory clearing requirement[1762] presents an indicative level of the volume of security-based swap transactions that potentially could be subject to the mandatory trade execution requirement if these security-based swaps are made available to trade on an exchange or SB SEF.

The Commission notes that it has not yet determined the criteria for assessing whether an exchange or SB SEF has made a security-based swap available to trade. The Commission, however, recognizes that the ''made available to trade'' determination is an essential element of the mandatory trade execution requirement. Any analysis of the benefits and costs flowing from the full complement of the mandatory trade execution requirement, when it is implemented, would need to take into consideration the Commission's determination of the scope of security-based swaps that would be ''made available to trade,'' as well as the cross-border rules that may be adopted by the Commission regarding application of the mandatory trade execution requirement. As a result, the ''made available to trade'' determination, when made by the Commission, will affect the ultimate benefits and costs associated with the mandatory trade execution requirement discussed in this release.[1763] Solely for purposes of analyzing herein the volume of security-based swap transactions that could be subject to the mandatory trade execution requirement, the Commission is assuming that all security-based

the SB SEF Proposing Release, if they were to be adopted by the Commission.

[1753] *See* Sections II.B., *supra.*

[1754] 15 U.S.C. 78c–3(h).

[1755] *Id.*

[1756] *See* SB SEF Proposing Release, 76 FR 10949.

[1757] While several commenters on the SB SEF Proposing Release that currently operate swap trading facilities in the OTC market have indicated their intention to register as SB SEFs, *see* note 1708, *supra,* as is currently the case for the security-based swap market as a whole, the Commission does not have comprehensive information regarding the volume of security-based swap transactions currently executed on security-based swap trading platforms.

[1758] For purposes of the analysis of the programmatic effect of the mandatory trade execution requirement, we do not consider the historical data regarding the clearing level of U.S. index CDS transactions. The statutory definition of security-based swap in relevant part includes swaps based on single securities or on narrow-based security-indices. *See* Section 3(a)(68)(A) of the Exchange Act, 15 U.S.C.78c(a)(68)(A). The historical data regarding the clearing level of U.S. index CDS transactions encompass broad-based index CDS transactions that do not fall within the definition of security-based swaps. The Commission recognizes that the security-based swap market includes not only single-name CDS, but also CDS based on narrow-based indices, and other non-CDS security-based swaps, primary examples of which are equity swaps and total return swaps based on single equities or narrow-based indices of equities. As previously stated, we believe that the single-name CDS data are sufficiently representative of the security-based swap market. *See* note 1301, *supra.*

[1759] *See* Section XV.F.3(a), *supra.*

[1760] 15 U.S.C. 78c–3(h).

[1761] 15 U.S.C. 78c–3(a)(1).

[1762] As previously stated, the estimate of the volume of single-name CDS transactions that could be subject to the mandatory clearing requirement is conditioned upon and will be affected by the mandatory clearing determination and the final rules regarding the end-user exception to the mandatory clearing requirement and other qualification. *See* Section XV.F.2, *supra.*

[1763] The Commission has indicated its preliminary view that the decision as to when a security-based swap would be considered to be ''made available to trade'' should be made pursuant to objective measures to be established by the Commission. *See* SB SEF Proposing Release, 76 FR 10969.

swaps that would be subject to mandatory clearing also would be deemed made available to trade and hence could be subject to the mandatory trade execution requirement.

As stated above, due in part to the data of the level of clearing activity during the years of 2009 to 2011, the Commission has recognized that mandatory clearing determinations made pursuant to Section 3C(a)(1) of the Exchange Act could alter current clearing practices at the time such determinations are made and potentially could result in a higher level of clearing for security-based swaps than would take place under a voluntary system.[1764] Therefore, the Commission preliminarily estimates that 33% of the $2,800 billion total gross notional volume of the total U.S. single-name CDS market [1765] would provide an indicative volume of the U.S. single-name CDS transactions that may be subject to the mandatory clearing requirement.[1766] Because the mandatory trade execution requirement of Section 3C(h) of the Exchange Act [1767] could apply to any security-based swap that is subject to the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act, subject to the ''made available to trade'' determination, this estimate may provide an indicative volume of U.S. single-name CDS transactions that could have been subject to the ''made available to trade'' determination in Section 3C(h)(2) of the Exchange Act (if such determination had been made in 2011) and, therefore, subject to the mandatory trade execution requirement.[1768]

The Commission is mindful that this estimate is only an indicative volume of U.S. single-name CDS transactions that may be subject to the mandatory trade execution requirement in Section 3C(h) of the Exchange Act,[1769] as the Commission currently does not have reliable information available with respect to security-based swap transactions due to the fact that such transactions are currently executed on trading platforms that are not exchanges or SB SEFs. However, the Commission preliminarily believes that the statutory mandatory trade execution requirement, together with the statutory definition of SB SEF [1770] and the Commission's proposed interpretation,[1771] when implemented, could alter existing security-based swap execution practices. As more security-based swap products are determined to be mandatorily cleared and once the Commission addresses how to determine whether such security-based swaps are made available for trading on an exchange or SB SEF, the level of trade execution in security-based swaps taking place on such exchanges or SB SEFs should be higher than in the current trading environment, in which no security-based swaps are traded on exchanges or SB SEFs. As a result, the mandatory trade execution requirement could have a material programmatic impact on execution practices in the U.S. security-based swap market by increasing the volume of transactions executed on an exchange or SB SEF.

(b) Programmatic Benefits of the Statutory Mandatory Trade Execution Requirement

Given that exchanges and SB SEFs are the essential infrastructure for implementing the mandatory trade execution requirement, there are additional benefits—separate from the fact that a large volume of security-based swap transactions would become subject to that requirement—flowing from the mandatory trade execution requirement that inevitably would overlap with the benefits associated with SB SEF registration, as described in the SB SEF Proposing Release. These benefits would be realized for the volume of security-based swap transactions that become subject to the mandatory trade execution requirement and are summarized below.

Increased Pre-Trade Price Transparency. One of the primary benefits of the mandatory trade execution requirement is to bring increased pre-trade transparency to the currently opaque security-based swap market. Increased pre-trade transparency should: (i) Help reduce informational asymmetries that may exist today in the security-based swap market, often to the benefit of large dealers who observe order flow; [1772] (ii) allow an increased number of market participants to see the trading interest of other market participants prior to trading, which should lead to increased price competition among market participants; and, in turn, (iii) lead to more efficient pricing in the security-based swap market.[1773]

Impartial Access and Competitive Security-Based Swaps Market. The Dodd-Frank Act's mandate to bring security-based swaps that are subject to the mandatory clearing requirement onto regulated markets, unless the security-based swap is not made available to trade, coupled with the proposed access requirements for SB SEFs in Regulation SB SEF,[1774] should help foster greater competition in the trading of security-based swaps by increasing access to security-based swap

[1764] As stated above, due in part to the data of the level of clearing activity during the years of 2009 to 2011, the Commission has recognized that mandatory clearing determinations made pursuant to Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1), could alter current clearing practices at the time such determinations are made and potentially could result in a higher level of clearing for security-based swaps than would take place under a voluntary system. *See* Section XV.F.2(a), *supra,* and the Clearing Procedures Adopting Release, 77 FR 41638.

[1765] The Commission previously calculated three measures to represent the clearing level of the U.S. single-name CDS transactions. The first measure is the gross notional volume of cleared U.S. single-name CDS transactions reported by ICE Clear Credit in 2011, which represents approximately 25% of the total $2,800 billion notional U.S. single-name CDS market. The second measure is the gross notional volume of U.S. single-name CDS accepted for clearing at any time during the calendar year of 2011, which represents approximately 33% of the total $2,800 billion notional U.S. single-name CDS market. The third measure is the gross notional volume of U.S. single-name CDS accepted for clearing at the time of execution, which represents approximately 29% of the total $2,800 billion notional U.S. single-name CDS market. For reasons stated above, the Commission preliminarily believes that the highest measure among these three would provide an indicative volume of the U.S. single-name CDS transaction that may be subject to the mandatory clearing requirement. *See* the text accompanying Table 1 in Section XV.F.2(a), *supra.*

[1766] The Commission recognizes that, even if a transaction is determined to be subject to mandatory clearing, such transaction may be excepted from clearing pursuant to the end-user clearing exception under Section 3C(g) of the Exchange Act. *See* 15 U.S.C. 78c–3(g). However, based on the available data, the Commission estimated that commercial end users that are eligible for the clearing exception currently participate in the security-based swap market on a very limited basis. Data compiled by the Commission's Division of Risk, Strategy, and Financial Innovation on credit default transactions from the DTCC–TIW between January 1, 2011 and December 31, 2011 suggest that the total percentage of trades between buyer and seller principals during the calendar year 2011 for single name credit default swaps was only 0.03% of the total trade counterparty distribution for non-financial end users, which are composed of non-financial companies and family trusts. *See* Capital, Margin and Segregation Proposing Release, 77 FR 70302, in particular, n.960. For purposes of the analysis and estimate here, we assume that the volume of transactions subject to the end user clearing exception under Section 3C(g) of the Exchange Act is negligible.

[1767] 15 U.S.C. 78c–3(h).

[1768] As stated earlier in this Section XV.G.3(a), this indicative volume estimate is based on an assumed scenario in which all mandatorily cleared security-based swaps are deemed made available to trade. The Commission reiterates that this assumption is being made solely for purposes of analyzing herein the volume of security-based swap transactions that could be subject to the mandatory trade execution requirement.

[1769] *See* 15 U.S.C. 78c–3(h).

[1770] *See* Section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77).

[1771] *See* SB SEF Proposing Release, 76 FR 10952–58.

[1772] *See* Sections XV.C.1, XV.C.2, and XV.C.3, *supra.*

[1773] *See* SB SEF Proposing Release, 76 FR 11036.

[1774] *See* proposed Rules 809 and 811(b) under the Exchange Act; *see also* SB SEF Proposing Release, 76 FR 10961–62.

trading venues.[1775] Such increased competition could lead to more efficient pricing in the security-based swap market.[1776]

(c) Programmatic Costs of the Statutory Mandatory Trade Execution Requirement

The Commission is mindful that programmatic costs also would be incurred for security-based swap transactions that become subject to the mandatory trade execution requirement.[1777] The Commission preliminarily believes that there would be transaction costs, such as fees and connectivity costs, that trading counterparties would incur in executing or trading security-based swaps subject to the mandatory trade execution requirement on SB SEFs. The Commission believes that a potential increase in transaction costs could result if the fees and connectivity costs associated with utilizing SB SEFs to secure trading interest and execute security-based swap transactions are higher than the current fees and costs associated with such practices in the OTC market. However, the Commission currently does not have information available to estimate the fees and costs that would be associated with transacting on SB SEFs, as no registered SB SEFs currently exist. Likewise, although unregulated trading venues exist in today's OTC derivatives market, the Commission does not have information regarding what, if any, fees and connectivity costs are associated with transacting on these unregulated trading venues.

In addition, studies suggest that pre-trade transparency can be costly for block trades as prices are likely to move adversely if the existence of a large unexecuted order becomes known.[1778] As mentioned earlier, pre-trade transparency could also produce concerns about information leakage and frontrunning of trades. These effects could cause market participants to alter their trading strategies in order to hide their interest, potentially reducing liquidity on SB SEFs.[1779]

4. Programmatic Benefits and Costs of Proposed Rule 3Ch–1 Regarding Application of the Mandatory Trade Execution Requirement in Cross-Border Context

As discussed above,[1780] the Commission is proposing Rule 3Ch–1 to clarify the applicability of the mandatory trade execution requirement of Section 3C(h) of the Exchange Act[1781] with respect to cross-border transactions in security-based swaps. Proposed Rule 3Ch–1(a) would identify the circumstances in which the mandatory trade execution requirement would apply, and proposed Rule 3Ch–1(b) then would carve out certain security-based swap transactions involving non-U.S. persons from the mandatory trade execution requirement.[1782]

Specifically, under proposed Rule 3Ch–1(a), the mandatory trade execution requirement would apply to a person that engages in a security-based swap transaction if: (1) A counterparty to the transaction is (i) a U.S. person, or (ii) a non-U.S. person whose performance under such security-based swap transaction is guaranteed by a U.S. person (''guaranteed non-U.S. person''); or (2) such transaction is a transaction conducted within the United States.[1783] Under proposed Rule 3Ch–1(b), the mandatory trade execution requirement would not apply to: (1) A security-based swap transaction described in proposed Rule 3Ch–1(a) that is not a transaction conducted within the United States if (i) one counterparty is a foreign branch or a guaranteed non-U.S. person, and (ii) the other counterparty to the transaction is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person (hereinafter referred to as ''non-guaranteed non-U.S. persons'') and who is not a foreign security-based swap dealer; or (2) a security-based swap transaction described in proposed Rule 3Ch–1(a) that is a transaction conducted within the United States if (i) neither counterparty to the transaction is a U.S. person, (ii) neither counterparty's performance under the security-based swap is guaranteed by a U.S. person; and (iii) neither counterparty to the transaction is a foreign security-based swap dealer.[1784]

Therefore, proposed Rule 3Ch–1(a) and proposed Rule 3Ch–1(b) apply the mandatory trade execution requirement to security-based swap transactions in the cross-border context based on the U.S.-person status of a counterparty, the existence of a guarantee provided by a U.S. person, the registered security-based swap dealer status of a counterparty, and the location where the transaction is conducted. Taken together, proposed Rules 3Ch–1(a) and 3Ch–1(b) would not apply the mandatory trade execution requirement to: (i) Transactions conducted outside the United States between two counterparties who are non-guaranteed non-U.S. persons, (ii) transactions conducted outside the United States between a foreign branch or a guaranteed non-U.S. person, and another counterparty who is a non-guaranteed non-U.S. person and is not a foreign security-based swap dealer, and (iii) transactions conducted within the United States between two counterparties who are non-guaranteed non-U.S. persons and are not foreign security-based swap dealers. As stated above,[1785] the Commission preliminarily believes that proposed Rule 3Ch–1 is appropriately tailored to extend the regulatory benefits intended by the mandatory trade execution requirement to the security-based swap activity that the Commission preliminarily believes is most likely to raise the concerns that Congress intended to address in Title VII.[1786]

The analysis in Section XV.G.4(a) below utilizes the best available information with respect to these criteria to assess the overall

[1775] *See* SB SEF Proposing Release, 76 FR 11037.

[1776] *Id.*

[1777] The Commission's consideration of the programmatic costs associated with setting up a SB SEF in the SB SEF Proposing Release and further discussion of such costs in the context of discussing when the SB SEF registration requirements would apply to foreign security-based swap markets and in considering the proposed availability of an exemption to foreign security-based swap markets from the registration requirements could be relevant to the costs associated with the mandatory trade execution requirement given that security-based swaps subject to the mandatory trade execution requirement would be required to be traded on an exchange or a SB SEF that is registered under Section 3D of the Exchange Act or is exempt from such registration. *See* SB SEF Proposing Release, 76 FR 11040–48; *see also* Sections XV.G.1 and XV.G.2, *supra.*

[1778] *See* SB SEF Proposing Release, 76 FR 11040; *see also* Minder Cheng and Ananth Madhavan, ''In Search of Liquidity: Block Trades in the Upstairs and Downstairs Markets,'' Review of Financial Studies, Vol. 10, No. 1 (1997) (analyzing data from equity block trades on components of the Dow Jones Industrial Average, the authors find that while the cost reductions for block trades on NYSE's ''upstairs'' market are economically small, the ''upstairs markets allow trades that may not otherwise occur''); Terrence Henderschott and Ananth Madhavan, ''Click or Call? Auction versus Search in the Over-the-Counter Market,'' Working Paper (2012) (using data from an electronic auction market, the authors find evidence that, controlling for venue selection, much of the cost savings from electronic platforms relative to dealer markets comes from small trades whereas coefficient estimates suggest that for large orders, the cost advantage of electronic auctions relative to the OTC market may be reversed).

[1779] *See* Section XV.G.1(b), *supra.*

[1780] *See* Section X, *supra.*

[1781] 15 U.S.C. 78c–3(h).

[1782] This is identical to the proposed approach for the mandatory clearing requirement. *See* Sections IX and XV.F.3, *supra.*

[1783] *See* proposed Rule 3Ch–1(a) under the Exchange Act. The term ''U.S. person'' and ''transaction conducted within the United States'' would have the meanings set forth in proposed Rule 3a71–3(a) under the Exchange Act.

[1784] *See* proposed Rule 3Ch–1(b) under the Exchange Act.

[1785] *See* Section XV.G.3, *supra.*

[1786] *See* Section II.B, *supra.*

programmatic effect of proposed Rules 3Ch–1(a) and 3Ch–1(b) by estimating the size of the security-based swap market that would be subject to the mandatory trade execution requirement as a result of proposed Rules 3Ch–1(a) and 3Ch–1(b). The Commission then discusses in Section XV.G.4(b) below the benefits and costs that would flow from proposed Rule 3Ch–1 regarding application of the mandatory trade execution requirement in the cross border context.

(a) Programmatic Effect of Proposed Rule 3Ch–1

It is not possible to quantify the potential programmatic effect of proposed Rule 3Ch–1 by estimating the future volume of security-based swap transactions when the mandatory trade execution requirement becomes effective partly because no ''made available to trade'' determinations have been made and partly because we do not know future trading volumes of security-based swaps. However, the Commission has examined the data available to it to analyze the potential programmatic effects of proposed Rule 3Ch–1. In particular, the Commission has tried to analyze the potential effects of proposed Rule 3Ch–1 by looking at the portion of the single-name U.S. reference CDS transactions that may provide an indication of the size of the security-based swap market that may be included in or excluded from the application of the mandatory trade execution requirement as a result of proposed Rule 3Ch–1.

A limitation we face when analyzing the data in order to estimate the size of the security-based swap market that may be affected by proposed Rule 3Ch–1 is that the domicile classifications in the DTCC–TIW database are not identical to the counterparty statuses that are described in proposed Rules 3Ch–1(a) and 3Ch–1(b), which would trigger application of, or an exception from, the mandatory trade execution requirement. Although the information provided by the data in the DTCC–TIW database does not allow us to identify the existence of a guarantee provided by a U.S. person with respect to a counterparty in a transaction, the registered security-based swap dealer status of a counterparty, or the location where the transaction is conducted, the Commission nevertheless preliminarily believes that the approach taken below would provide the best available estimate of the size of the security-based swap market that could be included in or excluded from the mandatory trade execution requirement by proposed Rule 3Ch–1.

As stated above, the commission has examined all transactions in single-name CDS during 2011 calendar year [1787] and estimated that the notional amount of the single-name CDS transactions executed during the 2011 calendar year is $2,400 billion.[1788] Proposed Rule 3Ch–1(a) provides that the mandatory trade execution requirement shall apply to a security-based swap transaction if (1) a counterparty to the transaction is a U.S. person or a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person or (2) such transaction is a transaction conducted within the United States. In applying proposed Rule 3Ch–1(a) to the $2,400 billion single-name CDS transactions executed in 2011, the Commission uses account holders and their domicile information in the DTCC–TIW database to determine the status of the counterparties.[1789] Because the Commission's proposed definition of ''U.S. person'' is based primarily on the place of organization or principal place of business of a legal person and a legal person's principal place of business and place of organization are usually in the same country, the Commission believes that the domicile of a legal person is a reliable indicator of such person's U.S.-person status. In addition, based on the Commission's understanding that the security-based swap transactions of foreign subsidiaries of U.S. entities, unless sufficiently capitalized to have their own independent credit ratings, are generally guaranteed by the most creditworthy U.S.-based entity within the corporate group, *i.e.,* the U.S. parent, the Commission preliminarily believes that it is reasonable to assume that foreign subsidiaries of U.S.-domiciled entities are non-U.S. persons whose performance under security-based swap transactions is guaranteed by a U.S. person. Finally, the DTCC–TIW data do not provide sufficient information for us to identify whether a transaction was conducted in the United States. Solely for purposes of this analysis, we have assumed that transactions involving a U.S.-domiciled counterparty (excluding foreign branch) or a U.S. branch counterparty were conducted in the United States.[1790]

Based on these assumptions, we estimate that the subset of the size of the single-name U.S. reference CDS market that includes a U.S.-domiciled counterparty (excluding a foreign branch of a U.S. bank), a foreign subsidiary of a U.S.-domiciled entity, or a U.S. branch of a foreign bank as a counterparty is $1,900 billion notional amount.[1791] The Commission preliminarily believes that this figure provides an indicative level of the single-name U.S. reference CDS activity that may represent an indicative size of the security-based swap market that could become subject to the mandatory trade execution requirement under proposed Rule 3Ch–1(a) when the requirement becomes effective.[1792] In

[1787] *See* note 1637, *supra,* and the accompanying text in Section XV.F.2(a), *supra.*

[1788] This estimate is based on the calculation by staff of the Division of Risk, Strategy, and Financial Innovation of all price-forming DTCC–TIW single-name CDS transactions that are based on North American corporate reference entities, U.S. municipal reference entities, U.S. loans or mortgage-backed securities (''MBS''), using ISDA North American documentation, ISDA U.S. Muni documentation, or other standard ISDA documentation for North American Loan CDS and CDS on MBS, and are denominated in U.S. dollars and executed in 2011. Price-forming transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades. *See* notes 1312 and 1638, *supra.*

[1789] *See* note 1639, *supra,* in Section XV.F.2(a) for explanations of the determination of an account holder's domicile by the Commission staff in the Division of Risk, Strategy, and Financial Innovation using information in the DTCC–TIW.

[1790] Since the origination location of a transaction is not available in DTCC–TIW, the Commission recognizes that its analysis here may undercount transactions conducted within the United States because some transactions may be solicited, negotiated, or executed within the United States by an agent other than U.S. branches of foreign banks (such as a non-U.S. person counterparty using an unaffiliated third-party agent).

[1791] Such $1,900 billion estimate does not capture transactions between two non-U.S. domiciled counterparties involving an agent to solicit, negotiate and execute security-based swaps in the United States and therefore, may be an underestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be included in the application of the mandatory trade execution requirement under proposed Rule 3Ch–1(a) because of the assumption we make herein regarding transactions conducted within the United States. By the same token, the difference between the $1,900 billion subset included in the application of the mandatory trade execution requirement under proposed Rule 3Ch–1(a) and the $2,400 billion total single-name U.S. reference CDS transactions (i.e., $500 billion or 20.8% of the $2,400 billion) may represent an overestimate of single-name U.S. reference CDS transactions in notional amount that are not included in the application of the mandatory trade execution requirement under proposed Rule 3Ch–1(a).

[1792] The Commission recognizes that the security-based swap market includes single-name CDS, CDS based on narrow-based indices, and other non-CDS security-based swaps, primary examples of which are equity swaps and total return swaps based on single equities or narrow-based indices of equities. As previously stated, we believe that the single-name CDS data are sufficiently representative of the security-based swap market as roughly 82% of the security-based swap market, as measured on a

addition, we recognize that the level of the security-based swap activity that could become subject to mandatory trade execution under proposed Rule 3Ch–1(a) may be affected by the ''made available to trade'' determination by the Commission.[1793]

Next, we apply proposed Rule 3Ch-1(b) to the transactions included in the analysis described above regarding proposed Rule 3Ch–1 in order to estimate the portion of the single-name U.S. reference CDS activity that may represent an indicative size of the security-based swap market that would not be subject to the mandatory trade execution requirement under the proposed rule. We reiterate the assumptions described above with respect to the counterparty status of a U.S. person and a non-U.S. person whose performance under security-based swap transactions is guaranteed by a U.S. person, and the assumption with respect to a transaction conducted within the United States. In addition, because of the lack of information about the location of transactions, solely for assessing the effect of proposed Rule 3Ch–1(b)(1), we have assumed that transactions between a counterparty that is a foreign branch or foreign subsidiary of a U.S.-domiciled entity and another counterparty that is a foreign-domiciled entity that is not a subsidiary of a U.S.-domiciled entity or an ISDA-recognized dealer are not transactions conducted within the United States; and solely for purposes of assessing the effect of proposed rule 3Ch–1(b)(2), we have assumed that transactions conducted between two foreign-domiciled counterparties that are not ISDA-recognized dealers and are not foreign subsidiaries of U.S.-domiciled entities are not conducted within the United States. These assumptions likely result in an overestimate of the notional volume carved-out by proposed Rule 3Ch–1(b). With respect to counterparty status as a registered security-based swap dealer, we recognize that as yet there are no dealers designated as security-based swap dealers and subject to the registration requirement. Solely for purposes of this analysis, we have assumed that those counterparties to CDS transactions that were ISDA recognized dealers[1794] would be required to register as security-based swap dealers.

Based on the above assumptions, we have estimated that approximately 2.1% of the total notional amount[1795] of single-name U.S. reference CDS transactions executed in 2011 would be excluded from the application of the mandatory trade execution requirement by proposed Rule 3Ch–1(b). Therefore, we preliminarily believe that 22.9% of the total size of the single-name U.S. reference CDS transactions in 2011 presents an indicative size of the U.S. security-based swap market that could be excluded from the application of the mandatory trade execution requirement under proposed Rule 3Ch–1.[1796]

The Commission preliminarily believes that this estimate provides the best available proxy for the overall programmatic effect of the application of the mandatory trade execution requirement in the cross-border context in terms of the portion of the single-name U.S. reference CDS market that may be included in or excluded from the scope of the application of the mandatory trade execution requirement, given the data limitations and the underlying assumptions described above.[1797] The Commission is mindful that the above analysis represents only an indicative estimate of the portion of the single-name U.S. reference CDS activity that may represent an indicative size of the security-based swap market that may be included in or excluded from the application of the mandatory trade execution requirement as a result of proposed Rule 3Ch–1. The Commission also recognizes that the above analysis represents an extrapolation from the limited data that is currently available to the Commission.

(b) Programmatic Benefits and Costs of Proposed Rule 3Ch–1

The Commission preliminarily believes that, in addition to the programmatic effect of a large volume of cross-border security-based swap transactions becoming subject to the mandatory trade execution requirement as a result of proposed Rule 3Ch–1, certain benefits and costs that overlap with the benefits and costs associated with SB SEF registration, as described in the SB SEF Proposing Release, would flow from proposed Rule 3Ch–1 because cross-border security-based swaps covered by proposed Rule 3Ch–1 would have to be executed or traded on SB SEFs or exchanges. Indeed, these benefits and costs would be realized for the volume of cross-border security-based swap transactions, estimated in Section XV.G.4(a) above,[1798] that would be covered by proposed Rule 3Ch–1(a) (and not excepted by proposed Rule 3Ch–1(b)) and, therefore, subject to the mandatory trade execution requirement.[1799] These benefits and costs, which are more fully described in the SB SEF Proposing Release, are summarized above.[1800]

(c) Alternatives

The Commission has considered alternatives to proposed Rule 3Ch–1. The Commission could propose to apply the mandatory trade execution requirement in the same way as the CFTC's proposed interpretive guidance.

notional basis, appears likely to be single-name CDS. *See* Section XV.B.2 and the text accompanying note 1301, *supra.*

[1793] *See* note 1763 and accompanying text, *supra.*

[1794] *See* note 1306, *supra.*

[1795] Based on calculations by the staff of the Division of Risk, Strategy and Financial Innovation applying the criteria provided in proposed rule 3Ch–1(b) and the assumptions stated herein, approximately $51 billion in notional amount, constituting approximately 2.1% of the total notional amount, of single-name U.S. reference CDS transactions executed in 2011 would be excluded from the application of the mandatory trade execution requirement. Because of the assumptions we made herein regarding transactions conducted within the United States and transactions conducted outside the United States, the 2.1% may be an overestimate of the aggregate notional amount of the single-name U.S. reference CDS transactions that may be excluded from the application of the mandatory trade execution requirement under proposed Rule 3Ch–1(b).

[1796] The 22.9% estimate is the sum of the 20.8% estimate of the single-name U.S. reference CDS transactions excluded from the mandatory trade execution requirement under proposed Rule 3Ca–3(a) and the 2.1% estimate of the single-name U.S. reference CDS transactions excluded from the mandatory trade execution requirement under proposed Rule 3Ca–3(b). The Commission reiterates that both 20.8% and 2.1% may overestimate the size of the single-name U.S. reference CDS transactions excluded from the application of the mandatory trade execution requirement under proposed Rules 3Ch–1(a) and (b).

In addition, this calculation is conducted using U.S. reference single-name CDS transaction data in 2011. See the text accompanying notes 1637 and 1787, *supra.* The Commission recognizes that the same calculation could generate a different result if both U.S. reference and non-U.S. reference single-name CDS transaction data were used. However, with respect to non-U.S. reference single-name CDS transaction data, the Commission currently does not have access to the part of such data in DTCC–TIW regarding non-U.S. reference single-name CDS transactions that do not involve a U.S. counterparty on either side of the transaction. *See* Section XV.B.2, *supra.*

[1797] The Commission reiterates that the assumptions made here are solely for purposes of this economic analysis.

[1798] *See* Section XV.G.4(a), *supra.*

[1799] To the extent that the estimated volume of security-based swap transactions that would be subject to the cross-border application of the statutory mandatory trade execution requirement in proposed Rules 3Ch–1(a) and 3Ch–1(b) (as analyzed in Section XV.G.4(a) above) differs from the estimated upper bound volume of the security-based transactions that would be subject to the statutory requirement (as set forth in Section XV.G.3(a) above), such differential reflects the aggregate programmatic effect of proposed Rules 3Ch–1(a) and 3Ch–1(b), and that the volume of security-based swap transactions that would be subject to those proposed cross-border rules is a subset of the upper bound volume estimate of transactions subject to the statutory requirement, which is not limited to the cross-border context.

[1800] *See* Sections XV.G.3(b) and (c), *supra.*

The major difference between the CFTC's proposed application of the mandatory trade execution requirement and the Commission's proposed Rule 3Ch–1 is that the CFTC would apply the mandatory trade execution requirement to a transaction conducted outside the United States between a foreign branch and a non-guaranteed non-U.S. person. The Commission preliminarily believes that subjecting such a transaction to mandatory trade execution may hinder a foreign branch's ability to access the foreign local market to a degree that fails to justify the pre-trade transparency benefits to the U.S. financial market.

(d) Assessment Costs for Proposed Rule 3Ch–1

The assessment costs associated with proposed Rule 3Ch–1 would be related primarily to identification of the counterparty status and origination location of the transaction to determine whether the mandatory trade execution requirement would apply. The same assessment would be performed not only in connection with the proposed application of the mandatory trade execution requirement in the cross border context, but also in connection with the proposed application of the reporting,[1801] public dissemination,[1802] and mandatory clearing [1803] requirements in the cross-border context and, therefore, would be part of the overall Title VII compliance costs.

The Commission preliminarily believes that market participants would request representations from their transaction counterparties to determine the U.S.-person status of their counterparties. In addition, if the transaction is guaranteed by a U.S. person, the guarantee would be part of the trading documentation and, therefore, the existence of the guarantee would be a readily ascertainable fact. Similarly, market participants would be able to rely on their counterparties' representations as to whether a transaction is solicited, negotiated or executed by a person within the United States.[1804] Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rule 3Ch–1 should be limited to the costs of establishing a compliance policy and procedure of requesting and collecting representations from trading counterparties and maintaining the collected representations as part of the market participants' recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately $15,160.[1805] The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.[1806]

The Commission also considers the likelihood that market participants may implement systems to keep track of counterparty status for purposes of future trading of security-based swaps that are similar to, if not the same as, the systems implemented by market participants for purposes of assessing security-based swap dealer or major security-based swap participant status. As stated above, the Commission estimated that market participants that perceived the need to perform the security-based swap dealer assessment or major security-based swap participant calculations would incur one-time programming costs of $12,870.[1807] Therefore, the Commission estimates the total one-time costs per entity associated with proposed Rule 3Ch–1 could be $28,030.[1808] To the extent that market participants have incurred costs relating to similar or the same assessments with respect to counterparty status and transaction location for other Title VII requirements, their assessment costs with respect to proposed Rule 3Ch–1 may be less.

Request for Comment

- Are there any benefits and costs not discussed herein? How would the benefits and costs affect the various groups of market participants involved in the trading of security-based swaps? To the extent the benefits or costs of complying with mandatory trade execution described above are different for different groups of market participants, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such different benefits or costs.
- Would the benefits of complying with mandatory trade execution be the same for foreign and domestic market participants?
- Would the costs associated with complying with mandatory trade execution be the same for domestic and foreign market participants? If not, how would they be different and how could the Commission most accurately estimate them? For example, would either domestic or foreign market participants face higher costs in gaining access to SB SEFs to comply with the mandatory trade execution requirement? Or would the costs be comparable?
- To the extent that the benefits or costs of complying with mandatory trade execution would be different for foreign market participants as compared to domestic market participants, please identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such different benefits or costs.
- Are the assessment cost estimates provided herein appropriate? If not, how should the estimates be adjusted? Please provide data and analysis to support differing cost estimates.

H. Application of Rules Governing Security-Based Swap Data Repositories in Cross-Border Context

SDRs are intended to play a critical role in enhancing transparency in the security-based swap market, bolstering market efficiency and liquidity, promoting standardization, and reducing systemic risks by serving as centralized recordkeeping facilities that collect and maintain information relating to security-based swap transactions.[1809] More broadly, the goal

[1801] *See* re-proposed Rule 908(a)(1) under the Exchange Act, as discussed in Section VIII.C.1, *supra,* and Section XV.H, *infra.*

[1802] *See* re-proposed Rule 908(a)(2) under the Exchange Act, as discussed in Section VIII.C.1, *supra,* and Section XV.H, *infra.*

[1803] *See* proposed Rule 3Ca–3 under the Exchange Act, as discussed in Sections IX.C and XV.F, *supra.*

[1804] *See* proposed Rules 3a71–3(a)(4)(ii) and (a)(5)(ii), as discussed in Sections III.B.5 and III.B.6, *supra.*

[1805] This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representations may be built into a form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

[1806] There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within the programmatic costs associated with substituted compliance.

[1807] *See* note 1428, *supra.* For the source of the estimated per hour costs, *see* note 1425, *supra.*

[1808] The estimated $28,030 per-entity cost is the sum of the estimated $15,160 cost of establishing written compliance policies and procedures regarding obtaining counterparty representations and the estimated $12,870 one-time programming cost relating to system implementation to maintain counterparties' representations and track counterparty status in the system.

[1809] *See* SDR Proposing Release, 75 FR 77354; *see also* 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("These new 'data repositories' will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the

of the Dodd-Frank Act is, among other things, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[1810] In furtherance of these goals, the Dodd Frank Act amended the Exchange Act to require the reporting of security-based swaps (whether cleared or uncleared) to an SDR registered with the Commission,[1811] and to require certain persons that perform the functions of an SDR to register with the Commission.[1812] SDRs that are registered with the Commission are subject to Section 13(n) of the Exchange Act[1813] and the rules and regulations thereunder (collectively, ''SDR Requirements''), as well as other requirements applicable to SDRs registered with the Commission.[1814] In this section, the Commission first discusses the benefits and costs of the Commission's proposed interpretive guidance regarding the application of the SDR Requirements and exemption from the SDR Requirements. The Commission then discusses the benefits and costs of the Commission's proposed interpretive guidance regarding relevant authorities' access to security-based swap information and exemption from the statutory indemnification requirement that could hinder such access. Finally, the Commission discusses the benefits and costs associated with the Commission's re-proposed Regulation SBSR, which sets forth the reporting obligations of counterparties to security-based swaps in the cross-border context.

I. Benefits and Costs Associated With Application of the SDR Requirements in the Cross-Border Context

(a) Benefits of Proposed Approach to SDR Requirements

As discussed above,[1815] the Commission proposes that any U.S. person that performs the functions of an SDR would be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act[1816] and previously proposed Rule 13n–1 thereunder. As further discussed above,[1817] the Commission further proposes that, to the extent that any non-U.S. person performs the functions of an SDR within the United States, it would be required to register with the Commission pursuant to Section 13(n)(1) of the Exchange Act[1818] and previously proposed Rule 13n–1 thereunder, absent an exemption. The Commission also is proposing new Rule 13n–12 under the Exchange Act, which provides that a non-U.S. person that performs the functions of an SDR within the United States is exempt from the SDR Requirements, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission (''SDR Exemption'').[1819]

The Commission has considered the benefits and costs associated both with the Commission's proposed interpretive guidance regarding U.S. persons and non-U.S. persons that would be required to register with the Commission as an SDR and with the SDR Exemption in light of the transparency and other objectives that the Dodd-Frank Act is intended to achieve. The Commission preliminarily believes that our proposed approach would be consistent with achieving these intended benefits of the SDR Requirements, but would avoid imposing the associated costs of these requirements on persons whose registration and regulation may not significantly advance these benefits.

i. Programmatic Benefits of Proposed Guidance Regarding Registration

The Commission preliminarily believes that there are a number of programmatic benefits to our proposal to require U.S. persons that perform the functions of an SDR and non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission and to comply with the other SDR Requirements. These requirements are intended to help ensure that SDRs function in a manner that will further the transparency and other goals of the Dodd-Frank Act.[1820] The SDR Requirements, including requirements that SDRs register with the Commission, retain complete records of security-based swap transactions, maintain the integrity and confidentiality of those records, and provide effective access to those records to relevant authorities and the public in line with their respective information needs, are intended to help ensure that the data held by SDRs is reliable and that the SDRs provide information that contributes to the transparency of the security-based swap market while protecting the confidentiality of information provided by market participants.[1821]

Enhanced transparency should produce market-wide benefits by, for example, promoting stability in the security-based swap market,[1822] and it should indirectly contribute to improved stability in related financial markets, including equity and bond markets.[1823] Enhanced transparency in the security-based swap market would assist the Commission and other relevant authorities in fulfilling their regulatory mandates and legal responsibilities such as performing market surveillance and detecting market manipulation, fraud, and other market abuses by providing the Commission and other relevant authorities with greater access to security-based swap information.[1824]

CFTC and the SEC in their oversight and market regulation responsibilities.'').

[1810] *See* Dodd-Frank Act, Public Law 111–203 at Preamble.

[1811] Section 13(m)(1)(G) of the Exchange Act, 15 U.S.C. 78m(m)(1)(G), as added by Section 763(i) of the Dodd-Frank Act.

[1812] Section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75), as added by Section 761(a) of the Dodd-Frank Act (defining a ''security-based swap data repository'' to mean ''any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps'') and Section 13(n)(1) of the Exchange Act, 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act (providing that it is ''unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository'').

[1813] 15 U.S.C. 78m(n), as added by Section 763(i) of the Dodd-Frank Act.

[1814] *See* note 703, *supra.*

[1815] *See* Section VI.B.3(a), *supra.*

[1816] 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

[1817] *See* Section VI.B.3(b), *supra.*

[1818] 15 U.S.C. 78m(n)(1), as added by Section 763(i) of the Dodd-Frank Act.

[1819] *See* Section VI.B.3(b), *supra.*

[1820] *See* SDR Proposing Release, 75 FR 77354. *See also* Dodd-Frank Act, Public Law 111–203 at Preamble.

[1821] *See* SDR Proposing Release, 75 FR 77307.

[1822] *See id.* (''SDRs may be especially critical during times of market turmoil, both by giving relevant authorities information to help limit systemic risk and by promoting stability through enhanced transparency. By enhancing stability in the [security-based swap] market, SDRs may also indirectly enhance stability across markets, including equities and bond markets.'').

[1823] *See* Darrell Duffie, Ada Li, and Theo Lubke, ''Policy Perspectives of OTC Derivatives Market Infrastructure,'' Federal Reserve Bank of New York Staff Report No. 424 (Jan. 2010, as revised Mar. 2010) (''Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds'').

[1824] *See* SDR Proposing Release, 75 FR 77307 (''The enhanced transparency provided by an SDR is important to help regulators and others monitor

Continued

Increased regulatory effectiveness should improve the integrity and transparency of the market and improve the confidence of market participants.[1825]

The Commission preliminarily believes that requiring U.S. persons performing the functions of an SDR to register with the Commission as SDRs and comply with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission,[1826] would further the goals of the SDR Requirements and contribute to enhanced transparency in the security-based swap market in the United States. The Commission preliminarily believes that U.S. persons performing the functions of an SDR will play a key role in ensuring that security-based swap transactions affecting the transparency of the security-based swap market within the United States are reported; properly maintained; and made available to the Commission, other relevant authorities, and the public.[1827] Requiring such U.S. persons to comply with the SDR Requirements would help ensure that they maintain data and make it available in a manner that advances the transparency benefits that Title VII is intended to produce.

Non-U.S. persons performing the functions of an SDR within the United States also may affect the transparency of the security-based swap market within the United States, even if transactions involving U.S. persons or U.S. market participants are being reported to such non-U.S. persons in order to satisfy the reporting requirements of a foreign jurisdiction (and not those of Title VII). The Commission preliminarily believes that, to the extent that non-U.S. persons are performing the functions of an SDR within the United States, they will likely receive data relating to transactions involving U.S. persons and other U.S. market participants. Ensuring that such data is maintained and made available in a manner consistent with the SDR Requirements would likely contribute to the transparency of the U.S. market and reduce potential confusion that may arise from discrepancies in transaction data due to, among other things, differences in the operational standards governing persons who perform the functions of an SDR in other jurisdictions (or the absence of such standards for any such persons that are not subject to any regulatory regime). Moreover, given the sensitivity of reported security-based swap data and the potential for market abuse and subsequent loss of liquidity in the event that a person performing the function of an SDR within the United States fails to maintain the privacy of such data,[1828] the Commission preliminarily believes that requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission would help ensure that data relating to transactions involving U.S. persons or U.S. market participants is handled in a manner consistent with the confidentiality protections applicable to such data, thereby reducing the risk both of the loss or disclosure of proprietary or other sensitive data and of market abuse arising from the misuse of such data.

ii. Programmatic Benefits of the SDR Exemption

As noted above, the Commission is proposing new Rule 13n–12 under the Exchange Act to provide an exemption from the SDR Requirements for non-U.S. persons that perform the functions of an SDR within the United States, provided that each regulator with supervisory authority over any such non-U.S. person has entered into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.[1829]

The Commission preliminarily believes that this SDR Exemption would not significantly reduce the programmatic benefits associated with the SDR Requirements. Although the proposed approach would potentially reduce the number of persons performing the functions of an SDR that are registered with the Commission,[1830] data relating to transactions involving U.S. persons and U.S. market participants would still be required to be reported, pursuant to Regulation SBSR, to an SDR registered with the Commission and subject to all SDR Requirements, absent other relief from the Commission.[1831]

Moreover, the SDR Exemption would be conditioned on a supervisory and enforcement MOU or other arrangement with each regulator with supervisory authority over the non-U.S. person that seeks to rely upon the SDR Exemption. This MOU or arrangement would address the Commission's interest in having access to security-based swap data involving U.S. persons and other U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and in protecting the confidentiality of such data. Further, proposed Rule 13n–12 should not impair the integrity and accessibility of security-based swap data. The Commission, therefore, preliminarily believes that exempting certain non-U.S. persons performing the functions of an SDR within the United States, subject to the condition described above, would likely not significantly affect the programmatic benefits that the SDR Requirements were intended to achieve.[1832]

(b) Costs of Proposed Approach to SDR Requirements

i. Programmatic Costs of the Commission's Proposed Approach

Registering with the Commission and complying with the SDR Requirements will impose certain costs on an SDR.[1833] The Commission's proposed interpretive guidance and SDR Exemption do not change the costs associated with any particular SDR Requirement, but the Commission preliminarily believes that the SDR Exemption may reduce the costs for certain non-U.S. persons performing the functions of an SDR within the United

the build-up and concentration of risk exposures in the [security-based swap] market.''); *see also* DTCC Letter I at 1 (''A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.'').

[1825] *See* SDR Proposing Release, 75 FR 77356.

[1826] *See* note 703, *supra*.

[1827] *See* SDR Proposing Release, 75 FR 77356.

[1828] *See id.* at 77307.

[1829] Proposed Rule 13n–12(b) under the Exchange Act.

[1830] It appears that, as of April 2013, there were several non-U.S. persons performing the functions of an SDR or intending to do so in the future. *See* FSB Progress Report April 2013 at 20–21, 63–65. The Commission, however, does not possess data regarding how many, if any, of these persons perform the functions of an SDR within the United States.

[1831] *See* discussion of Regulation SBSR in Section VIII, *supra* and discussion of substituted compliance in Section XI, *supra*.

[1832] The Commission also anticipates that non-U.S. persons that avail themselves of the SDR Exemption would be subject to the regulatory requirements of one or more foreign jurisdictions. The SDR Exemption would help ensure that such persons do not incur costs arising from being required to comply with duplicative regulatory regimes while also ensuring, through the condition that each regulator with supervisory authority enter into a supervisory and enforcement MOU or other arrangement with the Commission, that they are subject to regulatory requirements that would prevent them from undermining the transparency and other purposes of the Title VII SDR Requirements, for example, by failing to protect the confidentiality of data relating to U.S. persons and other U.S. market participants.

[1833] *See* SDR Proposing Release, 75 FR 77354–64.

States without reducing the expected benefits of the SDR Requirements.[1834] The Commission preliminarily believes that such persons would likely be performing the functions of an SDR in order to permit counterparties to satisfy reporting requirements under foreign law. An exemption, if available, would allow these non-U.S. persons to continue to perform this function within the United States, potentially reducing costs to U.S. market participants that have reporting obligations under foreign law and reducing the incentive for non-U.S. persons performing the functions of an SDR within the United States to restructure their operations to avoid registration with the Commission.

The Commission recognizes that making the exemption available subject to a condition may delay the availability of the exemption to certain non-U.S. persons. In some cases, the Commission may be unable to enter into an MOU or other arrangement with each regulator with supervisory authority over a non-U.S. person performing the functions of an SDR within the United States. The resulting delay or unavailability of the exemption may lead some of these non-U.S. persons to exit the U.S. market by, for example, restructuring their business so that they perform the functions of an SDR entirely outside the United States, potentially resulting in business disruptions in the security-based swap market.

ii. Assessment Costs

Under the Commission's proposed approach, non-U.S. persons that perform the functions of an SDR may be expected to incur certain assessment costs related to determining whether they can rely on the SDR Exemption and, if not, whether they perform the functions of an SDR within the United States.[1835]

With respect to determining the availability of the SDR Exemption, the Commission preliminarily believes that the costs for a non-U.S. person that performs the functions of an SDR to determine whether the condition for the availability of the SDR Exemption has been satisfied with respect to it would arise from confirming whether the Commission and each regulator with supervisory authority over such non-U.S. person have entered into a supervisory and enforcement MOU or other arrangement. The Commission preliminarily believes that, given that this information generally should be readily available,[1836] the cost involved in making such assessment should not exceed one hour of in-house counsel's time or $379 per person,[1837] for an aggregate one-time cost of $7,580.[1838]

If the condition for the SDR Exemption has not been satisfied with respect to any authority with supervisory authority over such non-U.S. person, that person may determine to analyze where it performs its SDR functions in order to determine whether it performs such functions within the United States. This analysis may involve two separate sets of costs: costs associated with determining whether it has entered into contracts, including user or technical agreements, with a U.S. person to enable the U.S. person to report security-based swap data to it, and costs associated with determining whether it otherwise performs the functions of an SDR within the United States, for example, by maintaining certain operations within the United States.

The Commission preliminarily believes that the assessment costs associated with determining the U.S. person status of parties to agreements with the non-U.S. person that performs the functions of an SDR should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from the parties to such agreements and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations. The Commission preliminarily believes that such one-time per-person costs would be approximately $15,160,[1839] with aggregate one-time costs of approximately $303,200.

The assessment costs associated with determining whether the non-U.S. person otherwise performs the functions of an SDR within the United States would likely involve an analysis of the location of the non-U.S. person's various operations and, with respect to any operations that occur within the United States, a determination of whether such operations constitute the performance of the functions of an SDR. The Commission preliminarily believes that the aggregate one-time costs associated with this analysis would be approximately $500,000.[1840]

(c) Alternative to Proposed Approach

In developing our approach to the application of the SDR Requirements to non-U.S. persons that perform the functions of an SDR, the Commission considered requiring such persons that perform the functions of an SDR within the United States to comply with the SDR Requirements, including registering with the Commission, as well as other requirements applicable to SDRs registered with the Commission.[1841] In such a scenario, a non-U.S. person performing the functions of an SDR within the United States would be required to register as an SDR and incur the costs associated with the SDR Requirements,[1842] as well as other requirements applicable to SDRs registered with the Commission.[1843] The Commission preliminarily believes that the marginal benefit of requiring all non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission, even where similar objectives could be achieved through an

[1834] As noted above, the data currently available to the Commission does not indicate how many non-U.S. persons performing the functions of an SDR perform such functions within the United States. *See* note 1830, *supra*. However, even if counterparties with reporting obligations under Regulation SBSR reported their transactions to a non-U.S. person that performs the functions of an SDR within the United States but is exempt from registration, they would still be required to report transactions under Regulation SBSR to an SDR registered with the Commission.

[1835] The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States and thus may determine that they do not need to incur any assessment costs related to the Commission's proposed approach.

[1836] As a general matter, the Commission provides a list of MOUs and other arrangements, which are available at the following link: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml*.

[1837] Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

[1838] This total is based on the assumption that as many as 20 non-U.S. persons that perform the functions of an SDR would seek outside legal counsel to determine the nature of any operations or other activity performed within the United States. Although there appear to be fewer than 10 such persons that are currently accepting and reporting on security-based swaps (*see* FSB Progress Report April 2013 at 20–21, 63–65), our estimate that as many as 20 such persons may perform this analysis is intended to account for the possibility that new market entrants may seek to provide such services in the future.

[1839] This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. As noted above, the staff estimates that the average national hourly rate for an in-house attorney is $379. *See* note 1426, *supra*.

[1840] We have estimated that this analysis would cost an average of $25,000 per person and that as many as 20 non-U.S. persons may incur such costs. This estimate is based on staff experience in undertaking legal analysis of status under federal securities laws.

[1841] *See* note 703, *supra*.

[1842] *See* SDR Proposing Release, 75 FR 77354–64.

[1843] *See* note 703, *supra*.

exemption conditioned on a supervisory and enforcement MOU or other arrangement with each regulatory authority with supervisory authority over such non-U.S. persons, would be insignificant, particularly in light of the costs that such non-U.S. persons would incur in complying with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission.[1844]

Request for Comment

The Commission seeks comment on the proposed interpretive guidance and SDR Exemption, and alternatives to our proposed approach, in all aspects. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications or alternatives to the proposed interpretive guidance and SDR Exemption. In addition, the Commission seeks comment on the specific questions below.

- Has the Commission appropriately considered the expected programmatic benefits of our proposed interpretive guidance and SDR Exemption? If not, please explain why and provide information on how such costs and benefits should be assessed.
- Are the programmatic benefits and costs discussed above accurate? If not, why not? How should the Commission assess the benefits and costs associated with our proposed interpretive guidance and SDR Exemption compared to their anticipated benefits of increasing transparency in the security-based swap market?
- Are there quantifiable programmatic benefits or costs associated with the Commission's proposed interpretive guidance and the SDR Exemption that are not discussed above, but that the Commission should consider? If so, please identify and describe them as thoroughly as possible, using relevant data and statistics where available.
- Has the Commission appropriately considered the benefits and costs of the alternative approach to the Commission's proposed interpretive guidance and SDR Exemption? In answering this question, consider addressing whether the Commission has appropriately considered the benefits and costs of duplicative regulatory regimes, including duplicative requirements governing SDRs.
- How would the Commission's proposed interpretive guidance and the SDR Exemption affect efficiency, competition, and capital formation, including the competitive or anticompetitive effects that such guidance and exemption may have on market participants? Are there other existing or proposed laws, rules, or regulations affecting SDRs in particular jurisdictions that affect efficiency, competition, and capital formation that the Commission should consider? If so, please identify and describe these effects as thoroughly as possible.
- Are there costs in fulfilling the condition in the SDR Exemption that the Commission has not discussed above? If so, what?
- Would the condition requiring a supervisory and enforcement MOU with a foreign supervisory regulator impose costs on non-U.S. persons performing the functions of an SDR within the United States? Further, would delay in entering into a supervisory and enforcement MOU or other arrangement (or the inability to enter into such MOU or arrangement) impose costs on such non-U.S. persons or market participants more generally? Would it have adverse consequences for liquidity in the security-based swap market?
- Should the Commission consider other alternatives to our proposed interpretive guidance and the SDR Exemption? What would be the benefits and costs of such alternative approaches?

2. Relevant Authorities' Access to Security-Based Swap Information and the Indemnification Requirement

One key function that SDRs will perform is making available to the Commission and other relevant authorities information relating to security-based swap transactions. As described above,[1845] Section 13(n)(5)(G) of the Exchange Act [1846] and previously proposed Rule 13n–4(b)(9) thereunder provide that an SDR shall on a confidential basis, pursuant to Section 24 of the Exchange Act, and the rules and regulations thereunder, upon request, and after notifying the Commission (''Notification Requirement''), make available all data obtained by the SDR, including individual counterparty trade and position data, to certain domestic authorities and any other person that the Commission determines to be appropriate, including, but not limited to, foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries. Section 13(n)(5)(H) of the Exchange Act [1847] and previously proposed Rule 13n–4(b)(10) further provide that before sharing information with any entity described in Section 13(n)(5)(G)[1848] or previously proposed Rule 13n–4(b)(9), respectively, an SDR must obtain a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Exchange Act,[1849] and the rules and regulations thereunder, relating to the information on security-based swap transactions that is provided; in addition, the entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act [1850] and the rules and regulations thereunder (''Indemnification Requirement'').

(a) Benefits and Costs of Relevant Authorities' Access to Security-Based Swap Data Under the Dodd-Frank Act

As discussed above,[1851] the Commission believes that Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act [1852] are intended to, among other things, obligate SDRs to make available security-based swap information to relevant authorities and maintain the confidentiality of such information. More broadly, the Dodd-Frank Act is intended to, among other things, promote the financial stability of the U.S. financial system by improving accountability and transparency in the financial system.[1853] To the extent that SDRs fulfill these statutory goals, the Commission preliminarily believes that certain benefits and costs will result.

i. Benefits of Relevant Authorities' Access to Security-Based Swap Data

As discussed below, the Commission preliminarily believes that there are a number of benefits associated with providing relevant authorities with access to security-based swap data maintained by SDRs registered with the Commission (''SDR Data'').

First, the Commission preliminarily believes that providing relevant authorities with such access would increase transparency in the security-based swap market, thereby facilitating oversight of the security-based swap

[1844] *See id.*

[1845] *See* Section VI.C., *supra.*

[1846] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[1847] 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act.

[1848] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[1849] 15 U.S.C. 78x.

[1850] *Id.*

[1851] *See* Section VI.C., *supra.*

[1852] 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rules 13n–4(b)(9) and (10) under the Exchange Act.

[1853] *See* Dodd-Frank Act, Public Law 111–203 at Preamble.

market. SDRs are expected to retain complete records of security-based swap transactions and maintain the integrity of those records.[1854] To the extent that SDRs provide relevant authorities with effective access to those records in line with the respective information needs arising out of the authorities' regulatory mandates and legal responsibilities, SDRs will play a key role in increasing transparency in the security-based swap market. In having such effective access, these authorities will likely be better positioned to prevent market manipulation, fraud, and other market abuses; monitor the financial responsibility and soundness of market participants; perform market surveillance and macroprudential (systemic risk) supervision; resolve issues and positions after an institution fails; monitor compliance with relevant regulatory requirements; and respond to market turmoil.[1855]

Second, the Commission preliminarily believes that providing relevant foreign authorities with access to SDR Data may minimize fragmentation of security-based swap data among trade repositories globally. If relevant foreign authorities are unable to access SDR Data, then they may establish trade repositories in their jurisdictions to ensure access to data that they need to perform their regulatory mandates and legal responsibilities.[1856] By minimizing such fragmentation, relevant authorities would likely be able to access, aggregate, and analyze relevant data more efficiently, which should, in turn, enhance regulatory effectiveness.

Third, the Commission preliminarily believes that providing relevant foreign authorities with access to SDR Data may reduce costs to market participants by reducing the potential for duplicative security-based swap transaction reporting requirements in multiple jurisdictions. The Commission anticipates that relevant foreign authorities will likely impose their own reporting requirements on market participants that fall within their jurisdiction; given the global nature of the security-based swap market and the large number of cross-border transactions, the Commission recognizes that it is likely that such transactions may be subject to the reporting requirements of at least two jurisdictions. The Commission preliminarily believes, however, that if relevant authorities are able to access security-based swap data in trade repositories outside their jurisdiction, such as SDRs registered with the Commission, as needed, then relevant authorities may be more inclined to permit market participants involved in such transactions to fulfill their reporting requirements by reporting the transactions to a single trade repository, rather than to separate trade repositories in each applicable jurisdiction, thereby potentially reducing market participants' compliance costs associated with establishing multiple reporting systems to multiple SDRs. Similarly, market participants would likely be able to access, aggregate, and analyze their data more efficiently in a single trade repository, than if they were required to report data to separate trade repositories in each applicable jurisdiction.

ii. Costs of Relevant Authorities' Access to Security-Based Swap Data

The Commission preliminarily believes that although there are benefits to SDRs providing access to relevant authorities to SDR Data, such access will likely involve certain costs, or more specifically, risks. For example, the Commission expects that SDRs will maintain data that is proprietary and highly sensitive[1857] and that is subject to strict confidentiality requirements.[1858] Section 13(n)(5)(G) of the Exchange Act, however, requires an SDR to make available data obtained by the SDR to authorities identified in Section 13(n)(5)(G) of the Exchange Act.[1859] Extending access to SDR Data to anyone, including relevant authorities, increases the risk of the confidentiality of SDR Data not being preserved.[1860] A relevant authority's inability to maintain the confidentiality of SDR Data could erode market participants' confidence in the integrity of the security-based swap market, thereby leading to reduced liquidity in the security-based swap market, hindering price discovery, and impeding the capital formation process.[1861]

To help mitigate these risks, Sections 13(n)(5)(G) and (H) of the Exchange Act impose certain conditions on access to SDR Data by relevant authorities.[1862] Specifically, Section 13(n)(5)(G) of the Exchange Act[1863] limits the authorities that may access SDR Data to an enumerated list of domestic authorities and any other persons, including foreign authorities, determined by the Commission to be appropriate and requires that an SDR notify the Commission when the SDR receives a request for SDR Data from an authority. Section 13(n)(5)(H) of the Exchange Act[1864] requires that, before an SDR shares security-based swap information with a relevant authority, the SDR must receive a written agreement from a relevant authority that it will abide by the confidentiality requirements described in Section 24 of the Exchange Act relating to the information provided by the SDR, and the relevant authority will agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Exchange Act.[1865]

[1854] *See* SDR Proposing Release, 75 FR 77307; *see also* Section 13(n)(5)(C) of the Exchange Act (requiring SDRs to maintain security-based swap data), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n–5(b)(3) and (4) under the Exchange Act (requiring SDRs to establish, maintain, and enforce policies and procedures reasonably designed to ensure that transaction data and positions are accurate and to maintain the transaction data and positions for specified periods of time).

[1855] *See, e.g.,* SDR Proposing Release, 75 FR 77307, 77356, as corrected at 76 FR 79320 (''The data maintained by an SDR may also assist regulators in (i) preventing market manipulation, fraud, and other market abuses; (ii) performing market surveillance, prudential supervision, and macroprudential (systemic risk) supervision; and (iii) resolving issues and positions after an institution fails . . . . [I]ncreased transparency on where exposure to risk reside in financial markets . . . will allow regulators to monitor and act before the risks become systemically relevant. Therefore, SDRs will help achieve systemic risk monitoring.'').

[1856] *Cf.* Cleary Letter IV at 31 (The Indemnification Requirement ''could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.'').

[1857] As the Commission has noted in the SDR Proposing Release, such data could include information about a market participant's trades or its trading strategy; it may also include nonpublic personal information. *See* 75 FR 77339.

[1858] *See* Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n–4(b)(8) and 13n–9 under the Exchange Act.

[1859] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rules 13n–4(b)(9) and (b)(10) under the Exchange Act.

[1860] *See, e.g.,* ESMA Letter at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

[1861] *See* SDR Proposing Release, 75 FR 77307, 77334 (''Failure to maintain privacy of [SDR Data] could lead to market abuse and subsequent loss of liquidity.'').

[1862] 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rules 13n–4(b)(9) and (b)(10) under the Exchange Act. In addition, Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act, and proposed Rules 13n–4(b)(8) and 13n–9 under the Exchange Act, require SDRs to maintain the privacy of SDR Data.

[1863] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(9) under the Exchange Act.

[1864] 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(10) under the Exchange Act.

[1865] 15 U.S.C. 78m(n)(5)(H), as added by Section 763(i) of the Dodd-Frank Act.

(b) Benefits and Costs of Proposed Guidance and Exemptive Rule

As discussed above, the Commission is (1) proposing interpretive guidance to specify how SDRs may comply with the Notification Requirement, (2) specifying how it proposes to determine whether a relevant authority is appropriate for purposes of receiving SDR Data, and (3) proposing the Indemnification Exemption.[1866] The Commission is proposing each of these to facilitate access to SDR Data by relevant authorities and to enable SDRs to fulfill their obligations under Sections 13(n)(5)(G) and 13(n)(5)(H) of the Exchange Act [1867] and previously proposed Rules 13n–4(b)(9) and 13n–4(b)(10) in a manner consistent with relevant authorities' need to have access to SDR Data that will enable them to carry out their regulatory mandates and legal responsibilities effectively and efficiently.[1868] The Commission preliminarily believes that our proposed guidance and the Indemnification Exemption would help realize the anticipated benefits of access to SDR Data by relevant authorities, as discussed above in Section XV.H.2(a)i, while at the same time mitigating the risks and other costs associated with such access, as discussed above in Section XV.H.2(a)ii. The Commission also preliminarily believes that, taken together, our proposed guidance and the Indemnification Exemption will enable the Commission and SDRs to respond promptly and flexibly to the needs of relevant authorities.

i. Notification Requirement

The Commission preliminarily believes that an SDR can comply with the Notification Requirement in Section 13(n)(5)(G) of the Exchange Act [1869] and previously proposed Rule 13n–4(b)(9) thereunder by notifying the Commission, upon the initial request for security-based swap data by a relevant authority, that such relevant authority has made a request for security-based swap data from the SDR, and maintaining records of the initial request and all subsequent requests.[1870] Under this proposed interpretation, where an SDR complies with the above, the Commission will consider the notice provided and records maintained as satisfying the Notification Requirement.

In the Commission's preliminary view, SDRs would be less burdened under this interpretation of the Notification Requirement than under an interpretation that would require SDRs to provide the Commission with actual notice of all requests for SDR Data by relevant authorities because SDRs would have to actually notify the Commission only one time for each relevant authority. The Commission estimates that approximately 200 relevant authorities may make requests for SDR Data from SDRs.[1871] Based on the Commission's experience in making requests for security-based swap data from trade repositories, the Commission estimates that each relevant authority may make about 12 requests for SDR Data per year. An alternative interpretation that would require SDRs to provide the Commission with actual notice of all requests for SDR Data by relevant authorities would naturally increase the burden on SDRs to notify the Commission. Therefore, over the course of a year, under the Commission's proposed interpretation of the Notification Requirement, the Commission estimates that an SDR would provide the Commission with actual notice approximately 200 times, whereas under an interpretation that would require SDRs to provide the Commission with actual notice of all requests for SDR Data by relevant authorities, the Commission estimates that the SDR would provide the Commission with actual notice approximately 2400 times. Because SDRs would be required to provide actual notification to the Commission only upon the first request of a relevant authority, rather than upon every request, SDRs should be able to respond to requests for SDR Data by relevant authorities more promptly and at lower cost than requiring SDRs to notify the Commission of every request.

The Commission's proposed interpretation would also minimize an impediment to relevant authorities' direct access to SDR Data to fulfill their regulatory mandates and legal responsibilities because SDRs would not be required to provide the Commission with actual notice of every request prior to providing access to the requesting relevant authority. If SDRs had to actually notify the Commission every time that a relevant authority requested access to SDR Data (following the initial request), this could interfere with the ability of relevant authorities to obtain efficiently security-based swap data from SDRs to fulfill their own regulatory mandate or legal responsibilities. Such an impediment could be a factor in leading certain relevant authorities to seek to promote the establishment of trade repositories in their own jurisdictions, which would lead to fragmentation of security-based swap data and SDRs geographically. By reducing a potential barrier to relevant authorities' access to SDR Data and reducing the likelihood of fragmentation of data among trade repositories, the Commission's proposed interpretation of the Notification Requirement should enhance the ability of SDRs to perform their intended functions and thereby increase market transparency and regulatory effectiveness. Because SDRs would still be required to maintain records of relevant authorities' requests for SDR Data, the proposed interpretation would also allow the Commission to obtain this information as needed.

The Commission is aware that our proposed interpretation of the Notification Requirement will not provide the Commission with actual notice of all relevant authorities' requests for SDR Data prior to an SDR fulfilling such requests. The Commission preliminarily believes, however, that the benefits of receiving such notice does not justify the additional costs that SDRs would incur in providing such notice and the potential delay in relevant authorities receiving SDR Data that they need to fulfill their regulatory mandates and legal responsibilities.

ii. Determination of Appropriate Regulators

The Commission is proposing an approach to determining whether an authority, other than those expressly identified in Section 13(n)(5)(G) of the

[1866] *See* Section VI.C.3, *supra.*

[1867] 15 U.S.C. 78m(n)(5)(G) and (H), as added by Section 763(i) of the Dodd-Frank Act.

[1868] *See* SDR Proposing Release, 75 FR 77356.

[1869] 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act.

[1870] *See* Section VI.C.3(a), *supra.*

[1871] The Commission preliminarily believes that each of the entities in the United States that is specifically listed in Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), as added by Section 763(i) of the Dodd-Frank Act, may request SDR Data from SDRs. Section 13(n)(5)(G) specifically lists each appropriate prudential regulator (which includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency), the Financial Stability Oversight Council, the CFTC, and the Department of Justice. The Commission also preliminarily expects that certain SROs and registered futures associations may request SDR Data from SDRs. Therefore, the Commission estimates that approximately 10 relevant authorities in the United States may request SDR Data from SDRs. The Commission also estimates that each of the G20 countries will have no more than 10 relevant authorities that may request SDR Data from SDRs. Thus, the Commission estimates that there will be a total of no more than 200 relevant domestic and foreign authorities that may request SDR Data from SDRs.

Exchange Act[1872] and previously proposed Rule 13n–4(b)(9) thereunder, should be determined to be appropriate for purposes of requesting SDR Data. As described above, the Commission preliminarily envisions that this process will involve consideration of, among other things, the scope of the relevant authority's regulatory mandate and legal responsibilities, the authority's ability to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction, and a supervisory and enforcement MOU or other arrangement that would be designed to protect the confidentiality of any SDR Data provided to the authority.[1873]

The Commission preliminarily believes that our proposed approach has the benefit of appropriately limiting access to SDR Data by relevant authorities in order to seek to protect the confidentiality of SDR Data.[1874] The Commission expects that relevant authorities from a wide range of jurisdictions may seek to obtain a determination by the Commission that they may appropriately have access to SDR Data. Each of these jurisdictions may have a distinct approach to supervision, regulation, or oversight of its financial markets or market participants and to the protection of proprietary and other confidential information. The Commission preliminarily believes that the process that it is contemplating has the benefit of enabling the Commission to determine whether an authority has a legitimate interest in the SDR Data, based on its regulatory mandate or legal responsibilities, and whether the authority is capable of protecting the confidentiality of SDR Data provided to it. In addition, the Commission preliminarily believes that this process will allow the Commission to be able to revoke its determination in certain instances, including, for example, if a relevant authority fails to keep confidential data that an SDR provides to the authority.

The Commission also preliminarily believes that our proposed approach will reduce the potential for fragmentation of security-based swap data among trade repositories because it will reduce the risks of improper disclosure, misappropriation, or misuse of SDR Data. Concerns about these risks could prompt relevant authorities to promote the development and maintenance of SDRs in their own jurisdictions rather than entrusting data reported by persons within their jurisdictions to consolidated trade repositories. As described above, the Commission envisions that any determination order by the Commission will likely be conditioned on a relevant authority and the Commission entering into a supervisory and enforcement MOU or other arrangement, which will likely address the confidentiality of SDR Data obtained by the authority.[1875] Because the Commission's determination process will likely address confidentiality concerns, the Commission preliminarily believes that our proposed approach would increase relevant authorities' confidence in the preservation of the confidentiality of SDR Data shared with the authorities' counterparts in other jurisdictions, and, in conjunction with the Commission's approach to ensuring access to SDR Data by relevant authorities discussed above,[1876] may reduce incentives for relevant authorities to seek to promote the establishment and maintenance of SDRs in other jurisdictions. If concerns over confidentiality reduce relevant authorities' incentives to promote the establishment and maintenance of SDRs in their own jurisdictions and market participants operating in those jurisdictions conclude that they may, under applicable foreign law, use SDRs registered with the Commission for reporting purposes and therefore do so, then the Commission preliminarily believes that this will improve market transparency and regulatory efficiency.

Furthermore, the Commission preliminarily believes that our proposal represents an efficient approach to the determination process that will promote the intended benefits of access by relevant authorities to SDR Data, as discussed above in Section XV.H.2(a)i. The Commission routinely negotiates MOUs or other arrangements with foreign authorities in order to secure mutual assistance or for other purposes, and the Commission preliminarily believes that the approach that it is proposing is generally consistent with this practice. As such, the Commission preliminarily believes that the burden of entering into supervisory and enforcement MOUs or other arrangements with relevant authorities during the Commission's determination process will be outweighed by the benefits to relevant authorities in gaining access to SDR Data to carry out their regulatory mandates or legal responsibilities.

iii. Exemptive Relief From the Indemnification Requirement

Finally, the Commission is proposing the Indemnification Exemption, which would provide SDRs registered with the Commission with the option of permitting relevant authorities to obtain SDR Data without agreeing to indemnify the SDR and the Commission, subject to three conditions. The first two conditions would limit the exemption to (1) requests by a relevant authority for security-based swap information made to fulfill a regulatory mandate and/or legal responsibility of the requesting authority, and (2) requests pertaining to a person or financial product subject to the jurisdiction, supervision, or oversight of the requesting authority.[1877] The third condition would require the relevant authority to have entered into a supervisory and enforcement MOU or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.[1878] The Commission preliminarily believes that the benefits of the Indemnification Exemption would include the benefits associated with permitting relevant authorities to access SDR Data, as discussed in Section XV.H.2(a)i above.

As discussed above, the Commission preliminarily believes that a rigid application of the Indemnification Requirement could prevent some relevant domestic authorities and some relevant foreign authorities from obtaining security-based swap information from SDRs because they cannot provide an indemnification agreement.[1879] Effectively prohibiting access to SDR Data by authorities other than the Commission would greatly reduce the ability of an SDR to provide the market transparency and regulatory efficiency benefits intended under Title VII.[1880] Although relevant authorities could obtain SDR Data from the Commission,[1881] it would likely be less efficient for relevant authorities to do so than obtaining access to SDR Data directly from SDRs, particularly in periods of market stress and particularly

[1872] 15 U.S.C. 78m(n)(5)(G) (permitting access to SDR Data by ''any other person that the Commission determines to be appropriate''), as added by Section 763(i) of the Dodd-Frank Act.

[1873] *See* Section VI.C.3(b), *supra.*

[1874] *See* ESMA Letter at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

[1875] *See* Section VI.C.3(b), *supra.*

[1876] *See* Section VI.C., *supra.*

[1877] *See* Section VI.C.3(c), *supra.*

[1878] *See id.*

[1879] *See* Section VI.C.3(c), *supra.*

[1880] *See* SDR Proposing Release, 75 FR 77307 (describing expected benefits of SDRs, including the market transparency benefits of access by regulators); *id.* at 77356 (''The ability of the Commission and other regulators to monitor risk and detect fraudulent activity depends on having access to market data.'').

[1881] *See* Section VI.C.1, *supra; see also* SDR Proposing Release, 75 FR 77319.

since SDRs are likely to have expertise in, and business incentives for, providing such data to relevant authorities efficiently.

The Commission also preliminarily believes that a rigid application of the Indemnification Requirement could reduce the amount of data held by SDRs registered with the Commission, thereby potentially reducing the usefulness of such SDRs to relevant authorities and market participants. To the extent that relevant foreign authorities are effectively limited in obtaining SDR Data, the relevant authorities may seek to promote the development and maintenance of SDRs in their own jurisdictions, which would likely lead to fragmentation of security-based swap data among trade repositories in multiple jurisdictions.[1882] Such fragmentation could result in higher reporting costs for market participants,[1883] who may be subject to duplicative security-based swap transaction reporting requirements in multiple jurisdictions, and would likely increase other costs that both relevant authorities and market participants may incur, including, for example, their inability to aggregate data across multiple SDRs.[1884]

The Commission preliminarily believes that, in addition to addressing the concerns raised by a rigid application of the Indemnification Requirement, the Indemnification Exemption is beneficial because it would mitigate the risks associated with permitting relevant authorities to obtain access to SDR Data, as discussed above in Section XV.H.2(a)ii. The Indemnification Exemption would be available only for requests that are consistent with each requesting authority's regulatory mandate or legal responsibilities and only for SDR Data pertaining to a person or financial product subject to the requesting authority's jurisdiction, supervision, or oversight. The Commission preliminarily believes that these conditions significantly reduce the confidentiality concerns relating to relevant authorities' access to SDR Data,[1885] as authorities are likely to be sensitive to the need for confidentiality of data, particularly if the data pertains to matters in which they have an interest, *i.e.,* data within their own regulatory mandates or legal responsibilities and to persons and financial products under their own jurisdiction, supervision, or oversight. Similarly, because the Indemnification Exemption is voluntary, the SDR may choose not to rely on the Indemnification Exemption, such as under circumstances where the risks associated with providing access to SDR Data may be unreasonably high—for example, where a relevant authority has a previous history of weak protections for preserving the confidentiality of SDR Data. Further, even where the SDR opts to rely on the Indemnification Exemption, the Commission will have an opportunity to evaluate the confidentiality protections provided by the relevant authority in the context of negotiations of a supervisory and enforcement MOU or other arrangement.[1886]

The Commission envisions that, to meet the first two conditions in the Indemnification Exemption, an SDR may incur costs in determining whether a relevant authority's request for data falls within its regulatory mandate or legal responsibilities and pertains to a person or financial product subject to the authority's jurisdiction, supervision, or oversight. The Commission preliminarily believes, however, that an SDR's costs for meeting the first two conditions in the Indemnification Exemption would be minimal, if any, in light of the burden already imposed by an SDR's statutory duty to maintain the privacy of security-based swap information that it receives.[1887] With respect to the third condition in the Indemnification Exemption, the

[1882] *Cf.* Cleary Letter IV at 31 (The Indemnification Requirement ''could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.'').

[1883] In the SDR Proposing Release, the Commission noted that multiple SDRs per asset class would allow for market competition to determine how data is collected. 75 FR 77358. Although the Commission continues to recognize that multiple SDRs may in some circumstances increase competition and lower costs associated with reporting and other Title VII requirements, the Commission preliminarily believes that fragmentation of security-based swap data among trade repositories under the circumstances described here would not likely increase competition or reduce costs. In a jurisdictionally-fragmented global market, an increase in the number of trade repositories in one jurisdiction may not increase the number of alternative trade repositories in another jurisdiction to which a counterparty may report. In such a market, counterparties to security-based swap transactions occurring wholly within one jurisdiction would likely not be free to choose to report to a trade repository in another jurisdiction to satisfy applicable reporting requirements. Similarly, cross-border transactions subject to the reporting requirements of two or more jurisdictions would likely be required to be reported to trade repositories in each of the jurisdictions that require the transactions to be reported.

[1884] *See* SDR Proposing Release, 75 FR 77358. The costs associated with aggregating the data of multiple SDRs would likely be significantly higher under the circumstances described here, as different jurisdictions are likely to impose different requirements regarding how data is to be reported and maintained.

[1885] *See, e.g.,* ESMA Letter at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

[1886] For the Indemnification Exemption to apply to the requests of a particular requesting authority, the Commission would be required to enter into a supervisory and enforcement MOU or other arrangement with such authority, which would enable the Commission to determine, prior to operation of the Indemnification Exemption, that the authority has a regulatory mandate or legal responsibilities to access SDR Data, that it agrees to protect the confidentiality of any security-based swap information provided to it, and that it will provide reciprocal assistance in securities matters within the Commission's jurisdiction. *See* Section VI.C.3(c), *supra.* In addition, if an SDR determines that it would prefer not to invoke the exemption, it would have the option to require an indemnification agreement from a relevant authority that seeks to access SDR Data. *See* Section VI.C.3(c), *supra.*

[1887] *See* Section 13(n)(5)(F) of the Exchange Act, 15 U.S.C. 78m(n)(5)(F), as added by Section 763(i) of the Dodd-Frank Act; *see also* proposed Rule 13n–4(b)(8) under the Exchange Act (requiring SDRs to maintain the privacy of any and all security-based swap transaction information that the SDR receives from a security-based swap dealer, counterparty, or certain registered entity) and proposed Rule 13n–9 under the Exchange Act (requiring an SDR to protect the privacy of security-based swap transaction information that the SDR receives by, among other things, establishing safeguards, policies, and procedures that are reasonably designed to protect such information and that address, without limitation, the SDR limiting access to confidential information, material, nonpublic information, and intellectual property). The Commission preliminarily believes that in order to comply with an SDR's statutory privacy duty, the SDR will most likely decide that it is reasonable to consider whether a relevant authority's request for security-based swap information is within its regulatory mandate or legal responsibilities and pertains to a person or financial product within the authority's jurisdiction, supervision, or oversight before the SDR provides the information. If so, then the Commission preliminarily believes that the SDR's costs for meeting the first two conditions in the Indemnification Exemption would be minimal, if any, because these conditions will most likely be already addressed in the SDR's policies and procedures required by previously proposed Rule 13n–9 under the Exchange Act. As discussed in the SDR Proposing Release, the Commission anticipated that the primary costs to SDRs for complying with proposed Rule 13n–9 would be derived from developing, maintaining, and ensuring compliance with the required policies and procedures. 75 FR 77363. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the Commission now estimates that the average initial paperwork cost associated with proposed Rule 13n–9 would be 630 hours and $60,000 in outside legal costs for each SDR. The Commission also estimates that the average ongoing paperwork cost would be 180 hours per year for each SDR and that assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost to comply with proposed Rule 13n–9 would be $2,553,000, which is calculated as follows: ($60,000 for outside legal services + (Compliance Attorney at $310 per hour for 630 hours)) * 10 registrants = $2,553,000. The Commission further estimates that the aggregate ongoing estimated dollar cost per year to comply with proposed Rule 13n–9 would be $558,000, which is calculated as follows: (Compliance Attorney at $310 per hour for 180 hours) * 10 registrants = $558,000.

Commission preliminarily believes that the costs for an SDR to confirm whether the Commission and a relevant authority have entered into a supervisory and enforcement MOU or other arrangement would be minimal because such information should generally be readily available.[1888]

Even if all the conditions in the Indemnification Exemption are satisfied, SDRs would have the option to seek to obtain an indemnification agreement from a relevant authority. The Commission recognizes that the conditions in the Indemnification Exemption would not necessarily provide SDRs that invoke the exemption with the same level of protection that an indemnification agreement would provide (*i.e.,* coverage for any expenses arising from litigation relating to information provided to a relevant authority) and thus, SDRs may decide to weigh the potential risks in not seeking an indemnification agreement from a relevant authority with the benefits of invoking the exemption.

The Commission preliminarily believes, however, that the conditions in the exemption would provide an additional layer of protection of the confidentiality of SDR Data—albeit different from the protection provided by an indemnification agreement—and that in cases where SDRs choose the exemption, such SDRs presumably believe that the benefits of the exemption, as discussed above, justify the costs of invoking the exemption. However, even in cases where the exemption is not chosen, the availability of the option is valuable to SDRs because the exemption would provide SDRs with an alternative to the Indemnification Requirement and an opportunity to choose the lower cost alternative.

(c) Alternatives to Proposed Guidance and Exemptive Relief

i. Notification Requirement

The Commission considered requiring SDRs to provide actual notice to the Commission of all requests for SDR Data by relevant authorities prior to SDRs fulfilling such requests. The Commission preliminarily believes, however, that the benefits of receiving actual notice for each and every request does not justify the additional costs imposed on SDRs to provide such notice and the potential delay in relevant authorities receiving SDR Data that they need to fulfill their regulatory mandates and legal responsibilities. The Commission also preliminarily believes that our proposed approach is the most efficient way to interpret the Notification Requirement and would allow the Commission access to the information needed.

ii. Determination of Appropriate Regulators

The Commission considered prescribing by rule a specific process to determine whether a relevant authority is appropriate for purposes of receiving security-based swap data directly from SDRs that would require, for example, a supervisory and enforcement MOU or other arrangement.[1889] The Commission preliminarily believes, however, that such a rule is not necessary because our process for determining an appropriate authority provides the Commission and relevant authorities greater flexibility to consult on appropriate terms of access to SDR Data, confidentiality commitments, and reciprocal access commitments on a case-by-case basis.

iii. Exemptive Relief From the Indemnification Requirement

The Commission considered whether to not propose any exemptive relief from the Indemnification Requirement. For the reasons discussed below, the Commission believes that the Indemnification Exemption is a better, and more appropriate, alternative to a rigid application of the Indemnification Requirement.[1890]

The Commission preliminarily believes that a rigid application of the Indemnification Requirement may reduce the expected benefits associated with relevant authorities' access to SDR Data, as discussed in Section XV.H.2(a)i above. In particular, the Indemnification Requirement may prevent some relevant authorities from accessing SDR Data directly from SDRs registered with the Commission.[1891] Although relevant authorities could obtain SDR Data from the Commission,[1892] it would likely be less efficient for relevant authorities to do so than obtaining SDR Data access directly from SDRs, particularly in periods of market stress and particularly since SDRs are likely to have expertise in, and business incentives for, providing such data to relevant authorities efficiently.

Moreover, the inability of relevant foreign authorities to obtain direct access to SDR Data from SDRs registered with the Commission would likely increase the risk of data fragmentation among trade repositories, as many foreign authorities may require establishment and maintenance of trade repositories in their jurisdictions if such authorities determine that they are unable to satisfy the Indemnification Requirement; such fragmentation may lead to higher reporting costs for market participants and less transparency in the security-based swap market.[1893]

The Commission also considered whether to prescribe additional conditions in or limitations to the Indemnification Exemption, but decided against it. Any additional conditions or limitations to the Indemnification Exemption would likely impose additional costs on SDRs that the Commission preliminarily believes are not warranted at this time. The Commission presently believes that the Indemnification Exemption strikes the right balance in furthering the goals of the Dodd-Frank Act by providing relevant authorities with access to SDR Data to fulfill their regulatory mandates and legal requirements while incorporating appropriate limitations to such access to guard against over-broad or unfettered access to all SDR Data as well as certain mechanisms to seek to preserve the confidentiality of the SDR Data.

Request for Comment

The Commission requests comments on all aspects of the economic analysis of our proposed interpretive guidance, Indemnification Exemption, and alternatives to our proposed approach. Interested persons are encouraged to provide supporting data and analysis and, when appropriate, suggest modifications to the Commission's proposed interpretive guidance and Indemnification Exemption. Responses that are supported by data and analysis provide great assistance to the Commission in considering the benefits and costs of proposed alternatives, as well as considering the practicality and effectiveness of the proposed alternatives. In addition, the

[1888] As a general matter, the Commission provides a list of MOUs and other arrangements, which are available at the following link: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.*

[1889] *See, e.g.,* CFTC Rule 49.17(b), 17 CFR 49.17(b) (requiring ''Appropriate Foreign Regulators'' to have an MOU or similar type of information sharing agreement, or as the CFTC determines on a case-by-case basis).

[1890] *See also* Section VI.C.3(c), *supra* (discussing how a rigid application of the Indemnification Requirement would frustrate the purposes of the Dodd-Frank Act).

[1891] *See, e.g.,* DTCC Letter I at 3 (discussing how the Indemnification Requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators' ability to carry out oversight functions).

[1892] *See* Section VI.C.1, *supra; see also* SDR Proposing Release, 75 FR 77319.

[1893] *See, e.g.,* Cleary Letter IV at 31 (The Indemnification Requirement ''could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.'').

Commission requests commenters' views on the following:

• Has the Commission appropriately considered the expected programmatic benefits and costs of our proposed interpretative guidance and Indemnification Exemption? If not, please explain why and provide information on how such benefits and costs should be assessed.

• Are the programmatic benefits and costs discussed above accurate? If not, why not and how can the Commission more accurately describe such benefits and costs?

• Are there quantifiable programmatic benefits or costs associated with the Commission's proposed interpretive guidance and Indemnification Exemption that are not discussed above, but that the Commission should consider? If so, please discuss, analyze, and supply relevant data, information, or statistics regarding any such benefits or costs. For example, how many relevant authorities will likely request SDR Data from SDRs? What is the average number of requests for SDR Data that an SDR may receive from relevant authorities per year?

• Are there costs in fulfilling any of the conditions in the Indemnification Exemption that the Commission has not discussed above? If so, what?

• Do you agree that an SDR's costs for meeting the first two conditions in the Indemnification Exemption would be minimal, if any, because these conditions will most likely be already addressed in the SDR's policies and procedures required by previously proposed Rule 13n-9 under the Exchange Act? If not, please explain.

• Do SDRs have appropriate incentives to rely on the Indemnification Exemption? Are there circumstances in which an SDR may rely on an Indemnification Exemption when it is inappropriate to do so? Conversely, would SDRs have incentives to require indemnification despite the availability of the Indemnification Exemption? Please explain.

• What kinds of legal frameworks will relevant authorities operate under? Will some relevant authorities operate under legal frameworks that do not impose confidentiality restrictions on the use of data that are comparable to those governing SDRs and those applicable to the Commission?

• Do the benefits of the Commission's proposed interpretive guidance and Indemnification Exemption justify the costs? If not, why not?

• Has the Commission appropriately considered the benefits and costs of the alternative approaches to the Commission's interpretive guidance and Indemnification Exemption? If not, why not?

3. Economic Analysis of the Re-proposal of Regulation SBSR

As discussed above, although the Commission is re-proposing all of Regulation SBSR, the new elements of the re-proposal relate directly to cross-border issues, are conforming changes necessitated by those larger changes, or are technical changes designed to facilitate understanding of those other changes. However, since Regulation SBSR was proposed but has not yet been adopted, the discussion below will include costs and benefits of the initial proposal from a pre-statutory baseline and then consider the changes to the initial assessments of costs and benefits implied by the re-proposal.

Broadly, the Commission continues to believe, as described in the Regulation SBSR Proposing Release, that Regulation SBSR taken as a whole would result in improved market quality, improved risk management, greater efficiency, and improved Commission oversight.[1894] Today's re-proposal of Regulation SBSR is intended to further these goals while further limiting, to the extent practicable, the overall costs associated with security-based swap reporting and public dissemination in cross-border situations. As described in more detail below, the proposed revisions were suggested by many commenters to the initial proposal and are designed, among other things, to better align reporting duties with larger entities that have greater resources and capability to report [1895] and to reduce the potential for duplicative reporting.[1896] These revisions should help to maximize the benefits and minimize the potential costs of regulatory reporting and public dissemination of security-based swaps faced by market participants.

The Commission seeks public comment on the costs and benefits that re-proposed Regulation SBSR would entail. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits. In particular, the Commission seeks comment on the following:

• Taken together, what are the costs and benefits of re-proposed Regulation SBSR?

• Would the revisions contained in re-proposed Regulation SBSR result in benefits or costs not identified by the Commission? If so, please describe.

• Has the Commission accurately identified and described all relevant benefits and costs associated with re-proposed Regulation SBSR?

• Could re-proposed Regulation SBSR be further enhanced, consistent with the Dodd-Frank Act, to maximize aggregate benefits and minimize costs to the security-based swap market?

(a) Modifications to ''Reporting Party'' Rules and Jurisdictional Reach of Regulation SBSR—Re-proposed Rules 901(a) and 908(a)

i. Initial Proposal

Rule 901(a), as initially proposed, set forth three scenarios for assigning the duty to report a security-based swap transaction. Proposed Rule 901(a)(1) would provide that, where only one counterparty to a security-based swap is a U.S. person, the U.S. person would be the reporting party. Proposed Rule 901(a)(2) would assign reporting responsibilities as follows:

• With respect to a security-based swap in which only one counterparty is a security-based swap dealer or major

[1894] *See* Regulation SBSR Proposing Release, 75 FR 75261–62.

[1895] *See, e.g.,* SIFMA AMG Letter at 2 (stating that, due to their commercial interests and technological expertise, non-U.S. security-based swap dealers and major security-based swap participants would be as likely as U.S. security-based swap dealers and major security-based swap participants to comply with the reporting obligations, or would be best positioned to develop at the lowest cost the necessary technological infrastructure or relationships with third party service providers); Vanguard Letter at 6 (stating that requiring U.S. end users to report security-based swaps would be costly and burdensome for end users, particularly for end users that enter into security-based swaps on an isolated basis); MarkitSERV Letter I at 9 (noting that, in light of end users' resources and the operational and technical challenges of security-based swap reporting, it will often be most efficient for a U.S. end user to delegate reporting to its non-U.S. security-based swap dealer or major security-based swap participant counterparty); DTCC Letter II at 27 (stating that the Commission's failure to encourage arrangements through which non-U.S. dealers could submit transaction reports for customers that are U.S. persons would impose significant burdens and costs on U.S. money managers, which likely would be passed to individual investors, pension funds, and state and local governments); Cleary Letter IV at 28 (stating that requiring U.S. end users to report security-based swaps entered into with non-U.S. security-based swap dealers would be unduly burdensome for end users and could negatively impact the competitiveness of affected U.S. markets); ISDA/SIFMA Letter I at 19 (the end-user reporting requirement could result in the inadvertent exclusion of non-U.S. security-based swap dealers, which could increase systemic risk by decreasing liquidity and further concentrating the U.S. security-based swap market); Cleary Letter II at 18 (end users and other unregistered counterparties might refuse to enter into security-based swaps with foreign security-based swap dealers or major security-based swap participants to avoid the costs of developing the necessary reporting systems, thereby potentially reducing price competition).

[1896] *See* notes 1136–1141, *supra.*

security-based swap participant, the security-based swap dealer or major security-based swap participant would be the reporting party;

- With respect to a security-based swap in which one counterparty is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer would be the reporting party; and
- With respect to any other security-based swap not described in the first two cases, the counterparties to the security-based swap would select a counterparty to be the reporting party.

Proposed Rule 901(a)(3), as originally proposed, would provide that, if neither party is a U.S. person but the security-based swap is executed in the United States or through any means of interstate commerce, or is cleared through a clearing agency having its principal place of business in the United States, the counterparties to the security-based swap would be required to select a counterparty to be the reporting party.

Rule 908(a), as initially proposed, would delineate the scope of the security-based swap market that would be subject to regulatory reporting and public dissemination under Regulation SBSR. Proposed Rule 908(a) provided that a security-based swap would be subject to these requirements if the security-based swap: (1) has at least one counterparty that is a U.S. person; (2) is executed in the United States or through any means of interstate commerce; or (3) is cleared through a registered clearing agency having its principal place of business in the United States. If a security-based swap met any of the tests in proposed Rule 908(a), the counterparties would then look to proposed Rule 901(a) to determine which of them would be required to report the security-based swap. Rule 908(a), as initially proposed, would not impose reporting requirements in connection with a security-based swap solely because one of the counterparties is guaranteed by a U.S. person.

Rule 902, as initially proposed, would require the public dissemination of security-based swaps that met the scope requirements of proposed Rule 908(a). Proposed Rule 902(a) set out the core requirement that a registered SDR, immediately upon receiving a transaction report of a security-based swap, would be required to publicly disseminate information about that security-based swap consisting of all the information reported by the reporting party pursuant to proposed Rule 901(c), plus any indicator(s) contemplated by the registered SDR's policies and procedures that would be required by proposed Rule 907.[1897]

a. Programmatic Benefits of Initial Proposal

The Regulation SBSR Proposing Release discussed various benefits that could result from proposed Rule 901.[1898] For example, the Commission anticipated that proposed Rule 901 would provide the Commission with a better understanding of the security-based swap market generally, including the size and scope of that market, as the Commission would have access to data held by SDRs.[1899] Such access is designed to promote more effective systemic regulation, and provide the Commission with better information to examine for improper market behavior and to take enforcement actions. Furthermore, specifying general types of information to be reported and publicly disseminated could increase the efficiency and level of standardization in the security-based swap market. Proposed Rule 901 also could facilitate the reports about the security-based swap marketplace that the Commission is required to provide to Congress.[1900]

The Commission anticipated that proposed Rule 901 would likely require reporting parties to establish and maintain order management systems (''OMSs'') for capturing and transmitting data about their security-based swap transactions. Such systems would be necessary to report data within the timeframes set forth in proposed Rules 901(c) and 901(d), because it is unlikely that manual processes could capture and report in real time the numerous required data elements relating to a security-based swaps. There could be substantial benefits in the form of reduced operational risk in requiring all reporting parties to have such capability, as more timely capture and storage at firm level of all security-based swap transaction information would support effective risk management. Counterparties, SDRs, clearing agencies (in some cases), and regulators would obtain accurate knowledge of new security-based swap transactions more quickly. Reporting parties that obtain such systems could see additional benefits in being able to process and manage risk or to exploit operational efficiency gains to expand their participation in the security-based swap market.

The information reported by reporting parties pursuant to proposed Rule 901(c) would be used by registered SDRs to publicly disseminate real-time reports of security-based swap transactions under proposed Rule 902. In the Regulation SBSR Proposing Release, the Commission highlighted numerous benefits of the public dissemination requirement in proposed Rule 902. Among other things, the Commission stated that ''[b]y reducing information asymmetries, post-trade transparency has the potential to lower transaction costs, improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the security-based swap market.'' [1901] The Commission noted the opacity of the current security-based swap market and stated that ''[m]arket participants, even dealers, lack an effective mechanism to learn the prices at which other market participants transact.'' [1902] Requiring prompt dissemination of last-sale information would provide all market participants with more extensive and more accurate information on which to make trading and valuation determinations. Moreover, the Commission noted that post-trade pricing and volume information ''could allow valuation models to be adjusted to reflect how [security-based swap] counterparties have valued a [security-based swap] instrument at a specific moment in time'' [1903] and that public, real-time dissemination of last-sale information ''also could aid dealers in deriving better quotations, because they would know the prices at which other market participants have recently traded.'' [1904] Post-trade transparency of security-based swap transactions also could improve market participants' ability to value security-based swaps, especially in opaque markets or markets with low liquidity where recent quotations or last-sale prices may not

[1897] Block trades would be subject to special dissemination rules. Section 13(m)(1)(E) of the Exchange Act, 15 U.S.C. 78(m)(1)(E), provides that, with respect to cleared security-based swaps, the rule promulgated by the Commission related to public dissemination shall contain provisions that ''specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular market and contracts'' and ''specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public.'' The Commission in the Regulation SBSR Proposing Release did not propose how to define a ''block trade.'' As noted in Regulation SBSR Proposing Release, the Commission intends to do so in a separate proposal. *See* Regulation SBSR Proposing Release, 75 FR 75228.

[1898] *See id.* at 75262–64.

[1899] *See, e.g.,* 15 U.S.C. 78m(n)(5)(D) (requiring SDRs to provide the Commission with direct electronic access to their data).

[1900] *See* Section 719 of the Dodd-Frank Act.

[1901] *See* Regulation SBSR Proposing Release, 75 FR 75267.

[1902] *Id.*

[1903] *Id.*

[1904] *Id.*

exist or, if they do exist, may not be widely available. Better valuations could create a benefit in the form of more efficient capital allocation and ultimately could reduce systemic risks.[1905]

b. Programmatic Costs of Initial Proposal

The proposed security-based swap reporting requirements would also impose initial and ongoing costs on reporting parties. In the Regulation SBSR Proposing Release, the Commission stated our preliminarily belief that certain of these costs would be a function of the number of reportable events [1906] and the data elements required to be submitted for each reportable event. The Commission preliminarily estimated that security-based swap market participants would face three categories of costs to comply with proposed Rule 901. First, each reporting party would have to develop an internal OMS capable of capturing relevant security-based swap transaction information so that it could be reported. Second, each reporting party would have to implement a reporting mechanism. Third, each reporting party would have to establish an appropriate compliance program and support for operating the OMS and reporting mechanism.[1907] The Commission preliminarily estimated that up to 1,000 entities could be reporting parties under proposed Rule 901(a) and that the first-year aggregate costs associated with proposed Rule 901 would be $511,013 per reporting party, for a total of $511,013,000 for all reporting parties.[1908] The Commission preliminarily estimated that the ongoing aggregate annualized costs associated with proposed Rule 901 would be $316,116 per reporting party, for a total of $316,116,000 for all reporting parties.[1909] These cost estimates all relied on the Commission's preliminary estimate of 1,000 reporting parties. In the Regulation SBSR Proposing Release, the Commission did not break down the costs of Rule 901 by each paragraph of Rule 901, but instead calculated costs arising from proposed Rule 901 as a whole.

The Commission noted that the costs associated with required reporting pursuant to proposed Regulation SBSR could represent a barrier to entry for new, smaller firms that might not have the ability to comply with the proposed reporting requirements or for whom the expected benefits of compliance might not justify the costs of compliance. To the extent that proposed Regulation SBSR might deter new firms from entering the security-based swap market, this would be a cost of the proposal and could negatively impact competition. Nevertheless, the Commission preliminarily believed that the proposed reporting requirements would not impose insurmountable barriers to entry, as firms that were reluctant to acquire and build reporting infrastructure would be able to engage with third-party service providers that carry out any reporting duties that they incurred under Regulation SBSR.[1910]

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that the initial one-time aggregate costs for registered SDRs to develop and implement the systems needed to disseminate the required transaction information would be $40,004,000, which corresponds to $4,000,400 per SDR. Further, the Commission preliminarily estimated that aggregate annual costs on registered SDRs for systems and connectivity upgrades associated with real-time public dissemination would be $24,002,400, which corresponds to $2,400,240 per SDR. Overall, the initial aggregate costs associated with proposed Rule 901 for all SDRs were estimated to be $64,006,400, which corresponds to $6,400,640 per registered SDR.[1911]

ii. Re-Proposal

For the reasons discussed above, the Commission is now re-proposing certain provisions of Regulation SBSR that would extend the scope of security-based swaps that would be subject to regulatory reporting and public dissemination and, in some cases, to shift the duty to report to a different counterparty. This re-proposal is being made, in part, to reflect the Commission's preliminary belief that in many cases the reporting and public dissemination requirements of Regulation SBSR should extend to security-based swaps executed outside the United States but having a U.S. person as an indirect counterparty. The Commission also is revising our approach to assigning the duty to report to minimize consideration of the domicile of the counterparties, and to focus more on their registration status (*i.e.,* whether or not a counterparty is a security-based swap dealer or major security-based swap participant).

To facilitate these revisions, the Commission is proposing to add certain new terms and definitions and to redefine other terms contained in Rule 900. First, the Commission is now proposing to redefine the term ''counterparty'' as ''a direct or indirect counterparty of a security-based swap.'' Re-proposed Rule 900 would define ''direct counterparty'' as ''a person that enters directly with another person into a contract that constitutes a security-based swap'' and ''indirect counterparty'' as ''a person that guarantees the performance of a direct counterparty to a security-based swap or that otherwise provides recourse to the other side for the failure of the direct counterparty to perform any obligation under the security-based swap.'' Second, re-proposed Rule 900 would eliminate the term ''reporting party'' and replace it with ''reporting side,'' and define ''reporting side'' as ''the side of a security-based swap having the duty to report information in accordance with §§ 242.900–911 to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.'' ''Side'' would be defined as ''a direct counterparty and any indirect counterparty that guarantees its performance on the security-based swap.''

The Commission's revisions would leave much of Rule 901, as initially proposed, substantially unchanged. Importantly, the Commission is not proposing to modify the basic duty to report security-based swap transactions to a registered SDR, as set forth in proposed Rule 901(b). Nor is the Commission proposing to add, delete, or substantively change any of the specific data elements set forth in proposed Rules 901(c) and 901(d) that reporting sides would be required to report.[1912] Rather, in this re-proposal, the Commission's substantive revisions to Rule 901 occur only in paragraph (a), which governs who must report security-based swap transactions. As described in more detail below, these changes are intended to better align reporting duties with larger entities that have greater resources and capability to

[1905] *See id.* at 75268.

[1906] A reportable event would include both an initial security-based swap transaction, required to be reported pursuant to proposed Rule 901(b) and the data elements of which would be set forth in proposed Rule 901(c), as well as a life cycle event, the reporting of which is governed by proposed Rule 901(e). *See id.* at 75264–66.

[1907] *See id.* at 75264.

[1908] *See id.* at 75266.

[1909] *See id.*

[1910] *See id.*

[1911] *See id.* at 75269.

[1912] However, re-proposed Rules 901(c) and 901(d) under the Exchange Act include certain conforming changes due to the use of new and revised terms in re-proposed Rule 900 under the Exchange Act.

report. Specifically, re-proposed Rule 901(a) would provide that a security-based swap dealer or major security-based swap participant that is not a U.S. person could incur the duty to report a security-based swap in various cases. Re-proposed Rule 901(a) would now provide as follows:

- If both sides of the security-based swap include a security-based swap dealer, the sides would be required to select the reporting side.
- If only one side of the security-based swap includes a security-based swap dealer, that side would be the reporting side.
- If both sides of the security-based swap include a major security-based swap participant, the sides would be required to select the reporting side.
- If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant would be reporting side.
- If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) If both sides include a U.S. person or neither side includes a U.S. person, the sides would be required to select the reporting side; and (ii) If only one side includes a U.S. person, that side would be the reporting side.

In conjunction with the proposed changes to Rule 901(a), the Commission also is now proposing to modify Rule 908(a) to extend the reporting requirement to all security-based swaps that are guaranteed by a U.S. person and all security-based swaps of security-based swap dealers and major security-based swap participants, regardless of whether or not they are U.S. persons.[1913] To reflect these changes, re-proposed Rule 908(a)(1) would provide that a security-based swap is subject to regulatory reporting if:

- The security-based swap is a transaction conducted within the United States;
- There is a direct or indirect counterparty that is a U.S. person on either side of the transaction;
- There is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Re-proposed Rule 908(a)(2) would provide that a security-based swap shall be subject to public dissemination if:

- The transaction is conducted within the United States;
- There is a direct or indirect counterparty that is a U.S. person on each side of the transaction;
- At least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch);
- One side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

Taken together, these changes to Rule 901(a) and 908(a) would have the cumulative effect of substantially preserving the reporting hierarchy contemplated in Section 766 of the Dodd-Frank Act while also taking into account the existence of indirect counterparties that could affect how the reporting duty is allocated. Thus, the new approach set forth in re-proposed Rule 901(a) would focus more on the status of an entity (*i.e.,* whether it is a security-based swap dealer or major security-based swap participant), and less on whether or not the counterparties are U.S. persons. Moreover, re-proposed Rule 908(a)(1) would extend the requirement for regulatory reporting to all security-based swaps that are guaranteed by a U.S. person or executed by security-based swap dealers and major security-based swap participants, regardless of whether or not they are U.S. persons.

As discussed above, the Commission is re-proposing Rule 902(a) to provide that certain security-based swaps would be subject to regulatory reporting but not publically disseminated. Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would have no obligation to publicly disseminate a transaction report for any such security-based swap. The remainder of Rule 902 is substantively unchanged.[1914] However, as result of the modifications to Rule 908(a)(2), certain transactions involving non-U.S. person security-based swap dealers, non-U.S. person major swap participants, and/or U.S. person indirect counterparties that would not have been subject to public dissemination under the initial proposal would be required to be publicly disseminated under re-proposed Regulation SBSR.

a. Programmatic Benefits

Re-proposed Rule 901(a) would, relative to the initial proposal, change which counterparty to a security-based swap transaction would be required to report the transaction in some instances, as the Commission is refocusing the reporting duty primarily on the status of the counterparties, rather than on whether or not they are U.S. persons. The remainder of the rule (aside from technical and conforming changes) would remain unchanged from the original proposal. The Commission preliminarily believes that the benefits identified in the Regulation SBSR Proposing Release associated with proposed Rule 901 would continue to be applicable to re-proposed Rule 901. These include providing a means for the Commission to gain a better understanding of the security-based swap market; facilitating public dissemination of security-based swap transaction information, thus enabling market participants and regulatory authorities to know the current state of the security-based swap markets and track those markets over time; and improving risk management by security-based swap counterparties, which would need to capture and store their transactions in security-based swaps to facilitate reporting.

The Commission preliminarily believes that requiring reporting of security-based swap transactions that are guaranteed by U.S. persons would provide benefits beyond those under Rule 908(a), as originally proposed. As discussed above, the Commission's access to such additional information could facilitate more thorough and complete monitoring of individual security-based swap market participants and more accurate systemic risk monitoring across the security-based swap market. In addition, expanding the reach of the security-based swap reporting regime in this manner is designed to mitigate certain unintended consequences of the original proposal, such as market participants shifting business to other jurisdictions to avoid reporting obligations.

The Commission preliminarily believes that the benefits identified in the Regulation SBSR Proposing Release associated with proposed Rule 902 would continue to be applicable to re-proposed Rule 902. Specifically, the Commission continues to believe that post-trade transparency has the potential to lower transaction costs,

[1913] However, the Commission also preliminarily believes that certain of these security-based swaps need not be subject to public dissemination. *See* Section VIII.C.1, *supra.*

[1914] However, re-proposed Rule 902 under the Exchange Act includes some conforming changes due to the use of new and revised terms in re-proposed Rule 900 under the Exchange Act.

improve confidence in the market, encourage participation by a larger number of market participants, and increase liquidity in the security-based swap market.[1915] Furthermore, the Commission continues to believe that public, real-time dissemination of last-sale information could aid dealers in deriving better quotations, because they would know the prices at which other market participants have recently traded.[1916] In addition, the Commission continues to believe that requiring prompt dissemination of last-sale information would provide all market participants with more extensive and more accurate information on which to make trading and valuation determinations and could allow valuation models to be adjusted to reflect how security-based swap counterparties have valued a security-based swap instrument at a specific moment in time.[1917] Such information, when made publicly available, could enhance market participants' ability to value security-based swaps, especially in opaque markets or markets with low liquidity where recent quotations or last-sale prices may not exist or are not widely available. Better valuations could create a benefit in the form of more efficient capital allocation and ultimately could help reduce systemic risks.[1918]

b. Programmatic Costs

Because the majority of proposed Rule 901 is not being revised and the overall emphasis of the rule and the majority of its specific provisions would not change under the re-proposal, the Commission preliminarily believes that the infrastructure-related costs identified in the Regulation SBSR Proposing Release associated with proposed Rule 901, on a per-entity basis, would not change. These include the costs for each reporting party: (i) To develop an OMS capable of capturing relevant security-based swap transaction information so that it can be reported; (ii) to implement a reporting mechanism; and (iii) to establish an appropriate compliance program and support for the operation of the OMS and reporting mechanism.[1919] The bulk of the costs resulting from Regulation SBSR derive from the infrastructure-related costs of complying with reporting obligations, which include establishing and maintaining the systems necessary to capture, store, and report transaction information; the establishment and maintenance of appropriate policies and procedures; and employing and training the necessary compliance personnel.[1920] The Commission preliminarily estimated and continues to believe that the marginal burden of reporting additional transactions once a respondent's reporting infrastructure and compliance systems are in place would be *de minimis* when compared to the costs of putting those systems in place. This is because the only additional costs of reporting an individual transaction would be entering the required data elements into the firm's OMS, which could subsequently deliver the required transaction information to a registered SDR. In many cases, particularly with standardized instruments and instruments traded electronically, transaction information could be generated and maintained in electronic form, which could then be provided to a registered SDR through wholly automated processes.

Re-proposed Rule 901(a) is designed to reduce the number of instances where a counterparty that is not a security-based swap dealer or major security-based swap participant would bear the responsibility to report a security-based swap transaction under Regulation SBSR. In other words, re-proposed Rule 901(a) is designed to assign the reporting duty to the larger counterparties that have greater resources and operational capability to carry out the reporting function. Consequently, re-proposed Rule 901(a) could result in each reporting counterparty being required to report, on average, more security-based swap transactions than envisioned under the original proposal, although smaller unregistered counterparties that previously would have been required to report a small number of security-based swap transactions under the original proposal would, under re-proposed Rule 901(a), be less likely to have to incur reporting duties under Regulation SBSR, and thus less likely to have to incur the initial infrastructure-related costs of reporting.[1921] The counterparties that would continue to have the reporting duty under re-proposed Rule 901(a)—primarily security-based swap dealers and major security-based swap participants—would have the reporting duty for nearly all security-based swap transactions. Security-based swap dealers and major security-based swap participants, whether or not they are U.S. persons, typically have greater resources and operational capability than non-registered U.S. counterparties and are likely to already have the reporting infrastructure, policies and procedures, and staff that could be adapted to carry out the reporting obligations under Regulation SBSR. The Commission preliminarily agrees with certain commenters [1922] that basing the reporting duty primarily on status as a security-based swap dealer or major security-based swap participant rather than on whether or not the entity is a U.S. person would, in the aggregate, reduce costs to the security-based swap market, as discussed in more detail below.

In addition, in re-proposing Rule 901(a), the Commission is proposing to revise the term ''reporting party'' to ''reporting side.'' Under the re-proposal, a reporting side could consist of multiple entities: the direct counterparty to the transaction and any guarantor of the direct counterparty. Although this has the potential to increase the number of counterparties that could incur a duty to report—by placing such duty on both the direct counterparty and any indirect counterparty—the Commission preliminarily believes that this would not be the result. The Commission preliminarily believes instead that, in practice, large groups that engage in security-based swaps transactions would likely centralize the reporting function for all entities within the group into a single operational unit. Thus, even if two counterparties on the reporting side each incurred the legal duty under re-proposed Rule 901(a) to report a security-based swap transaction, only one entity (either one of the counterparties itself or one of its affiliates) would in fact carry out the reporting function.

Although the Commission preliminarily estimated that there

[1915] *See* Regulation SBSR Proposing Release, 75 FR 75267.

[1916] *See id.*

[1917] *See id.*

[1918] *See id.* at 75268.

[1919] The Commission's complete assessment of the costs associated with proposed Rule 901 of Regulation SBSR is included in Section XIV.B of the Regulation SBSR Proposing Release. *See id.* at 75264–66.

[1920] *See id.* at 75261–80.

[1921] The Commission notes, however, that non-reporting sides would be required to provide certain information about a reportable transaction on a non-real-time basis. *See* Rule 906(a), as originally proposed (requiring reporting, if applicable, of participant ID, broker ID, desk ID, and trader ID). *See also* Regulation SBSR Proposing Release, 75 FR 75221 (discussing rationale for proposed Rule 906(a)).

[1922] *See, e.g.,* DTCC I at 8; ICI Letter at 5; Multiple Firms Letter at 31. *See also* Vanguard Letter at 6; Multiple Firms Letter at 28 (stating that requiring U.S. end users to report security-based swaps entered into with non-U.S. person security-based swap dealers would be unduly burdensome for end users and could negatively impact the competitiveness of affected U.S. markets).

would be 1,000 reporting entities,[1923] the Commission is now revising that estimate to 300.[1924] In the original proposal, the Commission preliminarily estimated that the initial, aggregate annualized costs associated with proposed Rule 901 would be $511,013 per reporting party, and that the ongoing aggregate annualized costs associated with proposed Rule 901 would be $316,116 per reporting party.[1925] The Commission continues to preliminarily believe that these per-respondent costs are appropriate. Given the same per-respondent costs—but adjusting for the decreased estimate of the number of respondents—the Commission now preliminarily believes that the total one-time costs of re-proposed Rule 901 would be $153,303,900,[1926] and the annual ongoing costs would be $94,834,800.[1927] The Commission seeks comment on and data to quantify these estimated costs.

It is possible that certain smaller market participants that are currently active in the security-based swap market could reduce their trading activity or exit the market completely, if they believed the compliance costs of re-proposed Regulation SBSR to be too high. This could result in adverse impacts on competition if there were fewer participants competing in the market. However, the Commission preliminarily believes that this outcome would be unlikely, given that the re-proposal is designed to further limit the instances where non-registered U.S. persons would be required to incur the infrastructure-related costs of reporting. The Commission preliminarily believes instead that, by focusing the reporting duty more on the status and away from whether or not entities are U.S. persons, re-proposed Rule 901(a) would lower the incentive of non-registered U.S. persons to reduce their participation in the market out of fear of incurring the infrastructure-related costs of complying with Regulation SBSR.

Furthermore, although the Commission is now proposing to extend the reach of the security-based swap reporting requirements, as described in re-proposed Rule 908(a), to all transactions guaranteed by a U.S. person, the Commission preliminarily believes that this would not result in a significant increase in the number of entities that incur reporting duties. The Commission preliminarily believes that organizations that operate through foreign subsidiaries that are guaranteed by a U.S. parent are likely to be large financial institutions that already were included in the Commission's estimate of reporting parties in the Regulation SBSR Proposing Release. Furthermore, these organizations are the most likely to have robust risk management systems that extend across business units and across geographic boundaries, and likely already have a presence in the United States and currently are engaging in transactions that they are reporting (on a voluntary basis) to the DTCC–TIW. Thus, such entities were included in the Commission's initial estimate of reporting parties in the Regulation SBSR Proposing Release. Re-proposing Rule 908(a) to require non-U.S. person security-based swap dealers and major security-based swap participants to report all of their transactions to a registered SDR would likely not impose any additional infrastructure-related costs beyond those that were already assessed in the Regulation SBSR Proposing Release. However, this aspect of the re-proposal could impose small additional costs on a per-reporting entity basis in the form of having to report additional transactions using that existing infrastructure.

The Commission notes that there may be a small number of entities that are in the business, or contemplate entering the business, of guaranteeing security-based swaps. Such entities may not have been included in the Commission's original analysis of potential reporting parties, because as indirect counterparties they may not have appeared in the TIW's records as counterparties. Under re-proposed Rule 908, any U.S. person that guarantees a security-based swap could incur the duty to report under re-proposed Regulation SBSR. However, based on consultation with market participants, the Commission preliminarily believes that the net effect on the number of reporting sides would be *de minimis* and would not impact the Commission's revised estimate of 300 reporting counterparties, discussed above. To the extent that there could be entities that act only as an indirect counterparty to security-based swap transactions and would not otherwise have been required to report their security-based swap transactions, the Commission preliminarily believes that our estimate takes these entities into account.

In addition, the Commission preliminarily believes that there may be a slight increase in costs for those reporting counterparties that continue to incur the reporting duty, as each such reporting counterparty would be required to report, on average, a larger percentage of the total number of reportable events than under the initial proposal. Under re-proposed Rule 901(a), smaller unregistered counterparties that previously would have been required to report a small number of security-based swap transactions under the original proposal would, under the re-proposal, be less likely to incur the reporting duty under re-proposed Rule 901(a). Under re-proposed Rules 901(a) and 908(a)(1)(iii), non-U.S. person security-based swap dealers and major security-based swap participants, rather than unregistered U.S. persons, would have the reporting duty for most of these transactions. Nonetheless, under the re-proposal, the per-transaction reporting cost should not change from what was originally proposed. Moreover, the Commission preliminarily believes that the additional cost for non-U.S. person security-based swap dealers and major security-based swap participants absorbing the costs of reporting these additional transactions should be *de minimis,* since these larger market participants have likely already taken significant steps to establish and maintain the systems, processes and procedures, and staff resources to report security-based swap transactions to existing data repositories.

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that 1,000 reporting parties would be required to report approximately 15.5 million security-based swap transactions at a total cost, exclusive of the infrastructure-related costs, of approximately $5,400,000.[1928] The Commission preliminarily believes that nothing in the re-proposal would affect the initial estimate of the cost of an individual reportable event. However, the Commission now is revising our assumptions about the number of reportable events covered by re-proposed Regulation SBSR. Since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the security-based swap market from DTCC–TIW. These historical data suggest that the Commission overestimated the number of security-based swap transactions that would be subject to regulatory reporting in the future. As a result, the Commission now estimates that 300 reporting counterparties would be required to report approximately 5

[1923] *See* Regulation SBSR Proposing Release, 75 FR 75247.

[1924] *See* Section XIV.F.2(d)(ii), *supra.*

[1925] *See* Regulation SBSR Proposing Release, 75 FR 75266.

[1926] The Commission estimates: (300 reporting counterparties) * $511,013) = $153,303,900.

[1927] The Commission estimates: (300 reporting counterparties) * $316,116) = $94,834,800.

[1928] *See* Regulation SBSR Proposing Release, 75 FR 75265.

million security-based swap transactions per year.[1929]

As discussed in the PRA section above, the Commission now preliminarily estimates that each reporting side would incur, on average, a burden of 83.3 hours per year—not including any infrastructure-related costs—to report individual security-based swap transactions to a registered SDR.[1930] In the Regulation SBSR Proposing Release, the Commission estimated that each reporting party would spend $5,400 to report specific security-based swap transactions to a registered SDR as required by proposed Rule 901.[1931] Given the Commission's revised estimate of the number of reportable events per year, the Commission also now preliminarily estimates that each reporting side would, on average, incur costs of $5,630 to report specific security-based swap transactions and life cycle events to a registered SDR.[1932]

The Commission further notes two factors that could serve to limit the per-transaction costs across all affected entities. First, to the extent that security-based swap instruments become more standardized and trade more frequently on electronic platforms (rather than manually), the act of reporting transactions to a registered SDR should become less costly. Together, these trends are likely to reduce the number of transactions that would necessitate the manual capture of bespoke data elements, which is likely to take more time and be more expensive than electronic capture. Second, the larger entities that would incur additional reporting duties under re-proposed Rules 901(a) and 908(a)(1)(iii)—*i.e.,* non-U.S. person security-based swap dealers and major security-based swap participants—can benefit from certain economies of scale in carrying out reporting duties might elude smaller, unregistered counterparties. The Commission preliminarily believes that, all other things being equal, a larger reporting counterparty is likely to handle a greater number of reportable events, including those requiring manual data capture, than a smaller counterparty and thus would develop greater expertise and greater speed in reporting transactions. Moreover, a larger reporting counterparty is likely to have greater incentive and ability to develop systems that support the reporting function, and the fixed cost of this infrastructure can be spread across the larger number of transactions handled by the larger counterparty. The extent of these effects, however, is difficult to quantify. The Commission seeks comments on the extent of these effects and their impact on average per-transaction reporting costs.

The Commission preliminarily believes that re-proposed Rule 901(a) would not increase the previously estimated costs for registered SDRs. The Commission preliminarily believes, rather, that the estimated costs for registered SDRs might be less than the original estimate, for two reasons. First, given that the Commission now estimates that there would be fewer entities incurring the duty to report (300 rather than the original estimate of 1,000), there would be fewer entities that would have to establish linkages to a registered SDR and thus fewer relationships for a registered SDR to manage. Second, given the Commission's reduced estimates of the number of reportable events, the Commission preliminarily believes that registered SDRs could face slightly lower costs because they would have fewer transactions to process than originally estimated. The extent of these effects, however, is difficult to quantify. The Commission seeks comments on the extent of these effects and their impact on average per-transaction costs. Finally, the Commission has no reason to believe and sees no reason to expect that re-proposed Rules 901(a) and 908(a)(1)(iii) would result in the registration of additional SDRs. Thus, given any fixed costs than any entity registering as a registered SDR might incur under re-proposed Regulation SBSR, the Commission is *not* increasing our cost estimates to account for a larger number of entities anticipated to incur those per-entity costs.

Furthermore, the Commission preliminarily believes that extending the scope of transactions that would be subject to public dissemination, as reflected in re-proposed Rules 908(a)(2) and 902(a), would not significantly increase or decrease the previously estimated costs for registered SDRs identified in the Regulation SBSR Proposing Release. The Commission preliminarily believes that these revisions would not result in the registration of additional SDRs or require them to bear the costs of connecting to additional reporting sides. Even if there would be a slight increase in the percentage of security-based swap transactions subject to public dissemination as a result of the applicability of the re-proposed Regulation SBSR to a larger universe of transactions involving non-U.S. entities and/or U.S. indirect counterparties, given the Commission's reduced estimates of the overall number of reportable events,[1933] the Commission now estimates that registered SDRs would be required to publicly disseminate fewer transactions than estimated in the Regulation SBSR Proposing Release. The Commission further notes that our original estimate of the costs of public dissemination was not calculated on a per-transaction basis, but represented instead the one-time aggregate estimated costs associated with development and implementation of the necessary infrastructure, as well as the aggregate annual estimated costs for supporting and upgrading that infrastructure as necessary.[1934]

The Commission continues to believe that the preliminary estimates contained in the Regulation SBSR Proposing Release are valid, and that implementing and complying with the real-time public dissemination requirement of Rule 902 would add 20% to the start-up and ongoing operational expenses that would otherwise be required of a registered SDR.[1935] In particular, the Commission continues to estimate that the initial one-time aggregate costs for development and implementation of the systems needed to disseminate the required transaction information would

[1929] Data provided by the DTCC–TIW indicate that there were approximately 4,000,000 transactions in single-name CDS in 2012. The Commission believes that the single-name CDS data are sufficiently representative of the security-based swap market. *See* Section XV.B.2 and note 1301 and accompanying text, *supra.* The Commission believes that single-name CDS transactions account for 82% of the security-based swap market. As a result, the Commission preliminarily estimates that there were 4.88 million (*i.e.,* 4,000,000/0.82) security-based swap transactions in 2012, and is basing its estimate of the future number of transactions on recent historical activity.

[1930] The Commission estimates: (5 million * 0.005)/(300 reporting sides) = 83.3 burden hours per reporting counterparty, or 25,000 total burden hours for all reporting counterparties.

[1931] *See* Regulation SBSR Proposing Release, 75 FR 75265. In arriving at this figure, the Commission preliminarily estimated that 1,000 reporting parties would be responsible for reporting 15,458,824 security-based swap transactions at a total cost of approximately $5,400,000. The Commission is not revising its initial estimate of the average cost of reporting an individual security-based swap transactions. However, the Commission now estimates that approximately 300 reporting sides will have the duty to report approximately 5 million security-based swap transactions per year.

[1932] The Commission estimates: ((Compliance Clerk (41.7 hours) at $59 per hour) + (Sr. Computer Operator (41.7 hours) at $76 per hour)) * 300 reporting sides = $1,688,850 for all reporting sides, or $5,630 per reporting side. *See also* note 1270, *supra.*

[1933] *See* notes 1267–1268, *supra.*

[1934] *See* Regulation SBSR Proposing Release, 75 FR 75269.

[1935] *See* SDR Proposing Release, 75 FR 77354–64. *See also* Regulation SBSR Proposing Release, 75 FR 75269.

be $40,004,000, which corresponds to $4,000,400 per registered SDR. Further, the Commission continues to estimate that aggregate annual costs for systems and connectivity upgrades associated with real-time public dissemination would be $24,002,400, which corresponds to $2,400,240 per registered SDR. Thus the initial aggregate costs associated with proposed Rule 902 are estimated to be $64,006,400, which corresponds to $6,400,640 per registered SDR.

Request for Comment

The Commission requests comment on the costs and benefits of re-proposed Rules 901, 902, and 908(a) discussed above, as well as any costs and benefits not already described that could result. The Commission also requests data to quantify any potential costs or benefits. In addition, the Commission requests comment on the following:

- How can the Commission more accurately assess the costs and benefits of re-proposed Rule 901?
- How many entities would be affected by re-proposed Rule 901? How many transactions would be subject to re-proposed Rule 901?
- Are there additional costs involved in complying with re-proposed Rule 901 that have not been identified? What are the types and amounts of those costs?
- Do the reporting requirements in re-proposed Rule 901(a), by potentially placing the duty to report upon a security-based swap dealer or major security-based swap participant that is not a U.S. person, mitigate any barrier to entry that Rule 901, as originally proposed, might have created? How can this benefit or reduction in potential cost be tabulated?
- How should the Commission assess the benefits and costs associated with re-proposed Rule 901(a), if any, compared to the anticipated benefits from increased transparency to the security-based swap market from the re-proposal?
- Would there be additional benefits or costs of re-proposed Rule 901, 902, and 908(a) that have not been identified?
- Are there methods to minimize the costs associated with re-proposed Rule 908(a)?
- Would re-proposed Rule 908(a) create any additional costs not discussed here? If so, please identify and quantify these costs.
- Is the Commission's revised estimate of the number of transactions subject to Regulation SBSR accurate? If not, how many transactions would be impacted by re-proposed Regulation SBSR? Please provide detailed information on the number and types of transactions impacted.
- Would re-proposed Rule 902 result in benefits or costs that the Commission has not considered? Are the Commissions estimates of the costs and benefits of re-proposed Rule 902 accurate? If not, please provide detailed information identifying and quantifies the costs and benefits of re-proposed Rule 902.

(b) Proposed Modification of the Definition of ''U.S. Person''

Regulation SBSR, as originally proposed, would have defined a ''U.S. person'' as ''a natural person that is a U.S. citizen or U.S. resident or a legal person that is organized under the corporate laws of any part of the United States or has its principal place of business in the United States.'' In this re-proposal, the Commission is proposing a new definition of ''U.S. person'' that is consistent with usage in our other Title VII proposals.[1936] The Commission preliminarily believes that these Title VII rules would benefit from having the same terms throughout and could, therefore, reduce assessment costs for market participants that might be subject to the proposed rules. Furthermore, the Commission preliminarily believes that the revised definition of ''U.S. person'' is intended to clarify application of Regulation SBSR and would not significantly change the number of entities that would be subject to Regulation SBSR. The Commission preliminarily believes that the revised definition of ''U.S. person'' would not entail any material costs to market participants, nor would it intrinsically impose any obligation or duty on market participants. Therefore, the Commission preliminarily believes that the new definition would not increase the aggregate compliance costs of re-proposed Regulation SBSR.

Request for Comment

The Commission requests comment on the costs and benefits of the re-proposed definition of ''U.S. person'' as used in re-proposed Regulation SBSR, and data to support those comments. In particular, the Commission requests comment on the following:

- Would the re-proposed definition of ''U.S. person'' as used in Regulation SBSR result in any costs or benefits not discussed here? Please distinguish any costs and benefits stemming from the re-proposed definition itself, rather than any costs or benefits attributable to other provisions of Regulation SBSR in which the term appears, such as re-proposed Rules 901, 902, and 908(a).

(c) Revisions to Proposed Rule 908(b)

i. Initial Proposal

Rule 908(b), as initially proposed, attempted to clarify when reporting duties would be imposed on counterparties of security-based swaps that are not U.S. persons when some connections to the United States might be present. Proposed Rule 908(b) provided that no duties would be imposed on a counterparty unless one of the following conditions were true:

- The counterparty is a U.S. person;
- The security-based swap is executed in the United States or through any means of interstate commerce; or
- The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

ii. Re-proposal

As described above, the Commission now believes, in light of other revisions being made to Regulation SBSR, that certain conforming revisions to Rule 908(b) are appropriate. Specifically, Rule 908(b) is being re-proposed to account for the possibility that a non-U.S. person security-based swap dealer or major security-based swap participant could incur a duty to report. In addition, the ''interstate commerce clause'' is being replaced with the new concept of a ''transaction conducted within the United States.''

a. Programmatic Benefits

The Commission now preliminarily believes that there are benefits to requiring all security-based swap dealers and major security-based swap participants, whether or not they are U.S. persons, to report their security-based swap transactions pursuant to re-proposed Regulation SBSR. Having access to security-based swaps of all such entities through data reported to a registered SDR would give the Commission greater ability to supervise such entities and assess the overall security-based swap market. Furthermore, requiring all such entities to report security-based swap information would help provide the Commission and other regulators with detailed, up-to-date information both about positions of particular entities and financial groups, as well as positions held by multiple market participants in particular instruments.

b. Programmatic Costs

The Commission preliminarily believes that the revisions to Rule 908(b)

[1936] Specifically, the re-proposed definition provides that the term ''U.S. person'' would have the same meaning as set forth in proposed Rule 3a71–3(a)(7) under the Exchange Act.

would not result in any significant increase in the overall cost of compliance for affected entities. The Commission preliminarily believes, rather, that many unregistered U.S. persons that participate in the security-based swap market would face lower costs, as they could be more likely to avoid entirely having to incur the infrastructure-related costs of reporting security-based swap transactions. Furthermore, to the extent that non-U.S. person security-based swap dealers and major security-based swap participants would be required to report security-based swap transactions, such entities were already included in the estimate of 1,000 reporting parties used in the Regulation SBSR Proposing Release and are also included in the new estimate of 300 reporting sides becoming subject to re-proposed Regulation SBSR. Although the number of security-based swap transactions that these reporting sides would be required to report would increase, the Commission preliminarily does not believe that they would be required to expand their systems capabilities to account for the additional transaction volume.

Request for Comment

The Commission requests comment on the costs and benefits of re-proposed Rule 908(b) and data to assess any potential costs or benefits. In addition, the Commission requests comment on the following:

- Would re-proposed Rule 908(b) result in any benefits or costs that the Commission has not considered?
- Are there methods to minimize the costs associated with re-proposed Rule 908(b)?
- Would re-proposed Rule 908(b) create any additional costs not discussed here? If so, please identify and quantify these costs.

(d) Other Technical Revisions in Re-Proposed Regulation SBSR

In addition to the revisions described above, the Commission is re-proposing certain technical or conforming changes to other rules contained in Regulation SBSR. Specifically, certain changes are required to re-proposed Rules 901(c) and 901(d), which address the data elements to be reported to a registered SDR, to reflect the re-proposal's approach that certain security-based swaps may be subject to regulatory reporting but not public dissemination. The introductory language to Rule 901(c) is being re-proposed as follows: ''For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section:'' Re-proposed Rule 901(c) would be retitled ''Primary trade information''—since not all information reported pursuant to Rule 901(c) would be required to be provided in real time—and re-proposed Rule 901(d) would be retitled ''Secondary trade information.'' The Commission also is re-proposing Rule 901(c)(10) as follows: ''If both sides of the security-based swap include a security-based swap dealer, an indication to that effect.'' The re-proposed rule clarifies that a security-based swap dealer might be a direct or indirect counterparty to a security-based swap. Rule 901(d)(1)(ii) is also being re-proposed to require reporting of the broker ID, desk ID, and trader ID, as applicable, only of the direct counterparty on the reporting side. Rule 901(d)(1)(iii) is being re-proposed to require reporting of a description of the terms and contingencies of the payment streams only of each direct counterparty to the other. The word ''direct'' is necessary to avoid extending Rule 901(d)(1)(iii) to indirect counterparty relationships, where payments might not (except in unusual circumstances) flow to or from an indirect counterparty.

Additional technical or conforming revisions include changes to Rule 901(e), which sets forth provisions for reporting life cycle events of a security-based swap. The Commission is re-proposing Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant (references to which are being added to Rule 901(e)). Re-proposed Rule 908 contemplates situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated. Therefore, the Commission is re-proposing Rule 902(a) to provide that a registered SDR would have no obligation to publicly disseminate a transaction report for any such security-based swap.

Re-proposed Rules 903, 905, 906, 907, 910, and 911 are each conformed to incorporate the use of the term ''side,'' while re-proposed Rules 904, 905, 906, and 907 each replace ''§§ 242.900 through 242.911'' with ''§§ 242.900–911.''

Rule 905(b)(2) is being re-proposed to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap was subject to public dissemination.

As originally proposed, Rule 907(a)(6) would require a registered SDR to establish and maintain written policies and procedures ''[f]or periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any other participant(s) which the counterparty is affiliated, using ultimate parent IDs and participant IDs.'' The Commission now is re-proposing Rule 907(a)(6) with the word ''participant'' in place of the word ''counterparty.''

Rule 910(b)(4), as originally proposed, would provide that, in Phase 4 of the Regulation SBSR compliance schedule, ''[a]ll security-based swaps reported to the registered security-based swap data repository shall be subject to real-time public dissemination as specified in § 242.902.'' As noted above, certain security-based swaps would be subject to regulatory reporting but not public dissemination. Therefore, the Commission is re-proposing Rule 910(b)(4) to provide that, ''All security-based swaps received by the registered security-based swap data repository shall be handled consistent with §§ 242.902, 242.905, and 242.908.''

Because the changes discussed above are technical in nature, the Commission preliminarily believes that they would not have any significant impact, negative or positive, on re-proposed Regulation SBSR. Nonetheless, the Commission preliminarily believes that, to the extent these changes clarify the application of certain aspects of Regulation SBSR, they could enhance consistency, reduce potential uncertainties related to the interpretation and application of Regulation SBSR, and thus reduce assessment costs. The Commission solicits comment on that preliminary view.

(e) Aggregate Total Quantifiable Costs

Based on the foregoing, the Commission preliminarily estimates that re-proposed Regulation SBSR would impose an estimated total first-year cost of approximately $511,243 [1937]

[1937] The Commission derived its estimate from the following: ($511,013 *(per entity total first-year cost of Regulation SBSR)—($5,400 (entity transaction reporting cost of Regulation SBSR)—$5,630 (revised reporting side transaction reporting*

per reporting counterparty for a total first-year cost of $153,372,900.[1938] The Commission preliminarily estimates that re-proposed Regulation SBSR would impose ongoing annualized aggregate costs of approximately $316,346 [1939] per reporting side, for a total aggregate annualized cost of $94,903,800.[1940]

As noted above, the Commission preliminarily believes that re-proposed Regulation SBSR would not significantly change the costs of registered SDRs, as estimated in the Regulation SBSR Proposing Release. The Commission preliminarily believes that the revisions contained in re-proposed Rules 901, 902, and 908(a) would not result in the registration of additional SDRs or require them to bear the costs of connecting to additional reporting sides. To the extent that the re-proposal would assign reporting responsibilities to fewer respondents, registered SDRs could face lower costs to support their connectivity.

In total, the Commission preliminarily estimates the total first-year cost of re-proposed Regulation SBSR to be $681,307,400.[1941] The Commission preliminarily estimates the total ongoing annual cost of re-proposed Regulation SBSR to be $481,935,340.[1942] The compliance costs attributable to re-proposed Regulation SBSR could be significantly reduced to the extent that foreign jurisdictions are deemed comparable in a substituted compliance order, which would enable market participants to comply with the foreign jurisdiction's rules relating to regulatory reporting and public dissemination and thus would relieve them of their primary obligations—and the associated costs—under Regulation SBSR.

I. Economic Analysis of Substituted Compliance

The Commission is proposing a policy and procedural framework that would allow for the possibility of substituted compliance with respect to four categories of rules in recognition of the potential, in a market as global as the security-based swap market, for security-based swap market participants to be subject to conflicting or duplicative compliance obligations. These four categories are: (i) Requirements applicable to registered security-based swap dealers in Section 15F of the Exchange Act and the rules and regulations thereunder; (ii) requirements relating to regulatory reporting and public dissemination of security-based swaps; (iii) requirements relating to clearing for security-based swaps; and (iv) requirements relating to trade execution for security-based swaps.[1943] Specifically, the Commission is proposing rules and interpretative guidance in this release to provide that: (i) The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign regulatory system that compliance with specific requirements under such foreign regulatory system by a registered foreign security-based swap dealer (or class thereof) may satisfy the corresponding requirements in Section 15F of the Exchange Act,[1944] and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer (or class thereof); [1945] (ii) the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination regarding regulatory reporting and public dissemination of security-based swaps in a foreign jurisdiction if such foreign jurisdiction's requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements under Section 13A(a)(1) of the Exchange Act,[1946] Section 13(m)(1)(G) of the Exchange Act [1947] and Section 13(m)(1)(C) of the Exchange Act,[1948] and the rules and regulations thereunder; [1949] (iii) the Commission may exempt persons from the mandatory clearing requirement in Section 3C(a)(1) of the Exchange Act [1950] if the relevant security-based swap transaction is submitted to a foreign clearing agency that is the subject of a substituted compliance determination by Commission order; [1951] and (iv) the Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign jurisdiction to permit a person subject to the mandatory trade execution requirement in Section 3C(h) of the Exchange Act to execute such transaction, or have such transaction executed on their behalf, on a security-based swap market (or class of markets) that is neither registered under the Exchange Act nor exempt from registration under the Exchange Act if the Commission determines that such security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by a foreign financial regulatory authority or authorities in such foreign jurisdiction.[1952]

1. Programmatic Benefits and Costs

The Commission recognizes that the programmatic costs and benefits of substituted compliance may vary depending on the specific nature of a particular substituted compliance determination. If the Commission imposes conditions on a substituted compliance determination, such conditions may have effects on the programmatic costs and benefits. The proposed rules and interpretive guidance regarding substituted compliance described above provide that the Commission would only make a determination that substituted compliance is permitted if the foreign regulatory system in a particular area, taking into consideration any relevant principles, regulations, or rules in other areas of the foreign regulatory system to the extent they are relevant to the analysis, achieves the regulatory outcomes that are comparable to the regulatory outcomes of the relevant provisions of the Exchange Act.

The Commission preliminarily believes that substituted compliance would not substantially change the programmatic benefits intended by the requirements in Section 15F of the Exchange Act, the programmatic benefits intended by the regulatory

cost))) = $511, 243. See notes 1908, 1931, and 1932 and accompanying text, supra.

[1938] The Commission derived its estimate from the following: ($511,243 * 300 reporting sides) = $153,372,900.

[1939] The Commission derived its estimate from the following: ($316,116 *(per entity annualized cost of Regulation SBSR)—($5,400 (entity transaction reporting cost of Regulation SBSR)—$5,630 (revised reporting side transaction reporting cost))) = $316,346. See notes 1909, 1931, and 1932 and accompanying text, supra.*

[1940] The Commission derived its estimate from the following: ($316,346 * 300 reporting sides) = $94,903,800.

[1941] The Commission derived its estimate from the following: ($1,038,947,500 (total first-year cost of Regulation SBSR)—$511,013,000 (Regulation SBSR Rule 901 first-year costs on reporting parties) + $153,372,900 (re-proposed Regulation SBSR Rule 901 first-year costs on reporting sides)) = $681,372,900.

[1942] The Commission derived its estimate from the following: ($703,147,540 (total ongoing annualized cost of Regulation SBSR)—$316,116,000 (Regulation SBSR Rule 901 annual ongoing costs on reporting sides) + $94,903,800 (re-proposed Regulation SBSR Rule 901 annual ongoing costs on reporting sides)) = $481,935,340.

[1943] *See* Section XI, *supra* (providing detailed discussions of substituted compliance).

[1944] 15 U.S.C. 78o–10.

[1945] *See* proposed Rule 3a71–5 under the Exchange Act, as discussed in Section XI.C, *supra.*

[1946] 15 U.S.C. 78m–1(a)(1).

[1947] 15 U.S.C. 78m(m)(1)(G).

[1948] 15 U.S.C. 78m(m)(1)(C).

[1949] *See* proposed Rule 908(c)(2) under the Exchange Act, as discussed in Section XI.D, *supra.*

[1950] 15 U.S.C 78c–3(a)(1).

[1951] *See* Section XI.E, *supra.*

[1952] *See* proposed Rule 3Ch–2(b)(1) under the Exchange Act, as discussed in Section XI.F, *supra.*

reporting and public dissemination requirements in Section 13(m)(1)(G), Section 13(m)(1)(C), and Section 13A(a)(1) of the Exchange Act, the programmatic benefits intended by the mandatory clearing requirement in Sections 3C(a)(1) of the Exchange Act, or the programmatic benefits intended by the mandatory trade execution requirement set forth in Section 3C(h) of the Exchange Act. To the extent that substituted compliance eliminates duplicative compliance costs, registered foreign security-based swap dealers or market participants entering into security-based swap transactions that are eligible for substituted compliance may incur lower programmatic costs associated with implementation or compliance with the specified Title VII requirements than they would otherwise incur without the option of substituted compliance available, either because such registered foreign security-based swap dealers may have implemented or begun to implement the foreign regulatory requirements that are determined comparable by the Commission, or because parties to a security-based swap transaction eligible for substituted compliance determination do not need to duplicate compliance with two sets of comparable requirements.

In the case of a substituted compliance determination made with Commission-imposed conditions in order to achieve comparable programmatic benefits intended by the applicable Title VII requirements, we cannot preclude the possibility that substituted compliance may increase programmatic costs because market participants would be required to incur costs to satisfy those conditions. On the other hand, substituted compliance also may enable certain foreign market participants subject to comparable foreign regulation to enter or stay in the U.S. security-based swap market. These are participants that would, due to conflicting local laws, otherwise not be able to participate under Title VII regulation in the absence of substituted compliance. In such cases, substituted compliance may either increase the number of market participants in the U.S. security-based swap market or prevent certain existing market participants from exiting the market, thereby contributing to the programmatic benefits and costs that flow from Title VII requirements.

The decision to request substituted compliance is purely voluntary. Market participants would choose to make a request for a substituted compliance determination only if, in their own assessment, compliance with applicable requirements under a foreign regulatory system were less costly than compliance with both the foreign regulatory regime and the relevant Title VII requirement. Even after a substituted compliance determination is made, market participants would only choose substituted compliance if the private benefits they expect to receive from participating in U.S. markets exceeds the private costs they expect to bear, including any conditions the Commission may attach to the substituted compliance determination. Therefore, the proposed rules regarding substituted compliance are based on the consideration that the net programmatic benefits associated with specific Title VII requirements could be increased by the Commission making the substituted compliance option available. Where substituted compliance increases the number of market participants in the U.S. security-based swap market or prevents existing participants from leaving the U.S. security-based swap market, there may be contributions to both programmatic benefits and costs associated with the applicable Title VII requirements.

2. Alternatives

The Commission could have proposed that substituted compliance determinations with respect to regulatory reporting, public dissemination and mandatory trade execution apply to all cross-border transactions involving at least one foreign counterparty or foreign branch of a U.S. bank. However, we propose in Rule 908(c)(2), the interpretive guidance regarding substituted compliance with the mandatory clearing requirement, and Rule 3Ch–2(b)(1) that substituted compliance would not be available to a security-based swap transaction that involves persons within the United States in executing, soliciting or negotiating the terms of such transaction on both sides of a transaction, even though at least one counterparty to the transaction is a non-U.S. person or foreign branch.[1953] In other words, if both counterparties to a security-based swap transaction conduct such transaction within the United States, it is a transaction in the United States. One of the primary objectives of making substituted compliance available to cross-border security-based swap transactions is to accommodate the global nature of the security-based swap market and cross-border security-based swap activity. In circumstances where both parties to a security-based swap are transacting in the United States, either from a U.S. office or U.S. branch, or using an affiliate or agent, to conduct the security-based swap, we do not believe that substituted compliance would be necessary or appropriate. Both parties (or their respective agents) to the transaction are conducting a transaction in the United States and should be able to satisfy the applicable Title VII requirements by reporting the transaction to a registered SDR or executing the transaction on a registered exchange of SB SEF in the United States without the need to rely on substituted compliance. In addition, because both parties (or their respective agents) are conducting a transaction in the United States, there is a strong public interest to subject such transaction to the Title VII mandatory execution, regulatory reporting, and public dissemination requirements. Therefore, the Commission does not believe that it would be appropriate to provide substitute compliance with respect to a transaction where both parties (or their agents) conduct the transaction within the United States.

3. Assessment Costs

The assessment costs associated with the proposed rules regarding substituted compliance would, in part, flow from the assessment of whether a registered security-based swap dealer is a foreign security-based swap dealer and whether a transaction counterparty is a non-U.S. person or a foreign branch and whether a transaction involves a person within the United States in soliciting, negotiating, or execution. The status of a foreign security-based swap dealer would be determined by analyzing the U.S. person definition, which may be done by an in-house counsel reviewing readily ascertainable information, such as the foreign security-based swap dealer's certificate of incorporation or formation or other internal documents evidencing residence, place of incorporation, or principal business location. The Commission preliminarily believes that the cost involved in making such assessment should not exceed one hour of in-house counsel's time or $379.[1954]

[1953] *See* proposed Rule 908(c)(2) under the Exchange Act, interpretive guidance regarding substituted compliance with the mandatory clearing requirement, and proposed Rule 3Ch–2(b)(1) under the Exchange Act, as discussed in Section XI.D–XI.F, *supra.*

[1954] Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

The assessment costs associated with proposed Rule 908(c), proposed interpretive guidance with respect to substituted compliance with the mandatory clearing requirement, and proposed Rule 3Ch–2(c)(2)(ii) would involve costs of determining a transaction counterparty's U.S. person status, as well as determining whether counterparty conducts the security-based swap in the United States or involves any persons in the United States to solicit, negotiate or execute a security-based swap transaction.

The Commission preliminarily believes that market participants would likely incur costs arising from the need to identify and maintain records concerning the U.S.-person status of their counterparties and the location of their transactions. We anticipate that potential applicants for substituted compliance are likely to request representations from their transaction counterparties to determine the counterparties' U.S.-person status and whether the transaction was conducted within the United States. Therefore, the Commission preliminarily believes that the assessment costs associated with determining the status of counterparties and the location of transactions should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations. Consistent with the analysis of the assessment costs associated with the *de minimis* exception relating to the security-based swap dealer definition that involves determining the status of counterparties and the location of transactions,[1955] the Commission preliminarily believes that such one-time costs would be approximately $15,160.[1956] The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.[1957] To the extent that market participants have incurred costs relating to similar or same assessments with respect to the counterparty status and location of the transactions for other Title VII requirements, their assessment costs with respect to substituted compliance may be less.

In addition, a registered security-based swap dealer or a security-based swap transaction eligible for a substituted compliance determination would incur costs in submitting a request to the Commission for a substituted compliance determination. The Commission preliminarily estimates the costs of submitting such request pursuant to proposed Rule 3a71–5(c), proposed Rule 908(c), proposed interpretive guidance with respect to substituted compliance with the mandatory clearing requirement, or proposed Rule 3Ch–2(c)(2)(ii) would be approximately $110,320.[1958] Once such request is made, however, other market participants that seek to request a substituted compliance determination with respect to the same area of a foreign regulatory system relevant to the requirements in Section 15F or regulatory reporting and public dissemination, the same foreign clearing agency, or the same foreign regulatory regime that a foreign exchange or SB SEF is subject to, would be able to rely on the Commission's substituted compliance determination. Accordingly, the assessment costs would only need to be incurred once with respect to the same area of a foreign regulatory system or the same foreign clearing agency.

Request for Comment

The Commission seeks comment on the costs and benefits associated with substituted compliance in all aspects. Responses that are supported by data and analysis provide great assistance to the Commission in considering the benefits and costs of the substituted compliance policy framework. In addition, the Commission seeks comment on the following specific questions:

- Would substituted compliance reduce costs associated with the applicable Title VII requirements? Would the analysis of the benefits and costs of substituted compliance differ between the case of regulatory duplication or overlap and the case of regulatory conflict?
- Does a substituted compliance determination based on comparability achieve the same benefits intended by Title VII? Could there be significant economic consequences if the Commission permitted substituted compliance in cases in which the foreign requirements are not identical, but, as contemplated, only comparable to the applicable Title VII requirements? What would those effects be? In cases where substituted compliance were granted but where requirements were comparable and not identical, are there certain differences, or types of differences, in regulation that would have more significant economic effects than others? Are there particular areas of Title VII regulation in which the effects of differences between comparable and identical standards would be more pronounced than in others?
- Could there be significant economic consequences, including effects on

[1955] *See* Section XV.D.2(a), *supra.*

[1956] This estimate is based on estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be built into form of standardized trading documentation. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379.

[1957] There will be ongoing costs associated with processing representations received from counterparties, including additional due diligence and verification to the extent that a counterparty's representation is contrary to or inconsistent with the knowledge of the collecting party. The Commission believes that these would be compliance costs encompassed within the programmatic costs associated with substituted compliance.

[1958] This estimate is based on information indicating that the average costs associated with preparing and submitting an application to the Commission for a Commission order for exemptive relief under Section 36 of the Exchange Act in accordance with the procedures set forth in 17 CFR 240.0–12. The Commission recognizes that a substituted compliance determination request made pursuant to proposed Rule 3a71–5(c), proposed Rule 908(c), proposed interpretive guidance with respect to substituted compliance with the mandatory clearing requirement, and proposed Rule 3Ch-2(c)(2)(ii) would be made under proposed Rule 0–13 under the Exchange Act, which establishes procedures similar to those used by the Commission in considering exemptive order applications under Section 36 of the Exchange Act. The staff estimates that costs associated with a request pursuant to these proposed rules would be approximately $110,320. The Commission estimates that preparation of the request would require approximately 80 hours of in-house counsel time and 200 hours of outside counsel time. Such estimate takes into account the time required to prepare supporting documents necessary for the Commission to make a substituted compliance determination, including, without limitation, information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $379. The Commission estimates the costs for outside legal services to be $400 per hour. Accordingly, the Commission estimates the cost to be $110,320 ($30,320 (based on 80 hours of in-house counsel time * $379) + $80,000 (based on 200 hours of outside counsel time * $400)) to submit a request for a substituted compliance determination.

competition, if a substituted compliance determination is made conditionally? What would those effects be?

• Could market participants be prompted to restructure in anticipation of substituted compliance determinations? What effects on market structure and competition might result? Are there other potential spillovers from strategic restructuring related to substituted compliance determinations?

• Do commenters agree with the preliminary estimates of the assessment costs and the costs to request a substituted compliance determination discussed above? Are there any other assessment costs not considered here? Specifically, the Commission requests comment on (i) the assessment costs of determining whether a market participant or a transaction is eligible for substituted compliance, and (ii) the costs of preparing and submitting a request for a substituted compliance determination.

J. General Request for Comments

In responding to the specific requests above for comment on the economic effects of our proposed rules, interested persons are encouraged to provide supporting data and analysis and, when appropriate, identify alternative models for assessing the costs and benefits of our proposed rules, as well as their expected effect on efficiency, competition and capital formation. Responses that are supported by data and analysis provide great assistance to the Commission in considering the economic effects of proposed new requirements, including the associated benefits and costs.

In addition to the specific requests for comment set forth above, the Commission also seeks comment on the expected economic effects of the interplay between our rules and those [adopted/proposed] by the CFTC. In particular, to the extent that the Commission's proposed rules and interpretations take a different approach from the CFTC's approach to the application of Title VII requirements in the cross-border context, what would be the economic impact, including the costs and benefits, of these differences on market participants and the U.S. security-based swap market as a whole? What effect would such differences have on efficiency, competition and capital formation in the U.S. security-based swap market? Commenters should provide analysis and empirical data to support their views on the costs, benefits and other economic effects associated with the differences between the Commission's proposed approach and the CFTC's approach.

The Commission also seeks comment on the relevant economic considerations for the Commission if we modify our proposed approach to conform to the CFTC's [proposed/final] guidance. Similarly, what would the economic considerations be for the Commission to adopt any cross-border interpretations proposed by the CFTC, but not proposed by the Commission?

XVI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'')[1959] the Commission must advise the OMB whether the proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on the potential impact of these proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

XVII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [1960] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[1961] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.'' [1962] Section 605(b) of the RFA [1963] provides that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) When used with reference to an ''issuer'' or a ''person,'' other than an investment company, an ''issuer'' or ''person'' that, on the last day of its most recent fiscal year, had total assets of $5 million or less; [1964] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[1965] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1966] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) For entities engaged in credit intermediation and related activities, entities with $175 million or less in assets; [1967] (ii) for entities engaged in non-depository credit intermediation and certain other activities, entities with $7 million or less in annual receipts; [1968] (iii) for entities engaged in financial investments and related activities, entities with $7 million or less in annual receipts; [1969] (iv) for insurance carriers and entities engaged in related activities, entities with $7 million or less in annual receipts; [1970] and (v) for funds, trusts, and other financial vehicles, entities with $7 million or less in annual receipts.[1971]

Based on feedback from industry participants and our own information about the security-based swap markets, the Commission preliminarily believes that non-U.S. entities that would be required to register and be regulated as

[1959] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[1960] 5 U.S.C. 601 *et seq.*

[1961] 5 U.S.C. 603(a).

[1962] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10 under the Exchange Act, 17 CFR 240.0–10. *See* Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982) (File No. AS–305).

[1963] 5 U.S.C. 605(b).

[1964] *See* 17 CFR 240.0–10(a).

[1965] 17 CFR 240.17a–5(d).

[1966] *See* 17 CFR 240.0–10(c).

[1967] *See* 13 CFR 121.201 (Subsector 522).

[1968] *See id.* at Subsector 522.

[1969] *See id.* at Subsector 523.

[1970] *See id.* at Subsector 524.

[1971] *See id.* at Subsector 525.

security-based swap dealers and major security-based swap participants exceed the thresholds defining ''small entities'' set out above. Thus, the Commission preliminarily believes it is unlikely that the proposed rules regarding registration of security-based swap dealers and major security-based swap market participants would have a significant economic impact any small entity.

In addition, based on the Commission's own information about the cross-border security-based swap market, the Commission believes that only persons or entities with assets significantly in excess of $5 million participate in the security-based swap market, and such persons or entities would thus not qualify as ''small entities.'' Therefore, the Commission preliminarily believes that the application of the mandatory clearing requirement to cross-border security-based swap transactions is unlikely to impact any small entities. Moreover, the Commission preliminarily believes that the entities likely to register as a security-based swap clearing agency located outside the United States are not likely to qualify as a ''small entity'' as defined above. Thus, the Commission preliminarily believes it is unlikely that the proposed rules regarding registration of security-based swap clearing agencies located outside the United States would have a significant economic impact any small entity.

In addition, as discussed in the Regulation SBSR Proposing Release, the Commission believes that the number of security based swap transactions involving a ''small entity'' is *de minimis.* Therefore, the Commission preliminarily believes that the application of the mandatory trade reporting requirement to cross-border security-based swap transactions is unlikely to impact any small entities. Moreover, the Commission preliminarily believes that the entities likely to register as a SDR located outside the United States are not likely to qualify as a ''small entity'' as defined above. Thus, the Commission preliminarily believes it is unlikely that the proposed rules regarding registration of SDRs located outside the United States would have a significant economic impact any small entity.

In addition, based on the Commission's own information about the cross-border security-based swap market, the Commission preliminarily believes that the proposed application of the mandatory trade execution requirement to cross-border security-based swap transactions is not likely to impact any small entities. Moreover, as discussed in the SB SEF Proposing Release, based on our understanding of the market and conversations with industry sources, the Commission preliminarily believes that approximately 20 SB SEFs could be subject to the requirements of proposed Regulation SB SEF. Based on the Commission's existing information about the security-based swap market and the entities likely to register as SB SEFs, the Commission preliminarily believes that the entities likely to register as SB SEFs would not be considered small entities. The Commission preliminarily believes that most, if not all, of the SB SEFs would be large business entities or subsidiaries of large business entities, and that all SB SEFs would have assets in excess of $5 million and annual receipts in excess of $7,000,000. Therefore, the Commission preliminarily believes that none of the potential SB SEFs would be considered small entities.

For the foregoing reasons, the Commission certifies that the proposed rules would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification. In particular, the Commission encourages written comments regarding the Commission's preliminary belief that the proposed application of the mandatory clearing requirement and the mandatory trade reporting requirement to cross-border security-based swap transactions is unlikely to impact any small entities. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

Statutory Basis and Text of Proposed Rules

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, Section 3(b), Section 15(d)(1), Section 23(a)(1), Section 30(c) thereof, Sections 712(a)(2), (6), and 761(b) of the Dodd-Frank Act, the SEC is proposing to adopt rules 0–13, 3a67–10, 3a71–3, 3a71–4, 3a71–5, 3Ca–3, 3Ch–1, 3Ch–2, 13n–4(d), 13n–12, 18a–4, and 900 through 911, and Forms SBSE, SBSE–A, and SBSE–BD, under the Exchange Act.

List of Subjects

17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rules

For the reasons stated in the preamble, the SEC is proposing to amend Title 17, Chapter II of the Code of the Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 is amended by adding an authority for §§ 240.3a67–10, 240.3a71–3, 240.3a71–4, and 240.3a71–5 in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* 12 U.S.C. 5221(e)(3), 15 U.S.C. 8302, and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Sections 240.3a67–10, 240.3a71–3, 240.3a71–4, and 240.3a71–5 are also issued under Public Law 111–203, secs. 712, 761(b), 124 Stat. 1754 (2010).

* * * * *

■ 2. Add § 240.0–13 to read as follows:

§ 240.0–13 Commission procedures for filing applications to request a substituted compliance order under the Exchange Act.

(a) The application shall be in writing in the form of a letter, must include any supporting documents necessary to make the application complete, and otherwise must comply with § 240.0–3. All applications must be submitted to the Office of the Secretary of the Commission. Requestors may seek confidential treatment of their applications to the extent provided under § 200.81 of this chapter. If an application is incomplete, the Commission, through the Division of Trading and Markets, may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit the omitted materials promptly.

(b) An applicant may submit a request electronically. The electronic mailbox to use for these applications is described on the Commission's Web site at *www.sec.gov* in the ''Exchange Act Substituted Compliance Applications''

section. In the event electronic mailboxes are revised in the future, applicants can find the appropriate mailbox by accessing the ''Electronic Mailboxes at the Commission'' section.

(c) All filings and submissions filed pursuant to this rule must be in the English language. If a filing or submission filed pursuant to this rule requires the inclusion of a document that is in a foreign language, a party must submit instead a fair and accurate English translation of the entire foreign language document. A party may submit a copy of the unabridged foreign language document when including an English translation of a foreign language document in a filing or submission filed pursuant to this rule. A party must provide a copy of any foreign language document upon the request of Commission staff.

(d) An applicant also may submit a request in paper format. Five copies of every paper application and every amendment to such an application must be submitted to the Office of the Secretary at 100 F Street NE., Washington, DC 20549–1090. Applications must be on white paper no larger than 8½ by 11 inches in size. The left margin of applications must be at least 1½ inches wide, and if the application is bound, it must be bound on the left side. All typewritten or printed material must be set forth in black ink so as to permit photocopying.

(e) Every application (electronic or paper) must contain the name, address, telephone number, and email address of each applicant and the name, address, telephone number, and email address of a person to whom any questions regarding the application should be directed. The Commission will not consider hypothetical or anonymous requests for a substituted compliance order. Each applicant shall provide the Commission with any supporting documentation it believes necessary for the Commission to make such determination, including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with such rules. Applicants should also cite to and discuss applicable precedent.

(f) Amendments to the application should be prepared and submitted as set forth in these procedures and should be marked to show what changes have been made.

(g) After the filing is complete, the Division of Trading and Markets will review the application. Once all questions and issues have been answered to the satisfaction of the Division of Trading and Markets, the staff will make an appropriate recommendation to the Commission. After consideration of the recommendation by the Commission, the Commission's Office of the Secretary will issue an appropriate response and will notify the applicant.

(h) The Commission, in its sole discretion, may choose to publish in the **Federal Register** a notice that the application has been submitted. The notice would provide that any person may, within the period specified therein, submit to the Commission any information that relates to the Commission action requested in the application. The notice also would indicate the earliest date on which the Commission would take final action on the application, but in no event would such action be taken earlier than 25 days following publication of the notice in the **Federal Register**.

(i) The Commission may, in its sole discretion, schedule a hearing on the matter addressed by the application.

■ 3a. Add § 240–3a67–10 to read as follows:

§ 240.3a67–10 Foreign major security-based swap participants.

(a) *Definitions.* As used in this rule, the following terms shall have the meanings indicated:

(1) *Foreign major security-based swap participant* means a major security-based swap participant, as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, that is not a U.S. person.

(2) *U.S. person* has the meaning set forth in § 240.3a71–3(a)(7).

(b) *Application of customer protection requirements.* A registered foreign major security-based swap participant shall not be subject, with respect to its security-based swap transactions with counterparties that are not U.S. persons, to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o–10(h)(1)(B)).

(c) *Application of major security-based swap participant tests in the cross-border context.* For purposes of calculating a person's status as a major security-based swap participant as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, a person shall include the following security-based swap transactions:

(1) If such person is a U.S. person, all security-based swap transactions entered into by such person; or

(2) If such person is a non-U.S. person, all security-based swap transactions entered into by such person with U.S. persons.

■ 3b. Add §§ 240.3a71–3, 240.3a71–4, and 240.3a71–5 to read as follows:

Sec.

240.3a71–3 Cross-border security-based swap dealing activity.

240.3a71–4 Exception from aggregation for affiliated groups with registered security-based swap dealers.

240.3a71–5 Substituted compliance for foreign security-based swap dealers.

* * * * *

§ 240.3a71–3 Cross-border security-based swap dealing activity.

(a) *Definitions.* As used in this rule, the following terms shall have the meanings indicated:

(1) *Foreign branch* means any branch of a U.S. bank if:

(i) The branch is located outside the United States;

(ii) The branch operates for valid business reasons; and

(iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

(2) *Foreign business* means security-based swap transactions that are entered into, or offered to be entered into, by or on behalf of, a foreign security-based swap dealer or a U.S. security-based swap dealer, other than the U.S. Business of such person.

(3) *Foreign security-based swap dealer* means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person.

(4) *Transaction conducted through a foreign branch*—(i) *Definition. Transaction conducted through a foreign branch* means a security-based swap transaction that is solicited, negotiated, or executed by a U.S. person through a foreign branch of such U.S. person if:

(A) The foreign branch is the counterparty to such security-based swap transaction; and

(B) The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of the foreign branch or its counterparty.

(ii) *Representations.* A person shall not be required to consider its counterparty's activity in connection with paragraph (a)(4)(i)(B) of this

section in determining whether a security-based swap transaction is a transaction conducted through a foreign branch if such person receives a representation from its counterparty that no person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap transaction on behalf of such counterparty, unless such person knows that the representation is not accurate.

(5) *Transaction conducted within the United States*—(i) *Definition. Transaction conducted within the United States* means a security-based swap transaction that is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction.

(ii) *Foreign branch exception.* Notwithstanding paragraph (a)(5)(i) of this section, a transaction conducted within the United States shall not include a transaction conducted through a foreign branch.

(iii) *Representations.* A person shall not be required to consider its counterparty's activity in connection with a transaction in determining whether such transaction is conducted within the United States if such person receives a representation from its counterparty that the transaction is not solicited, negotiated, executed, or booked within the United States by or on behalf of such counterparty, unless such person knows that the representation is not accurate.

(6) *U.S. business* means:

(i) With respect to a foreign security-based swap dealer:

(A) Any transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than with a foreign branch); or

(B) Any transaction conducted within the United States; and

(ii) With respect to a U.S. security-based swap dealer, any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.

(7) *U.S. person.* (i) Except as provided in paragraph (a)(7)(ii) of this section, *U.S. person* means:

(A) Any natural person resident in the United States;

(B) Any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States; and

(C) Any account (whether discretionary or non-discretionary) of a U.S. person.

(ii) The term *U.S. person* does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.

(8) *U.S. security-based swap dealer* means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is a U.S. person.

(9) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Application of de minimis exception to cross-border dealing activity.* For purposes of calculating the amount of security-based swap positions connected with dealing activity under § 240.3a71–2(a)(1), a person shall include the following security-based swap transactions:

(1)(i) If such person is a U.S. person, all security-based swap transactions connected with the dealing activity in which such person engages, including transactions conducted through a foreign branch; or

(ii) If such person is a non-U.S. person, security-based swap transactions connected with the dealing activity in which such person engages that are entered into with a U.S. person (other than with a foreign branch) or that are transactions conducted within the United States; and

(2) If such person engages in transactions described in paragraph (b)(1)(i) or (ii) of this section,

(i) All security-based swap transactions connected with the dealing activity in which any U.S. person controlling, controlled by, or under common control with such person engages, including transactions conducted through a foreign branch; and

(ii) All security-based swap transactions connected with the dealing activity in which any non-U.S. person controlling, controlled by, or under common control with such person engages that are entered into with U.S. persons (other than with a foreign branch) or that are transactions conducted within the United States.

(c) *Application of customer protection requirements.* A registered foreign security-based swap dealer and a registered U.S. security-based swap dealer, with respect to their Foreign Business, shall not be subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o–10(h)(1)(B)).

§ 240.3a71–4 Exception from aggregation for affiliated groups with registered security-based swap dealers.

Notwithstanding §§ 240.3a71–2(a)(1) and 240.3a71–3(b)(2), a person shall not include the security-based swap transactions of another person controlling, controlled by, or under common control with such person where such other person is registered with the Commission as a security-based swap dealer, provided that the security-based swap dealing activity of such person is operationally independent of the security-based swap dealing activity of such registered security-based swap dealer.

§ 240.3a71–5 Substituted compliance for foreign security-based swap dealers.

(a) *Determinations*—(1) *In general.* Subject to paragraph (a)(2) of this section and except as provided in paragraph (a)(3) of this section, the Commission may, conditionally or unconditionally, by order, make a determination with respect to a foreign financial regulatory system that compliance with specified requirements under such foreign financial regulatory system by a registered foreign security-based swap dealer (or class thereof) may satisfy the corresponding requirements in section 15F of the Act (15 U.S.C. 78o-10), and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer (or class thereof).

(2) *Standard.* The Commission shall not make a substituted compliance determination under paragraph (a)(1) of this section unless the Commission:

(i) Determines that the requirements of such foreign financial regulatory system applicable to such foreign security-based swap dealer (or class thereof) are comparable to otherwise applicable requirements, after taking into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the

effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of such foreign security-based swap dealer (or class thereof); and

(ii) Has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing oversight and supervision of applicable security-based swap dealers under the substituted compliance determination.

(3) *Limitation.* The Commission will not make a substituted compliance determination under paragraph (a)(1) of this section with respect to the requirements relating to the registration process described in sections 15F(a) through (d) of the Act (15 U.S.C. 78o–10(a) through (d)) and the rules and regulations thereunder.

(4) *Withdrawal or modification.* The Commission may, on its own initiative, by order, modify or withdraw a substituted compliance determination under paragraph (a)(1) of this section, after appropriate notice and opportunity for comment.

(b) *Reliance by foreign security-based swap dealers.* A registered foreign security-based swap dealer may satisfy requirements in section 15F of the Act (15 U.S.C. 78o–10), and the rules and regulations thereunder, by complying with corresponding legislative requirements and rules and regulations under a foreign financial regulatory system, provided:

(1) The Commission has made a substituted compliance determination pursuant to paragraph (a)(1) of this section regarding such foreign financial regulatory system providing that compliance with specified requirements under such foreign financial regulatory system by such registered foreign security-based swap dealer (or a class of registered foreign security-based swap dealers that includes such registered foreign security-based swap dealer) may satisfy the corresponding requirements in section 15F of the Act (15 U.S.C. 78o–10) and the rules and regulations thereunder; and

(2) Such registered foreign security-based swap dealer satisfies any conditions set forth in a substituted compliance determination made by the Commission pursuant to paragraph (a)(1) of this section.

(c) *Requests for determinations.* (1) A foreign security-based swap dealer or group of foreign security-based swap dealers of the same class may file an application, pursuant to the procedures set forth in § 240.0–13, requesting that the Commission make a substituted compliance determination pursuant to paragraph (a)(1) of this section, with respect to one or more requirements in section 15F of the Act (15 U.S.C. 78o–10), and the rules and regulations thereunder, and provide the reasons therefor and such other supporting documentation as the Commission may request.

(2) A foreign security-based swap dealer or group of foreign security-based swap dealers may make a request under paragraph (a)(1) of this section only if the foreign security-based swap dealer(s):

(i) Is directly supervised by the foreign financial regulatory authority or authorities under the system with respect to the foreign regulatory requirements relating to the applicable requirements in section 15F of the Act (15 U.S.C. 78o–10) and the rules and regulations thereunder; and

(ii) Provides the certification and opinion of counsel as described in § 240.15Fb2–4(c).

■ 4. Add § 240.3Ca–3 to read as follows:

§ 240.3Ca–3 Application of the mandatory clearing requirement to cross-border security-based swap transactions.

(a) *Application.* Subject to paragraph (b) of this section, the clearing requirement in section 3C(a)(1) of the Act (15 U.S.C. 78c–3(a)(1)), and the rules and regulations thereunder, shall apply to a person that engages in a security-based swap transaction if:

(1) A counterparty to the transaction is:

(i) A U.S. person; or

(ii) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or

(2) Such transaction is a transaction conducted within the United States.

(b) *Exceptions.* The clearing requirement in section 3C(a)(1) of the Act (15 U.S.C. 78c–3(a)(1)), and the rules and regulations thereunder, shall not apply to a transaction described in paragraph (a) of this section if:

(1) With respect to a security-based swap transaction that is not a transaction conducted within the United States,

(i) One counterparty to the transaction is:

(A) A foreign branch; or

(B) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; and

(ii) The other counterparty to the transaction is a non-U.S. person:

(A) Whose performance under the security-based swap is not guaranteed by a U.S. person; and

(B) Who is not a foreign security-based swap dealer; or

(2) With respect to a security-based swap transaction that is a transaction conducted within the United States,

(i) Neither counterparty to the transaction is a U.S. person;

(ii) Neither counterparty's performance under the security-based swap is guaranteed by a U.S. person; and

(iii) Neither counterparty to the transaction is a foreign security-based swap dealer.

(c) For purposes of this section, the terms *foreign branch, foreign security-based swap dealer, transaction conducted within the United States,* and *U.S. person* shall have the meanings set forth in § 240.3a71–3(a).

■ 5. Add an undesignated center heading following § 240.3Ca–2, and add §§ 240.3Ch–1 and 240.3Ch–2 to read as follows:

Trade Execution of Security-Based Swaps

* * * * *

Sec.

240.3Ch–1 Application of the mandatory trade execution requirement to cross-border security-based swap transactions.

240.3Ch–2 Substituted compliance for mandatory trade execution.

§ 240.3Ch–1 Application of the mandatory trade execution requirement to cross-border security-based swap transactions.

(a) *Application.* Subject to paragraph (b) of this section, the mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c–3(h)), and the rules and regulations thereunder, shall apply to a person that engages in a security-based swap transaction if:

(1) A counterparty to the transaction is:

(i) A U.S. person; or

(ii) A non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person; or

(2) Such transaction is a transaction conducted within the United States.

(b) *Exceptions.* The mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c–3(h)), and the rules and regulations thereunder, shall not apply to a transaction described in paragraph (a) of this section if:

(1) With respect to a security-based swap transaction that is not a transaction conducted within the United States,

(i) One counterparty to the transaction is:

(A) A foreign branch; or

(B) A non-U.S. person whose performance under the security-based

swap is guaranteed by a U.S. person; and

(ii) The other counterparty to the transaction is a non-U.S. person:

(A) Whose performance under the security-based swap is not guaranteed by a U.S. person; and

(B) Who is not a foreign security-based swap dealer; or

(2) With respect to a security-based swap transaction that is a transaction conducted within the United States,

(i) Neither counterparty to the transaction is a U.S. person;

(ii) Neither counterparty's performances under the security-based swap is guaranteed by a U.S. person; and

(iii) Neither counterparty to the transaction is a foreign security-based swap dealer.

(c) For purposes of this section, the terms *foreign branch, foreign security-based swap dealer,* and *transaction conducted within the United States,* and *U.S. person* shall have the meanings set forth in § 240.3a71–3(a).

§ 240.3Ch–2 Substituted compliance for mandatory trade execution.

(a) A person that is subject to the mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c–3(h)), and the rules and regulations thereunder, with respect to a security-based swap transaction may execute such transaction, or have such transaction executed on its behalf, on a security-based swap market that is neither registered under the Act nor exempt from registration under the Act if such security-based swap market is covered by, or is in a class of markets that is covered by, a Commission order described in paragraph (b) of this section, provided that with respect to at least one of the counterparties to the transaction:

(1) Such counterparty is either a non-U.S person or a foreign branch; and

(2) The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.

(b)(1) The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination with respect to a foreign jurisdiction to permit a person subject to the mandatory trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c–3(h)), and the rules and regulations thereunder, with respect to a security-based swap transaction to execute such transaction, or have such transaction executed on its behalf, on a security-based swap market (or class of markets) if it determines that such security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by the relevant foreign financial regulatory authority or authorities in such foreign jurisdiction.

(2) In making a determination under paragraph (b)(1) of this section, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities in the foreign jurisdiction to support the oversight of the security-based swap market (or class of markets).

(3) Before issuing a substituted compliance order pursuant to paragraph (b)(1) of this section, the Commission shall have entered into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant foreign regulatory authority or authorities in the foreign jurisdiction addressing the oversight and supervision of the security-based swap market (or class of markets).

(4) The Commission may, on its own initiative, modify or withdraw such order at any time, after appropriate notice and opportunity for comment.

(c) One or more security-based swap markets in a foreign jurisdiction may file an application, in writing, pursuant to the procedures set forth in § 240.0–13, requesting that the Commission make a substituted compliance determination with respect to such foreign jurisdiction pursuant to paragraph (b)(1) of this section. Such application must include the reasons therefor and such other documentation as the Commission may request.

(d) For purposes of this section, the terms *foreign branch* and *U.S. person* shall have the meanings set forth in § 240.3a71–3(a).

■ 6. Add paragraph (d) to § 240.13n–4 as previously proposed at 75 FR 77367, Dec. 10, 2010, to read as follows:

§ 240.13n–4 Duties and core principles of security-based swap data repository.

* * * * *

(d) *Exemption from the indemnification requirement.* A registered security-based swap data repository is not required to comply with the indemnification requirement set forth in Section 13(n)(5)(H)(ii) of the Act (15 U.S.C. 78m(n)(5)(H)(ii)) and paragraph (b)(10) of this section with respect to disclosure of security-based swap information by the security-based swap data repository if:

(1) An entity described in paragraph (b)(9) of this section requests security-based swap information from the security-based swap data repository to fulfill a regulatory mandate and/or legal responsibility of the entity;

(2) The request of such entity pertains to a person or financial product subject to the jurisdiction, supervision, or oversight of the entity; and

(3) Such entity has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of the security-based swap information provided and any other matters as determined by the Commission.

■ 7. Add § 240.13n–12 following § 240.13n–11 as previously proposed at 75 FR 77366, Dec. 10, 2010, to read as follows:

§ 240.13n–12 Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

(a) *Definitions.* For purposes of this section—

(1) *Non-U.S. person* means a person that is not a U.S. person.

(2) *U.S. person* shall have the same meaning as set forth in § 240.3a71–3(a)(7).

(b) A non-U.S. person that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the Act (15 U.S.C. 78m(n)), and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.

■ 8. Add paragraphs (e) and (f) to § 240.18a–4 as previously proposed at 77 FR 70350, Nov. 23, 2012, to read as follows:

§ 240.18a–4 Segregation requirements for security-based swap dealers and major security-based swap participants

* * * * *

(e) *Segregation requirements for foreign security-based swap dealers*—(1) *Non-cleared security-based swaps.* (i) A registered foreign security-based swap dealer (as defined in § 240.3a71–3(a)(3)) that is a registered broker-dealer shall be subject to the requirements relating to

segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c–5) and paragraphs (a) through (d) of this section, with respect to any assets received from, for, or on behalf of a counterparty to margin, guarantee, or secure a non-cleared security-based swap (including money, securities, or property accruing to such counterparty as the result of such a security-based swap transaction).

(ii) A registered foreign security-based swap dealer (as defined in § 240.3a71–3(a)(3)) that is not a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c–5) and paragraphs (a) through (d) of this section, with respect to non-cleared security-based swap transactions, solely with respect to any assets received from, for, or on behalf of a counterparty that is a U.S. person (as defined in § 240.3a71–3(a)(7)) to margin, guarantee, or secure a non-cleared security-based swap (including money, securities, or property accruing to such U.S. person counterparty as the result of such a security-based swap transaction).

(2) *Cleared security-based swaps.* (i) A registered foreign security-based swap dealer (as defined in § 240.3a71–3(a)(3)) that is a registered broker-dealer shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c–5) and paragraphs (a) through (d) of this section, with respect to any assets received from, for, or on behalf of a counterparty to margin, guarantee, or secure a cleared security-based swap (including money, securities, or property accruing to such counterparty as the result of such a security-based swap transaction).

(ii) A registered foreign security-based swap dealer (as defined in § 240.3a71–3(a)(3)) that is not a registered broker-dealer and is not a person described in 11 U.S.C. 109(b)(3) shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c–5) and paragraphs (a) through (d) of this section, with respect to cleared security-based swap transactions with any counterparty if such registered foreign security-based swap dealer accepts any assets from, for, or on behalf of a counterparty that is a U.S. person (as defined in § 240.3a71–3(a)(7)) to margin, guarantee, or secure a security-based swap (including money, securities, or property accruing to such U.S. person counterparty as the result of such a security-based swap).

(iii) A registered foreign security-based swap dealer (as defined in § 240.3a71–3(a)(3)) that is a person described in 11 U.S.C. 109(b)(3) shall be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E of the Act (15 U.S.C. 78c–5) and paragraphs (a) through (d) of this section, with respect to cleared security-based swap transactions, solely with respect to any assets received from, for, or on behalf of a counterparty who is a U.S. person (as defined in § 240.3a71–3(a)(7)) to margin, guarantee, or secure a security-based swap cleared by or through a clearing agency (including money, securities, or property accruing to such U.S. person counterparty as the result of such a security-based swap transaction). The special account maintained by a registered foreign security-based swap dealer that is a person described in 11 U.S.C. 109(b)(3) in accordance with paragraph (c) of this section shall be designated for the exclusive benefit of U.S. person security-based swap customers.

(3) *Disclosures.* A registered foreign security-based swap dealer (as defined in § 240.3a71–3(a)(3)) must disclose to its counterparty that is a U.S. person, prior to accepting any assets from, for, or on behalf of such counterparty to margin, guarantee, or secure a security-based swap, the potential treatment of the assets segregated by such registered foreign security-based swap dealer pursuant to section 3E of the Act (15 U.S.C. 78c–5), and the rules and regulations thereunder, in insolvency proceedings under U.S. bankruptcy law and any applicable foreign insolvency laws. Such disclosure shall include whether the foreign security-based swap dealer is subject to the segregation requirement set forth in Section 3E of the Act, and the rules and regulations thereunder, with respect to the assets collected from the U.S. person counterparty who will receive the disclosure, whether the foreign security-based swap dealer could be subject to the stockbroker liquidation provisions in the U.S. Bankruptcy Code, whether the segregated assets could be afforded customer property treatment under the U.S. bankruptcy law, and any other relevant considerations that may affect the treatment of the assets segregated under Section 3E of the Act in insolvency proceedings of the foreign security-based swap dealer.

(f) *Segregation requirements for foreign major security-based swap participants.* A registered foreign major security-based swap participant (as defined in § 240.3a67–10(a)(1)) that is not a registered broker-dealer shall not be subject to the requirements relating to segregation of assets held as collateral set forth in section 3E(f) of the Act (15 U.S.C. 78c–5(f)) and paragraph (d) of this section, with respect to non-cleared security-based swap transactions, solely with respect to any assets received from, for, or on behalf of a counterparty that is a not a U.S. person (as defined in § 240.3a71–3(a)(7)) to margin, guarantee, or secure a non-cleared security-based swap (including money, securities, or property accruing to such non-U.S. person counterparty as the result of such a security-based swap transaction).

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 9. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–l(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 10a. Revise the heading of part 242 to read as set forth above.

■ 10b. Add an undesignated center heading and revise §§ 242.900 through 242.911 as previously proposed at 75 FR 75283, Dec. 2, 2010, to read as follows:

Regulation SBSR—Regulatory Reporting and Public Dissemination of Security-Based Swap Information

Sec.

242.900 Definitions
242.901 Reporting obligations.
242.902 Public dissemination of transaction reports.
242.903 Coded information.
242.904 Operating hours of registered security-based swap data repositories.
242.905 Correction of errors in security-based swap information.
242.906 Other duties of participants.
242.907 Policies and procedures of registered security-based swap data repositories.
242.908 Cross-border matters.
242.909 Registration of security-based swap data repository as a securities information processor.
242.910 Implementation of security-based swap reporting and dissemination.
242.911 Prohibition during phase-in period.

* * * * *

§ 242.900 Definitions.

Terms used in §§ 242.900 through 242.911 that appear in Section 3 of the Exchange Act (15 U.S.C. 78c) have the same meaning as in Section 3 of the Exchange Act and the rules or regulations thereunder. In addition, for purposes of Regulation SBSR (§§ 242.900 through 242.911), the following definitions shall apply:

(a) *Affiliate* means any person that, directly or indirectly, controls, is

controlled by, or is under common control with, a person.

(b) *Asset class* means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives.

(c) *Block trade* means a large notional security-based swap transaction that meets the criteria set forth in § 242.907(b).

(d) *Broker ID* means the UIC assigned to a person acting as a broker for a participant.

(e) *Confirm* means the production of a confirmation that is agreed to by the parties to be definitive and complete and that has been manually, electronically, or, by some other legally equivalent means, signed.

(f) *Control* means, for purposes of §§ 242.900 through 242.911, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(1) Is a director, general partner or officer exercising executive responsibility (or having similar status or functions);

(2) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(3) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(g) *Counterparty* means a person that is a direct counterparty or indirect counterparty of a security-based swap.

(h) *Derivatives clearing organization* means the same as provided under the Commodity Exchange Act.

(i) *Desk ID* means the UIC assigned to the trading desk of a participant or of a broker of a participant.

(j) *Direct counterparty* means a person that is a primary obligor on a security-bases swap.

(k) *Direct electronic access* has the same meaning as in § 240.13n–4(a)(5) of this chapter.

(*l*) *Effective reporting date,* with respect to a registered security-based swap data repository, means the date six months after the registration date.

(m) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*), as amended.

(n) *Foreign branch* has the same meaning as in § 240.3a71–3(a)(1) of this chapter.

(o) *Indirect counterparty* means a guarantor of a direct counterparty's performance of any obligation under a security-based swap.

(p) *Life cycle event* means, with respect to a security-based swap, any event that would result in a change in the information reported to a registered security-based swap data repository under § 242.901, including a counterparty change resulting from an assignment or novation; a partial or full termination of the security-based swap; a change in the cash flows originally reported; for a security-based swap that is not cleared, any change to the collateral agreement; or a corporate action affecting a security or securities on which the security-based swap is based (*e.g.,* a merger, dividend, stock split, or bankruptcy). Notwithstanding the above, a life cycle event shall not include the scheduled expiration of the security-based swap, a previously described and anticipated interest rate adjustment (such as a quarterly interest rate adjustment), or other event that does not result in any change to the contractual terms of the security-based swap.

(q) *Non-U.S. person* means a person that is not a U.S. person.

(r) *Parent* means a legal person that controls a participant.

(s) *Participant* means a person that is a counterparty to a security-based swap that meets the criteria of § 242.908(b).

(t) *Participant ID* means the UIC assigned to a participant.

(u) *Phase-in period* means the period immediately after a security-based swap data repository has registered with the Commission during which it is not required to disseminate security-based swap data pursuant to an implementation schedule, as provided in § 242.910.

(v) *Pre-enactment security-based swap* means any security-based swap executed before July 21, 2010 (the date of enactment of the Dodd-Frank Act (Pub. L. 111–203, H.R. 4173)), the terms of which had not expired as of that date.

(w) *Price* means the price of a security-based swap transaction, expressed in terms of the commercial conventions used in that asset class.

(x) *Product ID* means the UIC assigned to a security-based swap instrument.

(y) *Publicly disseminate* means to make available through the Internet or other electronic data feed that is widely accessible and in machine-readable electronic format.

(z) *Real time* means, with respect to the reporting of security-based swap information, as soon as technologically practicable, but in no event later than 15 minutes after the time of execution of the security-based swap transaction.

(aa) *Registered security-based swap data repository* means a person that is registered with the Commission as a security-based swap data repository pursuant to section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and any rules or regulations thereunder.

(bb) *Registration date,* with respect to a security-based swap data repository, means the date on which the Commission registers the security-based swap data repository, or, if the Commission registers the security-based swap data repository before the effective date of §§ 242.900 through 242.911, the effective date of §§ 242.900 through 242.911.

(cc) *Reporting side* means the side of a security-based swap having the duty to report information in accordance with §§ 242.900 through 242.911 to a registered security-based swap data repository, or if there is no registered security-based swap data repository that would receive the information, to the Commission.

(dd) *Security-based swap instrument* means each security-based swap in the same asset class, with the same underlying reference asset, reference issuer, or reference index.

(ee) *Side* means a direct counterparty and any indirect counterparty that guarantees the direct counterparty's performance of any obligation under a security-based swap.

(ff) *Time of execution* means the point at which the counterparties to a security-based swap become irrevocably bound under applicable law.

(gg) *Trader ID* means the UIC assigned to a natural person who executes security-based swaps.

(hh) *Transaction conducted through a foreign branch* has the same meaning as in § 240.3a71–3(a)(4) of this chapter.

(ii) *Transaction conducted within the United States* has the same meaning as in § 240.3a71–3(a)(5) of this chapter.

(jj) *Transaction ID* means the unique identification code assigned by a registered security-based swap data repository to a specific security-based swap.

(kk) *Transitional security-based swap* means a security-based swap executed on or after July 21, 2010, and before the effective reporting date.

(*ll*) *Ultimate parent* means a legal person that controls a participant and that itself has no parent.

(mm) *Ultimate parent ID* means the UIC assigned to an ultimate parent of a participant.

(nn) *Unique Identification Code* or *UIC* means the unique identification code assigned to a person, unit of a person, or product by or on behalf of an internationally recognized standards-

setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory. If no standards-setting body meets these criteria, a registered security-based swap data repository shall assign all necessary UICs using its own methodology. If a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, a registered security-based swap data repository shall assign a UIC to that person, unit of a person, or product using its own methodology.

(oo) *United States* has the same meaning as in § 240.3a71–3(a)(9) of this chapter.

(pp) *U.S. person* has the same meaning as in § 240.3a71–3(a)(7) of this chapter.

§ 242.901 Reporting obligations.

(a) *Reporting side.* The reporting side for a security-based swap shall be as follows:

(1) If both sides of the security-based swap include a security-based swap dealer, the sides shall select the reporting side.

(2) If only one side of the security-based swap includes a security-based swap dealer, that side shall be the reporting side.

(3) If both sides of the security-based swap include a major security-based swap participant, the sides shall select the reporting side.

(4) If one side of the security-based swap includes a major security-based swap participant and the other side includes neither a security-based swap dealer nor a major security-based swap participant, the side including the major security-based swap participant shall be the reporting side.

(5) If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant:

(i) If both sides include a U.S. person or neither side includes a U.S. person, the sides shall select the reporting side.

(ii) If only one side includes a U.S. person, that side shall be the reporting side.

(b) *Recipient of security-based swap information.* For each security-based swap for which it is the reporting side, the reporting side shall provide the information required by §§ 242.900 through 242.911 to a registered security-based swap data repository or, if there is no registered security-based swap data repository that would accept the information, to the Commission.

(c) *Primary trade information.* For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information in real time. If a security-based swap is required by §§ 242.901 and 242.908 to be reported but not publicly disseminated, the reporting side shall report the following information no later than the time that the reporting side is required to comply with paragraph (d) of this section:

(1) The asset class of the security-based swap and, if the security-based swap is an equity derivative, whether it is a total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based;

(2) Information that identifies the security-based swap instrument and the specific asset(s) or issuer(s) of any security on which the security-based swap is based;

(3) The notional amount(s), and the currenc(ies) in which the notional amount(s) is expressed;

(4) The date and time, to the second, of execution, expressed using Coordinated Universal Time (UTC);

(5) The effective date;

(6) The scheduled termination date;

(7) The price;

(8) The terms of any fixed or floating rate payments, and the frequency of any payments;

(9) Whether or not the security-based swap will be cleared by a clearing agency;

(10) If both sides of the security-based swap include a security-based swap dealer, an indication to that effect;

(11) If applicable, an indication that the transaction does not accurately reflect the market; and

(12) If the security-based swap is customized to the extent that the information provided in paragraphs (c)(1) through (11) of this section does not provide all of the material information necessary to identify such customized security-based swap or does not contain the data elements necessary to calculate the price, an indication to that effect.

(d) *Secondary trade information.* (1) In addition to the information required under paragraph (c) of this section, for each security-based swap for which it is the reporting side, the reporting side shall report:

(i) The participant ID of each counterparty;

(ii) As applicable, the broker ID, desk ID, and trader ID of the direct counterparty on the reporting side;

(iii) The amount(s) and currenc(ies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each direct counterparty to the other;

(iv) The title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement;

(v) The data elements necessary for a person to determine the market value of the transaction;

(vi) If the security-based swap will be cleared, the name of the clearing agency;

(vii) If the security-based swap is not cleared, whether the exception in Section 3C(g) of the Exchange Act (15 U.S.C. 78c–3(g)) was invoked;

(viii) If the security-based swap is not cleared, a description of the settlement terms, including whether the security-based swap is cash-settled or physically settled, and the method for determining the settlement value; and

(ix) The venue where the security-based swap was executed.

(2) Any information required to be reported pursuant to paragraph (d)(1) of this section must be reported promptly, but in no event later than:

(i) Fifteen minutes after the time of execution for a security-based swap that is executed and confirmed electronically;

(ii) Thirty minutes after the time of execution for a security-based swap that is confirmed electronically but not executed electronically; or

(iii) Twenty-four hours after the time of execution for a security-based swap that is not executed or confirmed electronically.

(e) *Duty to report any life cycle event of a security-based swap.* For any life cycle event, and any adjustment due to a life cycle event, that results in a change to information previously reported pursuant to paragraph (c), (d), or (i) of this section, the reporting side shall promptly provide updated information reflecting such change to the entity to which it reported the original transaction, using the transaction ID, subject to the following exceptions:

(1) If a reporting side ceases to be a counterparty to a security-based swap due to an assignment or novation, the new side shall be the reporting side following such assignment or novation, if the new side includes a U.S. person, a security-based swap dealer, or a major security-based swap participant.

(2) If, following an assignment or novation, the new side does not include a U.S. person, a security-based swap dealer, or a major security-based swap participant, the other side shall be the reporting side following such assignment or novation.

(f) *Time stamping incoming information.* A registered security-based swap data repository shall time stamp, to the second, its receipt of any information submitted to it pursuant to paragraph (c), (d), (e), or (i) of this section.

(g) *Assigning transaction ID.* A registered security-based swap data repository shall assign a transaction ID to each security-based swap.

(h) *Format of reported information.* The reporting side shall electronically transmit the information required under this section in a format required by the registered security-based swap data repository, and in accordance with any applicable policies and procedures of the registered security-based swap data repository.

(i) *Reporting of pre-enactment and transitional security-based swaps.* With respect to any pre-enactment security-based swap or transitional security-based swap, the reporting side shall report all of the information required by paragraphs (c) and (d) of this section, to the extent such information is available.

§ 242.902 Public dissemination of transaction reports.

(a) *General.* Unless a security-based swap is a block trade or a cross-border security-based swap that is required to be reported but not publicly disseminated, a registered security-based swap data repository shall publicly disseminate a transaction report of the security-based swap immediately upon receipt of information about the security-based swap, or upon re-opening following a period when the registered security-based swap data repository was closed. The transaction report shall consist of all the information reported pursuant to § 242.901, plus any indicator or indicators contemplated by the registered security-based swap data repository's policies and procedures that are required by § 242.907.

(b) *Dissemination of block trades.* A registered security-based swap data repository shall publicly disseminate a transaction report of a security-based swap that constitutes a block trade immediately upon receipt of information about the block trade from the reporting side. The transaction report shall consist of all the information reported by the reporting side pursuant to § 242.901(c), except for the notional size, plus the transaction ID and an indicator that the report represents a block trade. The registered security-based swap data repository shall publicly disseminate a complete transaction report for such block trade (including the transaction ID and the full notional size) as follows:

(1) If the security-based swap was executed on or after 05:00 UTC and before 23:00 UTC of the same day, the transaction report (including the transaction ID and the full notional size) shall be disseminated at 07:00 UTC of the following day.

(2) If the security-based swap was executed on or after 23:00 UTC and up to 05:00 UTC of the following day, the transaction report (including the transaction ID and the full notional size) shall be disseminated at 13:00 UTC of that following day.

(3) Notwithstanding the foregoing, if a registered security-based swap data repository is in normal closing hours or special closing hours at a time when it would be required to disseminate information about a block trade pursuant to this section, the registered security-based swap data repository shall instead disseminate information about the block trade immediately upon re-opening.

(c) *Non-disseminated information.* A registered security-based swap data repository shall not disseminate:

(1) The identity of either counterparty to a security-based swap;

(2) With respect to a security-based swap that is not cleared at a registered clearing agency and that is reported to the registered security-based swap data repository, any information disclosing the business transactions and market positions of any person; or

(3) Any information regarding a security-based swap reported pursuant to § 242.901(i).

(d) *Temporary restriction on other market data sources.* No person other than a registered security-based swap data repository shall make available to one or more persons (other than a counterparty) transaction information relating to a security-based swap before the earlier of 15 minutes after the time of execution of the security-based swap; or the time that a registered security-based swap data repository publicly disseminates a report of that security-based swap.

§ 242.903 Coded information.

The reporting side may provide information to a registered security-based swap data repository pursuant to § 242.901 and a registered security-based swap data repository may publicly disseminate information pursuant to § 242.902 using codes in place of certain data elements, provided that the information necessary to interpret such codes is widely available on a non-fee basis.

§ 242.904 Operating hours of registered security-based swap data repositories.

A registered security-based swap data repository shall have systems in place to continuously receive and disseminate information regarding security-based swaps pursuant to §§ 242.900 through 242.911, subject to the following exceptions:

(a) A registered security-based swap data repository may establish normal closing hours during periods when, in its estimation, the U.S. market and major foreign markets are inactive. A registered security-based swap data repository shall provide reasonable advance notice to participants and to the public of its normal closing hours.

(b) A registered security-based swap data repository may declare, on an *ad hoc* basis, special closing hours to perform system maintenance that cannot wait until normal closing hours. A registered security-based swap data repository shall, to the extent reasonably possible under the circumstances, avoid scheduling special closing hours during periods when, in its estimation, the U.S. market and major foreign markets are most active; and provide reasonable advance notice of its special closing hours to participants and to the public.

(c) During normal closing hours, and to the extent reasonably practicable during special closing hours, a registered security-based swap data repository shall have the capability to receive and hold in queue information regarding security-based swaps that has been reported pursuant to §§ 242.900 through 242.911.

(d) When a registered security-based swap data repository re-opens following normal closing hours or special closing hours, it shall disseminate transaction reports of security-based swaps held in queue, in accordance with the requirements of § 242.902.

(e) If a registered security-based swap data repository could not receive and hold in queue transaction information that was required to be reported pursuant to §§ 242.900 through 242.911, it must immediately upon re-opening send a message to all participants that it has resumed normal operations. Thereafter, any participant that had an obligation to report information to the registered security-based swap data repository pursuant to §§ 242.900 through 242.911, but could not do so because of the registered security-based swap data repository's inability to receive and hold in queue data, must immediately report the information to the registered security-based swap data repository.

§ 242.905 Correction of errors in security-based swap information.

(a) *Duty of counterparties to correct.* Any counterparty to a security-based swap that discovers an error in information previously reported pursuant to §§ 242.900 through 242.911 shall correct such error in accordance with the following procedures:

(1) If a side that was not the reporting side for a security-based swap transaction discovers an error in the information reported with respect to such security-based swap, the counterparty shall promptly notify the reporting side of the error; and

(2) If the reporting side for a security-based swap transaction discovers an error in the information reported with respect to a security-based swap, or receives notification from its counterparty of an error, the reporting side shall promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction report. If the reporting side reported the initial transaction to a registered security-based swap data repository, the reporting side shall submit an amended report to the registered security-based swap data repository in a manner consistent with the policies and procedures contemplated by § 242.907(a)(3).

(b) *Duty of security-based swap data repository to correct.* A registered security-based swap data repository shall:

(1) Upon discovery of the error or receipt of a notice of the error from the reporting side, verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the erroneous information regarding such security-based swap contained in its system; and

(2) If such erroneous information relates to a security-based swap that the registered security-based swap data repository previously disseminated and falls into any of the categories of information enumerated in § 242.901(c), publicly disseminate a corrected transaction report of the security-based swap promptly following verification of the trade by the counterparties to the security-based swap, with an indication that the report relates to a previously disseminated transaction.

§ 242.906 Other duties of participants and guarantors.

(a) *Reporting by non-reporting-side.* A registered security-based swap data repository shall identify any security-based swap reported to it for which the registered security-based swap data repository does not have the participant ID and (if applicable) the broker ID, desk ID, and trader ID of each direct counterparty. Once a day, the registered security-based swap data repository shall send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered security-based swap data repository lacks participant ID and (if applicable) broker ID, desk ID, and trader ID. A participant that receives such a report shall provide the missing information to the registered security-based swap data repository within 24 hours.

(b) *Duty to provide ultimate parent and affiliate information.* Each participant of a registered security-based swap data repository shall provide to the registered security-based swap data repository information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered security-based swap data repository, using ultimate parent IDs and participant IDs. A participant shall promptly notify the registered security-based swap data repository of any changes to that information.

(c) *Policies and procedures of security-based swap dealers and major security-based swap participants.* Each participant that is a security-based swap dealer or major security-based swap participant shall establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure that it complies with any obligations to report information to a registered security-based swap data repository in a manner consistent with §§ 242.900 through 242.911 and the registered security-based swap data repository's applicable policies and procedures. Each such participant shall review and update its policies and procedures at least annually.

§ 242.907 Policies and procedures of registered security-based swap data repositories.

(a) *General policies and procedures.* With respect to the receipt, reporting, and dissemination of data pursuant to §§ 242.900 through 242.911, a registered security-based swap data repository shall establish and maintain written policies and procedures:

(1) That enumerate the specific data elements of a security-based swap or a life cycle event that the reporting side must report, which shall include, at a minimum, the data elements specified in § 242.901(c) and (d);

(2) That specify one or more acceptable data formats (each of which must be an open-source structured data format that is widely used by participants), connectivity requirements, and other protocols for submitting information;

(3) For specifying how reporting sides are to report corrections to previously submitted information, making corrections to information in its records that is subsequently discovered to be erroneous, and applying an appropriate indicator to any transaction report required to be disseminated by § 242.905(b)(2) that the report relates to a previously disseminated transaction;

(4) Describing how reporting sides shall report and, consistent with the enhancement of price discovery, how the registered security-based swap data repository shall publicly disseminate, reports of, and adjustments due to, life cycle events; security-based swap transactions that do not involve an opportunity to negotiate any material terms, other than the counterparty; and any other security-based swap transactions that, in the estimation of the registered security-based swap data repository, do not accurately reflect the market;

(5) For assigning:

(i) A transaction ID to each security-based swap that is reported to it; and

(ii) UICs established by or on behalf of an internationally recognized standards-setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory (or, if no standards-setting body meets these criteria or a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, using its own methodology); and

(6) For periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any participant(s) with which the participant is affiliated, using ultimate parent IDs and participant IDs.

(b) *Policies and procedures regarding block trades.* (1) A registered security-based swap data repository shall establish and maintain written policies and procedures for calculating and publicizing block trade thresholds for all security-based swap instruments reported to the registered security-based swap data repository, in accordance with the criteria and formula for determining block size as specified by the Commission.

(2) *Exceptions.* Notwithstanding the above, a registered security-based swap data repository shall not designate as a block trade any security-based swap:

(i) That is an equity total return swap or is otherwise designed to offer risks and returns proportional to a position in

the equity security or securities on which the security-based swap is based; or

(ii) Contemplated by Section 13(m)(1)(C)(iv) of the Exchange Act ((15 U.S.C. 78m(m)(1)(C)(iv)).

(c) *Public availability of policies and procedures.* A registered security-based swap data repository shall make the policies and procedures required by §§ 242.900 through 242.911 publicly available on its Web site.

(d) *Updating of policies and procedures.* A registered security-based swap data repository shall review, and update as necessary, the policies and procedures required by §§ 242.900 through 242.911 at least annually. Such policies and procedures shall indicate the date on which they were last reviewed.

(e) A registered security-based swap data repository shall have the capacity to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to §§ 242.900 through 242.911 and the registered security-based swap data repository's policies and procedures thereunder.

§ 242.908 Cross-border matters.

(a) *Application of Regulation SBSR to cross-border transactions*—(1) *Regulatory reporting.* A reporting side shall report a security-based swap if:

(i) The security-based swap is a transaction conducted within the United States;

(ii) There is a direct or indirect counterparty that is a U.S. person on either side of the transaction;

(iii) There is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction; or

(iv) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

(2) *Public dissemination.* A security-based swap shall be subject to public dissemination if:

(i) The security-based swap is a transaction conducted within the United States;

(ii) There is a direct or indirect counterparty that is a U.S. person on each side of the transaction;

(iii) At least one direct counterparty is a U.S. person (except in the case of a transaction conducted through a foreign branch);

(iv) One side includes a U.S. person and the other side includes a non-U.S. person that is a security-based swap dealer; or

(v) The security-based swap is cleared through a clearing agency having its principal place of business in the United States.

(b) *Limitation on counterparty duties.* Notwithstanding any other provision of §§ 242.900 through 242.911, a counterparty to a security-based swap shall not incur any obligation under §§ 242.900 through 242.911 unless it is:

(1) A U.S. person;

(2) A security-based swap dealer or major security-based swap participant; or

(3) A counterparty to a transaction conducted within the United States.

(c) *Substituted compliance*—(1) *General.* Compliance with the regulatory reporting and public dissemination requirements in sections 13(m) and 13A of the Act (15 U.S.C. 78m(m) and 78m–1), and the rules and regulations thereunder, may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a Commission order described in paragraph (c)(2) of this section, provided that with respect to at least one of the direct counterparties to the security-based swap:

(i) Such counterparty is either a non-U.S. person or a foreign branch; and

(ii) The security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.

(2) *Procedure.* (i) The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination regarding regulatory reporting and public dissemination of security-based swaps with respect to a foreign jurisdiction if that jurisdiction's requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements.

(ii) Any person that executes security-based swaps that would, in the absence of a substituted compliance order, be required to be reported pursuant to §§ 242.900 through 242.911 may file an application, pursuant to the procedures set forth in § 240.0–13 of this chapter, requesting that the Commission make a substituted compliance determination regarding regulatory reporting and public dissemination with respect to a foreign jurisdiction the rules of which also would require reporting and public dissemination of those security-based swaps. Such application shall include the reasons therefor and such other information as the Commission may request.

(iii) In making such a substituted compliance determination, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign financial regulatory authority to support oversight of its regulatory reporting and public dissemination system for security-based swaps. The Commission shall not make such a substituted compliance determination unless it finds that:

(A) The data elements that are required to be reported pursuant to the rules of the foreign jurisdiction are comparable to those required to be reported pursuant to § 242.901;

(B) The rules of the foreign jurisdiction require the security-based swap to be reported and publicly disseminated in a manner and a timeframe comparable to those required by §§ 242.900 through 242.911;

(C) The Commission has direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction; and

(D) Any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains required transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements imposed on security-based swap data repositories by §§ 240.13n–5 through 240.13n–7 of this chapter.

(iv) Before issuing a substituted compliance order pursuant to this section, the Commission shall have entered into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing oversight and supervision of the applicable security-based swap market under the substitute compliance determination.

(v) The Commission may, on its own initiative, modify or withdraw such order at any time, after appropriate notice and opportunity for comment.

§ 242.909 Registration of security-based swap data repository as a securities information processor.

A registered security-based swap data repository shall also register with the

Commission as a securities information processor on Form SIP (§ 249.1001 of this chapter).

§ 242.910 Implementation of security-based swap reporting and dissemination.

(a) *Reporting of pre-enactment security-based swaps.* The reporting side shall report to a registered security-based swap data repository any pre-enactment security-based swaps no later than January 12, 2012 (180 days after the effective date of the Dodd-Frank Act (Pub. L. 111–203, H.R. 4173)).

(b) *Phase-in of compliance dates.* A registered security-based swap data repository and its participants shall be subject to the following phased-in compliance schedule:

(1) *Phase 1,* six months after the registration date (*i.e.,* the effective reporting date):

(i) Reporting sides shall report to the registered security-based swap data repository any transitional security-based swaps.

(ii) With respect to any security-based swap executed on or after the effective reporting date, reporting sides shall comply with § 242.901.

(iii) Participants and the registered security-based swap data repository shall comply with § 242.905 (except with respect to public dissemination) and § 242.906(a) and (b).

(iv) Participants that are security-based swap dealers or major security-based swap participants shall comply with § 242.906(c).

(2) *Phase 2,* nine months after the registration date: *Wave 1* of public dissemination—The registered security-based swap data repository shall comply with §§ 242.902 and 242.905 (with respect to public dissemination of corrected transaction reports) for 50 security-based swap instruments.

(3) *Phase 3,* 12 months after the registration date: *Wave 2* of public dissemination—The registered security-based swap data repository shall comply with §§ 242.902 and 242.905 (with respect to public dissemination of corrected transaction reports) for an additional 200 security-based swap instruments.

(4) *Phase 4,* 18 months after the registration date: *Wave 3* of public dissemination—All security-based swaps received by the registered security-based swap data repository shall be treated in a manner consistent with §§ 242.902, 242.905, and 242.908.

§ 242.911 Prohibition during phase-in period.

A reporting side shall not report a security-based swap to a registered security-based swap data repository in a phase-in period described in § 242.910 during which the registered security-based swap data repository is not yet required or able to publicly disseminate transaction reports for that security-based swap instrument unless:

(a) The security-based swap is also reported to a registered security-based swap data repository that is disseminating transaction reports for that security-based swap instrument consistent with § 242.902; or

(b) No other registered security-based swap data repository is able to receive, hold, and publicly disseminate transaction reports regarding that security-based swap instrument.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 11. 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.;* 12 U.S.C. 5461 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 12. Section 249.1600, § 249.1600a, and § 249.1600b as previously proposed to be added at 76 FR 65824, Oct. 24, 2011, are further revised to read as follows:

Subpart Q—Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants

Sec.

249.1600 Form SBSE, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration.

249.1600a Form SBSE–A, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant that are not also registered or registering with the Commission as a broker or dealer.

249.1600b Form SBSE–BD, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commission as a broker or dealer.

* * * * *

§ 249.1600 Form SBSE, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration.

This form shall be used for application for registration as a security-based swap dealer or major security-based swap participant by firms that are not registered with the Commission as a broker or dealer and that are not registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant, pursuant to Section 15F(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(b)) and to amend such an application for registration.

§ 249.1600a Form SBSE–A, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant that are not also registered or registering with the Commission as a broker or dealer.

This form shall be used instead of Form SBSE (§ 249.1600) to apply for registration as a security-based swap dealer or major security-based swap participant by firms that are not registered or registering with the Commission as a broker or dealer but that are registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant, pursuant to Section 15F(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(b)) and to amend such an application for registration. An entity that is registered or registering with the Commission as a broker or dealer and is also registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant shall apply for registration as a security-based swap dealer or major security-based swap participant on Form SBSE–BD (§ 249.1600b) and not on this Form SBSE–A.

§ 249.1600b Form SBSE–BD, for application for registration as a security-based swap dealer or major security-based swap participant or to amend such an application for registration by firms registered or registering with the Commission as a broker or dealer.

This form shall be used instead of either Form SBSE (§ 249.1600) or SBSE–A (§ 249.1600a) to apply for registration as a security-based swap dealer or major security-based swap participant solely by firms registered or registering with the Commission as a broker or dealer, pursuant to Section 15F(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(b)) and to amend such an application for registration. An entity that is registered or registering with the Commission as a broker or dealer and is also registered or registering with the Commodity Futures Trading Commission as a swap dealer or major swap participant, the entity shall apply for registration as a security-based swap dealer or major security-based swap participant on this Form SBSE–BD and not on Form SBSE–A.

Note: The following Appendices will not appear in the Code of Federal Regulations.

Appendix A: Application of Subtitle B of Title VII in the Cross-Border Context

The following tables summarize the Commission's proposed approach to applying requirements in Subtitle B of Title VII of the Dodd-Frank Act in the cross-border context.[1972] Specifically, as explained more fully in the main body of the release, the tables show how the entity-level requirements in Title VII apply to various dealing entities (identified in row 1 of each of the tables).[1973] The tables also show how various transaction-level requirements in Title VII apply to transactions between such dealing entities and various transaction counterparties (identified in row 8 of each of the tables), depending on the location of the dealer or the dealer's agent (identified in row 7). For the sake of completeness, these tables may include transaction scenarios that are unlikely to occur in practice.

Guide to Reading the Title VII Tables

The following provides a guide to reading the tables below.

- ''Yes''—Indicates that the Commission is proposing to apply a particular transaction-level requirement in Title VII to a security-based swap transaction between the dealing entity identified in row 1 and the transaction counterparty identified in row 8, or that the Commission is proposing to apply a particular entity-level requirement in Title VII to the dealing entity identified in row 1, and that substituted compliance would not be permitted.
- ''No''—Indicates that the Commission is not proposing to apply the particular Title VII requirement.
- ''N/A''—Indicates that the Title VII requirement is not applicable because it applies only to registered security-based swap dealers.
- ''Substituted Compliance'' (or ''Sub Comp'')—Indicates that the Commission is proposing to apply the Title VII requirement, but that we also are proposing to establish a policy and procedural framework under which we would consider permitting compliance with comparable regulatory requirements in a foreign jurisdiction to substitute for compliance with requirements of the Exchange Act, and the rules and regulations thereunder, relating to security-based swaps.
- ''Location of Dealer/Agent''—Refers to the location of the dealing entity booking the transaction or its agent.
  - Table I describes the application of Title VII to registered U.S. security-based swap dealers and is divided between security-based swap transactions that are conducted:
    - Other than through a U.S. bank's foreign branch (columns 2 through 6); or
    - Through a U.S. bank's foreign branch (columns 7 through 11).[1974]
  - Tables II–V are divided between transactions in which the dealing entity or its agent is:
    - ''Within the U.S.''—Indicates that a person within the United States acting on behalf of such non-U.S. dealer has solicited, negotiated, executed, or booked the transaction within the United States; or
    - ''Outside the U.S.''—Indicates that such non-U.S. dealer has solicited, negotiated, executed, and booked the transaction, without involving any person within the United States acting on its behalf.[1975]
- ''Transaction counterparty''—Refers to the counterparty with which the dealing entity (identified in row 1) enters into a transaction and whose counterparty credit risk the dealing entity ultimately bears. Therefore, the transaction counterparty is the booking location or booking entity of the trading counterparty with which the dealing entity transacts. A transaction counterparty may use personnel or an agent in a different location than the booking location or booking entity to negotiate the transaction with the dealing entity. The five transaction counterparties identified in the tables are as follows:
  - ''U.S. Person (other than Foreign Branch)''—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a U.S. person (other than a foreign branch of a U.S. bank);
  - ''Non-U.S. Person Within the U.S.''—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a non-U.S. person and the security-based swap transaction is conducted (*i.e.,* solicited, negotiated, executed, *or* booked) by or on behalf of the non-U.S. person transaction counterparty within the United States. This includes a non-U.S. person counterparty that uses its own personnel in its U.S. branch or office to conduct the transaction or that uses a U.S. affiliate or third party acting as its agent to conduct the transaction on its behalf;[1976]
  - ''Foreign Branch of U.S. Bank''—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a foreign branch of a U.S. bank and the security-based swap transaction is conducted (*i.e.,* solicited, negotiated, executed, *and* booked) by or on behalf of such foreign branch without involving any person within the United States acting on behalf of the foreign branch;
  - ''Non-U.S. Person w/U.S. Guarantee Outside the U.S.''—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a non-U.S. person whose performance under the security-based swap is guaranteed by a U.S. person (the ''U.S. Guarantor'') such that its counterparty has direct recourse to the U.S. Guarantor for performance of obligations owed by such non-U.S. person (*i.e.,* the guaranteed entity) under the security-based swap, and the security-based swap transaction is conducted (*i.e.,* solicited, negotiated, executed, *and* booked) by or on behalf of such non-U.S. person counterparty without involving any person within the United States acting on behalf of such non-U.S. person; and
  - ''Non-U.S. Person w/o U.S. Guarantee Outside the U.S.''—Indicates the transaction counterparty of the dealing entity (identified in row 1) is a non-U.S. person whose performance under the security-based swap is not guaranteed by a U.S. person, and the security-based swap transaction is conducted (*i.e.,* solicited, negotiated, executed, *and* booked), by or on behalf of such non-U.S. person counterparty, without involving any person within the United States acting on behalf of such non-U.S. person.[1977]

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[1972] The tables in this appendix are only a summary of the rules and interpretations proposed in this release and are provided for ease of reference. They do not supersede, and should be read in conjunction with, the proposed rules and interpretations discussed in the release. All defined terms used in the tables have the same meaning as set forth in the release, unless otherwise indicated.

[1973] Tables III and V also apply to non-U.S. dealers and other non-U.S. market participants.

[1974] The transactions identified in columns 7 and 8 of Table I are transactions in which a foreign branch of a U.S. bank is the counterparty to the transaction, but such transactions would not fall within the definition of ''transaction conducted through a foreign branch'' in proposed Rule 3a71–3(a)(4) under the Exchange Act.

[1975] A transaction in which the non-U.S. dealing entity and its agent are outside the United States may still be a ''transaction conducted within the United States,'' as defined in proposed Rule 3a71–3(a)(5) under the Exchange Act. For example, the non-U.S. dealing entity may direct its solicitation activity to a U.S. or non-U.S. person counterparty located within the United States.

[1976] If the non-U.S. person transaction counterparty is a registered security-based swap dealer, see Table II or IV for application of other transaction-level requirements. If the non-U.S. person transaction counterparty is an unregistered dealer or market participant that receives a U.S. guarantee, see Table II or III for application of other transaction-level requirements.

[1977] If the non-U.S. person counterparty is a registered security-based swap dealer, see Table IV for application of other transaction-level requirements.

Table I—Registered U.S. Security-Based Swap Dealers

Registered U.S. Security-Based Swap Dealer										
Entity-Level Requirements										
Capital	SEC or Prudential Regulator									
Margin	SEC or Prudential Regulator									
Other	SEC									
Transaction-Level Requirements										
Location of Dealer /Agent	Other Than Through a U.S. Bank's Foreign Branch					Through a U.S. Bank's Foreign Branch				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
Transaction-Level Requirements Applicable to Security-Based Swap Dealers										
External Business Conduct	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Segregation (Cleared SBS)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Segregation (Uncleared SBS)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Other Transaction-Level Requirements										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table II—Registered Non-U.S. Security-Based Swap Dealer with U.S. Guarantee

Registered Non-U.S. Security-Based Swap Dealer with U.S. Guarantee										
Entity-Level Requirements										
Capital	SEC (Substituted Compliance) or Prudential Regulator									
Margin	SEC (Substituted Compliance) or Prudential Regulator									
Other	SEC (Substituted Compliance)									
Transaction-Level Requirements										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
Transaction-Level Requirements Applicable to Security-Based Swap Dealers										
External Business Conduct	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No	No	No
Segregation (Cleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
Segregation (Uncleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
Other Transaction-Level Requirements										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table III—Unregistered Non-U.S. Dealer (or Market Participant) with U.S. Guarantee

Unregistered Non-U.S. Dealer (or Market Participant) with U.S. Guarantee										
Entity-Level Requirements										
Capital	N/A									
Margin	N/A									
Other	N/A									
Transaction-Level Requirements										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
Transaction-Level Requirements Applicable to Security-Based Swap Dealers										
External Business Conduct	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Segregation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Other Transaction-Level Requirements										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table IV—Registered Non-U.S. Security-Based Swap Dealer Without U.S. Guarantee

Registered Non-U.S. Security-Based Swap Dealer Without U.S. Guarantee										
Entity-Level Requirements										
Capital	SEC (Substituted Compliance) or Prudential Regulator									
Margin	SEC (Substituted Compliance) or Prudential Regulator									
Other	SEC (Substituted Compliance)									
Transaction-Level Requirements										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
Transaction-Level Requirements Applicable to Security-Based Swap Dealers										
External Business Conduct	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No	No	No
Segregation (Cleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
Segregation (Uncleared SBS)	Yes	See Release	Yes	See Release	See Release	Yes	See Release	Yes	See Release	See Release
Other Transaction-Level Requirements										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Clearing	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Trade Execution	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No

Table V—Unregistered Non-U.S. Dealer (or Market Participant) Without U.S. Guarantee

Unregistered Non-U.S. Dealer (or Market Participant) Without U.S. Guarantee										
Entity-Level Requirements										
Capital	N/A									
Margin	N/A									
Other	N/A									
Transaction-Level Requirements										
Location of Dealer /Agent	Within the U.S.					Outside the U.S.				
Transaction Counter-Party	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.	U.S. Person (other than Foreign Branch)	Non-U.S. Person Within the U.S.	Foreign Branch of U.S. Bank	Non-U.S. Person w/ U.S. Guarantee Outside the U.S.	Non-U.S. Person w/o U.S. Guarantee Outside the U.S.
Transaction-Level Requirements Applicable to Security-Based Swap Dealers										
External Business Conduct	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Segregation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Other Transaction-Level Requirements										
Regulatory Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No
Public Reporting	Yes	Yes	Sub Comp	Sub Comp	Sub Comp	Sub Comp	Sub Comp	No	No	No
Clearing	Sub Comp	No	Sub Comp	Sub Comp	No	Sub Comp	No	No	No	No
Trade Execution	Yes	No	Sub Comp	Sub Comp	No	Sub Comp	No	No	No	No

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Appendix B: Registration of Security-Based Swap Dealers

This table shows the Commission's proposed approach to applying the *de minimis* threshold in the security-based swap dealer definition in the cross-border context.[1978] Specifically, it indicates whether a potential security-based swap dealer listed along the top of the table would be required to count a transaction conducted in a dealing capacity with the various counterparties listed along the left hand column of the table toward its *de minimis* threshold.

[1978] This table in this appendix is only a summary of the rules and interpretations proposed in this release and is provided for ease of reference. It does not supersede, and should be read in conjunction with, the proposed rules and interpretations discussed in the release. All defined terms used in this table have the same meaning as set forth in the release, unless otherwise indicated.

Security-Based Swap Dealer Registration				
		Potential Security-Based Swap Dealer		
		U.S. Person	Non-U.S. Person	
			Potential Dealer/Agent Located Within the U.S.	Potential Dealer/Agent Located Outside the U.S.
Counterparty	U.S. Person (other than Foreign Branch)	Count	Count	Count
	Non-U.S. Person Within the U.S.	Count	Count	Count
	Non-U.S. Branch of U.S. Bank	Count	Count	Don't Count
	Non-U.S. Person Outside the U.S.	Count	Count	Don't Count

Appendix C: Re-Proposal of Registration Forms

Form SBSE

Form SBSE–A

Form SBSE–BD

Form SBSE

OMB Approval
OMB Number: .....3235-____ Expires:..... ..Month __, 2016 Estimated average burden hours per response: . . . . . _____. per amendment: . . . . . _____.

Application for Registration of Security-based Swap Dealers and Major Security-based Swap Participants

Form SBSE Instructions

A. General Instructions

1. FORM—Form SBSE is the Application for Registration as either a Security-based Swap Dealer or Major Security-based Swap Participant (collectively, ''SBS Entities''). SBS Entities that are not registered with the Commission as broker-dealers nor registered or registering with the Commodity Futures Trading Commission (''CFTC'') as a swap dealer or major swap participant must file this form to register with the Securities and Exchange Commission. An applicant must also file Schedules A, B, D, E, F, and G as appropriate. There is no Schedule C.

2. ELECTRONIC FILING—The applicant must file Form SBSE through the EDGAR system, and must utilize the EDGAR Filer Manual (as defined in 17 CFR 232. 11) to file and amend Form SBSE electronically to assure the timely acceptance and processing of those filings.[1979]

3. UPDATING—By law, the *applicant* must promptly update Form SBSE information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason [17 CFR 240.15Fb2–2]. In addition, the *applicant* must update any incomplete or inaccurate information contained on Form SBSE prior to filing a notice of withdrawal from registration on Form SBSE–W [17 CFR 15Fb3–2(a)].

4. CONTACT EMPLOYEE—The individual listed as the contact employee must be authorized to receive all compliance information, communications, and mailings, and be responsible for disseminating it within the *applicant's* organization.

5. FEDERAL INFORMATION LAW AND REQUIREMENTS—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. Sections

[1979] As discussed in the release proposing this Form, the Commission is currently developing a system to facilitate receipt of applications electronically. More specific instructions on how to file this Form may be included in the final version of the Form.

15F, 17(a) and 23(a) of the Exchange Act authorize the SEC to collect the information on this form from registrants. *See* 15 U.S.C. §§ 78o–10, 78q and 78w. Filing of this form is mandatory; however, the social security number information, which aids in identifying the applicant, is voluntary. The principal purpose of this Form is to permit the Commission to determine whether the *applicant* meets the statutory requirements to engage in the security-based swap business. The Commission maintain[s] a file of the information on this form and will make certain information collected via the form publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. § 3507. The information contained in this form is part of a system of records subject to the Privacy Act of 1974, as amended. The Securities and Exchange Commission has published in the **Federal Register** the Privacy Act Systems of Records Notice for these records.

B. Filing Instructions

1. FORMAT

a. Sections 1–14 must be answered and all fields requiring a response must be completed before the filing will be accepted.

b. Failure to follow instructions or properly complete the form may result in the application being delayed or rejected.

c. *Applicant* must complete the execution screen certifying that Form SBSE and amendments thereto have been executed properly and that the information contained therein is accurate and complete.

d. To amend information, the *applicant* must update the appropriate Form SBSE screens.

e. A paper copy, with original signatures, of the initial Form SBSE filing and amendments to Disclosure Reporting Pages (DRPs) must be retained by the *applicant* and be made available for inspection upon a regulatory request.

2. DISCLOSURE REPORTING PAGE (DRP)—Information concerning the *applicant* or *control affiliate* that relates to the occurrence of an event reportable under Item 12 must be provided on the *applicant's* appropriate DRP.

3. DIRECT AND INDIRECT OWNERS—Amend the Direct Owners and Executive Officers screen and the Indirect Owners screen when changes in ownership occur.

The mailing address for questions and correspondence is:

Explanation of Terms

(The Following Terms are Italicized Throughout This Form.)

1. General

APPLICANT—The security-based swap dealer or major security-based swap participant applying on or amending this form.

CONTROL—The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any *person* that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25% or more of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25% or more of the capital, is presumed to *control* that company.

STATE—Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, any other territory of the United States, or any subdivision or regulatory body thereof.

PERSON—An individual, partnership, corporation, trust, or other organization.

SELF-REGULATORY ORGANIZATION (SRO)—Any national securities or futures exchange, registered securities or futures association, registered clearing agency, or derivatives clearing organization.

SUCCESSOR—The term ''successor'' is defined to be an unregistered entity that assumes or acquires substantially all of the assets and liabilities, and that continues the business of, a predecessor security-based swap dealer or major security-based swap participant that ceases its security-based swap activities. [*See* Exchange Act Rule 15Fb2–5 (17 CFR 240.15Fb2–5]

2. FOR THE PURPOSE OF ITEM 12 AND THE CORRESPONDING DISCLOSURE REPORTING PAGES (DRPs)

CHARGED—Being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge).

CONTROL AFFILIATE—A person named in Items 10 or 11 as a control person or any other individual or organization that directly or indirectly controls, is under common control with, or is controlled by, the *applicant,* including any current employee of the applicant except one performing only clerical, administrative, support or similar functions, or who, regardless of title, performs no executive duties or has no senior policy making authority.

ENJOINED—Includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or a temporary restraining order.

FELONY—For jurisdictions that do not differentiate between a *felony* and a *misdemeanor,* a *felony* is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least $1,000. The term also includes a general court martial.

FOUND—Includes adverse final actions, including consent decrees in which the respondent has neither admitted nor denied the findings, but does not include agreements, deficiency letters, examination reports, memoranda of understanding, letters of caution, admonishments, and similar informal resolutions of matters.

INVESTMENT OR INVESTMENT–RELATED—Pertaining to securities, commodities, banking, savings association activities, credit union activities, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, municipal securities dealer, government securities broker or dealer, issuer, investment company, investment adviser, futures sponsor, bank, security-based swap dealer, major security-based swap participant, savings association, credit union, insurance company, or insurance agency).

INVOLVED—Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

MINOR RULE VIOLATION—A violation of a *self-regulatory organization* rule that has been designated as ''minor'' pursuant to a plan approved by the SEC or CFTC. A rule violation may be designated as ''minor'' under a plan if the sanction imposed consists of a fine of $2,500 or less, and if the sanctioned person does not contest the fine. (Check with the appropriate *self-regulatory organization* to determine if a particular rule violation has been designated as ''minor'' for these purposes).

MISDEMEANOR—For jurisdictions that do not differentiate between a *felony* and a *misdemeanor,* a *misdemeanor* is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than

$1,000. The term also includes a special court martial.

ORDER—A written directive issued pursuant to statutory authority and procedures, including orders of denial, suspension, or revocation; does not include special stipulations, undertakings or agreements relating to payments, limitations on activity or other restrictions unless they are included in an *order.*

PROCEEDING—Includes a formal administrative or civil action initiated by a governmental agency, *self-regulatory organization* or a *foreign financial regulatory authority;* a *felony* criminal indictment or information (or equivalent formal charge); or a *misdemeanor* criminal information (or equivalent formal charge). Does not include other civil litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge).

BILLING CODE 8011–01–P

FORM SBSE Page 1 (Execution Page)	Uniform Application for Security-based Swap Dealer and Major Security-based Swap Participant Registration Date:_____ SEC Filer No: _____	Official Use	Official Use Only

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of business as an SBS Entity, would violate the Federal securities laws and may result in disciplinary, administrative, injunctive or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.

[ ] APPLICATION **[ ] AMENDMENT**

1. Exact name, principal business address, mailing address, if different, and telephone number of the *applicant:*

A. Full name of the *applicant*:

B. Tax Identification No.: Applicant's CIK # (if any):

C. (1) The *business name* under which the *applicant* primarily conducts business, if different from 1A.

(2) List on Schedule D, Page 1, Section I any other name by which the *applicant* conducts business and where it is used.

D. If this filing makes a name change on behalf of an *applicant,* enter the new name and specify whether the change is to the [ ] *applicant's name* (1A) or [ ] business name (1C):

Please check above.

E. *Applicant's* Main Address: (Do not use a P.O. Box)

Number and Street 1: Number and Street 2:

City: State: Country: Zip/Postal Code:

Other business locations must be reported on Schedule E. Security-based swap dealers and major security-based swap participants that do not reside in the United States of America shall designate a U.S. agent for service of process on Schedule F.

F. Mailing Address, if different:

Number and Street 1: Number and Street 2:

City: State: Country: Zip/Postal Code:

G. Business Telephone Number:

H Website/URL:

I. Contact Employee:

Name: Title:

Telephone Number: Email Address:

J. Chief Compliance Officer designated by the *applicant* in accordance with Exchange Act Section 15F(k):

Name: Title:

Telephone Number: Email Address:

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's security-based swap activities, unless the applicant is a nonresident SBS Entity , may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 1E and 1F. If the applicant is a nonresident SBS Entity, it must complete Schedule F to designate a U.S. agent for service of process.

The undersigned certifies that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including schedules attached hereto, and other information filed herewith are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

Date (MM/DD/YYYY) Name of Applicant

By: Signature Name and Title of Person Signing on *Applicant's* behalf

This page must always be completed in full.

DO NOT WRITE BELOW THIS LINE – FOR OFFICIAL USE ONLY

FORM SBSE Page 2	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only

2.	A.	The applicant is registering as a security-based swap dealer: [ ] Yes [ ] No
	B.	The applicant is registering as a major security-based swap participant: [ ] Yes [ ] No Because it: (check all that apply) [ ] maintains a substantial security-based swap position [ ] has substantial counterparty exposure [ ] is highly leveraged relative to its capital position
3.	A.	Is the *applicant* a foreign security-based swap dealer that intends to: • work with the Commission and its primary regulator to have the Commission determine whether the requirements of its primary regulator's regulatory system are comparable to the Commission's [ ] Yes [ ] No • avail itself of a previously granted substituted compliance determination [ ] Yes [ ] No with respect to the requirements of Section 15F of the Exchange Act of 1934 and the rules and regulations thereunder?
	B.	If "*yes*" to either of the questions in Item 3.A. above, identify the foreign financial regulatory authority that serves as the *applicant's* primary regulator and for which the Commission has made, or may make, a substituted compliance determination: _____ _____.
	C.	If the applicant is relying on a previously granted substituted compliance determination, please describe how the *applicant* satisfies any conditions the Commission may have placed on such substituted compliance determination: _____ _____.
4.		Does the applicant intend to compute capital or margin, or price customer or proprietary positions, using mathematical models? [ ] Yes [ ] No
5.		Is the *applicant* subject to regulation by a prudential regulator, as defined in Section 1a(39) of the Commodity Exchange Act. [ ] Yes [ ] No If "*yes*," identify the prudential regulator: _____.
6.		Is the *applicant* a U.S. branch of a non-resident entity? [ ] Yes [ ] No If "*yes*," identify the non-resident entity and its location: _____.
7.		Briefly describe the *applicant's* business: _____ _____ _____ _____ _____
8.	A.	Indicate legal status of the *applicant*: [ ] Corporation [ ] Limited Liability Company [ ] Other (specify) [ ] Partnership [ ]
	B.	Month *applicant's* fiscal year ends: [ ]
	C.	Indicate date and place *applicant* obtained its legal status (i.e., state or country where incorporated, where partnership agreement was filed, or where *applicant* entity was formed): State of formation: [ ] Country of formation: [ ] Date of formation: MM/DD/YYYY [ ] *Schedule A and, if applicable, Schedule B must be completed as part of all initial applications.*
9.		Is the *applicant* at the time of this filing *succeeding* to the business of a currently registered SBS Entity? YES [ ] NO [ ] *If "Yes," complete appropriate items on Schedule D, Page 1, Section III.*
10.		Does the *applicant* hold or maintain any funds or securities to collateralize counterparty transactions? [ ] [ ]

11.		Does the *applicant* have any arrangement:		
	A.	With any other *person*, firm, or organization under which any books or records of the *applicant* are kept, maintained, or audited by such other *person*, firm or organization?	[ ]	[ ]
	B.	Under which any other person, firm or organization executes, trades, custodies, clears or settles on behalf of the applicant (including any *SRO* or swap execution facility in which the applicant is a member)? *If "Yes" to any part of Item 11, complete appropriate items on Schedule D, Page 1, Section IV.*	[ ]	[ ]
12.		Does any *person* directly or indirectly:		
	A.	*Control* the management or policies of the *applicant* through agreement or otherwise?	[ ]	[ ]
	B.	Wholly or partially finance the business of the *applicant*? *Do not answer "Yes" to 12B if the person finances the business of the applicant through: 1) a public offering of securities made pursuant to the Securities Act of 1933; or 2) credit extended in the ordinary course of business by suppliers, banks, and others.* *If "Yes" to any part of Item 12, complete appropriate items on Schedule D, Page 1, Section IV.*	[ ]	[ ]
13.	A.	Directly or indirectly, does the *applicant control*, is the *applicant controlled* by, or is the *applicant* under common *control* with, any partnership, corporation, or other organization that is engaged in the securities or investment advisory business? *If "Yes" to item 13A, complete appropriate items on Schedule D, Page 2, Section V.*	[ ]	[ ]
	B.	Directly or indirectly, is applicant controlled by any bank holding company or does applicant control, is applicant controlled by, or is applicant under common control with any bank (as defined in 15 U.S.C. 78c(a)(6)) or any foreign bank? *If "Yes" to item 13B, complete appropriate items on Schedule D, Page 3, Section VI.*	[ ]	[ ]

FORM SBSE Page 3	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only

	14. Use the appropriate DRP for providing details to "yes" answers to the questions in Item 14. Refer to the Explanation of Terms section of Form SBSE Instructions for explanations of italicized terms.		
CRIMINAL DISCLOSURE	A. In the past ten years has the *applicant* or a *control affiliate*:		
	(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any *felony*?	YES [ ] NO [ ]	
	(2) Been charged with a *felony*	[ ] [ ]	
	B. In the past ten years has the *applicant* or a *control affiliate*:		
	(1) Been convicted of or pled guilty or or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	[ ] [ ]	
	(2) Been *charged* with a *misdemeanor* specified in 14B(1)?	[ ] [ ]	
REGULATORY ACTION DISCLOSURE	C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:		
	(1) *Found* the *applicant* or a *control affiliate* to have made a false statement or omission?	[ ] [ ]	
	(2) *Found* the *applicant* or a *control affiliate* to have been involved in a violation of its regulations or statutes?	[ ] [ ]	
	(3) *Found* the *applicant* or a *control affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, revoked, or restricted?	[ ] [ ]	
	(4) Entered an *order* against the *applicant* or a *control affiliate* in connection with *investment-related* activity?	[ ] [ ]	
	(5) Imposed a civil money penalty on the *applicant* or a *control affiliate*, or ordered the *applicant* or a *control affiliate* to cease and desist from any activity?	[ ] [ ]	
	D. Has any other federal regulatory agency, state regulatory agency, or *foreign financial regulatory authority*:		
	(1) Ever found the *applicant* or a *control affiliate* to have made a false statement or omission or been dishonest, unfair, or unethical?	[ ] [ ]	
	(2) Ever found the *applicant* or a *control affiliate* to have been involved in a violation of *investment-related* regulations or statutes?	[ ] [ ]	
	(3) Ever found the *applicant* or a *control affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?	[ ] [ ]	
	(4) In the past ten years, entered an order against the *applicant* or a *control affiliate* in connection with an *investment-related* activity?	[ ] [ ]	
	(5) Ever denied, suspended, or revoked the *applicant's* or a *control affiliate's* registration or license or otherwise, by order, prevented it from associating with an *investment-related* business or restricted its activities?	[ ] [ ]	
	E. Has any *self-regulatory organization*:		
	(1) *found* the *applicant* or a *control affiliate* to have made a false statement or omission?	[ ] [ ]	
	(2) *found* the *applicant* or a *control affiliate* to have been involved in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and exchange Commission)?	[ ] [ ]	
	(3) *found* the *applicant* or a *control affiliate* to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?	[ ] [ ]	
	(4) Disciplined the *applicant* or a *control affiliate* by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?	[ ] [ ]	
	F. Has the *applicant's* or a *control affiliate's* authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?	[ ] [ ]	
	G. Is the *applicant* or a *control affiliate* now the subject of any regulatory *proceeding* that could result in a "yes" answer to any part of 14C, D, or E?	[ ] [ ]	

FORM SBSE Page 4	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only
CIVIL JUDICIAL DISCLOSURE	H. (1) Has any domestic or foreign civil judicial court:		
	(a) In the past ten years, enjoined the *applicant* or a *control affiliate* in connection with any investment-related activity?	YES [ ] NO [ ]	
	(b) Ever *found* that the *applicant* or a *control affiliate* was involved in a violation of *investment-related* statutes or regulations?	[ ] [ ]	
	(c) Ever dismissed, pursuant to a settlement agreement, an *investment-related* civil judicial action brought against the *applicant* or *control affiliate* by a state or *foreign financial regulatory authority*?	[ ] [ ]	
	(2) Is the *applicant* or a *control affiliate* now the subject of any civil judicial *proceeding* that could result in a "yes" answer to any part of 14H(1)?	[ ] [ ]	
FINANCIAL DISCLOSURE	I. In the past ten years has the *applicant* or a *control affiliate* ever been a securities firm or a futures firm, or a control affiliate of a securities firm or a futures firm that:		
	(1) Has been the subject of a bankruptcy petition?	[ ] [ ]	
	(2) Has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?	[ ] [ ]	
15.	Is the *applicant* registered with the Commission as an investment adviser or municipal securities advisor or with the CFTC as a commodity trading adviser? If "yes," provide all unique identification numbers assigned to the firm relating to this business on Schedule D, Page 1, Section II.	[ ] [ ]	
16. A.	Does *applicant* effect transactions in commodity futures, commodities or commodity options as a broker for others or as a dealer for its own account? If "yes," provide all unique identification numbers assigned to the firm relating to this business on Schedule D, Page 1, Section II.	[ ] [ ]	
B.	Does *applicant* engage in any other investment-related, non-securities business? If "yes," provide all unique identification numbers assigned to the firm relating to this business and describe each other business briefly on Schedule D, Page 1, Section II.	[ ] [ ]	
17.	Is the *applicant* registered with a foreign financial regulatory authority? If "*yes*," list all such registrations on Schedule F, Page 1, Section II.	[ ] [ ]	

Schedule A of FORM SBSE DIRECT OWNERS AND EXECUTIVE OFFICERS (Answer for Form SBSE Item 8)	*Applicant* Name: _____ Date:_____ SEC Filer No: _____	**Official Use**

1. Use Schedule A to provide information on the **direct** owners and executive officers of the applicant. Use Schedule B to provide information on **indirect** owners. **Complete each column.**

2. List below the names of:

   (a) Each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, Director, and individuals with similar status or function;

   (b) In the case of an *applicant* that is a corporation, each shareholder that directly owns 5% or more of a class of a voting security of the *applicant*, unless the *applicant* is a public reporting company (a company subject to Sections 12 or 15(d) of the Securities Exchange Act of 1934).

   Direct owners include any *person* that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of a voting security of the *applicant*. For purposes of this Schedule, a *person* beneficially owns any securities (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence, or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant or right to purchase the security.

   (c) In the case of an *applicant* that is a partnership, **all** general partners, and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of the partnership's capital; and

   (d) In the case of a trust that directly owns 5% or more of a class of a voting security of the *applicant*, or that has the right to receive upon dissolution, or has contributed, 5% or more of the *applicant*'s capital, the trust and each trustee.

   (e) In the case of an *applicant* that is a Limited Liability Company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 5% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.

3. Are there any indirect owners of the applicant required to be reported on Schedule B? [ ] Yes [ ] No

4. In the "DE/FE/I" column, enter "DE" if the owner is a domestic entity, or enter "FE" if owner is an entity incorporated or domiciled in a foreign country, or enter "I" if the owner is an individual.

5. Complete the "Title or Status" column by entering board/management titles; status as partner, trustee, sole proprietor, or shareholder; and for shareholders, the class of securities owned (if more than one is issued).

6. Ownership Codes are:

NA -	less than 5%	B -	10% but less than 25%	D -	50% but less than 75%
A -	5% but less than 10%	C -	25% but less than 50%	E -	75% or more

7. (a) In the "Control Person" column, enter "Yes" if *person* has *control* as defined in the instructions to this form, and enter "No" if the *person* does not have *control.* Note that under this definition most executive officers and all 25% owners, general partners, and trustees would be "*control persons*".

   (b) In the "PR " column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Title or Status	Date Title or Status Acquired		Ownership Code	Control Person		CRD and/or IARD No. and/or foreign business No. If None, IRS Tax No.	Official Use Only
			MM	YYYY			PR		
	For individuals not presently registered through CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
	For individuals not presently registered through CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
	For individuals not presently registered through CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service)								
	For individuals not presently registered through CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								

Schedule B of FORM SBSE **INDIRECT OWNERS** (Answer for Form SBSE Item 8)	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	**Official Use**

1. Use Schedule B to provide information on the **indirect** owners of the *applicant*. Use Schedule A to provide information on **direct** owners. **Complete each column.**

2. With respect to each owner listed on Schedule A, (except individual owners), list below:

   (a) In the case of an owner that is a corporation, each of its shareholders that beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 25% or more of a class of a voting security of that corporation.
   For purposes of this Schedule, a *person* beneficially owns any securities (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence, or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant or right to purchase the security.

   (b) In the case of an owner that is a partnership, **all** general partners, and those limited and special partners that have the right to receive upon dissolution, or have contributed, 25% or more of the partnership's capital; and

   (c) In the case of an owner that is a trust, the trust and each trustee.

   (d) In the case of an owner that is a Limited Liability Company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 25% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.

3. Continue up the chain of ownership listing all 25% owners at each level. Once a public company (a company subject to Sections 12 or 15(d) of the Securities Exchange Act of 1934) is reached, no ownership information further up the chain of ownership need be given.

4. In the "DE/FE/I" column, enter "DE" if the owner is a domestic entity, or enter "FE" if owner is an entity incorporated or domiciled in a foreign country, or enter "I" if the owner is an individual.

5. Complete the "Status" column by status as partner, trustee, shareholder, etc., and if shareholder, class of securities owned (if more than one is issued).

6. Ownership Codes are:
   C - 25% but less than 50% D - 50% but less than 75% E - 75% or more F - Other General Partners

7. (a) In the "Control Person" column, enter "Yes" if *person* has *control* as defined in the instructions to this form, and enter "No" if the *person* does not have *control*. Note that under this definition most executive officers and all 25% owners, general partners, and trustees would be "*control persons*".

   (b) In the "PR" column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Entity in Which Interest is Owned	Status	Date Status Acquired		Ownership Code	Control Person		CRD and/or IARD No. and/or foreign business No. If None, IRS Tax No.	Official Use Only
				MM	YYYY			PR		

Schedule D of FORM SBSE Page 1	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only

Use Schedule D Page 1 to report details for items listed below.
This is an [ ] INITIAL [ ] AMENDED detail filing for the Form SBSE items checked below:

Section I ***Other Business Names***

(Check if applicable) [ ] Item 1C(2)
List each of the "other" names and the *state(s) or country(ies)* in which they are used.

1. Name	State/Country	2. Name	State/Country
3. Name	State/Country	4. Name	State/Country

Section II ***Other Business***

(Check if applicable) [ ] Item 15 [ ] Item 16A [ ] Item 16B
Applicant must complete a separate Schedule D Page 1 for each affirmative response in this section.

Unique Identification Number(s):	*Assigning Regulator(s)/Entity(s):*

Briefly describe any other investment-related, non-securities business. Use reverse side of this sheet for additional comments if necessary.

Section III ***Successions***

(Check if applicable) [ ] Item 9

Date of Succession MM DD YYYY / /	*Name of Predecessor*
IRS Employer Number (if any)	SEC File Number (if any)

Briefly describe details of the succession including any assets or liabilities not assumed by the successor. Use reverse side of this sheet for additional comments if necessary.

Section IV ***Record Maintenance Arrangements / Business Arrangements / Control Persons / Financings***

(Check one) [ ] Item 11A [ ] Item 11B [ ] Item 12A [ ] Item 12B
Applicant must complete a separate Schedule D Page 1 for each affirmative response in this section including any multiple responses to any item. Complete the "Effective Date" box with the Month, Day and Year that the arrangement or agreement became effective. When reporting a change or termination of an arrangement, enter the effective date of the change.

Firm or Organization Name	SEC File, CRD, NFA, IARD, foreign business No., and/or CIK Number (if any)	
Business Address *(Street, City, State/Country, Zip + 4 Postal Code)*	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Individual Name	CRD, NFA, and/or IARD Number (if any)	
Business Address (if applicable) *(Street, City, State/Country, Zip + 4 Postal Code)*	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /

Briefly describe the nature of the arrangement with respect to books or records (ITEM 11A); the nature of the execution, trading, custody, clearing or settlement arrangement (ITEM 11B);the nature of the control or agreement (ITEM 12A); or the method and amount of financing (ITEM 12B). Use reverse side of this sheet for additional comments if necessary.

For ITEM 12A ONLY - If the control person is an individual not presently registered through CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service).

Schedule D of FORM SBSE Page 2	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use	Official Use Only

Use this Schedule D Page 2 to report details for Item 13A. Supply details for all partnerships, corporations, organizations, institutions and individuals necessary to answer each item completely. Use additional copies of Schedule D Page 2 if necessary.

Use the "Effective Date" box to enter the Month, Day, and Year that the affiliation was effective or the date of the most recent change in the affiliation.

This is an [ ] INITIAL [ ] AMENDED detail filing for Form SBSE Item 13A

[ ] 13A. Directly or indirectly, does *applicant control*, is *applicant controlled* by, or is *applicant* under common *control* with, any partnership, corporation, or other organization that is engaged in the securities or investment advisory business?

Section V ***Complete this section for control issues relating to ITEM 13A only.***

The details supplied relate to:

1.	Partnership, Corporation, or Organization Name	CRD Number (if any)

(*check only one*)

This Partnership, Corporation, or Organization [ ] *controls applicant* [ ] is *controlled* by *applicant* [ ] is under common *control* with *applicant*

Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /

Is Partnership, Corporation or Organization a foreign entity" [ ] Yes [ ] No	If Yes, provide country of domicile or incorporation"	Check "Yes" or "No" for activities of this partnership Corporation, or organization: ►	Securities [ ] Yes [ ] No Activities:	Investment Advisory [ ] Yes [ ] No Activities:

Briefly describe the *control* relationship. Use reverse side of this sheet for additional comments if necessary.

2.	Partnership, Corporation, or Organization Name	CRD Number (if any)

(*check only one*)

This Partnership, Corporation, or Organization [ ] *controls applicant* [ ] is *controlled* by *applicant* [ ] is under common *control* with *applicant*

Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /

Is Partnership, Corporation or Organization a foreign entity" [ ] Yes [ ] No	If Yes, provide country of domicile or incorporation"	Check "Yes" or "No" for activities of this partnership Corporation, or organization: ►	Securities [ ] Yes [ ] No Activities:	Investment Advisory [ ] Yes [ ] No Activities:

Briefly describe the *control* relationship. Use reverse side of this sheet for additional comments if necessary.

3.	Partnership, Corporation, or Organization Name	CRD Number (if any)

(*check only one*)

This Partnership, Corporation, or Organization [ ] *controls applicant* [ ] is *controlled* by *applicant* [ ] is under common *control* with *applicant*

Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /

Is Partnership, Corporation or Organization a foreign entity" [ ] Yes [ ] No	If Yes, provide country of domicile or incorporation"	Check "Yes" or "No" for activities of this partnership Corporation, or organization: ►	Securities [ ] Yes [ ] No Activities:	Investment Advisory [ ] Yes [ ] No Activities:

Briefly describe the control relationship. Use reverse side of this sheet for additional comments if necessary.

If applicant has more than 3 organizations to report, complete additional Schedule D Page 2s.

Schedule D of FORM SBSE Page 3	*Applicant* Name: _____ Date:_____ SEC Filer No: _____	Official Use	Official Use Only

Use Schedule D Page 3 to report details for Item 13B. Report only new information or changes/updates to previously submitted details. Do not report previously submitted information. Supply details for all partnerships, corporations, organizations, institutions and individuals necessary to answer each item completely. Use additional copies of Schedule D Page 3 if necessary.

Use the "Effective Date" box to enter the Month, Day, and Year that the affiliation was effective or the date of the most recent change in the affiliation.

This is an [ ] INITIAL [ ] AMENDED detail filing for Form SBSE Item 13B

[ ] 13B. Directly or indirectly, is applicant controlled by any bank holding company or does applicant control, is applicant controlled by, or is applicant under common control with any bank (as defined in 15 U.S.C. 78c(a)(6)) or any foreign bank?

Section VI ***Complete this section for control issues relating to ITEM 12B only.***

Provide the details for each organization or institution that *controls* the *applicant*, including each organization or institution in the *applicant's* chain of ownership. The details supplied relate to:

1.	Financial Institution Name	CRD Number (if applicable)
Institution Type (*e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.*)		Effective Date MM DD YYYY / / Termination Date MM DD YYYY / /
Business Address (Street, City, State/Country, Zip + 4/Postal Code		If foreign, country of domicile or incorporation
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.		
2.	Financial Institution Name	CRD Number (if applicable)
Institution Type (*e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.*)		Effective Date MM DD YYYY / / Termination Date MM DD YYYY / /
Business Address (Street, City, State/Country, Zip + 4/Postal Code		If foreign, country of domicile or incorporation
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.		
3.	Financial Institution Name	CRD Number (if applicable)
Institution Type (*e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.*)		Effective Date MM DD YYYY / / Termination Date MM DD YYYY / /
Business Address (Street, City, State/Country, Zip + 4/Postal Code		If foreign, country of domicile or incorporation
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.		
4.	Financial Institution Name	CRD Number (if applicable)
Institution Type (*e.g., bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, foreign bank.*)		Effective Date MM DD YYYY / / Termination Date MM DD YYYY / /
Business Address (Street, City, State/Country, Zip + 4/Postal Code		If foreign, country of domicile or incorporation
Briefly describe the control relationship. Use reverse side of this sheet for additional comments, if necessary.		

If applicant has more than 4 organizations/institutions to report, complete additional Schedule D page 3s.

Schedule E of FORM SBSE Page 1	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use

INSTRUCTIONS

General: Use this schedule to identify other business locations of the *applicant.* Repeat Items 1-6 for each other business location. Each item must be completed unless otherwise noted. Use additional copies of this schedule as necessary.

Specific:

Item 1. Specify only one box. Check "Add" when the applicant is filing the initial notice to inform the Commission that it has opened another business location, "Delete" when the applicant closes another business location, and "Amendment" to indicate any other change to previously filed information.

Item 2. Complete this item for all entries. Provide the date that the other business location was opened (ADD), closed (DELETE), or the effective date of the change (AMENDMENT).

Item 3. Complete this item for all entries. A physical location must be included; post office box designations alone are not sufficient.

Item 4. Complete this item only when the *applicant* changes the address of an existing other business location.

Item 5. If the other business location occupies or shares space on premises within a bank, or other financial institution, enter the name of the institution in the space provided.

Item 6. Complete this item for all entries. Enter the name of the associated person who is responsible for the operations of, and is physically at, this location.

1. Check only one box: [ ] Add [ ] Delete [ ] Amendment
2. Effective Date: _____
3. Street: _____
   P.O. Box (if applicable), Suite, Floor: _____
   City, State/Country, Zip Code +4/Postal Code: _____
4. Street: _____
   P.O. Box (if applicable), Suite, Floor: _____
   City, State/Country, Zip Code +4/Postal Code: _____
5. Institution Name: _____
6. Responsible Associated Person: _____

1. Check only one box: [ ] Add [ ] Delete [ ] Amendment
2. Effective Date: _____
3. Street: _____
   P.O. Box (if applicable), Suite, Floor: _____
   City, State/Country, Zip Code +4/Postal Code: _____
4. Street: _____
   P.O. Box (if applicable), Suite, Floor: _____
   City, State/Country, Zip Code +4/Postal Code: _____
5. Institution Name: _____
6. Responsible Associated Person: _____

1. Check only one box: [ ] Add [ ] Delete [ ] Amendment
2. Effective Date: _____
3. Street: _____
   P.O. Box (if applicable), Suite, Floor: _____
   City, State/Country, Zip Code +4/Postal Code: _____
4. Street: _____
   P.O. Box (if applicable), Suite, Floor: _____
   City, State/Country, Zip Code +4/Postal Code: _____
5. Institution Name: _____
6. Responsible Associated Person: _____

Schedule F of FORM SBSE Page 1	*Applicant* Name: _____ Date:_____ SEC Filer No: _____	Official Use

Section I ***Service of Process and Certification Regarding Access to Records***

Each nonresident security-based swap dealer and non-resident security-based swap participant shall use Section I to identify its United States agent for service of process and the certify that it can

(1) provide the Commission with prompt access to its books and records, and

(2) submit to onsite inspection and examination by the Commission.

1. Service of Process:

A. Name of United States person *applicant* designates and appoints as agent for service of process

B. Address of United States person *applicant* designates and appoints as agent for service of process

The above identified agent for service of process may be served any process, pleadings, subpoenas, or other papers in

(a) any investigation or administrative proceeding conducted by the Commission that relates to the *applicant* or about which the *applicant* may have information; and

(b) any civil or criminal suit or action or proceeding brought against the *applicant* or to which the *applicant* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States or of any of its territories or possessions or of the District of Columbia, to enforce the Exchange Act. The *applicant* has stipulated and agreed that any such suit, action or administrative proceeding may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

2. Certification regarding access to records:

Applicant can as a matter of law;

(1) provide the Commission with prompt access to its books and records, and

(2) submit to onsite inspection and examination by the Commission.

Applicant must attach to this Form SBSE a copy of the opinion of counsel it is required to obtain in accordance with paragraph (c)(2) or (c)(3) of Exchange Act Rule 15Fb2-4, as appropriate [paragraphs (c)(2) or (c)(3) of 17 CFR 240.15Fb2-4.

Signature:

Name and Title:

Date:

Section II ***Registration with Foreign Financial Regulatory Authorities***

Complete this Section for Registration with Foreign Financial Regulatory Authorities relating to ITEM 17. Each security-based swap dealer and major security-based swap participant that is registered with a foreign financial regulatory authority must list on Section II of this Schedule F, for each foreign financial regulatory authority with which it is registered, the following information:

1. _____ English Name of Foreign Financial Regulatory Authority	_____ Foreign Registration No. (if any)	_____ English Name of Country:
2. _____ English Name of Foreign Financial Regulatory Authority	_____ Foreign Registration No. (if any)	_____ English Name of Country:
3. _____ English Name of Foreign Financial Regulatory Authority	_____ Foreign Registration No. (if any)	_____ English Name of Country:

If applicant has more than 3 Foreign Financial Regulatory Authorities to report, complete additional Schedule F Page 1s.

Schedule G of FORM SBSE CERTIFICATION ON STATUTORY DISQUALIFICATION	*Applicant* Name: _____ Date: _____ SEC Filer No: _____	Official Use

Use Schedule G to certify that none of the *applicant's* associated persons is subject to statutory disqualification (as that term is defined in Section 3(a)(39) of the Exchange Act [15 U.S.C. 78c(a)(39)].

Instructions: This certification must be signed by the *applicant's* Chief Compliance Officer designated pursuant to Exchange Act Section 15F(k) or by his or her designee.

For purposes of this Form, the term *associated person* shall have the meaning as specified in Section 3(a)(70) of the Exchange Act [15 U.S.C. 78c(a)(70)].

This is a: [ ] CERTIFICATION [ ] RE-CERTIFICATION

The *applicant* certifies that it has

(a) performed background checks on all of its *associated persons* who effect or are involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf, and

(b) determined that no *associated person* who effects or is involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(39)].

Applicant Name:	Date:
Signature of Chief Compliance Officer or Designee:	
Name of Chief Compliance Officer or Designee:	If Designee, Title of Designee:

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Items 14A and 14B*** of Form SBSE;

Check [√] item(s) being responded to:

14A. In the past ten years has the applicant or a control affiliate:

[ ] (1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any felony?

[ ] (2) Been charged with a felony?

14B. In the past ten years has the applicant or a control affiliate:

[ ] (1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a misdemeanor involving: investments or an investment-related business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?

[ ] (2) Been charged with a misdemeanor specified in 14B(1)?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

If a *control affiliate* is an individual or organization registered through the CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

Applicants must attach a copy of each applicable court document (*i.e.*, criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) if not previously submitted through CRD (as they could be in the case of a *control affiliate* registered through CRD). Documents will not be accepted as disclosure in lieu of answering the questions on this DRP.

PART I

A. The *person(s)* or entity(ies) for whom this DRP (SBSE) is being filed is (are):

[ ] The *Applicant*

[ ] *Applicant* and one or more *control affiliate(s)*

[ ] One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

SBSE DRP – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is [ ] Firm [ ] Individual

Registered: [ ] Yes [ ] No

NAME (For individuals, Last, First, Middle)

[ ] This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

PART II

1. If charge(s) were brought against an organization over which the applicant or control affiliate exercise(d) control: Enter organization name, whether or not the organization was an investment-related business and the applicant's or control affiliate's position, title or relationship.

_____

2. Formal Charge(s) were brought in: (include name of Federal, Military, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case number).

_____

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

A. Date First Charged (MM/DD/YYYY): [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

B. Event Disclosure Detail (include Charge(s)/Charge Description(s), and for each charge provide: 1. number of counts, 2. *felony* or *misdemeanor*, 3. plea for each charge, and 4. product type if charge is *investment-related*):

_____

_____

_____

C. Current status of the Event? [ ] Pending [ ] On Appeal [ ] Final

D. Event Status Date (complete unless status is Pending) (MM/DD/YYYY): [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

4. Disposition Disclosure Detail: Include for each charge, A. Disposition Type [e.g., convicted, acquitted, dismissed, pretrial.], B. Date, C. Sentence/Penalty, D. Duration [if sentence-suspension, probation, etc.], E. Start Date of Penalty, F. Penalty/Fine Amount and G. Date Paid.

_____

_____

_____

_____

_____

_____

5. Provide a brief summary of the circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the char(s) occurred. (The information must fit within the space provided.)

_____

_____

_____

_____

_____

_____

_____

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Items 14C, 14D, 14E, 14F, or 14G*** of Form SBSE;

Check [√] item(s) being responded to:

14C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:

[ ] (1) Found the applicant or a control affiliate to have made a false statement or omission?

[ ] (2) Found the applicant or a control affiliate to have been involved in a violation of its regulations or statutes?

[ ] (3) the applicant or a control affiliate to have been a cause of an investment-related business having its authorization to do business denied, revoked, or restricted?

[ ] (4) Entered an order against the applicant or a control affiliate in connection with investment-related activity?

[ ] (5) Imposed a civil money penalty on the applicant or a control affiliate, or ordered the applicant or a control affiliate to cease and desist from any activity?

14D. Has any other federal regulatory agency, state regulatory agency, or foreign financial regulatory authority:

[ ] (1) Ever found the applicant or a control affiliate to have made a false statement or omission or been dishonest, unfair, or unethical?

[ ] (2) Ever found the applicant or a control affiliate to have been involved in a violation of investment-related regulations or statutes?

[ ] (3) Ever found the applicant or a control affiliate to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?

[ ] (4) In the past ten years, entered an order against the applicant or a control affiliate in connection with an investment-related activity?

[ ] (5) Ever denied, suspended, or revoked the applicant's or a control affiliate's registration or license or otherwise, by order, prevented it from associating with an investment-related business or restricted its activities?

14E. Has any self-regulatory organization or commodities exchange ever:

[ ] (1) found the applicant or a control affiliate to have made a false statement or omission?

[ ] (2) found the applicant or a control affiliate to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and exchange Commission)?

[ ] (3) found the applicant or a control affiliate to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?

[ ] (4) Disciplined the applicant or a control affiliate by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?

14F. [ ] Has the applicant's or a control affiliate's authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?

14G. [ ] Is the applicant or a control affiliate now the subject of any regulatory proceeding that could result in a "yes" answer to any part of 14C, D, or E?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items 14C, 14D, 14E, 14F or 14G. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *control affiliate* is an individual or organization registered through the CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):

[ ] The *Applicant*

[ ] Applicant and one or more *control affiliate(s)*

[ ] One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

SBSE DRP – CONTROL AFFILIATE

CRD NUMBER	This *Control Affiliate* is [ ] Firm [ ] Individual

Registered: [ ] Yes [ ] No

NAME (For individuals, Last, First, Middle)

[ ] This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

PART II

1. Regulatory Action initiated by:

[ ] SEC [ ] Other Federal [ ] State [ ] SRO [ ] Foreign

(Full name of regulator, foreign financial regulatory authority, federal, state or SRO)

2. Principal Sanction: (check appropriate item)

[ ] Civil and Administrative Penalty(ies)/Fine(s)
[ ] Bar
[ ] Cease and Desist
[ ] Censure
[ ] Denial
[ ] Disgorgement
[ ] Expulsion
[ ] Injunction
[ ] Prohibition
[ ] Reprimand
[ ] Restitution
[ ] Revocation
[ ] Suspension
[ ] Undertaking
[ ] Other _____

Other Sanctions:

_____
_____
_____

3.

3. Date Initiated (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

4. Docket/Case Number:

5. Control Affiliate Employing Firm when activity occurred which led to the regulatory action (if applicable):

6. Principal Product Type: (check appropriate item)

[ ] Annuity(ies) - Fixed
[ ] Annuity(ies) – Variable
[ ] Banking Products (other than CD(s))
[ ] CD(s)
[ ] Commodity Option(s)
[ ] Debt – Asset Backed
[ ] Debt - Corporate
[ ] Debt - Government
[ ] Debt - Municipal
[ ] Derivative(s)
[ ] Direct Investment(s) – DPP & LP Interest(s)
[ ] Equity - OTC
[ ] Equity Listed (Common & Preferred Stock)
[ ] Futures - Commodity
[ ] Futures - Financial
[ ] Index Option(s)
[ ] Insurance
[ ] Investment Contract(s)
[ ] Money Market Fund(s)
[ ] Mutual Fund(s)
[ ] No Product
[ ] Options
[ ] Penny Stock(s)
[ ] Unit Investment Trust(s)
[ ] Other _____

Other Product Type:

7. Describe the allegations related to this regulatory action. (The information must fit within the space provided.):

_____
_____
_____
_____

8. Current Status? [ ] Pending [ ] On Appeal [ ] Final

9. If on appeal, regulatory action appealed to: (SEC, SRO, Federal or State Court) and Date Appeal Filed:

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 13 only.

10. How was matter resolved: (check appropriate item)

[ ] Acceptance, Waiver & Consent (AWC) [ ] Consent [ ] Settled
[ ] Decision & Order of Offer of Settlement [ ] Dismissed [ ] Stipulation and Consent
[ ] Decision [ ] Order [ ] Vacated

11. Resolution Date (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation:

12. A. Were any of the following Sanctions Ordered? (Check all appropriate items):

[ ] Monetary/Fine [ ] Revocation/Expulsion/Denial [ ] Disgorgement/Restitution
Amount $_____ [ ] Censure [ ] Cease and Desist/Injunction [ ] Bar [ ] Suspension

B. Other Sanctions Ordered:

C. Sanction Detail: If suspended, enjoined or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification, by exam/retraining was a condition of the sanction, provide length of time given to re-qualify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against applicant or control affiliate, date paid and if any portion of penalty was waived.

13. Provide a brief summary of details related to the action status and (or) disposition and include relevant terms, conditions and dates. (The information must fit within the space provided.)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (BD)] is an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Items 14H*** of Form BD;

Check [√] item(s) being responded to:

14H(1) Has any domestic or foreign civil judicial court:

[ ] (a) in the past ten years, enjoined the applicant or a control affiliate in connection with any investment-related activity?

[ ] (b) ever found that the applicant or a control affiliate was involved in a violation of investment-related statutes or regulations?

[ ] (c) ever dismissed, pursuant to a settlement agreement, an investment-related civil judicial action brought against the applicant or a control affiliate by a state or foreign financial regulatory authority?

14H(2) [ ] Is the applicant or a control affiliate now the subject of any civil judicial proceeding that could result in a "yes" answer to any part of 14H(1)?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items 14H. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *control affiliate* is an individual or organization registered through the CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):

[ ] The *Applicant*

[ ] Applicant and one or more *control affiliate(s)*

[ ] One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

DRP SBSE – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is [ ] Firm [ ] Individual

Registered: [ ] Yes [ ] No

NAME (For individuals, Last, First, Middle)

[ ] This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or BD DRP to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

PART II

1. Court Action initiated by: (Name of regulator, foreign financial regulatory authority, SRO, commodities exchange, agency, firm, private plaintiff, etc.)

2. Principal Relief Sought: (check appropriate item)

[ ] Cease and Desist
[ ] Civil Penalty(ies)/Fine(s)
[ ] Disgorgement
[ ] Injunction
[ ] Money Damages (Private/Civil Complaint)
[ ] Restitution
[ ] Restraining Order
[ ] Other _____

Other Relief Sought:

3.

3. Filing Date of Court Action (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

4. Principal Product Type: (check appropriate item)

[ ] Annuity(ies) - Fixed
[ ] Annuity(ies) - Variable
[ ] Banking Products (other than CD(s))
[ ] CD(s)
[ ] Commodity Option(s)
[ ] Debt – Asset Backed
[ ] Debt - Corporate
[ ] Debt - Government
[ ] Debt - Municipal
[ ] Derivative(s)
[ ] Direct Investment(s) – DPP & LP Interest(s)
[ ] Equity - OTC
[ ] Equity Listed (Common & Preferred Stock)
[ ] Futures - Commodity
[ ] Futures - Financial
[ ] Index Option(s)
[ ] Insurance
[ ] Investment Contract(s)
[ ] Money Market Fund(s)
[ ] Mutual Fund(s)
[ ] No Product
[ ] Options
[ ] Penny Stock(s)
[ ] Unit Investment Trust(s)
[ ] Other _____

Other Product Type:

5. Formal Action was brought in (include name of Federal, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case Number):

6. Control Affiliate Employing Firm when activity occurred which led to the civil judicial action (if applicable):

7. Describe the allegations related to this civil judicial action. (The information must fit within the space provided.):

8. Current Status? [ ] Pending [ ] On Appeal [ ] Final

9. If on appeal, action appealed to (provide name of court): Date Appeal Filed (MM/DD/YYYY):

10. If pending, date notice/process was served (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation:

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE)

(continuation)

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 14 only.

11. How was matter resolved: (check appropriate item)

[ ] Consent [ ] Judgement Rendered [ ] Settled
[ ] Dismissed [ ] Opinion [ ] Withdrawn [ ] Other _____

12. Resolution Date (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation:

13. Resolution Detail

A. Were any of the following Sanctions Ordered or Relief Granted? (Check all appropriate items):

[ ] Monetary/Fine [ ] Revocation/Expulsion/Denial [ ] Disgorgement/Restitution
Amount $_____ [ ] Censure [ ] Cease and Desist/Injunction [ ] Bar [ ] Suspension

B. Other Sanctions:

C. Sanction Detail: If suspended, enjoined or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification, by exam/retraining was a condition of the sanction, provide length of time given to re-qualify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against applicant or control affiliate, date paid and if any portion of penalty was waived.

14. Provide a brief summary of details related to action(s), allegation(s), disposition(s), and/or finding(s) disclosed above. (The information must fit within the space provided.)

BANKRUPTCY / SIPC DISCLOSURE REPORTING PAGE (SBSE)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Questions 14I*** on Form SBSE;

Check [√] item(s) being responded to:

14I In the past ten years has the *applicant* or a *control affiliate* of the *applicant* ever been a securities firm or a *control affiliate* of a securities firm that:

[ ] (1) has been the subject of a bankruptcy petition?

[ ] (2) has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?

Use a separate DRP for each event or *proceeding.* An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

It is not a requirement that documents be provided for each event or *proceeding*. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *control affiliate* is an individual or organization registered through CRD, such *control affiliate* need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *control affiliate's* appropriate DRP (BD) or DRP (U-4). If a *control affiliate* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *control affiliate* of its obligation to update its CRD records.

PART I

A. The *person* or entity for whom this DRP (SBSE) is being filed is:

[ ] The *Applicant*

[ ] Applicant and one or more *control affiliate(s)*

[ ] One or more *control affiliate(s)*

If this DRP is being filed for a *control affiliate*, give the full name of the *control affiliate* below (for individuals, Last name, First name, Middle name).

If the *control affiliate* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Applicant*

BD DRP – CONTROL AFFILIATE

CRD NUMBER

This *Control Affiliate* is [ ] Firm [ ] Individual

Registered: [ ] Yes [ ] No

NAME (For individuals, Last, First, Middle)

[ ] This DRP should be removed from the SBS Entity's record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *control affiliate* is registered through the CRD, has the *control affiliate* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *control affiliate* of its obligation to update its CRD records.

PART II

1. Action Type: (check appropriate item)

[ ] Bankruptcy [ ] Declaration [ ] Receivership

[ ] Compromise [ ] Liquidated [ ] Other _____

2. Action Date (MM/DD/YYYY) _____ [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

(continued)

3. If the financial action relates to an organization over which the *applicant* or the *control affiliate* exercise(d) *control*, enter organization name and the applicant's or control affiliate's position, title or relationship:

_____

Was the Organization investment-related? [ ] Yes [ ] No

4. Court action brought in (Name of Federal, State or Foreign Court), Location of Court (City or County and State or Country), Docket/Case Number and Bankruptcy Chapter Number (if Federal Bankruptcy Filing):

5. Is action currently pending? [ ] Yes [ ] No

6. If not pending, provide Disposition Type: (check appropriate item)

[ ] Direct Payment Procedure [ ] Dismissed [ ] Satisfied/Released

[ ] Discharged [ ] Dissolved [ ] SIPA Trustee Appointed [ ] Other _____

7. Disposition Date (MM/DD/YYYY): _____ [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

8. Provide a brief summary of events leading to the action and if not discharged, explain. (The information must fit within the space provided.):

9. If a SIPA trustee was appointed or a direct payment procedure was begun, enter the amount paid or agreed to be paid by you; or the name of the trustee:

Currently open? [ ] Yes [ ] No

Date Direct Payment Initiated/Filed or Trustee Appointed (MM/DD/YYYY): _____ [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

10. Provide details of any status/disposition. Include details of creditors, terms, conditions, amounts due and settlement schedule (if applicable). (The information must fit within the space provided.)

Form SBSE-A

OMB Approval
OMB Number: .....3235-____ Expires:..... ..Month __, 2016 Estimated average burden hours per response: . . . . . _____. per amendment: . . . . . _____.

Application for Registration of Security-based Swap Dealers and Major Security-based Swap Participants that are Registered or Registering with the Commodity Futures Trading Commission as a Swap Dealer or Major Swap Participant

BILLING CODE 8011–01–C

Form SBSE–A Instructions

A. General Instructions

1. FORM—Form SBSE–A is the Application for Registration as either a Security-based Swap Dealer or Major Security-based Swap Participant (collectively, ''SBS Entities'') by an entity that is not registered or registering with the Commission as a broker-dealer but is registered or registering with the Commodity Futures Trading Commission (''CFTC'') as a swap dealer or major swap participant. These SBS Entities must file this form and a copy of the Form 7–R they file with the CFTC (or its designee) to register with the Securities and Exchange Commission. An applicant must also file Schedules A, B, C, F, and G, as appropriate. There are no Schedules D, or E. An entity that is registered with the Commission as a broker-dealer and also is registered or registering with the Commodity Futures Trading Commission (''CFTC'') as a swap dealer or major swap participant should file Form SBSE–BD to register with the Commission as an SBS Entity.

2. ELECTRONIC FILING—This Form SBSE–A must be filed electronically with the Commission through the EDGAR system, and must utilize the EDGAR Filer Manual (as defined in 17 CFR 232. 11) to file and amend Form SBSE–A electronically to assure the timely acceptance and processing of those filings.[1980] Additional documents shall be attached to this electronic application.

3. UPDATING—By law, the *applicant* must promptly update Form SBSE–A information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason [17 CFR 240.15Fb2–2]. In addition, the applicant must update any incomplete or inaccurate information contained on Form SBSE–A prior to filing a notice of withdrawal from registration on Form SBSE–W [17 CFR 15Fb3–2(a)].

4. CONTACT EMPLOYEE—The individual listed as the contact employee must be authorized to receive all compliance information, communications, and mailings, and be responsible for disseminating it within the *applicant's* organization.

5. FEDERAL INFORMATION LAW AND REQUIREMENTS—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. Sections 15F, 17(a) and 23(a) of the Exchange Act authorize the SEC to collect the information on this form from registrants. *See* 15 U.S.C. §§ 78o–10, 78q and 78w. Filing of this form is mandatory; however, the social security number information, which aids in identifying the applicant, is voluntary. The principal purpose of this Form is to permit the Commission to determine whether the *applicant* meets the statutory requirement to engage in the security-based swap business. The Commission maintain[s] a file of the information on this form and will make certain information collected via the form publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. § 3507. The information contained in this form is part of a system of records subject to the Privacy Act of 1974, as amended. The Securities and Exchange Commission has published in the **Federal Register** the Privacy Act Systems of Records Notice for these records.

B. Filing Instructions

1. FORMAT

a. Items 1–16 and the accompanying Schedules and DRP pages must be answered and all fields requiring a response must be completed before the filing will be accepted.

b. Failure to follow instructions or properly complete the form may result in the application being delayed or rejected.

c. *Applicant* must complete the execution screen certifying that Form SBSE–A and amendments thereto have been executed properly and that the information contained therein is accurate and complete.

d. To amend information, the *applicant* must update the appropriate Form SBSE–A screens.

e. A paper copy, with original signatures, of the initial Form SBSE–A filing [and amendments to Disclosure Reporting Pages (DRPs)] must be retained by the *applicant* and be made available for inspection upon a regulatory request.

2. DISCLOSURE REPORTING PAGE (DRP)—Information concerning a *principal* that relates to the occurrence of an event reportable in Schedule C must be provided on the appropriate DRP.

The mailing address for questions and correspondence is:

Explanation of Terms

(The following terms are italicized throughout this form.)

1. General

Terms used in this Form SBSE–A that are defined in the form the CFTC requires that swap dealers and major swap participants use to apply for registration with the CFTC shall have the same meaning as set forth in that form.

APPLICANT—The security-based swap dealer or major security-based swap participant applying on or amending this form.

CONTROL—The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any *person* that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25% or more of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25% or more of the capital, is presumed to *control* that company.

JURISDICTION—A state, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, or any subdivision or regulatory body thereof.

SUCCESSOR—The term ''successor'' is defined to be an unregistered entity that assumes or acquires substantially all of the assets and liabilities, and that continues the business of, a predecessor security-based swap dealer or major security-based swap participants that ceases its security-based swap activities. [*See* Exchange Act Rule 15b2–5 (17 CFR 240.15Fb2–5)]

3. For the Purpose of Schedule C and the Corresponding Disclosure Reporting Pages (DRPs)

FOREIGN FINANCIAL REGULATORY AUTHORITY—Includes (1) a foreign securities authority; (2) other governmental body or foreign equivalent of a *self-regulatory organization* empowered by a foreign government to administer or enforce its laws relating to the regulation of *financial services industry-related* activities; and (3) a foreign membership organization, a function of which is to regulate the participation of its members in the activities listed above.

[1980] As discussed in the release proposing this Form, the Commission is currently developing a system to facilitate receipt of applications electronically. More specific instructions on how to file this Form may be included in the final version of the Form.

FINANCIAL SERVICES INDUSTRY-RELATED—Pertaining to securities, commodities, banking, savings association activities, credit union activities, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, municipal securities dealer, government securities broker or dealer, issuer, investment company, investment adviser, futures sponsor, bank, security-based swap dealer, major security-based swap participant, savings association, credit union, insurance company, or insurance agency). (This definition is used solely for the purpose of Form SBSE–A.)

INVOLVED—Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

ORDER—A written directive issued pursuant to statutory authority and procedures, including orders of denial, suspension, or revocation; does not include special stipulations, undertakings or agreements relating to payments, limitations on activity or other restrictions unless they are included in an *order.*

PROCEEDING—Includes a formal administrative or civil action initiated by a governmental agency, *self-regulatory organization* or a *foreign financial regulatory authority;* a *felony* criminal indictment or information (or equivalent formal charge); or a *misdemeanor* criminal information (or equivalent formal charge). Does not include other civil litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge).

BILLING CODE 8011–01–P

FORM SBSE-A Page 1 (Execution Page)	**Application for Registration as a Security-based Swap Dealer and Major Security-based Swap Participant that is Registered or Registering with the CFTC as a Swap Dealer or Major Swap Participant** Date:_____ *Applicant* NFA Number: _____	**Official Use**	Official Use Only

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of business as an SBS Entity, would violate the Federal securities laws and the laws of the *jurisdictions* and may result in disciplinary, administrative, injunctive or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.

[ ] **APPLICATION** [ ] **AMENDMENT**

1. Exact name, principal business address, mailing address, if different, and telephone number of the *applicant:*

A. Full name of the *applicant*:

B. IRS Empl. Ident. No.:

C. Applicant's NFA ID #: Applicant's CIK # (if any):

D. *Applicant's* Main Address: (Do not use a P.O. Box)

Number and Street 1: Number and Street 2:

City: State: Country: Zip/Postal Code:

E. Mailing Address, if different:

Number and Street 1: Number and Street 2:

City: State: Country: Zip/Postal Code:

F. Business Telephone Number:

G Website/URL:

H. Contact Employee:

Name: Title:

Telephone Number: Email Address:

I. Chief Compliance Officer designated by the *applicant* in accordance with Exchange Act Section 15F(k):

Name: Title:

Telephone Number: Email Address:

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's security-based swap activities, unless the applicant is a nonresident SBS Entity , may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 1E and 1F. If the applicant is a nonresident SBS Entity, it must complete Schedule F to designate a U.S. agent for service of process.

The undersigned certifies that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including schedules attached hereto, and other information filed herewith are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

Date (MM/DD/YYYY) Name of Applicant

By: Signature Name and Title of Person Signing on *Applicant's* behalf

This page must always be completed in full.

DO NOT WRITE BELOW THIS LINE – FOR OFFICIAL USE ONLY

FORM SBSE-A Page 2	*Applicant* Name: _____ Date: _____ *Applicant* NFA No.: _____	Official Use	Official Use Only

2. A. The *applicant* is registering as a security-based swap dealer: [ ] Yes [ ] No

   B. The *applicant* is registering as a major security-based swap participant: [ ] Yes [ ] No
   Because it: (check all that apply)
   [ ] maintains a substantial security-based swap position
   [ ] has substantial counterparty exposure [ ] is highly leveraged relative to its capital position

3. A. Is the *applicant* a foreign security-based swap dealer that intends to:
   - work with the Commission and its primary regulator to have the Commission determine whether the requirements of its primary regulator's regulatory system are comparable to the Commission's [ ] Yes [ ] No
   - avail itself of a previously granted substituted compliance determination [ ] Yes [ ] No

   with respect to the requirements of Section 15F of the Exchange Act of 1934 and the rules and regulations thereunder?

   B. If "*yes*" to either of the questions in Item 3.A. above, identify the foreign financial regulatory authority that serves as the *applicant's* primary regulator and for which the Commission has made, or may make, a substituted compliance determination:
   _____
   _____.

   C. If the applicant is relying on a previously granted substituted compliance determination, please describe how the *applicant* satisfies any conditions the Commission may have placed on such substituted compliance determination:
   _____
   _____.

4. Does the *applicant* intend to compute capital or margin, or price customer or proprietary positions, using mathematical models? [ ] Yes [ ] No

5. A. The *applicant* is currently registered with the Commodity Futures Trading Commission as a:
   [ ] Swap Dealer [ ] Major Swap Participant

   B. The *applicant* is registering with the Commodity Futures Trading Commission as a:
   [ ] Swap Dealer [ ] Major Swap Participant

6. Is the *applicant* a U.S. branch of a non-resident entity? [ ] Yes [ ] No
   If "*yes*," identify the non-resident entity and its location:
   _____.

7. Briefly describe the *applicant's* business: _____
   _____
   _____
   _____
   _____

		YES	NO
8.	Is the *applicant* subject to regulation by a prudential regulator, as defined in Section 1a(39) of the Commodity Exchange Act. If "*yes*," identify the prudential regulator: _____.	[ ]	[ ]
9.	Is the *applicant* registered with the Commission as an investment adviser? Applicant's IARD #: _____	[ ]	[ ]
10. A.	Is the *applicant* registered with the Commodity Futures Trading Commission in any capacity other than as a swap dealer or major swap participant?	[ ]	[ ]
B.	If "yes," as a: [ ] Futures Commission Merchant [ ] Introducing Broker [ ] Commodity Pool Operator [ ] Other: _____		
11.	Does *applicant* engage in any other non-securities, *financial services industry-related* business? *If "yes," describe each other business briefly on Schedule B, Section I.*	[ ]	[ ]

12.	Does the *applicant* hold or maintain any funds or securities to collateralize counterparty transactions?	[ ]	[ ]

FORM SBSE-A Page 3	*Applicant* Name: _____ Date:_____ *Applicant* NFA No.: _____	**Official Use**		Official Use Only
13.	Does the *applicant* have any arrangement:			
A.	With any other *person*, firm, or organization under which any books or records of the *applicant* are kept, maintained, or audited by such other *person*, firm or organization?	[ ]	[ ]	
B.	Under which such other person, firm or organization executes, trades, custodies, clears or settles on behalf of the applicant (including any *SRO* in which the applicant is a member)? *If "yes" to any part of Item 11, complete appropriate items on Schedule B, Section II.*	[ ]	[ ]	
14.	Does any *person* directly or indirectly *control* the management or policies of the *applicant* through agreement or otherwise? *If "yes," complete appropriate item on Schedule B, Section II.*	[ ]	[ ]	
15.	Does any *person* directly or indirectly finance (wholly or partially) the business of the *applicant*? *Do not answer "Yes" to Item 15 if the person finances the business of the applicant through: 1) a public offering of securities made pursuant to the Securities Act of 1933; or 2) credit extended in the ordinary course of business by suppliers, banks, and others.* *If "yes," complete appropriate item on Schedule B, Section II.*	[ ]	[ ]	
16.	Is the *applicant* at the time of this filing *succeeding* to the business of a currently registered SBS Entity? *If "yes," complete appropriate items on Schedule B, Section III.*	[ ]	[ ]	
17.	Is the *applicant* registered with a foreign financial regulatory authority? If "*yes*," list all such registrations on Schedule F, Page 1, Section II.	[ ]	[ ]	
18.	The applicant has _____ principals who are individuals. *Please list all principals who are individuals on Schedule A.*			
19.	Does any principal not identified in Item 18 and Schedule A effect, or is any principal not identified in Item 18 and Schedule A involved in effecting security-based swaps on behalf of the applicant, or will such principals effect or be involved in effecting such business on the applicant's behalf? *If "yes," complete appropriate item on Schedule B, Section IV.*			

Schedule A of FORM SBSE **PRINCIPALS THAT ARE INDIVIDUALS** (Answer for Form SBSE-A Item 18)	*Applicant* Name: _____ Date: _____ *Applicant* NFA No.: _____	**Official Use**

Use Schedule A to identify all principals of the applicant who are individuals.

Complete the "Title or Status" column by entering board/management titles; status as partner, trustee, sole proprietor, or shareholder; and for shareholders, the class of securities owned (if more than one is issued).

Ownership Codes are:

NA - less than 5% B - 10% but less than 25% D - 50% but less than 75%
A - 5% but less than 10% C - 25% but less than 50% E - 75% or more

	FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	Title or Status	Date Title or Status Acquired		Date Individual began working for applicant		Does person have an ownership interest in the applicant	If yes, include ownership code	NFA Identification No., CRD No. and/or IARD No.	Official Use Only
			MM	YYYY	MM	YYYY				
1.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
2.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
3.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
4.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
5.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
6.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
7.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
8.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
9.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								
10.							Y / N			
		For individuals not presently registered through NFA, CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service):								

Schedule B of FORM SBSE-A Page 1	*Applicant* Name: _____ Date: _____ *Applicant* NFA No.: _____	Official Use	Official Use Only

Use this Schedule B to report details for items listed below. Report only new information or changes/updates to previously submitted details. Do not repeat previously submitted information.

This is an [ ] INITIAL [ ] AMENDED detail filing for the Form SBSE-A items checked below:

Section I ***Other Business***

Item 11: Does *applicant* engage in any other non-securities, *financial services industry-related* business?

Unique Identification Number(s):	*Assigning Regulator(s)/Entity(s):*

Briefly describe any other *financial services industry-related*, non-securities business in which the applicant is engaged:

Section II ***Record Maintenance Arrangements / Business Arrangements / Control Persons / Financings***

(Check one) [ ] Item 13A [ ] Item 13B [ ] Item 14 [ ] Item 15

Applicant must complete a separate Schedule B Page 1 for each affirmative response in this section including any multiple responses to any item. Complete the "Effective Date" box with the Month, Day and Year that the arrangement or agreement became effective. When reporting a change or termination of an arrangement, enter the effective date of the change.

Firm or Organization Name	SEC File, CRD, NFA, IARD, and/or CIK Number (if any)	
Business Address *(Street, City, State/Country, Zip + 4 Postal Code)*	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /
Individual Name	CRD, NFA, and/or IARD Number (if any)	
Business Address (if applicable) *(Street, City, State/Country, Zip + 4 Postal Code)*	Effective Date MM DD YYYY / /	Termination Date MM DD YYYY / /

Briefly describe the nature of the arrangement with respect to books or records (ITEM 13A); the nature of the execution, trading, custody, clearing or settlement arrangement (ITEM 13B); the nature of the control or agreement (ITEM 14); or the method and amount of financing (ITEM 15). Use reverse side of this sheet for additional comments if necessary.

For ITEM 14 ONLY - If the control person is an individual not presently registered through CRD or IARD, describe prior *investment-related* experience (e.g., for each prior position - employer, job title, and dates of service).

Section III ***Successions***

Item 16: Is the *applicant* at the time of this filing *succeeding* to the business of a currently registered SBS Entity?

Date of Succession MM DD YYYY / /	*Name of Predecessor*
SEC File, CRD, NFA, IARD, and/or CIK Number (if any)	IRS Employer Number (if any)

Briefly describe details of the succession including any assets or liabilities not assumed by the successor. Use reverse side of this sheet for additional comments if necessary.

Section IV ***Principals Effecting or Involved in Effecting SBS Business***

Item 19: Does any principal not identified in Item 18 and Schedule A effect, or is any principal not identified in Item 15 and Schedule A involved in effecting security-based swaps on behalf of the applicant, or will such principals effect or be involved in effecting such business on the applicant's behalf?

For each Principal identified in Section IV, complete Schedule C of the Form SBSE-A and the relevant DRP pages.

1.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)		
	This entity [ ] effects [ ] is involved in effecting security based swaps on behalf of the applicant. (*check only one*)		

Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:

Schedule B of FORM SBSE-A Page 2	*Applicant* Name: _____ Date:_____ *Applicant* NFA No.: _____	Official Use	Official Use Only

Section IV, Continued — ***Principals Effecting or Involved in Effecting SBS Business***

For each Principal identified in Section IV, complete Schedule C of the Form SBSE-A and the relevant DRP pages.

2.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)		
	This entity [ ] effects [ ] is involved in effecting security based swaps on behalf of the applicant. (*check only one*)		
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:			
3.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)		
	This entity [ ] effects [ ] is involved in effecting security based swaps on behalf of the applicant. (*check only one*)		
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:			
4.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)		
	This entity [ ] effects [ ] is involved in effecting security based swaps on behalf of the applicant. (*check only one*)		
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:			
5.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)		
	This entity [ ] effects [ ] is involved in effecting security based swaps on behalf of the applicant. (*check only one*)		
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:			
6.	Name of Principal	Type of Entity (Corp, Partnership, LLC, etc.)	SEC File No., CRD, NFA, IARD, CIK Number, and/or Tax Identification Number
	Business Address (*Street, City, State/Country, Zip + 4/Postal Code*)		
	This entity [ ] effects [ ] is involved in effecting security based swaps on behalf of the applicant. (*check only one*)		
Briefly describe the details of the principal's activities relating to its effecting or involvement in effecting security-based swap transactions on behalf of the applicant:			

Schedule C of FORM SBSE-A Page 1	*Applicant* Name: _____ *Principal* Name: _____ Date: _____ *Applicant* NFA No.: _____	**Official Use**	Official Use Only

Use the appropriate DRP for providing details to "yes" answers to the questions in Schedule C. Refer to the Explanation of Terms section of Form SBSE-A Instructions for explanations of italicized terms.

		YES	NO
CRIMINAL DISCLOSURE	A. In the past ten years has the *principal*:		
	(1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any *felony*?	[ ]	[ ]
	(2) Been charged with a *felony*	[ ]	[ ]
	B. In the past ten years has the *principal*:		
	(1) Been convicted of or pled guilty or or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: *financial services industry-related* business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	[ ]	[ ]
	(2) Been *charged* with a *misdemeanor* specified in B(1)?	[ ]	[ ]
REGULATORY ACTION DISCLOSURE	C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:		
	(1) *Found* the *principal* to have made a false statement or omission?	[ ]	[ ]
	(2) *Found* the *principal* to have been involved in a violation of its regulations or statutes?	[ ]	[ ]
	(3) *Found* the *principal* to have been a cause of a *financial services industry-related* business having its authorization to do business denied, revoked, or restricted?	[ ]	[ ]
	(4) Entered an *order* against the *principal* in connection with *financial services industry-related* activity?	[ ]	[ ]
	(5) Imposed a civil money penalty on the *principal*, or ordered the *principal* to cease and desist from any activity?	[ ]	[ ]
REGULATORY ACTION DISCLOSURE	D. Has any other federal regulatory agency, state regulatory agency, or *foreign financial regulatory authority*:		
	(1) Ever found the *principal* to have made a false statement or omission or been dishonest, unfair, or unethical?	[ ]	[ ]
	(2) Ever found the *principal* to have been involved in a violation of *financial services industry-related* regulations or statutes?	[ ]	[ ]
	(3) Ever found the *principal* to have been a cause of a *financial services industry-related* business having its authorization to do business denied, suspended, revoked or restricted?	[ ]	[ ]
	(4) In the past ten years, entered an order against the *principal* in connection with a *financial services industry-related* activity?	[ ]	[ ]
	(5) Ever denied, suspended, or revoked the *principal's* registration or license or otherwise, by order, prevented it from associating with a *financial services industry-related* business or restricted its activities?	[ ]	[ ]
	E. Has any *self-regulatory organization* or commodities exchange ever:		
	(1) *found* the *principal* to have made a false statement or omission?	[ ]	[ ]
	(2) *found* the *principal* to have been involved in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and exchange Commission)?	[ ]	[ ]
	(3) *found* the *principal* to have been the cause of a *financial services industry-related* business having its authorization to do business denied, suspended, revoked or restricted?	[ ]	[ ]
	(4) Disciplined the *principal* by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?	[ ]	[ ]
	F. Has the *principal's* authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?	[ ]	[ ]
	G. Is the *principal* now the subject of any regulatory *proceeding* that could result in a "yes" answer to any part of C, D, or E?	[ ]	[ ]

Schedule C of FORM SBSE-A Page 2	*Applicant* Name: _____ *Principal* Name: _____ Date: _____ *Applicant* NFA No.: _____	**Official Use**	Official Use Only

			YES	NO
CIVIL JUDICIAL DISCLOSURE	H.	(1) Has any domestic or foreign civil judicial court:		
		(a) In the past ten years, enjoined the *principal* in connection with any *financial services industry-related* activity?	[ ]	[ ]
		(b) Ever *found* that the *principal* was involved in a violation of *financial services industry-related* statutes or regulations?	[ ]	[ ]
		(c) Ever dismissed, pursuant to a settlement agreement, a *financial services industry-related* civil judicial action brought against the *principal* by a state or *foreign financial regulatory authority*?	[ ]	[ ]
		(2) Is the *principal* now the subject of any civil judicial *proceeding* that could result in a "yes" answer to any part of H(1)?	[ ]	[ ]
FINANCIAL DISCLOSURE	I.	In the past ten years has the *principal* ever been a securities firm or a *principal* of a securities firm that:		
		(1) Has been the subject of a bankruptcy petition?	[ ]	[ ]
		(2) Has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?	[ ]	[ ]

Schedule F of FORM SBSE-A	*Applicant* Name: _____ Date:_____ *Applicant* NFA No.: _____	Official Use

Section I ***Service of Process and Certification Regarding Access to Records***

Each nonresident security-based swap dealer and non-resident security-based swap participant shall use Schedule F to identify its United States agent for service of process and the certify that it can

(3) provide the Commission with prompt access to its books and records, and

(4) submit to onsite inspection and examination by the Commission.

1. Service of Process:

A. Name of United States person *applicant* designates and appoints as agent for service of process

B. Address of United States person *applicant* designates and appoints as agent for service of process

The above identified agent for service of process may be served any process, pleadings, subpoenas, or other papers in

(a) any investigation or administrative proceeding conducted by the Commission that relates to the *applicant* or about which the *applicant* may have information; and

(b) any civil or criminal suit or action or proceeding brought against the *applicant* or to which the *applicant* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States or of any of its territories or possessions or of the District of Columbia, to enforce the Exchange Act. The *applicant* has stipulated and agreed that any such suit, action or administrative proceeding may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

2. Certification regarding access to records:

Applicant can as a matter of law;

(3) provide the Commission with prompt access to its books and records, and

(4) submit to onsite inspection and examination by the Commission.

Applicant must attach to this Form SBSE a copy of the opinion of counsel it is required to obtain in accordance with paragraph (c)(2) or (c)(3) of Exchange Act Rule 15Fb2-4, as appropriate [paragraphs (c)(2) or (c)(3) of 17 CFR 240.15Fb2-4].

Signature:

Name and Title:

Date:

Section II ***Registration with Foreign Financial Regulatory Authorities***

Complete this Section for Registration with Foreign Financial Regulatory Authorities relating to ITEM 17. Each security-based swap dealer and major security-based swap participant that is registered with a foreign financial regulatory authority must list on Section II of this Schedule F, for each foreign financial regulatory authority with which it is registered, the following information:

1.		
English Name of Foreign Financial Regulatory Authority	Foreign Registration No. (if any)	English Name of Country:
2.		
English Name of Foreign Financial Regulatory Authority	Foreign Registration No. (if any)	English Name of Country:
3.		
English Name of Foreign Financial Regulatory Authority	Foreign Registration No. (if any)	English Name of Country:

If applicant has more than 3 Foreign Financial Regulatory Authorities to report, complete additional Schedule F Page 1s.

Schedule G of FORM SBSE-A **CERTIFICATION ON STATUTORY DISQUALIFICATION**	*Applicant* Name: _____ Date:_____ *Applicant* NFA No.: _____	**Official Use**

Use Schedule G to certify that none of the *applicant's* associated persons is subject to statutory disqualification (as that term is defined in Section 3(a)(39) of the Exchange Act [15 U.S.C. 78c(a)(39)].

Instructions: This certification must be signed by the *applicant's* Chief Compliance Officer designated pursuant to Exchange Act Section 15F(k) or by his or her designee.

For purposes of this Form, the term *associated person* shall have the meaning as specified in Section 3(a)(70) of the Exchange Act [15 U.S.C. 78c(a)(70)].

This is a: [ ] CERTIFICATION [ ] RE-CERTIFICATION

The *applicant* certifies that it has

(c) performed background checks on all of its *associated persons* who effect or are involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf, and

(d) determined that no *associated person* who effects or is involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(39)].

Applicant Name:	Date:
Signature of Chief Compliance Officer or Designee:	
Name of Chief Compliance Officer or Designee:	If Designee, Title of Designee:

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Items A and B*** of Schedule C of Form SBSE-A;

Check [√] item(s) being responded to:

A. In the past ten years has the principal:

[ ] (1) Been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any felony?

[ ] (2) Been charged with a felony?

B. In the past ten years has the principal:

[ ] (1) Been convicted of or pled guilty or or nolo contendere ("no contest") in a domestic, foreign or military court to a misdemeanor involving: investments or an investment-related business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?

[ ] (2) Been charged with a misdemeanor specified in B(1)?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

If a *principal* is an organization registered through the CRD, such *principal* need only complete Part I of the *applicant's* appropriate DRP (SBSE-A). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an individual or organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE-A). The completion of this DRP does not relieve the *principal* of its obligation to update its CRD records.

Applicants must attach a copy of each applicable court document (*i.e.*, criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) if not previously submitted through CRD (as they could be in the case of a *control affiliate* registered through CRD). Documents will not be accepted as disclosure in lieu of answering the questions on this DRP.

PART I

A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*
CRD NUMBER

Registered: [ ] Yes [ ] No

[ ] This DRP should be removed from the SBS Entity's record because the principal is no longer associated with the SBS Entity.

B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

CRIMINAL DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

PART II

1. If charge(s) were brought against an organization over which the principal exercise(d) control: Enter organization name, whether or not the organization was an investment-related business and the principal's position, title or relationship.

_____

2. Formal Charge(s) were brought in: (include name of Federal, Military, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case number).

_____

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

A. Date First Charged (MM/DD/YYYY): [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

B. Event Disclosure Detail (include Charge(s)/Charge Description(s), and for each charge provide: 1. number of counts, 2. *felony* or *misdemeanor*, 3. plea for each charge, and 4. product type if charge is *investment-related*):

_____

_____

_____

C. Current status of the Event? [ ] Pending [ ] On Appeal [ ] Final

D. Event Status Date (complete unless status is Pending) (MM/DD/YYYY): [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

4. Disposition Disclosure Detail: Include for each charge, A. Disposition Type [e.g., convicted, acquitted, dismissed, pretrial.], B. Date, C. Sentence/Penalty, D. Duration [if sentence-suspension, probation, etc.], E. Start Date of Penalty, F. Penalty/Fine Amount and G. Date Paid.

_____

_____

_____

_____

_____

_____

5. Provide a brief summary of the circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the char(s) occurred. (The information must fit within the space provided.)

_____

_____

_____

_____

_____

_____

_____

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Items C, D, E, F, or G*** of Schedule C of Form SBSE-A;

Check [√] item(s) being responded to:

C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:

[ ] (1) Found the principal to have made a false statement or omission?

[ ] (2) Found the principal to have been involved in a violation of its regulations or statutes?

[ ] (3) the principal to have been a cause of an investment-related business having its authorization to do business denied, revoked, or restricted?

[ ] (4) Entered an order against the principal in connection with investment-related activity?

[ ] (5) Imposed a civil money penalty on the principal, or ordered the principal to cease and desist from any activity?

D. Has any other federal regulatory agency, state regulatory agency, or foreign financial regulatory authority:

[ ] (1) Ever found the principal to have made a false statement or omission or been dishonest, unfair, or unethical?

[ ] (2) Ever found the principal to have been involved in a violation of investment-related regulations or statutes?

[ ] (3) Ever found the principal to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?

[ ] (4) In the past ten years, entered an order against the principal in connection with an investment-related activity?

[ ] (5) Ever denied, suspended, or revoked the principal's registration or license or otherwise, by order, prevented it from associating with an investment-related business or restricted its activities?

E. Has any self-regulatory organization or commodities exchange ever:

[ ] (1) found the principal to have made a false statement or omission?

[ ] (2) found the principal to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and exchange Commission)?

[ ] (3) found the principal to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?

[ ] (4) Disciplined the principal by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?

F. [ ] Has the principal's authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?

G. [ ] Is the principal now the subject of any regulatory proceeding that could result in a "yes" answer to any part of C, D, or E?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items C, D, E, F or G. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If the principal is an organization registered through the CRD, such principal need only complete Part I of the *applicant's* appropriate DRP (SBSE). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE). The completion of this DRP does not relieve the *prinicipal* of its obligation to update its CRD records.

PART I

A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*	*Principal's* CRD Number

Registered: [ ] Yes [ ] No

[ ] This DRP should be removed from the SBS Entity record because the control affiliate(s) are no longer associated with the SBS Entity.

B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

PART II

1. Regulatory Action initiated by:

[ ] SEC [ ] Other Federal [ ] State [ ] SRO [ ] Foreign

(Full name of regulator, foreign financial regulatory authority, federal, state or SRO)

2. Principal Sanction: (check appropriate item)

[ ] Civil and Administrative Penalty(ies)/Fine(s)
[ ] Bar
[ ] Cease and Desist
[ ] Censure
[ ] Denial
[ ] Disgorgement
[ ] Expulsion
[ ] Injunction
[ ] Prohibition
[ ] Reprimand
[ ] Restitution
[ ] Revocation
[ ] Suspension
[ ] Undertaking
[ ] Other _____

Other Sanctions:

_____
_____
_____

3.

3. Date Initiated (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

4. Docket/Case Number:

5. Principal Employing Firm when activity occurred which led to the regulatory action (if applicable):

6. Principal Product Type: (check appropriate item)

[ ] Annuity(ies) - Fixed
[ ] Annuity(ies) - Variable
[ ] Banking Products (other than CD(s))
[ ] CD(s)
[ ] Commodity Option(s)
[ ] Debt – Asset Backed
[ ] Debt - Corporate
[ ] Debt - Government
[ ] Debt - Municipal
[ ] Derivative(s)
[ ] Direct Investment(s) – DPP & LP Interest(s)
[ ] Equity - OTC
[ ] Equity Listed (Common & Preferred Stock)
[ ] Futures - Commodity
[ ] Futures - Financial
[ ] Index Option(s)
[ ] Insurance
[ ] Investment Contract(s)
[ ] Money Market Fund(s)
[ ] Mutual Fund(s)
[ ] No Product
[ ] Options
[ ] Penny Stock(s)
[ ] Unit Investment Trust(s)
[ ] Other _____

Other Product Type:

7. Describe the allegations related to this regulatory action. (The information must fit within the space provided.):

_____
_____
_____
_____

8. Current Status? [ ] Pending [ ] On Appeal [ ] Final

9. If on appeal, regulatory action appealed to: (SEC, SRO, Federal or State Court) and Date Appeal Filed:

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 13 only.

10. How was matter resolved: (check appropriate item)

[ ] Acceptance, Waiver & Consent (AWC) [ ] Consent [ ] Settled
[ ] Decision & Order of Offer of Settlement [ ] Dismissed [ ] Stipulation and Consent
[ ] Decision [ ] Order [ ] Vacated

11. Resolution Date (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation:

12. A. Were any of the following Sanctions Ordered? (Check all appropriate items):

[ ] Monetary/Fine [ ] Revocation/Expulsion/Denial [ ] Disgorgement/Restitution
Amount $_____ [ ] Censure [ ] Cease and Desist/Injunction [ ] Bar [ ] Suspension

B. Other Sanctions Ordered:

C. Sanction Detail: If suspended, enjoined or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification, by exam/retraining was a condition of the sanction, provide length of time given to re-qualify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against principal, date paid and if any portion of penalty was waived.

13. Provide a brief summary of details related to the action status and (or) disposition and include relevant terms, conditions and dates. (The information must fit within the space provided.)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (BD)] is an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Item H*** of Schedule C of Form BD;

Check [√] item(s) being responded to:

H(1) Has any domestic or foreign civil judicial court:

[ ] (a) in the past ten years, enjoined the principal in connection with any investment-related activity?

[ ] (b) ever found that the principal was involved in a violation of investment-related statutes or regulations?

[ ] (c) ever dismissed, pursuant to a settlement agreement, an investment-related civil judicial action brought against the principal by a state or foreign financial regulatory authority?

H(2) [ ] Is the principal now the subject of any civil judicial proceeding that could result in a "yes" answer to any part of H?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Item H. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

It is not a requirement that documents be provided for each event or proceeding. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *principal* is an individual or organization registered through the CRD, such *principal* need only complete Part I of the *applicant's* appropriate DRP (SBSE-A). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE-A). The completion of this DRP does not relieve the *principal* of its obligation to update its CRD records.

PART I

A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*
CRD NUMBER

Registered: [ ] Yes [ ] No

[ ] This DRP should be removed from the SBS Entity's record because the principal is no longer associated with the SBS Entity.

B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

PART II

1. Court Action initiated by: (Name of regulator, foreign financial regulatory authority, SRO, commodities exchange, agency, firm, private plaintiff, etc.)

2. Principal Relief Sought: (check appropriate item)

[ ] Cease and Desist
[ ] Civil Penalty(ies)/Fine(s)
[ ] Disgorgement
[ ] Injunction
[ ] Money Damages (Private/Civil Complaint)
[ ] Restitution
[ ] Restraining Order
[ ] Other _____

Other Relief Sought:

3.

3. Filing Date of Court Action (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

4. Principal Product Type: (check appropriate item)

[ ] Annuity(ies) - Fixed
[ ] Annuity(ies) - Variable
[ ] Banking Products (other than CD(s))
[ ] CD(s)
[ ] Commodity Option(s)
[ ] Debt – Asset Backed
[ ] Debt - Corporate
[ ] Debt - Government
[ ] Debt - Municipal
[ ] Derivative(s)
[ ] Direct Investment(s) – DPP & LP Interest(s)
[ ] Equity - OTC
[ ] Equity Listed (Common & Preferred Stock)
[ ] Futures - Commodity
[ ] Futures - Financial
[ ] Index Option(s)
[ ] Insurance
[ ] Investment Contract(s)
[ ] Money Market Fund(s)
[ ] Mutual Fund(s)
[ ] No Product
[ ] Options
[ ] Penny Stock(s)
[ ] Unit Investment Trust(s)
[ ] Other _____

Other Product Type:

5. Formal Action was brought in (include name of Federal, State or Foreign Court, Location of Court – City or County and State or Country, Docket/Case Number):

6. Control Affiliate Employing Firm when activity occurred which led to the civil judicial action (if applicable):

7. Describe the allegations related to this civil action. (The information must fit within the space provided.):

8. Current Status? [ ] Pending [ ] On Appeal [ ] Final

9. If on appeal, action action appealed to (provide name of court): Date Appeal Filed (MM/DD/YYYY):

10. If pending, date notice/process was served (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation:

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 14 only.

11. How was matter resolved: (check appropriate item)

[ ] Consent [ ] Judgement Rendered [ ] Settled
[ ] Dismissed [ ] Opinion [ ] Withdrawn [ ] Other _____

12. Resolution Date (MM/DD/YYYY) [ ] Exact [ ] Explanation

If not exact, provide explanation:

13. Resolution Detail

A. Were any of the following Sanctions Ordered or Relief Granted? (Check all appropriate items):

[ ] Monetary/Fine [ ] Revocation/Expulsion/Denial [ ] Disgorgement/Restitution
Amount $_____ [ ] Censure [ ] Cease and Desist/Injunction [ ] Bar [ ] Suspension

B. Other Sanctions:

C. Sanction Detail: If suspended, enjoined or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification, by exam/retraining was a condition of the sanction, provide length of time given to re-qualify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against prinicpal, date paid and if any portion of penalty was waived.

14. Provide a brief summary of details related to action(s), allegation(s), disposition(s), and/or finding(s) disclosed above. (The information must fit within the space provided.)

BANKRUPTCY / SIPC DISCLOSURE REPORTING PAGE (SBSE-A)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page [DRP (SBSE)] is an an [ ] INITIAL ***OR*** [ ] AMENDED response to report details for affirmative responses to ***Questions I*** on Schedule C of Form SBSE;

Check [√] item(s) being responded to:

I In the past ten years has the *principal* ever been a securities firm or a *control affiliate* of a securities firm that:

[ ] (1) has been the subject of a bankruptcy petition?

[ ] (2) has had a trustee appointed or a direct payment procedure initiated under the Securities Investor Protection Act?

Use a separate DRP for each event or *proceeding*. An event or *proceeding* may be reported for more than one person or entity using one DRP. File with a completed Execution Page.

It is not a requirement that documents be provided for each event or *proceeding*. Should they be provided, they will not be accepted as disclosure in lieu of answering the questions on this DRP.

If a *principal* is an individual or organization registered through CRD, such *principal* need only complete Part I of the *applicant's* appropriate DRP (SBSE-A). Details of the event must be submitted on the *principal's* appropriate DRP (BD) or DRP (U-4). If a *principal* is an organization not registered through the CRD, provide complete answers to all the items on the *applicant's* appropriate DRP (SBSE-a). The completion of this DRP does not relieve the *prinicpal* of its obligation to update its CRD records.

PART I

A. If the *principal* is registered with the CRD, provide the CRD number. If not, indicate "non-registered" by checking the appropriate checkbox.

Name of *Principal*
CRD NUMBER

Registered: [ ] Yes [ ] No

[ ] This DRP should be removed from the SBS Entity's record because the principal is no longer associated with the SBS Entity.

B. If the *principal* is registered through the CRD, has the *principal* submitted a DRP (with Form U-4) or DRP (BD) to the CRD System for the event?

If the answer is "Yes," no other information on this DRP must be provided: If "No," complete Part II.

[ ] Yes [ ] No

Note: The completion of this Form does not relieve the *principal* of its obligation to update its CRD records.

PART II

1. Action Type: (check appropriate item)

[ ] Bankruptcy [ ] Declaration [ ] Receivership

[ ] Compromise [ ] Liquidated [ ] Other _____

2. Action Date (MM/DD/YYYY) _____ [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

BANKRUPTCY / SIPC DISCLOSURE REPORTING PAGE (SBSE-A)

(continuation)

3. If the financial action relates to an organization over which the *applicant* or the *control affiliate* exercise(d) *control*, enter organization name and the applicant's or control affiliate's position, title or relationship:

_____

Was the Organization investment-related? [ ] Yes [ ] No

4. Court action brought in (Name of Federal, State or Foreign Court), Location of Court (City or County and State or Country), Docket/Case Number and Bankruptcy Chapter Number (if Federal Bankruptcy Filing):

_____

5. Is action currently pending? [ ] Yes [ ] No

6. If not pending, provide Disposition Type: (check appropriate item)

[ ] Direct Payment Procedure [ ] Dismissed [ ] Satisfied/Released

[ ] Discharged [ ] Dissolved [ ] SIPA Trustee Appointed [ ] Other _____

7. Disposition Date (MM/DD/YYYY): _____ [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

8. Provide a brief summary of events leading to the action and if not discharged, explain. (The information must fit within the space provided.):

_____
_____
_____
_____
_____

9. If a SIPA trustee was appointed or a direct payment procedure was begun, enter the amount paid or agreed to be paid by you; or the name of the trustee:

Currently open? [ ] Yes [ ] No

Date Direct Payment Initiated/Filed or Trustee Appointed (MM/DD/YYYY): _____ [ ] Exact [ ] Explanation

If not exact, provide explanation: _____

10. Provide details of any status/disposition. Include details of creditors, terms, conditions, amounts due and settlement schedule (if applicable). (The information must fit within the space provided.)

_____
_____
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Form SBSE-BD

OMB Approval
OMB Number: .....3235-____ Expires:..... ..Month __, 2016 Estimated average burden hours per response: . . . . . _____. per amendment: . . . . . _____.

Application for Registration of Security-based Swap Dealers and Major Security-based Swap Participants that are Registered Broker-dealers

BILLING CODE 8011–01–C

Form SBSE–BD Instructions

A. General Instructions

1. FORM—Form SBSE–BD is the Application for Registration as either a Security-based Swap Dealer or Major Security-based Swap Participant (collectively, ''SBS Entities'') by an entity that is registered or registering with the Commission as a broker or dealer. These SBS Entities must file this form to register with the Securities and Exchange Commission. An applicant must also file Schedules F and G, as appropriate. There are no Schedules A, B, C, D, or E.

2. DEFINITIONS—Form SBSE–BD uses the same definitions as in Form BD.

3. ELECTRONIC FILING—This Form SBSE–BD must be filed electronically with the Commission through the EDGAR system, and must utilize the EDGAR Filer Manual (as defined in 17 CFR 232.11) to file and amend Form SBSE–BD electronically to assure the timely acceptance and processing of those filings.[1981] Additional documents shall be attached to this electronic application.

4. UPDATING—By law, the *applicant* must promptly update Form SBSE–BD information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason [17 CFR 240.15Fb2–2]. In addition, the applicant must update any incomplete or inaccurate information contained on Form SBSE–BD prior to filing a notice of withdrawal from

[1981] As discussed in the release proposing this Form, the Commission is currently developing a system to facilitate receipt of applications electronically. More specific instructions on how to file this Form may be included in the final version of the Form.

registration on Form SBSE–W [17 CFR 15Fb3–2(a)].

5. FEDERAL INFORMATION LAW AND REQUIREMENTS—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. Sections 15F, 17(a) and 23(a) of the Exchange Act authorize the SEC to collect the information on this form from registrants. *See* 15 U.S.C. §§ 78o–10, 78q and 78w. Filing of this form is mandatory. The principal purpose of this Form is to permit the Commission to determine whether the *applicant* meets the statutory requirements to engage in the security-based swap business. The Commission maintain[s] a file of the information on this form and will make certain information collected via the form publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. § 3507. The information contained in this form is part of a system of records subject to the Privacy Act of 1974, as amended. The Securities and Exchange Commission has published in the **Federal Register** the Privacy Act Systems of Records Notice for these records.

B. Filing Instructions

1. FORMAT

a. Items 1–4 and the accompanying Schedules must be answered and all fields requiring a response must be completed before the filing will be accepted.

b. Failure to follow instructions or properly complete the form may result in the application being delayed or rejected.

c. *Applicant* must complete the execution screen certifying that Form SBSE–BD and amendments thereto have been executed properly and that the information contained therein is accurate and complete.

d. To amend information, the *applicant* must update the appropriate Form SBSE–BD screens.

e. A paper copy, with original signatures, of the initial Form SBSE–BD filing and Schedules must be retained by the *applicant* and be made available for inspection upon a regulatory request.

The mailing address for questions and correspondence is:

BILLING CODE 8011–01–P

FORM SBSE-BD	Application for Registration as a Security-based Swap Dealer and Major Security-based Swap Participant that is Registered as a Broker-Dealer	Official Use	Official Use Only

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of business as an SBS Entity, would violate the Federal securities laws and may result in disciplinary, administrative, injunctive or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.

[ ] APPLICATION **[ ] AMENDMENT**

1. Exact name and CRD number of the *applicant:*
   - A. Full name of the *applicant*:
   - B. CRDNo.:
   - C Website/URL:
   - D. Contact Employee:
     Name: Title:
     Telephone Number: Email Address:
   - E. Chief Compliance Officer designated by the *applicant* in accordance with Exchange Act Section 15F(k):
     Name: Title:
     Telephone Number: Email Address:

2. A. The *applicant* is registering as a security-based swap dealer: [ ] Yes [ ] No
   B. The *applicant* is registering as a major security-based swap participant: [ ] Yes [ ] No
   Because it: (check all that apply)
   [ ] maintains a substantial security-based swap position
   [ ] has substantial counterparty exposure [ ] is highly leveraged relative to its capital position

3. A. The *applicant* is presently registered with the Commodity Futures Trading Commission as a:
   [ ] Swap Dealer [ ] Major Swap Participant
   B. The *applicant* is registering with the Commodity Futures Trading Commission as a:
   [ ] Swap Dealer [ ] Major Swap Participant

4. Is the *applicant* subject to regulation by a prudential regulator, as defined in Sec. 1a(39) of the Commodity Exchange Act.
   [ ] Yes [ ] No If "*yes*," identify the prudential regulator: _____.

Briefly describe the *applicant's* business: _____

5. Is the *applicant* registered with a foreign financial regulatory authority? [ ] [ ]
   If "*yes*," list all such registrations on Schedule F, Page 1, Section II.

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's security-based swap activities, unless the applicant is a nonresident SBS Entity , may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 1E and 1F. If the applicant is a nonresident SBS Entity, it must complete Schedule F to designate a U.S. agent for service of process.

The undersigned certifies that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including schedules attached hereto, and other information filed herewith are current, true and complete. The undersigned and applicant further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

Date (MM/DD/YYYY) Name of Applicant

By: Signature Name and Title of Person Signing on *Applicant's* behalf

This page must always be completed in full.

DO NOT WRITE BELOW THIS LINE – FOR OFFICIAL USE ONLY

Schedule F of FORM SBSE NONRESIDENT SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS	*Applicant* Name: _____ Date: _____ Firm SEC No.: _____	Official Use

Section I ***Service of Process and Certification Regarding Access to Records***

Each nonresident security-based swap dealer and non-resident security-based swap participant shall use Schedule F to identify its United States agent for service of process and the certify that it can

(1) provide the Commission with prompt access to its books and records, and

(2) submit to onsite inspection and examination by the Commission.

1. Service of Process:

A. Name of United States person *applicant* designates and appoints as agent for service of process

B. Address of United States person *applicant* designates and appoints as agent for service of process

The above identified agent for service of process may be served any process, pleadings, subpoenas, or other papers in

(a) any investigation or administrative proceeding conducted by the Commission that relates to the *applicant* or about which the *applicant* may have information; and

(b) any civil or criminal suit or action or proceeding brought against the *applicant* or to which the *applicant* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States or of any of its territories or possessions or of the District of Columbia, to enforce the Exchange Act. The *applicant* has stipulated and agreed that any such suit, action or administrative proceeding may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

2. Certification regarding access to records:

Applicant can as a matter of law;

(1) provide the Commission with prompt access to its books and records, and

(2) submit to onsite inspection and examination by the Commission.

Applicant must attach to this Form SBSE a copy of the opinion of counsel it is required to obtain in accordance with paragraph (c)(2) or (c)(3) of Exchange Act Rule 15Fb2-4, as appropriate [paragraphs (c)(2) or (c)(3) of 17 CFR 240.15Fb2-4].

Signature:

Name and Title:

Date:

Section II ***Registration with Foreign Financial Regulatory Authorities***

Complete this Section for Registration with Foreign Financial Regulatory Authorities relating to ITEM 5. Each security-based swap dealer and major security-based swap participant that is registered with a foreign financial regulatory authority must list on Section II of this Schedule F, for each foreign financial regulatory authority with which it is registered, the following information:

1. _____ English Name of Foreign Financial Regulatory Authority	_____ Foreign Registration No. (if any)	_____ English Name of Country:
2. _____ English Name of Foreign Financial Regulatory Authority	_____ Foreign Registration No. (if any)	_____ English Name of Country:
3. _____ English Name of Foreign Financial Regulatory Authority	_____ Foreign Registration No. (if any)	_____ English Name of Country:

If applicant has more than 3 Foreign Financial Regulatory Authorities to report, complete additional Schedule F Page 1s.

Schedule G of FORM SBSE-BD CERTIFICATION ON STATUTORY DISQUALIFICATION	*Applicant* Name: _____ Date:_____ Firm SEC No.: _____	Official Use

Use Schedule G to certify that none of the *applicant's* associated persons is subject to statutory disqualification (as that term is defined in Section 3(a)(39) of the Exchange Act [15 U.S.C. 78c(a)(39)].

Instructions: This certification must be signed by the *applicant's* Chief Compliance Officer designated pursuant to Exchange Act Section 15F(k) or by his or her designee.

For purposes of this Form, the term *associated person* shall have the meaning as specified in Section 3(a)(70) of the Exchange Act [15 U.S.C. 78c(a)(70)].

This is a: [ ] CERTIFICATION [ ] RE-CERTIFICATION

The *applicant* certifies that it has

(a) performed background checks on all of its *associated persons* who effect or are involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf, and

(b) determined that no *associated person* who effects or is involved in effecting, or who will effect or be involved in effecting, security-based swaps on its behalf is subject to statutory disqualification, as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(39)].

Applicant Name:	Date:
Signature of Chief Compliance Officer or Designee:	
Name of Chief Compliance Officer or Designee:	If Designee, Title of Designee:

BILLING CODE 8011–01–C

Appendix D: List of Commenters

Market participants, foreign regulators, and other interested parties have submitted to the Commission (and the CFTC) numerous written comment letters that address the application of Title VII to cross-border activities. Because of the interdisciplinary nature of cross-border issues, these comments were filed in connection with several rulemakings and following the joint public roundtable regarding the application of Title VII to cross-border activities held by the Commission and the CFTC on August 1, 2011. The Commission has provided the legend and table below to facilitate the public's ability to access and review these comment letters.

Abbreviation	Source	Location
Definitions Concept Release (Advanced Joint Notice of Proposed Rulemaking or "ANPR").	Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://www.sec.gov/comments/s7-16-10/s71610.shtml.*
Study on International Swap Regulation ("ISR").	Comments on Acceptance of Public Submissions for a Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://www.sec.gov/comments/4-635/4-635.shtml.*
Intermediary Definitions Adopting Release ("IDAR").	SEC Final Rules on the Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant".	*http://www.sec.gov/comments/s7-39-10/s73910.shtml.*
Registration Proposing Release ("RPR").	SEC Proposed Rules on the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants.	*http://www.sec.gov/comments/s7-40-11/s74011.shtml.*
Regulation SBSR Proposing Release ("RSPR").	SEC Proposed Rules on Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information.	*http://www.sec.gov/comments/s7-34-10/s73410.shtml.*

Abbreviation	Source	Location
Regulation SB SEF Proposing Release (''PRSBR'').	SEC Proposed Rules on the Registration and Regulation of Security-Based Swap Execution Facilities.	*http://www.sec.gov/comments/s7-06-11/s70611.shtml*.
Product Definitions (''PD'') ...	Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://www.sec.gov/comments/s7-16-11/s71611.shtml*.
Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act (''PC'').	Security-Based Swap Dealers and Major Security-Based Swap Participants: Title VII Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://www.sec.gov/comments/df-title-vii/swap/swap.shtml*.
Roundtable (''T7R'')	August 1, 2011—Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://www.sec.gov/comments/4-636/4-636.shtml*.
SDR Proposing Release (''SPR'').	Security-Based Swap Data Repository Registration, Duties, and Core Principles.	*http://www.sec.gov/comments/s7-35-10/s73510.shtml*.
CFTC Title VII Definitions (''CFTC–D'').	CFTC Proposed Rule 75 FR 51429: Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://comments.cftc.gov/PubliPublicCom/CommentList.aspa?id=759*.
CFTC Further Definitions of ''Swap Dealer'' (''FDSD'').	CFTC Proposed Rule 75 FR 80174: Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant''.	*http://comments.cftc.gov/PublicComments/CommentList.aspx?id=933*.
CFTC Further Definition of ''Swap'' (''FDS'').	CFTC Proposed Rule 76 FR 29818: Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping.	*http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1032*.
CFTC Cross-Border Guidance (''CBG'').	CFTC Proposed Interpretive Guidance and Policy Statement 77 FR 41214: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act.	*http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234*.
Interim Final Rule on Reporting of Security-Based Swap Transaction Data (''IFTR'').	Interim Final Temporary Rule for Reporting of Security-Based Swap Transaction Data.	*http://sec.gov/comments/s7-28-10/s72810.shtml*.
End-User Exception Proposing Release (''EUEPR'').	SEC Proposed Rules on the End-User Exception to Mandatory Clearing of Security-Based Swaps.	*http://www.sec.gov/comments/s7-43-10/s74310.shtml*.
Sequencing Policy Release (''SQPR'').	SEC Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based-Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act.	*http://www.sec.gov/comments/s7-05-12/s70512.shtml*.

Below is a list of comment letters that we considered in this release.

1. ''ABC Letter'' American Benefits Council, to Elizabeth M. Murphy, Secretary, SEC (Apr. 8, 2011) (available in PRSBR)
2. ''ACP/AMF Letter'' Christian Noyer, Chairman, Autorité de Controle Prudential and Jean-Pierre Jouyet, Chairman, Autorité des Marchés Financiers to Mary Schapiro, Chairman, SEC (Feb. 11, 2011) (available in IDAR)
3. ''AIMA Letter'' Mary Richardson, Director of Regulatory and Tax Department, Alternative Investment Management Association to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
4. ''APG Asset Management Letter'' Guus Warringa, Chief Counsel, Legal, Tax, Regulations and Compliance, APG Algemene Pensioen Groep NV/APG Asset Management to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (undated) (available in IDAR)
5. ''AFGI Letter'' Bruce Stern, Chairman, Association of Financial Guaranty Insurers (AFGI) to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Sept. 19, 2011) (available in T7R)
6. ''Asian-Pacific Regulators Letter'' Belinda Gibson, Deputy Chairman, Australian Securities and Investments Commission; Malcolm Edey, Assistant Governor (Financial System), Reserve Bank of Australia; Arthur Yuen, Deputy Chief Executive, Hong Kong Monetary Authority; Keith Lui, Executive Director, Supervision of Markets, Securities and Futures Commission, Hong Kong; Teo Swee Lian, Deputy Managing Director (Financial Supervision), Monetary Authority of Singapore to Gary Gensler, Chairman, CFTC (Aug. 27, 2012) (unavailable online)
7. ''BaFin Letter'' Thomas Happel, Executive Director for Banking Supervision, Bundesanstalt für Finanzdienstleistungsaufsicht to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (Mar. 25, 2011) (available in IDAR)
8. ''Better Markets Letter'' Dennis M. Kelleher, President & CEO, Stephen W. Hall, Securities Specialist, Wallace C. Turbeville, Derivatives Specialist, Better Markets, Inc., to Elizabeth M. Murphy, Secretary, SEC (Feb. 4, 2011) (available in EUEPR)
9. ''BIS Letter I'' Gunter Pleines, Head of Banking, and Diego Devos, General Counsel, Bank for International Settlements to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC and James Brigagliano, Deputy Director, Division of Trading and Markets, SEC (Mar. 18, 2011) (available in ANPR)
10. ''BIS Letter II'' Günter Pleines, Head of Banking Department, and Diego Devos, General Counsel, Bank for International Settlements to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (July 20, 2011) (available in PD)
11. ''BlackRock Letter'' Joanne Medero, Richard Prager, and Supurna VedBrat, BlackRock, Inc. to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
12. ''Bloomberg Letter'' Ben Macdonald, Global Head Fixed Income, Bloomberg

LP to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)

13. ''CEB Letter'' Jacques Mirante-Peré, Chief Financial Officer, and Jan De Bel, General Counsel, Council of Europe Development Bank to Elizabeth M. Murphy, Secretary, SEC, and David A. Stawick, Secretary, CFTC (July 22, 2011) (available in PD)
14. ''China Investment Letter'' Wang Jianxi, Executive Vice President, China Investment Corp. to David A. Stawick, Secretary, CFTC and Elizabeth Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
15. ''Citadel Letter'' Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC, to Elizabeth M. Murphy, Secretary, SEC (Aug. 13, 2012) (available in SQPR)
16. ''Citigroup Letter'' James A. Forese, Chief Executive Officer, Securities & Banking, Citigroup Inc. to David A. Stawick, Secretary, CFTC (Aug. 27, 2012) (available in CBG)
17. ''Cleary Letter I'' Edward Rosen, Cleary Gottlieb Steen & Hamilton, LLP to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Sept. 21, 2010) (available in ANPR)
18. ''Cleary Letter II'' Edward Rosen, Cleary Gottlieb Steen & Hamilton, LLP, for Bank of America, BNP Paribas, Citi, Credit Agricole, Credit Suisse (USA), Deutsche Bank AG, Morgan Stanley, Nomura Securities International, Inc., PNC Bank, National Association, Société Générale, UBS Securities LLC, and Wells Fargo & Co. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 14, 2011) (available in RSPR)
19. ''Cleary Letter III'' Edward J. Rosen, Partner, Cleary Gottlieb Steen & Hamilton LLP, for Bank of America, Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, UBS Securities LLC, and Wells Fargo & Co. to Elizabeth M. Murphy, Secretary, SEC and David A. Stawick, Secretary, CFTC (April 5, 2011) (available in PRSBR)
20. ''Cleary Letter IV'' Edward Rosen, Cleary Gottlieb Steen & Hamilton, LLP, for Bank of America, Barclays Capital, BNP Paribas, Citi, Credit Agricole, Credit Suisse (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, and UBS Securities LLC to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corp., Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration, and Alfred Pollard, General Counsel, Federal Housing Finance Agency (Sept. 20, 2011) (available in T7R)
21. ''CME Letter'' Craig S. Donohue, Chief Executive Officer, CME Group Inc., to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
22. ''Davis Polk Letter I'' Lanny Schwartz, Arthur Long, Bob Colby, and Courtenay Myers, Davis Polk & Wardwell, for Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, and UBS AG to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Jan. 11, 2011) (available in IDAR)
23. ''Davis Polk Letter II'' Lanny Schwartz, Arthur Long, Bob Colby, and Courtenay Myers, Davis Polk & Wardwell, for Barclays Bank PLC, BNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, HSBC, Nomura Securities International, Inc., Rabobank Nederland, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, The Toronto-Dominion Bank, and UBS AG to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Feb. 17, 2011) (available in IDAR)
24. ''Deutsche Bank Letter'' Ernest C. Goodrich, Jr., Managing Director—Legal Department, and Marcelo Riffaud, Managing Director—Legal Department, Deutsche Bank AG to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC (Nov. 5, 2010) (available in IFTR)
25. ''DTCC Letter I'' Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (Nov. 15, 2010) (available in SPR)
26. ''DTCC Letter II'' Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Elizabeth M. Murphy, Secretary, SEC (Jan. 18, 2011) (available in RSPR)
27. ''DTCC Letter III'' Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Elizabeth M. Murphy, Secretary, SEC (Jan. 24, 2011) (available in SPR)
28. ''DTCC Letter IV'' Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (June 3, 2011) (available in RSPR and SPR)
29. ''ECB Letter I'' Daniela Russo, Director General, Directorate General Payments and Market Infrastructure, and Antonio Sainz de Vicuna, General Counsel, European Central Bank to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC and James Brigagliano, Deputy Director, Division of Trading and Markets, SEC (May 6, 2011) (available in CFTC–D; not available on SEC Web site, but accessible via CFTC Web site)
30. ''ECB Letter II'' Daniela Russo, Director General, Directorate General Payments and Market Infrastructure, European Central Bank to Natalie Markman Radhakrishnan, Office of International Affairs, CFTC, and Babbak Sabahi, Office of International Affairs, SEC (Sep. 29, 2011) (available in ISR)
31. ''EDF Letter'' Eric Dennison, Sr. Vice President and General Counsel, Stephanie Miller, Assistant General Counsel-Commodities, Bill Hellinghausen, Director of Regulatory Affairs, EDF Trading North America, LLC to David A. Stawick, Secretary, CFTC (Feb. 22, 2011) (available in IDAR)
32. ''EIB Letter'' A. Querejeta, Secretary General and General Counsel, and B. de Mazières, Director General, European Investment Bank to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC, and James Brigagliano, Deputy Director, Division of Trading and Markets, SEC (July 22, 2011) (available in PD)
33. ''ESMA Letter'' Carlos Tavares, Vice-Chairman, European Securities and Markets Authority to Mary Schapiro, Chairman, SEC (Jan. 17, 2011) (available in SPR)
34. ''European Commission Letter I'' Michel Barnier, European Commissioner for Internal Markets and Services, European Commission to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (July 19, 2011) (unavailable online)
35. ''European Commission Letter II'' Michel Barnier, European Commissioner for Internal Markets and Services, European Commission to Mary Schapiro, Chairman, SEC and Gary Gensler, Chairman, CFTC (Oct. 24, 2011) (unavailable online)
36. ''European Financial Markets Letter'' Antonio Sainz de Vicuna, European Financial Markets Lawyers Group to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Mar. 24, 2011) (available in PC)
37. ''Financial Services Roundtable Letter'' Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
38. ''GFI Letter'' Scott Pintoff, General Counsel, GFI Group Inc., to Elizabeth Murphy, Secretary, SEC (July 12, 2011) (available in PRSBR)
39. ''GIC Letter'' Lee Ming Chua, General Counsel, Government of Singapore Investment Corp. Pte Ltd. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in ANPR)
40. ''ICI Letter'' Karrie McMillan, General Counsel, Investment Company Institute to Elizabeth M. Murphy, Secretary, SEC, dated (Jan.18, 2011) (available in RSPR)
41. ''IIB Letter'' Sarah A. Miller, Chief Executive Officer, Institute of International Bankers to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Jan. 10, 2011) (available in IDAR)
42. ''ISDA Letter I'' Robert Pickel, Executive Vice Chairman, International Swaps and

Derivatives Association, Inc. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)

43. ''ISDA Letter II'' Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc. to Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IFTR)
44. ''ISDA/SIFMA Letter I'' Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc. and Kenneth Bentsen, Jr. Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association to Elizabeth M. Murphy, Secretary, SEC (Jan. 18, 2011) (available in RSPR)
45. ''ISDA/SIFMA Letter II'' Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc. and Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
46. ''Japanese Banks Letter'' Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd., and Sumitomo Mitsui Banking Corp. to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (May 6, 2011) (available in RSPR)
47. ''JFSA Letter I'' Katsunori Mikuniya, Commissioner and Chief Executive, Financial Services Agency, Government of Japan to Gary Gensler, Chairman, CFTC; copy recipients include Chairman Mary Schapiro and Commissioners Luis Aguilar, Kathleen Casey, Troy Parades, and Elisse Walter, SEC (Apr. 1, 2011) (unavailable online)
48. ''JFSA Letter II'' Chikahisa Sumi, Deputy Commissioner for International Affairs, Financial Services Agency, Government of Japan to Jill Sommers, Commissioner, CFTC; copy recipients include Chairman Mary Schapiro and Commissioners Luis Aguilar, Kathleen Casey, Troy Parades, and Elisse Walter, SEC (June 3, 2011) (unavailable online)
49. ''Jones Day Letter'' Joel Telpner, Jones Day to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
50. ''KfW Letter'' Dr. Lutz-Christian Funke, Sr. Vice President, and Dr. Frank Czichowski, Sr. Vice President and Treasurer, KfW Bankengruppe to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Mar. 20, 2012) (available in PD)
51. ''MFA Letter I'' Stuart J. Kaswell, Executive Vice President, Managing Director, and General Counsel, Managed Funds Association to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Jan. 24, 2011) (available in SPR)
52. ''MFA Letter II'' Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
53. ''MFA Letter III'' Stuart J. Kaswell, Executive Vice President, Managing Director & General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
54. ''MFA Letter IV'' Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association to Elizabeth M. Murphy, Secretary, SEC (Aug. 13, 2012) (available in SQPR)
55. ''MarketAxess Letter'' Richard M. McVey, Chairman and Chief Executive Officer, MarketAxess Holdings Inc. to Elizabeth M. Murphy, Secretary, SEC (April 4, 2011) (available in PRSBR)
56. ''Markit Letter'' Kevin Gould, President, Markit North America, Inc. to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Sept. 19, 2011) (available in T7R)
57. ''MarkitSERV Letter I'' Jeff Gooch, Chief Executive Officer, MarkitSERV to Elizabeth M. Murphy, Secretary, SEC (Jan. 24, 2011) (available in RSPR and SPR)
58. ''MarkitSERV Letter II'' Jeff Gooch, CEO, MarkitSERV to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC (Sept. 19, 2011) (available in T7R)
59. ''Milbank Tweed Letter'' Winthrop N. Brown, Milbank, Tweed, Hadley & McCloy, LLP to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (Feb. 22, 2011) (available in IDAR)
60. ''Multiple Associations Letter I'' Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC (May 4, 2011) (available in ANPR)
61. ''Multiple Associations Letter II'' Futures Industry Association, the Financial Services Roundtable, Institute of International Bankers, Insured Retirement Institute, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association, and U.S. Chamber of Commerce to Elizabeth M. Murphy, Secretary, SEC (May 31, 2011) (available in ANPR)
62. ''Multiple Associations Letter III'' Conrad Voldstad, CEO, International Swaps and Derivatives Association; T. Timothy Ryan, Jr., President and CEO, Global Financial Markets Association; Guido Ravoet, CEO, Alternative Investment Management Association; Anthony Belchambers, CEO, Futures and Options Association; Jane Lowe, Director, Markets, Investment Management Association; and Alex McDonald, CEO, Wholesale Market Brokers' Association and London Energy Brokers' Association to Michel Barnier, Commissioner for the Internal Market and Services, The European Commission, and Timothy Geithner, Secretary, The Department of the Treasury; copy recipients include Chairman Mary Schapiro and Commissioners Luis Aguilar, Kathleen Casey, Troy Parades, and Elisse Walter, SEC (July 5, 2011) (available in ISR)
63. ''Multiple Associations Letter IV'' ABA Securities Association; American Council of Life Insurers; Financial Services Roundtable; Futures Industry Association; Institute of International Bankers; International Swaps and Derivatives Association; and Securities Industry and Financial Markets Association to David A. Stawick, Secretary, CFTC; Elizabeth M. Murphy, Secretary, SEC; Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System; Office of the Comptroller of the Currency; Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation; Alfred M. Pollard, General Counsel, Federal Housing Finance Agency; Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration (Sept. 8, 2011) (available in ANPR)
64. ''Newedge Letter'' Gary DeWaal, Senior Managing Director and General Counsel, Newedge Group to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, SEC (Feb. 24, 2011) (available in IDAR)
65. ''NIB Letter'' Heikki Cantell, General Counsel, and Lars Eibeholm, Vice President, Chief Financial Officer, Head of Treasury, and Pernelle de Klauman, Deputy Chief Counsel, Nordic Investment Bank to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Aug. 2, 2011) (available in PD)
66. ''Norges Bank Letter'' Yngve Slyngstad, CEO, and Marius Nygaard Haug, Global Head of Legal, Norges Bank Investment Management to David A. Stawick, Secretary, CFTC and Elizabeth M. Murphy, Secretary, SEC (Feb. 18, 2011) (available in IDAR)
67. ''Phoenix Letter'' Nicholas J. Stephan, Chief Executive Officer, Phoenix Partners Group LP, to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
68. ''Rabobank Letter'' William R. Mansfield, Managing Director, Head of Global Financial Markets Americas, Rabobank Nederland to David A. Stawick, Secretary, CFTC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Apr. 5, 2011) (available in FDSD; not available on SEC Web site, but accessible via CFTC Web site)
69. ''SDMA Letter I'' Michael Hisler, Swaps & Derivatives Market Association, to Elizabeth M. Murphy, Secretary, SEC (Feb. 18, 2012) (available in PRSBR)
70. ''SDMA Letter II'' Michael Hisler, Swaps & Derivatives Market Association, to Elizabeth M. Murphy, Secretary, SEC (Apr. 21, 2012) (available in PRSBR)
71. ''SIFMA Letter I'' Kenneth Bentsen, Executive Vice President, Public Policy

and Advocacy, Securities Industry and Financial Markets Association to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, John Walsh, Acting Comptroller, Office of the Comptroller of the Currency, Administrator of National Banks, Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corp., Edward DeMarco, Acting Director, Federal Housing Finance Agency, and Gary Van Meter, Acting Director, Farm Credit Administration (Feb. 3, 2011) (available in IDAR)

72. ''SIFMA Letter II'' Kenneth E. Bentsen, Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association to Elizabeth M. Murphy, Secretary, SEC (Dec. 16, 2011) (available in RPR)
73. ''SIFMA AMG Letter I'' Timothy W. Cameron, Managing Director, Asset Management Group, Securities Industry and Financial Markets Association to Elizabeth M. Murphy, Secretary, SEC (Jan. 18, 2011) (available in RSPR)
74. ''SIFMA AMG Letter II'' Timothy W. Cameron, Managing Director, Asset Management Group, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
75. ''Société Générale Letter I'' Laura J. Schisgall, Managing Director and Senior Counsel, Société Générale to Ananda Radhakrishnan, Director of Clearing and Intermediary Oversight, CFTC, John M. Ramsay, Deputy Director, Division of Trading and Markets, SEC, and Mark E. Van Der Weide, Senior Associate Director, Division of Supervision and Regulation, Board of Governors of the Federal Reserve System (Nov. 23, 2010) (available in PC)
76. ''Société Générale Letter II'' Laura J. Schisgall, Managing Director and Senior Counsel, Société Générale to David A. Stawick, Secretary, Commodity Futures Trading Commission, Elizabeth M. Murphy, Secretary, SEC (Feb. 18, 2011) (available in IDAR)
77. ''Sullivan & Cromwell Letter'' Kenneth Raisler, Sullivan & Cromwell LLP, on behalf of Bank of America Corp., Citigroup Inc., and JP Morgan Chase & Co. to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, SEC, and Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (Feb. 22, 2011) (available in IDAR)
78. ''TCX Letter'' Joost Zuidberg, Managing Director, Chief Executive Officer and Brice Ropion, Director and Chief Operating Officer, TCX Investment Management Company B.V. to Marcia Blase, Counsel, Office of Commissioner Jill E. Sommers, CFTC (Dec. 15, 2011) (available in FDSD; not available on SEC Web site, but accessible via CFTC Web site)
79. ''Thomson Letter'' Nancy C. Gardner, Executive Vice President and General Counsel, Thomson Reuters Markets to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
80. ''TradeWeb Letter'' Lee H. Olesky, Chief Executive Officer, and Douglas L. Friedman, General Counsel, Tradeweb Markets LLC to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
81. ''UBS Letter'' David Kelly, Managing Director, and Paul Hamill, Executive Director, UBS Securities LLC, to Elizabeth M. Murphy, Secretary, SEC (Nov. 2, 2011) (available in PRSBR)
82. ''Vanguard Letter'' Gus Sauter, Managing Director and Chief Investment Officer, and John Hollyer, Principal and Head of Risk Management and Strategy Analysis, Vanguard to Elizabeth M. Murphy, Secretary, SEC (Jan. 18, 2011) (available in RSPR)
83. ''WMBAA Letter'' Stephen Merkel, Chairman, Shawn Bernardo, Vice Chairman, Christopher Ferreri, Board Member, J. Christopher Giancarlo, Board Member, and Julian Harding, Board Member, Wholesale Market Brokers' Association, Americas to Elizabeth M. Murphy, Secretary, SEC (Apr. 4, 2011) (available in PRSBR)
84. ''World Bank Letter I'' John Gandolfo, Acting Vice President and Treasurer, The World Bank to Jill Sommers, Commissioner, CFTC (Apr. 5, 2011) (available in ANPR)
85. ''World Bank Letter II'' Vincenzo La Via, World Bank Group CFO, Anne-Marie Leroy, Senior Vice President and Group General Counsel, and Rachel Robbins, Vice President and General Counsel of International Finance Corp. to David A. Stawick, Secretary, CFTC (July 22, 2011) (available in FDS; not available on SEC Web site, but accessible via CFTC Web site)

By the Commission.

Dated: May 1, 2013.

Elizabeth M. Murphy,

Secretary.

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 422 and 423

Medicare Program; Medical Loss Ratio Requirements for the Medicare Advantage and the Medicare Prescription Drug Benefit Programs; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 422 and 423

[CMS–4173–F]

RIN 0938–AR69

Medicare Program; Medical Loss Ratio Requirements for the Medicare Advantage and the Medicare Prescription Drug Benefit Programs

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule implements new medical loss ratio (MLR) requirements for the Medicare Advantage Program and the Medicare Prescription Drug Benefit Program established under the Patient Protection and Affordable Care Act.

DATES: These regulations are effective on July 22, 2013.

FOR FURTHER INFORMATION CONTACT: Ilina Chaudhuri, 410–786–8628 or *Ilina.Chaudhuri@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

We are publishing this final rule for the Medicare Advantage (Part C) and prescription drug (Part D) programs to make changes as required by the Patient Protection and Affordable Care Act (Pub. L. 111–148) as amended by the Health Care and Education Reconciliation Act (Pub. L. 111–152) (''Reconciliation Act''), which we refer to collectively as the Affordable Care Act. The Affordable Care Act includes significant reforms to both the private health insurance industry and the Medicare and Medicaid programs. Provisions in the Affordable Care Act concerning the Part C Medicare Advantage (MA) and Part D Prescription Drug programs largely focus on beneficiary protections, MA payment reforms, and simplification of MA and Prescription Drug program processes for both programs. Regulations implementing most Affordable Care Act provisions pertaining to the MA and Prescription Drug program provisions were published on April 12, 2012 (77 FR 22072) and a correction was published June 1, 2012 (77 FR 32407).

This final rule implements section 1103 of Title I, Subpart B of the Reconciliation Act. This section of the Affordable Care Act amends section 1857(e) of the Social Security Act (the Act) to add new medical loss ratio (MLR) requirements. An MLR is expressed as a percentage, generally representing the percentage of revenue used for patient care, rather than for such other items as administrative expenses or profit. Because section 1860D–12(b)(3)(D) of the Act incorporates by reference the requirements of section 1857(e) of the Act, these new Affordable Care Act medical loss ratio requirements also apply to the Part D program. Under these new requirements, MA organizations and Part D sponsors are required to report their MLR, and are subject to financial and other penalties for a failure to meet a new statutory requirement that they have an MLR of at least 85 percent. The Affordable Care Act requires several levels of sanctions for failure to meet the 85 percent minimum MLR requirement, including remittance of funds to the Secretary, a prohibition on enrolling new members, and ultimately contract termination. In the February 22, 2013 **Federal Register** (78 FR 12428), we published a proposed rule with revisions to the Medicare Advantage (MA) program (Part C) and prescription drug benefit program (Part D). This final rule sets forth CMS' implementation of these new MLR requirements for the MA and Part D programs.

II. Provisions of the Proposed Rule and Summary of and Responses to the Public Comments

We received approximately 51 items of timely correspondence containing comments in response to the February 22, 2013 proposed rule. These public comments addressed issues on multiple topics. Commenters included health and drug plan organizations, insurance industry trade groups, provider associations, pharmacist and pharmacy associations, beneficiary advocacy groups, private citizens, and others. Overall, commenters supported our decision to model Medicare MLR policy after the commercial MLR rules.

In this final rule, we address comments and concerns regarding the policies included in the proposed rule. We present a summary of public comments received, as well as our responses to them in the applicable section of this final rule.

A. Introduction

The new minimum MLR requirement in section 1857(e)(4) of the Act is intended to create incentives for MA organizations and Part D sponsors to reduce administrative costs such as marketing costs, profits, and other uses of the funds earned by MA organizations and Part D sponsors and to help ensure that taxpayers and enrolled beneficiaries receive value from Medicare health plans. Under this final rule, an MLR will be determined based on the percentage of Medicare contract revenue spent on clinical services, prescription drugs, quality improving activities, and direct benefits to beneficiaries in the form of reduced Part B premiums. The higher the MLR, the more the MA organization or Part D sponsor is spending on claims and quality improving activities and the less they are spending on other things. MA organizations and Part D sponsors will remit payment to CMS when their spending on clinical services, prescription drugs, quality improving activities, and Part B premium rebates, in relation to their total revenue, is less than the 85 percent MLR requirement established under section 1857(e)(4) of the Act. We believe the payment remittance of section 1857(4)(e)(A) of the Act is designed to encourage the provision of value to policyholders by creating incentives for MA organizations and Part D sponsors to become more efficient in their operations. If an MA organization or Part D sponsor fails to meet MLR requirements for more than 3 consecutive years, they will also be subject to enrollment sanctions and, after 5 consecutive years, to contract termination.

B. Scope, Applicability, and Definitions

As noted previously, section 1857(e)(4) of the Act, which establishes requirements for a minimum MLR, directly applies to the MA program. The requirements at section 1857(e)(4) of the Act also apply to the Medicare Prescription Drug Benefit Program, because section 1860D–12(b)(3)(D) of the Act requires that the contractual requirements at section 1857(e) of the Act apply to the Part D program.

1. Scope and Applicability

This section discusses the scope of the Medicare MLR requirements and the applicability to various plan types. Part 422 of the Code of Federal Regulations (CFR) regulates the MA Program, and Part 423 of the CFR regulates the Part D program. This final rule implements sections 1857(e)(4) and 1860D–12(b)(3)(D) of the Act by adding to both Parts 422 and 423 a new Subpart X, ''Requirements for a Minimum Medical Loss Ratio.'' Subpart X for the MA program has the same structure as Subpart X for the Part D program. Thus, discussion in this preamble is organized by each Subpart X section, and both MA and Part D provisions are discussed within each section. Any differences between the MA and Part D provisions

are described within the relevant section.

Because section 1857(e) of the Act, where the MLR requirement appears in statute, does not directly apply to Cost HMOs/CMPs (Cost Health Maintenance Organizations/Competitive Medical Plans), HCPPs (Health Care Prepayment Plans) or PACE (Program of All-Inclusive Care for the Elderly) organizations, we are finalizing that MLR requirements set forth in this final rule only apply to the Part D portion of the benefits offered by Cost HMOs/CMPs and employers/unions offering HCPPs. We are finalizing our proposal that we would treat these contracts like PDPs for MLR purposes. If a Cost HMO/CMP or an HCPP does not meet the minimum MLR requirement on the Part D portion of the benefits it provides to Medicare enrollees, for 3 consecutive years, it will be forced to stop enrolling new individuals in such Part D coverage and, after 5 consecutive years, will potentially lose the Part D portion of its contract.

As explained in the proposed rule, we believe that for PACE organizations offering Part D, the situation is different such that we should use our authority under the PACE statute to waive Medicare MLR requirements for PACE organizations. We received a comment on this proposal, which supported our proposed approach, and thus we are finalizing this proposal without modification, and are not applying the Part D MLR requirements to the Part D offerings of PACE organizations.

Comment: Several commenters supported the proposed rule and CMS's general approach of using the commercial MLR rules as a reference point for developing the Medicare MLR requirements.

Response: We appreciate the support.

Comment: Many commenters believe that CMS has the discretion to not apply the Medicare MLR requirements to the Part D program, citing what they contended was a lack of evidence of Congressional intent to do so, or noting that holding Part D stand-alone contracts to the same minimum MLR as MA contracts is unfair because of relatively low drug claims costs or more volatility compared to medical-only plans or plans with both medical and drug benefits. Several commenters pointed to the provision in section 1857(e)(3) of the Act that applies to contracts with federally qualified health centers (FQHCs) as a precedent for not applying a provision in section 1857(e) of the Act to Part D, presumably based on the belief that the FQHC provision does not apply to Part D.

Another commenter stated that, if Medicare MLR applies to Part D, we should consider a multiplier to increase Part D MLRs. Another commenter asked us to consider lowering the 85 percent requirement for Part D contracts. Some commenters argued that enforcing an MLR for Part D contracts would be unnecessary because plans are already subject to risk corridors that serve as an upper limit on net revenue. A commenter suggested that, at a minimum, CMS delay the applicability of Medicare MLR requirements to Part D until 2015. Several commenters supported applying Medicare MLR requirements to the Part D program.

Response: In the proposed rule, we explained that the statute requires us to apply all provisions in section 1857(e) of the Act to the Part D program. We disagree that the FQHC provision is relevant precedent for understanding the Medicare MLR statute. While this provision is not applicable as a practical matter, as Part D sponsors do not subcontract with FQHCs to provide FQHC services, if a Part D plan ever did so, that contract would be subject to this provision. In the case of the MLR rule, however, it clearly can be applied to drug costs, as it is under the commercial MLR rule upon which this rule is based.

With respect to the commenters seeking special treatment for Part D under the MLR rule, our analysis suggests that by including Part D reinsurance payments in the MLR calculation, meeting the minimum MLR requirement will be reasonably achievable for Part D stand-alone contracts and thus a multiplier to increase MLRs for these contracts is not necessary. We believe that the MLR requirements and risk sharing achieve different goals, though they are related. The purpose of risk sharing as part of the Part D payment reconciliation is for sponsors and the government to share in the unexpected gains or losses to a sponsor that are not already included in the reinsurance subsidy or taken into account through risk adjustment. The MLR requirement places a lower bound on the percent of total revenue that must be spent on claims and quality improving activities, which risk sharing does not. Furthermore, one objective that the MLR policy will accomplish, that risk sharing does not, is to provide beneficiaries a measure by which they can compare relative value of Medicare products.

Comment: A few commenters believe that the Medicare MLR requirements should not apply to Part D stand-alone contracts because the Medicare MLR should mirror the commercial MLR, which the commenters believe does not require MLR reporting for drug-only coverage.

Response: As discussed in the prior response, the statute requires us to apply the Medicare MLR requirement to the Part D program. Moreover, the commercial MLR rule does apply to an insurance policy covering only drugs, as it applies to all health insurance coverage as defined by the Public Health Service Act, so the premise of the question is incorrect.

Comment: A commenter believed that applying MLR to Part D would make it difficult for beneficiaries to compare Medicare MLRs within the Medicare market and between the Medicare and commercial markets.

Response: By applying the Medicare MLRs to the Part D program, we believe that beneficiaries can meaningfully compare health insurance products between the Medicare and commercial markets. We recognize that the advantage to beneficiaries of applying the Medicare MLRs to Part D stand-alone contracts is to allow for comparison among the stand-alone contracts more so than comparison with the MA–PD contracts.

Comment: A commenter expressed concern about the MLR requirements placing Cost Plans at a competitive disadvantage. The commenter gave the example of a beneficiary comparing an MA–PD with a Cost Plan that offers Part D and concluding that the MA–PD offers better value based on the MLR even if Cost Plan is more efficient in providing drug coverage. In this situation, the commenter was concerned that it would reflect poorly on the Cost Plan as a whole and not just on the Part D portion of the plan.

Response: Because the MLR rule is applied to the Part D portion of the benefits offered by Cost Plans, we will be treating them like PDPs for MLR purposes. Thus, when we make MLR information available to the public, we plan to make clear which MLRs are associated with comprehensive benefits and which are associated only with a drug benefit.

Comment: Because beneficiary premiums fund 25 percent of the value of benefits offered under Part D plans, a commenter believes that absence of any mechanism to share the remittances with beneficiaries is further evidence that the Medicare MLR requirement is not applicable to Part D.

Response: That would not be a reason to exempt Part D coverage, as beneficiaries with Part C coverage may also have a premium.

Comment: A commenter sought clarification regarding the applicability of the rule for section 1876 Cost HMO/

CMPs and section 1833 Cost HCPPs (Health Care Prepayment Plans) that offer Part D.

Response: As the Medicare MLR rule will only apply to the Part D portion of the benefits offered by Cost HMOs/CMPs and employers/unions offering HCPPs, we will treat them like PDPs instead of MA–PDs for MLR purposes.

Comment: A commenter stated that application of the MLR to Part D would create an uneven playing field due to the manner by which LIS beneficiaries are auto-enrolled into certain plans without sponsors paying agent and broker fees to acquire this new enrollment. Because agent and broker fees are considered administrative costs under this rule, the commenter suggests that those contracts with high levels of auto-enrolled beneficiaries would be advantaged in meeting the MLR requirements.

Response: We do not believe this introduces a systemic bias that favors particular plan sponsors. Every plan sponsor has the potential to bid below the LIS benchmark and receive auto-enrollment for its non-enhanced PDPs.

Comment: A commenter supported applying the Medicare MLR requirements to EGWPs, while another commenter requested that we waive the Medicare MLR requirements for all EGWPs. A few commenters requested clarification that the MLR applies only to the defined standard benefit for Part D EGWPs in light of CMS' policy effective as of January 2014 that supplemental benefits for Part D EGWPs will be considered non-Medicare benefits for purposes of adjudicating the benefit and populating PDE records.

Response: The MLR statutory provision does not provide for an exemption for EGWPs and thus applies to contracts offering MA and Part D plans. As a significant percentage of MA enrollees are members of EGWPs (about 20 percent), we believe that it is important not to exempt EGWPs. We expect EGWPs to report costs and revenue per § 422.2420 and § 423.2420 on the Medicare-funded portion of each contract. Additional information regarding how to determine the Medicare-funded portion of each contract will be provided in sub-regulatory guidance or in the Paperwork Reduction Act notice and comment process. We note that though we currently do not collect information on EGWP benefit packages, we have the authority to request this information if needed. For non-CY EGWPs, we expect that MLR calculations and remittances would occur on a calendar year basis, similar to how payments and most submissions to CMS are on a calendar year basis.

Comment: A commenter supported not applying the Part D MLR requirements to the Part D offerings of PACE organizations.

Response: We appreciate the support, and as noted previously we are adopting this policy in this final rule.

Comment: A few commenters inquired how the Medicare MLR requirements will apply to private health plans participating in state demonstration to integrate care for dually eligible Medicare and Medicaid beneficiaries.

Response: Unless waived, all applicable statutory and regulatory requirements of the Medicare program apply to plans participating in these demonstrations. During the demonstration development process, we will determine, in conjunction with participating states, whether and to what extent to waive the Medicare MLR requirement.

2. Definitions

In proposed § 422.2401 and § 423.2401, we stated that the acronym MLR would be used to refer to the medical loss ratio referenced in Part 422, Subpart X and Part 423, Subpart X. We also defined non-claims costs as those expenses for administrative services that are not: Incurred claims, payments toward reducing the Part B premium for MA plan enrollees, expenditures on quality improving activities, licensing and regulatory fees, or state and federal taxes and assessments that cannot be deducted from total revenue.

After consideration of the public comments received, we are finalizing these provisions as proposed.

C. General Requirements for MA Organizations and Part D Sponsors

Sections 1857(e)(4) and 1860D–12 of the Act (which incorporates section 1857(e)(4) of the Act by reference) set forth a requirement that MA organizations and Part D sponsors report MLRs, and that these MLRs meet the statutory standard of 85 percent. Those organizations that do not meet this MLR requirement will be required to pay remittances. If organizations are unable to meet the minimum MLR for 3 consecutive years, they will also be subject to enrollment sanctions and, for 5 consecutive years, contract termination. MA organizations and Part D sponsors will be required to submit data to CMS that will allow enrollees of health plans, consumers, regulators, and others to take into consideration MLRs as a measure of health insurers' efficiency.

Comment: A few commenters requested that we deviate from requiring an 85 percent MLR for a contract year in favor of a lower MLR requirement, or that we calculate MLRs using a rolling 3-year average as required in the commercial markets.

Response: The 85 percent standard is set in statute, as is the fact that an MLR is calculated for each ''contract year.''

1. Aggregation of MLR to the Contract Level

We proposed at § 422.2410(a) and § 423.2410(a) that an MA organization and a Part D sponsor must report an MLR for each contract they have with CMS, instead of at the MA plan level or at the MA organization level. We also proposed requiring MA organizations to report one MLR for each contract that includes MA–PD plans, instead of one for nondrug benefits and another for prescription drug benefits.

Comment: Many commenters supported reporting MLRs at a higher level than the contract level, such as at the parent organization level. The commenters noted that this approach would be preferable as there would be less claims variation, would be administratively less burdensome to report, would reflect the national character of the Medicare program, is the closest option to the commercial MLR, and would ensure a level playing field. A few commenters recommended that CMS require aggregation of the MLR for MA organizations at the contract level within a state and for Part D stand-alone contracts at the contract level by region. Another commenter suggested that the appropriate level of aggregation is aggregated to the state level by MA or Part D plan, noting that beneficiaries enroll in plans and not contracts, that a good MLR at the contract level may mask low-value plans underneath it, and that applying sanctions at plan level would cause the least beneficiary disruption. These commenters recognized the potential value of reporting plan-level MLRs and urged us to continue considering this option after the final rule is published. Several commenters suggested that sponsors be able to choose a level of aggregation when reporting MLRs similar to the manner in which they can choose the level of aggregation when determining gain/loss margins for bidding. Many commenters agreed with reporting at the contract level as proposed.

Response: We continue to believe that reporting MLRs at the contract level strikes an appropriate balance of

administrative burden, meaningful MLRs, and comparability with commercial MLR reporting. Although Medicare is a national program, beneficiaries consider the coverage options available to them in a particular geographic area, which often correlates with the state in which they live. As MA and PDP contracts are often executed at the state level and no other reporting for MA and Part D organizations is done at the state level of aggregation, we believe that reporting Medicare MLRs at the contract level is preferable. This level of aggregation parallels the commercial MLR approach, which aggregates the MLR to the state and market level, and avoids imposing administrative burden for the minority of contracts that span multiple states. Contrary to the claim that aggregating at the parent organization level is necessary to ensure a level playing field, it would in fact favor parent organizations that operate nationally by allowing claims and revenues to be shifted around to meet the MLR requirements, which a parent organization with more limited scope would be unable to do.

Though we recognize that the value of individual plans in a contract may differ from one another, we also need to keep in mind that calculating MLRs at the plan level would necessitate higher credibility adjustments due to higher random claims variation; and therefore, may not result in a better measure of value. If we allowed sponsors to choose their level of reporting, then the foremost concern is that resulting MLRs would not be comparable by beneficiaries. We presume that most MA organizations and Part D sponsors would choose to report at the highest level of parent organization, which would raise the concerns we have previously discussed of meaningfulness of the MLR and significant beneficiary disruption in the event of enrollment sanction or contract termination.

Comment: Many commenters agreed with our proposed approach of reporting one combined MLR for MA only and MA–PD contracts for clarity to beneficiaries and the public.

Response: We appreciate the support.

After consideration of the public comments received, we are finalizing the level of aggregation for reporting Medicare MLR at the contract level as proposed.

2. Remittance Requirement

Per section 1857(e)(4)(A) of the Act and as set forth in proposed § 422.2410(b) and § 423.2410(b), if we determine for a contract year that an MA organization or Part D sponsor has an MLR for a contract year that is less than 0.85 (85 percent), the MLR requirement will not have been met and the sponsoring organization will be required to remit a payment to CMS. The amount of the remittance will be equal to the product of: (1) The total revenue under the contract for the contract year; and (2) the difference between 0.85 and the contract's MLR. Total revenue is discussed later in section II.D. of this final rule.

Comment: Notwithstanding the statutory requirement for remittances to be paid to the Secretary, a few commenters believe that we should reimburse Medicare beneficiaries who paid premiums to plans that did not meet the 85 percent MLR during the plan year.

Response: As the commenters note, the statute expressly provides that MA organizations and Part D sponsors must remit to the Secretary when the minimum MLR is not met.

After consideration of the public comments received, we are finalizing these provisions as proposed.

3. Enrollment Sanction

As set forth in § 422.2410(c) and § 423.2410(c), if an MA or PDP contract fails to have an MLR of at least 0.85 for 3 or more consecutive contract years, enrollment of new enrollees in plans under that contract will be prohibited. The year for which this enrollment sanction will apply will be the second succeeding year after the third consecutive year in which the MA organization or Part D sponsor fails to meet the MLR requirement. For example, the MLRs for contract years 2014 through 2016 will be reported in 2015 through 2017. If a contract did not meet the MLR requirement for the 2014, 2015, and 2016 contract years, new enrollment in plans under that contract will be prohibited beginning in 2018, which is the second succeeding contract year after the third consecutive year of failure (2016) to meet the MLR requirement.

Comment: A few commenters suggested establishing a special enrollment period to allow beneficiaries under MA or Part D contracts that do not meet the minimum MLR to disenroll and select a new plan.

Response: As discussed in section II.G. of this final rule, we are requiring MA organizations and Part D sponsors that fail to meet the minimum MLR 2 years in a row to report earlier the following year, such that any beneficiary would have sufficient time to select a new plan during the annual election period. Thus, we do not believe that a special enrollment period would be necessary. We note that in the circumstance of a contract termination for failure to meet the MLR, during the special enrollment period, enrollees in the plans under that contract being terminated would be notified that they have to elect another option for the year the termination takes effect, or would be placed under original Medicare.

Comment: A commenter requested that CMS interpret the enrollment sanction required after the ''second succeeding contract year'' as the second succeeding contract year following submission of the report. The commenter noted that such an interpretation would avoid imposing enrollment suspensions on MA organizations and Part D sponsors after they have already submitted their bids.

Response: We believe that one purpose of the enrollment sanction is to keep beneficiaries from enrolling in low value plans. The plain reading of the statute supports this goal, whereas interpreting the enrollment sanction to apply the second succeeding contract year following submission of the report would allow new enrollment into low value plans for another year.

Comment: A commenter asked for new enrollment to be allowed for plans that meet MLR requirements in the fourth year of reporting but had failed to meet the requirements for 3 consecutive years.

Response: If a contract fails to meet the minimum MLR for contract years 2014, 2015, and 2016, the enrollment sanction for all plans under that contract will be for contract year 2018. If the contract then meets the minimum MLR for 2017, new enrollment for plans under that contract will be allowed during contract year 2019.

Comment: A commenter urged that the processes that currently apply to suspensions of enrollment imposed as an intermediate sanction should apply to prohibitions on new enrollment based on a failure to meet MLR requirements.

Response: We would not expect an MA organization or Part D sponsor to contest a suspension of enrollment since it is required by statute and would be based on an MLR that the organization itself reported. However, if an MA organization or Part D sponsor wished to argue that an enrollment sanction should not have been imposed because they did not report 3 consecutive years of below 85 percent MLRs, we would make available the processes that currently apply to suspensions of enrollment imposed as an intermediate sanction. We note that under that process, the prohibition on new enrollment would remain in place

during any appeal of the enrollment sanction.

After consideration of the public comments received, we are finalizing these provisions as proposed.

4. Termination

If the contract fails to have an MLR of at least 0.85 (85 percent) for 5 consecutive contract years, we are required under section 1857(e)(4)(C) of the Act to terminate the contract. This requirement is reflected in proposed § 422.2410(d) and § 423.2410(d). We proposed to implement section 1857(e)(4)(C) of the Act by terminating the contract for the year following the year in which the MA organization or Part D sponsor is required to report the MLR for the fifth year. For termination, we proposed to implement the ''second succeeding contract year'' requirement in a manner similar to how we proposed to implement the enrollment termination after 3 or more consecutive years of not meeting the minimum MLR requirement. Thus, for a contract that failed to meet the MLR requirement in 2014 through 2018, we will terminate the contract in 2020.

Comment: A commenter concerned about beneficiary displacement asked how beneficiaries would be notified and transitioned in the event of a contract termination for failure to meet the MLR requirements.

Response: As discussed in section II.G. of this proposed rule, we are requiring MA organizations and Part D sponsors that fail to meet the minimum MLR 2 years in a row and onwards to report earlier the following year, such that any beneficiary would have sufficient time to select a new plan during the annual election period should the beneficiary wish to do so based on the MLR finding. As noted previously, in the case of a termination, enrollees would be informed that they needed to elect another option for the year the termination takes effect, or would be placed under original Medicare. Thus, in the event of a contract termination for failure to meet the MLR, the plans under that contract would not be available as an option for beneficiaries during the annual election period.

Comment: A commenter requested for appeal rights in the event of a contract termination due to failure to meet the MLR requirements for 5 consecutive years.

Response: We would not expect an MA organization or Part D sponsor to contest a contract termination since it is required by statute and would be based on an MLR that the organization itself reported. However, in response to this comment we are making notice and appeal rights in § 422.510(b)(1) and (d) and § 423.509(b)(1) and (d) available in the event of a contract termination for MLR reasons. Therefore, we are not finalizing § 422.510(a)(16) as proposed and instead revising § 422.2410(d) and § 423.2410(d) to state that CMS would terminate a contract per § 422.510(b)(1) and (d) and § 423.509(b)(1) and (d).

After consideration of the public comments received, we are finalizing these provisions as proposed, with the exceptions of not finalizing § 422.510(a)(16) and instead revising § 422.2410(d) to state that ''CMS terminates the contract per § 422.510(b)(1) and (d) effective as of the second succeeding contract year'' and not finalizing § 423.509(a)(16) and instead revising § 423.2410(d) to state that CMS terminates the contract per § 423.509(b)(1) and (d) effective as of the second succeeding contract year.

D. Calculation of Medical Loss Ratio

1. Definition of Medical Loss Ratio

Proposed § 422.2420(a) and 423.2420(a) set forth a high-level definition of the MLR as a ratio of the numerator defined in paragraph (b) to the denominator defined in paragraph (c). In general, the MA and Part C costs are in the numerator and revenues are in the denominator. A credibility adjustment is discussed in section II.F. of this final rule.

Proposed § 422.2410(a)(2) provides that the MLR for an MA contract not offering Part D prescription drug benefits will only be required to reflect the costs and revenues related to the benefits defined at § 422.100(c), basic benefits, mandatory supplemental benefits, and optional supplemental benefits. If the MA contract includes MA–PD plans, the MLR would, also under the proposed rule, be required to reflect costs and revenues for benefits described at § 423.104(d), (e), and (f) (standard coverage, alternative coverage, and enhanced alternative coverage). Proposed § 423.2410(a)(2) also specified that the MLR for a PDP contract would be required to reflect costs and revenues for standard coverage, alternative coverage, and enhanced alternative coverage.

Comment: A number of commenters commended CMS for adopting the same MLR rules that apply to commercial plans (which were based on recommendations of the National Association of Insurance Commissioners), modifying them when appropriate for the Medicare program. Commenters noted that this reduces issuer burden by avoiding needless duplication for issuers participating in both Medicare and commercial markets, facilitating common standards allowing comparisons and evaluations, and minimizes confusion for the public.

Response: We appreciate the support for aligning commercial and Medicare approaches to MLR reporting.

After consideration of the public comments received, we are finalizing these provisions as proposed.

2. MLR Numerator

Proposed sections 422.2420(b) and § 423.2420(b) for MA and Part D contracts identify the elements to be included in the numerator for a contract's MLR. Sections 422.2420(b)(1) and 423.2420(b)(1) identify two basic elements that would constitute the MLR numerator: Incurred claims (as defined in paragraphs (b)(2) through (b)(4) for both programs) and expenditures under the contract for activities that improve health care quality, which are referenced at paragraph (b)(1)(iii) for both programs, and described in detail at sections § 422.2430 and § 423.2430.

a. Incurred Claims

For the MA program, under the proposed rule, incurred claims would include direct claims that the MA organization pays to providers (including under capitation contracts) for covered services that are provided to all enrollees under the contract, as described at § 422.2420(b)(2)(i). In addition, as set forth at proposed § 422.2420(b)(2)(ii) and § 423.2420(b)(2)(i), for MA contracts that include MA–PD plans and for PDP contracts, respectively, incurred claims would be required to include only drug costs that are ''actually paid'' by the Part D sponsor, which are net of direct or indirect remuneration from any source. ''Actually paid'' claims refer to those costs for which the MA organization or Part D sponsor is liable through all phases of the benefit, including the reinsurance portion of claim costs in the catastrophic phase of the benefit. MA and Part D contracts would also be required to reflect the various items under § 422.2420(b)(2)(iii) through (xi) and § 423.2420(b)(2)(ii).

Comment: A commenter inquired whether claims costs for members with end-stage renal disease (ESRD) or who have elected hospice should be included in the numerator as incurred claims.

Response: Sections 422.2420(b)(1)(i) and 423.2420(b)(1)(i) state that the MLR numerator should include incurred claims for all enrollees. Thus, claims costs for ESRD enrollees should be included in the numerator as incurred

claims, as well as claims paid by the plan (and not fee-for-service Medicare) for enrollees who have elected hospice.

Comment: A commenter argued that use of Part C rebate dollars to reduce Part D premium and cost sharing should be added to the numerator for MA–PD contracts, in the same manner that the proposed rule allows rebate dollars allocated to reduce the Part B premium to be added to the numerator, because the Part D reductions also benefit beneficiaries. The commenter noted that this approach would be especially important to SNPs, which typically use some or all of the bid savings to buy down the cost of prescription drugs.

Response: The MLR is based on actual costs and revenues for plan benefit packages under a contract. Part C rebates are revenue to the MA organization, and thus are in the MLR denominator. The numerator includes expenses for benefits. A reduced Part B premium is a plan benefit, and only accounting flows make this appear other than a benefit expense. Currently, CMS makes a monthly payment to the MA organization for each enrollee in a plan, which includes the plan-specific rebate amount minus the amount (if any) for Part B premium reduction. This is revenue. Then CMS sends the amounts allocated to reduce Part B premiums to the Social Security Administration (SSA). If CMS instead paid the MA organization the Part B premium rebate amount and then required the MA organization to pay the SSA on behalf of its enrollees, it would be more apparent that such a payment is payment for a benefit, that is, a cost in the numerator. Given existing accounting flows, we find it appropriate to add the Part B rebate amount to the numerator, as proposed at § 422.2420(b)(ii) and § 422.2420(b)(ii). In contrast, rebates used to reduce Part D premiums and cost-sharing are associated with expenditures on drugs, and these costs are included in the numerator as incurred claims. Incurred claims reflect the benefit design for each plan under the contract, including design features such as reduced cost-sharing and supplemental drug coverage (which are in the benefit design in part because of rebate revenue). In reviewing this comment, we realized that making an adjustment for Part B premiums is not applicable to stand-alone Part D contracts and we have therefore deleted proposed § 423.2420(b)(1)(ii) and renumbered accordingly.

Comment: A few commenters requested that CMS clarify whether MA organizations employing capitated provider reimbursement arrangements may consider the full capitation amount as a benefit expense unless the provider contract specifies a distinct fee for administrative services. A commenter noted that an approach including the full capitation amount in incurred claims would mirror the commercial MLR requirements. Another commenter noted that capitated services often may include care management or disease management activities and other activities intended to improve quality.

Response: In § 422.2420(b)(2), we are following the commercial MLR approach where incurred claims are direct claims paid to providers, including under capitation contracts. Where an MA organization of Part D sponsor has arranged with a clinical provider for capitation payments rather than fee-for-service reimbursement for covered services to enrollees, and such capitation payments include reimbursement for certain provider administrative costs, then the entire per member per month capitation payment paid to the provider may be included in incurred claims. The full capitation amount paid to a provider for covered services described at § 422.2420(a)(2) could be reported as a benefit expense, unless, as the commenters noted, the provider contract specifies a distinct fee for administrative services. Note that if the capitated payment includes payment for quality-improving activities that also would meet the requirements under § 422.2430 and § 423.2430 (activities that improve health care quality), the MA organization must ensure that costs for these activities are only counted once in the numerator.

Comment: A commenter requested that CMS exclude from provider bonuses and incentive payments, which must be included in the numerator, the treatment of incentive bonuses to providers for the purposes of exclusive provider-sponsor contracting.

Response: One requirement of incentives and bonus payments to providers under § 422.2420(b)(2) and § 423.2420(b)(2) is that the payments must be ''related to clinical services and prescription drug costs'', which would not include bonus payments specifically as an incentive not to contract with another organization.

Comment: A commenter stated that CMS' proposal to include costs and revenues for optional supplemental benefits in the MLRs for MA contracts is unjustified because revenue for these benefits comes solely from beneficiary premium, and by law beneficiaries do not share in any remittances that must be made by MA organizations and Part D sponsors for contracts that fail to meet the MLR requirement. The commenter believed that the MLR should only include benefits funded by the Medicare program.

Response: The commenter is correct that we intend for the MA MLR to include all of the MA benefits defined at § 422.100(c): Basic benefits, mandatory supplemental benefits, and optional supplemental benefits. We believe that all Medicare costs and revenues under an MA contract should be included in the MLR, and the optional supplemental benefit package is defined by law as a type of Medicare benefit under the MA program. The fact that the optional supplemental benefit is funded completely by beneficiary premiums is a reason for including these benefits in the MLR. A key goal of the MLR provision is to provide beneficiaries with information needed to better understand how much of revenue—including beneficiary premiums—is being used to pay for their Medicare services and quality-improving activities.

Comment: A commenter recommended that CMS establish a multiplier to apply to the numerator for Part D contracts in recognition of significant differences between the structure of these limited benefit policies and comprehensive medical coverage, analogous to the multiplier developed for mini-med policies under the commercial MLR rule.

Response: We do not believe that the Medicare Part D benefit package is analogous to the limited benefit packages referred to as a mini-med policies, which the commercial MLR has defined as policies that have a total annual limit of $250,000 or less, and thus do not believe that application of an adjuster analogous to the mini-med adjuster is appropriate. Like stand-alone Part D contracts, commercial, stand-alone pharmacy policies are subject to the commercial MLR standard and do not receive an adjustment.

Comment: A few commenters requested that CMS follow the commercial rule and implement a 3-year reporting period to allow for smoothing of abatement years, thus resulting in a more accurate MLR calculation.

Response: The statutory language for the Medicare MLR requirement, unlike the commercial statute, requires that ''the Secretary determines for a contract year'' whether the MLR meets the threshold of 85 percent. We believe that CMS does not have the authority to implement a rolling 3-year average MLR.

Comment: A commenter determined that the proposed treatment of commercial reinsurance in the proposed rule deviated from the commercial MLR regulation. The commenter noted that

under 45 CFR 158.130(a)(3) of the commercial regulation, the only instances in which the premiums and claims associated with a ''100 percent indemnity reinsurance treaty'' are reported as part of the MLR calculation by the ''assuming entity'' instead of by the ''ceding entity'' are—(1) when the reinsurance treaty was in force prior to the date of enactment of the Affordable Care Act; and (2) in situations in which the assuming entity is also completely responsible for performing administrative functions.

Response: We thank the commenter for pointing out this unintended inconsistency with the commercial MLR regulation in our proposed provisions at § 422.2420(b)(1)(iv), § 422.2420(c)(4), § 423.2420(b)(1)(iv) and § 423.2420(c)(4).

Our proposed regulation would require that claims and revenue be reported on a direct basis, at § 422.2420(b)(2)(i), § 422.2420(c)(1), § 423.2420(b)(2)(i), and § 423.2420(c)(1). We agree that our proposed regulations about the exceptions to direct reporting should be corrected to mirror the commercial regulation as we intended. As we stated in the preamble to the proposed rule, we only intended to depart from the commercial MLR rule to the extent necessary and appropriate given the Medicare context. In this case, the provisions at issue do not involve Medicare. Thus, we are revising the proposed regulation text to mirror more exactly the commercial regulation at 45 CFR 158.130(a)(2) and (a)(3). We are separating provisions on assumptive and 100 percent indemnity reinsurance, and incorporating the commercial rule language at 45 CFR 158.130(a)(3), which provides that the only instance in which the premiums (revenue) and claims associated with a 100 percent indemnity reinsurance treaty are reported by the assuming entity, instead of by the ceding entity, is when the reinsurance treaty was in force prior to the date of enactment of the Affordable Care Act. In short, with this change our provisions now mirror the distinction between paragraphs § 158.130(a)(2) and (a)(3) in the commercial rule.

We are including these reinsurance provisions under § 422.2420 and § 423.2420 for both the MLR numerator (costs) and MLR denominator (revenue.) (The commercial MLR rule addresses the treatment of reinsurance for the MLR numerator at § 158.103 through a definition of direct paid claims.) Finally, we are moving the numerator provision at § 158.103 (b)(1)(iv) to (b)(5) and adding paragraph (b)(6).

Comment: A few commenters questioned whether, and how, the MLR requirement applies to MA Medical Savings Account (MSA) plans. One of these commenters requested that MSA plans be exempted, and another commenter argued that if the requirement applies to this unique plan type, the beneficiary deposit should be included in both the numerator and denominator of the calculation.

Response: Medicare MSA plans are a type of MA plan, and they are not exempted from the MLR statutory provisions. We agree with the commenter, however, that the annual deposit into the beneficiary's MSA should be included in both the numerator and denominator of the MLR calculation. In response to this comment, we are revising proposed § 422.2420(b)(1), to indicate that the annual deposit to the beneficiary's medical savings account should be included in the MLR numerator.

Note that the requirement to include optional supplemental benefit costs and revenue under the contract applies to all MA plan types.

After consideration of the public comments received, we are finalizing these provisions as proposed, with the exception of revising the proposed § 422.2420(b)(1) to indicate that the annual deposit to the beneficiary's medical savings account should be included in the MLR numerator, and making changes to the 100 percent indemnity and assumptive reinsurance provisions under § 422.2420 and § 423.2420.

b. Adjustments to and Exclusions From Incurred Claims

Under proposed § 422.2420(b)(3) and § 423.2420(b)(3), any amounts paid to providers that were recovered because they were overpayments would have to be deducted from incurred claims. There are also several expenditures that would not be included in incurred claims for MA and PDP contracts, as provided in § 422.2420(b)(4) and § 423.2420(b)(4). Under proposed § 422.2420(b)(4)(ii) and § 423.2420(b)(4)(ii), amounts paid to CMS by an MA organization or Part D sponsor as a remittance under § 422.2410(b) or § 423.2410(b) are not permitted to be included in incurred claims for any contract year.

Comment: A few commenters noted that direct and indirect remuneration was inadvertently being backed out of incurred claims twice, as the definition of drug costs ''actually paid'' per § 423.308 is already net of DIR and then again in the section listing adjustments that must be deducted from incurred claims.

Response: We agree and are correcting this error by removing proposed § 422.2420(b)(3)(i) and renumbering § 422.2420(b)(3)(ii) accordingly, as well as removing proposed § 423.2420(b)(3)(i) and renumbering § 423.2420(b)(3)(ii) accordingly. For clarity in the regulatory text, we added a reference to direct and indirect remuneration in § 423.2420(b)(2)(i).

Comment: Several commenters recommended that all low income premium and cost sharing subsidies (LIPS and LICS) and discounts on brand drugs advanced to beneficiaries as part of the Coverage Gap Discount Program be taken into account in the numerator (and denominator), similar to the treatment of Part D reinsurance.

Response: We make LIPS payments to MA organizations and Part D sponsors to make the sponsor whole for reduced premiums that eligible beneficiaries are paying the plan. Beneficiary premiums are revenue, not costs, and thus LIPS payments are taken into account in the denominator of the MLR. We view LICS payments and coverage gap discount payments as pass-through payments, unlike federal reinsurance, which pays for a portion—but not all—of plan liability in the catastrophic phase of the benefit. Thus, LICS and CGDP amounts do not belong in the MLR numerator or the MLR calculation.

We are finalizing this provision with the following modifications. We have made changes to the regulatory text by deleting proposed § 422.2420(b)(3)(i) and renumbering § 422.2420(b)(3)(ii) accordingly, as well as deleting proposed § 423.2420(b)(3)(i) and renumbering § 423.2420(b)(3)(ii) accordingly. We inserted the reference to direct and indirect remuneration in § 423.2420(b)(2)(i). We made these changes to make clear that direct and indirect remuneration must already be netted out of drug costs that are actually paid per § 423.308 and therefore should not be deducted again.

3. MLR Denominator

We proposed at § 422.2420(c) and § 423.2420(c) that the MLR denominator would equal the total revenue under the contract (as described in § 422.2420(c)(1) and § 423.2420 (c)(1)), net of deductions set forth in § 422.2420(c)(2) and § 423.2420(c)(2), taking into account the exclusions described in § 422.2420(c)(3) and § 423.2420(c)(3), and in accordance with § 422.2420(c)(4) and § 423.2420(c)(4). Total revenue for the MA program, as defined under proposed § 422.2420(c)(1) and § 423.2420(c)(1), must be reported on a direct basis and would include our risk-adjusted payments to the MA

organization for all enrollees under a contract, reflecting final risk scores, including Part C rebate payments, all unpaid premium amounts that an MA organization or Part D sponsor could have collected from enrollees in the plan(s) under the contract; all changes in unearned premium reserves, and for MA plans under a contract that offer Part D, direct subsidy payments and reinsurance payments as reconciled per § 423.329(c)(2)(ii); all premiums paid by or on behalf of enrollees to the MA organization or Part D sponsor as a condition of receiving coverage under an MA or Part D plan; our payments for low income premium subsidies under § 423.780; and risk corridor payments under § 423.315(e).

Total revenue for the Part D program, as defined at § 423.2420(c)(1), means CMS' payments to the Part D sponsor for all enrollees under a contract, reflecting final risk scores, including: direct subsidy payments at § 423.329(a)(1), reinsurance payments at § 423.329(a)(2), and payment adjustments resulting from reconciliation per § 423.329(c)(2)(ii); all premiums paid by or on behalf of enrollees to the Part D sponsor as a condition of receiving coverage under a plan; CMS' payments for low income premium subsidies under § 423.780; all unpaid premium amounts that a Part D sponsor could have collected from enrollees in the plan(s) under the contract; all changes in unearned premium reserves; and risk corridor payments under § 423.315(e).

At § 422.2420(c)(2), we proposed three categories of taxes and fees that must be deducted from total revenue: Licensing and regulatory fees, federal taxes and assessments, and state taxes and assessment. We also proposed that a fourth amount be deducted from total revenue: community benefit expenditures. We proposed to align with the commercial MLR regulations to allow a federal income tax-exempt issuer to deduct community benefit expenditures by defining them in § 422.2420(c)(2)(iv) and § 423.2420(c)(2)(iv), up to a cap of 3 percent of total revenue under this part or the highest premium tax rate in the state for which the MA organization or Part D sponsor is licensed, as expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health, and relief of government burden.

Next, we proposed that some items not be included in total revenue. First is the amount of unpaid premiums that the MA organization or Part D sponsor can demonstrate to us that it made a reasonable effort to collect. We proposed that HITECH, or EHR, incentive payments and payment adjustments would not be considered for purposes of the MLR calculation. Thus, neither EHR incentive payments for meaningful use of certified electronic health records by qualifying MAOs, MA EPs and MA-affiliated eligible hospitals (as administered under Part 495 subpart C), nor EHR payment adjustments for a failure to meet meaningful use requirements (as administered under Part 495 subpart C) will be in the MLR calculation. We proposed that Coverage Gap Discount Program payments under § 423.2320 would not be included in total revenue.

Finally, as explained in the preamble to the proposed rule, we did not propose an adjustment to total revenue for commercial reinsurance.

Comment: A few commenters requested clarification on the proposed regulatory requirement that total revenue must include all unpaid premium amounts that an MA organization or Part D sponsor could have collected from enrollees under a contract, but should exclude from total revenue all unpaid premium amounts for which they can demonstrate to CMS they made a reasonable effort to collect. Both commenters wanted to exclude all unpaid beneficiary premium revenue from the denominator. A commenter noted that the citations in the proposed rule to § 422.74(d)(1)(i) and § 423.44(d)(1)(i) are references to CMS' disenrollment policy, which includes the option that an MA organization or Part D sponsor may forgive unpaid amounts and not disenroll beneficiaries, and they requested clarification.

Response: We appreciate that the commenters brought to our attention that these provisions of the proposed rule are somewhat confusing because our disenrollment policy is cited. Specifically, at § 422.2420(c)(1)(v), § 422.2420(c)(3)(i), § 423.2420(c)(1)(iv), and § 423.2420(c)(3)(i)), where we regulate the treatment of unpaid premium amounts, we included references to § 422.74(d)(1)(i) and § 423.44(d)(1)(i). These citations are to our policy on the conditions under which an MA organization or Part D sponsor may disenroll a beneficiary for non-payment of plan premiums. This disenrollment policy is focused on beneficiary protection by setting limits around disenrollment. We believe that these citations are confusing in the context of MLR calculation and reporting. Thus, we are revising proposed § 422.2420(c)(3)(i) and § 423.2420(c)(3)(i) to delete these citations. The policy intention remains the same: The MA organization or Part D sponsor will include all beneficiary premium amounts under a contract in total revenue (the MLR denominator) minus any premium amounts that remain unpaid after reasonable collection efforts.

Comment: Several commenters requested that CMS allow the MLR for dual SNPs and FIDE SNPs to include Medicaid and Medicare costs and revenues.

Response: We do not believe that we have the authority to include Medicaid costs and revenues in the Medicare MLR requirement, including the authority to require payment of a remittance calculated on a combined MLR.

Comment: A number of commenters contended that there are a number of administrative costs that are in the denominator of the MLR that are barriers to contracts meeting the MLR requirement. A few commenters argued that administrative costs associated with the rules of participating in the Medicare program should specifically be excluded from the calculation of their MLRs, similar to the treatment of taxes and fees in the MA and Part D MLR calculation. Examples of these costs include provider credentialing, costs associated with meeting the annual bidding requirements, member communications, compliance activities over which MA organizations and Part D sponsors have no control, and expenses incurred for maintaining compliance and quality assurance programs in accordance with state and federal requirements, maintaining effective grievance and appeals processes, and audits that require additional investments. Other commenters argued that it is an unbalanced approach to include administrative costs associated with managing several components of the Part D program in total revenue, with no costs related to these items allowed in the numerator: low-income cost-sharing (LICS) payments, low-income subsidy payments that cover beneficiary premiums (LIPS), and discounts on brand drugs advanced to beneficiaries as part of the Coverage Gap Discount Program (CGDP). These commenters argued that LICS, LIPS, and CGDP should be treated similarly to how CMS proposed to treat Part D reinsurance payments, as allowable in both the numerator and denominator of the MLR.

Response: As the commenters noted, administrative costs are an element of doing business. A goal of the MLR is to indicate the share of medical and prescription drug costs under a contract, relative to total revenue. Total revenue includes amounts that cover administrative costs and margin. We do

not believe that excluding administrative costs from revenue (or adding such costs to the numerator) would provide an accurate representation of the MLR for a contract. This is reflected in the commercial MLR rule, which does not permit administrative expenses like provider credentialing, annual bidding, member communications, compliance, quality assurance, grievance and appeals, or audit costs to be deducted from the premium or added to the numerator. In fact, one of the key goals of the MLR is to have a measure to compare how cost-effectively MA organizations and Part D sponsors can meet their administrative requirements.

Regarding administrative costs specific to the CGDP, we believe that CMS bears most of these administrative costs, including executing agreements with manufacturers participating in the CGDP, paying monthly interim coverage gap payments, invoicing manufacturers, and conducting coverage gap discount reconciliation. We require all MA organizations and Part D sponsors to engage in certain administrative activities as a condition of participation in the MA and Part D programs, and believe that the burden of meeting these requirements is fairly distributed.

For these reasons, we do not believe it necessary or appropriate to adjust the MLR calculation for administrative costs beyond what we proposed. We will be mindful of placing additional administrative requirements on MA organizations and Part D sponsors that could have differential impacts on the MLR calculation.

LICS, LIPS, and CGDP payments are not allowable in both the numerator and denominator of the MLR, like the way Part D reinsurance payments are treated. As we make LIPS payments on behalf of eligible beneficiaries, this amount is treated as revenue just as if the beneficiary had paid these amounts directly to the plan. We view LICS and CGDP payments as pass-through payments, unlike federal reinsurance, for which MA organizations and Part D sponsors retain some plan liability in the catastrophic phase of the benefit.

Comment: One commenter requested clarification regarding the exclusion of commercial reinsurance from total revenue and inquired whether the ''commercial reinsurance'' exclusion means net reinsurance (that is, reinsurance premium less reinsurance recoveries) or whether both premiums and recoveries are excluded from the MLR calculation.

Response: We followed the commercial MLR approach by not allowing MA organizations and Part D sponsors to adjust the MLR for commercial reinsurance (we note that this response is addressing commercial insurance and not the federal reinsurance provision under the Part D program). That is, both reinsurance premiums and recoveries are excluded from the MLR calculation. Both costs and revenues must be reported on a direct basis, that is, before ceded reinsurance as stated at § 422.2420(b)(2)(1) regarding incurred claims as direct claims direct drug costs that are actually paid, and § 422.2420(c)(1) and § 423.2420(c)(1) regarding total revenue reported on a direct basis.

Comment: Some commenters supported the alignment of the proposed rule with the commercial MLR regulations, by allowing federal income tax-exempt MA organizations and Part D sponsors to deduct community benefit expenditures from total revenue, up to a cap. In regards to contracts that span more than one state, a commenter supported the blending of the highest premium tax rates for the states in which the contract is offered. Another commenter recommended applying the state premium tax rate to the proportion of community benefit expenditures furnished by plans under the contract in that state, or allocating based on proportions of enrollment in each applicable state, then deducting the amount up to the cap. Several commenters noted that community benefit expenditures should not be considered a category of expenditures to be deducted from total revenue. Generally, commenters who did not support the deduction of community benefit expenditures argued that since MA and Part D plans do not pay state premium taxes on their Medicare revenue, the proposed rule provides an unfair advantage for federal income tax-exempt issuers and does not recognize the community benefit expenditures made by for-profit issuers.

Response: We agree that, because an MA organization or Part D sponsor that is exempt from federal income taxes must make community benefit expenditures, such an MA organization or Part D sponsor should be allowed to deduct community benefit expenditures. This final rule allows a federal income tax-exempt MA organization or Part D sponsor to deduct its community benefit expenditures in the same manner that a for-profit plan sponsor is allowed to deduct its federal income taxes. This rule explains the community benefit expenditure deduction available to an MA organization or Part D sponsor that is exempt from federal income taxes. Such MA organizations and Part D sponsors will be allowed to deduct actual community benefit expenditures up to the higher of 3 percent of total revenue as defined for MLR purposes, or the highest premium tax rate in the state where the MA organization or Part D sponsor is licensed, multiplied by the MA organization or Part D sponsor's earned premium for the contract. We note that the amount of community benefit expenditures deducted is not allowed to exceed the amount of actual community benefit expenditures in the reporting year. In the instance where a contract spans more than one state, we will blend the highest premium tax rates for the states in which the contract is offered in a manner to be determined through sub-regulatory guidance or the Paperwork Reduction Act notice and comment process.

After consideration of the public comments received, we are finalizing these provisions with the following technical corrections. First, we are revising proposed § 422.2420(c)(3)(i) by removing the citation to § 422.74(d)(1)(i), and we are revising proposed § 423.2420(c)(3)(i) by removing the citation to § 423.44(d)(1)(i). These changes to the provisions on treatment of unpaid premiums remove a confusing reference to our disenrollment policy, which is not directly relevant to the determination of total revenue for MLR purposes. The second technical correction clarifies what is meant by total revenue under the contract, specifically, that total revenue for a contract is not simply the amount under paragraph § 422.2420(c)(1) and § 423.2420(c)(1) but is the amount under paragraph (c) that reflects (c)(1) through (c)(4). Finally, we are correcting proposed § 422.2420(c)(3) and § 423.2420(c)(3), which are provisions on amounts to be excluded from total revenue; we erroneously proposed ''incurred claims,'' which are in the MLR numerator. We have corrected this to state ''revenue.''

4. Projection of Net Total Revenue

When calculating Medicare MLRs, we proposed that MA organizations and Part D sponsors would be required to account for all Part C and D revenue that would be paid after the final risk adjustment reconciliation occurs, and all Part D revenue that would be paid after all reinsurance and risk corridor reconciliations occur.

Comment: Several commenters stated concerns about CMS' proposal that the MLR would be reported once, based on the Medicare revenue for the year at the time of the report, and that neither

reopening(s) of a reconciliation process nor any risk adjustment data validation (RADV) audits that could change the final revenue amount would result in a reopening of the MLR reported for a contract year. A few commenters agreed that the MLR calculation should not be reopened on a routine basis, but recommended that CMS allow the reopening of the MLR for contracts with MLRs below the threshold. Finally, some commenters requested that, at a minimum, if there is a finding from a RADV or other audit that requires an issuer to remit funds to CMS, CMS should allow recalculation of a past MLR to reflect this adjustment to revenue based on an audit finding, or alternatively allow an adjustment to revenue in the MLR reported for the year of the audit finding.

Response: We believe that the remittances owed based on a failure to meet the MLR standard should be based on the revenue figure at the time of the report, and should not be subject to change if this revenue figure is decreased or increased in a future year. First, that is the revenue that in fact was received by the MA organization or Part D sponsor at the time it made its decisions on how to apportion it between patient care and quality improvement and other costs. The remittance (and other sanctions) can be considered a penalty for plans that apportioned more than 15 percent of the revenue received to costs other than patient care or quality improvement. Presumably, the MA organization did not make those decisions based upon an assumption that its revenue would be reduced or increased in a future year as a result of an audit or reconciliation that changes the final Medicare payment amount in some future year.

Moreover, if the payment amount is adjusted downward in a future year (for example, because it is found that the organization or sponsor submitted inflated risk scores that were not justified), we do not believe it would be appropriate for the MA organization or Part D sponsor to be provided with an adjustment to its MLR that could reduce or eliminate its penalty for violating the MLR standard for the year in question. The fact that the MA organization or Part D sponsor had to refund amounts to which it should not have been entitled does not retroactively affect the value it delivered with the funds it had during the contract year at issue. Thus, if an MLR violates the 85 percent standard as reported, that MLR is final.

We are finalizing these provisions as proposed.

5. Allocation of Expenses

We proposed that MA organizations and Part D sponsors would be required to properly allocate all expenses stemming from each contract, as provided under § 422.2420(d) and § 423.2420(d). Each expense would be required to be included under only one type of expense, unless a portion of the expense fits under the definition of one type of expense and the remainder fits into a different type of expense, in which case the expense will be required to be pro-rated between types of expenses. Expenditures that benefit multiple contracts, or contracts other than those being reported, including but not limited to those that are for, or benefit, commercial plans, would under our proposal have to be reported on a pro rata share basis. This approach aligns with the commercial MLR rules.

Comment: A commenter requested clarification regarding the alignment with the commercial MLR in reference to the proposal that, MA organizations and Part D sponsors must use Statutory Accounting Principles for the purposes of MLR determination except in cases when another regulatory authority such as state insurance departments requires other reporting for a particular contract or product using Generally Accepted Accounting Principles (GAAP).

Response: We agree that use of Statutory Accounting Principles for Medicare MLR requirements would align with current practices in determining commercial MLR and minimize administrative burden on issuers. We thus are adopting this approach by requiring MA organizations and Part D sponsors to explain how revenue is used to pay for non-claims expenditures. MA organizations and Part D sponsors must allocate their non-claims and quality improving expenses by contract. If an expense is attributable to a specific activity, then MA organizations and Part D sponsors should allocate the expense to that particular activity. However, if this is not feasible, then the MA organization or Part D sponsor must apportion the costs using a generally accepted accounting method that yields the most accurate results.

After consideration of the public comments received, we are finalizing these provisions as proposed.

E. Activities That Improve Health Care Quality

We proposed to adopt definitions of activities that improve health care quality for the purposes of this MLR rule that will result in a uniform accounting of the associated costs for MA organizations and Part D sponsors. As noted in the proposed rule, this definition of quality would apply solely for the purposes of MLR reporting and calculation, and not for other purposes, such as Medicare star ratings that determine MA quality bonus payments as authorized under the Affordable Care Act or any quality activities related to the Medicaid program. This final rule provides a set of criteria in § 422.2430 and § 423.2430 which MA organizations or Part D sponsors will be required to comply with in order for the activity in question to be treated as quality improving. In the proposed rule, we requested comment on the types of drug utilization review that should be considered a quality improving activity for Medicare MLR purposes.

Comment: A few commenters noted that concurrent and retrospective utilization reviews are often used for cost containment purposes. However, commenters generally recommended the inclusion of concurrent and retrospective reviews and remarked that the activities provide an opportunity to prevent overutilization, increase the likelihood of desired health outcomes, and improve education of providers and future patients, thereby making them quality-improving. Many commenters recommended expanding the definition under proposed § 423.2430 to allow all utilization review as a QIA. A few commenters suggested categorizing utilization management as an allowable QIA.

Response: As discussed in the proposed rule, prospective utilization is considered a QIA because it is rendered before care or services are delivered and can help ensure that the most appropriate treatment or services is given in the most appropriate setting. While concurrent and retrospective review in Part D cannot meet the ''before care or services are delivered'' prong, we understand that these types of utilization reviews could promote quality in certain circumstances, especially in the Part D context. In reviewing the comments received on QIA in the commercial MLR and the experience we have had in collecting commercial MLR data, which includes expenditures to provide a drug benefit, we are not persuaded that deviating from the proposed QIA definition is necessary. Thus, we believe that the interest of maintaining consistency with the definition of QIA in the commercial rule outweighs changing the treatment of utilization review in the QIA definition.

Comment: Many commenters supported the definition of QIA and our efforts to align the Medicare MLR

regulation with the commercial MLR policy. A few of these commenters particularly supported requiring QIA to be grounded in evidence-based practice that can be objectively measured. Many commenters suggested that CMS expand their interpretation of QIA for MA organizations and Part D sponsors, as well as expand the guidance on QIA.

Response: We appreciate the commenters' support. We believe it is important to maintain definitions of QIA that are consistent with the commercial MLR regulation for more accurate comparability for beneficiaries and to minimize the administrative burden on MA organizations and Part D sponsors that have both commercial and Medicare lines of business.

Comment: A number of commenters responded to the solicitation for comments regarding Medication Therapy Management (MTM) programs in a Part D context, with the recommendation that programs be considered for inclusion in the MLR as quality improving activities. Generally, commenters remarked that MTM programs required by CMS improve quality and care coordination and therefore, should be included in the MLR. In addition, commenters noted the importance of MTM programs in individualized disease management and some commenters believe the inclusion of MTM programs would further encourage and incentivize providers to strengthen their MTM programs.

Response: We appreciate the comments on this topic and will use them to inform our MTM requirements. We also agree that so long as the MTM activities meet the requirements set forth in § 422.2430 and § 423.2430, they would qualify as a QIA.

Comment: Many commenters requested that CMS consider as QIA all activities to prevent and reduce fraud, waste, and abuse, noting that CMS requires such activities as a condition of participation in the Part C and D programs. Commenters stated their concerns that by not allowing plans to count all expenses incurred in reducing fraud, waste, and abuse, it will result in a disincentive to engage in these beneficial activities.

Response: Fraud reduction efforts include both fraud prevention and fraud recovery. We are allowing the amount of claim payments recovered through fraud reduction efforts, not to exceed the amount of fraud reduction expenses, to be included in incurred claims per § 422.240(b)(2)(ix) and § 423.240(b)(2)(xiii). Thus, even though fraud prevention is not a QIA, we believe this provides an incentive for MA organizations and Part D sponsors to engage in fraud reduction activities. To the extent that MA organizations and Part D sponsors are engaging in other activities that meet the requirements in § 422.2430 and § 423.2430, they may be considered as quality improving activities.

Comment: A number of commenters advised caution in regards to categorizing wellness programs as QIA. They suggest that CMS only include wellness programs that have evidence to support their effectiveness, those that do not penalize beneficiaries who do not participate, and those that are at low-risk for ''cherry-picking'' the healthiest beneficiaries. In particular, commenters were worried about wellness programs that disproportionately penalize groups of older adults, those with disabilities, racial minority groups, and low-income individuals. Similarly, one commenter urged us to be critical of coaching programs that are not evidence-based.

Response: Our longstanding policy is that a plan benefit design cannot offer differential benefits to its enrollees, and that an MA organization or Part D sponsor may not deny, limit, or condition enrollment to individuals eligible to enroll in an MA plan offered by the organization on the basis of any factor that is related to health status, including medical history, disability, race, or age. Moreover, MA organizations and Part D sponsors must have procedures in place to ensure that members are not discriminated against in the delivery of health care services, consistent with the benefits covered in their policy, based on race, ethnicity, national origin, religion, gender, age, mental or physical disability, genetic information, or source of payment. With regard to comments that we only include wellness programs that have evidence to support their effectiveness, we developed subregulatory recommendations of acceptable evidence-based criteria which may be found in section 90.5 of Chapter 4 of the Managed Care manual. The suggestions for evidence-based approaches include: ''(i) Studies from government agencies (for example, the FDA); (ii) Evaluations performed by independent technology assessment groups (for example, BCBSA); and (iii) Well-designed controlled clinical studies that have appeared in peer review journals. Chapter 4 of the managed care manual (Section 10.5.3) outlines general criteria, additional to the federal anti-discrimination laws, that plans are required to follow when designing benefits. These criteria are applicable to wellness programs. We would note that these criteria also include a prohibition against steerage: ''An MAO may not design a plan with supplemental benefits that only appeal to healthier beneficiaries.'' We believe it is important to provide plans the flexibility needed to design wellness programs that maximize the potential for improved health outcomes for their enrolled populations. We see this as both an opportunity to prevent the onset of chronic illness and to improve the health status of chronically ill enrollees. Therefore, for MLR purposes, these programs are appropriately considered a QIA subject to the requirements in § 422.2430 and § 423.2430.

Comment: A few commenters agreed that marketing expenses should not be included in QIA and asked us to clarify that fees paid to brokers and agents are included within the term ''marketing expenses.''

Response: Like the commercial MLR, we consider agents and brokers fees as non-claims costs and therefore impermissible as being considered included as incurred claims. We also exclude marketing as a quality improving activity. Though MA organizations and Part D sponsors are responsible for applying the QIA criteria to determine if a particular activity is permissible to be reported as QIA, we take this opportunity to note that our subregulatory guidance discusses agent and broker compensation in Manual chapters titled ''Medicare Marketing Guidelines.''

Comment: A few commenters requested including statutorily required quality-related activities that are specific to SNPs in the definition of QIA.

Response: To the extent that SNPs' quality activities meet the criteria of sections § 422.2430 and § 423.2430, they may be considered QIA.

After consideration of the public comments received, we are finalizing these provisions as proposed.

F. Credibility Adjustment

As noted in section II.A. of this final rule, we are using the commercial MLR rules as a reference point for developing the Medicare MLR. We proposed that the methodology for the Medicare MLR calculation take into account the special circumstances of contracts with lower enrollment by applying credibility adjustment factors to smaller enrollment contracts that are designed to reduce the probability that an issuer with smaller enrollment has to pay a remittance in a given year to 25 percent of the time or less. Unlike the commercial rule, we did not propose including a deductible factor.

The Office of the Actuary derived the proposed MA–PD and Part D stand-

alone credibility adjustments based on the variability of expected claims, assuming plans are priced exactly at an 85 percent MLR. The target failure rate is 25 percent for contracts priced at an 85 percent MLR. We followed the commercial MLR rule by proposing that an MA organization and a Part D sponsor may add a credibility adjustment to a contract's MLR if the contract's experience is partially credible, as defined by CMS. Fully-credible contracts are not eligible for a credibility adjustment. Finally, we proposed that for contract years when a contract has non-credible experience, the sanctions specified in the statute for having an MLR that does not meet the minimum requirement of 85 percent would not apply.

We defined partially-credible experience for MA contracts as enrollment that is greater than or equal to 2,400 member months and no greater than 180,000 member months of enrollment for a contract year. We defined partially-credible experience for Part D stand-alone contracts as enrollment that is greater than or equal to 4,800 member months and no greater than 360,000 member months of enrollment for a contract year. Accordingly, non-credible MA contracts would have annual enrollment of less than 2,400 member months, and non-credible Part D stand-alone contracts would have annual enrollment of less than 4,800 member months. Further, fully-credible MA contracts would have an enrollment greater than 180,000 member months, and fully-credible Part D stand-alone contracts would have an enrollment greater than 360,000 member months.

Tables 1A and 1B provide the proposed credibility adjustments for partially-credible MA–PD contracts and Part D stand-alone contracts beginning in 2014. Credibility adjustments for contracts with enrollment sizes that fall between the categories of member months displayed in the tables would be determined using linear interpolation. We proposed to use member months (instead of life years, which is used in the commercial MLR credibility adjustment) to describe the enrollment thresholds pertinent to application of the Medicare credibility adjustments, such that member months for a contract year equal the sum across the 12 months of a year of the total number of enrollees for each month. This includes enrollees who are in ESRD and hospice status for a month. As with the commercial rule, we intend to evaluate the credibility adjustments and update them, if necessary.

TABLE 1A—MLR CREDIBILITY ADJUSTMENTS FOR MA–PD * CONTRACTS

Member months	Credibility adjustment (%)
<2,400	Non-credible.
2,400	8.4.
6,000	5.3.
12,000	3.7.
24,000	2.6.
60,000	1.7.
120,000	1.2.
180,000	1.0.
> 180,000	Fully-credible.

* MA–PD combined with MA-only.

TABLE 1B—PROPOSED MLR CREDIBILITY ADJUSTMENTS FOR PART D STAND-ALONE CONTRACTS

Member months	Credibility adjustment (%)
<4,800	Non-Credible.
4,800	8.4.
12,000	5.3.
24,000	3.7.
48,000	2.6.
120,000	1.7.
240,000	1.2.
360,000	1.0.
> 360,000	Fully-credible.

Comment: Several commenters supported CMS' proposal to apply credibility adjustments to low enrollment contracts, to best balance the goals of providing value to beneficiaries and ensuring that contracts with relatively low enrollment would be able to function effectively.

Response: We appreciate the commenters' support.

Comment: A commenter expressed concern that proposed text at § 423.2440 on credibility adjustments could be interpreted in future years to allow CMS the option of eliminating credibility adjustments for a year. The commenter confirmed the importance of credibility adjustments and requested that the regulation be amended to state that in no case can CMS eliminate a credibility adjustment.

Response: At § 422.2440 and § 423.2440, the regulation text states that we will define and publish definitions of partial, full, and non-credibility through the annual Advance Notice and Rate Announcement process. We agree that credibility adjustments are important for small enrollment contracts, which we described at length in the proposed rule. Moreover, we would not be able to completely eliminate the credibility adjustment for MLR purposes without notice and comment rulemaking outside of the Advance Notice/Rate Announcement process.

Comment: A commenter recommended that CMS consider broadening further the enrollment thresholds for a Part D credibility adjustment to provide an additional element to improve compatibility of the 85 percent MLR threshold with Part D. Another commenter requested that CMS establish full credibility thresholds at 700,000 member months for MA–PD and 1.4 million member months for Part D stand-alone contracts.

Response: We are mirroring the commercial MLR rule's approach, where credibility adjustments are designed to reduce the probability that an issuer with smaller enrollment has to pay a rebate in a given year to 25 percent of the time or less. Establishing full credibility thresholds at greater than 700,000 member months for MA–PD contracts and greater than 1.4 million member months for Part D stand-alone contracts would be approximately equivalent to using a 10 percent target failure rate. As we discussed in the proposed rule, the National Association of Insurance Commissioners (NAIC) did consider setting the commercial base credibility adjustments so that such an issuer would be required to pay a rebate less than 10 percent of the time. The NAIC concluded that setting credibility adjustments based on a 25 percent probability of paying a rebate struck a more equitable balance of consumer and issuer interests.

Comment: A few commenters questioned that the threshold for fully-credible enrollment is set at 1 percent and not zero percent. The commercial MLR regulation sets the fully-credible threshold at 0 percent. One of these commenters also requested CMS to confirm that there is a lower coefficient of variation for MA–PD claims than for Part D stand-alone claims; this commenter expected the full-credibility threshold for MA–PD contracts to be higher than that for Part D stand-alone contracts.

Response: We mirrored the commercial approach of setting 25 percent as the target failure rate for partially credible contracts. Our policy for transitioning from partial to full credibility is to maintain the 25 percent target failure rate for all partially credible contracts, up to (but excluding) the full credibility threshold. Thus, we are finalizing the credibility adjustment factors published in the proposed rule.

Regarding full credibility thresholds, it is correct that MA–PD contracts have a lower coefficient of variation (less variation around the mean) than Part D stand-alone contracts. Thus, the full credibility threshold for MA–PD contracts is set at fewer member months

than the threshold for Part D stand-alone contracts.

After consideration of the public comments received, we are finalizing our proposals for the credibility adjustments, and will apply the factors listed in Tables 1A and 1B as described.

G. Reporting Requirements

Consistent with existing reporting requirements at § 422.504(f)(2) and § 423.505(f)(2), we proposed that MA organizations and Part D sponsors be required to submit an MLR report in a timeframe and manner specified by CMS, and that the organizations be required to calculate MLRs and remittance as part of their report submission. In addition, we proposed that the reports will include, but not be limited to, the data needed by the MA organization and Part D sponsor to calculate and verify the MLR and remittance amount, if any, for each contract.

The proposed rule also described three options for reporting dates after the end of the contract year, and requested comment on these options: July, September (after the risk score reconciliation), and December (after the Part D reconciliation and calculation of risk corridor payments). We noted that we must balance any preference for a later reporting date with disruption that beneficiaries will experience if we halted new enrollment or terminated a contract after open enrollment has begun.

Comment: Many commenters were concerned about the timeframe for MLR reporting. None supported MLR reporting before September and almost all recommended December reporting to reduce the extent to which MLRs are based on projections of costs and revenues. One commenter recommended against December reporting because of the disruption it could cause beneficiaries who might be enrolled in plans about to be terminated. Several commenters suggested that in the event an MA organization or Part D sponsor fails to meet the MLR threshold for 2 consecutive years, in the third year the MA organizations or Part D sponsor should be required to meet an earlier MLR reporting deadline to avoid disruptions to beneficiaries enrolled in plans that would become subject to enrollment sanctions or termination.

Response: We agree with the commenters that the best balance between beneficiary protection and calculating MLRs based on the most complete data is to require that, in general, MLR reporting for a contract year will occur in the December following the contract year, on a date and in a manner specified by CMS. The exception will be for contracts that fail to meet the MLR threshold for 2 consecutive years. For these contracts, MLR reporting will occur in the following contract year prior to December, in a month that will be specified by us. This reporting deadline will allow time for us to implement, prior to the open enrollment period, an enrollment sanction for any contract that fails to meet the MLR threshold for 3 or more consecutive years and contract termination for any contract that fails to meet the MLR threshold for 5 consecutive years. We will specify this early reporting date for contracts that failed to meet the MLR threshold for 2 consecutive years in forthcoming guidance on MLR reporting requirements.

After consideration of the public comments received, we are finalizing these provisions with the following clarification in the preamble: in general, MLR reporting for a contract year will occur in December following the contract year, on a date and in a manner specified by us. The exception will be for contracts that fail to meet the MLR threshold for 2 consecutive years; MLR reporting will occur in the following contract year prior to December, in a month that will be specified by us and that will allow time for us to implement, prior to the open enrollment period, an enrollment sanction for any contract that fails to meet the MLR threshold for 3 or more consecutive years and contract termination for any contract that fails to meet the MLR threshold for 5 consecutive years.

H. Remittances if Applicable MLR Requirement Is Not Met

Sections 422.2470 and 423.2470, paragraphs (a), (b), (c), and (d), delineate the proposed general requirements regarding sanctions, the calculation of the amount to be remitted, the timeframe for payment of any amount that may be due, and the treatment of remittances in future years' numerator and denominator.

In accordance with section 1857(e)(4) of the Act, § 422.2470(a) and § 423.2470(a) simply provide that if a contract is partially or fully-credible and does not meet the applicable MLR standard set forth in § 422.2410(b) and § 423.2410(b), then the MA organization or Part D sponsor will remit payment to CMS as calculated under this final rule.

Sections 422.2470(b) and 423.2470(b) explain the amount of the payment that will be due to CMS. Consistent with the remittance provisions in the Affordable Care Act in this final rule, we propose that MA organizations and Part D sponsors be required to remit to CMS the amount by which the applicable MLR requirement in § 422.2410(b) and § 423.2410(b) exceeds the contract's actual MLR, multiplied by the total revenue of the contract, as provided under proposed § 422.2420(c) and § 423.2420(c).

Sections 422.2470(c) and 423.2470(c) specify that we will subtract remittances from plan payment amounts in a timely manner after the MLR is reported, on a schedule determined by CMS. Remittances by MA and Part D organizations will occur as part of regular monthly payments that CMS makes to MA organizations and Part D sponsors. Sections 422.2470(d) and 423.2470(d) specify that remittances paid in any 1 year will not be included in the numerator or denominator of the next year's or any year's MLR.

Comment: Several commenters commented on the special circumstances of MA organizations and Part D sponsors in Puerto Rico with respect to the Medicare MLR requirement. The commenters requested that Medicaid and Medicare benefits be combined when calculating the contract's MLR because expenses for Platino benefits, relative to revenue, are truly medical losses. In addition, commenters noted the unique circumstances facing plan sponsors serving Puerto Rico, where Part D low-income subsidy funding does not apply.

Response: The Medicare MLR requirement, including calculation of a remittance amount, applies to Medicare benefits and not to Medicaid benefits. However, we have added language to § 422.2420(a) and § 423.2420(a) authorizing us to make adjustments to the MLR produced by the standard formula to address exceptional circumstances for areas outside the 50 states and the District of Columbia that we determine would warrant an adjustment. We will explore whether or how to adjust the MLR calculation under this language to take into account the unique circumstances of these areas.

After consideration of the public comments received, with the exception of the new language in § 422.2420(a) and § 423.2420(a) permitting us to make adjustments warranted by exceptional circumstances for areas outside the 50 states and the District of Columbia, we are finalizing these provisions as proposed.

I. MLR Review and Non-Compliance

We proposed that we would conduct selected reviews of reports submitted under § 422.2460 and § 423.2460 to determine that remittance amounts

under § 422.2410(b) and § 423.2410(b) and sanctions under §§ 422.2410(c), § 422.2410(d), § 423.2410(c), and § 423.2410(d) were accurately calculated, reported, and applied.

MA organizations and Part D sponsors would under this proposal be required to retain documentation relating to the data reported, and provide access to that data to CMS, HHS, the Comptroller General, or their designees, in accordance with proposed § 422.504 and § 423.505. These proposed provisions were intended to give CMS or its designees access to information needed to determine whether the reports and amounts submitted with respect to the MLR are accurate and valid. Sanctions would be imposed for non-compliance with the MLR requirements. Furthermore, under proposed § 422.2480(c) and § 423.2480(c), MA organizations and Part D sponsors with third party vendors would be required to have or be able to obtain and validate, in a timely manner, all underlying data associated with their services prior to the preparation and submission of MLR reporting to CMS. This includes all claims data paid on behalf of the MA organization or Part D sponsor, direct and indirect remuneration data and supporting materials, and all pricing components and utilization data that were used or rendered to substantiate invoices submitted to sponsors or financial data submitted to CMS.

In addition, we proposed to add a failure to provide accurate and timely MLR data to the list of items in § 422.510(a) and § 423.509(a) that constitute grounds for termination, and for intermediate sanctions and civil money penalties, by adding a paragraph (15) related to MLR reporting. Such an addition would provide CMS authority to invoke the contract termination procedures in § 422.510(b) through (d) and § 423.509(b) through (d) for failure by an MA organization or Part D sponsor to provide timely and accurate MLR data. Further, we proposed that intermediate sanctions at § 422.752(b) and (c) and § 423.752(b) and (c) would also be available, as well as civil monetary penalties at § 422.760 and § 423.760.

Comment: A commenter supported the requirement for third party vendors to disclose claims data to MA organizations and Part D sponsors by request and suggested that we require third party electronic audit for 100 percent of paid claims, clarify what ''all underlying data'' means, and require a PBM to link claims to the underlying retail contract.

Response: By ''all underlying data,'' we mean complete claim detail. This would include, at a minimum, individual claim transaction file layout records, relevant pharmacy contractual terms and rate schedules dictating payment terms for purposes of claim detail comparison, and a similar level of detail on rebates and any other price concessions received. We decline to require third party auditing for 100 percent of paid claims, as we believe this would be an overly onerous requirement on MA organizations and Part D sponsors.

After consideration of the public comments received, we are finalizing these provisions as proposed.

III. Provisions of the Final Rule

For the most part, this final rule incorporates the provisions of the proposed rule. Those provisions of this final rule that differ from the proposed rule are as follows:

- Stating in preamble that in general, MLR reporting for a contract year will occur in December following the contract year, on a date and in a manner specified by us. The exception will be for contracts that fail to meet the MLR threshold for 2 consecutive years; MLR reporting will occur in the following contract year prior to December, in a month that will be specified by us and that will allow time for us to implement, prior to the open enrollment period, an enrollment sanction for any contract that fails to meet the MLR threshold for 3 or more consecutive years and contract termination for any contract that fails to meet the MLR threshold for 5 consecutive years.
- Not finalizing proposed § 422.510(a)(16) and instead revising § 422.2410(d) to state that ''CMS terminates the contract per § 422.510(b)(1) and (d) effective as of the second succeeding contract year''
- Not finalizing proposed § 423.510(a)(16) and instead revising § 423.2410(d) to state that ''CMS terminates the contract per § 423.509(b)(1) and (d) effective as of the second succeeding contract year.''
- Making changes to the 100 percent indemnity and assumptive reinsurance provisions under § 422.2420 and § 423.2420 to conform with the commercial MLR rule.
- Adding new language in § 422.2420(a) and § 423.2420(a), permitting CMS to make adjustments warranted by exceptional circumstances for areas outside the 50 states and the District of Columbia.
- Revising the proposed § 422.2420(b)(1) to indicate that the annual deposit to the beneficiary's medical savings account should be included in the MLR numerator.
- Deleting proposed § 422.2420(b)(3)(i) and renumbering § 422.2420(b)(3)(ii) accordingly.
- Deleting proposed § 423.2420(b)(3)(i), renumbering § 423.2420(b)(3)(ii) accordingly, and inserting a reference to direct and indirect remuneration in § 423.2420(b)(2)(i)
- Revising proposed § 422.2420(c)(3)(i) by removing the citation to § 422.74(d)(1)(i), and we are revising proposed § 423.2420(c)(3)(i) by removing the citation to § 423.44(d)(1)(i).
- In proposed § 422.2420(c)(3) and § 423.2420(c)(3), revising the term ''revenue'' to read ''incurred claims.''
- Correcting proposed § 422.2420(c)(3) and § 423.2420(c)(3).

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements:

A. ICRs Regarding MLR and Remittance Reporting Requirement (§ 422.2470 and § 423.2470)

This final rule describes the information that will be reported by MA organizations and Part D sponsors on an annual basis to the Secretary starting in 2014. We proposed that MA organizations and Part D sponsors' submissions will include information regarding reimbursement for clinical services, expenditures for activities that improve health care quality, other non-claim costs, total revenue, and federal and state taxes and regulatory fees,

among other data elements. MA organizations and Part D sponsors will be required to calculate MLRs and remittance as part of their submission to the Secretary.

At this time, we have not developed the MLR reporting instructions and forms that MA organizations and Part D sponsors will have to complete on an annual basis beginning for contract years starting January 1, 2014. We expect the first year of MLR reporting for MA organizations and Part D sponsors to occur in 2015 for the 2014 contract year, and we proposed to continue collecting MLR data for the foreseeable future. We plan to publish the instructions and forms that issuers must file for all plans in future guidance. At that time, we will solicit public comments on both the forms and the estimated burden imposed on health insurance issuers for complying with the provisions of this final rule. We will publish the required 60-day and 30-day notices in the **Federal Register** notifying the public of OMB approval as required by the PRA.

Comment: One commenter requested the format for the MLR report in draft with sufficient time for stakeholder comments, including specification of which information in the report will be made public.

Response: There will be two opportunities for public comment on the draft reporting form and instructions as is required by the PRA.

We are finalizing these provisions as proposed.

B. ICRs Regarding Retention of Records (§ 422.2480(b) and (c) and § 423.2480(b) and (c))

Subpart I of the final rule establishes our enforcement authority regarding the reporting requirements under section 1857(e) of the Act. MA organizations and Part D sponsors must maintain all documents and other evidence necessary to enable us to verify that the data required to be submitted comply with the definitions and criteria set forth in this final rule, and that the MLR is calculated and any remittances owed are calculated and provided in accordance with this final rule. The proposed § 422.2480(c) and § 423.2480(c) will require MA organizations and Part D sponsors to maintain all of the documents and other evidence for 10 years.

We expect that all MA organizations and Part D sponsors will have to retain data relating to the calculation of MLRs; those who have owed remittances will also have to retain information regarding the payment of remittances. We believe that the burden associated with our record retention requirements does not exceed standard record retention practices because MA organizations and Part D sponsors are already required to retain the records and information required by this final rule in order to comply with the legal requirements of their states' departments of insurance. For that reason, we are assigning a lesser burden to these requirements as compared with the commercial MLR requirements. We estimate that about 616 contracts will be subject to the aforementioned requirements. (The 616 contracts are comprised of 605 contracts subject to the remittance requirement plus 11 non-credible contracts that are subject to reporting requirements). We further estimate that it will take MA organizations and Part D sponsors about 28 hours in total to meet the record retention requirements, at a cost of about $4.00 per report. The total estimated annual burden associated with the requirements in § 422.2480(b) and (c) and § 423.2480(b) and (c) is shown in the regulatory impact analysis.

While we have developed a preliminary burden estimate, we are not seeking OMB approval at this time. We will seek OMB approval for the aforementioned recordkeeping requirements at the same time we seek OMB approval for the information collection requirements associated with the proposed MLR remittance reporting requirements discussed in § 422.2470 and § 423.2470.

V. Regulatory Impact Analysis

A. Introduction

This final rule implements section 1857(e)(4) of the Act, which sets forth requirements for a medical loss ratio (MLR) for MA organizations and Part D sponsors. The MLR is an accounting statistic that, stated simply, measures the percentage of total revenue that MA organizations and Part D sponsors spend on health care and quality initiatives (and, under this rule, amounts spent to reduce Part B premiums), versus what they spend on such other items as administration, marketing and profit. The higher the MLR, the more the MA organization or Part D sponsor is spending on claims and quality improving activities and the less they are spending on other items and retaining as profit. As stated earlier, MA organizations and Part D sponsors must submit MLR-related data to the Secretary on an annual basis, and in the event that a contract's MLR fails to meet the minimum statutory requirement, MA organizations and Part D sponsors will remit a payment to CMS. If the contract continues to fall below the minimum MLR standard, the contract will be subject to enrollment sanctions and possibly termination. This final rule sets forth uniform definitions and standardized methodologies for calculating the MLR and addresses enforcement of the reporting requirements. These provisions are generally effective for contract years beginning on or after January 1, 2014.

We have examined the effects of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 (58 FR 51735) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with

economically significant effects ($100 million or more in any 1 year), and a ''significant'' regulatory action is subject to review by the Office of Management and Budget (OMB). This final rule is likely to have economic impacts of $100 million or more in any 1 year, and therefore has been designated an ''economically significant'' rule under section 3(f)(1) of Executive Order 12866. Therefore, we have prepared an RIA that details the anticipated effects (costs, savings, and expected benefits), and alternatives considered in this final rule. Accordingly, OMB has reviewed this final rule pursuant to the Executive Order.

We did not receive any comments on the RIA and are therefore finalizing the analysis as proposed.

B. Statement of Need

Consistent with the provisions in section 1857(e)(4) of the Act, which are incorporated by reference in section 1860D–12(b)(3)(D) of the Act, this final rule requires MA organizations and Part D sponsors to meet the minimum MLR requirement of 85 percent. If this requirement is not met at the contract level, which is the level of aggregation in this final rule, MA organizations and Part D sponsors are subject to penalties. Section 1857(e)(4) of the Act requires MA organizations and Part D sponsors to ''remit to the Secretary an amount equal to the product of the total revenue of the MA plan under this part for the contract year and the difference between 0.85 and the medical loss ratio.'' Section 1857(e)(4) of the Act also provides that the Secretary shall not permit enrollment of new enrollees if the plan does not meet the MLR requirement of 85 percent for 3 or more consecutive years and shall terminate the contract if the plan (contract) fails to have such a medical loss ratio for 5 consecutive contract years.

C. Summary of Impacts

We limited the period covered by the regulatory impact analysis (RIA) to calendar year (CY) 2014 (with the exception of section V.D.5. of this final rule, which presents estimates for ongoing annual administrative costs for 2014 and subsequent years). We anticipate that the transparency and standardization of MLR reporting in this final rule will help ensure that taxpayers, the federal government, and enrolled beneficiaries receive value from Medicare health plans. Additionally, including in the MLR calculation those costs related to quality-improving activities could help to increase the level of investment in and implementation of effective quality improving activities, which could result in improved quality outcomes and lead to a healthier beneficiary population.

Executive Order 12866 also requires consideration of the ''distributive impacts'' and ''equity'' of a rule. As described in this RIA, this regulatory action will help ensure that MA organizations and Part D sponsors spend at least a specified portion of total revenue on reimbursement for clinical services, prescription drugs, quality improving activities, and direct benefits to beneficiaries in the form of reduced Part B premiums, and will result in a decrease in the proportion of health insurance revenue spent on administration and profit. It will require MA organizations and Part D sponsors to remit payment to CMS if this standard is not met. MA organizations and Part D sponsors may also experience sanctions if this standard is not met over a period of 3 to 5 consecutive years. The remittance will help incent MA organizations and Part D sponsors to price their benefit packages such that a specified portion of premium income is likely to be spent on reimbursement for clinical services and quality improving activities, resulting in increased value to beneficiaries enrolled in MA and Part D. In accordance with Executive Order 12866, we believe that the benefits of this regulatory action justify the costs.

Although we are unable to quantify benefits, Table 2 shows that the estimated transfer amounts due to failure to meet the minimum MLR requirement, which we characterize in this RIA as remittances to CMS could be substantial. Estimates for CY 2014 remittances are $717 million for MA–PD contracts and $141 million for Part D stand-alone contracts. As discussed in section V.D.4, these estimates do not account for potential plan sponsor behavioral changes. (Note that the estimates in Tables 2 through 5 are based on CY 2013 bid data, which are a proxy for actual CY 2014 costs and revenues that will be used in actual MLR calculations.) Additional details relating to these estimates are discussed later in this regulatory impact analysis. We also estimate that administrative costs of the rule will be approximately $9.6 million upfront and $2.8 million in subsequent years.

TABLE 2—ESTIMATED REMITTANCE FOR CY 2014

[With credibility adjustment]

Contract type	Remittance estimates (in millions)		
	Contracts with MLRs < 80%	Contracts with MLRs from 80% to 84.99%	All contracts below MLR requirement of 85% [total remittance]
MA–PD	$293	$424	$717
Part D Stand-alone	5	136	141
Total	298	560	858

Source: 2013 approved bids.

Notes: Estimates reflect application of the credibility adjustment to MLRs for partially-credible contracts. The remittance for a contract is the product of the difference between 0.85 and the contract's MLR and the total revenue of the contract, as provided in § 422.2420(c) and § 423.2420(c). All MA contracts include at least one MA–PD plan, so are labeled MA–PD. This analysis does not explicitly model the impact of potential MA organizations or Part D sponsor behavioral changes.

D. Detailed Economic Analysis

1. Benefits

In developing this final rule, we carefully considered its potential effects, including both costs and benefits. We identify several potential benefits which are discussed later in this section.

A potential benefit of this final rule is greater market transparency and improved ability of beneficiaries to make informed insurance choices. The uniform reporting required under this final rule, along with other programs such as *www.Medicare.gov,* a Web site

with plan-level information, will mean that beneficiaries will have better data to inform their choices, enabling the market to operate more efficiently.

In addition, contracts that will not otherwise meet the MLR minimum defined by this final rule may opt to increase spending on quality-promoting activities. These programs, which include case management, care coordination, chronic disease management and medication compliance, have the potential to create a societal benefit by improving outcomes and beneficiary population health.

MA organizations and Part D sponsors that will not otherwise meet the MLR minimum may also expand covered benefits or reduce cost-sharing for beneficiaries. To the extent that these changes result in increased consumption of effective health services, the final rule could result in improved beneficiary health outcomes, thereby creating a societal benefit.

2. Costs

We have identified the direct costs associated with this final rule as the costs associated with reporting, recordkeeping, remittance payments, enrollment sanctions and termination, and other costs.

a. Direct Costs

We estimate that each MA organization and Part D sponsor will incur approximately $16,000 in one-time administrative costs (per report), and about $5,000 in annual ongoing administrative costs (per report) related to complying with the requirements of this final rule. Additional details relating to these costs are discussed later in this RIA.

b. Other Costs

Additionally, there are three other potential types of costs associated with this final rule: Costs of potential increases in medical care use, the cost of additional quality-improving activities, and costs to beneficiaries if MA organizations and Part D sponsors decide to limit products offered as a result of this final rule.

As discussed in the benefits section, there may be increases in quality-improving activities, provision of medical services, and Part D covered items due to this final rule. This is likely have some benefit to beneficiaries but also potentially represents an additional cost to MA organizations, Part D sponsors, and the federal government.

It is also possible that some MA organizations and Part D sponsors in particular areas or markets will not be able to operate profitably when required to comply with the proposed requirements. They may respond by changing or reducing the number of products they offer. MA organizations and Part D sponsors are likely to consider whether they expect to be successful competitors in a given market. Entire contracts or subsets of plans under contracts with low MLRs may be withdrawn from a given market entirely, while MA organizations and Part D sponsors with low MLR contracts (particularly those that are subsidiaries of larger organizations) may find ways to achieve higher MLRs through increased efficiencies.

To the extent that MA organizations and Part D sponsors decide to limit product offerings in response to this final rule, individual enrollees in the plans under these contracts may bear some costs associated with searching for and enrolling in a new Medicare health plan. For Medicare beneficiaries, this may also lead to reduced choice, the inability to purchase similar coverage, and higher search costs related to finding affordable insurance coverage.

c. Transfers

To the extent that MA organizations and Part D sponsors have contracts with MLRs that fall short of the minimum requirement, they must remit payment to the Secretary. These remittances will reflect transfers from the MA organizations or Part D sponsors to the Secretary. Using 2013 approved bid data, we have estimated remittances for CY 2014, which are presented in Table 2.

d. Additional Sanctions

To the extent that MA organizations' and Part D sponsors' MLRs fall short of the minimum MLR requirements for a period of 3 or 5 consecutive years, they will undergo additional sanctions. If an MA organization's or Part D sponsor's MLR falls below 85 percent for 3 consecutive contract years, the Secretary shall not permit the enrollment of new enrollees under the contract for coverage. If the MLR falls below 85 percent for 5 consecutive contract years, the Secretary shall terminate the contract. To the extent that enrollment sanctions are issued, this may lead to reduced choice for Medicare beneficiaries. To the extent that contracts are terminated, individual enrollees in these contracts may bear some costs associated with searching for and enrolling in a new Medicare health or drug plan. One benefit of enrollment sanctions will be the movement of beneficiaries into contracts with a more efficient operating cost structure.

3. Overview of Data Sources, Methods, and Limitations

The most recent data on the number of licensed entities offering Medicare coverage through MA or Part D prescription drug plans are the 2013 approved bids. These bid data contain information on MA organizations' and Part D sponsors' projected revenues, expenses, and enrollment. Generally, these projections are based on actual plan experience from previous years. CY 2013 bid data are a proxy for actual CY 2014 costs and revenues that will be used in actual MLR calculations.

We used 2013 approved plan bid data, aggregated to the contract level. An MA organization or Part D sponsor can have one or multiple contracts with CMS and, under each contract, the MA organization or Part D sponsor can offer one or multiple plans (plan benefit packages) in which beneficiaries may enroll. Although these data represent the most recent data source with which to estimate impacts of the MLR regulations, there are limitations that should be noted. For example, plan bids are projected estimates of per person per month revenue needed to offer a benefit package, where required revenue is the sum of direct medical costs or prescription drug costs, administrative costs and margin. Member month projections may differ from actual enrollment, and revenue projections in the bid may differ from the actual revenue MA organizations and Part D sponsors truly require, given actual claims experience in a year.

Moreover, we proposed to follow the commercial MLR regulations by including expenditures on quality improving activities in the numerator of the MLR (and, under this rule, amounts spent to reduce Part B premiums), and allowing certain amounts to be subtracted from the denominator of the MLR, such as licensing and regulatory fees; federal and state taxes and assessments; and community benefit expenditures. Some data for this RIA was collected in the bid pricing tool for the first time in 2013, such as reported estimates by MA organizations and Part D sponsors of expenditures on quality and levels of taxes and fees. Part D employer-group waiver plans are not required to submit bids, and therefore they are not included in the data analysis. Therefore, these plans are excluded from the analysis of Part D stand-alone contracts. Employer group waiver plans offered under MA–PD contracts are included in the RIA, although the bid data available for these

plans are only from the MA portions of the bids.

As discussed at greater length in section V.D.4 of this final rule, we expect that MA organization and Part D sponsor behavior will change as a result of this final rule, which will impact the MLRs and remittances due. Because we are limited in our ability to predict behavioral changes, we do not explicitly model these behavioral changes in our estimates. We asked for comment on our methods and limitations presented in this regulatory impact analysis, anticipated impacts of behavioral changes, and additional ideas for quantifying the costs and benefits of this final rule.

4. Number of Affected Entities Subject to the MLR Provisions

We proposed that the MLR provisions will apply to all MA organizations and Part D sponsors offering Part C or D coverage (except for the proposed exclusion of PACE organizations, and the proposed inclusion of cost plans' Part D coverage). For purposes of the RIA, we have estimated the total number of entities that will be affected by the requirements of this final rule at the contract level because this is the level at which we proposed to apply the MLR. We believe that this is the best read of the statute at 1857(e) of the Act and that applying the MLR adjustment at the contract level will promote program stability and a variety of benefit structures.

Table 3 shows the estimated distribution of entities offering Part C and D contracts subject to MLR remittance requirements. Note that section 1876 Cost HMO/CMPs and section 1833 Cost HCPPs (Health Care Prepayment Plans) are excluded from this MLR analysis, as they do not submit Part C bids and only a few Part D bids for 2013 were submitted for section 1876 cost plans.

TABLE 3—ESTIMATED NUMBER OF CONTRACTS SUBJECT TO MLR REMITTANCE REQUIREMENTS

Contract type	Contract count	Estimated number of beneficiaries (in millions)
MA–PD *	544	14.3
Part D Stand-alone **	61	19.3
Total	605	33.6

* All MA contracts include at least one MA–PD plan, so are labeled MA–PD. Non-credible contracts, of which there are 11, are not displayed or included in this table as they are not subject to the remittance requirements.

** PACE and costs contracts are excluded.

Source: CMS administrative data on MA and Part D contracts, based on 2013 accepted bids. Beneficiary counts are bid projections.

Of the 605 MA–PD and Part D stand-alone contracts subject to the remittance requirement, we estimate that only 14 percent of these contracts will be required to pay an MLR related remittance to CMS in 2014 (see Table 5). This RIA provides estimates only for CY 2014, and, as a result, does not estimate the number of contracts that could undergo MLR-related enrollment suspensions or terminations in subsequent years.

We note that the estimates in Table 3 will be used to estimate potential CY 2014 remittances and therefore exclude non-credible contracts, which are not subject to the remittance requirements. This RIA does not account for the changes to remittance amounts if the distributions of credibility status changes. If more contracts become partially or fully credible, then remittance amounts would increase. Conversely, if more contracts become non-credible, then remittances amounts would decrease.

5. MLR Remittance Payments

a. Data Limitations and Modeling Assumptions

As described in the commercial MLR rule, we expect that as a result of this final rule, MA organization and Part D sponsor behavior will change. Even if the 2013 bid data were a precise indication of actual claims costs and revenue for 2013, MLRs in 2014 may well be different as a result of MA organization or Part D sponsor behavioral change. However, for purposes of this analysis, we do not explicitly model these behavioral changes in our estimates. Potential behavioral changes as a result of this final rule are as follows:

- Pricing Policy—MA organizations and Part D sponsors will likely consider a number of responses in 2014 to minimize or avoid remittance (for example, reducing premium increases, or paying providers bonuses if incurred claims fall short of a certain threshold).
- Activities That Improve Quality—MA organizations and Part D sponsors may increase their quality-improving activities given the financial incentive to do so, or modify existing activities to meet the QIA definition, and spending on these activities may change and vary significantly by MA organization or Part D sponsor.
- Other Changes—MA organizations and Part D sponsors are expected to carefully scrutinize all of their expenditures to determine whether some could legitimately be categorized as expenditures for clinical services, prescription drugs, or quality improving activities based on the definitions implemented by this regulation. Further, it is unclear to what extent companies may make other behavioral changes that could affect MLR remittances (for example, expanding coverage to increase medical claims, consolidation, requesting permission to split contracts into smaller contracts in order to receive credibility adjustments, etc.).

b. Methods for Estimating MLR Remittances

The analysis includes estimates that are based on both unadjusted and adjusted MLRs. An ''adjusted MLR'' refers to the MLR for a contract to which a credibility adjustment has been added, as described in section II.F. of this final rule. Accordingly, an unadjusted MLR is calculated without any credibility adjustment. Comparisons of unadjusted and adjusted MLRs are provided to assess the impact of the proposed credibility adjustments on partially-credible contracts. All MLRs reported in this analysis have denominators net of estimated federal and state taxes and licensing and regulatory fees, using data reported by MA organizations and Part D sponsors in their 2013 bids. Because the definitions of these taxes and fees are new to this rule, the estimates from the 2013 bid data may differ from how much they will actually spend on taxes and fees in 2014. Similarly, all estimated MLRs reported in this analysis also incorporate 2013 bid estimates of expenses for quality improving activities, as reported by MA organizations and Part D sponsors. Because the definitions of quality improving activities are new to this rule, the estimates from the 2013 bid data may differ from how much they will actually spend on these activities in 2014.

The adjusted MLRs reflect application of the credibility adjustments for contracts that have partially credible experience. As described in section II.F. of this final rule, we proposed that an MA–PD contract be defined as partially-credible when the enrollment is greater than or equal to 2,400 member months and no greater than 180,000 member months for a contract year. We proposed that a Part D stand-alone contract be defined as partially-credible when the enrollment is greater than or equal to 4,800 member months and no greater than 360,000 member months for a contract year. We proposed that these contracts receive a credibility adjustment to their MLRs to account for

statistical variability in their claims experience that is inherent in contracts with smaller enrollment. We proposed that MA–PD contracts are defined as fully-credible when the enrollment is greater than 180,000 member months and Part D stand-alone contracts are defined as fully-credible when the enrollment is greater than 360,000 member months. Reported MLR values for fully-credible contracts will not reflect a credibility adjustment. Finally, we proposed that contracts are defined as having non-credible experience if the enrollment for a year is less than 2,400 member months for MA–PD contracts and less than 4,800 member months for Part D stand-alone contracts. Non-credible contracts will not be subject to the remittance requirements or other MLR-related sanctions specified in statute (and implemented in the regulations at § 422.2410(b), (c), and (d) and § 423.2410(b) through (d)). Section II.F. of the final rule describes the rationale and method for calculating credibility adjustments.

First, the unadjusted MLR for a contract is calculated as follows. Each component of the MLR numerator (incurred claims, expenditures for quality activities, Part B premium rebates amount, and Part D reinsurance) is summed across all plans under the contract for all projected enrollees and the contract-level components are then summed. Next, each component of the MLR denominator (revenue net of taxes and fees, and Part D reinsurance) is summed across all plans under the contract for all projected enrollees, and the contract-level components are then summed. The ratio is then calculated to determine the unadjusted MLR. Finally, for contracts that are partially-credible and thus eligible for a credibility adjustment, and have an MLR below 85 percent prior to application of a credibility adjustment, we calculate an adjusted MLR for the contract by adding the applicable percentage points.

To estimate a remittance for a contract whose MLR falls below the minimum MLR requirement of 85 percent, we multiply the contract's difference between the minimum MLR requirement of 85 percent and the contract's MLR by the contract's total revenue (as provided at § 422.2430(c) and § 423.2420(c)).

We did not receive any comments and we are finalizing these analyses as proposed.

c. Numbers and Enrollment of MA Organizations and Part D Sponsors Affected by the MLR Requirements and Associated MLR Remittance Payments

As shown in Table 4, we estimate that 336 MA–PD contracts and 26 Part D stand-alone contracts will be designated as ''partially-credible'' according to the standards of this final rule, and thus eligible for a credibility adjustment. That is, about 62 percent of MA–PD contracts (representing about 13 percent of projected total MA–PD enrollment) will be partially-credible, and about 43 percent of Part D stand-alone contracts (representing about 1 percent of projected total stand-alone enrollment) will be eligible for a credibility adjustment if the MLR falls below 85 percent. (Many MLRs for partially-credible contracts are estimated to meet the minimum MLR requirement, as shown in Table 5.)

A total of 208 MA–PD contracts and 35 Part D stand-alone contracts are estimated to be fully-credible, so are not eligible for a credibility adjustment. As discussed elsewhere in this final rule, contracts with non-credible experience during a given contract year that do not meet the minimum MLR requirement will not be required to provide any remittance to CMS nor be subject to enrollment sanctions or termination because the contract will not have a sufficiently large number of member months to yield a statistically valid MLR.

TABLE 4—ESTIMATED ENROLLMENT, REVENUE, AND AVERAGE MLR BY CREDIBILITY STATUS

Contract type	Credibility status	Contract count	Number of beneficiaries (in millions)	Total revenue (in billions)	Avg MLR * (percent)
MA–PD	Partial	336	1.8	$20.8	89.6
	Full	208	12.5	135.8	88.9
Part D Stand-alone	Partial	26	0.2	0.4	86.7
	Full	35	19	31.3	88.4

Notes: The table excludes 9 MA–PD contracts and 2 Part D stand-alone contracts that are non-credible. Employer group waiver plans do not submit Part D bids, so are absent from the Part D stand-alone analysis, and only their MA bid data are included in the MA–PD analysis. This analysis does not explicitly model the impact of potential MA organization or Part D sponsor behavioral changes.

* Average MLRs reflect adjusted MLRs for those partially-credible contracts with MLRs below 85% prior to application of a credibility adjustment. Averages are enrollment-weighted. The average MLR for partially-credible contracts uses the MLR with credibility adjustment. Enrollment and total revenue are projections from the 2013 approved bids.

Source: CMS analysis of administrative data on MA and Part D contracts, based on 2013 accepted bids.

Finally, Table 4 shows average MLRs for the subgroups of MA–PD and Part D stand-alone partially-credible and fully-credible contracts. (The average MLRs for partially-credible contracts reflect the MLRs after application of a credibility adjustment for those partially-credible contracts with an MLR below 85 percent prior to application of a credibility adjustment.) On average, each of these four subgroups of contracts is estimated to meet the minimum MLR requirement, with average MLRs ranging from 86.7 percent to 89.6 percent. However, there are contracts within both subgroups of partially-credible and fully-credible contracts that do not meet the minimum MLR requirement, as shown in Table 5.

For the purpose of this RIA (and not the actual MLR calculation), total revenue for MA–PD contracts is the total MA revenue requirement + MA optional supplemental benefit premium (if any) + Part D basic bid + Part D reinsurance—Parts C and D taxes and fees.

For the purpose of this RIA (and not the actual MLR calculation), total revenue for Part D stand-alone contracts is the sum of the basic bid and Part D reinsurance, minus taxes and fees. Low-income cost sharing (LICS) payments are excluded.

Table 5 shows the number of MA–PD and Part D stand-alone contracts estimated to owe a remittance payment, before and after application of a credibility adjustment to eligible partially-credible contracts. The figures in Table 5 were determined as follows. First, we used enrollment projections to determine which contracts are fully-credible and which are partially-credible. Next we calculated the MLRs with the credibility adjustment added for those partially-credible contracts with MLRs below 85 percent. Finally, to

show the overall program impact of credibility adjustments, we calculated the estimated remittances for partially-credible and fully-credible contracts before and after application of credibility adjustments.

TABLE 5—ESTIMATED IMPACT OF CREDIBILITY ADJUSTMENT ON ESTIMATED MLR REMITTANCE PAYMENTS FOR CY 2014

Contract type	Credibility status	Number of contracts	Number of contracts below 85% MLR *before credibility adjustment*	Estimated remittance without credibility adjustment (in millions)	Number of contracts below 85% *after credibility adjustment*	Estimated remittance with credibility adjustment (in millions)
MA–PD	Partial	336	68	$109	34	$55
	Full	208	37	662	37	662
	Total	544	105	771	71	717
Part D stand-alone	Partial	26	12	11	9	8
	Full	35	2	133	2	133
	Total	61	14	144	11	141

* Partially-credible contracts are those with enrollment levels that make them eligible for a credibility adjustment.
This analysis does not explicitly model the impact of potential MA organization or Part D sponsor behavioral changes.
Source: CMS analysis of administrative data on MA and Part D contracts, based on 2013 accepted bids.

Of the 336 MA–PD contracts that will be categorized as partially-credible, 68 will fail to meet the MLR minimum requirement of 85 percent in the absence of a credibility adjustment. The average MLR for this group of 68 contracts, prior to adding a credibility adjustment, is 82.6 percent. Upon application of the credibility adjustment, 34 of these 68 will pass the MLR requirement, and 34 will still have MLRs below 85 percent. The subset of 34 contracts that passes with application of the credibility adjustment has an average MLR of 85.7 percent. As a result, the credibility adjustment decreases the estimated remittance amount by about $54 million (from $771 to $717 million). However, it should be noted that the majority of the estimated remittance of $717 million, that is, $662 million, is owed by fully-credible contracts.

For Part D stand-alone contracts, 12 of the 26 partially-credible contracts will fail to meet the MLR minimum requirement in the absence of a credibility adjustment. The average MLR for this group of 12 contracts, prior to adding a credibility adjustment, is 80.4 percent. Upon application of the credibility adjustment, 3 of these 12 contracts will pass the requirement, and 9 will still have MLRs below 85 percent. The subset of 3 contracts that passes with application of the credibility adjustment has an average MLR of 86.8 percent. As a result, the credibility adjustment decreases the estimated remittance amount by about $3 million (from $144 to $141 million). However, it should be noted that the majority of the estimated remittance of $141 million, that is $133 million, is owed by fully-credible contracts. Non-credible contracts were excluded from this analysis because no sanctions under § 422.2410(b) through (d) will apply to these contracts; as these contracts will not have remittances, they do not factor into the analysis of the estimated impacts.

6. Administrative Costs Related to MLR Provisions

As stated previously, this final rule implements the reporting requirements of section 1857(e)(4) of the Act, describing the medical loss ratio requirements and sanctions for not meeting those requirements, including a remittance payment of the difference to the Secretary and enrollment suspensions and contract termination for those who do not meet the requirements. Implementation of these requirements necessitates that a report be submitted to the Secretary and that MLR information be made available to the public in a time and manner that we determine, as well as the remittance calculation, payment and enforcement provisions of section 1857(e)(4) of the Act. We have quantified the primary sources of start-up costs that MA organizations and Part D sponsors will incur to bring themselves into compliance with this final rule, as well as the ongoing annual costs that they will incur related to these requirements. These costs and the methodology used to estimate them are discussed later in this section.

a. Methodology and Assumptions for Estimating Administrative Costs

Many MA organizations and Part D sponsors already report to CMS several elements needed for the MLR calculation, for example, certain fields in the Part D prescription drug events records, and some information in the annual Part C and Part D Technical Reporting. This final rule includes requirements related to additional data elements. As discussed earlier in this impact analysis, in order to assess the potential administrative burden relating to the requirements in this final rule, we drew on the regulatory impact analysis from the commercial MLR rules to gain insight into the tasks and level of effort required, and modified these estimated impacts for Medicare. Based on this review, we estimate that MA organizations and Part D sponsors will incur one-time start-up costs associated with developing teams to review the requirements in this final rule, and with developing processes for capturing the necessary data (for example, automating systems, writing new policies for tracking expenses in the general ledger, and developing methodologies for allocating expenses by lines of business and by contract). We estimate that MA organizations and Part D sponsors will also incur ongoing annual costs relating to data collection, populating the MLR reporting forms, conducting a final internal review, submitting the reports to the Secretary, conducting internal audits, record retention, preparing and submitting remittances, suspending enrollment (where appropriate), modifying marketing, and/or terminating contracts (where appropriate).

We anticipate that the level of effort relating to these activities will vary depending on the scope of an MA organization or Part D sponsor's operations. The complexity of each MA organization or Part D sponsor's estimated reporting burden is likely to be affected by a variety of factors, including the number of contracts it offers, enrollment size, the degree to

which it currently captures relevant data, whether it is a subsidiary of a larger carrier, and whether it currently offers coverage in the commercial market (and is therefore subject to the commercial MLR requirements).

b. Costs Related to MLR Reporting

For each contract year, MA organizations or Part D sponsors must submit a report to the Secretary that complies with the requirements of this final rule and in a time and manner that the Secretary determines. For purposes of these impact estimates, we assume that this report will include data relating to both the amounts expended on reimbursement for clinical services and prescription drugs, activities that improve quality and other non-clinical costs, as well as information relating to remittance payments.

The estimated total number of MLR data reports that MA organizations and Part D sponsors will be required to submit to the Secretary under the provisions of this final rule depends on the number of contracts held. We anticipate one report per contract. Our analysis here is based on 553 MA contracts and 63 Part D stand-alone contracts, for a total of 616 reports. The 616 contracts are comprised of 605 contracts subject to the remittance requirement plus 11 non-credible contracts that are subject to reporting requirements. We used the commercial MLR RIA as a basis for estimating the total hours of administrative work related to the Medicare MLR requirements. We estimated the average cost per hour to be $94.88. This figure was derived by using the May 2011 mean hourly wage of $60.41 for computer and information systems managers from the Department of Labor's Bureau of Labor Statistics. This rate was increased by 48 percent to account for fringe benefits and overhead (36 percent for fringe benefits and 12 percent for overhead). This figure was then converted to 2014 dollars using an average annual growth rated derived from the changes to the Consumer Price Index. This is an upper-bound estimate that assumes all MA organizations and Part D sponsors will be submitting a separate MLR report for each contract. Table 6 shows our estimates that MA organizations and Part D sponsors will incur one-time costs in 2014 and ongoing costs thereafter, relating to the MLR reporting requirements in this final rule of approximately $16,000 per contract, on average, in 2014.

TABLE 6—ESTIMATED ADMINISTRATIVE COSTS RELATED TO MEDICAL LOSS RATIO (MLR) REPORTING REQUIREMENTS

Type of administrative cost	Total number of contracts	Total number of reports	Estimated total hours	Estimated average cost per hour	Estimated total cost	Estimated average cost per report
One-Time Costs	616	616	101,000	$94.88	$9,600,000	$16,000
Ongoing Costs	616	616	29,000	94.88	2,800,000	5,000

Notes: Total number of reports represents the estimated total number of MLR reports that will be submitted to the Secretary.
The source data has been modified to reflect estimated costs for MA organizations and Part D sponsors. Values may not be exact due to rounding. Estimates reflect 2011 wage data from the U.S. Department of Labor, Bureau of Labor Statistics.

c. Costs Related to MLR Record Retention Requirements

Consistent with the assumptions discussed earlier, MLR record retention costs are assumed to be relatively negligible, since MA organizations and Part D sponsors already retain similar data for general MA and Prescription Drug audits and per the established requirements in § 422.504(f)(2) and § 423.505(f)(2). Therefore, to arrive at an estimate for MA organizations and Part D sponsors, we adjusted downward the 3.5 minute-per-report estimate that appears in the RIA for the commercial MLR rule. Table 7 shows that we estimate that MA organizations and Part D sponsors will incur annual ongoing costs relating to the MLR reporting requirements in this final rule of approximately $4.00 per report on average. We estimated the average cost per hour to be $94.88. This figure was derived by using the May 2011 mean hourly wage of $60.41 for computer and information systems managers from the Department of Labor's Bureau of Labor Statistics. This rate was increased by 48 percent to account for fringe benefits and overhead (36 percent for fringe benefits and 12 percent for overhead). This figure was then converted to 2014 dollars using an average annual growth rated derived from the changes to the Consumer Price Index.

TABLE 7—MLR RECORD RETENTION REQUIREMENTS-ESTIMATED ONGOING ADMINISTRATIVE COSTS

Description	Total number of contracts	Total number of reports	Estimated total hours	Estimated average cost per hour	Estimated total cost	Estimated average cost per report
Ongoing Costs	616	616	28	$94.88	$2,600	$4

Notes: Total number of reports represents the estimated total number of MLR reports that will be submitted to the Secretary.
The source data has been modified to reflect estimated costs for MA organization and Part D sponsors. Values may not be exact due to rounding. Estimates reflect 2011 wage data from the U.S. Department of Labor, Bureau of Labor Statistics.

d. Costs Related to MLR Remittance Payments

Consistent with the assumptions discussed earlier, costs around submitting remittances to CMS are expected to be relatively negligible, in particular because we proposed to implement payment of remittances using a standard payment adjustment procedure in our payment system, which is a routine systems interface for the industry.

E. Alternatives Considered

Under the Executive Order, we are required to consider alternatives to issuing regulations and alternative regulatory approaches. We considered a variety of regulatory alternatives to the policies proposed thus far, and solicited comments on these alternatives.

1. Credibility Adjustment

One alternative to the credibility adjustment in this final rule will be to not make any adjustment for credibility, and to require smaller plans to make remittance payments on the same terms as larger plans. If we do not adopt a

credibility adjustment, the estimated remittance in 2014 will be approximately $915 million for MA–PD and Part D stand-alone contracts, or approximately $57 million larger, as shown in Table 5. As described elsewhere in this preamble, we believe that the credibility adjustment as proposed will best balance the goals of providing value to beneficiaries and assuring that contracts with relatively low enrollment will be able to function effectively.

2. Aggregation of MLR to the Contract Level

We considered two alternatives to aggregating MLRs to the contract level. Determining MLRs at the level of plan benefit package will increase the burden on MA organizations and Part D sponsors and the size of many plan benefit packages is too small for an MLR to reasonably represent the MA organization's or Part D sponsor's approach to resource allocation. We also considered calculating MLRs at the parent organization level, but we believe that this high level of aggregation will obscure local variation in resource allocation that will be important to enrollees. As described elsewhere in this final rule, we believe that the contract-level of aggregation is closest to the commercial MLR regulations of state-level aggregation and best promotes program stability.

3. Quality Improving Activities

After considering the commercial MLR regulations' approach to defining quality improving activities, we decided to propose aligning our definition of quality improving activities with that in the commercial MLR rule. As discussed elsewhere in this final rule, potential alternatives would be to adopt narrower or broader definitions of quality improving activities. These distinctions could be made based on the criteria for selecting quality improving activities or the specific types of activities included in the definition.

This final rule defines quality-improving activities as being those that are grounded in evidence-based medicine, designed to improve the quality of care received by an enrollee, and capable of being objectively measured and producing verifiable results and achievements. A narrower definition might include only evidence-based quality improving initiatives, while excluding activities that have not been demonstrated to improve quality. Similarly, a narrower definition would not allow for inclusion of future innovations before data are available that demonstrate their effectiveness.

Conversely, a broader definition might allow additional types of administrative expenses to be counted as activities that improve quality, such as network fees associated with third party provider networks or costs associated with converting International Classification of Disease (ICD) code sets from ICD–9 to ICD–10 that are in excess of 0.3 percent of a MA organization or Part D sponsor's total revenue. As discussed elsewhere in this final rule, while we agree that certain administrative expenses should not be counted as expenditures on quality improving activities, some traditional administrative activities could qualify as expenditures on quality improving activities if they meet the criteria set forth in this final rule.

We do not have data available to estimate the effects of alternative definitions of quality improving activities on MLRs, but a broader definition of quality improving activities would produce smaller estimated remittances, and a narrower definition would result in larger estimated remittances.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) (RFA) requires agencies that issue a regulation to analyze options for regulatory relief for small businesses if a rule has a significant impact on a substantial number of small entities. The Act generally defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000 (states and individuals are not included in the definition of ''small entity.'') HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

As discussed earlier, in general, health insurance issuers offering Part C and D coverage, including MA organizations, Part D sponsors, 1876 Cost HMO/CMPs, and section 1833 HCPPs (Health Care Prepayment Plans), will be affected by the final rule. We believe that health insurers will be classified under the North American Industry Classification System (NAICS) Code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of $7 million or less will be considered small entities for this NAICS code. Health issuers could possibly also be classified in NAICS Code 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard will be $10 million or less.

As discussed in the Web Portal interim final rule (75 FR 24481), HHS examined the health insurance industry in depth in the RIA we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis we determined that there were few, if any, issuers underwriting health insurance coverage (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the relevant size thresholds for ''small'' business established by the SBA.

Similarly, MA organizations and Part D sponsors, the entities that will largely be affected by the provisions of this final rule, are not generally considered small business entities. They must follow minimum enrollment requirements (5,000 in urban areas and 1,500 in nonurban areas) and because of the revenue from such enrollments, these entities are generally above the revenue threshold required for analysis under the RFA. While a very small rural plan could fall below the threshold, we do not believe that there are more than a handful of such plans. Additionally, a fraction of MA organizations and sponsors could be considered small businesses because of their non-profit status and lack of dominance in their field. As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. We do not believe that this threshold will be reached by the requirements in this final rule because very few small entities are subject to the provisions in this final rule, the estimated administrative costs associated with reporting MLR data to the Secretary are very low (see section V.D.6. of this final rule), and the credibility adjustment addresses the special circumstances of contracts with lower enrollment. For these reasons, we believe this final rule will have minimal impact on small entities. As a result, the Secretary has determined that this final rule will not have a significant impact on a substantial number of small entities.

G. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that includes a federal mandate that could result in expenditure in any 1 year by state, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold level is approximately $141 million.

UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of cost, mainly those ''federal mandate'' costs resulting from: (1) Imposing enforceable duties on state, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, state, local, or tribal governments under entitlement programs.

Consistent with policy embodied in UMRA, this proposed regulation has been designed to a low-burden alternative for state, local and tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

This final rule contains reporting requirements and data retention requirements for MA organizations and Part D sponsors. We estimate that administrative costs related to MLR reporting requirements will be $9.6 million in total one-time costs in 2014 and $2.8 million per year in ongoing costs. We estimate that ongoing costs per year for record retention requirements will be $2,600. This final rule also contains requirements related to remittance payments paid by MA organizations and Part D sponsors that do not meet the minimum MLR standards. We estimate approximately $858 million in remittance payments to the Secretary in 2014, contingent upon certain changes in bidding and payment behavior. It includes no mandates on state, local, or tribal governments.

H. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications.

States generally regulate health insurance coverage. However in 2003, section 232(a) of the MMA amended section 1856 for MA plans by eliminating the general and specific preemption distinctions from section 1856 and expanded federal preemption of state standards to broadly apply preemption to all state law or regulation (other than state licensing laws or state laws relating to plan solvency). In our view, while this final rule does not impose substantial direct requirement costs on state and local governments, this final rule has minimal Federalism implications due to direct effects on the distribution of power and responsibilities among the state and federal governments relating to determining and enforcing minimum MLR standards, reporting and remittance requirements relating to coverage that MA organizations and Part D sponsors offer.

We anticipate that the federalism implications (if any) are substantially mitigated because the Affordable Care Act does not provide any role for the states in terms of receiving or analyzing the data or enforcing the requirements of section 1857(e)(4) of the Act. The enforcement provisions of this final rule state that the Secretary has enforcement authority and does not require the states to do anything.

As discussed earlier, in developing this final rule for the Medicare Advantage and the Medicare Prescription Drug Benefit programs, HHS used the commercial MLR regulation as a reference point for developing the Medicare MLR requirements. In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policymaking discretion of the states, HHS made efforts to consult with and work cooperatively with states during the development of the commercial MLR regulation, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners, and consulting with state insurance officials on an individual basis. Throughout the process of developing the commercial MLR regulation, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Department attempted to balance the states' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every state.

By doing so, it is the Department's view that we have complied with the requirements of Executive Order 13132. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department certifies that we have complied with the requirements of Executive Order 13132 for the attached final rule in a meaningful and timely manner.

I. Congressional Review Act

This final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and has been transmitted to the Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

J. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars_a004_a-4)*, we have prepared an accounting statement in Table 8 showing the classification of the transfers and costs associated with the provisions of this final rule for CY 2014.

TABLE 8—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES FOR THE MA–PD AND PART D STAND-ALONE MLR REMITTANCE PAYMENTS FOR CY 2014

[In millions of 2013 dollars]

Category	Transfers		
	Discount rate		Period covered
	7%	3%	
Annualized Monetized Transfers: Primary Estimate	$802	$833	CY 2014
From/To	From MA Organizations and Part D Sponsors / To Federal Government		
Category	Costs		
	Discount rate		Period covered
Annualized Costs to MA Organizations and Part D Sponsors:	7%	3%	CY 2014
Primary Estimate	$9.0	$9.3	

List of Subjects

42 CFR Part 422

Administrative practice and procedure, Health facilities, Health maintenance, organizations (HMO), Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR parts 422 and 423 as set forth below:

PART 422 MEDICARE ADVANTAGE PROGRAM

■ 1. The authority citation for part 422 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 422.510 is amended by adding paragraph (a)(15) to read as follows:

§ 422.510 Termination of contract by CMS.

(a) * * *

(15) Has failed to report MLR data in a timely and accurate manner in accordance with § 422.2460.

* * * * *

Subpart U—[Reserved]

Subpart W—[Reserved]

■ 3. Remove and reserve subparts U and W.

■ 4. Add subpart X to read as follows:

Subpart X—Requirement for a Minimum Medical Loss Ratio

Sec.
422.2400 Basis and scope.
422.2401 Definitions.
422.2410 General requirements.
422.2420 Calculation of the medical loss ratio.
422.2430 Activities that improve health care quality.
422.2440 Credibility adjustment.
422.2450 [Reserved]
422.2460 Reporting requirements.
422.2470 Remittance to CMS if the applicable MLR requirement is not met.
422.2480 MLR review and non-compliance.

Subpart X—Requirement for a Minimum Medical Loss Ratio

§ 422.2400 Basis and scope.

This subpart is based on section 1857(e)(4) of the Act, and sets forth medical loss ratio requirements for Medicare Advantage organizations, and financial penalties and sanctions against MA organizations when minimum medical loss ratios are not achieved by MA organizations.

§ 422.2401 Definitions.

Non-claims costs means those expenses for administrative services that are not—

(1) Incurred claims (as provided in § 422.2420(b)(2) through (4));

(2) Expenditures on quality improving activities (as provided in § 422.2430);

(3) Licensing and regulatory fees (as provided in § 422.2420(c)(2)(ii));

(4) State and Federal taxes and assessments (as provided in § 422.2420(c)(2)(i) and (iii)).

§ 422.2410 General requirements.

(a) For contracts beginning in 2014 or later, an MA organization (defined at § 422.2) is required to report an MLR for each contract under this part for each contract year.

(b) *MLR requirement.* If CMS determines for a contract year that an MA organization has an MLR for a contract that is less than 0.85, the MA organization has not met the MLR requirement and must remit to CMS an amount equal to the product of the following:

(1) The total revenue of the MA contract for the contract year.

(2) The difference between 0.85 and the MLR for the contract year.

(c) If CMS determines that an MA organization has an MLR for a contract that is less than 0.85 for 3 or more consecutive contract years, CMS does not permit the enrollment of new enrollees under the contract for coverage during the second succeeding contract year.

(d) If CMS determines that an MA organization has an MLR for a contract that is less than 0.85 for 5 consecutive contract years, CMS terminates the contract per § 422.510(b)(1) and (d) effective as of the second succeeding contract year.

§ 422.2420 Calculation of the medical loss ratio.

(a) *Determination of MLR.* (1) The MLR for each contract under this part is the ratio of the numerator (as defined in paragraph (b) of this section) to the denominator (as defined in paragraph (c) of this section). An MLR may be increased by a credibility adjustment according to the rules at § 422.2440, or subject to an adjustment determined by CMS to be warranted based on

exceptional circumstances for areas outside the 50 states and the District of Columbia.

(2) The MLR for an MA contract—

(i) Not offering Medicare prescription drug benefits must only reflect costs and revenues related to the benefits defined at § 422.100(c); and

(ii) That includes MA–PD plans (defined at § 422.2) must also reflect costs and revenues for benefits described at § 423.104(d) through (f) of this chapter.

(b) Determining the *MLR numerator.* (1) For a contract year, the numerator of the MLR for an MA contract (other than an MSA contract) must equal the sum of paragraphs (b)(1)(i) through (iii) of this section, and the numerator of the MLR for an MSA contract must equal the sum of paragraphs (b)(1)(i), (iii), and (iv) of this section. The numerator must be determined in accordance with paragraphs (b)(5) and (6) of this section.

(i) Incurred claims for all enrollees, as defined in paragraphs (b)(2) through (4) of this section.

(ii) The amount of the reduction, if any, in the Part B premium for all MA plan enrollees under the contract for the contract year.

(iii) The expenditures under the contract for activities that improve health care quality, as defined in § 422.2430.

(iv) The amount of the annual deposit into the medical savings account described at § 422.4(a)(2).

(2) *Incurred claims for clinical services and prescription drug costs.* Incurred claims must include the following:

(i) Direct claims that the MA organization pays to providers (including under capitation contracts with physicians) for covered services, described at paragraph (a)(2) of this section provided to all enrollees under the contract.

(ii) For an MA contract that includes MA–PD plans (described in paragraph (a)(2) of this section), drug costs provided to all enrollees under the contract, as defined at § 423.2420(b)(2)(i) of this chapter.

(iii) Unpaid claims reserves for the current contract year, including claims reported in the process of adjustment.

(iv) Percentage withholds from payments made to contracted providers.

(v) Incurred but not reported claims based on past experience, and modified to reflect current conditions such as changes in exposure, claim frequency or severity.

(vi) Changes in other claims-related reserves.

(vii) Claims that are recoverable for anticipated coordination of benefits.

(viii) Claims payments recoveries received as a result of subrogation.

(ix) Claims payments recoveries as a result of fraud reduction efforts, not to exceed the amount of fraud reduction expenses.

(x) Reserves for contingent benefits and the medical claim portion of lawsuits.

(xi) The amount of incentive and bonus payments made to providers.

(3) Adjustments that must be deducted from incurred claims include the following:

(i) Overpayment recoveries received from providers.

(4) *Exclusions from incurred claims.* The following amounts must not be included in incurred claims:

(i) Non-claims costs, as defined in § 422.2401, which include the following:

(A) Amounts paid to third party vendors for secondary network savings.

(B) Amounts paid to third party vendors for any of the following:

(*1*) Network development.

(*2*) Administrative fees.

(*3*) Claims processing.

(*4*) Utilization management.

(C) Amounts paid, including amounts paid to a provider, for professional or administrative services that do not represent compensation or reimbursement for covered services provided to an enrollee, such as the following:

(*1*) Medical record copying costs.

(*2*) Attorneys' fees.

(*3*) Subrogation vendor fees.

(*4*) Bona fide service fees.

(*5*) Compensation to any of the following:

(*i*) Paraprofessionals.

(*ii*) Janitors.

(*iii*) Quality assurance analysts.

(*iv*) Administrative supervisors.

(*v*) Secretaries to medical personnel.

(*vi*) Medical record clerks.

(ii) Amounts paid to CMS as a remittance under § 422.2410(b).

(5) Incurred claims under this part for policies issued by one MA organization and later assumed by another entity must be reported by the assuming organizations for the entire MLR reporting year during which the policies were assumed and no incurred claims under this part for that contract year must be reported by the ceding MA organization.

(6) Reinsured incurred claims for a block of business that was subject to indemnity reinsurance and administrative agreements effective before March 23, 2010, for which the assuming entity is responsible for 100 percent of the ceding entity's financial risk and takes on all of the administration of the block, must be reported by the assuming issuer and must not be reported by the ceding issuer.

(c) *Determining the MLR denominator.* For a contract year, the denominator of the MLR for an MA contract must equal the total revenue under the contract. Total revenue under the contract is as described in paragraph (c)(1) of this section, net of deductions described in paragraph (c)(2) of this section, taking into account the exclusions described in paragraph (c)(3) of this section, and in accordance with paragraph (c)(4) of this section.

(1) CMS' payments to the MA organization for all enrollees under a contract, reported on a direct basis, including the following:

(i) Payments under § 422.304(a)(1) through (3) and (c).

(ii) The amount applied to reduce the Part B premium, as provided under § 422.266(b)(3).

(iii) Payments under § 422.304(b)(1), as reconciled per § 423.329(c)(2)(ii) of this chapter.

(iv) All premiums paid by or on behalf of enrollees to the MA organization as a condition of receiving coverage under an MA plan, including CMS' payments for low income premium subsidies under § 422.304(b)(2).

(v) All unpaid premium amounts that an MA organization could have collected from enrollees in the MA plan(s) under the contract.

(vi) All changes in unearned premium reserves.

(vii) Payments under § 423.315(e) of this chapter.

(2) The following amounts must be deducted from total revenue in calculating the MLR:

(i) *Licensing and regulatory fees.* (A) Statutory assessments to defray the operating expenses of any State or Federal department, such as the ''user fee'' described in section 1857(e)(2) of the Act.

(B) Examination fees in lieu of premium taxes as specified by State law.

(ii) *Federal taxes and assessments.* All Federal taxes and assessments allocated to health insurance coverage.

(iii) *State taxes and assessments.* State taxes and assessments such as the following:

(A) Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the State directly.

(B) Guaranty fund assessments.

(C) Assessments of State industrial boards or other boards for operating expenses or for benefits to sick employed persons in connection with

disability benefit laws or similar taxes levied by States.

(D) State income, excise, and business taxes other than premium taxes.

(iv) *Community benefit expenditures.* Community benefit expenditures are payments made by a Federal income tax-exempt MA organization for community benefit expenditures as defined in paragraph (c)(2)(iv)(A) of this section, limited to the amount defined in paragraph (c)(2)(iv)(B) of this section, and allocated to a contract as required under paragraph (d)(1) of this section.

(A) Community benefit expenditures means expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health and relief of government burden.

(B) Such payment may be deducted up to the limit of either 3 percent of total revenue under this part or the highest premium tax rate in the State for which the Part D sponsor is licensed, multiplied by the Part D sponsor's earned premium for the contract.

(3) The following amounts must not be included in total revenue:

(i) The amount of unpaid premiums for which the MA organization can demonstrate to CMS that it made a reasonable effort to collect.

(ii) The following EHR payments and adjustments:

(A) EHR incentive payments for meaningful use of certified electronic health records by qualifying MAOs, MA EPs and MA-affiliated eligible hospitals that are administered under 42 CFR part 495 subpart C.

(B) EHR payment adjustments for a failure to meet meaningful use requirements that are administered under 42 CFR part 495 subpart C.

(iii) Coverage Gap Discount Program payments under § 423.2320 of this chapter.

(4) Total revenue (as defined at § 422.2420(c)) for policies issued by one MA organization and later assumed by another entity must be reported by the assuming entity for the entire MLR reporting year during which the policies were assumed and no revenue under this part for that contract year must be reported by the ceding MA organization.

(5) Total revenue (as defined at § 422.2420(c)) that is reinsured for a block of business that was subject to indemnity reinsurance and administrative agreements effective prior to March 23, 2010, for which the assuming entity is responsible for 100 percent of the ceding entity's financial risk and takes on all of the administration of the block, must be reported by the assuming issuer and must not be reported by the ceding issuer.

(d) *Allocation of expense*—(1) *General requirements.* (i) Each expense must be included under only one type of expense, unless a portion of the expense fits under the definition of or criteria for one type of expense and the remainder fits into a different type of expense, in which case the expense must be pro-rated between types of expenses.

(ii) Expenditures that benefit multiple contracts, or contracts other than those being reported, including but not limited to those that are for or benefit self-funded plans, must be reported on a pro rata share.

(2) *Description of the methods used to allocate expenses.* (i) Allocation to each category must be based on a generally accepted accounting method that is expected to yield the most accurate results. Specific identification of an expense with an activity that is represented by one of the categories in § 422.2420(b) or (c) will generally be the most accurate method.

(ii) Shared expenses, including expenses under the terms of a management contract, must be apportioned pro rata to the contracts incurring the expense.

(iii)(A) Any basis adopted to apportion expenses must be that which is expected to yield the most accurate results and may result from special studies of employee activities, salary ratios, premium ratios or similar analyses.

(B) Expenses that relate solely to the operations of a reporting entity, such as personnel costs associated with the adjusting and paying of claims, must be borne solely by the reporting entity and are not to be apportioned to other entities within a group.

§ 422.2430 Activities that improve health care quality.

(a) *Activity requirements.* Activities conducted by an MA organization to improve quality must fall into one of the categories in paragraph (a)(1) of this section and meet all of the requirements in paragraph (a)(2) of this section.

(1) *Categories of quality improving activities.* The activity must be designed to achieve one or more of the following:

(i) To improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Patient Protection and Affordable Care Act, for treatment or services under the plan or coverage.

(ii) To prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post-discharge reinforcement by an appropriate health care professional.

(iii) To improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology under the plan or coverage.

(iv) To promote health and wellness.

(v) To enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology. Such activities, such as Health Information Technology (HIT) expenses, are required to accomplish the activities that improve health care quality and that are designed for use by health plans, health care providers, or enrollees for the electronic creation, maintenance, access, or exchange of health information, and are consistent with meaningful use requirements, and which may in whole or in part improve quality of care, or provide the technological infrastructure to enhance current quality improving activities or make new quality improvement initiatives possible.

(2) The activity must be designed for all of the following:

(i) To improve health quality.

(ii) To increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements.

(iii) To be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees.

(iv) To be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.

(b) *Exclusions.* Expenditures and activities that must not be included in quality improving activities include, but are not limited to, the following:

(1) Those that are designed primarily to control or contain costs.

(2) The pro rata share of expenses that are for lines of business or products other than those being reported, including but not limited to, those that are for or benefit self-funded plans.

(3) Those which otherwise meet the definitions for quality improving activities but which were paid for with grant money or other funding separate from premium revenue.

(4) Those activities that can be billed or allocated by a provider for care delivery and that are reimbursed as clinical services.

(5) Establishing or maintaining a claims adjudication system, including costs directly related to upgrades in health information technology that are designed primarily or solely to improve claims payment capabilities or to meet regulatory requirements for processing claims, including ICD–10 implementation costs in excess of 0.3 percent of total revenue under this part, and maintenance of ICD–10 code sets adopted in accordance with to the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d–2, as amended.

(6) That portion of the activities of health care professional hotlines that does not meet the definition of activities that improve health quality.

(7) All retrospective and concurrent utilization review.

(8) Fraud prevention activities.

(9) The cost of developing and executing provider contracts and fees associated with establishing or managing a provider network, including fees paid to a vendor for the same reason.

(10) Provider credentialing.

(11) Marketing expenses.

(12) Costs associated with calculating and administering individual enrollee or employee incentives.

(13) That portion of prospective utilization review that does not meet the definition of activities that improve health quality.

(14) Any function or activity not expressly permitted by CMS under this part.

§ 422.2440 Credibility adjustment.

(a) An MA organization may add a credibility adjustment to a contract's MLR if the contract's experience is partially credible, as determined by CMS.

(b) An MA organization may not add a credibility adjustment to a contract's MLR if the contract's experience is fully credible, as determined by CMS.

(c) For those contract years for which a contract has non-credible experience for their MLR, sanctions under § 422.2410(b) through (d) will not apply.

(d) CMS defines and publishes definitions of partial credibility, full credibility, and non-credibility and the credibility factors through the notice and comment process of publishing the Advance Notice and Final Rate Announcement.

§ 422.2450 [Reserved]

§ 422.2460 Reporting requirements.

For each contract year, each MA organization must submit a report to CMS, in a timeframe and manner specified by CMS, which includes but is not limited to the data needed by the MA organization to calculate and verify the MLR and remittance amount, if any, for each contract, such as incurred claims, total revenue, expenditures on quality improving activities, non-claims costs, taxes, licensing and regulatory fees, and any remittance owed to CMS under § 422.2410.

§ 422.2470 Remittance to CMS if the applicable MLR requirement is not met.

(a) *General requirement.* For each contract year, an MA organization must provide a remittance to CMS if the contract's MLR does not meet the minimum MLR requirement required by § 422.2410(b) of this subpart.

(b) *Amount of remittance.* For each contract that does not meet the MLR requirement for a contract year, the MA organization must remit to CMS the amount by which the MLR requirement exceeds the contract's actual MLR multiplied by the total revenue of the contract, as provided in § 422.2420(c), for the contract year.

(c) *Timing of remittance.* CMS deducts the remittance from plan payments in a timely manner after the MLR is reported, on a schedule determined by CMS.

(d) *Treatment of remittance.* Payment to CMS must not be included in the numerator or denominator of any year's MLR.

§ 422.2480 MLR review and non-compliance.

To ensure the accuracy of MLR reporting, CMS conducts selected reviews of reports submitted under § 422.2460 to determine that that the MLRs and remittance amounts under § 422.2410(b) and sanctions under § 422.2410(c) and (d), were accurately calculated, reported, and applied.

(a) The reviews include a validation of amounts included in both the numerator and denominator of the MLR calculation reported to CMS.

(b) MA organizations are required to maintain evidence of the amounts reported to CMS and to validate all data necessary to calculate MLRs.

(c)(1) Documents and records must be maintained for 10 years from the date such calculations were reported to CMS with respect to a given MLR reporting year.

(2) MA organizations must require any third party vendor supplying drug or medical cost contracting and claim adjudication services to the MA organization to provide all underlying data associated with MLR reporting to that MA organization in a timely manner, when requested by the MA organization, regardless of current contractual limitations, in order to validate the accuracy of MLR reporting.

(d) Reports submitted under § 422.2460, calculations, or any other MLR submission required by this subpart found to be materially incorrect or fraudulent—

(1) Is noted by CMS;

(2) Appropriate remittance amounts are recouped by CMS; and

(3) Sanctions may be imposed by CMS as provided in § 422.752.

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 5. The authority for part 423 continues to read as follows:

Authority: Secs. Sections 1102, 1106, 1860D–1 through 1860D–42, and 1871 of the Social Security Act (42 U.S.C. 1302, 1306, 1395w–101 through 1395w–152, and 1395hh).

■ 6. Section 423.509 is amended by adding paragraph (a)(14) to read as follows:

§ 423.509 Termination of contract by CMS.

(a) * * *

(14) Has failed to report MLR data in a timely and accurate manner in accordance with § 423.2460.

* * * * *

■ 7. Add subpart X to read as follows:

Subpart X—Requirements for a Minimum Medical Loss Ratio

Sec.
423.2300 Basis and scope.
423.2401 Definitions.
423.2410 General requirements.
423.2420 Calculation of medical loss ratio.
423.2430 Activities that improve health care quality.
423.2440 Credibility adjustment.
423.2450 [Reserved]
423.2460 Reporting requirements.
423.2470 Remittance to CMS if the applicable MLR requirement is not met.
423.2480 MLR review and non-compliance.

Subpart X—Requirements for a Minimum Medical Loss Ratio

§ 423.2400 Basis and scope.

This subpart is based on section 1857(e)(4) of the Act, and sets forth medical loss ratio requirements for Part D sponsors, and financial penalties and sanctions against Part D sponsors when minimum medical loss ratios are not achieved by Part D sponsors.

§ 423.2401 Definitions.

Non-claims costs means those expenses for administrative services that are not—

(1) Incurred claims (as provided in § 423.2420(b)(2) through (b)(4));

(2) Expenditures on quality improving activities (as provided in § 423.2430);

(3) Licensing and regulatory fees (as provided in § 423.2420(c)(2)(i)); or

(4) State and Federal taxes and assessments (as provided in § 423.2420(c)(2)(ii) and (iii)).

§ 423.2410 General requirements.

(a) For contracts beginning in 2014 or subsequent contract years, a Part D sponsor (defined at § 423.4) is required to report an MLR for each contract under this part for each contract year.

(b) If CMS determines for a contract year that a Part D sponsor has an MLR for a contract that is less than 0.85, the Part D sponsor must remit to CMS an amount equal to the product of the following:

(1) The total revenue of the prescription drug plan for the contract year.

(2) The difference between 0.85 and the MLR for the contract year.

(c) If CMS determines that a Part D sponsor has an MLR for a contract that is less than 0.85 for 3 or more consecutive contract years, CMS does not permit the enrollment of new enrollees under the contract for coverage during the second succeeding contract year.

(d) If CMS determines that a Part D sponsor has an MLR for a contract that is less than 0.85 for 5 consecutive contract years, CMS does terminate the contract under the authority at § 423.509(a)(11) and (14) effective as of the second succeeding contract year.

§ 423.2420 Calculation of medical loss ratio.

(a) *Determination of the MLR.* (1) The MLR for each contract under this part is the ratio of the numerator (as defined in paragraph (b) of this section) to the denominator (as defined in paragraph (c) of this section). An MLR may be increased by a credibility adjustment according to the rules at § 423.2440, or subject to an adjustment determined by CMS to be warranted based on exceptional circumstances for areas outside the 50 states and the District of Columbia.

(2) The MLR must reflect costs and revenues for benefits described at § 423.104(d) through (f). The MLR for MA–PD plans (defined at § 422.2 of this chapter) must also reflect costs and revenues for benefits described at § 422.100(c) of this chapter.

(b) *Determining the MLR numerator.* (1) For a contract year, the numerator of the MLR for a Part D prescription drug contract must equal the sum of paragraphs (b)(1)(i) through (iii) of this section and must be in accordance with paragraph (b)(1)(iv) of this section.

(i) Incurred claims for all enrollees, as defined in paragraphs (b)(2) through (4) of this section.

(ii) The expenditures under the contract for activities that improve health care quality, as defined in § 423.2430;

(2) *Incurred claims for prescription drug costs.* Incurred claims must include the following:

(i) Direct drug costs that are actually paid (as defined in § 423.308, which are net of prescription drug rebates and other direct or indirect remuneration as defined herein) by the Part D sponsor.

(ii) Unpaid claims reserves for the current contract year, including claims reported in the process of adjustment.

(iii) Percentage withholds from payments made to contracted providers.

(iv) Claims incurred but not reported based on past experience, and modified to reflect current conditions such as changes in exposure, claim frequency or severity.

(v) Changes in other claims-related reserves.

(vi) Claims that are recoverable for anticipated coordination of benefits.

(vii) Claims payments recoveries received as a result of subrogation.

(viii) Claims payments recoveries received as a result of fraud reduction efforts, not to exceed the amount of fraud reduction expenses.

(ix) Reserves for contingent benefits and the Part D claim portion of lawsuits.

(3) Adjustments that must be deducted from incurred claims include the following:

(i) Overpayment recoveries received from providers.

(4) *Exclusions from incurred claims.* The following amounts must not be included in incurred claims:

(i) Non-claims costs, as defined in § 423.2401, which include the following:

(A) Amounts paid to third party vendors for secondary network savings.

(B) Amounts paid to third party vendors for any of the following:

(*1*) Network development.

(*2*) Administrative fees.

(*3*) Claims processing.

(*4*) Utilization management.

(C) Amounts paid, including amounts paid to a pharmacy, for professional or administrative services that do not represent compensation or reimbursement for covered services provided to an enrollee, such as the following:

(*1*) Medical record copying costs.

(*2*) Attorneys' fees.

(*3*) Subrogation vendor fees.

(*4*) Bona fide service fees.

(*5*) Compensation to any of the following:

(*i*) Paraprofessionals.

(*ii*) Janitors.

(*iii*) Quality assurance analysts.

(*iv*) Administrative supervisors.

(*v*) Secretaries to medical personnel.

(*vi*) Medical record clerks.

(ii) Amounts paid to CMS as a remittance under § 423.2410(b).

(5) Incurred claims under this part for policies issued by one Part D sponsor and later assumed by another entity must be reported by the assuming organization for the entire MLR reporting year during which the policies were assumed and no incurred claims under this part for that contract year must be reported by the ceding Part D sponsor.

(6) Reinsured incurred claims for a block of business that was subject to indemnity reinsurance and administrative agreements effective before March 23, 2010, for which the assuming entity is responsible for 100 percent of the ceding entity's financial risk and takes on all of the administration of the block, must be reported by the assuming issuer and must not be reported by the ceding issuer.

(c) *Determining the MLR denominator.* For a contract year, the denominator of the MLR for a Part D prescription drug contract must be in accordance with paragraph (c)(4) of this section and equal the total revenue under the contract. Total revenue is as described in paragraph (c)(1) of this section, net of deductions described in paragraph (c)(2) of this section, taking into account the exclusions described in paragraph and (c)(3) of this section, and be in accordance with (c)(4) of this section.

(1) CMS' payments to the Part D sponsor for all enrollees under a contract, reported on a direct basis, including the following:

(i) Payments under § 423.329(a)(1) and (2).

(ii) Payment adjustments resulting from reconciliation per § 423.329(c)(2)(ii).

(iii) All premiums paid by or on behalf of enrollees to the Part D sponsor as a condition of receiving coverage under a Part D plan, including CMS' payments for low income premium subsidies under § 422.304(b)(2) of this chapter.

(iv) All unpaid premium amounts that a Part D sponsor could have collected from enrollees in the Part D plan(s) under the contract.

(v) All changes in unearned premium reserves.

(vi) Payments under § 423.315(e).

(2) The following amounts must be deducted from total revenue in calculating the MLR:

(i) *Licensing and regulatory fees.* Statutory assessments to defray operating expenses of any State or Federal department, such as the ''user fee'' described in section 1857(e)(2) of the Act, and examination fees in lieu of premium taxes as specified by State law.

(ii) *Federal taxes and assessments.* All Federal taxes and assessments allocated to health insurance coverage.

(iii) *State taxes and assessments.* State taxes and assessments, such as the following:

(A) Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the State directly.

(B) Guaranty fund assessments.

(C) Assessments of State industrial boards or other boards for operating expenses or for benefits to sick employed persons in connection with disability benefit laws or similar taxes levied by States.

(D) State income, excise, and business taxes other than premium taxes.

(iv) *Community benefit expenditures.* Community benefit expenditures are payments made by a Federal income tax-exempt Part D sponsor for community benefit expenditures as defined in paragraph (c)(2)(iii)(A) of this section, limited to the amount defined in paragraph (c)(2)(iii)(B) of this section, and allocated to a contract as required under paragraph (d)(1) of this section.

(A) Community benefit expenditures means expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health and relief of government burden.

(B) Such payment may be deducted up to the limit of either 3 percent of total revenue under this part or the highest premium tax rate in the State for which the Part D sponsor is licensed, multiplied by the Part D sponsor's earned premium for the contract.

(3) The following amounts must not be included in total revenue:

(i) The amount of unpaid premiums for which the Part D sponsor can demonstrate to CMS that it made a reasonable effort to collect.

(ii) Coverage Gap Discount Program payments under § 423.2320.

(4) Total revenue (as defined at § 422.2420(c)) of this chapter) for policies issued by one Part D sponsor and later assumed by another entity must be reported by the assuming entity for the entire MLR reporting year during which the policies were assumed and revenue under this part for that contract year must be reported by the ceding Part D sponsor.

(5) Total revenue (as defined at § 422.2420(c) of this chapter) that is reinsured for a block of business that was subject to indemnity reinsurance and administrative agreements effective before March 23, 2010, for which the assuming entity is responsible for 100 percent of the ceding entity's financial risk and takes on all of the administration of the block, must be reported by the assuming issuer and must not be reported by the ceding issuer.

(d) *Allocation of expenses*—(1) *General requirements.* (i) Each expense must be included under only one type of expense, unless a portion of the expense fits under the definition of or criteria for one type of expense and the remainder fits into a different type of expense, in which case the expense must be pro-rated between types of expenses.

(ii) Expenditures that benefit multiple contracts, or contracts other than those being reported, including but not limited to those that are for or benefit self-funded plans, must be reported on a pro rata share.

(2) *Description of the methods used to allocate expenses.* (i) Allocation to each category must be based on a generally accepted accounting method that is expected to yield the most accurate results.

(ii) Specific identification of an expense with an activity that is represented by one of the categories in § 423.2420(b) or (c) will generally be the most accurate method.

(ii) Shared expenses, including expenses under the terms of a management contract, must be apportioned pro rata to the entities incurring the expense.

(iii)(A) Any basis adopted to apportion expenses must be that which is expected to yield the most accurate results and may result from special studies of employee activities, salary ratios, premium ratios or similar analyses.

(B) Expenses that relate solely to the operations of a reporting entity, such as personnel costs associated with the adjusting and paying of claims, must be borne solely by the reporting entity and are not to be apportioned to other entities within a group.

§ 423.2430 Activities that improve health care quality.

(a) *Activity requirements.* Activities conducted by a Part D sponsor to improve quality fall into one of the categories in paragraph (a)(1) of this section and meet all of the requirements in paragraph (a)(2) of this section.

(1) *Categories of quality improving activities.* The activity must be designed to achieve one or more of the following:

(i) To improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Patient Protection and Affordable Care Act, for treatment or services under the plan or coverage.

(ii) To prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post-discharge reinforcement by an appropriate health care professional.

(iii) To improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology under the plan or coverage.

(iv) To promote health and wellness.

(v) To enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology. Activities, such as Health Information Technology (HIT) expenses, are required to accomplish the activities that improve health care quality and that are designed for use by health plans, health care providers, or enrollees for the electronic creation, maintenance, access, or exchange of health information, and are consistent with meaningful use requirements, and which may in whole or in part improve quality of care, or provide the technological infrastructure to enhance current quality improving activities or make new quality improvement initiatives possible.

(2) The activity must be designed for all of the following:

(i) To improve health quality.

(ii) To increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements.

(iii) To be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees.

(iv) To be grounded in evidence-based medicine, widely accepted best clinical

practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.

(b) *Exclusions.* Expenditures and activities that must not be included in quality improving activities include, but are not limited to, the following:

(1) Those that are designed primarily to control or contain costs.

(2) The pro rata share of expenses that are for lines of business or products other than those being reported, including but not limited to, those that are for or benefit self-funded plans.

(3) Those which otherwise meet the definitions for quality improving activities but which were paid for with grant money or other funding separate from premium revenue.

(4) Those activities that can be billed or allocated by a pharmacy for care delivery and that are reimbursed as clinical services.

(5) Establishing or maintaining a claims adjudication system, including costs directly related to upgrades in health information technology that are designed primarily or solely to improve claims payment capabilities or to meet regulatory requirements for processing claims, including ICD–10 implementation costs in excess of 0.3 percent of total revenue under this part, and maintenance of ICD–10 code sets adopted in accordance with the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d-2, as amended.

(6) That portion of the activities of health care professional hotlines that does not meet the definition of activities that improve health quality.

(7) All retrospective and concurrent utilization review.

(8) Fraud prevention activities.

(9) The cost of developing and executing pharmacy contracts and fees associated with establishing or managing a pharmacy network, including fees paid to a vendor for the same reason.

(10) Pharmacy network credentialing.

(11) Marketing expenses.

(12) Costs associated with calculating and administering individual enrollee or employee incentives.

(13) That portion of prospective utilization review that does not meet the definition of activities that improve health quality.

(14) Any function or activity not expressly permitted by CMS under this part.

§ 423.2440 Credibility adjustment.

(a) A Part D sponsor may add a credibility adjustment to a contract's MLR if the contract's experience is partially credible, as determined by CMS.

(b) A Part D sponsor may not add a credibility adjustment to a contract's MLR if the contract's experience is fully credible, as determined by CMS.

(c) For those contract years for which a contract has non-credible experience for their MLR, sanctions under § 423.2410(b) through (d) will not apply.

(d) CMS defines and publishes definitions of partial credibility, full credibility, and non-credibility and the credibility factors through the notice and comment process of publishing the Advance Notice and Final Rate Announcement.

§ 423.2450 [Reserved].

§ 423.2460 Reporting requirements.

(a) For each contract year, each Part D sponsor must submit a report to CMS, in a timeframe and manner specified by CMS, which includes but is not limited to the data needed by the Part D sponsor to calculate and verify the MLR and remittance amount, if any, for each contract, such as incurred claims, total revenue, costs for quality improving activities, non-claims costs, taxes, licensing and regulatory fees, and any remittance owed to CMS under § 423.2410.

(b) Total revenue reported as part of the MLR report must be net of all projected reconciliations.

(c) The MLR will be reported once, and will not be reopened as a result of any payment reconciliation processes.

§ 423.2470 Remittance to CMS if the applicable MLR requirement is not met.

(a) *General requirement.* For each contract year, a Part D sponsor must provide a remittance to CMS if the contract's MLR does not meet the minimum percentage required by § 423.2410(b).

(b) *Amount of remittance.* For each contract that does not meet MLR requirement for a contract year, the Part D sponsor must remit to CMS the amount by which the MLR requirement exceeds the contract's actual MLR multiplied by the total revenue of the contract, as provided in § 423.2420(c), for the contract year.

(c) *Timing of remittance.* CMS will deduct the remittance from plan payments in a timely manner after the MLR is reported, on a schedule determined by CMS.

(d) *Treatment of remittance.* Payment to CMS must not be included in the numerator or denominator of any year's MLR.

§ 423.2480 MLR review and non-compliance.

To ensure the accuracy of MLR reporting, CMS conducts selected reviews of reports submitted under § 423.2460 to determine that the MLRs and remittance amounts under § 423.2410(b) and sanctions under § 423.2410(c) and (d), were accurately calculated, reported, and applied.

(a) The reviews will include a validation of amounts included in both the numerator and denominator of the MLR calculation reported to CMS.

(b) Part D sponsors are required to maintain evidence of the amounts reported to CMS and to validate all data necessary to calculate MLRs.

(c)(1) Documents and records must be maintained for 10 years from the date such calculations were reported to CMS with respect to a given contract year.

(2) Part D sponsors must require any third party vendor supplying drug cost contracting and claim adjudication services to the Part D sponsors to provide all underlying data associated with MLR reporting to that Part D sponsor in a timely manner, when requested by the Part D sponsor, regardless of current contractual limitations, in order to validate the accuracy of MLR reporting.

(d) Reports submitted under § 423.2460, calculations, or any other MLR submission required by this subpart found to be materially incorrect or fraudulent—

(1) Are noted by CMS;

(2) Appropriate remittance amounts are recouped by CMS; and

(3) Sanctions may be imposed by CMS as provided in § 423.752.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 15, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 15, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013–12156 Filed 5–17–13; 4:15 pm]

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Part IV

Environmental Protection Agency

40 CFR Part 60

Kraft Pulp Mills NSPS Review; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2012–0640; FRL–9815–9]

RIN 2060–AR64

Kraft Pulp Mills NSPS Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing revisions to the new source performance standards for kraft pulp mills. These revised standards include particulate matter emission limits for recovery furnaces, smelt dissolving tanks and lime kilns, which apply to emission units commencing construction, reconstruction or modification after May 23, 2013 that are different than those required under the existing standards for kraft pulp mills. The exemptions to opacity standards do not apply to the proposed standards for kraft pulp mills. The proposed rule also removes the exemption for periods of startup and shutdown resulting in a standard that applies at all times. The proposed rule includes additional testing requirements and updated monitoring, recordkeeping and reporting requirements for affected sources. These differences are expected to ensure that control systems are properly maintained over time, ensure continuous compliance with standards and improve data accessibility for the EPA, states, tribal governments and communities.

DATES: Comments must be received on or before July 8, 2013. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget receives a copy of your comments on or before June 24, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–HQ–OAR–2012–0640, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/oar/docket.html.* Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web site.
- *E-Mail: a-and-r-Docket@epa.gov.* Include EPA–HQ–OAR–2012–0640 in the subject line of the message.
- *Fax:* Fax your comments to: (202) 566–9744, Attention: Docket ID Number EPA–HQ–OAR–2012–0640.
- *Mail:* Send your comments to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, Attention: Docket ID Number EPA–HQ–OAR–2012–0640. Please include a total of two copies. 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 or Courier:* In person or by courier, deliver comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Such deliveries are only accepted during the Docket Center's normal hours of operation, (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.

Instructions: All submissions received must include the agency name and docket number or Regulatory Identifier Number (RIN) for this rulemaking. All comments received will be posted without change to *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 *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means that the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and will be made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''General Information'' heading under the ''Organization of This Document'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Public Reading Room, 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed rule for kraft pulp mills, contact Dr. Kelley Spence, Natural Resources Group, Sector Policies and Program Division, Office of Air Quality Planning and Standards (E143–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541–3158; fax number (919) 541–3470; email address: *spence.kelley@epa.gov.*

SUPPLEMENTARY INFORMATION:

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document:

ANSI American National Standards Institute
ASME American Society of Mechanical Engineers
BACT Best achievable control technology
BDT Best demonstrated technology
BLO Black liquor oxidation
BLS Black liquor solids
BSER Best system of emissions reduction
CAA Clean Air Act
CBI Confidential business information
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CEMS Continuous emission monitoring system
CFR Code of Federal Regulations
CO Carbon monoxide
COMS Continuous opacity monitoring system
CWA Clean Water Act
DCE Direct contact evaporator
ERT Electronic Reporting Tool
ESP Electrostatic precipitator
g/dscm Grams per dry standard cubic meter

gr/dscf Grains per dry standard cubic foot
HAP Hazardous air pollutant
H_2S Hydrogen Sulfide
HVLC High volume low concentration
ICR Information collection request
lb Pound
LVHC Low volume high concentration
MACT Maximum achievable control technology
NAAQS National Ambient Air Quality Standards
NCG Non-condensable gas
NDCE Non-direct contact evaporator
NESHAP National Emission Standards for Hazardous Air Pollutants
NO_X Nitrogen oxides
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act of 1995
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
O&M Operating and maintenance
O_2 Oxygen
PM Particulate Matter
ppm Parts per million
ppmv Parts per Million by Volume
ppmdv Parts per Million of Dry Volume
PRA Paperwork Reduction Act
RIN Regulatory Identifier Number
SD Smelt dissolving tank
SISNOSE Significant economic impact on a substantial number of small entities
S/L/Ts State, local and tribal
SO_2 Sulfur dioxide
SSM Startup, shutdown and malfunction
TTN Technology Transfer Network
TRS Total reduced sulfur
UMRA Unfunded Mandates Reform Act
VCS Voluntary consensus standards
WWW Worldwide Web

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

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I. Executive Summary

A. Purpose of Regulatory Action

Section 111(b)(1)(B) of the CAA requires the EPA to review and, if appropriate, revise existing NSPS at least every 8 years. The NSPS for kraft pulp mills (40 CFR part 60, subpart BB) were promulgated in 1978 and last reviewed in 1986. As part of the review, the EPA considers what degree of emission limitation is achievable through the application of the BSER, which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. The EPA also considers the emission limitations and reductions that have been achieved in practice.

In addition to conducting the NSPS review, the EPA is evaluating the SSM provisions in the rule in light of the D.C. Circuit Court of Appeals decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), which held that the SSM exemption in the General Provisions in 40 CFR part 63 violated the CAA's requirement that some standard apply continuously. In the *Sierra Club* case, the D.C. Circuit vacated the SSM exemption provisions in the General Provisions of 40 CFR part 63 for non-opacity and opacity standards. The court explained that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature. The court then held that the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. In light of the court's reasoning, all rule provisions must be carefully examined to determine whether they provide for periods when no emission standard applies. The EPA believes the reasoning behind the D.C. Circuit's decision in *Sierra Club* v. *EPA* applies equally to section 111 rules. The EPA's general approach to SSM periods has been used consistently in CAA section 111, 112 and section 129 rulemaking actions, since the D.C. Circuit's decision in *Sierra Club.* See, e.g., *New Source Performance Standards Review for Nitric Acid Plants, Final Rule,* 77 FR 48433 (August 14, 2012); *New Source Performance Standards for New Stationary Sources and Emission guidelines for Existing Sources; Commercial and Industrial Solid Waste Incineration Units, Final rule,* 76 FR 15704 (March 21, 2011); *Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final rules,* 77 FR 49490 (August 16, 2012).

To address the NSPS review, SSM exemptions and other changes, the EPA is proposing new standards, which will apply to affected sources at kraft pulp mills for which construction, modification or reconstruction commences on or after May 23, 2013. The affected sources under the proposed NSPS are new, modified or reconstructed digester systems, brown stock washer systems, evaporator systems, condensate stripper systems, recovery furnaces, SDTs, and lime kilns at kraft pulp mills. The requirements for these new, modified or reconstructed sources will be included in a new subpart—40 CFR part 60, subpart BBa. The EPA is also proposing testing, monitoring, recordkeeping and reporting requirements for subpart BBa that are in some ways different from what is required under subpart BB.

B. Summary of Major Provisions

Based on the results of the NSPS review, the EPA is proposing the following regarding the standards for filterable PM, opacity and TRS compounds:

- Reducing the filterable PM emission limit for new and reconstructed

recovery furnaces and lime kilns and new and reconstructed SDTs associated with new or reconstructed recovery furnaces to levels equivalent to the new source PM limits in the NESHAP for chemical recovery combustion sources at kraft, soda, sulfite and stand-alone semichemical pulp mills (40 CFR part 63, subpart MM), to which these sources would already be subject;

- Maintaining the filterable PM emission limit for modified recovery furnaces and lime kilns and for modified SDTs and new and reconstructed SDTs not associated with a new or reconstructed recovery furnace at their current NSPS levels;
- Reducing the opacity limit for recovery furnaces to the 20 percent corrective action level in NESHAP subpart MM and reducing the opacity monitoring allowance from 6 percent to 2 percent;
- Adding an opacity limit of 20 percent for lime kilns equipped with ESPs with an opacity monitoring allowance of 1 percent; and
- Maintaining the TRS emission limit for digester systems, brown stock washer systems, evaporator systems, condensate stripper systems, recovery furnaces, SDTs, and lime kilns at their current levels, but restricting the TRS monitoring allowance of 1 percent for recovery furnaces to 30 ppmdv and adding a TRS monitoring allowance of 1 percent for lime kilns, restricted to 22 ppmdv.

To ensure continuous compliance with the PM standards, including during periods when the opacity monitoring allowance is used, the EPA is proposing new ESP parameter monitoring requirements for recovery furnaces and lime kilns equipped with ESPs. The EPA is proposing wet scrubber parameter monitoring requirements for recovery furnaces, SDTs and lime kilns equipped with wet scrubbers that will be consistent with the wet scrubber parameter monitoring requirements under NESHAP subpart MM. The PM standards and parameter monitoring requirements are applicable at all times. The EPA is proposing to include in the rule an affirmative defense to civil penalties for exceedances of emission limits caused by malfunctions that meet certain criteria (*i.e.,* the exceedance must come from an ''unavoidable failure''), along with recordkeeping and reporting requirements.

The EPA is proposing repeat performance testing for filterable PM and TRS once every 5 years for new, modified and reconstructed affected sources complying with the filterable PM and TRS standards in subpart BBa. The EPA is also proposing initial and repeat performance testing for condensable PM to gather emissions data that will enable a broader understanding of condensable PM emissions from pulp and paper combustion sources. The EPA is proposing that mills submit electronic copies of their performance test reports to the EPA using the EPA's ERT. The EPA is also proposing text with certain technical and editorial differences, including clarifying the location of applicable test methods in the CFR, incorporating by reference one non-EPA test method, and including definitions to subpart BBa pertinent to the differences between the proposed subpart BBa and the current subpart BB.

C. Summary of Costs and Benefits

Table 1 summarizes the costs and benefits of this proposed action. See section VI of this preamble for further discussion.

TABLE 1—SUMMARY OF THE COSTS AND BENEFITS OF SUBPART BBa FOR NEW, MODIFIED AND RECONSTRUCTED AFFECTED SOURCES AT KRAFT PULP MILLS

Requirement	Capital cost ($ thousand)	Annual cost ($ thousand)	Net benefit
Repeat emissions testing	$186	$45	N/A
Monitoring	341	129	N/A
Incremental reporting/recordkeeping	50	215	N/A
Total nationwide	577	390	N/A

Note: Totals may not sum exactly due to rounding.

II. General Information

A. Does this action apply to me?

Categories and entities potentially regulated by this proposed rule include:

Category	NAICS code [1]	Examples of regulated entities
Industry	3221	Kraft pulp mills.
Federal government		Not affected.
State/local/tribal government		Not affected.

[1] North American Industrial Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in 40 CFR 60.280a. If you have any questions regarding the applicability of this proposed action to a particular entity, contact the person in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments to the EPA?

Do not submit information that you consider to be CBI electronically through *http://www.regulations.gov* or email. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS

Document Control Officer (C404–02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, NC 27711, Attention: Docket ID Number EPA–HQ–OAR–2012–0640. 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 the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the 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 marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

C. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of the proposed action is available on the WWW through the TTN Web site. Following signature, the EPA posted a copy of the proposed action on the TTN Web site's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN Web site provides information and technology exchange in various areas of air pollution control.

D. When would a public hearing occur?

The EPA will hold a public hearing on this proposed rule if requested. Requests for a hearing must be made by June 3, 2013. Please contact Ms. Joan Rogers at *Rogers.Joanc@epa.gov* or 919–541–4487 by June 3, 2013 to request a public hearing. If a hearing is requested, the EPA will hold a hearing on June 7, 2013 at the U.S. EPA, 109 T.W. Alexander Drive, Research Triangle Park, North Carolina 27711. Please contact Ms. Joan Rogers for details regarding the public hearing.

III. Background Information

A. What is the statutory authority for this proposed rule?

New source performance standards implement CAA section 111, which requires that each NSPS reflect the degree of emission limitation achievable through the application of the BSER which (taking into consideration the cost of achieving such emission reductions, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. This level of control is referred to as BSER and has been referred to in the past as ''best demonstrated technology'' or BDT. In assessing whether a standard is achievable, the EPA must account for routine operating variability associated with performance of the system on whose performance the standard is based. See *National Lime Ass'n* v. *EPA,* 627 F. 2d 416, 431–33 (D.C. Cir. 1980).

Existing affected facilities that are modified or reconstructed would also be subject to this proposed rule for affected sources. Under CAA section 111(a)(4), ''modification'' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. Changes to an existing facility that do not result in an increase in emissions are not considered modifications.

Rebuilt emission units would become subject to the proposed standards under the reconstruction provisions, regardless of changes in emission rate. Reconstruction means the replacement of components of an existing facility such that: (1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility; and (2) it is technologically and economically feasible to meet the applicable standards (40 CFR 60.15). Section 111(b)(1)(B) of the CAA requires the EPA to periodically review and revise the standards of performance, as necessary, to reflect improvements in methods for reducing emissions.

The NSPS are directly enforceable federal regulations issued for categories of sources which cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. Since 1970, the NSPS have been successful in achieving long-term emissions reductions in numerous industries by assuring that cost-effective controls are installed on new, reconstructed or modified sources.

B. What are the current NSPS for kraft pulp mills?

The original NSPS for kraft pulp mills (40 CFR part 60, subpart BB) were promulgated in the **Federal Register** on February 23, 1978 (43 FR 7572). The first review of the kraft pulp mills NSPS was completed on May 20, 1986 (51 FR 18544). The 1986 review made changes to TRS emission limits and temperature monitoring requirements. Minor testing and monitoring changes and technical corrections were made to the kraft pulp mills NSPS after the 1986 review (February 14, 1989 (54 FR 6673); May 17, 1989 (54 FR 21344); February 14, 1990 (55 FR 5212); October 17, 2000 (65 FR 61759); and September 21, 2006 (71 FR 55127)).

The current kraft pulp mills NSPS (subpart BB) apply to the following emission units constructed, reconstructed or modified after September 24, 1976, that are located at facilities engaged in kraft pulping:

- Digester systems
- Brown stock washer systems
- Multiple-effect evaporator systems
- Condensate stripper systems
- Recovery furnaces
- Smelt dissolving tanks
- Lime kilns

The current NSPS, as amended under the 1986 review and later actions, include the following emission limits and work practice standards:

Affected sources	40 CFR 60.282 Particulate matter (PM)	40 CFR 60.283 Total reduced sulfur (TRS)
Digester system Brown stock washer system. Evaporator system. Condensate stripper system.	None	One of the following conditions must be met: 1. Combust emissions from affected source in one of the following: (a) lime kiln subject to subpart BB (8 ppmdv TRS limit); (b) recovery furnace subject to subpart BB (5 or 25 ppmdv TRS limit); or (c) incinerator, recovery furnace, or lime kiln not subject to subpart BB, operated at a minimum temperature of 1200 °F for 0.5 seconds (no ppmdv limit). 2. Use non-combustion control device with a limit of 5 ppmdv. 3. It is technologically or economically infeasible to incinerate brown stock washer systems gases. 4. Uncontrolled digester gases contain less than 0.01 pound of TRS per ton of air-dried pulp.
Recovery furnace	1. 0.044 gr/dscf @ 8% O_2; and 2. 35% opacity; and 3. 6% monitoring allowance for opacity.	1a. *Straight*[1]: 5 ppmdv @ 8% O_2; or 1b. *Cross*[2]: 25 ppmdv @ 8% O_2; and 2. 1% monitoring allowance for TRS.
Smelt dissolving tank	0.2 lb/ton BLS dry weight	0.033 lb/ton BLS as H_2S.
Lime kiln	1a. *Gas-fired:* 0.066 gr/dscf @ 10% O_2; or 1b. *Liquid fuel-fired:* 0.13 gr/dscf @ 10% O_2.	8 ppmdv @ 10% O_2.

[1] A straight recovery furnace is one that only burns kraft pulping liquors.
[2] A cross recovery furnace is one that burns kraft and neutral sulfite semichemical pulping liquors.

Initial compliance with the PM and TRS emission limits in the current NSPS (subpart BB) is demonstrated by conducting initial performance tests for these pollutants. To demonstrate continuous compliance, certain operating parameters must be monitored and maintained within a range of site-specific values. Continuous opacity monitors are required for recovery furnaces and continuous TRS monitors are required for recovery furnaces and lime kilns. Parameter monitors for scrubber pressure loss and scrubbing liquid supply pressure are required for any lime kiln or SDT using a wet scrubber to comply with their respective PM emission limits in subpart BB. For digester systems, brown stock washers, evaporators and condensate stripper systems that use an incinerator to control emissions, incinerator temperature monitors are required. Subpart BB requires TRS monitors for those that do not use incinerators (e.g., the TRS monitor installed on a recovery furnace or lime kiln controlling emissions is used; or a TRS monitor is installed on a non-combustion control system).

IV. Summary of Proposed Standards

A. What source category is being regulated?

Today's proposed standards would apply to affected emission sources at kraft pulp mills for which construction, modification or reconstruction commences on or after May 23, 2013. The affected sources under the proposed NSPS are new, modified or reconstructed digester systems, brown stock washer systems, evaporator systems, condensate stripper systems, recovery furnaces, smelt dissolving tanks and lime kilns located at a kraft pulp mill.

B. What pollutants are emitted from these sources?

The pollutants regulated under section 111(b) for new, modified or reconstructed emission units at kraft pulp mills are filterable PM and TRS. Opacity is regulated to ensure proper operation and maintenance of the ESP used to control PM emissions.

Particulate matter emissions and opacity are also regulated under a separate federal standard, the subpart MM NESHAP for chemical recovery combustion sources at kraft, soda, sulfite and stand-alone semichemical pulp mills (40 CFR part 63). These standards were promulgated on January 12, 2001 (66 FR 3180) and were not challenged; therefore the standards are an appropriate baseline for analysis. Particulate matter is regulated as a surrogate for HAP metals in the subpart MM NESHAP pursuant to CAA section 112.

The most common technologies used to control PM and TRS emissions from kraft pulp mills are listed as follows:

Affected sources	Pollutant	Control technology
Digester, brown stock washer, evaporator and condensate stripper systems.	TRS	Incineration of the gases in the recovery furnace, lime kiln or separate incineration unit.
Recovery furnace	PM	Use of an ESP.
	TRS	Use of a NDCE recovery furnace; or use of staged BLO for DCE recovery furnaces.
Smelt dissolving tank	PM	Use of a wet scrubber.
	TRS	Use of water not highly contaminated with dissolved sulfides for dissolving the smelt and for scrubbing.
Lime kiln	PM	Use of a venturi scrubber, ESP, or scrubber/ESP combination.
	TRS	More efficient process controls (e.g., mud washing) and use of caustic solution in the scrubber.

The PM concentration limits in the subpart BB NSPS and subpart MM NESHAP are based on filterable PM measured by EPA Method 5. Filterable PM consists of those particles directly emitted by a source as a solid or liquid at the stack (or similar release conditions) and captured on the filter of a stack test train. A fraction of the PM emitted from recovery furnaces, SDTs and lime kilns is PM with an aerodynamic diameter less than or equal to 2.5 micrometers ($PM_{2.5}$). The EPA is not proposing separate standards for $PM_{2.5}$ in this action because the available emissions test data for $PM_{2.5}$ are limited and not adequate for setting standards (e.g., the measurement method for $PM_{2.5}$ does not apply for scrubber wet stacks), and the same controls that remove filterable PM also reduce filterable $PM_{2.5}$.

Condensable PM is also emitted from recovery furnaces, SDTs and lime kilns. Condensable PM is material that is in vapor phase at stack conditions that condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM after discharge from the stack. For purposes of implementing the NAAQS, Appendix A to subpart A of 40 CFR part 51 defines $PM_{2.5}$ as including both filterable and condensable fractions of PM.

The PM concentration limits in today's proposed NSPS review are based on filterable PM measured by EPA Method 5 because the majority of PM emissions data available are Method 5 data. Emissions of condensable PM are measured using EPA Method 202, which can be added as the ''back half'' to a Method 5 sampling train. Although today's proposed NSPS review contains no emission limits for condensable PM, the EPA is proposing to require emissions testing for condensable PM in conjunction with filterable PM testing to gather condensable PM emissions data for future analyses. Additional data and research are needed to develop a broader understanding of condensable PM emissions from pulp and paper combustion sources and to determine mechanisms for reducing condensable PM. Work to date suggests that condensable PM emissions may not correlate with filterable PM emissions, and there is some indication that SO_2 present in the stack gas from pulp and paper combustion sources may affect the accuracy of the condensable PM measurement. Additional data will aid in our understanding of condensable PM from pulp and paper sources and how it may be addressed.

In addition to PM and TRS, kraft pulp mills are also sources of criteria pollutants such as NO_X, SO_2, and CO. Today's proposed NSPS review focuses on the PM and TRS emission standards in subpart BB that are due for review under CAA section 111(b)(1)(B). No standards were established for SO_2, NO_X, and CO emissions from recovery furnaces and lime kilns in the original kraft pulping NSPS or in the 1986 NSPS review because no best demonstrated control techniques, considering costs, were identified for these pollutants and sources in the kraft pulping industry. Since that time, permitting authorities have implemented permit limits for these pollutants based on site-specific process measures that may or may not be transferrable from mill to mill. The pollutants NO_X and SO_2 are of particular interest because these pollutants can react in the atmosphere to form secondary emissions of $PM_{2.5}$. Additional research will be done for a potential future rulemaking to determine if federal emission limits should be established for other criteria pollutants (such as NO_X or SO_2), including research into the technological basis for permit limits; analysis of emissions test data; and analysis of the benefits, trade-offs and costs of controls to achieve reductions in these pollutants.

C. What are the proposed standards?

The EPA is proposing the following actions regarding the NSPS emission limits for those affected sources for which construction, modification or reconstruction is commenced on or after May 23, 2013:

- Reduce the NSPS PM limit for new and reconstructed recovery furnaces from 0.044 gr/dscf to the new source PM limit of 0.015 gr/dscf found in the subpart MM NESHAP.
- Reduce the opacity limit for recovery furnaces from 35 percent to 20 percent opacity and reduce the monitoring allowance from 6 percent to 2 percent of the 6-minute opacity averages.
- Maintain the current NSPS TRS limits for recovery furnaces (5 ppmdv for straight, 25 ppmdv for cross) and restrict the 1 percent monitoring allowance for TRS emissions to 30 ppmdv or less. Previously, there was no maximum TRS limit for these periods.
- Reduce the NSPS PM limit for new and reconstructed SDTs associated with new or reconstructed recovery furnaces from 0.2 lb/ton BLS to the new source PM limit of 0.12 lb/ton BLS in the subpart MM NESHAP.
- Reduce the NSPS PM limit for modified lime kilns from 0.066 gr/dscf for gas-fired kilns and 0.13 gr/dscf for liquid-fired kilns to the existing source limit of 0.064 gr/dscf found in the subpart MM NESHAP (for all fuels) and reduce the NSPS PM limit for new and reconstructed lime kilns from 0.066 gr/dscf for gas-fired kilns and 0.13 gr/dscf for liquid-fired kilns to the new source limit of 0.010 gr/dscf found in the subpart MM NESHAP.
- Maintain the current NSPS TRS limit for lime kilns at 8 ppmdv and add a 1 percent monitoring allowance restricted to 22 ppmdv.
- Add an opacity limit for lime kilns equipped with ESPs based on the subpart MM NESHAP limit of 20 percent opacity with a 1 percent monitoring allowance.

The EPA is proposing the following emission limits for those affected sources for which construction, modification or reconstruction is commenced on or after May 23, 2013 to be the same as currently in subpart BB:

- Maintain the current NSPS PM limit of 0.044 gr/dscf for modified recovery furnaces.
- Maintain the current NSPS TRS limit for SDTs at 0.033 lb/ton BLS.
- Maintain the current NSPS PM limit of 0.2 lb/ton BLS for modified and new and reconstructed SDTs not associated with a new or reconstructed recovery furnace.

The emission limits for new, modified or reconstructed sources will be included in a new subpart—40 CFR part 60, subpart BBa. The PM concentration emission limits are in terms of filterable PM measured by EPA Method 5. The TRS emission limits are in terms of TRS (or TRS as H_2S for SDTs) measured by EPA Method 16, 16A, 16B or 16C.

The EPA is proposing ESP parameter monitoring requirements for recovery furnaces and lime kilns equipped with ESPs to enable affected units to show continuous compliance with the PM concentration standards at all times, including periods when the opacity monitoring allowance is used. The EPA is proposing that these sources monitor the secondary voltage and secondary current (or, alternatively, total secondary power) of each ESP collection field. These ESP parameter monitoring requirements are in addition to opacity monitoring for recovery furnaces and lime kilns equipped with ESPs alone. For recovery furnaces or lime kilns equipped with an ESP in combination with a wet scrubber system, the EPA is proposing wet scrubber parameter monitoring and ESP parameter monitoring instead of opacity monitoring. The parameter monitors will measure the wet scrubber pressure drop and scrubber liquid flow rate (or liquor supply pressure). Scrubber fan amperage monitoring is proposed as an alternative to scrubber pressure drop monitoring for certain types of scrubbers used on SDTs (e.g., dynamic scrubbers that operate near atmospheric pressure). All parameters would be measured and recorded at least once every 15 minutes and reduced to 12-hour block averages (except that ESP parameters would be reduced to a quarterly average when an opacity monitor is also used on the ESP). The EPA is proposing to specify

a 5-minute data recording frequency and 3-hour block averaging time for incinerator temperature measurements required under the NSPS.

The General Provisions in 40 CFR part 60 provide that emissions in excess of the level of the applicable emission limit during periods of SSM shall not be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard. See 40 CFR 60.8(c). The General Provisions, however, may be amended for individual subparts. Here, the EPA is proposing standards in subpart BBa that apply at all times as specified in the proposed §§ 60.282a(b) and 60.283a(b). This is discussed further in section V.A.5, and with respect to specific standards in various sections below.

The EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause a violation of the relevant emission standard; thus, the EPA is proposing to include an affirmative defense to civil penalties for violations of emission standards that are caused by malfunctions that meet certain criteria, as discussed in section V.A.5 below.

As part of an ongoing effort to improve compliance with the standards, the EPA is proposing to require repeat air emissions testing for filterable PM, and TRS for recovery furnaces, SDTs and lime kilns once every 60 months (5 years), as discussed in section V.B below. The EPA is also proposing initial and repeat condensable PM testing once every 60 months (5 years) for informational purposes.

To increase the ease and efficiency of data submittal and improve data accessibility, the EPA is also proposing to require mills to submit electronic copies of performance test reports to the EPA's WebFIRE database, as discussed in section V.C below.

V. Rationale for the Proposed Standards

Section 111(a)(1) requires that standards of performance for new sources reflect the—

> * * * degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Section 111(b)(1)(B) requires the EPA to ''at least every 8 years review and, if appropriate, revise'' performance standards unless the ''Administrator determines that such review is not appropriate in light of readily available information on the efficacy'' of the standard.

A. What is the EPA's rationale for the proposed emission limits and monitoring requirements for affected sources?

1. Digesters, Brown Stock Washers, Evaporators and Condensate Strippers

National emission standards for HAPs were promulgated for pulp and paper manufacturing emissions sources in 1998. Under the pulp and paper manufacturing NESHAP (40 CFR part 63, subpart S), NCGs from digesters, evaporators and condensate strippers are collected as part of the LVHC system for incineration control. The NCGs from brown stock washers are either collected as part of the HVLC system under the subpart S NESHAP for incineration-based control, or are subject to the subpart S NESHAP clean condensate alternative. (See 40 CFR 63.447.) The incineration control technology used for NESHAP subpart S compliance is the same as that needed to meet the TRS emission limit under the NSPS, and the incineration control technology has not changed since implementation of the NESHAP. In many respects, the NESHAP is more expansive in its coverage of NCG sources than the NSPS (e.g., the NESHAP targets HAP emissions while the NSPS targets the largest sources of TRS emissions), such that additional reductions in TRS emissions from kraft pulp mills have occurred as a result of the TRS co-control benefits of the NESHAP. Implementation of the NESHAP has expanded use of incineration-based controls, and mills are likely to have made process monitoring improvements to ensure the reliability and effectiveness of NCG collection systems and incineration-based controls as part of NESHAP implementation. While TRS control benefits from enhancements of NCG collection and control systems made for NESHAP implementation, the underlying technology that is the basis of the 5 ppmdv TRS limit and the level of control that is achieved in practice have not changed. The EPA received four datasets (TRS CEMS) for processes emitting NCGs. (See memo titled, *Review of the Continuous Emission Monitoring and Continuous Opacity Monitoring Data from the Pulp and Paper Information Collection Request Responses Pertaining to Subpart BB Sources,* in the docket.) The analysis of these datasets confirm that incineration remains the best demonstrated technology and show that 5 ppm remains the appropriate limit. Recognizing improvements to control system operations and monitoring, a maximum limit was added for TRS emissions from lime kilns and recovery furnaces. Alternatives to incineration, such as scrubbing, are less effective at the removal of TRS because only two of the four TRS compounds (H_2S and methyl mercaptan) are acidic enough to be removed with alkaline scrubbing, resulting in a removal efficiency much lower than that achieved by incineration. Therefore, the EPA is proposing to maintain the TRS limit for NCG sources.

Incinerator temperature monitoring. Subpart BB requires monitoring of incineration temperature in conjunction with the compliance option for TRS emissions from digesters, washers, evaporators and strippers to be combusted at a temperature of 1200 °F for 0.5 seconds. Subpart BB does not specify a data recording frequency or averaging time for the temperature measurements but does define excess emissions as temperature measurements below 1200 °F for a period of 5 minutes or more (excluding periods of startup and shutdown, per § 60.8(c)). In the subpart S NESHAP, incinerator temperature averaging time is not specified, but compliance testing is based on a 3-hour average (an average of three 1-hour test runs). For subpart BBa, the EPA is proposing to clarify the incineration temperature monitoring requirement by specifying a data recording frequency of at least every 5 minutes, and to create consistency between subpart S and subpart BBa by proposing a 3-hour block averaging period. Because incineration devices must warm to 1200 °F during control startup prior to firing gases containing TRS emissions (and subsequently cool to below 1200 °F during control shutdown), the EPA is proposing to allow facilities to omit 5-minute recorded temperature measurements from the 3-hour block averages when no TRS emissions are fired. This means that when the incinerator is not burning TRS (e.g., during incinerator warm-up and cool-down periods before TRS emissions are generated or when an alternative control device is used), the low temperature does not constitute a violation. The EPA requests comment on the 3-hour averaging time for incinerator temperature monitoring, especially as it relates to temperature data recording and averaging practices specified for individual mills under the subpart S NESHAP.

2. Recovery Furnaces

Recovery furnace PM. Under the current subpart BB, new, modified and reconstructed recovery furnaces are

required to meet a PM emission limit of 0.044 gr/dscf at 8 percent O_2. The PM emission limit in subpart BB is the same as the existing source emission limit for recovery furnaces under the NESHAP for chemical recovery combustion sources (40 CFR part 63, subpart MM).

For the NSPS review, the EPA reviewed data from more than 200 filterable PM stack tests, including some repeat tests, on nearly all of the recovery furnaces in the United States. Test data were reviewed for DCE and NDCE recovery furnaces using a variety of PM emission controls (ESP, ESP and wet scrubber combinations, and wet scrubbers). The PM stack test data revealed little or no distinction between DCE and NDCE recovery furnaces for PM emissions. Nearly all of the recovery furnaces tested met the current NSPS and existing source NESHAP (subpart MM) limit (0.044 gr/dscf),[1] and many met the new source NESHAP (subpart MM) limit (0.015 gr/dscf). However, some recovery furnaces equipped with a wet scrubber alone or with a wet scrubber in combination with an ESP exhibited PM emissions above 0.015 gr/dscf (but below the 0.044 gr/dscf existing source NESHAP limit subpart MM). This suggests that wet scrubbing of recovery furnace exhaust gases (either alone or in conjunction with an ESP) does not necessarily improve filterable PM removal. The review of the stack test data also shows that a limit lower than 0.015 gr/dscf has not been adequately demonstrated.

Based on our review of the stack test data and technologies used to reduce PM emissions from kraft recovery furnaces, the EPA is proposing a limit equivalent to the subpart MM NESHAP PM limit for new and reconstructed recovery furnaces (0.015 gr/dscf at 8 percent O_2) for recovery furnaces constructed or reconstructed (excluding modified units) after May 23, 2013. Because a limit of 0.015 gr/dscf has been adequately demonstrated (and is already required under the subpart MM NESHAP) for new and reconstructed recovery furnaces, the EPA does not expect any incremental costs or emissions reductions associated with adopting a NSPS limit of 0.015 gr/dscf for new or reconstructed recovery furnaces. The proposed limits establish consistency between this NSPS and other regulatory requirements.

The EPA also considered a 0.015 gr/dscf limit for existing recovery furnaces that are modified. Unlike new or reconstructed sources which trigger both the new source MACT requirements and NSPS upon construction or reconstruction, recovery furnaces can trigger the applicable NSPS provisions as a result of modification but would not trigger the new source MACT requirements because there are no modification provisions under the NESHAP (subpart MM) or the subpart A General Provisions for part 63 standards. Therefore, costs and emissions reductions associated with controlling PM emissions down to a level of 0.015 gr/dscf are different for modified units than for new or reconstructed units. The EPA evaluated the number of existing recovery furnaces with PM stack test data above 0.015 gr/dscf but below 0.044 gr/dscf, and concluded that some existing recovery furnaces that are modified could have difficulty achieving a limit of 0.015 gr/dscf if they attempt to use their existing control device to meet this limit. The EPA estimated the cost effectiveness of incremental improvements in ESP performance needed for modified recovery furnaces to meet 0.015 gr/dscf to be $27,500/ton (in 2012 dollars). The EPA also evaluated other emission limits between 0.015 gr/dscf and 0.044 gr/dscf, but because the costs associated with ESP upgrades remained the same with smaller emission reductions, the options were less cost effective. With the high costs (poor cost effectiveness) of further PM reductions and the potential for some modified recovery furnaces to have difficulty achieving 0.015 gr/dscf, the EPA is proposing to retain the 0.044 gr/dscf PM limit for existing recovery furnaces that are modified. For more information, see the memorandum, *Emissions Inventory for Kraft Pulp Mills and Costs/Impacts of the Section 111(b) Review of the Kraft Pulp Mills NSPS,* in the docket.

Recovery furnace opacity and parameter monitoring. Ongoing compliance with the subpart BB PM concentration limit is demonstrated by continuously monitoring opacity. The recovery furnace PM opacity limit under subpart BB is 35 percent opacity with a monitoring allowance that allows 6 percent of the 6-minute opacity averages during a quarter (excluding periods of startup, shutdown and malfunction and periods when the facility is not operating) to exceed 35 percent without being considered a violation.

The subpart MM NESHAP also requires continuous opacity monitoring, specifying a 20 percent opacity limit for new sources beyond which a violation occurs if more than 6 percent of the 6-minute averages exceed 20 percent opacity during the reporting period (*i.e.,* a monitoring allowance) and a 35 percent opacity limit for existing sources with a similar monitoring allowance. The subpart MM NESHAP also establishes a corrective action threshold of 10 consecutive 6-minute averages above 20 percent opacity for existing sources.

The EPA reviewed COMS data for 138 recovery furnaces to evaluate the opacity limits in the current NSPS subpart BB. The EPA also reviewed state permits and found many recovery furnaces with state permit limits of 20 percent opacity. In addition, as noted above, 20 percent opacity also represents the corrective action level for existing recovery furnaces and the new source opacity limit under the subpart MM NESHAP. The COMS data analyzed for the NSPS review show that 20 percent opacity has been adequately demonstrated and achieved in practice by both DCE and NDCE recovery furnaces using a variety of air pollution controls and including periods of startup and shutdown. Given numerous state limits of 20 percent opacity, and the fact that new and reconstructed sources must meet 20 percent under the subpart MM NESHAP, the EPA is proposing an opacity limit of 20 percent for new, modified and reconstructed units subject to subpart BBa. The EPA believes there are no incremental costs or emission reductions associated with adopting an opacity limit of 20 percent because the majority of units are already meeting this limit, without a federal requirement to do so. The EPA is unaware of any technological reason that would hinder modified units from meeting this limit but requests comment on the 20 percent opacity requirement for modified sources.

The EPA also used the COMS data to evaluate the current 6 percent monitoring allowance for opacity. Our analysis of the COMS data is included in a memorandum in the docket.[2] The COMS data show that over 90 percent of existing recovery furnaces, whether subject to the current NSPS or not, regardless of design (DCE or NDCE), and with most controls, are meeting a 20 percent opacity limit based on a 6-minute average with fewer than 2 percent of averaging periods exceeding 20 percent opacity, including periods of startup and shutdown. Therefore, the EPA has determined in subpart BBa that a 2 percent monitoring allowance for recovery furnace opacity has been

[1] Exceptions included a few stack tests that were repeated, or recovery furnaces that participate in the PM bubble compliance option under subpart MM.

[2] See memorandum titled, ''*Review of the Continuous Emission Monitoring and Continuous Opacity Monitoring Data from the Pulp and Paper Information Collection Request Responses Pertaining to Subpart BB Sources*'' in the docket.

adequately demonstrated to be achieved in practice and is more representative of actual performance than the current 6 percent monitoring allowance, and thus the EPA is proposing that the monitoring allowance be 2 percent for the new NSPS subpart BBa.

The COMS data for recovery furnaces currently subject to NSPS (subpart BB) were reviewed closely to understand the impacts of startup and shutdown on opacity and to what extent a monitoring allowance should be refined to reflect opacity levels achieved in practice during startup and shutdown. High short-duration spikes in opacity were observed during some (but not all) instances of startup and shutdown at some recovery furnaces. Brief spikes were also observed during normal operation. The exact causes of these brief spikes were not documented in the COMS datasets but could have been monitor malfunctions, high level span checks, calibrations or some other cause. The COMs data showed that the maximum 6-minute opacity average at approximately half of the recovery furnaces for which COMS data are available exceeded 75 percent opacity, while the annual average of the 6-minute values for these units was no more than 16 percent opacity. The potential for brief high-level spikes in opacity can be accommodated with a 2 percent monitoring allowance without an upper limit. To ensure continuous compliance with the PM limit, the EPA is also proposing to add an ESP parameter monitoring requirement to subpart BBa that would provide another indicator of ESP performance and ensure continuous compliance with the PM limit during the reporting period. The EPA is proposing that ESP secondary voltage and secondary current (or total secondary power) be monitored and averaged over the same calendar quarter as the opacity monitoring allowance. The 2 percent opacity monitoring allowance will only be available for recovery furnaces with ESP parameters that are above the minimum limits established during the PM performance test (*i.e.,* above the minimum secondary current and secondary voltage or above minimum total secondary power). Subpart BB currently requires that the opacity allowance be calculated based on the percent of the total number of possible contiguous periods of excess emissions in a quarter. The EPA requests comment on this requirement, specifically whether a semiannual basis would be more appropriate based on the semiannual reporting requirement.

Monitoring for recovery furnaces with combined ESP/scrubber controls. Because opacity is not a suitable monitoring requirement for recovery furnaces with wet scrubber stacks, the EPA is proposing to require ESP and wet scrubber parameter monitoring for recovery furnaces equipped with an ESP followed by a wet scrubber. The ESP parameters to be monitored are secondary voltage and secondary current (or, alternatively, total secondary power), and the wet scrubber parameters are pressure drop and scrubber liquid flow rate (or scrubber liquid supply pressure). The EPA is specifying that these parameters would be measured and recorded at least once every 15 minutes and these 15-minute measurements used to calculate 12-hour block averages. The EPA requests comment on the use of parameter monitoring instead of opacity monitoring in systems that utilize both an ESP and a wet scrubber. The EPA is also requesting comment on the parameter recording frequency and averaging time for ESP parameters and wet scrubber parameters.

Cross recovery furnace TRS. Although the current NSPS limits TRS from cross recovery furnaces to 25 ppmdv at 8 percent O_2, there are currently no cross recovery furnaces subject to the NSPS, and, likewise, no TRS emissions data to analyze for cross recovery furnaces. Although there are currently no cross recovery furnaces subject to the NSPS, there are some kraft mills with co-located semichemical processes that may, in the future, have furnaces designated as NSPS cross recovery furnaces; therefore, a TRS limit for these sources should be maintained.

The cross recovery furnace TRS emission limit is higher than the straight recovery furnace TRS emission limit of 5 ppmdv at 8 percent O_2 for three technical reasons. First, the sulfur content of the semichemical liquor is higher than traditional kraft liquor. Second, the heat content of the liquor is lower because it contains less organic material than kraft liquor due to higher pulping yields. Third, the heavier sulfur loading and the lower operating temperature puts a restriction on the amount of excess O_2 available to oxidize the sulfur compounds.[3] For these reasons, the EPA is proposing to retain the current cross recovery furnace TRS emission limit of 25 ppmdv at 8 percent O_2 for the new NSPS subpart BBa.

Straight recovery furnace TRS. The current kraft NSPS limits TRS emissions from straight recovery furnaces (including both DCE and NDCE recovery furnaces) to 5 ppmdv at 8 percent O_2. The CAA 111(d) TRS emission guidelines (44 FR 29828) limit TRS to 5 ppmdv for existing NDCE recovery furnaces and 20 ppmdv for existing DCE recovery furnaces.

The EPA analyzed 1 year of TRS CEMS data for most recovery furnaces as part of the NSPS review. Our review focused on CEMS data as opposed to stack test data because relatively few TRS stack test reports (for recovery furnaces or lime kilns) were submitted in response to the EPA's 2011 ICR survey as compared to the number of available TRS CEMS datasets.

The data the EPA analyzed suggest that recovery furnace type (DCE vs. NDCE) and NSPS applicability (*i.e.,* whether or not the unit is required to meet the more stringent standard) are more relevant than control device type in distinguishing between the best performing recovery furnaces for TRS. Recovery furnaces with combined ESP/scrubber controls did not achieve lower TRS emissions than recovery furnaces with ESP systems alone, which was expected because process control factors are expected to play a role in recovery furnace TRS emissions. Annual average TRS emissions revealed that NDCE recovery furnaces can be expected to achieve lower TRS levels than DCE recovery furnaces. Because compliance is based on a 12-hour average, the EPA considered the 99th percentile of the 730 potential 12-hour blocks in a given year for each recovery furnace. Nearly all DCE furnaces had TRS emissions above 5 ppmdv (and usually below 20 ppmdv) while the majority of NDCE furnaces achieved 5 ppmdv consistently. Multi-staged BLO has been reported to reduce TRS emissions from DCE recovery furnaces; however, the trend over the past several decades has been towards installation of NDCE recovery furnaces or ''low-odor'' conversions of DCE recovery furnaces to NDCE technology. Only 41 DCE recovery furnaces remain in the industry, as compared to 108 NDCE furnaces. Many of the remaining DCE furnaces are approaching the end of their useful life and would be expected to be replaced with a new NDCE as opposed to being modified or reconstructed as an NDCE furnace. No new DCE recovery furnaces are projected for the pulp and paper industry. Given these trends, we are not proposing separate standards for new, reconstructed or modified DCE recovery furnaces. All new modified or reconstructed furnaces would have to comply with the proposed standard of 5 ppmdv.

[3] U.S. EPA. *Review of New Source Performance Standards for Kraft Pulp Mills.* EPA–450/3–83–017. September 1983.

Subpart BB contains a 1 percent monitoring allowance for recovery furnace TRS which allows 1 percent of the reported 12-hour averages in a reporting period to exceed the emission limit without being considered an excess emission. The majority of NDCEs subject to the NSPS achieved the 5 ppmdv limit consistently with 1 percent or fewer of the averaging periods in exceedance of 5 ppmdv, including periods of startup and shutdown. Periods of startup and shutdown are not excluded under subpart BBa to ensure that emissions standards apply continuously. The EPA is unaware of any technological reason that would hinder modified, reconstructed or new units from meeting the 1 percent allowance, but requests comment on such instances.

Based on analysis of the TRS CEMS data for recovery furnaces, which included periods of startup and shutdown, the EPA is proposing to retain the 5 ppmdv at 8 percent O_2 TRS emission limit for straight recovery furnaces with a conditional 1 percent monitoring allowance (see conditions discussed below) as the standard that has been adequately demonstrated. This limit would apply at all times, including during periods of startup and shutdown. The EPA did not identify a lower achievable TRS limit based on the data and, therefore, is proposing to maintain the current limit.[4] The 1 percent monitoring allowance is proposed to be retained and can be used for operational variability as well as startup and shutdown periods.

The EPA reviewed NSPS recovery furnace TRS CEMS datasets with startup and shutdown details to understand the effects of startup and shutdown on emissions. The EPA observed that periods of startup and shutdown can lead to a situation where continuously monitored TRS concentrations that are corrected to a specific percent O_2 can be grossly inflated as a result of the O_2 correction equation. As the stack gas O_2 concentration approaches ambient conditions, the denominator of the O_2 correction equation becomes very small, leading to an O_2-corrected concentration that is artificially high, such that an otherwise-compliant TRS measurement can exceed the applicable concentration because it is corrected for O_2. Periods when no BLS are fired into the recovery furnace seemed to lead to this O_2-correction artifact. Nevertheless, the EPA observed that many mills complied with the 5 ppmdv limit with a 1 percent monitoring allowance regardless of startup and shutdown periods and process variability. The highest representative TRS 12-hour averages associated with startup or shutdown periods were on the order of 30 ppmdv at 8 percent O_2 for three different CEMS. A value of 30 ppmdv also corresponds with the span setting for TRS monitors required in subpart BB. Based on these observations, the EPA is proposing to: (1) Restrict use of the 1 percent monitoring allowance to 12-hour TRS averages below an upper limit of 30 ppmdv (to ensure that the 1 percent monitoring allowance is unquestionably continuous), (2) address the O_2-correction issue by clarifying that the TRS concentration limit applies when black liquor is being fired into the recovery furnace and by adding language to the rule that would allow enforcement authorities to accept uncorrected TRS concentration values during startup and shutdown periods when stack O_2 concentration approaches ambient levels. The EPA is seeking comment on this approach. In summary, the EPA is proposing to maintain the 5 ppmdv at 8 percent O_2 TRS emission limit with a 1 percent monitoring allowance, not to exceed 30 ppmdv. Subpart BB currently requires that the TRS monitoring allowance be calculated based on the percent of the total number of possible contiguous periods of excess emissions in a quarter. The EPA requests comment on this requirement, specifically whether a semiannual basis would be more appropriate based on the semiannual reporting requirement.

3. Smelt Dissolving Tanks

SDT PM. The current NSPS PM limit for SDTs (0.2 lb/ton BLS) was established in 1976 based on use of a low-energy water scrubber or a combination demister/low-energy water scrubber. Wire mesh demister pads were determined not to be as effective as low-energy wet scrubbers in the 1986 NSPS review. The 1986 NSPS review concluded that no new control technology for SDTs had emerged since the original NSPS. The subpart MM NESHAP PM emission limit (which is a surrogate for HAP metals) for existing SDTs is equivalent to the NSPS limit of 0.2 lb/ton BLS. The subpart MM NESHAP PM limit for new and reconstructed sources with initial startup in 2001 or later is 0.12 lb/ton BLS based on the use of a high-efficiency wet scrubber. A SDT is only considered to be new or reconstructed under the subpart MM NESHAP if the associated recovery furnace is also new or reconstructed (see 40 CFR 63.860—applicability and designation of affected source).

Analysis of recent SDT PM stack test data collected with the 2011 ICR shows that nearly all SDTs have achieved 0.2 lb/ton BLS (with the exception of a few SDTs with mist eliminators and SDTs included in the PM bubble compliance option under the subpart MM NESHAP). Many SDTs have also achieved the new source MACT limit of 0.12 lb/ton BLS, without a federal requirement to do so. Therefore, the EPA considers a PM limit of 0.12 lb/ton BLS to be adequately demonstrated for new and reconstructed SDTs associated with new or reconstructed recovery furnaces. Because 0.12 lb/ton BLS is already required for new and reconstructed SDTs associated with new or reconstructed recovery furnaces under the subpart MM NESHAP, there would be no additional cost associated with applying this limit for new and reconstructed SDTs associated with new or reconstructed recovery furnaces under subpart BBa. For these reasons, the EPA is proposing to establish a limit of 0.12 lb/ton BLS for new and reconstructed SDTs associated with new or reconstructed recovery furnaces.

The EPA also considered the control options for modified, and reconstructed and new SDTs not associated with a new or reconstructed recovery furnace. These units would not be required to meet a limit of 0.12 lb/ton by the subpart MM NESHAP. The EPA estimated the cost-effectiveness to reduce PM from existing SDTs that are modified to be $6,600/ton (in 2012 dollars). This cost assumes that an owner or operator would automatically replace the existing scrubber with a new one upon modification because the scrubbers for the projected units have surpassed their useful life. However, if a new scrubber would not have been required in the absence of revised NSPS, the cost-effectiveness would increase to $15,500/ton. Similar cost effectiveness can be expected from SDTs that trigger the new source or reconstruction provisions under NSPS (independent of the recovery furnace) but do not meet the new source or reconstruction criteria under the subpart MM NESHAP (e.g., because the recovery furnace is included in the reconstruction capital cost calculation under the subpart MM NESHAP). Considering this relatively high cost effectiveness and that test data for several existing SDTs exceeds 0.12 lb/ton BLS (as they are not currently required to meet 0.12 lb/ton BLS), the EPA is proposing to retain the current PM NSPS limit of 0.2 lb/ton BLS for SDTs that are modified, and for new or

[4] See memorandum titled, ''*Review of the Continuous Emission Monitoring and Continuous Opacity Monitoring Data from the Pulp and Paper Information Collection Request Responses Pertaining to Subpart BB Sources*'' in the docket.

reconstructed SDTs that are not associated with a new or reconstructed recovery furnace.

SDT TRS. The current NSPS limits TRS emissions from SDTs to 0.033 lb as H_2S/ton BLS (the ''as H_2S'' represents how TRS is measured—we will refer to this as ''lb/ton BLS'' for the remainder of this section). This limit was raised from 0.0168 to 0.033 lb/ton BLS during the 1986 NSPS review because some SDTs with wet scrubbers could not meet the original 1976 limit of 0.0168 lb/ton BLS. Both of these limits were considered as regulatory options in the current NSPS review because the emissions guideline for existing SDTs remains at 0.0168 lb/ton BLS.[5] The EPA intends to review these emission guidelines in the future to correct for this discrepancy. The technology basis for the current NSPS limit is the use of water that is not highly contaminated with dissolved sulfides for dissolving smelt and for scrubbing. A study conducted by the National Council for Air and Stream Improvement in 2005 summarized 1990s SDT TRS emissions test data showing that the current NSPS emission limit of 0.033 lb/ton BLS could not be met consistently in a few cases, and that a lower limit of 0.0168 lb/ton BLS can be difficult to achieve for a number of existing SDTs. The inability for some units to consistently meet the more stringent limit is the result of plant-specific process variables. The analysis of approximately 100 recent TRS stack tests (most conducted in 2004 or later) collected through the EPA's 2011 ICR showed that all of the SDTs tested were able to meet the current NSPS limit of 0.033 lb/ton BLS, but some of the SDTs were repeatedly unable to achieve the former limit of 0.0168 lb/ton BLS. Thus, a limit of 0.033 lb/ton BLS appears to be adequately demonstrated, while adequate demonstration of 0.0168 lb/ton BLS is questionable. The EPA estimated the cost effectiveness of scrubber upgrades that could aid in reduction of TRS emissions from SDTs to be $45,300/ton (in 2012 dollars). The EPA has no information to estimate additional process-change costs that may be incurred in order for some mills to achieve a limit of 0.0168 lb/ton BLS. The EPA also investigated limits between 0.033 lb/ton BLS and 0.0168 lb/ton BLS, but costs for scrubber upgrades were assumed to be the same while emission reductions were less, therefore the most cost-effective option was 0.0168 lb/ton BLS. Considering the high cost of reducing the TRS limit to 0.0168 (even without process-change costs) and that emissions data show a limit of 0.033 lb/ton BLS has been adequately demonstrated, the EPA is proposing the current subpart BB TRS limit of 0.033 lb/ton BLS as the standard for new, reconstructed and modified SDTs in subpart BBa.

SDT scrubber monitoring. Monitoring of scrubber liquid supply pressure and pressure loss is specified in the current NSPS subpart BB for SDTs. For subpart BBa, the EPA is proposing that scrubber liquid flow rate and pressure drop be monitored consistent with the wet scrubber parameter monitoring requirements under subpart MM NESHAP. Scrubber liquid supply pressure is allowed as an alternative to scrubber liquid flow rate because some mills received approval to monitor scrubber liquid supply pressure (required under subpart BB) instead of scrubber liquid flow rate (required under subpart MM) following promulgation of subpart MM. Consistent with several EPA applicability determinations, the EPA is also proposing that SDT scrubber fan amperage may be used as an alternative to pressure drop measurement for SDT dynamic scrubbers operating at ambient pressure or for low-energy entrainment scrubbers on SDTs where the fan speed does not vary. The EPA is proposing a 12-hour averaging time for wet scrubber parameters recorded at least once every 15 minutes rather than retaining the current NSPS requirement to record wet scrubber parameters only once per shift. Excess emissions for SDTs would be defined in subpart BBa as any 12-hour scrubber parameter average below its respective site-specific parameter limits (established during performance testing) during times when BLS is fired. Data from the ICR indicate that facilities have difficulty meeting the minimum pressure drop requirement during startup and shutdown, as expected due to the reduced (and changing) volumetric flow of stack gases during startup and shutdown. The EPA is proposing to consider only scrubber liquid flow rate or liquid supply pressure during these periods (*i.e.,* excess emissions would include any 12-hour period when BLS is fired that the scrubber flow rate [or liquid supply pressure] does not meet the minimum parameter limits set in the initial performance test). The EPA requests comment on the SDT scrubber parameter monitoring requirements, especially the recording frequency and the averaging time for wet scrubber parameters.

4. Lime Kilns

Lime kiln PM. New, modified and reconstructed lime kilns are required under subpart BB to meet a PM emission limit of 0.066 gr/dscf for gaseous fuel-fired kilns and 0.13 gr/dscf for liquid fuel-fired kilns, both at 10 percent O_2. However, a more stringent PM limit of 0.064 gr/dscf at 10 percent O_2 is required for existing lime kilns under the subpart MM NESHAP. For new or reconstructed lime kilns, the NESHAP limit is 0.010 gr/dscf at 10 percent O_2 based on use of a high-efficiency ESP. The NESHAP does not distinguish between fuel types. Lime kilns typically burn natural gas, fuel oil, petroleum coke or a combination of these fuels. They may also burn NCGs or pulp mill byproducts such as tall oil.

Lime kiln air pollution control devices include wet scrubbers, ESPs, or a combination system including an ESP followed by a wet scrubber. Wet scrubbers were the most common control in 1986 when the NSPS was last reviewed and remain the most common lime kiln control system today. However, the number of lime kilns with ESPs or ESP/wet scrubber combinations is increasing. The ICR data indicate that, of 131 lime kilns in the U.S., 29 kilns have ESPs and 10 kilns have ESP/wet scrubber combinations.

The EPA reviewed PM stack test data from more than 250 filterable PM stack tests (including several repeat tests) on 110 lime kilns in the U.S. for purposes of reevaluating the NSPS PM limits for lime kilns. The tests included lime kilns with scrubbers, ESPs and ESP/wet scrubber combination controls and were representative of the various fuel combinations burned in lime kilns. Consistent with the NESHAP (subpart MM), the EPA found no reason to distinguish among fuel types for purposes of establishing a PM limit in subpart BBa. The EPA found that ESP and ESP/wet scrubber controls typically reduce PM to lower levels than wet scrubbers alone and that wet scrubbers would not be expected to meet the new source MACT limit of 0.010 gr/dscf at 10 percent O_2. The ESP/wet scrubber systems did not necessarily perform better on filterable PM than the ESPs alone. Several ESP and ESP/wet scrubber-controlled kilns consistently met the limit of 0.010 gr/dscf at 10 percent O_2. Therefore, the EPA is proposing a PM limit of 0.010 gr/dscf at 10 percent O_2 for new and reconstructed

[5] We note that the May 22, 1979, **Federal Register** notice (44 FR 29828) announcing availability of the final emissions guideline document for kraft pulp mills incorrectly stated that the emission guideline for SDT TRS was 0.168 lb/ton BLS, but the actual March 1979 emissions guideline document contained a guideline of 0.0168 lb/ton BLS. The emissions guidelines are used by states in setting standards for existing sources.

lime kilns as the PM limit that has been adequately demonstrated. There are no incremental cost impacts or emissions reductions associated with a limit of 0.010 gr/dscf at 10 percent O_2 for new and reconstructed lime kilns because this limit is already required under subpart MM NESHAP.

As noted above for recovery furnaces, lime kilns can trigger the NSPS provisions as a result of modification but would not trigger the new source MACT requirements because there are no modification provisions under the NESHAP (subpart MM) or the subpart A General Provisions for part 63 standards. The EPA estimated the cost effectiveness of incremental improvements in ESP performance needed for modified lime kilns to meet 0.010 gr/dscf to be $16,000/ton (in 2012 dollars). This cost-effectiveness calculation assumes that modified kilns would have installed a new ESP to meet the current NSPS PM limit (because the kilns that were projected to be modified have scrubbers that have exceeded their useful equipment life). The EPA considered PM emission limits between 0.010 gr/dscf and 0.064 gr/dscf, however, the costs for air pollution control device upgrades remained the same, therefore 0.010 gr/dscf was the most cost effective option. With the high cost (poor cost effectiveness) of further PM reductions and the potential for some modified lime kilns to be unable to achieve 0.010 gr/dscf without new controls, the EPA is proposing the existing source MACT limit of 0.064 gr/dscf at 10 percent O_2 for modified lime kilns under subpart BBa.

Lime kiln opacity and parameter monitoring. Monitoring of scrubber liquid supply pressure and pressure loss (drop) is specified in the current NSPS subpart BB for lime kilns controlled by wet scrubbers. For subpart BBa, the EPA is proposing that scrubber liquid flow rate (or liquid supply pressure) and pressure drop be monitored consistent with the wet scrubber parameter monitoring requirements under subpart MM NESHAP. Liquid supply pressure is an indicator of flow rate, therefore either can be monitored.

While subpart BB specifies wet scrubber parameter monitoring requirements for lime kilns, it does not specify any requirements for lime kilns controlled with ESPs or ESP/scrubber combinations. The EPA is proposing to add requirements to subpart BBa for monitoring lime kiln opacity and ESP operating parameters (secondary voltage and secondary current, or total secondary power) for lime kilns controlled by ESPs alone. When an opacity monitor is used, the ESP parameters would be averaged over the same calendar quarter used for determining the opacity monitoring allowance. For ESP/scrubber combination controls, the EPA is proposing to add 12-hour average ESP parameter monitoring requirements in addition to the wet scrubber parameter monitoring requirements. The EPA is proposing a 12-hour averaging time for wet scrubber parameters recorded at least once every 15 minutes (instead of the current NSPS requirement to record wet scrubber parameters only once per shift). Excess emissions for lime kilns with ESP/scrubber combination controls would be any 12-hour block ESP or scrubber parameter below its respective site-specific limit (established during the performance test) during times when lime mud is fired in the kiln. As with SDT scrubbers, the EPA is proposing to consider only scrubber liquid flow rate (or supply pressure) during periods of startup and shutdown (*i.e.,* excess emissions would include any 12-hour period when lime mud is fired that the scrubber flow rate [or liquid supply pressure] does not meet the minimum parameter limits set in the initial performance test). The EPA requests comment on the 12-hour averaging time specified for ESP and scrubber parameters, and whether a 3-hour averaging time (such as that specified under the subpart MM NESHAP for wet scrubber parameters) would be more appropriate and adequately account for periods of process variability in the absence of a monitoring allowance (such as that specified under the subpart MM NESHAP for wet scrubber parameters).

The subpart MM NESHAP requires continuous opacity monitoring for lime kilns and specifies 20 percent as the opacity level where corrective action is required for both new and existing kilns. The NESHAP (subpart MM) contains an opacity monitoring allowance where 6 percent of the 6-minute opacity averages may exceed the 20 percent limit without being considered a violation.

The EPA is proposing opacity monitoring for lime kilns with ESPs alone under subpart BBa based on our review of COMS data for 27 lime kilns that show 20 percent opacity has been adequately demonstrated under periods of normal operation and during startup and shutdown. The COMS data were used to evaluate the 6 percent monitoring allowance for lime kiln opacity under the NESHAP (subpart MM).[6] The COMS data show that the majority of existing lime kilns are meeting a 20 percent opacity limit based on a 6-minute average, with fewer than 1 percent of averaging periods exceeding 20 percent opacity, including periods of startup and shutdown. Therefore, the EPA is proposing a 1 percent monitoring allowance for opacity for ESP-controlled lime kilns. As with recovery furnaces, the potential for brief high-level spikes in ESP-controlled lime kiln opacity can be accommodated with a 1 percent monitoring allowance with no upper limit on opacity. To ensure continuous compliance with the PM limit, the EPA is proposing that the quarterly average of lime kiln ESP parameters be above the site-specific minimum parametric monitor values established during the PM performance test in order for the lime kiln opacity 1 percent monitoring allowance to be used. To be consistent with current monitoring requirements for opacity and TRS from recovery furnaces, the EPA is proposing that the monitoring allowance for lime kiln opacity be calculated based on the percent of the total number of possible contiguous periods of excess emissions in a quarter. The EPA requests comment on this requirement, specifically whether a semiannual basis would be more appropriate based on the semiannual reporting requirement of subpart BB.

Lime kiln TRS. Lime kiln TRS emissions are limited by the current NSPS to 8 ppmdv at 10 percent O_2. The EPA analyzed 1 year of TRS CEMS data for most lime kilns as part of our NSPS review. The EPA found that that there is no clear distinction in lime kiln TRS emissions for the different control devices that are used (wet scrubbers, ESPs or ESP/wet scrubber combinations). This affirms that process factors (e.g., mud washing, use of uncontaminated scrubber water and NCG burning) are likely to have a greater effect on lime kiln TRS emissions than control device type. Use of caustic (alkaline) scrubbing liquid in the lime kiln scrubber may reduce emissions of two of the four TRS compounds (H_2S and methyl mercaptan, which are acidic compounds) but would not reduce emissions of dimethyl sulfide and dimethyl disulfide, which are neutral compounds. The EPA considered whether NCG burning or white liquor scrubbing of NCG streams prior to the lime kiln significantly alters lime kiln TRS emissions and found no conclusive evidence of increased lime kiln TRS emissions due to NCG burning

[6] See memorandum titled, ''*Review of the Continuous Emission Monitoring and Continuous Opacity Monitoring Data from the Pulp and Paper Information Collection Request Responses Pertaining to Subpart BB Sources*'' in the docket.

or significantly decreased lime kiln TRS due to NCG pre-scrubbing.

The CEMS data reviewed show that, while most existing lime kilns (*i.e.,* those kilns that are not subject to the NSPS) achieved the 8 ppmdv NSPS limit on an annual average basis, several existing kilns controlled by wet scrubbers and two existing kilns with ESPs exceeded 8 ppmdv for a relatively high percentage of 12-hour averaging periods. The TRS NSPS for lime kilns is more stringent that the emissions guideline for existing kilns that have not triggered NSPS, therefore a more focused review of the 8 ppmdv limit on only those kilns that are required to meet that limit under the NSPS was performed.

All of the lime kilns subject to NSPS met the 8 ppmdv limit on an annual average basis, regardless of control device type; however, compliance is not based on an annual average. In a given year, 730 12-hour average values are generated by TRS CEMS for comparison to the emission limit. The 99th percentile of the 12-hour averages for most NSPS kilns was near to or below 8 ppmdv limit, and most NSPS kilns had less than 1 percent of averaging periods that exceeded the 12-hour average 8 ppmdv limit, including periods of startup and shutdown. The data did not show that a lower TRS limit is consistently achieved in practice, therefore the EPA is proposing to maintain the TRS emission limit of 8 ppmdv at 10 percent O_2. The EPA is also proposing a 1 percent monitoring allowance to account for process-related factors that lead to variability in lime kiln TRS emissions.

The EPA also reviewed the TRS CEMS data to determine the impact of continuously applying the 8 ppmdv limit to startup and shutdown periods in addition to normal operations. Twenty of 31 TRS CEMS datasets with startup and shutdown details contained no exceedances of the 12-hour 8 ppmdv limit, suggesting that compliance with the 8 ppmdv limit during startup and shutdown has been demonstrated at many mills. The maximum number of 12-hour averages where the 8 ppmdv limit was exceeded by any mill was eight. Eight of 730 possible 12-hour blocks in a year corresponds to 1.1 percent of possible averaging periods (8/730 = 1.1 percent). An upper limit 12-hour average of 22 ppmdv appears to adequately represent the TRS concentration that has been achieved in practice considering process variability and startup and shutdown events. To be consistent with current monitoring requirements for opacity and TRS from recovery furnaces, the EPA is proposing that the monitoring allowance for lime kiln TRS be calculated based on the percent of the total number of possible contiguous periods of excess emissions in a quarter. The EPA requests comment on this requirement, specifically whether a semiannual basis would be more appropriate based on the semiannual reporting requirement of subpart BBa.

Considering the findings described above, the EPA proposes for subpart BBa that the current 8 ppmdv limit with a 1 percent monitoring allowance has been adequately demonstrated during normal operations and startup and shutdown. To ensure that the standard with a monitoring allowance is a continuous standard, the EPA is proposing to restrict use of the 1 percent monitoring allowance with an upper limit of 22 ppmdv. Mills would not violate the standard if they exceed 8 ppmdv with their TRS monitors for no more than 1 percent of the averaging periods (up to 7 averaging periods per year) as long as the 12-hour average emissions for each of those periods does not exceed 22 ppmdv. As discussed above, the EPA is proposing a provision where TRS concentrations uncorrected for O_2 may be considered to avoid the situation were near-ambient stack oxygen levels that could occur during startup and shutdown lead to seemingly non-compliant TRS concentrations by virtue of the O_2 correction equation.

5. Periods of Startup, Shutdown and Malfunction

Periods of startup or shutdown. In reviewing the standards in this rule, and in proposing the standards in the new subpart BBa, the EPA has taken into account startup and shutdown periods and, for the reasons explained below, has not proposed alternate standards for those periods. Instead, the EPA has proposed standards that apply at all times, including startup and shutdown periods. Continuous opacity and TRS emissions monitoring are used to indicate ongoing compliance with the PM and TRS emission limits. In developing proposed standards for subpart BBa, the EPA reviewed numerous continuous opacity and TRS monitoring datasets that included periods of startup and shutdown, and the affected units will be able to comply with the proposed standards at all times. The EPA is also proposing a provision that would allow enforcement authorities to consider an alternative compliance calculation that allows TRS emissions to be uncorrected for O_2 during startup and shutdown periods because the O_2 correction equation could cause an otherwise-compliant TRS measurement to exceed the applicable concentration emission limit when O_2 levels in the stack approach ambient conditions.

Incinerator temperature, ESP and wet scrubber parameter monitoring are also required under the proposed NSPS subpart BBa. Parameter limits apply at all times, including during startup and shutdown. Incinerator temperature is to be recorded at least once every 5 minutes. Wet scrubber and ESP operating parameters are to be recorded at least once every 15 minutes. In addition to specifying a 3-hour block averaging time for incinerator temperature monitors, the EPA is proposing to define excess emissions as periods where the minimum temperature of 1200 °F is not met when TRS emissions are not fired (*i.e.,* periods when an incinerator is not burning TRS such as during warm-up and cool-down or when an alternative control device is used, would not be considered violations). The ESP and scrubber parameters are to be averaged over a 12-hour block (except for ESPs with COMS, which would have ESP parameters averaged quarterly). To address the need for ESPs to warm to a specified temperature (typically above 200 °F) before full power is applied to the transformer-rectifier set, the EPA is proposing to define excess emissions as ESP parameter measurements below the minimum requirements during times when BLS or lime mud is fired (as applicable) based on several responses to the ICR indicating that mills with ESP minimum temperature requirements bring the ESP online before introducing BLS or lime mud into the recovery furnace or lime kiln, respectively. The EPA is also proposing language that would allow affected units to use wet scrubber liquid flow rate (or liquid supply pressure) to demonstrate compliance during periods of startup and shutdown because pressure drop is difficult to achieve during these periods.

The EPA solicits comment on whether the proposal to apply these standards at all times is practicable and achievable. In particular, the EPA notes that the General Provisions in part 60 require facilities to keep records of the occurrence and duration of any startup, shutdown or malfunction (40 CFR 60.7(b)) and either report to the EPA any period of excess emissions that occurs during periods of startup, shutdown or malfunction (40 CFR 60.7(c)(2)) or report that no excess emissions occurred (40 CFR 60.7(c)(4)). In light of this requirement, comments that contend that sources cannot meet the proposed standard during startup and shutdown

periods should include data and other specifics supporting this claim.

Periods of malfunction. Periods of startup, normal operations and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, ''malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.'' (40 CFR 60.2). The EPA has determined that section 111 does not require that emissions that occur during periods of malfunction be factored into development of CAA section 111 standards. Nothing in CAA section 111 or in case law requires that the EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards. Section 111 of the CAA provides that the EPA set standards of performance which reflect the degree of emission limitation achievable through ''the application of the best system of emission reduction'' that the EPA determines is adequately demonstrated. Applying the concept of ''the application of the best system of emission reduction'' to periods during which a source is malfunctioning presents difficulties. The ''application of the best system of emission reduction'' is more appropriately understood to include operating units in such a way as to avoid malfunctions.

Further, accounting for malfunctions would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. *See, e.g., Sierra Club* v. *EPA,* 167 F. 3d 658, 662 (D.C. Cir. 1999) (the EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to ''invest the resources to conduct the perfect study.''). *See also, Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978). (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, the goal of a ''source that uses the best system of emission reduction'' is to operate in such a way as to avoid malfunctions of the source and accounting for malfunctions could lead to standards that are significantly less stringent than levels that are achieved by a well-performing non-malfunctioning source. The EPA's approach to malfunctions is consistent with section 111 and is a reasonable interpretation of the statute.

In the event that a source fails to comply with the applicable CAA section 111 standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to avoid malfunctions and to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to determine, correct and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The EPA would also consider whether the source's failure to comply with the CAA section 111 standard was, in fact, ''sudden, infrequent, not reasonably preventable'' and was not instead ''caused in part by poor maintenance or careless operation.'' See 40 CFR 60.2 (definition of malfunction).

Finally, the EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard. *See, e.g.,* State Implementation Plans: Response to Petition for Rulemaking; Findings of Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed rule, 78 FR 12460 (Feb. 22, 2013); State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983). The EPA is, therefore, proposing to add an affirmative defense to civil penalties for violations of emission standards that are caused by malfunctions. (See 40 CFR 60.281a defining ''affirmative defense'' to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.) We are also proposing other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in 40 CFR 60.285a. See 40 CFR 22.24. The criteria are designed in part to ensure that the affirmative defense is available only where the event that causes a violation of the emission standard meets the narrow definition of malfunction in 40 CFR 60.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that violation ''[w]as caused by a sudden, infrequent, and unavoidable failure of air pollution control, process equipment, or a process to operate in a normal or usual manner . . .'' The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with 40 CFR 60.11(d) and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that ''[r]epairs were made as expeditiously as possible when a violation occurred'' and that ''[a]ll possible steps were taken to minimize the impact of the violation on ambient air quality, the environment and human health . . . .'' In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the CAA (see also 40 CFR 22.77).

The EPA included an affirmative defense in the proposed rule in an attempt to balance a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission standards may be violated under circumstances beyond the control of the source. The EPA must establish emission standards that ''limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.'' 42 U.S.C. 7602(k) (defining ''emission limitation'' and ''emission standard''). *See generally, Sierra Club* v. *EPA,* 551 F.3d 1019, 1021 (D.C. Cir. 2008) Thus, the EPA is required to ensure that section 111 emissions standards are continuous. The affirmative defense for malfunction

events meets this requirement by ensuring that even where there is a malfunction, the emission standard is still enforceable through injunctive relief. The United States Court of Appeals for the Fifth Circuit recently upheld the EPA's view that an affirmative defense provision is consistent with section 113(e) of the CAA. *Luminant Generation Co. LLC* v. *United States EPA,* 2013 U.S. App. LEXIS 6397 (5th Cir. Mar. 25, 2013) (upholding the EPA's approval of affirmative defense provisions in a CAA State Implementation Plan). While ''continuous'' standards, on the one hand, are required, there is also case law indicating that in many situations it is appropriate for the EPA to account for the practical realities of technology. For example, in *Essex Chemical* v. *Ruckelshaus,* 486 F.2d 427, 433 (D.C. Cir. 1973), the D.C. Circuit acknowledged that in setting standards under CAA section 111 ''variant provisions'' such as provisions allowing for upsets during startup, shutdown and equipment malfunction ''appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force.'' See also, *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973). Though intervening case law such as *Sierra Club* v. *EPA* and the CAA 1977 amendments call into question the relevance of these cases today, they support the EPA's view that a system that incorporates some level of flexibility is reasonable. The affirmative defense simply provides for a defense to civil penalties for violations that are proven to be beyond the control of the source. By incorporating an affirmative defense, the EPA has formalized its approach to malfunctions. In a CWA setting, the Ninth Circuit required this type of formalized approach when regulating ''upsets beyond the control of the permit holder.'' *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253, 1272–73 (9th Cir. 1977). *See also, Mont. Sulphur & Chem. Co.* v. *United States EPA,* 666 F.3d. 1174 (9th Cir. 2012) (rejecting industry argument that reliance on the affirmative defense was not adequate). *But see, Weyerhaeuser Co.* v. *Costle,* 590 F.2d 1011, 1057–58 (D.C. Cir. 1978) (holding that an informal approach is adequate). The affirmative defense provisions give the EPA the flexibility to both ensure that its emission standards are ''continuous'' as required by 42 U.S.C. 7602(k), and account for unplanned upsets and thus support the reasonableness of the standard as a whole.

B. What testing requirements is the EPA proposing?

As part of an ongoing effort to improve compliance with federal air emission regulations, the EPA reviewed the current testing requirements of subpart BB and is proposing the testing requirements for subpart BBa be different from subpart BB in the following ways. First, the EPA is proposing to require repeat air emissions performance testing once every 5 years for facilities subject to NSPS subpart BBa. Repeat performance tests are already required by permitting authorities for some facilities. Further, the EPA believes that requiring periodic repeat performance tests will help to ensure that control systems are properly maintained over time. Today's proposal would require repeat air emissions testing for filterable PM, condensable PM and TRS once every 60 months (5 years) for recovery furnaces, SDTs and lime kilns. The EPA added condensable PM to the list of pollutants to test to develop a broader understanding of condensable PM emissions from pulp and paper combustion sources and to determine mechanisms for reducing condensable PM, as discussed in section IV.B above.

Second, the EPA is proposing to include Method 16C as another alternative to Method 16 for measuring emissions of TRS from sources subject to the TRS standards in subpart BBa. Method 16C was not available at the time of the original NSPS and 1986 NSPS review. The method was promulgated on July 30, 2012 (77 FR 44488).

C. What notification, reporting and recordkeeping requirements is the EPA proposing?

The existing subpart BB requires mills to keep records of TRS and opacity monitoring data along with scrubber and incinerator operating parameter data. The reporting requirements in the existing subpart BB include reports of performance tests and excess emissions. The frequency of reporting is semiannually as specified in 40 CFR 60.7(c).

Reporting and recordkeeping requirements are being proposed as separate sections for subpart BBa. Under this proposal, owners/operators subject to subpart BBa would be required to keep records of all TRS and opacity monitoring data; all scrubber, incinerator and ESP operating parameter data; excess emissions; and malfunctions. A facility would be required to report all exceedances of the standard, including exceedances that are the result of a malfunction. The proposed malfunction recordkeeping requirements would provide pulp and paper companies with some of the information required to support the assertion of an affirmative defense in the event of a violation due to malfunction.

Under this proposal, owners/operators would be required to report all performance tests, results and excess emissions. The frequency of reporting for subpart BBa would be semiannually, the same as for subpart BB, and consistent with the NESHAP requirement. Further, we are proposing a malfunction report to provide information on each type of malfunction which occurred during the reporting period and which caused or may have caused an exceedance of an emission limit.

The proposed subpart BBa also includes a requirement for electronic reporting of performance test data, as discussed below.

Electronic Reporting Tool. In this proposal, the EPA is describing a process to increase the ease and efficiency of performance test data submittal while improving data accessibility. Specifically, the EPA is proposing that owners and operators of kraft pulp mills submit electronic copies of required performance test and performance evaluation reports by direct computer-to-computer electronic transfer using EPA-provided software. The direct computer-to-computer electronic transfer is accomplished through the EPA's CDX using the CEDRI. The Central Data Exchange is the EPA's portal for submittal of electronic data. The EPA-provided software is called the ERT which is used to generate electronic reports of performance tests and evaluations. The ERT generates an electronic report package which will be submitted using the CEDRI. The submitted report package will be stored in the CDX archive (the official copy of record) and the EPA's public database called WebFIRE. All stakeholders will have access to all reports and data in WebFIRE and accessing these reports and data will be very straightforward and easy (see the WebFIRE Report Search and Retrieval link at *http://cfpub.epa.gov/webfire/index.cfm?action=fire.searchERTSubmission*). A description and instructions for use of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/index.html* and CEDRI can be accessed through the CDX Web site (*www.epa.gov/cdx*). A description of the WebFIRE database is available at: *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main.*

The proposal to submit performance test data electronically to the EPA applies only to those performance tests conducted using test methods that are supported by the ERT. The ERT supports most of the commonly used EPA reference methods. A listing of the pollutants and test methods supported by the ERT is available at: *http://www.epa.gov/ttn/chief/ert/index.html.*

We believe that industry would benefit from this proposed approach to electronic data submittal. Specifically, by using this approach, industry will save time in the performance test submittal process. Additionally, the standardized format that the ERT uses allows sources to create a more complete test report resulting in less time spent on data backfilling if a source failed to include all data elements required to be submitted. Also through this proposal, industry may only need to submit a report once to meet the requirements of the applicable subpart because stakeholders can readily access these reports from the WebFIRE database. This also benefits industry by cutting back on recordkeeping costs as the performance test reports that are submitted to the EPA using CEDRI are no longer required to be retained in hard copy, thereby, reducing staff time needed to coordinate these records.

Since the EPA will already have performance test data in hand, another benefit to industry is that fewer or less substantial data collection requests in conjunction with prospective required residual risk assessments or technology reviews will be needed. This would result in a decrease in staff time needed to respond to data collection requests.

State, local and tribal air pollution control agencies may also benefit from having electronic versions of the reports they are now receiving. For example, these agencies may be able to conduct a more streamlined and accurate review of electronic data submitted to them. For example, the ERT would allow for an electronic review process, rather than a manual data assessment, therefore, making review and evaluation of the source provided data and calculations easier and more efficient. In addition, the public stands to benefit from electronic reporting of emissions data because the electronic data will be easier for the public to access. How the air emissions data are collected, accessed and reviewed will be more transparent for all stakeholders.

One major advantage of the proposed submittal of performance test data through the ERT is a standardized method to compile and store much of the documentation required to be reported by this rule. The ERT clearly states what testing information would be required by the test method and has the ability to house additional data elements that might be required by a delegated authority.

In addition the EPA must have performance test data to conduct effective reviews of CAA section 111 standards, as well as for many other purposes including compliance determinations, emission factor development and annual emission rate determinations. In conducting these required reviews, the EPA has found it ineffective and time consuming, not only for us, but also for regulatory agencies and source owners and operators, to locate, collect, and submit performance test data. In recent years, though, stack testing firms have typically collected performance test data in electronic format, making it possible to move to an electronic data submittal system that would increase the ease and efficiency of data submittal and improve data accessibility.

A common complaint heard from industry and regulators is that emission factors are outdated or not representative of a particular source category. With timely receipt and incorporation of data from most performance tests, the EPA would be able to ensure that emission factors, when updated, represent the most current range of operational practices. Finally, another benefit of the proposed data submittal to WebFIRE electronically is that these data would greatly improve the overall quality of existing and new emissions factors by supplementing the pool of emissions test data for establishing emissions factors.

In summary, in addition to supporting regulation development, control strategy development and other air pollution control activities, having an electronic database populated with performance test data would save industry, state, local, tribal agencies, and the EPA significant time, money, and effort while also improving the quality of emission inventories and air quality regulations.

D. Other Miscellaneous Differences Between the Proposed Subpart BBa and the Current Subpart BB

The following lists additional, minor differences between the current subpart BB NSPS and the proposed rule BBa. This list includes proposed rule differences that address editorial and other corrections.

(1) § 60.17 incorporates by reference ANSI/ASME PTC 19.10–1981;

(2) Alphabetized definitions and removed paragraph numbers in § 60.281a;

(3) Definitions for affirmative defense, condensable PM, filterable PM, and monitoring system malfunction in § 60.281a;

(4) Text makes clear that the PM emission limits in § 60.282a and the Method 5 PM emission test in § 60.285a actually refer to filterable PM, to avoid confusion with the inclusion of Method 202 condensable PM testing; and

(5) Referenced the specific appendices in parts 51 and 60 for EPA test methods cited in § 60.285a.

(6) Used ''must'' instead of ''shall'' throughout subpart BBa consistent with plain language guidance.

(7) The span of O_2 monitoring systems is 21 percent instead of 25 percent in § 60.284a so air can be used instead of a calibration gas in span checks.

(8) Text makes clear that only ''one of'' the conditions in § 60.283a(1) needs to be met.

(9) Mentioned performance specifications 1 and 5 in § 60.284a(a)(1) and (2) in addition to § 60.284a(f).

VI. Summary of Cost, Environmental, Energy, and Economic Impacts of These Proposed Standards

In setting standards, the CAA requires us to consider alternative emission control approaches, taking into account the estimated costs as well as impacts on energy, solid waste and other effects.

A. What are the impacts for new, modified, and reconstructed emission units at kraft pulp mills?

The EPA is presenting estimates of the impacts for the proposed 40 CFR part 60, subpart BBa that revises the performance standards for new, modified, or reconstructed emission units at kraft pulp mills. The impacts presented in this section are expressed as incremental differences between the impacts of emission units complying with the proposed subpart BBa and the baseline (NSPS subpart BB or NESHAP subpart MM) requirements for these sources. The impacts are presented for emission units at kraft pulp mills that commence construction, reconstruction or modification over the 5 years following proposal of the revised NSPS (subpart BBa). Costs are based on the third quarter of 2012. The analyses and the documents referenced below can be found in the docket for this proposed rulemaking.

In order to determine the incremental impacts of this proposed rule, the EPA first projected the number of new, modified, or reconstructed emission units that would become subject to

regulation during the 5-year period after proposal of subpart BBa. Extrapolating from the number of recovery furnaces, SDTs and lime kilns that have been constructed, modified, or reconstructed during the 10-year period preceding the base-year 2009 pulp and paper ICR conducted in 2011 (1999 to 2009), an estimated 19 emission units (8 recovery furnaces, 8 SDTs and 3 lime kilns) at 10 kraft pulp mills are expected to be constructed, modified, or reconstructed in the 5-year period after proposal of subpart BBa (2013 to 2018). For further detail on the methodology of these calculations, see the memorandum, *Projections of the Number of New, Modified, and Reconstructed Emission Units for the Kraft Pulp Mill NSPS Review,* in the docket for this proposed rulemaking.

The proposed subpart BBa emission limits reflect the performance of control technologies currently in use by the industry. The proposed NSPS PM and TRS limits under subpart BBa for modified emission units and the proposed NSPS TRS limits under subpart BBa for new and reconstructed emission units are the same as the subpart BB limits. Consequently, there are no emission control costs or emissions reductions associated with these proposed requirements. The proposed NSPS PM limits under subpart BBa for new and reconstructed emission units are the same as the PM limits under the NESHAP (subpart MM) for new sources. As a result, the air pollution control systems that these sources would install to meet the NESHAP (subpart MM) limits could be used to meet the proposed NSPS PM limits, with no additional emission control cost or emissions reduction.

There are differences in the testing, monitoring, reporting and recordkeeping requirements under subpart BB and the proposed subpart BBa that would result in increased costs. The additional testing requirements for recovery furnaces, SDTs and lime kilns under subpart BBa include initial testing for condensable PM and 5-year repeat testing for filterable PM, condensable PM and TRS, and sources would need to submit documentation of these additional tests. While the continuous monitoring requirements for opacity and wet scrubbers in subpart BBa are already incurred at baseline (resulting in zero incremental cost), subpart BBa would restrict use of the TRS monitoring allowances to an upper ppmdv limit which would have an associated cost. Additional monitoring costs would also be incurred for ESP parameter monitoring. The recordkeeping and reporting requirements for subpart BBa would include records of the occurrence and duration of startup and shutdown and the inclusion of records of a failure to meet a standard in otherwise required periodic reports.

The EPA estimates that the total increase in nationwide annual cost associated with this proposed rule is $389,900 for the emission units projected to be constructed, modified, or reconstructed between 2013 and 2018. The methodology is detailed in the memorandum, *Emissions Inventory for Kraft Pulp Mills and Costs/Impacts of the Section 111(b) Review of the Kraft Pulp Mills NSPS,* in the docket for this proposed rulemaking.

B. What are the secondary impacts for new, modified, and reconstructed emission units at kraft pulp mills?

Indirect or secondary air emissions impacts are impacts that would result from the increased electricity usage associated with the operation of control devices (*i.e.,* increased secondary emissions of criteria pollutants from power plants). Energy impacts consist of the electricity and steam needed to operate control devices and other equipment that would be required under this proposed rule. No additional control devices or other equipment are expected to be needed to meet the proposed NSPS requirements beyond those that would already be installed to meet the baseline requirements for these emission units. Thus, no secondary impacts are expected.

C. What are the economic impacts for new, modified, and reconstructed emission units at kraft pulp mills?

The EPA performed an economic impact analysis that estimates changes in prices and output for emission units nationally using the annual compliance costs estimated for this proposed rule. All estimates are for the fifth year after proposal since this is the year for which the compliance cost impacts are estimated. The proposed action is not expected to induce measurable changes in the average national price and production of pulp and paper products. Hence, the overall economic impact of this NSPS should be minimal on the affected industries and their consumers. For more information, please refer to the memorandum, *Economic Impact Analysis for the Section 111(b) Review of the Kraft Pulp Mills New Source Performance Standards Subpart BB,* in the docket for this proposed rulemaking.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the memorandum, *Economic Impact Analysis for the Section 111(b) Review of the Kraft Pulp Mills New Source Performance Standards Subpart BB.* A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The ICR document prepared by the EPA has been assigned the EPA ICR number 2485.01.

These proposed revisions to the NSPS for kraft pulp mills for future affected sources include different emission limits and continuous monitoring requirements and additional performance testing from what is in subpart BB. The additional performance testing requirements for recovery furnaces, SDTs, and lime kilns include initial testing for condensable PM, and 5-year repeat testing for filterable PM, condensable PM and TRS. The proposed monitoring requirements include a different opacity limit and monitoring allowance for recovery furnaces, restriction of the monitoring allowances for TRS to an upper concentration limit, continuous opacity monitoring for lime kilns equipped with ESPs and continuous ESP parameter monitoring for recovery furnaces and lime kilns equipped with ESPs. These testing and monitoring requirements are in addition to the initial performance testing and continuous monitoring requirements described in section III.B of this preamble which are required under the current subpart BB.

The recordkeeping and reporting requirements associated with these testing and monitoring provisions are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of

confidentiality is made is safeguarded according to the EPA policies set forth in 40 CFR part 2, subpart B.

When a malfunction occurs, sources must report it according to the applicable reporting requirements of 40 CFR part 60, subpart BBa. An affirmative defense to civil penalties for violations of emission standard that are caused by malfunctions is available to a source if it can demonstrate that certain criteria and requirements are satisfied. In addition, the source must meet certain notification and reporting requirements. For example, the source must prepare a written root cause analysis and submit a written report to the Administrator documenting that it has met the conditions and requirements for assertion of the affirmative defense.

For this rule, the EPA is considering the affirmative defense in its estimate of burden in the ICR. To provide the public with an estimate of the relative magnitude of the burden associated with an assertion of the affirmative defense position adopted by a source, the EPA has provided administrative adjustments to the ICR that shows what the notification, recordkeeping and reporting requirements associated with the assertion of the affirmative defense might entail. The EPA's estimate for the required notification, reports and records, including the root cause analysis associated with a single incident totals approximately $3,375, and is based on the time and effort required of a source to review relevant data, interview plant employees and document the events surrounding a malfunction that has caused a violation of an emission limit. The estimate also includes time to produce and retain the record and reports for submission to the EPA.

The EPA provides this illustrative estimate of this burden because these costs are only incurred if there has been a violation and a source chooses to take advantage of the affirmative defense. Given the variety of circumstances under which malfunctions could occur, as well as differences among sources' operation and maintenance practices, the EPA cannot reliably predict the severity and frequency of malfunction-related excess emissions events for a particular source. It is important to note that the EPA has no basis currently for estimating the number of malfunctions that would qualify for an affirmative defense. Current historical records would be an inappropriate basis, as source owners or operators previously operated their facilities in recognition that they were exempt from the requirement to comply with emissions standards during malfunctions. Of the number of violation events reported by source operators, only a small number would be expected to result from a malfunction (based on the definition of a malfunction in 40 CFR 60.2), and only a subset of violations caused by malfunctions would result in the source choosing to assert the affirmative defense. Thus, the EPA believes the number of instances in which source operators might be expected to avail themselves of the affirmative defense will be extremely small.

For this reason, the EPA estimates no more than two such occurrences for all sources subject to 40 CFR part 60, subpart BBa over the 3-year period covered by the ICR. The EPA expects to gather information on such events in the future and will revise this estimate as better information becomes available.

The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to total 1,905 labor-hours per year at a cost of $186,324/yr. The annualized capital costs are estimated at $411,300 per year. The annual O&M costs are $155,880. The total annualized capital and O&M costs are $567,180 per year. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this ICR, under Docket ID Number EPA–HQ–OAR–2012–0640. Submit any comments related to the ICR to the EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after May 23, 2013, a comment to OMB is best assured of having its full effect if OMB receives it by June 24, 2013. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act 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 this rule will not have a significant economic impact on a substantial number of small entities (SISNOSE). Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's 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 this proposed rule on small entities, I certify that this action will not have a SISNOSE. This certification is based on the economic impact of this action to all affected small entities. Only two small entities may be impacted by this proposed rule. The EPA estimates that all affected small entities will have annualized costs of less than 0.1 percent of their sales. The EPA concludes that there is no SISNOSE for this rule.

For more information on the small entity impacts associated with this proposed rule, please refer to the Economic Impact and Small Business Analyses in the public docket. Although this proposed rule would not have a SISNOSE, the EPA nonetheless tried to reduce the impact of this proposed rule on small entities. When developing these proposed standards, the EPA took special steps to ensure that the burdens imposed on small entities were minimal. The EPA conducted several meetings with the industry trade association to discuss regulatory options and the corresponding burden on industry, such as recordkeeping and reporting, and impacts on existing sources that are modified. The EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures

of $100 million or more for state, local and tribal governments, in the aggregate, or to the private sector in any 1 year. This proposed rule is not expected to impact state, local or tribal governments. The nationwide annualized cost of this proposed rule for affected industrial sources is estimated to be $389,900/yr. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule will not apply to such governments and will not impose any obligations upon them.

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. None of the facilities subject to this action are owned or operated by state governments and nothing in this proposal will supersede state regulations. Thus, Executive Order 13132 does not apply to this proposed rule. In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

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). It will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. This proposed rule imposes requirements on owners and operators of kraft pulp mills and not tribal governments. The EPA does not know of any kraft pulp mills owned or operated by Indian tribal governments. However, if there are any, the effect of this proposed rule on communities of tribal governments would not be unique or disproportionate to the effect on other communities. Thus, Executive Order 13175 does not apply to this action. The EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 F.R. 19885, April 22, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the NTTAA of 1995, Public Law 104–113 (15 U.S.C. 272 note), directs the EPA to use VCS 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, business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This proposed rulemaking involves technical standards. The EPA proposes to use one VCS in this proposed rule. The VCS, ASME PTC 19.10–1981, ''Flue and Exhaust Gas Analyses,'' is cited in this proposed rule for its manual method of measuring the content of the exhaust gas as an acceptable alternative to EPA Method 3B of 40 CFR part 60, appendix A–2. This standard is available at *http://www.asme.org* or by mail at the American Society of Mechanical Engineers (ASME), P.O. Box 2900, Fairfield, NJ 07007–2900; or at Global Engineering Documents, Sales Department, 15 Inverness Way East, Englewood, CO 80112.

The EPA has identified two other VCS as being potentially applicable to this proposed rule. The first, ASTM D7520–09, is an alternative to Method 9 (see part 60, appendix A–4 for a description of Method 9). This rule currently provides the use of continuous opacity monitors as an alternate to Method 9; therefore the EPA has decided not to use ASTM D7520–09 in this rulemaking. The second, ANSI/ASME PTC 19–10–1981–Part 10, is an alternative to Method 16A (see part 60, appendix A–6 for a description of Method 16A). The EPA is incorporating this VCS as an alternative to Method 3B above, but is not incorporating it as an alternative to Method 16A because it is an alternate for only the manual portion and not the instrumental portion of Method 16A. Given that sources are already allowed four EPA methods for measuring TRS (Methods 16, 16A, 16B and 16C), and that the VCS is only partially applicable, the EPA has decided not to use this VCS in this rulemaking. See the docket for this proposed rule for the reasons for these determinations.

The EPA welcomes comments on this aspect of the proposed rulemaking and specifically invites the public to identify potentially applicable VCS and to explain why such standards should be used in this regulation.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority, low income or indigenous populations from this proposed rule as it is unknown where new facilities will be located and the EPA does not expect new facilities to be built. However, the agency has reviewed the areas surrounding all existing kraft pulp mills to determine if there is an overrepresentation of minority, low income or indigenous populations near the sources such that they may currently face disproportionate risks from pollutants.

To gain a better understanding of the source category and near source populations, the EPA conducted a demographic analysis on the source

category for this rulemaking. This analysis only gives some indication of the prevalence of subpopulations that may be exposed to air pollution from the sources and, therefore, would be those populations that may be expected to benefit most from this regulation; it does not identify the demographic characteristics of the most highly affected individuals or communities, nor does it quantify the level of risk faced by those individuals or communities. The data show that most demographic categories were below or within 20 percent of their corresponding national averages except for the African American population percentage within 3 miles of any source potentially affected by this rulemaking. This segment of the population exceeds the national average by 5 percentage points (18 percent vs. 13 percent), or plus 38 percent. There is no indication that this segment of the population faces an unacceptable risk from emissions from these sources. However, the additional information that will be collected from the increase in testing requirements is expected to better inform the agency of the emissions associated with this source category. This will ensure better compliance with this rule, and will result in this rule being more protective of human health. The demographic analysis results and the details concerning their development are presented in the September 18, 2012, memorandum titled, *Environmental Justice Review: Kraft Pulp Mills NSPS,* a copy of which is available in the docket for this action (EPA–HQ–OAR–2012–0640).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: May 14, 2013.

Bob Perciasepe,

Acting EPA Administrator.

40 CFR part 60 is proposed to be amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Section 60.17 is amended by revising paragraph (h)(4) to read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(h) * * *

(4) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], (Issued August 31, 1981), IBR approved for § 60.56c(b), § 60.63(f), § 60.104a(d), (h), (i), and (j), § 60.105a(d), (f), and (g), § 60.106(e), § 60.106a(a), § 60.107a(a), (c), and (e), § 60.285a(f), tables 1 and 3 of subpart EEEE, tables 2 and 4 of subpart FFFF, table 2 of subpart JJJJ, § 60.2145(s), § 60.2145(t), § 60.2710(s), § 60.2710(t), § 60.2710(w), § 60.2730(q), § 60.4415(a), § 60.4900(b), § 60.5220(b), tables 1 and 2 to subpart LLLL, tables 2 and 3 to subpart MMMM, § 60.5406(c), and § 60.5413(b).

* * * * *

■ 3. Section 60.280 is amended by revising paragraph (b) to read as follows:

§ 60.280 Applicability and designation of affected facility.

* * * * *

(b) Except as noted in § 60.283(a)(1)(iv), any facility under paragraph (a) of this section that commences construction, reconstruction, or modification after September 24, 1976, and on or before May 23, 2013 is subject to the requirements of this subpart. Any facility under paragraph (a) of this section that commences construction, reconstruction, or modification after May 23, 2013 is subject to the requirements of subpart BBa of this part.

■ 4. Add subpart BBa to read as follows:

Subpart BBa—Standards of Performance for Kraft Pulp Mill Affected Sources for Which Construction, Reconstruction, or Modification Commenced After May 23, 2013

Sec.

60.280a Applicability and designation of affected facility.
60.281a Definitions.
60.282a Standard for filterable particulate matter.
60.283a Standard for total reduced sulfur (TRS).
60.284a Monitoring of emissions and operations.
60.285a Test methods and procedures.
60.286a Affirmative defense for violations of emission standards during malfunction.
60.287a Recordkeeping.
60.288a Reporting.

Subpart BBa—Standards of Performance for Kraft Pulp Mill Affected Sources for Which Construction, Reconstruction, or Modification Commenced After May 23, 2013

§ 60.280a Applicability and designation of affected facility.

(a) The provisions of this subpart are applicable to the following affected facilities in kraft pulp mills: Digester system, brown stock washer system, multiple-effect evaporator system, recovery furnace, smelt dissolving tank, lime kiln, and condensate stripper system. In pulp mills where kraft pulping is combined with neutral sulfite semichemical pulping, the provisions of this subpart are applicable when any portion of the material charged to an affected facility is produced by the kraft pulping operation.

(b) Except as noted in § 60.283a(a)(1)(iv), any facility under paragraph (a) of this section that commences construction, reconstruction, or modification after May 23, 2013, is subject to the requirements of this subpart.

§ 60.281a Definitions.

As used in this subpart, all terms not defined herein must have the same meaning given them in the Act and in subpart A of this part.

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

Black liquor oxidation system means the vessels used to oxidize, with air or oxygen, the black liquor, and associated storage tank(s).

Black liquor solids (BLS) means the dry weight of the solids which enter the recovery furnace in the black liquor.

Brown stock washer system means brown stock washers and associated knotters, vacuum pumps, and filtrate tanks used to wash the pulp following the digester system. Diffusion washers are excluded from this definition.

Condensable particulate matter, for purposes of this subpart, means particulate matter measured by EPA Method 202 of Appendix M of part 51 of this chapter that is vapor phase at stack conditions, but condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack.

Condensate stripper system means a column, and associated condensers,

used to strip, with air or steam, TRS compounds from condensate streams from various processes within a kraft pulp mill.

Cross recovery furnace means a furnace used to recover chemicals consisting primarily of sodium and sulfur compounds by burning black liquor which on a quarterly basis contains more than 7 weight percent of the total pulp solids from the neutral sulfite semichemical process and has a green liquor sulfidity of more than 28 percent.

Digester system means each continuous digester or each batch digester used for the cooking of wood in white liquor, and associated flash tank(s), blow tank(s), chip steamer(s), and condenser(s).

Filterable particulate matter, for purposes of this subpart, means particulate matter measured by EPA Method 5 of Appendix A–3 of this part.

Green liquor sulfidity means the sulfidity of the liquor which leaves the smelt dissolving tank.

Kraft pulp mill means any stationary source which produces pulp from wood by cooking (digesting) wood chips in a water solution of sodium hydroxide and sodium sulfide (white liquor) at high temperature and pressure. Regeneration of the cooking chemicals through a recovery process is also considered part of the kraft pulp mill.

Lime kiln means a unit used to calcine lime mud, which consists primarily of calcium carbonate, into quicklime, which is calcium oxide.

Monitoring system malfunction means a sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. The owner or operator is required to implement monitoring system repairs in response to monitoring system malfunctions or out-of-control periods, and to return the monitoring system to operation as expeditiously as practicable.

Multiple-effect evaporator system means the multiple-effect evaporators and associated condenser(s) and hotwell(s) used to concentrate the spent cooking liquid that is separated from the pulp (black liquor).

Neutral sulfite semichemical pulping operation means any operation in which pulp is produced from wood by cooking (digesting) wood chips in a solution of sodium sulfite and sodium bicarbonate, followed by mechanical defibrating (grinding).

Recovery furnace means either a straight kraft recovery furnace or a cross recovery furnace, and includes the direct-contact evaporator for a direct-contact furnace.

Smelt dissolving tank means a vessel used for dissolving the smelt collected from the recovery furnace.

Straight kraft recovery furnace means a furnace used to recover chemicals consisting primarily of sodium and sulfur compounds by burning black liquor which on a quarterly basis contains 7 weight percent or less of the total pulp solids from the neutral sulfite semichemical process or has green liquor sulfidity of 28 percent or less.

Total reduced sulfur (TRS) means the sum of the sulfur compounds hydrogen sulfide, methyl mercaptan, dimethyl sulfide, and dimethyl disulfide that are released during the kraft pulping operation and measured by Method 16 of Appendix A–6 of this part.

§ 60.282a Standard for filterable particulate matter.

(a) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart must cause to be discharged into the atmosphere:

(1) From any modified recovery furnace any gases which:

(i) Contain filterable particulate matter in excess of 0.10 g/dscm (0.044 gr/dscf) corrected to 8 percent oxygen.

(ii) Exhibit 20 percent opacity or greater, where an electrostatic precipitator (ESP) emission control device is used.

(2) From any new or reconstructed recovery furnace any gases which:

(i) Contain filterable particulate matter in excess of 0.034 g/dscm (0.015 gr/dscf) corrected to 8 percent oxygen.

(ii) Exhibit 20 percent opacity or greater, where an ESP emission control device is used.

(3) From any modified or reconstructed smelt dissolving tank, or from any new smelt dissolving tank that is not associated with a new or reconstructed recovery furnace subject to the provisions of paragraph (a)(2) of this section, any gases which contain filterable particulate matter in excess of 0.1 g/kg black liquor solids (dry weight) [0.2 lb/ton black liquor solids (dry weight)].

(4) From any new smelt dissolving tank associated with a new or reconstructed recovery furnace subject to the provisions of paragraph (a)(2) of this section, any gases which contain filterable particulate matter in excess of 0.060 g/kg black liquor solids (dry weight) [0.12 lb/ton black liquor solids (dry weight)].

(5) From any modified lime kiln any gases which:

(i) Contain filterable particulate matter in excess of 0.15 g/dscm (0.064 gr/dscf) corrected to 10 percent oxygen.

(ii) Exhibit 20 percent opacity or greater, where an ESP emission control device is used.

(6) From any new or reconstructed lime kiln any gases which:

(i) Contain filterable particulate matter in excess of 0.023 g/dscm (0.010 gr/dscf) corrected to 10 percent oxygen.

(ii) Exhibit 20 percent opacity or greater, where an ESP emission control device is used.

(b) The standards in this section apply at all times.

(c) The exemptions to opacity standards under 40 CFR 60.11(c) do not apply to subpart BBa.

§ 60.283a Standard for total reduced sulfur (TRS).

(a) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart must cause to be discharged into the atmosphere:

(1) From any digester system, brown stock washer system, multiple-effect evaporator system, or condensate stripper system any gases which contain TRS in excess of 5 ppm by volume on a dry basis, corrected to 10 percent oxygen, unless one of the following conditions are met:

(i) The gases are combusted in a lime kiln subject to the provisions of either paragraph (a)(5) of this section or § 60.283(a)(5) of subpart BB of this part; or

(ii) The gases are combusted in a recovery furnace subject to the provisions of either paragraphs (a)(2) or (a)(3) of this section or § 60.283(a)(2) or (a)(3) of subpart BB of this part; or

(iii) The gases are combusted with other waste gases in an incinerator or other device, or combusted in a lime kiln or recovery furnace not subject to the provisions of this subpart (or subpart BB of this part), and are subjected to a minimum temperature of 650 °C (1200 °F) for at least 0.5 second; or

(iv) It has been demonstrated to the Administrator's satisfaction by the owner or operator that incinerating the exhaust gases from a new, modified, or reconstructed brown stock washer system is technologically or economically unfeasible. Any exempt system will become subject to the provisions of this subpart if the facility is changed so that the gases can be incinerated.

(v) The gases from the digester system, brown stock washer system, or condensate stripper system are

controlled by a means other than combustion. In this case, this system must not discharge any gases to the atmosphere which contain TRS in excess of 5 ppm by volume on a dry basis, uncorrected for oxygen content.

(vi) The uncontrolled exhaust gases from a new, modified, or reconstructed digester system contain TRS less than 0.005 g/kg air dried pulp (ADP) (0.01 lb/ton ADP).

(2) From any straight kraft recovery furnace any gases which contain TRS in excess of 5 ppm by volume on a dry basis, corrected to 8 percent oxygen.

(3) From any cross recovery furnace any gases which contain TRS in excess of 25 ppm by volume on a dry basis, corrected to 8 percent oxygen.

(4) From any smelt dissolving tank any gases which contain TRS in excess of 0.016 g/kg black liquor solids as H_2S (0.033 lb/ton black liquor solids as H_2S).

(5) From any lime kiln any gases which contain TRS in excess of 8 ppm by volume on a dry basis, corrected to 10 percent oxygen.

(b) The standards in this section apply at all times.

§ 60.284a Monitoring of emissions and operations.

(a) Any owner or operator subject to the provisions of this subpart must install, calibrate, maintain, and operate the continuous monitoring systems specified in paragraphs (a)(1) and (2) of this section:

(1) A continuous monitoring system to monitor and record the opacity of the gases discharged into the atmosphere from any recovery furnace or lime kiln using an ESP emission control device, except as specified in paragraph (b)(4) of this section. The span of this system must be set at 70 percent opacity. You must install, certify, and operate the continuous opacity monitoring system in accordance with Performance Specification (PS) 1 in Appendix B to 40 CFR part 60.

(2) Continuous monitoring systems to monitor and record the concentration of TRS emissions on a dry basis and the percent of oxygen by volume on a dry basis in the gases discharged into the atmosphere from any lime kiln, recovery furnace, digester system, brown stock washer system, multiple-effect evaporator system, or condensate stripper system, except where the provisions of § 60.283a(a)(1)(iii) or (iv) apply. You must install, certify, and operate the continuous TRS monitoring system in accordance with Performance Specification (PS) 5 in Appendix B to 40 CFR part 60. These systems must be located downstream of the control device(s) and the spans of these continuous monitoring system(s) must be set:

(i) At a TRS concentration of 30 ppm for the TRS continuous monitoring system, except that for any cross recovery furnace the span must be set at 50 ppm.

(ii) At 21 percent oxygen for the continuous oxygen monitoring system.

(b) Any owner or operator subject to the provisions of this subpart must install, calibrate, maintain, and operate the following continuous parameter monitoring devices specified in paragraphs (b)(1) through (4) of this section.

(1) For any incinerator, a monitoring device for the continuous measurement of the combustion temperature at the point of incineration of effluent gases which are emitted from any digester system, brown stock washer system, multiple effect evaporator system, black liquor oxidation system, or condensate stripper system where the provisions of § 60.283a(a)(1)(iii) apply. The monitoring device is to be certified by the manufacturer to be accurate within ±1 percent of the temperature being measured.

(2) For any recovery furnace, lime kiln, or smelt dissolving tank using a wet scrubber emission control device:

(i) A monitoring device for the continuous measurement of the pressure drop of the gas stream through the control equipment. The monitoring device is to be certified by the manufacturer to be accurate to within a gage pressure of ±500 Pascals (±2 inches water gage pressure).

(ii) A monitoring device for the continuous measurement of the scrubbing liquid flow rate. The monitoring device used for continuous measurement of the scrubbing liquid flow rate must be certified by the manufacturer to be accurate within ±5 percent of the design scrubbing liquid flow rate.

(iii) As an alternative to pressure drop measurement under paragraph (b)(2)(i) of this section, a monitoring device for measurement of fan amperage may be used for smelt dissolving tank dynamic scrubbers that operate at ambient pressure or for low-energy entrainment scrubbers where the fan speed does not vary.

(iv) As an alternative to scrubbing liquid flow rate measurement under paragraph (b)(2)(ii) of this section, a monitoring device for measurement of scrubbing liquid supply pressure may be used. The monitoring device is to be certified by the manufacturer to be accurate within ±15 percent of design scrubbing liquid supply pressure. The pressure sensor or tap is to be located close to the scrubber liquid discharge point. The Administrator may be consulted for approval of alternative locations.

(3) For any recovery furnace or lime kiln using an ESP emission control device, the owner or operator must use the continuous parameter monitoring devices specified in paragraphs (b)(3)(i) and (ii) of this section.

(i) A monitoring device for the continuous measurement of the secondary voltage of each ESP collection field.

(ii) A monitoring device for the continuous measurement of the secondary current of each ESP collection field.

(iii) Total secondary power may be calculated as the product of the secondary voltage and secondary current measurements for each ESP collection field and used to demonstrate compliance as an alternative to the secondary voltage and secondary current measurements.

(4) For any recovery furnace or lime kiln using an ESP followed by a wet scrubber, the owner or operator must use the continuous parameter monitoring devices specified in paragraphs (b)(2) and (3) of this section. The opacity monitoring system specified in paragraph (a)(1) of this section is not required for combination ESP/wet scrubber control device systems.

(c) *Monitor operation and calculations.* Any owner or operator subject to the provisions of this subpart must follow the procedures for collecting and reducing monitoring data and setting operating limits in paragraphs (c)(1) through (6) of this section. Subpart A of this part specifies methods for reducing continuous opacity monitoring system data.

(1) Any owner or operator subject to the provisions of this subpart must, except where the provisions of § 60.283a(a)(1)(iii) or (iv) apply, perform the following:

(i) Calculate and record on a daily basis 12-hour average TRS concentrations for the two consecutive periods of each operating day. Each 12-hour average must be determined as the arithmetic mean of the appropriate 12 contiguous 1-hour average TRS concentrations provided by each continuous monitoring system installed under paragraph (a)(2) of this section.

(ii) Calculate and record on a daily basis 12-hour average oxygen concentrations for the two consecutive periods of each operating day for the recovery furnace and lime kiln. These 12- hour averages must correspond to the 12-hour average TRS concentrations

under paragraph (c)(1) of this section and must be determined as an arithmetic mean of the appropriate 12 contiguous 1-hour average oxygen concentrations provided by each continuous monitoring system installed under paragraph (a)(2) of this section.

(iii) Using the following equation, correct all 12-hour average TRS concentrations to 10 volume percent oxygen, except that all 12-hour average TRS concentrations from a recovery furnace must be corrected to 8 volume percent oxygen instead of 10 percent, and all 12-hour average TRS concentrations from a facility to which the provisions of § 60.283a(a)(1)(v) apply must not be corrected for oxygen content:

$$C_{corr} = C_{meas} \times (21 - X/21 - Y)$$

where:

C_{corr} = the concentration corrected for oxygen.

C_{meas} = the concentration uncorrected for oxygen.

X = the volumetric oxygen concentration in percentage to be corrected to (8 percent for recovery furnaces and 10 percent for lime kilns, incinerators, or other devices).

Y = the measured 12-hour average volumetric oxygen concentration.

(2) Record at least once each successive 5-minute period all measurements obtained from the continuous monitoring devices installed under paragraph (b)(1) of this section. Calculate 3-hour block averages from the recorded measurements of incinerator temperature. Temperature measurements recorded when no TRS emissions are fired in the incinerator (e.g., during incinerator warm-up and cool-down periods when no TRS emissions are generated or an alternative control device is used) may be omitted from the block average calculation.

(3) Record at least once each successive 15-minute period all measurements obtained from the continuous monitoring devices installed under paragraph (b)(2) through (4) of this section and reduce the data as follows:

(i) Calculate 12-hour block averages from the recorded measurements of wet scrubber pressure drop (or smelt dissolving tank scrubber fan amperage) and liquid flow rate (or liquid supply pressure), as applicable.

(ii) Calculate quarterly averages from the recorded measurements of ESP parameters (secondary voltage and secondary current, or total secondary power) for ESP-controlled recovery furnaces or lime kilns that measure opacity in addition to ESP parameters.

(iii) Calculate 12-hour block averages from the recorded measurements of ESP parameters (secondary voltage and secondary current, or total secondary power) for recovery furnaces or lime kilns with combination ESP/wet scrubber controls.

(4) During the initial performance test required in § 60.285a, the owner or operator must establish site-specific operating limits for the monitoring parameters in paragraphs (b)(2) through (4) of this section by continuously monitoring the parameters and determining the arithmetic average value of each parameter during the performance test. The arithmetic average of the measured values for the three test runs establishes your minimum site-specific operating limit for each wet scrubber or ESP parameter. Multiple performance tests may be conducted to establish a range of parameter values. The owner or operator may establish replacement operating limits for the monitoring parameters during subsequent performance tests using the test methods in § 60.285a.

(5) You must operate the continuous monitoring systems required in paragraphs (a) and (b) of this section to collect data at all required intervals at all times the affected facility is operating except for periods of monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, and required monitoring system quality assurance or quality control activities including, as applicable, calibration checks and required zero and span adjustments.

(6) You may not use data recorded during monitoring system malfunctions or out-of-control periods, repairs associated with monitoring system malfunctions or out-of-control periods, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating limits. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(7) Except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required quality monitoring system quality assurance or quality control activities (including, as applicable, system accuracy audits and required zero and span adjustments), failure to collect required data is a deviation of the monitoring requirements.

(d) Excess emissions are defined for this subpart as follows:

(1) For emissions from any recovery furnace, periods of excess emissions are:

(i) All 12-hour averages of TRS concentrations above 5 ppm by volume at 8 percent oxygen for straight kraft recovery furnaces and above 25 ppm by volume at 8 percent oxygen for cross recovery furnaces during times when BLS is fired.

(ii) All 6-minute average opacities that exceed 20 percent during times when BLS is fired.

(2) For emissions from any lime kiln, periods of excess emissions are:

(i) All 12-hour average TRS concentration above 8 ppm by volume at 10 percent oxygen during times when lime mud is fired.

(ii) All 6-minute average opacities that exceed 20 percent during times when lime mud is fired.

(3) For emissions from any digester system, brown stock washer system, multiple-effect evaporator system, or condensate stripper system, periods of excess emissions are:

(i) All 12-hour average TRS concentrations above 5 ppm by volume at 10 percent oxygen unless the provisions of § 60.283a(a)(1)(i), (ii), or (iv) apply; or

(ii) All 3-hour block averages during which the combustion temperature at the point of incineration is less than 650 °C (1200 °F), where the provisions of § 60.283a(a)(1)(iii) apply.

(4) For any recovery furnace, lime kiln, or smelt dissolving tank controlled with a wet scrubber emission control device that complies with the parameter monitoring requirements specified in § 60.284a(b)(2), periods of excess emissions are:

(i) All 12-hour block average scrubbing liquid flow rate (or scrubbing liquid supply pressure) measurements below the minimum site-specific limit established during performance testing during times when BLS or lime mud is fired (as applicable), and

(ii) All 12-hour block average scrubber pressure drop (or fan amperage, if used as an alternative under paragraph (b)(2)(iii) of this section) measurements below the minimum site-specific limit established during performance testing during times when BLS or lime mud is fired (as applicable), except during startup and shutdown.

(5) For any recovery furnace or lime kiln controlled with an ESP followed by a wet scrubber that complies with the parameter monitoring requirements specified in § 60.284a(b)(4), periods of excess emissions are:

(i) All 12-hour block average scrubbing liquid flow rate (or scrubbing liquid supply pressure) measurements below the minimum site-specific limit established during performance testing during times when BLS or lime mud is fired (as applicable), and

(ii) All 12-hour block average scrubber pressure drop measurements below the

minimum site-specific limit established during performance testing during times when BLS or lime mud is fired (as applicable) except during startup and shutdown,

(iii) All 12-hour block average ESP secondary voltage and secondary current measurements (or total secondary power values) below the minimum site-specific limit established during performance testing during times when BLS or lime mud is fired (as applicable).

(e) The Administrator will not consider periods of excess emissions reported under § 60.288a(a) to be indicative of a violation of the standards provided the criteria in paragraphs (e)(1) and (2) of this section are met.

(1) The percent of the total number of possible contiguous periods of excess emissions in a quarter does not exceed:

(i) One percent for TRS emissions from recovery furnaces, provided that the TRS concentration does not exceed 30 ppm corrected to 8 percent oxygen.

(ii) Two percent for average opacities from recovery furnaces, provided that the ESP secondary voltage and secondary current averaged over the quarter remained above the minimum operating limits established during the performance test.

(iii) One percent for TRS emissions from lime kilns, provided that the TRS concentration does not exceed 22 ppm corrected to 10 percent oxygen.

(iv) One percent for average opacities from lime kilns, provided that the ESP secondary voltage and secondary current (or total secondary power) averaged over the quarter remained above the minimum operating limits established during the performance test.

(2) The Administrator determines that the affected facility, including air pollution control equipment, is maintained and operated in a manner which is consistent with good air pollution control practice for minimizing emissions during periods of excess emissions.

(3) The TRS concentration uncorrected for oxygen may be considered when determining compliance with the excess emissions provisions in paragraphs (e)(1)(i) and (iii) of this section during periods of startup or shutdown when stack oxygen percentage approaches ambient conditions. If the measured TRS concentration uncorrected for oxygen is less than the applicable limit (5 ppm for recovery furnaces or 8 ppm for lime kilns) during periods of startup or shutdown when the stack oxygen concentration is 15 percent or greater, then the Administrator will consider the TRS average to be in compliance. This provision only applies during periods of affected facility startup and shutdown.

(f) The procedures under § 60.13 must be followed for installation, evaluation, and operation of the continuous monitoring systems required under this section. All continuous monitoring systems must be operated in accordance with the applicable procedures under Performance Specifications 1, 3, and 5 of appendix B of this part.

§ 60.285a Test methods and procedures.

(a) In conducting the performance tests required by this subpart and § 60.8, the owner or operator must use as reference methods and procedures the test methods in appendix A of this part or other methods and procedures in this section, except as provided in § 60.8(b). Acceptable alternative methods and procedures are given in paragraph (f) of this section.

(b) The owner or operator must determine compliance with the filterable particulate matter standards in § 60.282a(a)(1), (2), (5) and (6) as follows:

(1) Method 5 of Appendix A–3 of this part must be used to determine the filterable particulate matter concentration. The sampling time and sample volume for each run must be at least 60 minutes and 0.90 dscm (31.8 dscf). Water must be used as the cleanup solvent instead of acetone in the sample recovery procedure. The particulate concentration must be corrected to the appropriate oxygen concentration according to § 60.284a(c)(3).

(2) The emission rate correction factor, integrated sampling and analysis procedure of Method 3B of Appendix A–2 of this part must be used to determine the oxygen concentration. The gas sample must be taken at the same time and at the same traverse points as the particulate sample.

(3) Method 9 of Appendix A–4 of this part and the procedures in § 60.11 must be used to determine opacity. Opacity measurement is not required for recovery furnaces or lime kilns operating with a wet scrubber alone or a wet scrubber in combination with an ESP.

(4) In addition to the initial performance test required by this subpart and § 60.8(a), you must conduct repeat performance tests for filterable particulate matter at intervals no longer than 60 months following the previous performance test using the procedures in paragraphs (b)(1) and (2) of this section.

(5) When the initial and repeat performance tests are conducted for filterable particulate matter, the owner or operator must also measure condensable particulate matter using Method 202 of Appendix M of part 51 of this chapter.

(c) The owner or operator must determine compliance with the filterable particular matter standards in § 60.282a(a)(3) and (4) as follows:

(1) The emission rate (E) of filterable particulate matter must be computed for each run using the following equation:

$$E = c_s Q_{sd}/BLS$$

Where:

E = emission rate of filterable particulate matter, g/kg (lb/ton) of BLS.

c_s = Concentration of filterable particulate matter, g/dscm (lb/dscf).

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr).

BLS = black liquor solids (dry weight) feed rate, kg/hr (ton/hr).

(2) Method 5 of Appendix A–3 of this part must be used to determine the filterable particulate matter concentration (c_s) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume must be at least 60 minutes and 0.90 dscm (31.8 dscf). Water must be used instead of acetone in the sample recovery.

(3) Process data must be used to determine the black liquor solids (BLS) feed rate on a dry weight basis.

(4) In addition to the initial performance test required by this subpart and § 60.8(a), you must conduct repeat performance tests for filterable particulate matter at intervals no longer than 60 months following the previous performance test using the procedures in paragraphs (c)(1) through (3) of this section must be conducted within 60 months following the previous filterable particulate matter performance test.

(5) When the initial and repeat performance tests are conducted for filterable particulate matter, the owner or operator must also measure condensable particulate matter using Method 202 of Appendix M of part 51.

(d) The owner or operator must determine compliance with the TRS standards in § 60.283a, except § 60.283a(a)(1)(vi) and (4), as follows:

(1) Method 16 of Appendix A–6 of this part must be used to determine the TRS concentration. The TRS concentration must be corrected to the appropriate oxygen concentration using the procedure in § 60.284a(c)(3). The sampling time must be at least 3 hours, but no longer than 6 hours.

(2) The emission rate correction factor, integrated sampling and analysis procedure of Method 3B of Appendix A–2 of this part must be used to determine the oxygen concentration. The sample must be taken over the same time period as the TRS samples.

(3) When determining whether a furnace is a straight kraft recovery furnace or a cross recovery furnace, TAPPI Method T.624 (incorporated by reference—see § 60.17(d)(1)) must be used to determine sodium sulfide, sodium hydroxide, and sodium carbonate. These determinations must be made 3 times daily from the green liquor, and the daily average values must be converted to sodium oxide (Na_20) and substituted into the following equation to determine the green liquor sulfidity:

$$GLS = 100\ C_{Na_2S}/(C_{Na_2S}C_{NaOH}C_{Na_2CO_3})$$

Where:

GLS = green liquor sulfidity, percent.

C_{Na_2S} = concentration of Na_2S as Na_2O, mg/liter (gr/gal).

C_{NaOH} = concentration of NaOH as Na_2O, mg/liter (gr/gal).

$C_{Na_2CO_3}$ = concentration of Na_2CO_3 as Na_2O, mg/ liter (gr/gal).

(4) For recovery furnaces and lime kilns, in addition to the initial performance test required in this subpart and § 60.8(a), you must conduct repeat TRS performance tests at intervals no longer than 60 months following the previous performance test using the procedures in paragraphs (d)(1) and (2) of this section.

(e) The owner or operator must determine compliance with the TRS standards in § 60.283a(a)(1)(vi) and (a)(4) as follows:

(1) The emission rate (E) of TRS must be computed for each run using the following equation:

$$E = C_{TRS}\ F\ Q_{sd}/P$$

Where:

E = emission rate of TRS, g/kg (lb/ton) of BLS or ADP.

CTRS = average combined concentration of TRS, ppm.

F = conversion factor, 0.001417 g H_2S/m^3-ppm (8.846×10^{-8} lb H_2S/ft^3-ppm).

Q_{sd} = volumetric flow rate of stack gas, dscm/hr (dscf/hr).

P = black liquor solids feed or pulp production rate, kg/hr (ton/hr).

(2) Method 16 of Appendix A–6 of this part must be used to determine the TRS concentration (C_{TRS}).

(3) Method 2 of Appendix A–1 of this part must be used to determine the volumetric flow rate (Q_{sd}) of the effluent gas.

(4) Process data must be used to determine the black liquor feed rate or the pulp production rate (P).

(5) For smelt dissolving tanks, in addition to the initial performance test required in this subpart and § 60.8(a), you must conduct repeat TRS performance tests at intervals no longer than 60 months following the previous performance test using the procedures in paragraphs (e)(1) through (4) of this section.

(f) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this section:

(1) In place of Method 5 of Appendix A–3 of this part, Method 17 of Appendix A–6 of this part may be used if a constant value of 0.009 g/dscm (0.004 gr/dscf) is added to the results of Method 17 and the stack temperature is no greater than 204 °C (400 °F).

(2) In place of Method 16 of Appendix A–6 of this part, Method 16A, 16B, or 16C of Appendix A–6 of this part may be used.

(3) In place of Method 3B of Appendix A–2 of this part, ASME PTC 19.10–1981 [Part 10] (incorporated by reference—see § 60.17(h)(4)) may be used.

§ 60.286a Affirmative defense for violations of emission standards During malfunction.

In response to an action to enforce the standards set forth in §§ 60.282a and 60.283a, you may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at § 60.2. Appropriate penalties may be assessed if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense must not be available for claims for injunctive relief.

(a) *Assertion of affirmative defense.* To establish the affirmative defense in any action to enforce such a standard, you must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that: (1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred; and

(3) The frequency, amount, and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis must also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) *Report.* The owner or operator seeking to assert an affirmative defense must submit a written report to the Administrator with all necessary supporting documentation that explains how it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report must be included in the first periodic compliance, deviation report or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance, deviation report or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance, deviation report or excess emission report due after the initial occurrence of the violation of the relevant standard.

§ 60.287a Recordkeeping.

(a) The owner or operator must maintain records of the performance evaluations of the continuous monitoring systems.

(b) For each continuous monitoring system, the owner or operator must maintain records of the following information, as applicable:

(1) Records of the opacity of the gases discharged into the atmosphere from any recovery furnace or lime kiln using an ESP emission control device, except as specified in paragraph (b)(6) of this

section, and records of the ESP secondary voltage and secondary current (or total secondary power) averaged over the reporting period for the opacity allowances specified in § 60.284a(e)(1)(ii) and (iv).

(2) Records of the concentration of TRS emissions on a dry basis and the percent of oxygen by volume on a dry basis in the gases discharged into the atmosphere from any lime kiln, recovery furnace, digester system, brown stock washer system, multiple-effect evaporator system, or condensate stripper system, except where the provisions of § 60.283a(a)(1)(iii) or (iv) apply.

(3) Records of the combustion temperature at the point of incineration of effluent gases which are emitted from any digester system, brown stock washer system, multiple effect evaporator system, black liquor oxidation system, or condensate stripper system where the provisions of § 60.283a(a)(1)(iii) apply.

(4) For any recovery furnace, lime kiln, or smelt dissolving tank using a wet scrubber emission control device:

(i) Records of the pressure drop of the gas stream through the control equipment (or smelt dissolving tank scrubber fan amperage), and

(ii) Records of the scrubbing liquid flow rate (or scrubbing liquid supply pressure).

(5) For any recovery furnace or lime kiln using an ESP control device:

(i) Records of the secondary voltage of each ESP collection field, and

(ii) Records of the secondary current of each ESP collection field, and

(iii) If used as an alternative to secondary voltage and current, records of the total secondary power of each ESP collection field.

(6) For any recovery furnace or lime kiln using an ESP followed by a wet scrubber, the records specified under paragraphs (b)(4) and (5) of this section.

(7) Records of excess emissions as defined in § 60.284a(d).

(c) For each malfunction, the owner or operator must maintain records of the following information:

(1) Records of the occurrence and duration of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment.

(2) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

§ 60.288a Reporting.

(a) For the purpose of reports required under § 60.7(c), any owner or operator subject to the provisions of this subpart must report semiannually periods of excess emissions defined in 60.284a(d).

(b) Within 60 days after the date of completing each performance test (defined in § 60.8) as required by this subpart you must submit the results of the performance tests, including any associated fuel analyses, required by this subpart to the EPA as follows. You must use the latest version of the EPA's Electronic Reporting Tool (ERT) (see *http://www.epa.gov/ttn/chief/ert/index.html*) existing at the time of the performance test to generate a submission package file, which documents performance test data. You must then submit the file generated by the ERT through the EPA's Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed by logging in to the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). Only data collected using test methods supported by the ERT as listed on the ERT Web site are subject to the requirement to submit the performance test data electronically. Owners or operators who claim that some of the information being submitted for performance tests is confidential business information (CBI) must submit a complete ERT file including information claimed to be CBI on a compact disk, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAPQS/CORE CBI Office, Attention: WebFIRE Administrator, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT file with the CBI omitted must be submitted to the EPA via CDX as described earlier in this paragraph. At the discretion of the delegated authority, you must also submit these reports, including the confidential business information, to the delegated authority in the format specified by the delegated authority. For any performance test conducted using test methods that are not listed on the ERT Web site, the owner or operator must submit the results of the performance test to the Administrator at the appropriate address listed in § 60.4.

(c) Within 60 days after the date of completing each CEMS performance evaluation test as defined in § 60.13, you must submit relative accuracy test audit (RATA) data to the EPA's Central Data Exchange (CDX) by using CEDRI in accordance with paragraph (b) of this section. Only RATA pollutants that can be documented with the ERT (as listed on the ERT Web site) are subject to this requirement. For any performance evaluations with no corresponding RATA pollutants listed on the ERT Web site, the owner or operator must submit the results of the performance evaluation to the Administrator at the appropriate address listed in § 60.4.

(d) If a malfunction occurred during the reporting period, you must submit a report that contains the following:

(1) The number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded.

(2) A description of actions taken by an owner or operator during a malfunction of an affected facility to minimize emissions in accordance with § 60.11(d), including actions taken to correct a malfunction.

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Part V

Department of Education

34 CFR Chapter II

Final Priorities, Requirement, Definitions, and Selection Criteria—Enhanced Assessment Instruments; Final Rule

Applications for New Awards; Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments—Kindergarten Entry Assessment Competition; Notice

DEPARTMENT OF EDUCATION

34 CFR Chapter II

[Docket ID: ED–2012–OESE–0033]

Final Priorities, Requirement, Definitions, and Selection Criteria—Enhanced Assessment Instruments

[CFDA Number: 84.368.]

AGENCY: Office of Elementary and Secondary Education, Department of Education.

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

SUMMARY: The Assistant Secretary for Elementary and Secondary Education announces priorities, a requirement, definitions, and selection criteria under the Enhanced Assessment Instruments Grant program, also called the Enhanced Assessment Grants (EAG) program. The Assistant Secretary may use one or more of these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2013 and later years. We take this action to focus Federal financial assistance on the pressing need to improve the assessment instruments and systems used by States to accurately measure student academic achievement and growth under the Elementary and Secondary Education Act of 1965, as amended (ESEA).

DATES: These priorities, requirement, definitions, and selection criteria are effective June 24, 2013.

FOR FURTHER INFORMATION CONTACT: Erin Shackel, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W110, Washington, DC 20202. Telephone: (202) 453–6423 or by email: *Erin.Shackel@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Purpose of Program: The purpose of the EAG program is to enhance the quality of assessment instruments and systems used by States for measuring the academic achievement of elementary and secondary school students.

Program Authority: 20 U.S.C. 7301a. We published a notice of proposed priorities, requirements, definitions, and selection criteria (NPP) for this program in the **Federal Register** on January 25, 2013 (78 FR 5337). The NPP contained background information and our reasons for proposing the particular priorities, requirement, definitions, and selection criteria. In response to comments we received on the NPP, we have made revisions to Priority 1—Kindergarten Entry Assessment (KEA priority), and selection criteria.

- We revised the KEA priority to require that the purpose of a KEA developed or enhanced under the priority is to provide valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness (as defined in this notice) at the time of entry into kindergarten. Correspondingly, we also revised paragraph (d) of the KEA priority and selection criterion (h), to reflect activities that we anticipate would be informed by the results of a KEA.
- We expanded the prohibition against inappropriate use of KEA results.
- We also revised the selection criterion to ask applicants to describe how a proposed KEA would be included as a component of a State's student assessment system and to include references to ''early learning practitioners,'' ''experts in early learning and development standards,'' ''Early Learning Advisory Councils'' and ''families'' as examples of key stakeholders who may be involved the development of a KEA.

Public Comment: In response to our invitation in the NPP, 26 parties submitted comments on the proposed priorities, requirement, definitions, and selection criteria. We group major issues according to subject. Generally, we do not address technical and other minor changes.

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

Priority 1—Kindergarten Entry Assessment

Comment: Many commenters provided positive feedback about the potential of a Kindergarten Entry Assessment (KEA), as developed or enhanced according to the KEA priority, to improve instruction and children's learning opportunities in the early years. All of these commenters expressed support for the KEA priority, stating that it would bring focus to the importance of early learning opportunities. Several commenters specifically agreed that valid and reliable assessments, such as those proposed under this priority, when used as one of multiple measures, help us know whether children are making progress and provide direction on how to improve instruction and information regarding necessary teacher support. One commenter stated that new assessments for young children, such as the ones the KEA priority would support, are important, especially if they help young children attain the skills they need to learn how to read. One commenter noted that the KEA priority is a natural extension of the Department's past programmatic funding of evidence-based early education interventions. One commenter indicated that the development or enhancement of KEAs would be a meaningful step toward improving assessment practices. One commenter applauded the Department's timeliness in proposing the KEA priority, stating the field wants to work on efforts like those the KEA priority would support but that States do not have sufficient funds to do so.

Discussion: We agree with the commenters that the development or enhancement of a well-designed and properly implemented KEA, which the KEA priority would support, can help improve children's learning outcomes. We also appreciate the commenters' recognition of the multiple benefits that such a KEA can provide.

Changes: None.

Comment: Many commenters expressed concerns about three potential uses of assessment data and how the results of a KEA developed or enhanced under the KEA priority may or may not be appropriate for these uses.

First, many commenters articulated concerns that the KEA results would be used to evaluate the programs that children attend in the years prior to kindergarten. These commenters raised several different issues. A couple of commenters stated that while they believe that data resulting from the KEA would be beneficial to early childhood programs, the KEA should not be used as an accountability measure or a reason to stop funding specific early learning programs. Some commenters recommended that the priority explicitly state that KEA results not be used to penalize or remove funding from early learning programs. Some commenters stated that KEAs cannot be valid and reliable for the purposes of evaluating early childhood programs. One commenter stated that children are not randomly enrolled in early childhood programs and that this compromises the validity of KEA results for the purpose of evaluating the programs children attend. One commenter added that KEAs do not provide enough information to evaluate a program, and another said that proper evaluation of early childhood programs requires a more focused and higher

quality study. One commenter expressed concern that early learning programs would inappropriately change the work they do with children based on what the KEA assessed.

Second, many commenters expressed concern about the use of KEA results to evaluate staff effectiveness. One commenter expressed concern that, even though the NPP stated the Department does not intend to use existing selection criterion (b) with the KEA priority, States would use the KEA results to measure teacher effectiveness in the absence of a comprehensive teacher evaluation system. One commenter stated using the KEA as part of high-stakes testing would lead to ''undue pressure on children.'' Another commenter stated that test scores cannot be used to determine effectiveness of providers or teachers; and some other commenters added that results from the KEA should not be used to determine retention of, or incentives for, staff. One commenter stated that the Department clearly included in the proposed KEA priority that the results of the KEA may not be used to deny entry into kindergarten and suggested that the KEA priority also address other potential misuses of the KEA, such as teacher effectiveness evaluations. Another commenter recommended that misuses of the KEA results should be addressed in selection criterion (h)(4), which lists the intended uses of the data. One commenter offered that if a KEA developed or enhanced under the KEA priority is to be used for teacher evaluation, it must be designed to be valid and reliable for the purpose of evaluating teachers and that other measures such as reviews of a professional portfolio must be included in the teacher evaluation. Finally, one commenter stated that the uses of a KEA should be limited to the following: guiding instruction, promoting skills development, and closing learning gaps.

Third, many commenters supported the language in the KEA priority stating that a KEA developed or enhanced under the priority must not be used to prevent children's entry into kindergarten. Several commenters stated concern that results from a KEA could be used to penalize children. Several commenters praised the Department's inclusion of language stating that a KEA must not be used to prohibit entry into kindergarten.

Discussion: We appreciate these concerns but believe most of them are adequately addressed by the priority. A KEA developed or enhanced under the KEA priority would provide information on children's learning and development at the time of kindergarten entry. Unless the KEA were designed to measure growth over time, which is not part of selection criterion (h) regarding the KEA design, results could not be validly used as a single measure to evaluate the effectiveness of a program or staff.

Furthermore, as indicated in the proposed KEA priority, a KEA developed or enhanced under the priority must not be used to prevent children's entry into kindergarten. We recognize that the results of a KEA should not be used to deny children's entry into kindergarten and have included the language in the KEA priority prohibiting inappropriate uses of the KEA results for this reason.

In response to these comments and the next, which state that the Department has identified too many purposes that a KEA developed or enhanced under the KEA priority must meet, we have revised the purpose section of the priority to specify that a KEA must focus on one key purpose: providing valid, reliable, and fair information on each child's learning and development at kindergarten entry.

We also have added to the KEA priority that a KEA developed or enhanced under this priority may not be used for purposes for which it has not been validated or as a single measure for high-stakes decisions. High-stakes decisions may include, but are not limited to, dismissal of or rewards for staff and closure of programs. However, we expect that the KEA will be part of a comprehensive assessment system, and a comprehensive assessment system may be used for various purposes and decisions.

Changes: We have revised the KEA priority to state that the purpose of a KEA developed or enhanced under this priority must be to provide valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness at the time of entry into kindergarten.

In addition, we have expanded the prohibition against inappropriate use of KEA results. The prohibition now states that a KEA developed or enhanced under this priority must not be used for purposes for which it has not been validated or as a single measure for high-stakes decisions.

The data section of the KEA priority and selection criterion (h) regarding KEA design have been revised to reflect activities that we anticipate would be informed by the results of a KEA. Paragraph (a)(2) of the proposed KEA priority is now integrated into selection criterion (h)(4)(iii). Proposed paragraph (a)(1) is now integrated into selection criterion (h)(4)(iv). And, finally, proposed paragraph (a)(4) is now integrated into selection criterion (h)(4)(v).

Comment: Many commenters addressed the multiple purposes included in the proposed KEA priority. The commenters expressed concern that a KEA developed or enhanced under this priority would include too many purposes. Many of these commenters argued that too many purposes for the KEA would make the assessment invalid for many, if not all, of the required purposes. Several of these commenters recommended that we clarify the purpose(s) of the KEA to be developed under the priority. One commenter indicated that the proposed purposes for the KEA were clear.

Discussion: We agree with the commenters that the proposed priority included too many purposes for a KEA developed or enhanced using funds from this grant program. We are revising the KEA priority to provide that a KEA developed or enhanced under the priority must focus on the single purpose of providing, at the time of entry into kindergarten, valid, reliable and fair information on each child's learning and development across the essential domains of school readiness. We also are revising paragraph (d) of the KEA priority and selection criterion (h), regarding KEA design, to reflect activities that we anticipate would be informed by the results of a KEA.

Changes: We have revised the language in the KEA priority and selection criteria by:

(1) Stating that the purpose of a KEA developed or enhanced under the priority must be to provide, at kindergarten entry, valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness;

(2) moving paragraph (a)(5) of the proposed KEA priority to paragraph (a)(2)(i) of the final KEA priority;

(3) moving paragraph (a)(3) of the proposed KEA priority to paragraph (d) of the KEA priority as well as to selection criterion (h)(4)(i);

(4) integrating proposed paragraph (a)(2) of the KEA priority into selection criterion (h)(4)(iii);

(5) integrating proposed paragraph (a)(1) of the KEA priority into selection criterion (h)(4)(iv);

(6) integrating proposed paragraph (a)(4) of the KEA priority into selection criterion (h)(4)(v); and

(7) removing proposed selection criterion (h)(4)(i).

Comment: One commenter recommended that we revise the priority to state one of the purposes of

a KEA is to close the achievement gap before children enter kindergarten.

Discussion: The Department is funding this priority to develop or enhance KEAs as part of an EAG competition because we believe that, over time, the KEA, when used as part of a comprehensive early learning assessment system (as defined in this notice), will provide data that inform State and local efforts to improve child learning outcomes and help close achievement gaps. We wish to focus on the purpose of a KEA providing, at kindergarten entry, valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness; thus, we decline to make the change recommended by this commenter.

Changes: None.

Comment: One commenter asserted that passage of an amended Universal Prekindergarten Act must come before the creation of KEAs and that assessments must be administered to children and the results used in the years prior to kindergarten in order for the assessments to affect the learning and development of children.

Discussion: We agree that data obtained from assessments and screenings are helpful before kindergarten, and we believe that their use should be continued by early learning and development programs to identify special needs and guide children's learning and development. For example, it is particularly helpful to kindergarten programs when preschool programs use assessment tools to generate data and anecdotal information that can be shared about incoming students. While high-quality universal preschool would help to prepare children for success in school and in life, its absence does not negate the importance of the development and use of a KEA. Therefore, we do not believe that passage of an amended Universal Prekindergarten Act, or any other legislation calling for universal preschool, need be in place before assessments such as a KEA can be used to collect information about children's learning and development. Regardless of whether children attend preschool, knowing the status of children's learning and development when they enter kindergarten is important for helping to guide instruction for children and informing decision-makers on the allocation of resources.

Changes: None.

Comment: A few commenters suggested that we use a different term to refer to a KEA. One commenter expressed concern that the word ''entry'' in the title suggests that the assessment could be used to deny or grant entry to kindergarten programs. Another commenter proposed not using the word ''entry'' so that a KEA also could be used for on-going formative assessment purposes. Finally, a third commenter suggested the terms ''kindergarten preparedness assessment'' or ''kindergarten readiness assessment'' as alternatives.

Discussion: While we appreciate the commenters' concerns and suggestions for alternate names, we do not agree to make the change. At this time, 14 States are currently receiving funding through Race to the Top—Early Learning Challenge (RTT–ELC), and KEAs were an element of that competition. Altering the Department's terminology could cause confusion in the field. Using the name ''KEA'' promotes consistency across Department programs.

As to denying admission to kindergarten, an assessment developed or enhanced under the KEA priority must be administered soon enough after a child's enrollment into kindergarten to achieve the purposes for which the assessment was developed. The KEA priority specifically prohibits a KEA from being used to prevent a child's entry into kindergarten.

Changes: None.

Comment: Some commenters asked if a one-time screening tool developed or enhanced under the KEA priority would be the most appropriate tool to meet the intended purpose of a KEA. These commenters recommended the use of the KEA as an on-going formative assessment.

Discussion: A KEA developed or enhanced under the KEA priority must provide information on each child's learning and development across the essential domains of school readiness at kindergarten entry. A KEA is merely one part of a comprehensive early learning assessment system; and we acknowledge the importance of the other components, including formative assessments (as defined in this notice), that are included in a comprehensive early learning assessment system.

Furthermore, the KEA priority does not prohibit the administration of the KEA multiple times during the year. For example, a grant applicant may propose to administer the KEA once soon enough after enrollment to achieve the purposes for which the assessment was developed; or plan to use the KEA, or elements of the KEA, multiple times throughout the kindergarten year. To preserve focus on the purpose of the KEA priority, and because we believe that the KEA can be part of on-going formative assessments, we decline to make the recommended changes.

Changes: None.

Comment: Many commenters addressed the type or form of the assessment that would be developed or enhanced under the KEA priority. Several commenters suggested that the priority emphasize formative assessments to strengthen and support instruction throughout the kindergarten year. One commenter suggested expanding the KEA priority to include formative assessments across infant, toddler, preschool, and kindergarten programs, as well as early elementary school grades. One commenter recommended expanding the KEA priority to include formative assessments for either ages three through five or kindergarten through third grade. One commenter suggested revising the proposed KEA priority to allow for the development of formative assessments that would produce data for multiple uses including: Enabling teachers to describe each child's progress in early learning programs or in kindergarten through third grade classrooms; illuminating the extent to which kindergarten through third grade strategies are successful in improving student performance over time; and allowing State policy leaders to understand the extent to which investments in different types of early care and education programs are associated with patterns of progress. One commenter suggested that a KEA developed or enhanced under the KEA priority could be administered multiple times throughout the kindergarten year to guide instruction.

Discussion: We agree that formative assessments are important and have defined a comprehensive early learning assessment system to include both formative assessments and a KEA. However, we have designed the KEA priority to focus on one part of a comprehensive early learning assessment system—specifically, an assessment at kindergarten entry. The skills and knowledge a KEA assesses at this early stage are the foundations for subsequent learning in a kindergarten through twelfth grade educational career. We note that the KEA priority does not prohibit an applicant from proposing to use the KEA multiple times throughout the kindergarten year, when useful and appropriate.

Changes: None.

Comment: One commenter suggested that we give priority to existing assessment tools or ongoing efforts to enhance or adapt existing assessment tools.

Discussion: The statutory purpose of the EAG program is to enhance the quality of assessment instruments and

systems used by States for measuring the academic achievement of elementary and secondary school students; and thus we focus the program activities, and the KEA priority, on student assessment. Applicants may propose to enhance existing tools, but we will not give such work any additional priority over proposals to develop new assessments or tools. To meet the KEA priority, existing assessment tools would need to be enhanced to meet all of the requirements of the KEA priority and would need to be made freely available per program requirements. While we understand the value of tools to improve teaching and learning, in light of the statutory program purpose and our efforts to strategically target resources, we decline to add a priority, revise the KEA priority, or award more points for the enhancement or adaption of tools beyond those described in the KEA priority.

Changes: None.

Comment: One commenter suggested expanding the KEA priority to support the development or enhancement of an assessment for students entering first grade. The commenter noted that such an expanded priority may be more relevant for States with laws defining the age in which compulsory education begins later than kindergarten.

Discussion: While assessments at every grade can be useful, the Department has chosen to develop a KEA priority because of the critical nature of this type of assessment in a comprehensive early learning assessment system. Though only eight States, the District of Columbia, and Puerto Rico require compulsory education beginning at age five (*www.ncsl.org/documents/educ/ECSCompulsoryAge.pdf*), over 92 percent of five year-olds in the United States attend kindergarten (*www.census.gov/hhes/school/data/cps/2010/tables.html*). Therefore, all States can benefit from the data generated by a KEA. Additionally, due to limited resources available to the EAG program, we decline to expand the KEA priority.

Changes: None.

Comment: Several commenters did not support the proposed KEA priority for various reasons. One commenter questioned whether assessments developed according to the KEA priority would be useful for teachers in improving instruction. A couple of commenters stated that they did not believe KEAs developed or enhanced under this priority would be useful generally. One commenter expressed concern that KEA results would contribute to students with disabilities being separated from other students and classes. One commenter stated that school-readiness benchmarks are artificial and do not take into account kindergarteners' development or growth in areas such as creativity, learning to share, taking turns, and being respectful. Finally, one commenter stated that the KEA would just be a standardized test for kindergartners.

Discussion: While we understand these concerns, we have designed the KEA priority in ways we believe will support the appropriate use of the assessments. The revised priority specifies that a KEA designed under this priority must provide valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness, with each domain making a significant contribution to the overall comprehensive score. Part of a well-designed assessment is its ability to accommodate children across varying developmental levels and standardizing interpretation of results. We believe that appropriately using the results of a well-designed KEA will assist teachers in improving instruction for all children by including all developmental levels, children with disabilities, and English learners (as defined in this notice). The KEA must not be used to prevent children's entry into kindergarten and must not by itself be used to make high-stakes decisions.

Changes: None.

Comment: Several commenters stated they do not believe that investing in developing a KEA is a good use of funds. One commenter asserted that the results from KEAs would not be useful by the time the data generated by the KEA are available. One commenter stated that a KEA would disrupt the quality of education and that funds should be used for other educational purposes. The third commenter expressed concern that a KEA would generate a single ideal profile of ''school readiness.''

Discussion: Our goal for the KEA priority is to fund the development or enhancement of well-designed KEAs that will provide valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness. When included as part of a comprehensive early learning assessment system, we believe that KEAs developed or enhanced under the KEA priority will provide data that can inform States' efforts to improve child learning outcomes and help close achievement gaps. Providing funding for the development of this tool is one way the Department is supporting quality schools and instruction. In establishing this priority, we are responding to interest from the field for a KEA, as evidenced by the number of States that committed in their RTT–ELC applications to implement a statewide KEA.

Furthermore, we believe the KEA priority will produce useful data in a timely manner. In paragraph (d)(1) of the KEA priority, as well as selection criterion (h)(4)(i), we ask applicants to explain how the proposed KEA will produce data and information that may be used to guide individualized instruction for children enrolled in kindergarten and throughout the school year. Additionally, paragraph (b)(9) of the KEA priority requires that a KEA developed or enhanced under the priority be administered soon enough after a child's enrollment in kindergarten to achieve its purpose. In paragraph (b)(5) of the KEA priority, we ask applicants to design a KEA that will provide a summative assessment of each child's learning and development at kindergarten entry across the essential domains of school readiness. We believe that assessments of young children should address the full range of early learning and development; and accordingly have included, in the definition of ''essential domains of school readiness,'' five domains adapted from the National Education Goals Panel (*http://govinfo.library.unt.edu/negp/reports/prinrec.pdf*), to provide a comprehensive interpretation of school readiness. Therefore, we disagree that the KEA would produce a single ideal of school readiness and accordingly decline to make any changes.

Changes: None.

Comment: One commenter noted that children's enrollment in kindergarten programs varies, such as from half-day to full-day or the number of school days in a year, and expressed concern that results from a KEA developed or enhanced under the KEA priority could be corrupted if linked to other summative assessment results at a future point in time.

Discussion: We agree that it would be improper to link results in this way. A KEA that would be developed or enhanced under the KEA priority would be an assessment given at the beginning of the kindergarten school year and must be aligned to early learning and development standards (as defined in this notice). Subsequent kindergarten assessments designed by States or groups of States should be aligned to kindergarten standards of those States. Since a KEA supported by the priority and an assessment at a later point in time would be aligned to different

standards, comparability of these assessments would be questionable. Considering that any assessment after kindergarten entry would be aligned to different content standards, the KEA developed or enhanced under the KEA priority would be a static assessment that does not measure progress on standards at higher grade levels.

Changes: None.

Comment: Several commenters discussed the importance of a KEA fitting within a more comprehensive assessment or educational system. A couple of these commenters added that KEAs developed or enhanced under the priority should be based on a broader set of factors, such as curriculum, instructional strategies, ongoing assessment, and professional development. One of these commenters also suggested awarding extra points to applicants that plan to develop a KEA based on such broader factors. Finally, one commenter expressed concern about uncoordinated policies and initiatives and noted that policies need to come together coherently in the classroom.

Discussion: We agree that KEAs developed or enhanced under the priority should be part of States' larger assessment and educational systems, and we added selection criterion (h)(10) to address this issue. In paragraph (b)(1) of the KEA priority, we require that a KEA developed or enhanced under the KEA priority be a component of a State's student assessment system, including a State's comprehensive early learning assessment system. We now go further and have added a similar factor to the KEA design selection criteria in order to award points based on the quality of an applicant's plans in this area. Finally, we note that other requirements and factors can support the integration of a KEA developed or enhanced under the priority into larger systems. For example, a KEA must: be aligned with early learning and development standards (as defined in this notice) (KEA priority paragraph (b)(2)); and provide for broad reporting of results (KEA priority paragraph (d)(2) and selection criterion (h)(9)).

Changes: We have added factor (h)(10) to the KEA design selection criterion, which asks each applicant to describe how the KEA it proposes to develop or enhance will be included as a component of a State's, or States', student assessment systems, and how the KEA it proposes to develop or enhance will be included as a component of a State's, or States', comprehensive early assessment system (as defined in this notice), if a comprehensive early learning assessment system exists.

Comment: None.

Discussion: In reviewing paragraph (b)(1) of the proposed KEA priority, which states that a KEA must be a component of a State's student assessment system, and its reference to ''each State included in an application,'' we have determined that the language does not adequately distinguish between applicant States, consortium member States, and States that may be included in an application in another capacity (e.g., as a collaborating, non-governing, or observing State). As a result, we have revised this paragraph to provide clarification.

Changes: We have revised paragraph (b)(1) of the KEA priority to clarify that it applies to the applicant State and, if the State applies as part of a consortium, each State in the consortium in which a comprehensive early learning assessment system exists.

Comment: One commenter suggested adding language to the KEA priority design element and to factors in the KEA design selection criteria indicating that the KEA must be included in the continuous review and evaluation of the State longitudinal data system (SLDS) so that the early learning and development standards are both attainable and not pushed down from higher grades.

Discussion: We believe that early learning and development standards, as defined in this notice, reflect reasonable and attainable expectations for children. The levels of performance for the KEA would be based on those standards, not merely pushed down from higher grades. The Department is purposely giving flexibility to States to decide how they want to develop the assessment framework, and nothing prohibits an applicant from proposing what the commenters suggests.

Changes: None.

Comments: Many commenters expressed concern that most States do not have established standards for kindergarten through the early elementary grades that include all of the essential domains of school readiness and that such standards would need to be established before a KEA could be developed or enhanced. A couple of commenters suggested requiring an assurance or adding a requirement that States awarded a grant under this priority revise their standards in the early grades to include all of the essential domains of school readiness. One commenter stated that a KEA should not be developed or implemented until kindergarten standards covering all of the essential domains of school readiness are established.

Discussion: Most States have early learning and development standards for the year prior to kindergarten that include all of the essential domains of school readiness.[1] The KEA, which must be aligned to the State's early learning and development standards, would be administered at the beginning of kindergarten and would not be designed to assess students' performance against kindergarten standards. Supporting the development of kindergarten through third grade standards that address all of the domains is beyond the scope of this priority, and we believe an assurance requiring States to revise their kindergarten or primary grade standards would be unnecessarily burdensome. Based on these considerations, we decline to make the changes requested.

Changes: None.

Comment: Many commenters agreed that the KEA should address multiple domains, not just the cognitive domain. They expressed concern that, without including multiple domains in the standards that are used to assess children at the end of kindergarten, teachers would focus on the cognitive domain, including literacy and mathematics, and minimize the other domains, such as social, emotional, and physical learning. One commenter pointed out that research links emotional competence to cognitive performance. Another commenter stated that a KEA addressing all of the essential domains will help move the emphasis in kindergarten through third grade beyond literacy and mathematics and provide a better connection to preschool programs.

Discussion: We agree, and this is why the priority requires that the early learning and development standards cover all of the essential domains of school readiness, not just the cognitive domain. As defined in this notice, these domains include: language and literacy development, cognition and general knowledge (including early mathematics and early scientific development), approaches toward learning, physical well-being and motor development (including adaptive skills), and social and emotional development. While the Department believes that all domains are important to learning and that the KEA must be aligned with early learning and development standards that address the essential domains of

[1] Barnett, W.S., Carolan, M.E., Fitzgerald, J., & Squires, J.H. (2011). *The state of preschool 2011: State preschool yearbook*. New Brunswick, NJ: National Institute for Early Education Research.

school readiness, supporting the development of kindergarten and primary grade standards that address all of these domains is beyond the scope of this program. We agree, however, that implementing a KEA addressing all of the essential domains will likely contribute to standards used for kindergarten through third grade that emphasize multiple domains.

Changes: None.

Comment: A couple of commenters suggested including additional areas in the essential domains of school readiness, specifically creative arts, social studies, and play. One commenter applauded the Department for requiring that the standards used for the KEA be aligned to the essential domains of school readiness.

Discussion: We do not believe that the suggested change is necessary. Our definition of the essential domains of school readiness is based on that of the National Education Goals Panel, which developed five domains that are widely accepted and utilized by the early learning field. Most States have already included these domains in their early learning and development standards. Moreover, the additional areas suggested by commenters are already included within the essential domains of school readiness. Specifically, creative arts expression is part of the Approaches to Learning domain, and social studies is part of the Cognition and General Knowledge domain. Play is not a domain but rather a method by which children learn. Finally, it is important to note that the KEA priority does not limit States from including additional domains.

Changes: None.

Comment: One commenter suggested we add the phrase ''reasonable and attainable expectations'' of what a child should know and be able to do in paragraph (b)(4) of the KEA priority. Another commenter expressed concern about standards being pushed down from higher grades rather than scaffolding the standards for each age group, as the commenter noted sound science would suggest be done.

Discussion: Our definition of early learning and development standards requires these standards to be a set of expectations, guidelines, or developmental milestones that, along with other specifications, describe what all children from birth to kindergarten entry should know and be able to do, and be appropriate for each age group (e.g., infants, toddlers, and preschoolers) rather than pushed down from kindergarten through twelfth grade. These standards must also be universally designed and developmentally, culturally, and linguistically appropriate, including for English learners and for children with disabilities or developmental delays. The early learning and development standards are based on the essential domains of school readiness as adapted from the National Education Goals Panel. The levels of performance will be based on those standards. We believe that early learning and development standards that meet this definition would be reasonable and attainable expectations for all children and that it is not necessary to include the phrase suggested by the commenter.

Changes: None.

Comment: One commenter suggested that we require KEA administrators to be certified or credentialed early childhood educators with three or more years teaching experience.

Discussion: Paragraph (b)(11) of the KEA priority specifically requires that a KEA developed or enhanced under this priority be administered by a trained assessor or assessors. Beyond this requirement, we do not think it is appropriate to be more prescriptive in the qualifications that KEA administrators should meet and believe States are in the best position to make these decisions.

Changes: None.

Comment: A couple of commenters suggested revising the language of the KEA priority to emphasize that a KEA should be developed or enhanced in such a way that its administration does not burden teachers or unduly detract from instructional time. One of these commenters specifically suggested that we add this requirement to paragraph (b)(10) of the KEA priority.

Discussion: In paragraph (b)(13) of the KEA priority, we require that the development and implementation of the KEA be cost-effective; and in paragraph (b)(11) we require that the KEA be administered by a trained assessor. If States decide that having teachers conduct the assessments is burdensome or detracts from instructional time, they may use trained assessors other than the classroom teacher. Other States may see the value in having teachers work one-on-one with students in conducting assessments and not see it as a burden, but instead as a good use of classroom time.

Changes: None.

Comment: A couple of commenters applauded the Department for explicitly requiring the inclusion of English Learners and children with disabilities or development delays in paragraph (b) of the KEA priority.

Discussion: The Department agrees that assessments, such as a KEA, should be designed to include all students, including English Learners and children with disabilities or developmental delays.

Changes: None.

Comment: One commenter suggested that the KEA priority include a focus on instruction for students with disabilities, including assessing the impact of instruction related to social emotional learning for students with disabilities.

Discussion: We believe the KEA priority adequately addresses the stated concerns. An assessment developed according to the KEA priority would be aligned to early learning and development standards that address the essential domains of school readiness. Social and emotional learning is one of the essential domains of school readiness, and paragraph (b)(5) of the KEA priority requires that a KEA provide a summative assessment of each child's learning across these domains. In addition, paragraphs (b)(7) and (b)(8) of the KEA priority require that any KEA developed or enhanced under the priority be developed to include children with disabilities.

Changes: None.

Comment: A couple of commenters stated that research is needed to support work under the KEA priority. One of these commenters stated that the KEA priority gives appropriate attention to the need for adequate research-based early learning assessment practices. The other commenter stated that more research and guidance are needed in order for States to develop a KEA that would meet the requirements of the KEA priority.

Discussion: We agree that the design and development of a KEA should be research-based and believe that paragraph (c) of the KEA priority ensures this will occur. The National Research Council report on early childhood assessments, as referenced, provides a sufficient research base and guidance in order for States to develop a KEA that would meet the requirements of the KEA priority. In addition, the Department has provided funding for the Regional and National Comprehensive Centers, particularly the Center on Enhancing Early Learning Outcomes and the Center on Standards and Assessments Implementation, to provide technical assistance to States. The assistance includes support to States as they develop and implement early learning assessments such as the KEA. In light of this requirement and these resources, we decline to make changes.

Changes: None.

Comment: Several commenters expressed support for paragraph (c)(2) of the KEA priority that requires a KEA developed or enhanced under the KEA priority to be consistent with the recommendations of the National Research Council (NRC) report on early assessment. A couple of commenters recommended that, in addition to the NRC report, the KEA also be consistent with the recommendations in the National Association for the Education of Young Children's report ''Developing Kindergarten Readiness and Other Large-Scale Assessment Systems'' (*www.naeyc.org/files/naeyc/file/research/Assessment_Systems.pdf*). Another commenter suggested that we add the National Academy of Science report, ''Early Childhood Assessment: Why, What and How?'' to the list of referenced reports. Another commenter suggested we revise the KEA priority to require that a KEA developed or enhanced under the priority be consistent with the Head Start Outcomes Framework.

Discussion: We agree that resources on good practices are helpful when developing or enhancing a KEA and comprehensive assessment system. As outlined in the NPP and included in the final priorities, requirement, definitions, and selection criteria in this notice, we require that KEAs developed or enhanced under this priority be consistent with the NRC guidelines in order to be consistent with the direction we received from Congress that States receiving grants under the RTT–ELC program provide an assurance that any use of early childhood assessments conform to the NRC report. We decline to require applicants to develop KEAs consistent with any other report without a similar directive from Congress.

While we consider the Head Start Outcomes Framework helpful in guiding instruction in Head Start classrooms, we believe, consistent with the requirements of the RTT–ELC program, that the KEA must be aligned with the State's early learning and development standards and that it would be a burden for States to align the KEA with both the State early learning and development standards and the Head Start Outcomes Framework. The early learning and development standards cover the essential domains of school readiness, are the standards used across early learning and development programs, and are sufficient to be the standards to which the KEA is aligned. Based on these considerations, we added additional language to paragraph (c)(2) of the KEA priority that the KEA must measure children's learning and development at kindergarten entry in ways that are consistent with current research and best practices in the field.

Changes: We added language to paragraph (c)(2) of the KEA priority that the KEA must measure children's learning and development at kindergarten entry in ways that are consistent with current research and best practices in the field, which may include the resources the commenter has cited.

Comment: Several commenters suggested that the Department coordinate with the U.S. Department of Health and Human Services (HHS) on the application and the awarding of grants in competitions that use the KEA priority.

Discussion: The Department of Education and HHS have worked closely together over the last four years on the Early Learning Interagency Policy Board and in developing and implementing the RTT–ELC program. Much of the language used in the KEA priority was informed by the FY 2011 Notice Inviting Applications for the jointly administered RTT–ELC program. We will continue to work with HHS to support early learning, including, where appropriate, early learning efforts funded under an EAG priority.

Changes: None.

Comment: Many commenters expressed concern about possible misuses of the KEA results. One commenter expressed concern that potential uses of a KEA developed or enhanced under the KEA priority could be unfair to certain groups of students and warned about potential biases in a KEA and KEA results being misinterpreted and misused. One commenter stated that results should not be used to label children. Another commenter pointed to the limited value of a single point in time evaluation of students. One commenter expressed concern that excessive focus on testing can distort the education process. Another commenter suggested including safeguards against outcomes of narrow assessments, restricting innovation, and data driven curricula. Finally, a commenter expressed concern about possible misuses of the results of the KEAs and applauded the Department for including safeguard language.

Discussion: We agree with the commenters' concerns regarding fairness and in order to help ensure the misuses cited by commenters do not occur and to emphasize fairness, we are making several changes to the priority. We note that existing requirement (a), as well as selection criterion (d), require that the KEA developed under this priority be fair for its intended use. We are adding the word ''fair'' to paragraph (a)(1) of the KEA priority, which was originally proposed as paragraph (d)(1). We are adding the word ''fair'' to paragraphs (a)(1), (c)(3), and (c)(4) of the KEA priority and to and selection criterion (h)(8). In addition, we note that the first paragraph of the KEA priority has been changed to state that the KEA should not be used for purposes for which it has not been validated or as a single measure for high-stakes decisions.

In response to the comment about the limited value of a single point in time evaluation, any assessment administered after kindergarten entry would need to focus on kindergarten standards. The KEA focuses on early learning standards.

Changes: We have revised paragraph (a)(1) of the KEA priority, which was originally proposed as paragraph (d)(1), to include the word ''fair.'' We also have revised paragraphs (c)(3) and (c)(4) of the KEA priority and selection criterion (h)(8) to include the word ''fair.''

Comment: One commenter suggested that a KEA developed or enhanced under the KEA priority should be linked to early learning programs.

Discussion: We agree that there should be a link between a KEA developed or enhanced under the KEA and early learning programs. We have included a requirement in paragraph (b)(2) of the KEA priority that the KEA be aligned with a set of early learning and development standards. Further we require in the data section of the KEA priority, paragraph (d)(3), that the data generated be incorporated into the SLDS for each State (and the State's early learning data system if it is separate from its SLDS), consistent with requirements of Federal, State, and local privacy laws. We also require, in paragraph (e) of the KEA priority, that the KEA use approaches to assessment design and implementation (e.g., use of technology, assessment administration, scoring, and reporting) that facilitate the integration of the KEA into a State's student assessment system, including a State's comprehensive early learning assessment system if a comprehensive early learning assessment system exists.

Finally, in the KEA design selection criterion (h)(4), we require applicants to describe how the KEA will produce data and information that may be used to identify teacher professional development and support needs, as well as support State and local agencies in effectively targeting investments for early learning and development systems. As we believe these provisions help to ensure that KEAs developed under this priority will be adequately linked with early learning programs, we

decline to make the changes suggested by the commenter.

Changes: None.

Comment: One commenter stated that a KEA should include the continuum of a child's learning and development that is above or below typical growth and development at a particular chronological age.

Discussion: We agree with the comment and have already provided for this in paragraph (c)(4) of the KEA priority, which requires that a KEA developed or enhanced under the priority provide valid, reliable, and fair measures of children's learning and development across the performance spectrum. This would allow for variation in learning and development that is above or below typical growth and development at a particular chronological age.

Changes: None.

Comment: One commenter expressed concern that a KEA developed or enhanced under the priority might involve commercial or propriety products in ways that may compel their use, restrict innovation, and limit State educational agency (SEA) access to, and choices among, assessments. This commenter recommended that the Department limit the involvement of commercial vendors in the development of KEAs by adding the phrase ''commercially neutral'' to paragraphs (a)(6) and (c)(4) of the KEA priority; paragraph (a) of the Early Learning Collaborative Efforts priority; requirement (i) in the definitions of ''comprehensive early learning assessment system'' and ''formative assessment;'' and selection criterion (h)(3). The commenter also suggested that a KEA supported by the priority should be built independent of any commercial product that currently exists.

Discussion: Any KEA developed or enhanced under the EAG program must meet all of the requirements outlined in the KEA priority, as well as any other requirements applicable to the program and competition. Any State or consortium of States awarded a grant will be responsible for ensuring that such requirements are met over the period of the grant. Though only SEAs, or consortia of SEAs, are eligible applicants, we acknowledge that applicants may contract with commercial vendors for goods and services that support the activities or products of this grant, provided they also comply with applicable State and local procurement laws. The Department does not wish to limit the resources available to SEAs in developing a KEA beyond the requirements included in the priority, requirements that apply to EAGs, and any other requirements that we may apply to an EAG grant. Furthermore, as a general matter, program requirement (g) requires a grantee to make any assessments developed with funds from this competition freely available to States, technology platform providers, and others that request it for purposes of administering assessments. We intend to apply this requirement to any competition involving the KEA priority. We believe the requirements under the KEA priority and the additional program requirement regarding availability of products developed with grant funds provide adequate safeguards relative to the concerns expressed by the commenter, and we decline to make changes.

Changes: None.

Comment: Some commenters noted that children naturally learn at different paces and will exhibit different skills at kindergarten entry. Another commenter suggested that assessment takes away from natural discovery and passions of children.

Discussion: We agree that children's learning paces vary, and also believe that the results of a KEA developed or enhanced under this priority can help teachers individualize instruction by providing them with insight into each child's pace of learning. We also believe that the results of a KEA developed or enhanced under this priority can be helpful to teachers in thoughtfully and intentionally designing appropriate and engaging activities for children based on that knowledge. Paragraph (d)(1) of the KEA priority, (originally proposed as paragraph (a)(3)), requires that a KEA developed under this priority produce data and information that guides individualized instruction for children enrolled in kindergarten and throughout the school year. Because we believe the concerns are adequately addressed, we decline to make changes.

Changes: None.

Comment: One commenter recommended that States be required to describe a plan for working with schools, families, and community-level agencies, such as early childhood programs, to analyze KEA data.

Discussion: We agree that States should develop a plan for the use of data from a KEA developed or enhanced under the KEA priority. In selection criterion (h)(4), applicants must describe how the KEA will produce data and information that may be used to provide families with information about their children's learning and development based on the essential domains of school readiness and engage them in the early learning of their children. Therefore, we do not believe that changes are necessary to address the commenter's concern.

Changes: None.

Comment: One commenter noted that KEAs can provide useful information to kindergarten teachers and encouraged the sharing of such information with early learning programs in order to promote programs' continuous improvement.

Discussion: We agree that KEA results can be used to support and improve teaching and learning. Paragraph (d)(2) of the KEA priority requires the KEA to be developed or enhanced to allow for such sharing, consistent with Federal, State, and local privacy laws. We believe this requirement addresses the concern expressed by the commenter and therefore decline to make any changes.

Changes: None.

Comment: Some commenters inquired about coordination among KEA grantees and existing assessment development activities. A few commenters asked questions about the relationship of the proposed KEA priority to the RTT–ELC grants. A couple of commenters asked how a State that has received a grant under the RTT–ELC program may participate in an EAG program grant. Another commenter encouraged the Department to use the priority to facilitate States' ability to learn from the results of RTT–ELC grants. One commenter suggested that the KEA priority be written to support existing KEA efforts, including efforts among States that have begun working together through the RTT–ELC program and other similar programs.

Discussion: We appreciate that RTT–ELC grantees and other States that have begun developing or implementing KEAs have valuable experience related to the development and implementation of KEAs as described in this priority. A State receiving funds under RTT–ELC is eligible to apply for an EAG program grant, and an RTT–ELC State may be able to receive funding under the EAG competition as part of a consortium in order to expand its RTT–ELC work to the States within the consortium.

However, we note that the Department is prohibited from funding duplicative activities, and grantees may not receive funding to support activities already supported through another grant.

Changes: None.

Comment: One commenter encouraged the Department to clarify the expected relationship between the KEA priority for the EAG program and other efforts such as the work of the two

consortia developing assessments under the Race-to-the-Top Assessment (RTTA) program.

Discussion: We agree that coordination across programs and consortia of States is important to ensure that assessment systems are coordinated and aligned in ways that best serve students. For this reason, we included in paragraph (b)(2) of the KEA priority a requirement that any KEA developed or enhanced under the priority be aligned with a set of early learning and development standards that are aligned with the State's kindergarten through third grade academic standards in, at a minimum, early literacy and mathematics. In addition, the program has an existing requirement that any grantee actively participating in any applicable technical assistance activities conducted or facilitated by the Department or its designees must coordinate with the RTTA program in the development of assessments under this program and participate in other activities as determined by the Department. We believe this requirement will help ensure that key assessment development efforts do not occur in isolation of one another.

Changes: None.

Priority 2—Early Learning Collaborative Efforts Among States

Comment: Several commenters expressed support for the Early Learning Collaborative Effort Among States priority. One commenter noted that the benefits of collaboration include States building on one another's experience and expertise; developing efficiencies in providing professional development support; containing costs; and facilitating implementation. A couple of commenters also emphasized that, in evaluating proposals, the quality of the assessment proposed by a consortium and the nature of a consortium need to be balanced against the size of the consortium.

Discussion: We appreciate the support the commenters expressed. Further, we have designed the selection criteria to identify the highest quality proposals and, as a result, do not believe additional changes are needed to the KEA or Early Learning Collaborative Efforts Among States priorities.

Changes: None.

Comment: One commenter suggested that, to promote collaboration among existing assessment consortia, such as those developing RTTA and EAG English language proficiency assessment systems (ELP), the Early Learning Collaborative Efforts Among States priority be revised to require applicants to address how they would coordinate with existing State educational improvement efforts.

Discussion: As noted previously in our discussion of comments on the KEA priority, we agree that coordination across various development efforts is important to ensure that assessment systems are well coordinated. As also explained in the previous section, we have included a requirement that, when applied to a competition, requires any grantee to actively participate in any applicable technical assistance activities conducted or facilitated by the Department or its designees, coordinate with the RTTA program in the development of assessments under this program, and participate in other activities as determined by the Department. We believe this requirement will help ensure that key assessment development efforts do not occur in isolation.

Changes: None.

Comment: A couple of commenters raised questions about the three-State minimum for consortia under the Early Learning Collaborative Efforts Among States priority. One commenter asked if a single State could apply when the priority is used for a competition. Another commenter expressed concern that a priority that defines a consortium for the purposes of the priority as including a minimum of three States would discourage current two-State partnerships and their efforts to enhance and validate existing tools for broader use.

Discussion: Because of the complexity of developing or enhancing a KEA, multiple States collaborating with each other may yield better results than those undertaking this effort alone. States working in collaboration can build on each other's expertise and experience, and they can generate efficiencies in development, costs, implementation, and uses of results. For this reason, we strongly encourage consortia with multiple States, and therefore consider a consortium to be a group of three or more States, rather than just two States. In addition, data produced by a KEA administered across multiple States are more meaningful when the early learning and development standards are the same across States, and can provide a common framework for understanding the level of children's learning and development at kindergarten entry. Though we have included the Collaborative Efforts Among States priority, a single State may apply.

Changes: None.

Comment: One commenter questioned whether, given their governance structures, some States, at the time of application, would be able to commit to the adoption of the common KEA developed under the grant and the set of early learning and development standards upon which the KEA is based.

Discussion: Requirements similar to this one have been included in competitions for RTTA grants and EAG–ELP grants, and there is no evidence that these requirements have been barriers for applicants. In addition, should this be a barrier, there are alternate ways for a State to participate in a grant other than as a consortium member. For example, a State may participate as a collaborator, and the applicant State or consortium may define what such collaboration means. Because of these options and the success of past collaborative efforts, we decline to make a change to this priority.

Changes: None.

Comment: One commenter expressed support for the language in the Early Learning Collaborative Efforts Among States priority that consortia adopt or propose a plan for all States in the consortium to adopt a set of early learning and development standards that, for at least the year prior to kindergarten entry, are substantially identical across all States in the consortium. However, this commenter expressed concern about whether there is enough time or sufficient resources for this adoption to be done in a meaningful way, including alignment to kindergarten through third grade standards, prior to KEA development. This commenter suggested States be given more time to develop standards as they implement this grant.

Discussion: We agree that the establishment of the early learning and development standards to which a KEA would be aligned is a critical first step in any successful KEA development collaboration. Under section 6112 of the ESEA, the purpose of the EAG program is the development and enhancement of assessment instruments, not the development of standards. Thus, program requirement (e) does not allow the use of program funds to support the development of standards. As specified in requirement (e), grantees must ensure that funds awarded under the EAG program are not used to support the development of standards. This prohibition includes the development of early learning and development standards under the KEA priority or standards under any other priority.

However, there are likely alignment activities that will be beneficial or necessary in order to develop a KEA that do not constitute standards development and would likely be

allowable under the EAG program. For example, an EAG grantee would not be allowed to use EAG funds to support an analysis of alignment of early learning and development standards across States in a consortium. However, a grantee would be allowed to use EAG funds to study the alignment of a KEA being developed or enhanced under an EAG to the early learning and development standards, and use funds to make revisions to the early learning and development standards if such a study indicates some revisions to the standards would strengthen the standards with respect to the assessment. In addition, an applicant may propose standards development activities as part of an EAG project, if the applicant also clearly provides for supporting those activities with non-EAG program funds.

We understand the commenters' concern that time be provided for a consortium to adopt a set of early learning and development standards that, for at least the year prior to kindergarten entry, are substantially identical across all States in the consortium. We will take this consideration into account when establishing periods of performance for grant competitions.

Changes: None.

Requirements

Comment: One commenter encouraged the appropriate sharing of information from KEAs in ways that protect the privacy of individual children and families.

Discussion: We appreciate the importance of protecting the privacy of individual children and families and believe the KEA priority, as written, adequately provides for such protections. States must follow Federal, State, and local privacy laws when reporting the results of any KEA and incorporating such data into a State's SLDS and early learning data system. We highlight these legal obligations by including them in the KEA priority. In addition, existing program requirement (c) requires that a grantee under this program develop a strategy to make sure student-level data that result from any assessments or other assessment-related instruments developed under a grant from this competition are available on an ongoing basis for research. Part of this strategy must be a plan to comply with Federal privacy laws, including the Family Educational Rights and Privacy Act (FERPA), as well as with State and local privacy laws.

Changes: None.

Definitions

Comment: One commenter suggested adding the phrase ''reasonable and attainable expectations'' to part (a) of the definition of early learning and development standards.

Discussion: We have used the same definition of early learning and development standards as that used in the RTT–ELC program. We have found that it meets the needs of the early learning field, and we believe early learning and development standards that meet our definition reflect reasonable and set attainable expectations for children and decline to make any changes.

Changes: None.

Comment: One commenter applauded us for basing the essential domains of school readiness definition on the recommendations of the National Education Goals Panel.

Discussion: We are pleased to use this definition as a consistent base for continuing the work already begun in the early learning community.

Changes: None.

Comment: One commenter suggested that the phrase ''social and emotional'' should be added to the definition of ''screening measures.'' Another commenter suggested that the word ''linguistically'' be added to the phrase ''age and developmentally'' appropriate in the definition of ''screening measures.''

Discussion: The definition of ''screening measures'' is the same as that used for the RTT–ELC program. The definition of ''screening measures'' includes instruments that are used to identify children who may need follow-up services to address developmental, learning, or health needs in, at a minimum, a number of areas, including ''behavior health,'' which we believe is inclusive of ''social and emotional.'' Further, in the definition of ''comprehensive early learning system'' we specify that this ''means a coordinated system of multiple assessments, each of which is valid and reliable for its specified purpose and for the population with which it will be used.'' For the assessment to be valid and reliable for the population it must include linguistically appropriate measures. We believe the definition addresses the commenters' concerns.

Changes: None.

Comment: One commenter suggested including a definition of ''universal design.'' The commenter suggested using the definition of universal design for learning in the Higher Education Act.

Discussion: We agree a definition is necessary. We believe that assessments incorporating universal design (as defined in this notice) principles increase the chance of obtaining valid test results for all students, including young children with disabilities or who may have disabilities not yet recognized because of the lack of educational experience or prior testing or evaluation. A fundamental principle of universal design in assessment is the precise definition of the competencies (test constructs) to be measured so as to minimize the effects of any factors not related to these competencies. Although the test constructs must be clearly defined, universal design permits the design, mode of presentation, and setting in which an assessment is given to vary according to the needs of students, so that the requirements for accommodations may be reduced. For very young children who have taken a unique initial assessment, the need for accommodations will not have been documented. Children with recognized disabilities should be provided accommodations to allow them to demonstrate their competencies, including accommodations or allowances in observational assessments.

We have included a definition of ''universal design'' in the priority. The commenter referred to the definition in the Higher Education Act, which was adapted from the Assistive Technology Act of 1998. However, the language used in the KEA priority, requirement, definitions, and selection criteria refers to ''universal design,'' not ''universal design for learning,'' as used in the Higher Education Act. Therefore, we have added the definition of ''universal design'' taken from section 3 of the Assistive Technology Act of 1998.

Changes: We have added the definition for ''universal design'' from the Assistive Technology Act of 1998, which reads: ''The term 'universal design' means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies.''

Selection Criteria

Comment: Many commenters wrote about professional development for teachers. Several commenters asked that professional development be required by the KEA priority. A couple of commenters suggested that data resulting from the KEA be used to direct professional development. One

commenter pointed out that the target audience for professional development should be kindergarten teachers and education providers in the years before and after kindergarten. One commenter asked if funds from an EAG award involving the KEA priority could be used for professional development. Multiple commenters recommended that an EAG award involving the KEA priority provide for the use of funds to support professional development for teachers on interpreting and using results. Finally, one commenter applauded our inclusion of selection criterion (e)(1).

Discussion: Selection criterion (e)(1) asks applicants to provide a plan for supporting teachers and administrators in implementing the assessments and for developing, in an ongoing manner, their professional capacity to use the assessments and results to inform and improve instructional practice. Pursuant to these selection criteria, applicants may include a plan to use EAG funds to support professional development on the implementation of the KEA and the use of the data. As a result, we decline to make changes or add language to the priority.

Changes: None.

Comment: One commenter suggested that we revise the KEA priority to require alignment between preschool and kindergarten assessments. Another commenter suggested that we add language to both the KEA priority and the selection criteria that would support alignment of preschool and kindergarten, as well as student transition from preschool to kindergarten.

Discussion: Assessments given in preschool ideally are aligned with States' high-quality early learning and development standards (as defined in this notice). We believe that requiring such alignment, however, is beyond the scope of the KEA priority. We note that the KEA priority requires KEAs developed or enhanced under it to be aligned with States' early learning and development standards, which are to be aligned with the States' kindergarten through third grade academic content standards in, at a minimum, early literacy and mathematics. We note that paragraph (b)(1) of the KEA priority requires that a KEA developed or enhanced under this priority be designed to be a component of a State's student assessment system including a State's comprehensive early learning assessment system for each State included in an application in which a comprehensive early learning assessment system exists. We agree with the commenters that this alignment between preschool and kindergarten assessments must be more thoroughly thought through by applicants. Accordingly, we have added a factor to selection criterion (h) to further address this issue.

Changes: We have added (h)(10) to the KEA design selection criteria, that asks applicants to describe how a proposed KEA would be included as a component of a State's student assessment system, including a State's comprehensive early assessment system (as defined in this notice) for each State included in an application in which a comprehensive early learning assessment system exists.

Comment: A couple of commenters advocated for the inclusion of early childhood educators' input in the design of the KEA. One commenter specifically recommended requiring the involvement of the Early Learning Advisory Councils, which were established in the Head Start Act of 2007. One commenter stated that stakeholders should be engaged in the continuous review of and evaluation of the SLDS, the early learning comprehensive assessment system, and the early learning and development standards.

Discussion: The KEA development plan selection criterion (i)(1)(ii) asks applicants to list the types of personnel involved in each development phase and process. We agree that it would be best practice to include Early Learning Advisory Councils and other early learning coordinating bodies and resources as appropriate; however, we do not want to be overly prescriptive in this area. Though we do not want to prescribe for States the groups that must be involved in KEA development, we revised the list of examples of personnel in selection criterion (i)(1)(ii) to include ''early learning practitioner'' and ''experts in early learning and development standards.'' We also included ''Early Learning Advisory Councils'' as an example of a key stakeholder in the same list of examples.

Changes: We have revised selection criterion (i)(1)(ii) to include references to ''early learning practitioners,'' ''experts in early learning and development standards,'' and ''Early Learning Advisory Councils.''

Comment: We received a number of comments about families' roles in the development, interpretation, and use of results from a KEA. One commenter suggested that the KEA priority require the information resulting from the KEA be provided to families in an accessible and transparent format, such as sharing information resulting from the KEA to families who do not speak or read English. A couple of commenters suggested a grantee be required to do more than just provide information to the families of the children assessed but engage the families in using the data and in developing the KEA. One commenter recommended that we expand this priority to include family engagement in preparing children for school readiness.

Discussion: We agree with the commenters that providing KEA results to families is important in supporting children's learning and development. We also agree that information generated by the assessments should be accessible to families whose first language is not English. That is why selection criterion (h)(9) provides for the reports and interpretation guides that will be produced based on the assessments: the key data the guide will present; the guides' intended use; the guides' target audience (e.g., families, teachers, administrators, policymakers, and other stakeholders); and how presentation of the guide will be in an understandable and uniform format and, to the extent practicable, in a language that families can understand. With regard to the suggestion to include family engagement in the priority, the Department has provided in selection criterion (h)(4)(v) that we will consider how the KEA will produce data and information that may be used to provide families with information about their children's learning and development based on the essential domains of school readiness and engage families in the early learning of their children. Finally, we have included ''families'' as an example of key stakeholders in the types of personnel involved in each development phase and process of the KEA in selection criterion (i)(1)(ii).

Changes: We have added ''families'' as an example of key stakeholders involved in each development phase and process of the KEA in selection criterion (i)(1)(ii).

Funding

Comment: One commenter asked for clarification on whether EAG funds may be used to strengthen standards or to work on standards alignment.

Discussion: The purpose of the EAG program, under section 6112 of the ESEA, is the development and enhancement of assessment instruments, not standards development. As specified in requirement (e), grantees must ensure that funds awarded under the EAG program are not used to support the development of standards. This prohibition includes the development of early learning and development

standards under the KEA priority or standards under any other priority. However, there are likely alignment activities that will be beneficial or necessary in order to develop a KEA that do not constitute standards development and would likely be allowable under the EAG program. For example, an EAG grantee would not be allowed to use EAG funds to support an analysis of alignment of early learning and development standards across States in a consortium prior to adoption. However, a grantee would be allowed to use EAG funds to study the alignment of a KEA being developed or enhanced under an EAG to the early learning and development standards. A grantee could also use funds to make revisions to the early learning and development standards if such a study indicates some revisions to the standards would strengthen the standards with respect to alignment to the assessment.

Changes: None.

Final Priorities:

Priority 1—Kindergarten Entry Assessment.

To meet this priority, an applicant must propose a project that supports the development or enhancement of a KEA that meets the following requirements:

(a) Purpose. The KEA must—

(1) Provide, at kindergarten entry, valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness (as defined in this notice) with each domain making a significant contribution to the overall comprehensive score.

(2) Not be used—

(i) To prevent children's entry into kindergarten; or

(ii) For purposes for which it has not been validated or as a single measure for high-stakes decisions.

(b) Design. The KEA must—

(1) Be a component of a State's student assessment system, including, a State's comprehensive early learning assessment system (as defined in this notice) for the applicant State and, if the State applies as part of a consortium, each State in the consortium, in which a comprehensive early learning assessment system exists;

(2) Be aligned with a set of early learning and development standards (as defined in this notice);

(3) Measure the full range of learning and development across the essential domains of school readiness (as defined in this notice);

(4) Measure children's learning and development against a set of levels of performance where the levels of performance encompass descriptors of what a child knows and is able to do for each level, are common statewide, and, if the applicant State applies on behalf of a consortium, are common across States in the consortium;

(5) Provide a summative assessment of each child's learning and development at kindergarten entry across the essential domains of school readiness (as defined in this notice);

(6) Be capable of assessing all children in the applicant State, and if the State applies as part of a consortium, all children in the consortium;

(7) Be developed consistent with universal design (as defined in this notice) principles to be accessible to all children, including children with disabilities or developmental delays and English learners (as defined in this notice);

(8) As needed, provide appropriate accommodations and supports for children with disabilities or developmental delays and English learners (as defined in this notice) (e.g., augmentative communication devices and assistive technologies);

(9) Be administered soon enough after a child's enrollment into kindergarten to achieve the purposes for which the assessment was developed, including the purpose specified in paragraph (a) of this priority;

(10) Use multiple methods (e.g., performance tasks, selected responses, observational ratings) to measure children's performance and development;

(11) Be administered by a trained assessor or assessors;

(12) Be designed to incorporate technology in the collection of student data and in the process of assessing children's performance on learning and development tasks; and

(13) Be cost-effective to administer, maintain, and enhance during and after the project period.

(c) Technical Quality. The KEA must measure children's learning and development at kindergarten entry in ways that—

(1) Are consistent with nationally recognized professional and technical standards for assessment;

(2) Are consistent with current research and best-practices in the field, and the recommendations of the National Research Council report on early childhood assessments; [2]

(3) Are valid, reliable, fair, and appropriate for their intended purposes;

(4) Provide a valid, reliable, and fair measure across the performance spectrum of each child's learning and development at kindergarten entry, including children with disabilities or developmental delays and English learners (as defined in this notice).

(d) Data. The KEA must produce data and information that—

(1) Can guide individualized instruction for children enrolled in kindergarten and throughout the school year;

(2) Can be reported to and easily understood and used by various stakeholders, including families, teachers, administrators, early learning providers, and policy-makers, consistent with requirements of Federal, State, and local privacy laws; and

(3) Can be incorporated into a State's longitudinal data system (SLDS) and a State's early learning data system (if it is separate from an SLDS), consistent with requirements of Federal, State, and local privacy laws.

(e) Compatibility. The KEA must use approaches to assessment design and implementation (e.g., use of technology, assessment administration, scoring, and reporting) that facilitate the integration of the KEA with a State's student assessment system, including a State's comprehensive early learning assessment system (as defined in this notice) for each State included in an application in which a comprehensive early learning assessment system exists.

Priority 2—Early Learning Collaborative Efforts Among States.

To meet this priority, an applicant must—

(a) Include a minimum of three States in the consortium and propose developing or enhancing a common KEA for those States. An applicant will receive a greater number of points under this priority based on the extent to which it includes a greater number of States in its consortium;

(b) Adopt or propose a plan for all States in the consortium to adopt a set of early learning and development standards (as defined in this notice) that, for at least the year prior to kindergarten entry, are substantially identical across all States in the consortium;

(c) Adopt or propose a plan for all States in the consortium to adopt the common KEA; and

(d) Provide in the memorandum of understanding or other binding agreement executed by each State in the consortium an assurance that, as a condition of remaining in the consortium, the State will, no later than

[2] National Research Council. (2008). Early Childhood Assessment: Why, What, and How. Committee on Developmental Outcomes and Assessments for Young Children, C.E. Snow and S.B. Van Hemel, Editors. Board on Children, Youth, and Families, Board on Testing and Assessment, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Available at *www.nap.edu/catalog.php?record_id=12446*.

the end of the project period, adopt the common KEA developed under this priority and the set of early learning and development standards (as defined in this notice) upon which the KEA is based. *Types of Priorities:*

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

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

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

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

Final Requirement: The Assistant Secretary for Elementary and Secondary Education establishes the following requirement for the Enhanced Assessment Grants program. We may apply this requirement in any year in which a competition for program funds is held. An eligible applicant awarded a grant under this program must:

(i) Adopt and implement any assessments, other assessment-related instruments developed or enhanced under the proposed project, and any standards upon which they are based. In addition, if the applicant State applies as, or on behalf of a consortium of States, it must provide in any memorandum of understanding or other binding agreement executed by each State in the consortium an assurance that, to remain in the consortium, the State will adopt and implement any assessments or other assessment-related instruments developed or enhanced under the proposed project and any standards upon which they are based by the end of the project period.

Final Definitions: The Assistant Secretary for Elementary and Secondary Education establishes the following definitions for the Enhanced Assessment Grants program. We may apply one or more of these definitions in any year in which a competition for program funds is held.

Comprehensive early learning assessment system means a coordinated and comprehensive system of multiple assessments, each of which is valid and reliable for its specified purpose and for the population with which it will be used, that organizes information about the process and context of young children's learning and development in order to help teachers make informed instructional and programmatic decisions and that conforms with the recommendations of the National Research Council report on early childhood assessments [3] by including, at a minimum: (a) Screening measures (as defined in this notice); (b) formative assessments; (c) measures of environmental quality (as defined in this notice); (d) measures of the quality of adult-child interactions (as defined in this notice); and (e) a kindergarten entry assessment (KEA).

Early learning and development standards means a set of expectations, guidelines, or developmental milestones that—

(a) Describe what all children from birth to kindergarten entry should know and be able to do and their dispositions toward learning;

(b) Are appropriate for each age group (e.g., infants, toddlers, and preschoolers); for English learners (as defined in this notice); and for children with disabilities or developmental delays;

(c) Cover all essential domains of school readiness (as defined in this notice);

(d) Are universally designed and developmentally, culturally, and linguistically appropriate; and

(e) Are aligned with the State's kindergarten through third grade academic standards in, at a minimum, early literacy and mathematics.

English learner means a child, including a child aged three and younger, who is an English learner consistent with the definition of a child who is ''limited English proficient,'' as applicable, in section 9101(25) of the Elementary and Secondary Education Act of 1965, as amended.

Essential domains of school readiness means the domains of language and literacy development, cognition and general knowledge (including early mathematics and early scientific development), approaches toward learning, physical well-being and motor development (including adaptive skills), and social and emotional development.

Formative assessment (also known as a classroom-based or ongoing assessment) means assessment questions, tools, and processes—

(a) That are—

(1) Specifically designed to monitor children's progress;

(2) Valid and reliable for their intended purposes and their target populations; and

(3) Linked directly to the curriculum; and

(b) The results of which are used to guide and improve instructional practices.

Measures of environmental quality means valid and reliable indicators of the overall quality of the early learning environment.

Measures of the quality of adult-child interactions means the measures obtained through valid and reliable processes for observing how teachers and caregivers interact with children, where such processes are designed to promote child learning and to identify strengths and areas for improvement for early learning professionals.

Screening measures means age and developmentally appropriate, valid, and reliable instruments that are used to identify children who may need follow-up services to address developmental, learning, or health needs in, at a minimum, the areas of physical health, behavioral health, oral health, child development, vision, and hearing.

Universal design means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies. This meaning is given to the term in section 3 of the Assistive Technology Act of 1998 (29 U.S.C. 3002).

Final Selection Criteria: The Assistant Secretary for Elementary and Secondary Education establishes the following selection criteria for the Enhanced Assessment Grant program. We may apply one or more of these selection criteria in any year in which a competition for program funds is held.

(h) *Kindergarten entry assessment design.*

The Secretary reviews each application to determine the extent to which the design of the eligible

[3] National Research Council (2008). Early Childhood Assessment: Why, What, and How. Committee on Developmental Outcomes and Assessments for Young Children, C.E. Snow and S.B. Van Hemel, Editors. Board on Children, Youth, and Families, Board on Testing and Assessment, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Available at: *www.nap.edu/catalog.php?record_id=12446.*

applicant's proposed assessment is innovative, feasible, and consistent with the theory of action. In determining the extent to which the design has these attributes, the Department will consider—

(1) How the assessment will measure child performance and development against early learning and development standards (as defined in this notice);

(2) The steps proposed for ensuring that the assessment is aligned with the specific early learning and development standards on which the assessment is based;

(3) The extent to which data from the assessment can be incorporated into a State's longitudinal data system (SLDS) and a State's early learning data system (if it is separate from an SLDS) through the use of or connection to common data elements and definitions, such as the Common Education Data Standards (), consistent with requirements of Federal, State, and local privacy laws;

(4) How the KEA will produce data and information which may be used to—

(i) Guide individualized instruction for children enrolled in kindergarten and throughout the school year;

(ii) Identify teacher professional development and support needs;

(iii) Support programmatic decision-making at the school level for informing teaching, learning, and program improvement;

(iv) Support State and local agencies in effectively targeting investments for early learning and development systems serving children in the years before kindergarten; and

(v) Provide families with information about their children's learning and development based on the essential domains of school readiness (as defined in this notice) and engage them in the early learning of their children; and

(5) The number and types of items (e.g., performance tasks, selected responses, observational ratings) and the distribution of item types within the assessment, including the variation of the items and the rationale for using these item types and their distributions;

(6) The assessment's administration mode(s) (e.g., direct, observation, or administered using an electronic device), and the rationale for the mode(s);

(7) The methods for scoring child performance on the assessments, the estimated turnaround times for scoring, and the rationale(s) for these;

(8) The applicant's plan to set levels of performance for the assessment, where the levels of performance encompass descriptors of what a child knows and is able to do for each level, and for how the applicant will meaningfully engage and solicit stakeholder input on the development of levels of performance that are valid, reliable, and fair for children's learning and development;

(9) The reports and interpretation guides that will be produced based on the assessments, and for each report and interpretation guide: the key data it will present; its intended use; its target audience (e.g., families, teachers, administrators, policymakers, and other stakeholders); and how its presentation will be in an understandable and uniform format and, to the extent practicable, in a language that families can understand; and;

(10) How the proposed KEA will be a component of a State's student assessment system, including, a State's comprehensive early learning assessment system (as defined in this notice) for each State included in an application in which a comprehensive early learning assessment system exists.

(i) *Kindergarten entry assessment development plan.*

The Secretary reviews each application to determine the extent to which the eligible applicant's plan for developing the proposed KEA will ensure that the assessments are ready by the end of the grant period for wide-scale administration in a manner that is timely, cost-effective, and consistent with the proposed design and incorporates a process for ongoing feedback and improvement. In determining the extent to which the assessment development plan has these attributes, the Department will consider—

(1)(i) The approaches for developing assessment items (e.g., evidence-centered design, universal design (as defined in this notice)), the rationale for using those approaches, and the development phases and processes to be implemented consistent with the approaches;

(ii) The types of personnel involved in each development phase and process (e.g., early learning practitioners, experts in early learning and development, expert in early learning and development standards, experts in the assessment of young children, content experts, assessment experts, experts in assessing children with disabilities or developmental delays and English learners, psychometricians, cognitive scientists, and other key stakeholders, including families and Early Learning Advisory Councils);

(2) The approach and strategy for designing and developing accommodations, accommodation policies, and methods for standardizing the use of those accommodations for children with disabilities or developmental delays and English learners (as defined in this notice);

(3) The approach and strategy for ensuring scalable, accurate, and consistent scoring of items, including the approach and moderation system for any items not scored by machine and the extent to which teachers are trained and involved in the administration and scoring of assessments;

(4) The approach and strategy for developing the reporting system; and

(5) The overall approach to quality control, maintaining the integrity of the assessment process, field-testing assessment items, accommodations, scoring systems, and reporting systems, including, with respect to assessment items and accommodations, the use of representative sampling of all types of child populations, taking into particular account the full range of learning and development across the essential domains of school readiness (as defined in this notice), and including children with disabilities or developmental delays and English learners (as defined in this notice).

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

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

Executive Orders 12866 and 13563

Regulatory Impact Analysis

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

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

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

(3) Materially alter the budgetary impacts of entitlement grants, user fees,

or loan programs or the rights and obligations of recipients thereof; or

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

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

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

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

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

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

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

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

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

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

We have determined, also, that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

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

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

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

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

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

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

Dated: May 17, 2013.

Deborah S. Delisle,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2013–12216 Filed 5–22–13; 8:45 am]

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DEPARTMENT OF EDUCATION

Applications for New Awards; Ehanced Assessment Instruments Grants Program—Enhanced Assessment Instruments—Kindergarten Entry Assissment Competition

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information

Enhanced Assessment Instruments Grants Program—Enhanced Assessment Instruments—Kindergarten Entry Assessment Competition

Notice inviting applications for new awards for fiscal year (FY) 2012 funds.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.368A.

DATES: *Applications Available:* May 23, 2013.

Deadline for Notice of Intent to Apply: June 24, 2013.

Deadline for Transmittal of Applications: July 8, 2013.

Deadline for Intergovernmental Review: September 5, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Enhanced Assessment Instruments Grant program, also called the Enhanced Assessment Grants (EAG) program, is to enhance the quality of assessment instruments and systems used by States for measuring the academic achievement of elementary and secondary school students.

In 2013, the Department will hold a competition for fiscal year (FY) 2012 EAG funds to support the development or enhancement of a kindergarten entry assessment (KEA) that is aligned with the State's early learning and development standards and that must cover all of the essential domains of school readiness. We will give priority to early learning collaborative efforts among States (collaborative efforts) in developing this assessment.

Priorities: This competition includes five absolute priorities and one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(iv), absolute priorities 1 through 4 (Statutory Priorities) are based on section 6112 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), 20 U.S.C. 7301a. Absolute priority 5 (Regulatory Priority) and competitive preference priority 1 are from the notice of final priorities, requirement, definitions, and selection criteria published elsewhere in this issue of the **Federal Register**.

Absolute Priorities: For awards made in 2013 with FY 2012 funds, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet: (a) one or more of the Statutory Priorities (Absolute Priorities 1 through 4) and (b) the Regulatory Priority (Absolute Priority 5).

These priorities are:

Absolute Priority 1—Collaboration

Collaborate with institutions of higher education, other research institutions, or other organizations to improve the quality, validity, and reliability of State academic assessments beyond the requirements for these assessments described in section 1111(b)(3) of the ESEA.

Absolute Priority 2—Use of Multiple Measures of Student Academic Achievement

Measure student academic achievement using multiple measures of student academic achievement from multiple sources.

Absolute Priority 3—Charting Student Progress Over Time

Chart student progress over time.

Absolute Priority 4—Comprehensive Academic Assessment Instruments

Evaluate student academic achievement through the development of comprehensive academic assessment instruments, such as performance- and technology-based academic assessments.

Absolute Priority 5—Kindergarten Entry Assessment

To meet this priority, an applicant must propose a project that supports the development or enhancement of a KEA that meets the following requirements:

(a) Purpose. The KEA must—

(1) Provide, at kindergarten entry, valid, reliable, and fair information on each child's learning and development across the essential domains of school readiness (as defined in this notice) with each domain making a significant contribution to the overall comprehensive score.

(2) Not be used—

(i) To prevent children's entry into kindergarten; or

(ii) For purposes for which it has not been validated or as a single measure for high-stakes decisions.

(b) Design. The KEA must—

(1) Be a component of a State's student assessment system, including, a State's comprehensive early learning assessment system (as defined in this notice) for the applicant State and, if the State applies as part of a consortium, each State in the consortium, in which a comprehensive early learning assessment system exists;

(2) Be aligned with a set of early learning and development standards (as defined in this notice);

(3) Measure the full range of learning and development across the essential domains of school readiness (as defined in this notice);

(4) Measure children's learning and development against a set of levels of performance where the levels of performance encompass descriptors of what a child knows and is able to do for each level, are common statewide, and, if the applicant State applies on behalf of a consortium, are common across States in the consortium;

(5) Provide a summative assessment of each child's learning and development at kindergarten entry across the essential domains of school readiness (as defined in this notice);

(6) Be capable of assessing all children in the applicant State, and if the State applies as part of a consortium, all children in the consortium;

(7) Be developed consistent with universal design principles to be accessible to all children, including children with disabilities or developmental delays and English learners (as defined in this notice);

(8) As needed, provide appropriate accommodations and supports for children with disabilities or developmental delays and English learners (as defined in this notice) (e.g., augmentative communication devices and assistive technologies);

(9) Be administered soon enough after a child's enrollment into kindergarten to achieve the purposes for which the assessment was developed, including the purpose specified in paragraph (a) of this priority;

(10) Use multiple methods (e.g., performance tasks, selected responses, observational ratings) to measure children's performance and development;

(11) Be administered by a trained assessor or assessors;

(12) Be designed to incorporate technology in the collection of student data and in the process of assessing children's performance on learning and development tasks; and

(13) Be cost-effective to administer, maintain, and enhance during and after the project period.

(c) Technical Quality. The KEA must measure children's learning and

development at kindergarten entry in ways that—

(1) Are consistent with nationally recognized professional and technical standards for assessment;

(2) Are consistent with current research and best practices in the field, and the recommendations of the National Research Council report on early childhood assessments; [1]

(3) Are valid, reliable, fair, and appropriate for their intended purposes;

(4) Provide a valid, reliable, and fair measure across the performance spectrum of each child's learning and development at kindergarten entry, including children with disabilities or developmental delays and English learners.

(d) Data. The KEA must produce data and information that—

(1) Can guide individualized instruction for children enrolled in kindergarten and throughout the school year;

(2) Can be reported to and easily understood and used by various stakeholders, including families, teachers, administrators, early learning providers, and policy-makers, consistent with requirements of federal, State, and local privacy laws; and

(3) Can be incorporated into a State's longitudinal data system (SLDS) and a State's early learning data system (if it is separate from an SLDS), consistent with requirements of Federal, State, and local privacy laws.

(e) Compatibility. The KEA must use approaches to assessment design and implementation (e.g., use of technology, assessment administration, scoring, and reporting) that facilitate the integration of the KEA with a State's student assessment system, including a State's comprehensive early learning assessment system (as defined in this notice) for each State included in an application in which a comprehensive early learning assessment system exists.

Competitive Preference Priority: For awards made in 2013 with FY 2012 funds, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 30 points to an application, depending on how well the application meets this priority.

In awarding these points, an applicant will receive more points based on the extent to which it includes a larger number of States in the consortium, with three to four States representing a low number of States, five to seven States representing an intermediate number of States, and eight or more States representing a high number of States.

This priority is:

Competitive Preference Priority 1—Early Learning Collaborative Efforts Among States

To meet this priority, an applicant must—

(a) Include a minimum of three States in the consortium and propose developing or enhancing a common KEA for those States. An applicant will receive a greater number of points under this priority based on the extent to which it includes a greater number of States in its consortium;

(b) Adopt or propose a plan for all States in the consortium to adopt a set of early learning and development standards (as defined in this notice) that, for at least the year prior to kindergarten entry, are substantially identical across all States in the consortium;

(c) Adopt or propose a plan for all States in the consortium to adopt the common KEA; and

(d) Provide in the memorandum of understanding or other binding agreement executed by each State in the consortium an assurance that, as a condition of remaining in the consortium, the State will, no later than the end of the project period, adopt the common KEA developed under this priority and the set of early learning and development standards (as defined in this notice) upon which the KEA is based.

Requirements: The following requirements for this competition are from the final priorities, requirements, definitions and selection criteria for this program published in the **Federal Register** on April 19, 2011 (76 FR 21986), and from the final priorities, requirement, definitions and selection criteria published elsewhere in this issue of the **Federal Register**. An eligible applicant awarded a grant under this program must:

(a) Evaluate the validity, reliability, and fairness of any assessments or other assessment-related instruments developed under a grant from this competition, and make available documentation of evaluations of technical quality through formal mechanisms (e.g., peer-reviewed journals) and informal mechanisms (e.g., newsletters), both in print and electronically;

(b) Actively participate in any applicable technical assistance activities conducted or facilitated by the Department or its designees, coordinate with Race To The Top Assessment program staff in the development of assessments under this program, and participate in other activities as determined by the Department;

(c) Develop a strategy to make student-level data that result from any assessments or other assessment-related instruments developed under a grant from this competition available on an ongoing basis for research, including for prospective linking, validity, and program improvement studies; [2]

(d) Ensure that any assessments or other assessment-related instruments developed under a grant from this competition will be operational (ready for large-scale administration) at the end of the project period;

(e) Ensure that funds awarded under the EAG program are not used to support the development of standards, such as under the English language proficiency assessment system priority or any other priority.

(f) Maximize the interoperability of any assessments and other assessment-related instruments developed with funds from this competition across technology platforms and the ability for States to move their assessments from one technology platform to another by doing the following, as applicable, for any assessments developed with funds from this competition by—

(1) Developing all assessment items in accordance with an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period, without non-standard extensions or additions; and

(2) Producing all student-level data in a manner consistent with an industry-recognized open-licensed interoperability standard that is approved by the Department during the grant period;

(g) Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) and other assessment-related instruments developed with funds from this competition freely available to States, technology platform providers, and others that request it for purposes of

[1] National Research Council. (2008). Early Childhood Assessment: Why, What, and How. Committee on Developmental Outcomes and Assessments for Young Children, C.E. Snow and S.B. Van Hemel, Editors. Board on Children, Youth, and Families, Board on Testing and Assessment, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Available at *www.nap.edu/catalog.php?record_id=12446.*

[2] Eligible applicants awarded a grant under this program must comply with the Family Educational Rights and Privacy Act (FERPA) and 34 CFR Part 99, as well as State and local requirements regarding privacy.

administering assessments, provided that those parties receiving assessment content comply with consortium or State requirements for test or item security; and

(h) For any assessments and other assessment-related instruments developed with funds from this competition, use technology to the maximum extent appropriate to develop, administer, and score the assessments and report results.

(i) Adopt and implement any assessments, other assessment-related instruments developed or enhanced under the proposed project, and any standards upon which they are based. In addition, if the applicant State applies as, or on behalf of a consortium of States, it must provide in any memorandum of understanding or other binding agreement executed by each State in the consortium an assurance that, to remain in the consortium, the State will adopt and implement any assessments or other assessment-related instruments developed or enhanced under the proposed project and any standards upon which they are based by the end of the project period.

Definitions: The following definitions are from the final priorities, requirements, definitions and selection criteria for this program published in the **Federal Register** on April 19, 2011 (76 FR 21986), and the final priorities, requirement, definitions and selection criteria for this program published elsewhere in this issue of the **Federal Register**.

Comprehensive early learning assessment system means a coordinated and comprehensive system of multiple assessments, each of which is valid and reliable for its specified purpose and for the population with which it will be used, that organizes information about the process and context of young children's learning and development in order to help teachers make informed instructional and programmatic decisions and that conforms with the recommendations of the National Research Council report on early childhood assessments [3] by including, at a minimum: (a) screening measures (as defined in this notice); (b) formative assessments; (c) measures of environmental quality (as defined in this notice); (d) measures of the quality of adult-child interactions (as defined in this notice); and (e) a kindergarten entry assessment (KEA).

Early learning and development standards means a set of expectations, guidelines, or developmental milestones that—

(a) Describe what all children from birth to kindergarten entry should know and be able to do and their dispositions toward learning;

(b) Are appropriate for each age group (e.g., infants, toddlers, and preschoolers); for English learners; and for children with disabilities or developmental delays;

(c) Cover all essential domains of school readiness (as defined in this notice);

(d) Are universally designed and developmentally, culturally, and linguistically appropriate; and

(e) Are aligned with the State's K–3 academic standards in, at a minimum, early literacy and mathematics.

English learner means a child, including a child aged three and younger, who is an English learner consistent with the definition of a child who is ''limited English proficient,'' as applicable, in section 9101(25) of the Elementary and Secondary Education Act of 1965, as amended.

Essential domains of school readiness means the domains of language and literacy development, cognition and general knowledge (including early mathematics and early scientific development), approaches toward learning, physical well-being and motor development (including adaptive skills), and social and emotional development.

Formative assessment (also known as a classroom-based or ongoing assessment) means assessment questions, tools, and processes—

(a) That are—

(1) Specifically designed to monitor children's progress;

(2) Valid and reliable for their intended purposes and their target populations; and

(3) Linked directly to the curriculum; and

(b) The results of which are used to guide and improve instructional practices.

Measures of environmental quality means valid and reliable indicators of the overall quality of the early learning environment.

Measures of the quality of adult-child interactions means the measures obtained through valid and reliable processes for observing how teachers and caregivers interact with children, where such processes are designed to promote child learning and to identify strengths and areas for improvement for early learning professionals.

Screening measures means age and developmentally appropriate, valid, and reliable instruments that are used to identify children who may need follow-up services to address developmental, learning, or health needs in, at a minimum, the areas of physical health, behavioral health, oral health, child development, vision, and hearing.

Student with a disability means a student who has been identified as a child with a disability under the Individuals with Disabilities Education Act, as amended.

Universal design means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies. This meaning is given to the term in section 3 of the Assistive Technology Act of 1998 (29 U.S.C. 3002).

Program Authority: 20 U.S.C. 7301a and 7842.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department suspension and debarment regulations in 2 CFR part 3485. (c) The final priorities, requirements, definitions, and selection criteria published in the **Federal Register** on April 19, 2011 (76 FR 21986). (d) The final priorities, requirements, definitions, and selection criteria published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $9,200,000 in FY 2012 funds to be awarded in a competition in 2013.

Contingent upon the availability of funds and the quality of applications, we may make additional awards with FY 2013 funds from the list of unfunded applicants from this competition.

Estimated Range of Awards: $4,200,000 to $5,000,000.

Estimated Average Size of Awards: $4,600,000.

Estimated Number of Awards: 2.

[3] National Research Council (2008). Early Childhood Assessment: Why, What, and How. Committee on Developmental Outcomes and Assessments for Young Children, C.E. Snow and S.B. Van Hemel, Editors. Board on Children, Youth, and Families, Board on Testing and Assessment, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Available at *www.nap.edu/catalog.php?record_id=12446.*

Note: Applicants should submit a single budget request for a single budget and project period of up to 48 months. Subject to the availability of future years' funds, the Department may make supplemental grant awards to the grants awarded with FY 2012 funds.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies (SEAs) as defined in section 9101(41) of the ESEA and consortia of such SEAs.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other:* An application from a consortium of SEAs must designate one SEA as the fiscal agent.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can access the electronic grant application for the Enhanced Assessment Instruments Grants Program at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.368, not 84.368A). You can also obtain a copy of the application package by contacting the program contact, Erin Shackel, Enhanced Assessment Grants Program, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW., room 3W110, Washington, DC 20202–6132. Telephone: (202) 453–6423 or by email: *Erin.shackel@ed.gov.*

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

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person listed under *Accessible Format* in section VIII of this notice.

2. a. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The project narrative (Part 3 of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the project narrative (Part 3) to the equivalent of no more than 65 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the project narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use Times New Roman font no smaller than 11.0 point for all text in the project narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables figures, and graphs. (Font sizes that are smaller than 11 but round up to 11, such as 10.7 point, will be considered smaller than 11.0.)
- Any screen shots included as part of the narrative should follow these standards or, if other standards are applied, be sized to equal the equivalent amount of space if these standards were applied.

The page limit applies to the project narrative (Part 3), including the table of contents, which must include a discussion of how the application meets one or more of the statutory absolute priorities and how well the applicant meets the regulatory absolute priority; if applicable, how the application meets the competitive preference priority; and how well the application addresses each of the selection criteria. The page limit also applies to any attachments to the project narrative other than the references/bibliography. In other words, the entirety of Part 3 of the application, including the aforementioned discussion and any attachments to the project narrative, must be limited to the equivalent of no more than 65 pages. The only allowable attachments other than those included in the project narrative are outlined in Part 6, ''Other Attachments Forms'' in the application package. Any attachments other than those included within the page limit of the project narrative and those outlined in Part 6 will not be reviewed.

The 65-page limit, or its equivalent, does not apply to the following sections of an application: Part 1 (including the response regarding research activities involving human subjects); Part 2 (two-page project abstract); Part 4 (the budget sections, including the chart and narrative budget justification); Part 5 (standard assurances and certifications); and Part 6 (memoranda of understanding or other binding agreement, copy of applicant's indirect cost rate agreement, letters of commitment and support from collaborating SEAs and organizations, and other attachments forms, including, if applicable, references/bibliography for the project narrative, individual résumés for project director(s) and key personnel. Applicants are encouraged to limit each résumé to no more than five pages).

In addition, do not use hyperlinks in an application. Reviewers will be instructed not to follow hyperlinks if included. Our reviewers will not read any pages of your project narrative that exceed the page limit, or the equivalent of the page limit if you apply other standards. Applicants are encouraged to submit applications that meet the page limit following the standards outlined in this section rather than submitting applications that are the equivalent of the page limit applying other standards.

3. *Submission Dates and Times:*

Applications Available: May 23, 2013.

Deadline for Notice of Intent to Apply: June 24, 2013.

We will be able to develop a more efficient process for reviewing grant applications if we have a better understanding of the number of applicants that intend to apply for funding under this competition. Therefore, we strongly encourage each potential applicant to notify us of the applicant's intent to submit an application for funding. This notification should be brief, and provide the applicant organization's name and the SEA the applicant will designate as the fiscal agent for an award. Submit this notification to by email to *Erin.Shackel@ed.gov* with ''Intent to Apply'' in the email subject line or mail to Erin Shackel, U.S. Department of Education, 400 Maryland Avenue SW., room 3W110, Washington, DC 20202–6132. Applicants that do not provide this email notification may still apply for funding.

Deadline for Transmittal of Applications: July 8, 2013.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION**

CONTACT in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 5, 2013.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, Central Contractor Registry, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR)—and, after July 24, 2012, with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR or SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR or SAM registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the Enhanced Assessment Instruments Grants KEA competition, CFDA number 84.368A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Enhanced Assessment Instruments Grants KEA competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.368, not 84.368A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- 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. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at www.G5.gov.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Erin Shackel, U.S. Department of Education, 400 Maryland Avenue SW, room 3W110, Washington, DC 20202–6132. FAX: (202) 205–0310.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.368A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.368A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications:

If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the final priorities, requirements, definitions, and selection criteria published in the **Federal Register** on April 19, 2011 (76 FR 21986), and the final priorities, requirement, definitions, and selection criteria published elsewhere in this issue of the **Federal Register**, and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we will also notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has developed four measures to evaluate the overall effectiveness of the Enhanced Assessment Instruments Grants program: (1) The number of States that participate in Enhanced Assessment Instruments Grants projects funded by this competition; (2) the percentage of grantees that, at least twice during the period of their grants, make available to SEA staff in non-participating States and to assessment researchers information on findings resulting from the Enhanced Assessment Instruments Grants through presentations at national conferences, publications in refereed journals, or other products disseminated to the assessment community; and (3) for each grant cycle and as determined by an expert panel, the percentage of Enhanced Assessment Instruments Grants that yield significant research, methodologies, products, or tools regarding assessment systems or assessments. Grantees will be expected to include in their interim and final performance reports information about the accomplishments of their projects because the Department will need data on these measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Erin Shackel, Enhanced Assessment Grants Program, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W110, Washington, DC 20202–6132. Telephone: (202) 453–6423 or by email: *Erin.Shackel@ed.gov*.

If you use a TDD or a TTY, call the FRS, toll-free, at 1–800–877–8339.

VIII. Other Information

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

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Dated: May 17, 2013.

Deborah S. Delisle,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2013–12212 Filed 5–22–13; 8:45 am]

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H.R. 1071/P.L. 113–10
To specify the size of the precious-metal blanks that will be used in the production of the National Baseball Hall of Fame commemorative coins. (May 17, 2013; 127 Stat. 445)
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