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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 210

**[Regulation J; Docket No. R–1473]**

**RIN 7100–AE06**

## Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire: Time of Settlement by a Paying Bank for an Item Received From a Reserve Bank

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors (Board) is adopting amendments to subpart A of its Regulation J, *Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers through Fedwire,* to permit the Federal Reserve Banks (Reserve Banks) to require paying banks that receive presentment of checks from the Reserve Banks to make the proceeds of settlement for those checks available to the Reserve Banks as soon as one half-hour after receipt of the checks. The amendments will also permit the Reserve Banks to obtain settlement from paying banks by as early as 8:30 a.m. eastern time for checks that the Reserve Banks present. These amendments to Regulation J are consistent with the revised method for posting debits and credits to banks' Federal Reserve accounts to measure daylight overdrafts under amendments to the *Federal Reserve Policy on Payment System Risk* (PSR policy) that the Board is concurrently adopting. The Board is also adopting a technical amendment to the definition of ''Administrative Reserve Bank.''

**DATES:** *Effective Date:* The technical amendment to § 210.2(c) is effective on December 5, 2014. All other amendments are effective on July 23, 2015. *Applicability Date:* All items scheduled to settle on July 23, 2015, and after will post according to the new posting rule procedures for these transactions, regardless of date of deposit.

**FOR FURTHER INFORMATION CONTACT:** Susan V. Foley, Senior Associate Director (202/452–3596), Samantha J. Pelosi, Manager (202/530–6292), Scott J. Anchin, Senior Financial Services Analyst (202/452–3638), Division of Reserve Bank Operations and Payment Systems; or Evan Winerman, Senior Attorney (202/872–7578), Legal Division; for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263–4869.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Subpart A of Regulation J, Collection of Checks and Other Items by Federal Reserve Banks, governs the collection of checks and the handling of returned checks by the Reserve Banks. The purpose of the subpart is to provide rules for collecting and returning items and settling balances. Among other things, the subpart specifies the time and manner in which paying banks must settle for items presented to them by the Reserve Banks.

In accordance with Subpart A, the Reserve Banks have issued Operating Circular 3 (OC 3), *Collection of Cash Items and Returned Checks,* which provides specific terms and conditions under which the Reserve Banks will handle checks.[1] The Board's Regulation CC, *Availability of Funds and Collection of Checks,* and provisions of the Uniform Commercial Code (UCC), as adopted in a state, also govern the collection, presentment, and return of checks, to the extent those provisions are not inconsistent with Regulation J.[2]

On December 10, 2013, the Board requested comment on proposed changes to the PSR policy.[3] The changes related to the Board's procedures for posting debit and credit entries to depository institutions' Federal Reserve accounts for automated clearinghouse (ACH) debit transactions and commercial check transactions. At the same time, the Board requested comment on proposed changes to Regulation J that would conform to the proposed changes to the PSR policy.[4]

Currently, § 210.9(b)(2)(i) of Regulation J provides that the proceeds of a paying bank's settlement must be made available to its Administrative Reserve Bank by the latest of (1) the next clock hour that is at least one hour after the paying bank receives the check; (2) 9:30 a.m. eastern time; or (3) such later time as provided in the Reserve Banks' operating circulars.[5] Under this section, 9:30 a.m. is the earliest time a paying bank is required to settle for an item, and there has to be at least one hour between the time the item was presented to the paying bank and the time the paying bank settles for the item. The same rules apply to the settlement of returned items under § 210.12(i).[6]

Section 12.2 of the Reserve Banks' Operating Circular 3 currently sets 11:00 a.m. as the earliest settlement time (later than 9:30 a.m. set forth in Regulation J). Under section 12.2, the proceeds of a paying bank's settlement must be available to its Administrative Reserve Bank by the later of 11:00 a.m. or the next clock hour that is at least one hour after the paying bank receives the item, but no later than 3:00 p.m. local time of the paying bank.

Consistent with the proposed PSR policy changes, the Board proposed that § 210.9(b)(2)(i) of Regulation J be revised to state that the paying bank shall settle for an item by the latest of (1) the next clock hour or clock half-hour that is at least one half-hour after the paying bank receives the item; (2) 8:30 a.m.; or (3) such later time as provided in the Reserve Banks' operating circulars. For example, if a Reserve Bank presents an item by 8:00 a.m., the paying bank would be required to settle for the item at 8:30 a.m., unless a later settlement time were provided for in the Reserve

[1] Operating Circular 3 is available at *www.frbservices.org/regulations/operating_circulars.html.*

[2] 12 CFR part 229; UCC Article 4.

[3] 78 FR 74130 (Dec. 10, 2013). The Federal Reserve's current policy on payment system risk is available at *www.federalreserve.gov/paymentsystems/psr_policy.htm.*

[4] 78 FR 74041 (Dec.10, 2013).

[5] All times are eastern time unless otherwise specified. Section 210.9(b)(3)(i) sets forth similar times of day if the paying bank closes voluntarily on a Reserve Bank banking day. Section 210.9(b)(4)(i) sets forth analogous times if the paying bank receives an item on a banking day on which the Reserve Bank is closed, *i.e.,* a business day that is not a banking day for the Reserve Bank.

[6] Section 210.12(i) of Regulation J provides that recipients of returned items must settle with Reserve Banks in the same manner and by the same time as items presented for payment.

Banks' operating circulars. The Board proposed similar changes in §§ 210.9(b)(3)(i) and (b)(4)(i).

The Board also proposed to define ''clock half-hour,'' a new term in § 210.2(p)(2), to mean a time that is on the half-hour (for example, 1:30 or 2:30). Section 210.2(p), which the Board proposed to redesignate as § 210.2(p)(1), currently defines the term ''clock hour'' as a time that is on the hour (for example, 1:00 or 2:00).

## II. Summary of Public Comments and Analysis

The Board received six comments submitted by depository institution trade organizations on the proposed amendments to Regulation J.[7] The Board considered these comments in developing its final rule as discussed below.

### *A. One Half-Hour Window Between Presentment and Settlement*

The Board requested comment on whether one half-hour between receipt of items by a paying bank and the paying bank's settlement is sufficient for a paying bank to perform a limited verification of cash letters and determine whether to settle for or return the cash letter. The Board also requested comment on whether a shorter period between presentment and settlement would be appropriate (for example, fifteen minutes).

Two commenters, the American Bankers Association and the Independent Community Bankers of America, supported the Board's proposal to reduce the settlement window to one half-hour, agreeing that advances in check processing allow for a shorter period between check presentment and settlement. One commenter, the American Bankers Association, did not support shortening the period further to 15 minutes but did not provide a specific reason.

The Board believes that the almost all-electronic nature of check processing that currently exists makes one half-hour between presentment and settlement sufficient because of the reduced time required to verify cash letters in an electronic environment.

The Board also believes that sufficient tools are available to depository institutions to mitigate any adverse effect that movement to a one half-hour settlement window would have on an institution's Federal Reserve account balance. Past trends indicate that an institution should be able to predict within a reasonable margin of error the approximate dollar value of the checks it expects the Reserve Banks to present and should be able to hold balances sufficient to cover that amount. The Reserve Banks now pay interest on most institutions' Federal Reserve account balances, reducing institutions' opportunity cost (that is, loss of interest) associated with holding higher account balances overnight.[8] In addition, the PSR policy allows eligible institutions to collateralize their daylight overdrafts to avoid paying a fee. For each two-week reserve maintenance period, depository institutions also receive a $150 fee waiver, reducing the burden on institutions that might incur small amounts of uncollateralized daylight overdrafts.[9]

For these reasons, the Board is adopting as proposed the amendments shortening the minimum time period between receipt of checks by a paying bank and the paying bank's settlement to one half-hour. The Board did not receive any comments on the proposal to define ''clock half-hour'' as a new term in § 210.2(p)(2) and is adopting the new term as proposed.

### *B. Earliest Settlement Time at 8:30 a.m.*

The Board requested comment on whether to permit the Reserve Banks to obtain settlement from a paying bank for a check by as early as 8:30 a.m. The Board also requested comment on the feasibility of settlement earlier than 8:30 a.m., given the current almost all-electronic check processing environment, and whether an earlier settlement time would even better align presentment to settlement.[10]

Two commenters, the American Bankers Association and the Independent Community Bankers of America, supported the proposal to allow the Reserve Banks to obtain settlement from a paying bank for a check by as early as 8:30 a.m., noting that the rules that allow the Reserve Banks to pay interest on account balances held by institutions reduces the cost that institutions might incur to hold funds overnight to cover any checks presented early the next morning. One commenter, the American Bankers Association, did not support the proposal to move the settlement time earlier than 8:30 a.m. but did not provide a specific reason. Four commenters, the Credit Union National Association, the Georgia Credit Union League, the Missouri Credit Union Association, and the National Association of Federal Credit Unions, expressed concern that some smaller institutions might be negatively affected by the proposed change and might have to increase their Federal Reserve account balances to settle presented checks by holding higher balances overnight, arranging for additional funding before settlement time, or incurring daylight overdrafts.

The Board recognizes that some depository institutions will need to fund their accounts earlier in order to settle for checks by as early as 8:30 a.m. or incur daylight overdrafts. The Board believes, however, that sufficient tools are available to depository institutions to mitigate any adverse effect that a change to 8:30 a.m. may present. As discussed earlier, the Reserve Banks now pay interest on most institutions' Federal Reserve account balances, eligible institutions can collateralize their daylight overdrafts to avoid paying a fee, and depository institutions receive a $150 fee waiver for each two-week reserve maintenance period. The changes to the posting rules of the PSR policy and to Regulation J better align the policy and regulation with today's electronic check processing environment, in which over 90 percent of checks are available to be presented by 8:00 a.m. and prompt settlement is possible for the majority of the value of check activity.[11] Accordingly, the Board

[7] The comment letters are available at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*

[8] 12 CFR 204.10.

[9] The Board notes that Federal Home Loan Banks (FHLBs) are not eligible to earn interest on balances in Federal Reserve accounts, but can act as pass-through correspondents. Per § 204.10 of Regulation D, in cases of balances maintained by pass-through correspondents that are not interest-eligible institutions, Reserve Banks shall pay interest only on the balances maintained to satisfy a reserve balance requirement of one or more respondents, and the correspondents shall pass back to its respondents interest paid on balances in the correspondent's account (12 CFR 204.10). The Board notes also that voluntary collateralization of daylight overdrafts and the $150 fee waiver are not available to Edge and agreement corporations, bankers' banks that have not waived their exemption from reserve requirements, limited-purpose trust companies, government-sponsored enterprises (including FHLBs), and international organizations. These types of institutions do not have regular access to the discount window and, therefore, are expected not to incur daylight overdrafts in their Federal Reserve accounts.

[10] In September 1997, the Board revised § 210.9(b) to explicitly refer to 9:30 a.m. (rather than one hour after the opening of Fedwire) as the earliest time a paying bank could be required to settle for an item. This revision to § 210.9(b) was intended to ensure the earliest settlement time for checks remained unchanged when the scheduled opening of Fedwire moved from 8:30 a.m. to an earlier hour. 62 FR 48166, 48169 (Sept. 15, 1997). In December 1997, the scheduled opening of Fedwire was moved from 8:30 a.m.to 12:30 a.m., and in May 2004, it moved to 9:00 p.m. on the preceding calendar day. For example, for the Reserve Banks' banking day of Tuesday, Fedwire opens at 9:00 p.m. on Monday.

[11] In addition, the proposed posting rules would give earlier availability for items deposited with the Reserve Banks and for credit adjustments and corrections.

is adopting the amendments to Regulation J, § 210.9(b) as proposed. The Reserve Banks plan to amend OC 3 to conform to the changes in Regulation J.

*C. Effective date*

The Board proposed that the changes to the PSR policy and these conforming changes to Regulation J would become effective six months after publication in the **Federal Register**. The Board requested comment on whether six months provided paying banks with sufficient time to make any necessary operational changes.

Five commenters, the American Bankers Association, the Credit Union National Association, the Georgia Credit Union League, the Independent Community Bankers of America, the Missouri Credit Union Association, believed that a six-month lead time would allow enough time to make any necessary operational changes. One commenter, the National Association of Federal Credit Unions, requested that the Board allow a one-year implementation period, stating that the proposed six-month implementation period would not allow institutions enough time to adjust their policies and procedures to reduce the chances of incurring daylight overdraft fees. The Board is adopting an effective date of July 23, 2015. All items scheduled to settle on this date and after will post according to the new posting rule procedures for these transactions, regardless of date of deposit.

## III. Technical Amendment

The Board is also adopting a technical amendment to the definition of ''Administrative Reserve Bank.'' [12] Section 210.2(c) states that an ''Administrative Reserve Bank'' is the Reserve Bank in whose District the entity is located, as determined under the procedure described in § 204.3(b)(2) of the chapter (Regulation D). The Board has relocated § 204.3(b)(2) of Regulation D to § 204.3(g).[13] Accordingly, the Board is amending the definition of ''Administrative Reserve Bank'' in § 210.2(c) to cross-reference § 204.3(g) rather than § 204.3(b)(2).

The Board did not provide public notice or request comment regarding this technical amendment. Pursuant to section 553(b)(3)(B) of the Administrative Procedure Act,[14] the Board finds that public notice and comment is unnecessary because the technical amendment does not effect a substantive change; rather, the technical amendment conforms § 210.2(c) to reorganized Regulation D. For the same reasons, the Board finds that there is good cause for the technical amendment to be effective immediately, rather than thirty days after its publication date.[15]

## IV. Competitive Impact Analysis

The Board conducts a competitive impact analysis when it considers a rule or policy change that may have a substantial effect on payment system participants. Specifically, the Board determines whether there would be a direct and material adverse effect on the ability of other service providers to compete with the Federal Reserve due to legal differences or due to the Federal Reserve's dominant market position deriving from such legal differences.[16] If such legal differences exist, the Board will assess whether the same objectives could be achieved by a modified proposal with lesser competitive impact or, if not, whether the benefits of the proposal outweigh the effect on competition.

The Board believes that the amendments to Regulation J do not have a direct and material adverse effect on the ability of other service providers to compete effectively with the Reserve Banks in providing similar services.

Under Regulation J, the Reserve Banks have the legal ability to obtain same-day settlement for checks they present before the paying bank's cut-off hour (typically 2:00 p.m. local time) through ''auto-charge,'' that is, a direct debit to the Federal Reserve account of the paying bank or its correspondent settlement agent.[17] Under amended Regulation J, the Reserve Banks could present a check at any time before the paying bank's cut-off hour and debit the account of the paying bank or its correspondent settlement agent on the next clock hour or half-hour that is at least one half-hour after presentment.

In contrast, the latest that a private-sector bank may present a paper check for same-day settlement is 8:00 a.m. local time. Section 229.36(f) of Regulation CC requires the paying bank to settle for the check by credit to a Reserve Bank account designated by the presenting bank by the close of Fedwire (currently 6:30 p.m.) or by another agreed-upon method and time.[18] Thus, the Reserve Banks may present checks later in the day for same-day settlement than private-sector banks. In addition, the Reserve Banks may obtain settlement earlier in the day than private-sector collecting banks and, in turn, may pass credits for deposited checks earlier in the day without incurring significant intraday float.

In March 1998, the Board requested comment on whether these legal differences between the rights of the Reserve Banks and private-sector presenting banks provided the Reserve Banks with a competitive advantage and whether the Board should take action to reduce the differences.[19] Commenters generally concluded that the costs of further changes outweighed any advantage of the Reserve Banks. In particular, commenters noted the efficiency of the Reserve Bank's auto-charge process for paying banks, and stated that moving the private-sector presentment deadline to later in the day or eliminating the direct debit of Federal Reserve accounts for check presentments would result in higher costs to paying banks and their business customers in terms of account management, settlement funds transfer fees, and shortened processing windows, and that those costs would outweigh the benefits gained by presenting banks. Based on an analysis of the comments, the Board took no further action.

Currently, institutions may determine, as part of the agreement between a presenting bank and a paying bank, the time at which settlement for electronic checks is required to be funded. A presenting bank and a paying bank could agree, for example, to a minimum time between presentment and settlement. For presenting banks and paying banks that opt to use a check clearinghouse rather than directly exchange checks, private-sector clearinghouses have the option to use the Reserve Banks' National Settlement Service (NSS) to effect settlement of checks or may settle by directing their members to initiate funds transfers over the Reserve Banks' Fedwire Funds Service.[20] Beginning in January 2015, the NSS file submission window will be 7:30 a.m. to 5:30 p.m. Fedwire Funds operating hours begin at 9:00 p.m. the

[12] 12 CFR 210.2(c).

[13] *See* 74 FR 25629, 25633–34 (May 29, 2009).

[14] 5 U.S.C. 553(b)(3)(B).

[15] 5 U.S.C. 553(d)(3).

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

[17] 12 CFR 210.9(b)(1) and (b)(5).

[18] 12 CFR 229.36(f)(2).

[19] The request for comment and the subsequent notice of the Board's decision can be found, respectively, at 63 FR 12700 (March 16, 1998) and 63 FR 68701 (December 14, 1998).

[20] NSS is a multilateral settlement service owned and operated by the Reserve Banks. The service is offered to depository institutions that settle for participants in clearinghouses, financial exchanges, and other clearing and settlement groups. Settlement agents, acting on behalf of depository institutions in a settlement arrangement, electronically submit settlement files to the Reserve Banks. Files are processed upon receipt, and entries are automatically posted to the depository institutions' Reserve Bank accounts. The NSS file submission window is currently 8:30 a.m. to 5:00 p.m.

previous calendar day and end at 6:30 p.m.

Under the final amendments to Regulation J and the recently adopted changes to the PSR policy posting rules, the bulk of the Reserve Banks' postings of credits to senders and debits to paying banks for commercial check transactions will shift to earlier in the day. The value of checks a bank sends to the Reserve Banks could be higher or lower than the value it receives from the Reserve Banks. As a result, the earlier posting of commercial check transactions may be viewed as more or less attractive, depending on whether the value of an institution's check credits is higher or lower than the value of its check debits. Further, private-sector institutions can achieve improvements in earlier settlement similar to those provided by the rule and the PSR policy changes through private agreements among participants, as well as the use of NSS.

More recently, the Board requested comment on the continued utility of the Regulation CC same-day settlement rule for paper checks and whether the rule should be applied to electronic check presentments by private-sector banks. The Board also noted that if, in the future, it proposes to eliminate the same-day settlement rule, it could also propose to retain the proscription against paying banks' assessment of presentment fees in order to maintain the current balance of bargaining power, as well as reduce the competitive disparities in presentment abilities between the Reserve Banks and private-sector banks.[21] The Board is in the process of analyzing these comments and will discuss these issues, as appropriate, at a later date in the context of the final amendments to Regulation CC. In the meantime, the Board does not believe that the changes to Regulation J reducing the minimum time between presentment and settlement to 30 from 60 minutes, and moving the earliest settlement time to 8:30 a.m. from 9:30 a.m., changes the Reserve Banks' competitive position versus private-sector presenting banks in a material way.

## V. Final Regulatory Flexibility Analysis

The Board has reviewed the final regulation in accordance with section 3(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The rule would apply to all depository institutions that receive presentment or return of checks from the Reserve Banks. Based on current information, the Board believes that the final rule would not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). Nonetheless, a Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 604, after consideration of comments received during the public comment period.

### Statement of the Need for, and Objectives of the Final Rule

These final amendments to Regulation J are necessary to conform the required settlement times for checks presented by the Reserve Banks to the method for posting debits and credits to institutions' Federal Reserve accounts to measure daylight overdrafts under recent revisions to the PSR policy. The Board believes that the Regulation J revisions and the PSR policy posting rules better align the settlement for checks with actual deposit and presentment times, reflecting the industry's almost complete shift from paper to electronic check processing.

### Public Comments

The Board requested information and comment on any costs that would arise from the application of the proposed rule. Four institutions expressed concern that some smaller institutions might be negatively affected by the proposed change and might have to increase their Federal Reserve account balances to settle presented checks by holding higher balances overnight, arranging for additional funding before settlement time, or incurring daylight overdrafts. As discussed earlier, the Board believes that sufficient tools are available to depository institutions to mitigate any adverse effect. For example, the Reserve Banks now pay interest on most institutions' Federal Reserve account balances, eligible institutions can collateralize their daylight overdrafts to avoid paying a fee, and depository institutions receive a $150 fee waiver for each two-week reserve maintenance period.[22] As further discussed earlier, under the PSR policy posting rules, the bulk of the Reserve Banks' postings of debits to paying institutions for commercial check transactions will shift to earlier in the day, allowing the Reserve Banks to provide credits to depositing institutions earlier, thus mitigating adverse effects on depository institutions.

### Small Entities Affected by the Rule

The final rule affects all institutions that receive checks or returned checks handled by the Reserve Banks. The Board believes that virtually all depository institutions receive checks or returned checks handled by the Reserve Banks on at least an occasional basis. Pursuant to regulations issued by the Small Business Administration (SBA) (13 CFR 121.201), a ''small banking organization'' includes a depository institution with $550 million or less in total assets. Based on data reported as of June 30, 2014, the Board believes that there are approximately 11,750 small depository institutions.

### Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule would permit the Reserve Banks to require a paying bank to settle for an item by as early as 8:30 a.m., instead of 9:30 a.m., and as soon as one half-hour, instead of one hour, after it receives the item from the Reserve Banks. Paying banks may choose to fund their accounts to accommodate the earlier settlement time by holding sufficient balances overnight or arranging for funding before the settlement time. Otherwise, paying banks would incur daylight overdrafts in their Federal Reserve account. The rule contains no other reporting, recordkeeping, or compliance requirements.

### Steps Taken To Minimize Impact of, and Significant Alternatives to, the Final Rule

As noted earlier, four commenters, the Credit Union National Association, the Georgia Credit Union League, the Missouri Credit Union Association, and the National Association of Federal Credit Unions, suggested that some smaller institutions might be negatively affected by the proposed change and might have to increase their Federal Reserve account balances to settle presented checks by holding higher balances overnight or arranging for additional funding before settlement time. Otherwise, paying banks would incur daylight overdrafts. As discussed earlier, the Board believes that sufficient tools are available to depository institutions to mitigate any adverse effect on an institution's Federal Reserve account balance (including interest on Federal Reserve account balances, collateralization of daylight overdrafts to avoid paying a fee, and a $150 fee waiver for each two-week reserve maintenance period). As further

[21] 79 FR 6674 (Feb. 14, 2014).

[22] A small number of institutions could be ineligible to receive intraday credit and would incur overdrafts. To avoid violating the PSR policy and incurring fees, these institutions would need to increase funding either overnight or early in the morning. Some of these institutions could be eligible to receive interest on Federal Reserve account balances.

discussed earlier, under the PSR policy posting rules, the bulk of the Reserve Banks' postings of debits to paying institutions for commercial check transactions will shift to earlier in the day, allowing the Reserve Banks to provide credits to depositing institutions earlier, thus mitigating adverse effects on depository institutions.

Alternatively, the Board could have adopted a rule that permits the Reserve Banks to require a paying bank to settle for an item at a time earlier than 8:30 a.m. or leave the earliest possible settlement time at 9:30 a.m. The Board believes the proposed time of 8:30 a.m. better achieves the Board's goal of aligning presentment to settlement, and better aligns with today's electronic check processing environment, than the existing 9:30 a.m. settlement time under Regulation J. In addition, the Board believe that the proposed settlement time of 8:30 a.m. will impose minimal costs on paying banks. The Board sought comment on (1) whether permitting the Reserve Banks to obtain settlement from a paying bank for a check by as early as 8:30 a.m. was appropriate and (2) the feasibility of settlement prior to 8:30 a.m. and whether an earlier posting time would even better align presentment to settlement. (See discussion earlier in section II.B.)

In addition, in lieu of proposing to permit the Reserve Banks to require a paying bank to settle as soon as one half-hour after it receives the item from the Reserve Banks, the Board could have proposed a shorter or longer period. The Board believes the final time period of one half-hour promotes the Board's objective of minimizing the window between presentment and settlement to reflect technological and operational developments while continuing to provide paying banks with sufficient time to perform a limited verification of cash letters. The Board requested comment on whether one half-hour between presentment and settlement is appropriate or if a shorter window would be sufficient. (See discussion earlier in section II.A.)

## VI. Paperwork Reduction Act Analysis

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320, appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). No collections of information pursuant to the PRA are contained in the final rule.

## List of Subjects in 12 CFR Part 210

Banks, Banking, Federal Reserve System.

## Authority and Issuance

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

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

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

**Authority:** 12 U.S.C. 248(i), (j), and 248–1, 342, 360, 464, 4001–4010, and 5001–5018.

■ 2. In § 210.2, revise paragraphs (c) and (p) to read as follows:

### § 210.2 Definitions.

* * * * *

(c) *Administrative Reserve Bank* with respect to an entity means the Reserve Bank in whose District the entity is located, as determined under the procedure described in § 204.3(g) of this chapter (Regulation D), even if the entity is not otherwise subject to that section.

* * * * *

(p) *Clock hour and clock half-hour.* (1) *Clock hour* means a time that is on the hour, such as 1:00, 2:00, etc.

(2) *Clock half-hour* means a time that is on the half-hour, such as 1:30, 2:30, etc.

* * * * *

■ 3. In § 210.9, revise paragraphs (b)(2), (3), and (4) to read as follows:

### § 210.9 Settlement and payment.

* * * * *

(b) * * *

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

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

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

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

(ii) If the paying bank fails to settle for or return a cash item in accordance with paragraph (b)(2)(i) of this section, it shall be subject to any applicable overdraft charges. Settlement under paragraph (b)(2)(i) of this section satisfies the settlement requirements of paragraph (b)(1) of this section.

(3) *Paying bank closes voluntarily.* (i) If a paying bank closes voluntarily so that it does not receive a cash item on a day that is a banking day for a Reserve Bank, and the Reserve Bank makes a cash item available to the paying bank on that day, the paying bank shall either—

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

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

(ii) If a paying bank closes voluntarily so that it does not receive a cash item on a day that is a banking day for a Reserve Bank, and the Reserve Bank makes a cash item available to the paying bank on that day, the paying bank is not considered to have received the item until its next banking day, but it shall be subject to any applicable overdraft charges if it fails to settle for or return the item in accordance with paragraph (b)(3)(i) of this section. The settlement requirements of paragraphs (b)(1) and (2) of this section do not apply to a paying bank that settles in accordance with paragraph (b)(3)(i) of this section.

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

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

(B) Settle for the item so that the proceeds of the settlement are available to its administrative Reserve Bank by 8:30 a.m. eastern time on the Reserve Bank's next banking day or such later

time as provided in the Reserve Bank's operating circular, or return the item by midnight of the day it receives the item. If the paying bank fails to settle for or return a cash item in accordance with this paragraph (b)(4)(i)(B), it shall be subject to any applicable overdraft charges. Settlement under this paragraph (b)(4)(i)(B) satisfies the settlement requirements of paragraph (b)(4)(i)(A) of this section.

(ii) [Reserved]

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 1, 2014.

**Robert deV. Frierson,**

*Secretary of the Board.*

[FR Doc. 2014–28516 Filed 12–4–14; 8:45 am]

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## FEDERAL RESERVE SYSTEM

## 12 CFR Part 210

**[Docket No. OP–1472]**

## Federal Reserve Policy on Payment System Risk; Procedures for Measuring Daylight Overdrafts

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Policy statement.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) has adopted revisions to part II of the Federal Reserve Policy on Payment System Risk (PSR policy) related to the procedures for measuring balances intraday in institutions' accounts at the Federal Reserve Banks (Reserve Banks). The changes relate to the Board's procedures for posting debit and credit entries to institutions' Federal Reserve accounts for automated clearinghouse (ACH) debit transactions and commercial check transactions. Elsewhere in the **Federal Register** under Docket No. R–1473, the Board has adopted related changes to the Board's Regulation J that affect when paying banks settle for check transactions presented to them by the Reserve Banks. Additionally, in this document, the Board has adopted a set of principles for establishing future posting procedures for the Reserve Banks' same-day ACH service. The Board has also adopted a change in language of the PSR policy intended to clarify the Reserve Banks' administration of the policy for U.S. branches and agencies of foreign banking organizations. Finally, the Board has adopted two technical revisions to the posting procedures to reflect deposit deadlines already in effect for Treasury checks, postal money orders, local Federal Reserve Bank checks, and savings bond redemptions in separately sorted deposits.

**DATES:** *Effective Dates:* The policy changes related to the set of principles for establishing future posting procedures for the Reserve Banks' same-day ACH service, the Reserve Banks' administration of the policy for U.S. branches and agencies of foreign banking organizations, and the technical revisions to the posting procedures for Treasury checks, postal money orders, local Federal Reserve Bank checks, and savings bond redemptions will take effect on December 5, 2014. The policy changes to the Board's procedures for posting debit and credit entries to institutions' Federal Reserve accounts for ACH debit and commercial check transactions will take effect on July 23, 2015. All items scheduled to settle on this date and after will post according to the new posting rule procedures for these transactions, regardless of date of deposit.

**FOR FURTHER INFORMATION CONTACT:** Susan V. Foley, Senior Associate Director (202/452–3596), Jeffrey D. Walker, Assistant Director (202/721–4559), or Michelle D. Olivier, Senior Financial Services Analyst (202/452–2404), Division of Reserve Bank Operations and Payment Systems, Board of Governors of the Federal Reserve System; for users of Telecommunications Device for the Deaf (TDD) only, contact 202/263–4869.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On December 10, 2013, the Board requested comment on several changes to part II of the PSR policy intended to enhance the efficiency of the payment system.[1] Technology and processing improvements have enabled payment systems and depository institutions to achieve significant efficiencies since the Board first established the procedures, referred to as posting rules, to measure depository institutions' intraday Federal Reserve account balances. The proposed changes to these posting rules are intended to align them with current operations and processing times and to strategically position the rules for future advancements in the speed of clearing and settlement.

#### *Commercial and Government ACH Debit Transactions*

The Board proposed moving the posting times for commercial and government ACH debit transactions processed overnight to 8:30 a.m. from 11:00 a.m. eastern time (ET) to coincide with the posting time for ACH credit transactions processed overnight.[2] Under the proposal, other types of ACH transactions, including same-day ACH and certain ACH return items, would not be affected and would continue to post at 5:00 p.m.

The Board outlined four potential benefits to shifting earlier the posting for ACH debit transactions. First, posting ACH debit transactions according to the proposed posting rules would simplify account management by allowing institutions to fund the net of all ACH activity at a single posting time, rather than funding debit and credit transactions separately. Second, the change would increase liquidity early in the day both for institutions that originate ACH debit transactions over the FedACH network and for those institutions that originate ACH debit transactions over the Electronic Payments Network (EPN), the other ACH operator, but have transactions delivered to receiving institutions over the FedACH network (interoperator transactions).[3] Third, moving the posting time for ACH debit transactions to 8:30 a.m. would align the Reserve Banks' FedACH settlement times with those of EPN. The Board believes that this change would remove any potential competitive disparities between the two ACH operators and their participants arising from the different settlement times for ACH debit transactions. Fourth, the earlier posting of ACH debit transactions would increase the efficiency of the ACH network by aligning better the settlement of ACH debit transactions with their processing. Additionally, posting ACH debit transfers at 8:30 a.m. would better conform to the Board's principles for measuring daylight overdrafts, specifically the principle that encourages posting times to be as close as possible to the delivery of payments to the receiving institution.[4]

[1] 78 FR 74130 (Dec. 10, 2013). The Board's PSR policy is available at *www.federalreserve.gov/paymentsystems/psr_policy.htm.*

[2] All times are eastern time unless otherwise specified.

In 2008, the Board requested comment on moving the posting time of ACH debit transactions from 11:00 a.m. to 8:30 a.m. to coincide with the posting of ACH credit transactions but decided not to pursue the change because of economic conditions at the time and the additional costs and liquidity pressures that could be placed on some institutions. The request for comment and the subsequent notice of the Board's decision not to pursue the proposed changes can be found, respectively, at 73 FR 12443 (Mar. 7, 2008) and 73 FR 79127 (Dec. 24, 2008).

[3] Liquidity refers to balances in Federal Reserve accounts to make payments. An increase in liquidity involves higher account balances, which could result in fewer daylight overdrafts.

[4] The Board's four principles for measuring daylight overdrafts are as follows: (1) The

*Commercial Check Transactions*

The Board proposed several revisions to its posting rules for commercial check transactions to reflect today's nearly 100 percent electronic check-processing environment. Specifically, the Board proposed to post commercial check transactions, both credits and debits, at 8:30 a.m., 1:00 p.m., and 5:30 p.m., with the specific posting time depending on when a check is deposited with the Reserve Banks (for credit) or presented by the Reserve Banks (for debit).[5] Credits associated with any commercial checks received by the Reserve Banks' deposit deadlines would post on a rolling basis at the next available posting time at least 30 minutes after receipt by the Reserve Banks.[6] Similarly, debits associated with electronic check transactions would post on a rolling basis at the next available posting time that is at least 30 minutes after presentment to the paying bank. To accommodate the extra time required to make paper presentments, debits for the few remaining paper commercial check transactions, which account for less than one-tenth of 1 percent of checks processed by the Reserve Banks, would post at the final posting time of 5:30 p.m. on the day the paper check is presented to the paying bank.[7]

Under the current posting rules and Regulation J, at least one hour must elapse between presentment and posting to allow limited verification of cash letters. The Board proposed reducing this requirement from one hour to 30 minutes. As a result of the widespread use of electronic check-handling methods and the extremely small value of paper presentments, the Board believes 30 minutes is now sufficient for institutions to verify cash letters.[8] Additionally, as part of the proposed posting rules, the Reserve Banks would present multiple electronic cash letters per day to institutions that receive electronic presentments, with the first presentment by 8:00 a.m. for settlement at 8:30 a.m.[9]

The Board also proposed to revise the posting rules for large-value check corrections and adjustments amounting to $1 million or more.[10] In alignment with the proposed posting times for commercial check transactions, the Board proposed to move the settlement of large-value credit corrections and adjustments to begin at 8:30 a.m. and hourly thereafter on the half-hour depending on when the discrepancy is detected.[11] Additionally, the Board proposed to post large-value debit corrections after the close of the Fedwire Funds Service, the same time as large-value debit adjustments are posted.[12]

The Board outlined four potential benefits from the proposed changes to its commercial check posting rules. First, the proposed posting rules would give earlier availability for items deposited with the Reserve Banks based on an institution's deposit behavior and would provide earlier availability for credit adjustments and corrections. Second, these changes would simplify the posting rule structure and, as a result, reduce the administrative burden on institutions and Reserve Banks. Third, the proposed rules would reduce the amount of intraday float currently provided by the Reserve Banks as a result of posting rules that do not adequately reflect current operations.[13] Fourth, the proposals would align the posting rules with the significant shift over the past decade from paper to electronic check clearing. The proposed commercial check posting rules would conform better to the Board's principles for measuring daylight overdrafts, specifically the principles that discourage providing intraday float and encourage posting times to be as close as possible to the delivery of payments to the receiving institution.

As part of its posting rule proposals, the Board assessed the effect of the ACH debit and commercial check transaction posting rule changes on institutions' account balances and daylight overdraft fees both separately and combined. The Board recognized that the combined effect of the changes would, on average, reduce institutions' Federal Reserve account balances at 8:30 a.m. for the majority of master accounts that settle ACH and commercial check activity (94 percent of approximately 3,500 master accounts) based on second-quarter 2013 payment data.[14] Less than 1 percent of

measurement procedures should not provide intraday float to participants. (2) The measurement procedures should reflect the times at which payor institutions are obligated to pay for transactions. (3) The users of payment services should be able to control their use of intraday credit. (4) The Reserve Banks should not obtain any competitive advantage from the measurement procedures. The Board developed the principles in the early 1990s; for the latest version, refer to 73 FR 12443 (Mar. 7, 2008).

[5] Under the current posting rules, commercial check credits post according to one of two options: (1) All credits post at a single, float-weighted posting time, or (2) fractional credits post between the hours of 11:00 a.m. and 6:00 p.m., depending on the institution's preference. The second option lets the institution receive portions of its available check credits on the clock hours between 11:00 a.m. and 6:00 p.m. The option selected applies to all check deposits posted to an institution's account. Both crediting options are based on surveys of check presentment times and vary across time zones. Commercial check debits are posted on the next clock hour at least one hour after presentment beginning at 11:00 a.m. for paper checks and 1:00 p.m. local time for electronic checks, and ending at 3:00 p.m. local time.

[6] Immediate credit would not be passed for deferred-availability deposit products. Customer availability for files deposited for these services would be the same as if the file were received at a deposit deadline before 8:00 a.m. the next business day.

Currently, the Reserve Banks' electronic check deposit deadlines are 9:00 p.m. on the previous business day, and 1:00 a.m., 5:00 a.m., and 10:00 a.m. on the settlement day. The paper check deposit deadline is 7:00 p.m. on the previous business day. As a result, depositing banks could expect credit for all electronic items deposited for the 9:00 p.m., 1:00 a.m., and 5:00 a.m. deposit deadlines to post at 8:30 a.m., and credit for electronic items deposited for the 10:00 a.m. deadline to post at 1:00 p.m. Paper items deposited by 7:00 p.m. on the previous day would post at 8:30 a.m.

[7] The posting of debits associated with electronic presentments earlier than the debits associated with paper check presentments may contribute marginally to a given paying bank's incentive to require that checks be presented to it in paper form. Electronic check presentment is now pervasive, however, and the Board does not believe that a paying bank that receives presentments electronically would be swayed by the later posting time to return to paper presentment.

Credits for checks presented in paper form would not be delayed to accommodate the extra time required for presentment and would post at the next available posting time at least 30 minutes after receipt by the Reserve Banks. The Reserve Banks will monitor the value of commercial checks presented in paper form, and should it increase materially, the Board may propose changes to the posting rules to reduce float.

[8] The Board issued a companion document requesting comment on proposed changes to Regulation J, under which a paying bank would be required to settle for an item by as early as 8:30 a.m. and as soon as one half-hour after it receives the item from the Reserve Banks. The request for comment can be found at 78 FR 74041 (Dec. 10, 2013). Elsewhere in the **Federal Register** under Docket No. R–1473, the Board adopted these changes to Regulation J.

[9] The timing and frequency of presentments is subject to change by the Reserve Banks to align better with processing advancements and product type.

[10] Corrections are account entries made to correct discrepancies detected by a Reserve Bank during the initial processing of checks. Adjustments are account entries made to correct discrepancies detected by an institution after entries have posted to Federal Reserve accounts.

[11] Currently, credit corrections and adjustments amounting to $1 million or more post at 11:00 a.m. and hourly thereafter, coinciding with the current posting rules for commercial checks.

[12] Currently, debit corrections amounting to $1 million or more post at 11:00 a.m. and hourly thereafter.

[13] Under the current posting rules, check credits and paper check debits begin posting at 11:00 a.m., whereas electronic check debits begin posting at 1:00 p.m. local time. As a result, the current measurement procedures provide intraday float, which has increased over time as electronic deposits and presentments have expanded.

[14] Although most institutions that maintain master accounts are involved in both ACH and commercial check activity, approximately half of these institutions settle their activity through a correspondent rather than their own master account.

In connection with the 2013 proposal, analysis reflects activity at the master account level from the

Continued

these institutions, only 33 institutions, would incur overdraft fees in any of the six two-week reserve maintenance periods within the quarter analyzed. The low incidence of fees can be attributed to the current levels of pledged collateral and collateralized daylight overdrafts receiving a zero fee, the $150 fee waiver covering modest amounts of uncollateralized overdrafts, and the high balances held in Federal Reserve accounts. Twenty-eight of the 33 institutions are eligible to incur daylight overdrafts and could avoid paying higher fees by pledging (additional) collateral, holding higher balances and receiving interest on their Federal Reserve balances, or arranging early-morning funding. The remaining 5 institutions are ineligible to receive intraday credit and would need to increase funding in their accounts either by holding higher balances (and in some cases potentially receiving interest on their Federal Reserve balances) or by arranging early-morning funding.[15]

For both the ACH debit and commercial check posting rule proposals, the Board proposed an effective date of no less than six months from the publication of the revised PSR policy to give institutions sufficient time to make any necessary changes.

*Principles for Future Posting Rules for the Reserve Banks' Same-Day ACH Service*

Given the Board's expectations that the Reserve Banks' same-day ACH service will evolve, with the potential establishment of additional processing cycles that require new posting times for settlement, the Board proposed establishing a set of principles that would be applied to any new same-day ACH posting rules.[16] Under the proposal, the Board would generally request public comment on changes to the posting rules only when the changes deviate from the principles. Such principles would apply to the Reserve Banks' voluntary (opt-in) same-day ACH service and to any future same-day ACH service, such as a universal same-day ACH service covering all participants in the ACH network.[17] These principles, which would apply in addition to the current four posting-rules principles, were proposed as follows:[18]

(1) For each same-day ACH transmission deadline, the Reserve Banks will establish expected distribution times for the same-day ACH files.

a. The Reserve Banks will post settlement for same-day ACH debit transactions no earlier than 15 minutes after the Reserve Banks' expected distribution times for the associated same-day ACH file.

b. The Reserve Banks will post settlement for ACH credit and debit transactions associated with a particular same-day ACH file distribution time at the same time.

(2) The Reserve Banks will not post settlement for same-day ACH transactions between 6:30 p.m. and 8:30 a.m. on the next processing day.

(3) The Reserve Banks will post settlement for same-day ACH transactions exchanged with another operator to support universal same-day ACH during the operating hours for the Reserve Banks' National Settlement Service (NSS).[19]

The Board proposed that the principles for future posting rules for the Reserve Banks' same-day ACH service would be effective on final approval.

*Language Clarification in Section II.G.3*

The Board proposed a language clarification to part II of the PSR policy to explain more clearly the Reserve Banks' administration of the PSR policy as it relates to U.S. branches and agencies of foreign banking organizations (FBOs). The proposed language would clarify that U.S. branches and agencies of the same foreign bank (also referred to as an FBO family) are expected to manage their accounts so that the daylight overdraft position in each account does not exceed the capacity allocated to that account from the FBO family's net debit cap.[20] In the past, the Reserve Banks monitored the master accounts of FBO families on a consolidated basis rather than requiring an FBO family to allocate its net debit cap if it wanted to incur daylight overdrafts in more than one account across the Federal Reserve.

The Board proposed that the language change clarifying the Reserve Banks' administration of the policy for U.S. branches and agencies of FBOs would be effective on final approval.

## III. Summary of Public Comments and Analysis

The Board received thirteen comment letters in response to its PSR policy proposals.[21] Comments were submitted by seven depository institution trade organizations, one private-sector clearing and settlement system, one commercial banking organization, one bankers' bank, one government-sponsored enterprise, and two individuals. Most commenters expressed support for the posting-rule proposals' intent to improve the speed and efficiency of the payment system but also raised specific concerns. The Board considered these comments in finalizing its changes to the PSR policy, as discussed in more detail below.

*Effect on Credit Unions and Small Institutions*

Five commenters, including four depository institution trade organizations and a bankers' bank, expressed concerns regarding the effect of the ACH debit and commercial check posting rule proposals on credit unions and small institutions.[22] The

second quarter 2013 and is intended to be illustrative only. All institutions should consider their own historical payment activity when evaluating the effect of the posting rule changes.

The average balance calculation only includes days in the second quarter of 2013 for which institutions had ACH debit or commercial check payment activity. The simulation of balances focused only on balances held at 8:30 a.m., while the analysis of fees and collateral took into account balances held and collateral pledged over the entire 21.5-hour Fedwire operating day.

[15] These institutions include bankers' banks and Federal Home Loan Banks, and not all would be eligible to earn interest on their Federal Reserve balances.

[16] The current processing schedule has a 2:00 p.m. deadline for submitting same-day, forward ACH transactions for settlement at 5:00 p.m. Return same-day ACH transactions post at 5:30 p.m.

[17] In 2011, NACHA, a not-for-profit association that manages the development, administration, and governance of the ACH network for participating depository institutions, proposed amendments to its operating rules to enable ACH debit and credit transfers to be cleared and settled on the same day that they are originated. The expedited service would require the participation of all receiving institutions in the ACH network, going beyond the Reserve Banks' voluntary service. Although the majority of NACHA's voting members were in favor of the proposal, NACHA did not receive the 75 percent positive votes required for passage. NACHA is currently evaluating modifications to its earlier proposal to address concerns expressed regarding it.

[18] These four posting-rule principles are outlined in a footnote earlier in this document.

[19] NSS is a multilateral settlement service owned and operated by the Reserve Banks. The service is offered to institutions that settle for participants in clearinghouses, financial exchanges, and other clearing and settlement groups. Settlement agents, acting on behalf of those institutions in a settlement arrangement, electronically submit settlement files to the Reserve Banks. Files are processed upon receipt, and entries are automatically posted to the institutions' Federal Reserve accounts. The NSS file submission window is currently 8:30 a.m. to 5:00 p.m.

[20] The previous language in the PSR policy that related to the administration of multiple master accounts was somewhat ambiguous and could have been interpreted to allow the Federal Reserve to administer these accounts as is the current practice (separate administration for the multiple master accounts) or the previous practice (consolidated administration).

[21] The comment letters are available at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*

[22] Commenters were the Credit Union National Association, Georgia Credit Union League, Missouri Credit Union Association, National Association of Federal Credit Unions, and Midwest Independent Bank.

commenters were supportive of the proposals' intent but believed that credit unions and smaller institutions might be disproportionately affected and the proposals could lead to more-frequent and larger daylight overdrafts and associated fees. Given the concerns raised by commenters related to these types of institutions, the Board performed additional analysis on the effect of the combined ACH debit and commercial check proposals on these institutions based on second-quarter 2013 payment data, consistent with the 2013 proposal. Of the approximately 3,500 master accounts maintained by institutions that settle ACH and commercial check activity, almost 800 (22 percent) are maintained by natural person credit unions. The combined posting rule proposals would, on average, reduce account balances held in Federal Reserve accounts at 8:30 a.m. for 94 percent of these institutions. Out of those credit unions that would experience lower balances, only 1 credit union would incur higher daylight overdraft fees as a result of the proposals, and this credit union was already incurring fees under the current posting rules. The average increase in fees over the quarter under the proposed posting rules would be $132 per reserve maintenance period.[23] To avoid fee increases, this credit union could pledge on average $7 million of additional collateral.[24]

Excluding natural person credit unions, an additional 2,500 master accounts of the approximately 3,500 master accounts maintained by institutions that settle ACH and commercial check activity are maintained by institutions with assets of less than $10 billion. The combined posting rule proposals would reduce, on average, account balances held in Federal Reserve accounts at 8:30 a.m. for 95 percent of these institutions. Out of those small institutions that would experience lower balances, approximately 1 percent, only 25 institutions, would incur higher fees as a result of the proposals. More than one-third of the 25 institutions were already incurring fees under the current posting rules, and the average increase in fees over the quarter under the proposed posting rules would be $66 per reserve maintenance period. To avoid fee increases, these 25 institutions could pledge on average $10 million of (additional) collateral.

The Board recognizes that many institutions are holding higher balances in their Federal Reserve accounts today, and although second-quarter 2013 payment data indicate that only a very limited number of credit unions and institutions with assets less than $10 billion would incur higher fees under the proposal, over time, more of these institutions may need to alter their account management in response to the posting rule changes. Nevertheless, the Board believes that institutions have the tools to mitigate any adverse impact. For each two-week reserve maintenance period, institutions receive a $150 fee waiver, which is intended to reduce the burden on institutions that incur a small amount of uncollateralized daylight overdrafts. Many institutions have considerable room for additional daylight overdrafts under the waiver. In addition, institutions could post (additional) collateral, hold higher balances overnight, or arrange early morning funding. Interest on balances in Federal Reserve accounts would help compensate those institutions that hold higher balances overnight in their Federal Reserve accounts.

*Effect on Institutions Ineligible for Access to Intraday Credit*

One commenter, representing the interests of five Federal Home Loan Banks without regular access to the discount window and thus without access to intraday credit under the PSR policy because of their classification as government-sponsored enterprises, expressed concern that the proposed posting rule for ACH debit transactions would be excessively burdensome for institutions ineligible for access to intraday credit.[25] The commenter believed that, in addition to account management changes necessary to avoid incurring daylight overdrafts, such as holding higher balances overnight or finding alternative liquidity sources, the proposal might require these institutions to reduce their income-generating investments of overnight funds. The commenter also believed that, if adopted, the new posting rule for ACH debit transactions might cause institutions ineligible for access to intraday credit to re-evaluate the provision of ACH services to their customers and the fees associated with ACH services. The Board acknowledges that institutions ineligible for access to intraday credit may face additional challenges as a result of the proposed posting rule for ACH debit transactions. Of the 26 institutions ineligible to incur daylight overdrafts that participate in FedACH, 22 on average would experience lower balances at 8:30 a.m. under the proposed posting rule for ACH debit transactions. Only 4 of these 22 institutions, however, would incur daylight overdrafts according to the Board's analysis of second-quarter 2013 payment data. The average maximum overdrafts incurred by these 4 institutions over the quarter analyzed ranged from just under $100,000 to slightly below $100 million, with an average of $33 million across the 4 institutions. These institutions would need to arrange early-morning funding or hold higher balances overnight based on expected settlement of ACH activity.[26] The Board understands that there may be costs associated with these actions, and institutions would need to weigh the costs and benefits of their account-management options. In addition, the Board acknowledges that some institutions that would experience lower balances might also need to manage their Federal Reserve accounts more closely to avoid daylight overdrafts under the proposed posting rule for ACH debit transactions.

A limited number of institutions that are ineligible for access to intraday credit may need to manage their Federal Reserve accounts to avoid daylight overdrafts as a result of the earlier posting time for ACH debit transfers. The Board believes that these institutions can reasonably manage their Federal Reserve accounts for activity settling at 8:30 a.m. given the availability of Fedwire Funds beginning at 9:00 p.m. the previous calendar day. The Board believes that the associated burden of closer account management by a small number of institutions is outweighed by the benefits of the earlier posting time discussed earlier, including the long-run efficiency of the payment system.

*Competitive Disparity Between Reserve Bank and Private-Sector Services*

In response to the Board's ACH debit and commercial check posting rule proposals, The Clearing House (TCH), which owns EPN, was supportive of the Board's intent to align and modernize the posting rules but expressed several

[23] The average calculation includes all reserve maintenance periods in the quarter.

[24] The average calculation only includes reserve maintenance periods for which the credit union required (additional) collateral.

[25] Edge and agreement corporations, bankers' banks that have not waived their exemption from reserve requirements, limited-purpose trust companies, government-sponsored enterprises including Federal Home Loan Banks (FHLBs), and international organizations do not have regular access to the discount window and are not permitted to incur daylight overdrafts in their Federal Reserve accounts. Voluntary collateralization of daylight overdrafts and the $150 fee waiver are not available to these institutions.

[26] Only one of the four institutions is eligible to earn interest on its Federal Reserve account balance.

short-term and long-term competitive disparity concerns. Specifically, TCH was concerned that the posting rules might give the Reserve Banks an unfair advantage over private-sector clearing and settlement systems as a result of underlying legal differences and the limited settlement hours of NSS. TCH also stated that in the long run, the Board should ensure that all processes related to the posting and settlement of Reserve Bank priced services do not provide an advantage to Reserve Bank priced services over those of other clearing and settlement systems. TCH stated that, in the short-term, the posting rules should avoid disrupting the settlement of clearing and settlement systems, specifically EPN's 8:30 a.m. settlement of ACH transactions over NSS. Two additional commenters, U.S. Bank and NACHA, endorsed and emphasized the importance of addressing TCH's concerns related to the proposed posting rules for ACH debit and commercial check transactions.

Reserve Bank priced services settle transactions in participants' Federal Reserve accounts through direct entries to the Federal Reserve's accounting system whereas private-sector clearing and settlement systems typically use Fedwire Funds, ACH, or NSS to settle transactions in participants' Federal Reserve accounts. The Board has traditionally encouraged the use of NSS for multilateral settlement arrangements to mitigate counterparty credit risk. The establishment of posting rules outside of the NSS operating day could potentially create competitive disparities between Reserve Bank and private-sector clearing and settlement systems. The posting rules proposed for ACH debit and commercial check transactions occur within the NSS file submission window, with the exception of the final posting time for commercial check transactions at 5:30 p.m. and the posting of a limited number of check debit and small-dollar credit corrections and adjustments after the close of Fedwire. The Reserve Banks will extend the NSS file submission window until 5:30 p.m. beginning in January 2015. In regard to the posting of debit corrections and adjustments after the close of Fedwire Funds, such late posting ensures that an institution could not receive a debit correction or adjustment before the associated transaction posted. Given the minimal occurrence of large-value check corrections and adjustments and the low value of other check corrections and adjustments, the Board does not believe posting these transactions after the close of Fedwire creates a significant competitive disparity between Reserve Bank and private-sector service providers.[27]

Additionally, TCH was concerned that the Reserve Banks' priced services personnel could view participants' Federal Reserve account balances, daylight overdraft capacity, and placement on the real-time monitor and use that information to restrict transactions or payment services as a means of managing potential settlement failures.[28] Although the Reserve Banks' priced services personnel may have the ability to view account balances in the normal course of business operations, they do not have access to daylight overdraft capacity or risk control information. The Reserve Banks, like other clearing and settlement systems, use a range of risk-management tools that may include requiring minimum balances and collateral to manage the inherent risk of providing services, but Reserve Bank priced services personnel do not influence the application of these controls to be able to affect the outcome of settlement and do not have the ability to apply such controls.[29]

TCH encouraged the Board to ensure that, in the long run, all processes related to the posting and settlement for Reserve Bank priced services more broadly do not provide an advantage to the Reserve Banks over the private-sector clearing and settlement systems as a result of legal or settlement differences between providers. In the normal course, the Board will continue to assess Reserve Bank priced service proposals for new products, pricing, or posting rules to determine if any competitive advantage is derived from legal differences. In the case of settlement, the Board believes that potential competitive disparities can be addressed by expanding NSS operating hours to encompass more of the Fedwire Funds day. Private-sector clearing and settlement systems would then generally have the ability if needed to settle transactions in participants' Federal Reserve accounts over similar hours as Reserve Bank priced services.[30]

In the short run, TCH also requested that the Board delay the posting of ACH debit transactions until after 8:30 a.m. to avoid potentially disrupting EPN's 8:30 a.m. settlement over NSS.[31] TCH believed that posting FedACH debit transactions at 8:30 a.m. could lower EPN participants' Federal Reserve account balances and increase the likelihood that a participant would have insufficient funds to settle its activity over EPN. The Board believes there are several factors that minimize the likelihood of such an outcome. The posting of ACH debit and credit transactions simultaneously at 8:30 a.m. may result in an increase in balances held by institutions that are large originators of ACH debit transactions; many of the largest ACH debit originators are EPN customers. The posting-rule change benefits not only FedACH participants that originate debit transactions but also EPN

[27] In addition to debit corrections and adjustments, small-dollar credit corrections and adjustments also post after the close of the Fedwire Funds Service.

[28] For the limited number of institutions that may expose the Federal Reserve and other payment system participants to risk of loss, the Reserve Banks have implemented tools, including the Account Balance Monitoring System (ABMS), which can monitor institutions' payment activity in real time. ABMS verifies that institutions have sufficient balances to fund their Fedwire Funds, NSS, and certain ACH credit transactions as these payment files are submitted and processed. ABMS may reject these transactions if there are insufficient funds to cover the associated payments, regardless of whether the payment files are processed by the Reserve Banks or submitted by private-sector clearing and settlement systems through NSS.

Institutions that are monitored in real time must fund the total amount of their commercial ACH credit originations in order for the transactions to be processed. If the Federal Reserve receives commercial ACH credit transactions from institutions monitored in real time after the scheduled close of the Fedwire Funds Service, these transactions are currently processed at 12:30 a.m. the next business day, or by the ACH deposit deadline, whichever is earlier. ABMS provides intraday account information to the Reserve Banks and institutions and is used primarily to give authorized Reserve Bank personnel a mechanism to control and monitor account activity for selected institutions. For more information on ACH transaction processing, refer to the ''ACH Settlement Day Finality Guide'' available through the Federal Reserve Financial Services Web site at *http://www.frbservices.org.*

[29] The Federal Reserve's ''Standards Related to Priced-Service Activities of the Federal Reserve Banks'' states that ''No Reserve Bank personnel with responsibility for priced services, unless acting in the capacity of president or first vice president, will also be responsible for monetary policy, bank supervision, or lending areas. Priced-service personnel will not make policy decisions affecting monetary policy, bank supervision, or lending matters.'' *http://www.federalreserve.gov/paymentsystems/pfs_standards.htm.*

[30] Commercial check debit and small-dollar credit corrections and adjustments post after the close of Fedwire. Given the minimal occurrence of large-value check corrections and adjustments and the low value of other check corrections and adjustments, the Board does not believe posting these transactions after the close of Fedwire provides a competitive advantage to the Reserve Bank priced services.

[31] TCH also requested a clarification on how FedACH debit and credit transactions would post simultaneously at 8:30 a.m. Under the proposed posting rules, both ACH debit and credit transactions would be assigned the same posting time, 8:30 a.m., and post exactly at the same time for purposes of measuring an institution's daylight overdraft balance. Debit and credit transactions would not be netted before posting; however, because all transactions would post exactly at the same minute, the institution's account balance would only change by the net of its activity.

customers that originate debit transactions destined to FedACH customers, which settle according to the Board's posting rules. Institutions currently hold high balances, and most have access to daylight overdrafts, with total daylight overdraft capacity calculated as multiples of capital for healthy institutions, to ensure the smooth functioning of the payment system. Although high balances may not remain, balances are not likely to drop precipitously in the near term, giving institutions time to adjust account-management activity, if needed, to ensure sufficient balances for all payment activity settling at 8:30 a.m. In addition, the Reserve Banks debit funds to cover ACH credit transactions for any institution on the highest level of control under the real-time monitor at the time of file submission, not when the payments settle under the posting rules. The Reserve Banks also will extend the NSS file submission window from 7:30 a.m. to 5:30 p.m., beginning in January 2015, and are evaluating potential further expansion of NSS hours in the future. Given these factors, the Board continues to believe that posting ACH debit transactions at 8:30 a.m. is the best option for the long-run safety and efficiency of the payment system.

The Board acknowledges some of the competitive concerns expressed by TCH and agrees with the need to have settlement options available at the same time to avoid introducing potential competitive disparities. In the near term, the Board believes that extending the NSS file submission window from 7:30 a.m. to 5:30 p.m. mitigates any adverse competitive effect of the ACH debit and commercial check posting rule changes. In the long run, the Board believes that any competitive disparity concerns resulting more broadly from Reserve Banks' ability to settle transactions outside of NSS hours can be addressed by further expanding NSS operating hours, and potentially functionality.

The Board has adopted the posting rules for ACH debit and commercial check transactions as proposed.

*Effective Dates for Posting Rule Proposals*

As part of its posting rules proposals for ACH debit and commercial check transactions, the Board proposed a six-month implementation period before the new posting rules would become effective. Five commenters, including four depository institution trade associations and one government-sponsored enterprise, indicated that an effective date six months after the publication of the final rule in the **Federal Register** would allow enough time to make necessary operational changes.[32] One commenter, the National Association of Federal Credit Unions, requested a one-year implementation period to allow institutions additional time to determine if they were affected by the proposed posting rules and, if so, to raise capital. Given commenters' feedback, the Board is adopting an implementation period of no less than six months as proposed, and the posting rule changes for ACH debit and commercial check transactions will take effect on July 23, 2015. All items scheduled to settle on this date and after will post according to the new posting rule procedures, regardless of the date of deposit.

Elsewhere in the **Federal Register** under Docket No. R–1473, the Board also adopted necessary related changes to the Board's Regulation J (12 CFR part 210) regarding the timing of when paying banks settle for check transactions presented to them by the Reserve Banks effective on July 23, 2015.

*Principles for Future Posting Rules for the Reserve Banks' Same-Day ACH Service*

Two commenters, TCH and U.S. Bank, raised account-management and competitive disparity concerns regarding the second principle proposed by the Board for future posting rules for the Reserve Banks' same-day ACH service. The principle stated that the Reserve Banks would not post settlement for same-day ACH transactions between 6:30 p.m. and 8:30 a.m. the next processing day. Commenters' concerns related to the Reserve Banks' ability to settle same-day ACH transactions until 6:30 p.m. Specifically, the commenters were concerned that posting these transactions up to the close of the Fedwire Funds Service would not allow sufficient time between the settlement of same-day ACH transactions and the close of Fedwire Funds for institutions to settle other positions amongst themselves, and that the period between 5:00 p.m. and 6:30 p.m. was outside of current NSS operating hours, putting any future private-sector same-day ACH service providers at a potential disadvantage relative to the Reserve Banks' service. To address this concern, the Board has modified the second principle to read, ''The Reserve Banks will not post settlement for same-day ACH transactions between the close of the Reserve Banks' National Settlement Service and 8:30 a.m. the next processing day.'' The modified principle requires that settlement post within the NSS operating day before the close of Fedwire Funds. As a result of the modification, the third proposed posting rule principle, which stated that the Reserve Banks will post settlement for same-day ACH transactions exchanged with another operator to support universal same-day ACH during the operating hours for the Reserve Banks' NSS, is no longer needed. The Board has removed the third principle from the final principles for establishing future posting rules for the Reserve Banks' same-day ACH service. The revised principles are as follows:

(1) For each same-day ACH transmission deadline, the Reserve Banks will establish expected distribution times for the same-day ACH files.

a. The Reserve Banks will post settlement for same-day ACH debit transactions no earlier than 15 minutes after the Reserve Banks' expected distribution times for the associated same-day ACH file.

b. The Reserve Banks will post settlement for ACH credit and debit transactions associated with a particular same-day ACH file distribution time at the same time.

(2) Settlement will not post between the close of the Reserve Banks' National Settlement Service and 8:30 a.m. on the next processing day.

In addition, five commenters, including one commercial banking organization, one private-sector clearing and settlement system, and three depository institution trade organizations indicated their preference that the Board always request comment on new same-day ACH posting rule proposals, regardless of whether these rules conformed to the posting rule principles.[33] Commenters believed it was important to request comment, given that future material considerations may emerge that may not be addressed by the principles and any alterations to the current same-day ACH service may require institutions to make significant changes. The Board continues to believe that the principles provide a reasonable gating mechanism to enable flexibility in the evolution of same-day ACH while still constraining settlement to the NSS operating day during core business hours. The Board expects that

[32] Commenters were the American Bankers Association, Credit Union National Association, Georgia Credit Union league, Missouri Credit Union Association, and a joint letter from five Federal Home Loan Banks.

[33] Commenters were U.S. Bank, TCH, Credit Union National Association, Georgia Credit Union League, and Missouri Credit Union Association.

institutions can reasonably manage their Federal Reserve accounts during the core business day. The Board will assess each future posting rule for same-day ACH to determine if public comment may be warranted based on the specific circumstances and the environment at that time and in conformance with the Board's ''Principles for Pricing of Federal Reserve Bank Services.'' [34] Those principles provide that that the Board will request comment on proposed fee or service changes that would have significant longer-run effects on the nation's payment system.

The Board has adopted the same-day ACH principles as revised earlier, effective on December 5, 2014.

*Language Clarification to Section II.G.3*

The Board received no comments on its proposed language clarification to part II of the PSR policy regarding operational changes in the administration of the policy as it relates to U.S. branches and agencies of FBOs. The Board has adopted the proposed language changes to section II.G.3 of the PSR policy as proposed effective on December 5, 2014.

## IV. Additional Technical Revisions to the Posting Rules

The Board has revised the PSR policy's posting rules to conform to the current deposit deadline for Treasury checks, postal money orders, local Federal Reserve Bank checks, and savings bond redemptions in separately sorted deposits, which post at 8:30 a.m. The posting rule currently reflects a previous deposit deadline for these items at 12:01 a.m. local time or the local deposit deadline, whichever is later.[35] Additionally, the Board has revised the posting rules to conform to the current deposit deadline for Treasury checks, postal money orders, and savings bond redemptions in separately sorted deposits which post at 5:00 p.m. The posting rule currently reflects a previous deposit deadline for these items at 4:00 p.m.[36] The Board is removing these obsolete deposit deadline references and, in both cases, indicating that the posting time will apply to items deposited by the latest applicable deposit deadline preceding the posting time.

As the updated deposit deadlines are already in effect for the transactions described earlier, institutions' Federal Reserve account balances are not affected by these updates to the incorrectly stated deposit deadlines in the posting rules. These revisions are effective on December 5, 2014.

## V. Competitive Impact Analysis

The Board conducts a competitive impact analysis when it considers a rule or policy change that may have a substantial effect on payment system participants, such as that being proposed for the posting of ACH debit and commercial check transactions. Specifically, the Board determines whether there would be a direct and material adverse effect on the ability of other service providers to compete with the Federal Reserve due to differing legal powers or due to the Federal Reserve's dominant market position deriving from such legal differences.[37] The Board believes that there are no adverse effects resulting from the changes due to legal differences.

Shifting the posting of ACH debit transactions to 8:30 a.m. brings the settlement of ACH debit transactions processed by the Reserve Banks' FedACH service in line with the private-sector ACH operator, EPN. The posting-rule change benefits not only FedACH participants that originate debit transactions but also EPN customers that originate debit transactions destined to FedACH customers, which settle according to the Board's posting rules. The Board also believes that the implementation window will provide ample time for institutions to make account-management changes, if any.

Under Regulation J, the Reserve Banks have the legal ability to obtain same-day settlement for checks they present before the paying bank's banking day cutoff hour through ''auto-charge,'' that is, a direct debit to the Federal Reserve account of the paying bank or its correspondent settlement agent.[38] Under the amendments to Regulation J explained elsewhere in this **Federal Register**, the Reserve Banks will have the right to debit the account of the paying bank or its correspondent settlement agent on the next clock hour or half-hour that is at least one half-hour after presentment. In contrast, when a private-sector bank presents a paper check by 8:00 a.m. for same-day settlement, Regulation CC requires the paying bank to settle for the check by sending a Fedwire Funds transfer to the presenting bank by the close of Fedwire (or by another agreed upon method).[39] Thus, Reserve Banks may present checks later in the day for same-day settlement than private-sector banks. In addition, Reserve Banks may obtain settlement earlier in the day than private-sector collecting banks and, in turn, may pass credits for deposited checks earlier in the day without incurring significant intraday float.

In March 1998, the Board requested comment on whether the legal differences between rights of the Reserve Banks and the private-sector presenting banks provided the Reserve Banks with a competitive advantage and whether the Board should take action to reduce the differences. Commenters generally concluded that the costs of further changes outweighed any advantage of the Reserve Banks.[40] In particular, commenters noted the efficiency of the Reserve Bank's auto-charge process for paying banks, and stated that moving the private-sector presentment deadline to later in the day or eliminating the direct debit of Federal Reserve accounts for check presentments would result in higher costs to paying banks and their business customers in terms of account management, settlement funds transfer fees, and shortened processing windows, and that those costs would outweigh the benefits gained by presenting banks. Based on an analysis of the comments, the Board took no further action.

For the vast majority of checks presented by private-sector banks today, which are presented in electronic form, settlement occurs as agreed between the presenting bank and paying bank. Banks may determine, as part of the agreement between the presenting bank and paying bank, the time at which settlement for checks is required to be funded. Furthermore, for collecting banks and paying banks that opt to use a check clearinghouse, the clearinghouses have the option to use NSS to effect settlement of checks or may settle by directing their members to initiate funds transfers over the Reserve Banks' Fedwire Funds Service. Beginning in January 2015, the NSS file submission window will be 7:30 a.m. to 5:30 p.m. Fedwire Funds operating hours begin at 9:00 p.m. the previous calendar day and end at 6:30 p.m. As adopted in this **Federal Register** document, effective on July 23, 2015, the Reserve Banks will settle commercial check transactions at

[34] The Board's ''Principles for Pricing of Federal Reserve Bank Services'' are available at *http://www.federalreserve.gov/paymentsystems/pfs_principles.htm.*

[35] At this time, for posting at 8:30 a.m., the electronic deposit deadline is 5:00 a.m. the same day and the paper check deposit deadline is 7:00 p.m. on the previous business day.

[36] At this time, the deposit deadline is 10:00 a.m. for items posting at 5:00 p.m.

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

[38] 12 CFR 210.9(b)(1) and (b)(5).

[39] 12 CFR 229.36(f)(2).

[40] The request for comment and the subsequent notice of the Board's decision can be found, respectively, at 63 FR 12700 (March 16, 1998) and 63 FR 68701 (December 14, 1998).

8:30 a.m., 1:00 p.m., and 5:30 p.m. and debits from corrections and adjustments amounting to $1 million or more will settle after the close of Fedwire Funds Service. A limited number of commercial check debit and small-dollar credit corrections and adjustments post after the close of Fedwire. Such late posting ensures that institutions only benefit intraday from detected processing errors and that an institution could not receive a debit correction or adjustment before the associated check transaction posted. Given the minimal occurrence of large-value check corrections and adjustments and the low value of other check corrections and adjustments, the Board does not believe posting these transactions after the close of Fedwire creates a direct and material competitive disparity between Reserve Bank and private-sector service providers.[41]

Under the adopted posting rules, the bulk of the Reserve Banks' postings of credits to depositing banks and debits to paying banks for commercial check transactions will shift to earlier in the day. The value of checks a bank sends to the Reserve Banks could be higher or lower than the value it receives from the Reserve Banks. As a result, the earlier posting of commercial check transactions may be viewed as more or less attractive, depending on whether the value of an institution's check credits is higher or lower than the value of its check debits. Further, private-sector banks can achieve improvements similar to those provided by the proposed changes through private agreements among participants, as well as the use of the NSS.

Given the factors discussed earlier, the Board does not believe that the changes to the posting rules would have a direct and material adverse effect on other service providers to compete effectively with Reserve Banks in providing similar services.

## VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 appendix A.1), the Board reviewed the PSR policy changes it is considering under the authority delegated to the Board by the Office of Management and Budget. No collection of information pursuant to the Paperwork Reduction Act are contained in the policy statement.

[41] In addition to debit corrections and adjustments, small-dollar credit corrections and adjustments also post after the close of Fedwire Funds.

## VII. Federal Reserve Policy on Payment System Risk

*Technical Revisions to the Posting Rules*

Effective on December 5, 2014, the ''Federal Reserve Policy on Payment System Risk'' section II.A. under the heading ''Procedures for Measuring Daylight Overdrafts'' and the subheadings ''Post at 8:30 a.m. eastern time'' and ''Post at 5:00 p.m. eastern time'' is amended as follows.

Post at 8:30 a.m. eastern time:

+/− Term deposit maturities and accrued interest

+/− Government and commercial ACH credit transactions [42]

+ Treasury checks, postal money orders, local Federal Reserve Bank checks, and savings bond redemptions in separately sorted deposits; these items must be deposited by the latest applicable deposit deadline preceding the posting time.

+ Advance-notice Treasury investments

− Penalty assessments for tax payments from the Treasury Investment Program (TIP).[43]

Post at 5:00 p.m. eastern time:

+/− FedACH SameDay Service transactions

+/− Immediate settlement ACH transactions; these transactions include ACH return items and check-truncation items.

+ Treasury checks, postal money orders, and savings bond redemptions in separately sorted deposits; these items must be deposited by the latest applicable deposit deadline preceding the posting time.

+ Local Federal Reserve Bank checks; these items must be presented before 3:00 p.m. eastern time

[42] Institutions that are monitored in real time must fund the total amount of their commercial ACH credit originations before the transactions are processed by the Reserve Banks. If the Federal Reserve receives commercial ACH credit transactions from institutions monitored in real time after the scheduled close of the Fedwire Funds Service, these transactions are currently processed at 12:30 a.m. the next business day, or by the ACH deposit deadline, whichever is earlier. The Account Balance Monitoring System provides intraday account information to the Reserve Banks and institutions and is used primarily to give authorized Reserve Bank personnel a mechanism to control and monitor account activity for selected institutions. For more information on ACH transaction processing, refer to the ACH Settlement Day Finality Guide available through the Federal Reserve Financial Services Web site at *http://www.frbservices.org.*

[43] The Reserve Banks will identify and notify institutions with Treasury-authorized penalties on Thursdays. In the event that Thursday is a holiday, the Reserve Banks will identify and notify institutions with Treasury-authorized penalties on the following business day. Penalties will then be posted on the business day following notification.

*Revisions to Section II.G.3 of the PSR Policy*

Effective December 5, 2014, section II.G.3 of the ''Federal Reserve Policy on Payment System Risk'' is amended to clarify the Reserve Banks' administration of the policy for U.S. branches and agencies of foreign banking organizations as follows.

3. Multi-District Institutions

An institution maintaining merger-transition accounts or an Edge or agreement corporation that accesses Fedwire through master accounts in more than one Federal Reserve District is expected to manage its accounts so that the total daylight overdraft position across all accounts does not exceed the institution's net debit cap. One Reserve Bank will act as the administrative Reserve Bank and will have overall risk-management responsibilities for an institution maintaining master accounts in more than one Federal Reserve District. For domestic institutions that have branches in multiple Federal Reserve Districts, the administrative Reserve Bank generally will be the Reserve Bank where the head office of the bank is located.

U.S. branches and agencies of the same foreign bank (also referred to as an FBO family) are assigned one net debit cap per FBO family. FBO families that access Fedwire through master accounts in more than one Federal Reserve District are expected to manage their accounts so that the daylight overdraft position in each account does not exceed the capacity allocated to that account from the FBO family's net debit cap. The administrative Reserve Bank generally is the Reserve Bank that exercises the Federal Reserve's oversight responsibilities under the International Banking Act.[44] The administrative Reserve Bank, in consultation with the management of the foreign bank's U.S. operations and with Reserve Banks in whose territory other U.S. agencies or branches of the same foreign bank are located, may recommend that these agencies and branches not be permitted to incur overdrafts in Federal Reserve accounts. Alternatively, the administrative Reserve Bank, after similar consultation, may recommend that all or part of the foreign family's net debit cap be allocated to the Federal Reserve accounts of agencies or branches that are located outside of the administrative Reserve Bank's District; in this case, the Reserve Bank in whose Districts those agencies or branches are

[44] 12 U.S.C. 3101–3108.

located will be responsible for administering all or part of this policy.[45]

*Changes to the Posting Rules for ACH Debit and Commercial Check Transactions*

Effective on July 23, 2015, the ''Federal Reserve Policy on Payment System Risk'' section II.A. under the heading ''Procedures for Measuring Daylight Overdrafts'' is amended as follows.

*Procedures for Measuring Daylight Overdrafts*[46]

Opening Balance (Previous Day's Closing Balance)

Post at 8:30 a.m. eastern time:
+/− Term deposit maturities and accrued interest
+/− Government and commercial ACH transactions[47]
+/− Commercial check transactions, including returned checks[48]
+ Treasury checks, postal money orders, local Federal Reserve Bank checks, and savings bond redemptions in separately sorted deposits; these items must be deposited by the latest applicable deposit deadline preceding the posting time.
+ Advance-notice Treasury investments
− Penalty assessments for tax payments from the Treasury Investment Program (TIP).[49]

Post at 8:30 a.m. eastern time and hourly, on the half-hour, thereafter:
+/− Main account administrative investment or withdrawal from TIP
+/− Special Direct Investment (SDI) administrative investment or withdrawal from TIP
+ 31 CFR part 202 account deposits from TIP
+ Credit corrections amounting to $1 million or more[50]
+ Credit adjustments amounting to $1 million or more[51]
− Uninvested paper tax (PATAX) deposits from TIP
− Main account balance limit withdrawals from TIP
− Collateral deficiency withdrawals from TIP
− 31 CFR part 202 deficiency withdrawals from TIP

Post at 11:00 a.m. eastern time and hourly thereafter:
+ Currency and coin deposits

Post at 1:00 p.m. eastern time:
+/− Commercial check transactions, including returned checks

Post at 5:30 p.m. eastern time:
+/− FedACH SameDay Service return transactions.
+/− Commercial check transactions, including returned checks

Post after the close of Fedwire Funds Service:
+/− All other transactions. These transactions include the following: currency and coin shipments; noncash collection; term-deposit settlements; Federal Reserve Bank checks presented after 3:00 p.m. eastern time but before 3:00 p.m. local time; foreign check transactions; small-dollar credit corrections and adjustments; and all debit corrections and adjustments. Discount-window loans and repayments are normally posted after the close of Fedwire as well; however, in unusual circumstances a discount window loan may be posted earlier in the day with repayment 24 hours later, or a loan may be repaid before it would otherwise become due.

Equals:
Closing Balance.

* * * * *

Dated: December 1, 2014.

By order of the Board of Governors of the Federal Reserve System,

**Robert deV. Frierson,**

*Secretary of the Board.*

[FR Doc. 2014–28664 Filed 12–4–14; 8:45 am]

**BILLING CODE 6210–01–P**

[45] As in the case of Edge and agreement corporations and their branches, with the approval of the designated administrative Reserve Bank, a second Reserve Bank may assume the responsibility for administering this policy regarding particular foreign branch and agency families. This would often be the case when the payments activity and national administrative office of the foreign branch and agency family is located in one District, while the oversight responsibility under the International Banking Act is in another District. If a second Reserve Bank assumes management responsibility, monitoring data will be forwarded to the designated administrator for use in the supervisory process.

[46] This schedule of posting rules does not affect the overdraft restrictions and overdraft-measurement provisions for nonbank banks established by the Competitive Equality Banking Act of 1987 and the Board's Regulation Y (12 CFR 225.52).

[47] Institutions that are monitored in real time must fund the total amount of their commercial ACH credit originations in order for the transactions to be processed. If the Federal Reserve receives commercial ACH credit transactions from institutions monitored in real time after the scheduled close of the Fedwire Funds Service, these transactions are currently processed at 12:30 a.m. the next business day, or by the ACH deposit deadline, whichever is earlier. The Account Balance Monitoring System provides intraday account information to the Reserve Banks and institutions and is used primarily to give authorized Reserve Bank personnel a mechanism to control and monitor account activity for selected institutions. For more information on ACH transaction processing, refer to the ACH Settlement Day Finality Guide available through the Federal Reserve Financial Services Web site at *http://www.frbservices.org.*

[48] For the three commercial check transaction posting times, the Reserve Banks will post credits and debits to institutions' accounts for checks deposited and presented, respectively, at least 30 minutes before the posting time.

[49] The Reserve Banks will identify and notify institutions with Treasury-authorized penalties on Thursdays. In the event that Thursday is a holiday, the Reserve Banks will identify and notify institutions with Treasury-authorized penalties on the following business day. Penalties will then be posted on the business day following notification.

[50] Corrections are account entries made to correct discrepancies detected by a Reserve Bank during the initial processing of checks.

[51] Adjustments are account entries made to correct discrepancies detected by an institution after entries have posted to Federal Reserve accounts.

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1238

**[No. 2014–N–15]**

### Orders: Reporting by Regulated Entities of Stress Testing Results as of September 30, 2014

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Orders.

**SUMMARY:** In this document, the Federal Housing Finance Agency (FHFA) provides notice that it issued Orders dated December 1, 2014, with respect to reporting under section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

**DATES:** Effective December 5, 2014. Each Order is applicable on December 1, 2014.

**FOR FURTHER INFORMATION CONTACT:** Naa Awaa Tagoe, Senior Associate Director, Office of Financial Analysis, Modeling and Simulations, (202) 649–3140, *naaawaa.tagoe@fhfa.gov;* Stefan Szilagyi, Examination Manager, FHLBank Modeling, FHLBank Risk Modeling Branch, (202) 649–3515, *Stefan.szilagy@fhfa.gov;* or Mark D. Laponsky, Deputy General Counsel, Office of General Counsel, (202) 649–3054 (these are not toll-free numbers), *mark.laponsky@fhfa.gov.* The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FHFA is responsible for ensuring that the regulated entities operate in a safe and sound manner, including the maintenance of adequate capital and internal controls, that their operations and activities foster liquid, efficient, competitive, and resilient national housing finance markets, and that they carry out their public policy missions

through authorized activities. *See* 12 U.S.C. 4513. These Orders are being issued under 12 U.S.C. 4514(a), which authorizes the Director of FHFA to require by Order that the regulated entities submit regular or special reports to FHFA and establishes remedies and procedures for failing to make reports required by Order. The Orders are accompanied by Summary Instructions and Guidance to which is appended reporting templates and scenarios for stress testing.

**II. Orders**

For the convenience of the affected parties, the text of the Orders, without the accompanying Summary Instructions and Guidance and appendices, follows below in its entirety. You may access these Orders with all of the accompanying material from FHFA's Web site at: *http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Issues-Scenarios-and-Guidance-to-FannieMae,-Freddie-Mac-and-the-Federal-Home-Loan-Banks-Regarding-Annual-Dodd-Frank-St.aspx.* The Orders and Summary Instructions and Guidance will be available for public inspection and copying at the Federal Housing Finance Agency, Eighth Floor, 400 Seventh St. SW., Washington, DC 20024. To make an appointment, call (202) 649–3804.

The text of the Orders is as follows:

**Federal Housing Finance Agency**

*Order Nos. 2014–OR–B–3, 2014–OR–FNMA–2, and 2014–OR–FHLMC–2*

ORDER ON REPORTING BY REGULATED ENTITIES OF STRESS TESTING RESULTS AS OF SEPTEMBER 30, 2014

*Whereas,* section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') requires certain financial companies with total consolidated assets of more than $10 billion, and which are regulated by a primary Federal financial regulatory agency, to conduct annual stress tests to determine whether the companies have the capital necessary to absorb losses as a result of adverse economic conditions;

*Whereas,* FHFA's rule implementing section 165(i)(2) of the Dodd-Frank Act is codified as 12 CFR part 1238 and requires that ''[e]ach regulated entity must file a report in the manner and form established by FHFA.'' 12 CFR 1238.5(b);

WHEREAS, 12 CFR 1238.3(b) requires that FHFA issue to each regulated entity scenarios to be used in conducting annual stress testing;

*Whereas,* the Director of FHFA considers it appropriate to Order each regulated entity to report to FHFA results of stress testing under 12 CFR part 1238 using scenarios supplied by FHFA;

*Whereas,* FHFA issued to each regulated entity the required scenarios and reporting templates on November 14, 2014, fifteen calendar days following the Federal Reserve Board's release of global shock scenario elements for use in its Dodd-Frank stress testing exercises; and

*Whereas,* section 1314 of the Safety and Soundness Act, 12 U.S.C. 4514(a) authorizes the Director of FHFA to require regulated entities, by general or specific order, to submit such reports on their management, activities, and operations as the Director considers appropriate.

*Now therefore,* it is hereby Ordered as follows:

Each regulated entity shall conduct annual stress testing and report to FHFA and to the Board of Governors of the Federal Reserve System the results of such stress testing as required by 12 CFR part 1238, in the form and with the content described therein and in the Summary Instructions and Guidance accompanying this Order, using the scenarios and assumptions issued on November 14, 2014, and provided in Appendices 4 through 11 to the Summary Instructions and Guidance that accompanies this Order.

*It is so ordered,* this 1st day of December 2014.

This Order is effective immediately.

Signed at Washington, DC, this 1st day of December, 2014.

Melvin L. Watt,
*Director, Federal Housing Finance Agency.*

Dated: December 1, 2014.

**Melvin L. Watt,**

*Director, Federal Housing Finance Agency.*

[FR Doc. 2014–28593 Filed 12–4–14; 8:45 am]

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2014–0168; Directorate Identifier 2013–NM–208–AD; Amendment 39–18039; AD 2014–24–06]**

**RIN 2120–AA64**

### Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 airplanes. This AD was prompted by failure during testing of the anchor attachment on the occupant restraint system on the standard attendant seat due to an understrength attachment fitting. This AD requires replacing the existing restraint attachment fitting on the standard attendant seat with a new, improved attachment fitting. We are issuing this AD to prevent failure of the restraint attachment fitting of the attendant seat during an emergency landing, which could cause injury to the cabin crew and passengers and could impede a rapid evacuation.

**DATES:** This AD is effective January 9, 2015.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 9, 2015.

**ADDRESSES:** For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

**Examining the AD Docket**

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0168; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Eric M. Brown, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6746; fax: 425–917–6590; email: *eric.m.brown@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 787–8 airplanes. The NPRM published in the **Federal Register** on March 28, 2014 (79 FR 17455). The NPRM was prompted by failure during testing of the anchor attachment on the occupant restraint system on the standard attendant seat due to an understrength attachment fitting. The NPRM proposed to require replacing the existing restraint attachment fitting on the standard attendant seat with a new, improved attachment fitting. We are issuing this AD to prevent failure of the restraint attachment fitting of the attendant seat during an emergency landing, which could cause injury to the cabin crew and passengers and could impede a rapid evacuation.

## Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM (79 FR 17455, March 28, 2014) and the FAA's response to each comment.

### Request To Change the Reason for the Unsafe Condition

Boeing asked that we change the reason for the unsafe condition in the **SUMMARY** and Discussion sections of the NPRM (79 FR 17455, March 28, 2014). The reason specifies that the AD was prompted by failure of the anchor attachment on the occupant restraint system on the standard attendant seat due to an undersized attachment fitting. Boeing stated that the reason stated in the NPRM is ambiguous and may give an incorrect impression of the nature of the failure. Boeing asked that the reason be changed to specify that the triggering failure occurred during testing, and not in service.

We agree with the commenter that the failure of the anchor attachment occurred during testing. We have changed this final rule accordingly.

### Requests for Changes to the Unsafe Condition

Boeing asked that we clarify the unsafe condition specified in the **SUMMARY** and Discussion sections of the NPRM (79 FR 17455, March 28, 2014). The unsafe condition in the NPRM specified that the AD is being issued to ''prevent failure'' of the restraint attachment fitting and consequent ''detachment of the attendant seat. . . .'' Boeing stated that the language should be clarified to specify that only the restraint system, not the attendant seat, will detach. Boeing added that the undersized fitting is not the correct reason for the failure because the geometry of the existing fitting increased the local internal loads beyond the attachment capability, and the new fitting is actually smaller than the existing fitting, yet reduces the internal loads that lead to failure.

We agree with the commenter that only the restraint system, not the attendant seat, will detach. We have clarified this language in the **SUMMARY** and Discussion sections, as well as paragraph (e) of this final rule.

We agree that the failure is due to the excessive internal loads generated by the attachment fitting geometry; however, we note that the term ''undersized'' refers to the loading capability of the attachment fitting, not the actual physical size. We have clarified the **SUMMARY** and Discussion sections, as well as paragraph (e) of this final rule, by changing the term ''undersized'' to ''understrength.''

Boeing also asked that the end level effect, which specifies in part, ''. . . could cause injury to passengers and crew . . .'' be changed to ''. . . could cause injury to cabin crew and passengers. . .'' Boeing stated that the language in the NPRM (79 FR 17455, March 28, 2014) could suggest that the equivalent or primary threat is to passengers because they are identified first; however, the primary threat would be to the cabin crew. Boeing noted that unrestrained cabin crew may be injured by impact to the aircraft interior or other cabin crew or passengers.

We agree with the commenter that the primary threat would be to the cabin crew. Our evaluation shows that an injury to a flight attendant would increase the risk of injury to a passenger during an emergency evacuation. We have clarified the **SUMMARY** and Discussion sections, as well as paragraph (e) of this final rule, to include the phrase ''injury to the cabin crew and passengers.''

### Request To Clarify the Applicability Section

Boeing asked that we clarify the scope of the affected airplanes specified in the **SUMMARY** section of the NPRM (79 FR 17455, March 28, 2014), by referring to the service information as follows: ''. . . certain The Boeing Company Model 787–8 airplanes, certificated in any category, as identified in Boeing Service Bulletin B787–81205–SB250027–00, Issue 001, dated January 14, 2014.'' Boeing stated that the current language identifies the target airplanes only as ''certain The Boeing Company 787–8 airplanes,'' which is not specific.

We disagree with the request to add details for the affected airplanes specified in the **SUMMARY** section. The **SUMMARY** section of this final rule provides an overview and does not include detailed information. Paragraph (c) of this AD lists the full details for the airplanes affected by this final rule. We have, however, changed the applicability section specified in paragraph (c) of this AD to also refer to the effectivity of Boeing Service Bulletin B787–81205–SB250027–00, Issue 001, dated January 14, 2014.

## Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously. We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

## Costs of Compliance

We estimate that this AD affects 1 airplane of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Replacement | 1 work-hour × $85 per hour = $85 | $0 | $85 | $85 |

## 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

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**2014–24–06 The Boeing Company:** Amendment 39–18039; Docket No. FAA–2014–0168; Directorate Identifier 2013–NM–208–AD.

**(a) Effective Date**

This AD is effective January 9, 2015.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, with Goodrich Model 2787 seat assemblies installed; as identified in Boeing Service Bulletin B787–81205–SB250027–00, Issue 001, dated January 14, 2014.

**(d) Subject**

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

**(e) Unsafe Condition**

This AD was prompted by failure during testing of the anchor attachment on the occupant restraint system on the standard attendant seat due to an understrength attachment fitting. We are issuing this AD to prevent failure of the restraint attachment fitting of the attendant seat during an emergency landing, which could cause injury to the cabin crew and passengers and could impede a rapid evacuation.

**(f) Compliance**

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

**(g) Replacement**

Within 24 months after the effective date of this AD: Replace the existing restraint attachment fitting on the standard attendant seat with a new, improved attachment fitting, in accordance with the Accomplishment Instructions of Boeing Service Bulletin B787–81205–SB250027–00, Issue 001, dated January 14, 2014; and UTC Aerospace Systems Service Bulletin 2787–25–006, Revision B, dated July 10, 2013.

**(h) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (i) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane.

**(i) Related Information**

For more information about this AD, contact Eric M. Brown, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6476; fax: 425–917–6590; email: *eric.m.brown@faa.gov.*

**(j) Material Incorporated by Reference**

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

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

(i) Boeing Service Bulletin B787–81205–SB250027–00, Issue 001, dated January 14, 2014.

(ii) UTC Aerospace Systems Service Bulletin 2787–25–006, Revision B, dated July 10, 2013.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on November 19, 2014.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2014–28132 Filed 12–4–14; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2014–0193; Directorate Identifier 2013–NM–234–AD; Amendment 39–18040; AD 2014–24–07]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Airbus Model A318, A319, A320, and A321 series airplanes. This AD was prompted by a report of a crack found in the fuselage during a fatigue test campaign. This AD requires repetitive rototest inspections for cracking; corrective actions if necessary; and modification of the torsion box, which would terminate the repetitive inspections. We are issuing this AD to prevent cracking in the side box beam flange of the fuselage, which could affect the structural integrity of the airplane.

**DATES:** This AD becomes effective January 9, 2015.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 9, 2015.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2014-0193;* or in person at the Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

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

**FOR FURTHER INFORMATION CONTACT:** Sanjay Ralhan, Aerospace Engineer, International Branch, ANM 116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus Model A318, A319, A320, and A321 series airplanes. The NPRM published in the **Federal Register** on April 10, 2014 (79 FR 19846).

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0261, dated October 28, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus Model A318, A319, A320, and A321 series airplanes. The MCAI states:

> During the full scale fatigue test campaign of the A320 family type design, a crack was reported in the fuselage side box beam flange at frame (FR) 43 level, both sides.
>
> This condition, if not detected and corrected, could affect the structural integrity of the aeroplane.
>
> For the reason describe above, this [EASA] AD requires repetitive inspections of the fuselage side box beam flange at FR43, and, depending on findings, corrective action(s) [repair]. This [EASA] AD also requires a modification, which constitutes terminating action for the repetitive inspections.

The modification includes related investigative and corrective actions. The related investigative actions include a rotoprobe inspection of the holes for cracks, and a high frequency eddy current (HFEC) inspection for cracks. The corrective action includes repair. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2014-0193-0002.*

### Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM (79 FR 19846, April 10, 2014) and the FAA's response to each comment.

### Request To Remove Requirement To Refer to This AD in Repair Approvals

Airlines for America, Inc. (A4A), on behalf of several affected member airlines, requested that we revise paragraphs (h), (i), and (l)(2) of the NPRM (79 FR 19846, April 10, 2014) to remove the requirement to include the AD reference in repair approvals. The commenters have made this request because this proposed requirement is overly broad and would add significant cost and complexity to their operations. The commenters were concerned that this proposed requirement would set a precedent for how repairs are approved, and could negatively affect all U.S. operators of foreign-manufactured airplanes.

We concur with the commenters' request to remove from this AD the requirement that repair approvals specifically refer to this AD.

Since late 2006, we have included a standard paragraph titled ''Airworthy Product'' in all MCAI ADs in which the FAA develops an AD based on a foreign authority's AD. The MCAI or referenced service information in an FAA AD often directs the owner/operator to contact the manufacturer for corrective actions, such as a repair. Briefly, the Airworthy Product paragraph allowed owners/operators to use corrective actions provided by the manufacturer if those actions were FAA-approved. In addition, the paragraph stated that any actions approved by the State of Design Authority (or its delegated agent) are considered to be FAA-approved.

In the NPRM (79 FR 19846, April 10, 2014), we proposed to prevent the use of repairs that were not specifically developed to correct the unsafe condition, by requiring that the repair approval provided by the State of Design Authority or its delegated agent specifically refer to this FAA AD. This change was intended to clarify the method of compliance and to provide operators with better visibility of repairs that are specifically developed and approved to correct the unsafe condition. In addition, we proposed to change the phrase ''its delegated agent'' to include ''the Design Approval Holder (DAH) with a State of Design Authority's design organization approval (DOA)'' to refer to a DAH authorized to approve required repairs for the proposed AD.

Comments were provided to the NPRM (79 FR 19846, April 10, 2014) about these proposed changes. One commenter, UPS, stated the following: ''The proposed wording, being specific to repairs, eliminates the interpretation that Airbus messages are acceptable for approving minor deviations (corrective actions) needed during accomplishment of an AD mandated Airbus service bulletin.''

This comment has made the FAA aware that some operators have misunderstood or misinterpreted the Airworthy Product paragraph to allow the owner/operator to use messages

provided by the manufacturer as approval of deviations during the accomplishment of an AD-mandated action. The Airworthy Product paragraph does not approve messages or other information provided by the manufacturer for deviations to the requirements of the AD-mandated actions. The Airworthy Product paragraph only addresses the requirement to contact the manufacturer for corrective actions for the identified unsafe condition and does not cover deviations from other AD requirements. However, deviations to AD-required actions are addressed in 14 CFR 39.17, and anyone may request the approval for an alternative method of compliance to the AD-required actions using the procedures found in 14 CFR 39.19.

To address this misunderstanding and misinterpretation of the Airworthy Product paragraph, we have changed that paragraph and retitled it ''Contacting the Manufacturer.'' This paragraph now clarifies that for any requirement in this AD to obtain corrective actions from a manufacturer, the actions must be accomplished using a method approved by the FAA, EASA, or Airbus's EASA DOA.

The Contacting the Manufacturer paragraph also clarifies that, if approved by the DOA, the approval must include the DOA-authorized signature. The DOA signature indicates that the data and information contained in the document are EASA-approved, which is also FAA-approved. Messages and other information provided by the manufacturer that do not contain the DOA-authorized signature approval are not EASA-approved, unless EASA directly approves the manufacturer's message or other information.

This clarification does not remove flexibility afforded previously by the Airworthy Product paragraph. Consistent with long-standing FAA policy, such flexibility was never intended for required actions. This is also consistent with the recommendation of the AD Implementation Aviation Rulemaking Committee to increase flexibility in complying with ADs by identifying those actions in manufacturers' service instructions that are ''Required for Compliance'' with ADs. We continue to work with manufacturers to implement this recommendation. But once we determine that an action is required, any deviation from the requirement must be approved as an alternative method of compliance.

Other commenters pointed out that in many cases the foreign manufacturer's service bulletin and the foreign authority's MCAI may have been issued some time before the FAA AD. Therefore, the DOA may have provided U.S. operators with an approved repair, developed with full awareness of the unsafe condition, before the FAA AD is issued. Under these circumstances, to comply with the FAA AD, the operator would be required to go back to the manufacturer's DOA and obtain a new approval document, adding time and expense to the compliance process with no safety benefit.

Based on these comments, we removed the requirement from this AD that the DAH-provided repair specifically refer to this AD. Before adopting such a requirement in the future, the FAA will coordinate with affected DAHs and verify they are prepared to implement means to ensure that their repair approvals consider the unsafe condition addressed in an AD. Any such requirements will be adopted through the normal AD rulemaking process, including notice-and-comment procedures, when appropriate.

We have also decided not to include a generic reference to either the ''delegated agent'' or the ''DAH with State of Design Authority design organization approval,'' but instead we will provide the specific delegation approval granted by the State of Design Authority for the DAH.

## Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (79 FR 19846, April 10, 2014) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (79 FR 19846, April 10, 2014).

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

## Costs of Compliance

We estimate that this AD affects 851 airplanes of U.S. registry.

We also estimate that it would take about 178 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work hour. Required parts would cost about $31,334 per product. Based on these figures, we estimate the cost of this AD on U.S. operators to be $39,540,864, or $46,464 per product.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2014-0193;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone

800–647–5527) is in the **ADDRESSES** section.

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**2014–24–07 Airbus:** Amendment 39–18040. Docket No. FAA–2014–0193; Directorate Identifier 2013–NM–234–AD.

**(a) Effective Date**

This AD becomes effective January 9, 2015.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Airbus Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes; certificated in any category; all manufacturer serial numbers on which Airbus Modification 21202 has been embodied in production, except those on which Modification 152569 has been embodied in production.

**(d) Subject**

Air Transport Association (ATA) of America Code 53, Fuselage.

**(e) Reason**

This AD was prompted by a report of a crack found in the side box beam flange of the fuselage at the frame (FR) 43 level during a fatigue test campaign. We are issuing this AD to prevent cracking in the side box beam flange of the fuselage, which could affect the structural integrity of the airplane.

**(f) Compliance**

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

**(g) Inspection**

At the time specified in paragraph (g)(1) or (g)(2) of this AD, whichever occurs later: Do a rototest inspection for cracking of the beam flange of the stiffener 15 side box on the left- and right-hand sides in the FR43 area, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–53–1258, dated October 18, 2012. Repeat the inspection thereafter at intervals not to exceed 7,500 flight cycles or 15,000 flight hours, whichever occurs first.

(1) Before exceeding 24,000 flight cycles or 48,000 flight hours, whichever occurs first since the airplane's first flight.

(2) Within 3,000 flight cycles or 6,000 flight hours, whichever occurs first after the effective date of this AD.

**(h) Corrective Action**

If any crack is found during any inspection required by paragraph (g) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

**(i) Modification**

Before exceeding 48,000 flight cycles or 96,000 flight hours, whichever occurs first since the airplane's first flight: Modify the fittings on the left- and right-hand sides of the torsion box, including doing all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–53–1251, Revision 01, dated October 18, 2013; except where Airbus Service Bulletin A320–53–1251, Revision 01, dated October 18, 2013, specifies to contact Airbus for repair, before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

**(j) Terminating Action**

Modification of the airplane as required by paragraph (i) of this AD constitutes terminating action for the repetitive inspections required by paragraph (g) of this AD.

**(k) Credit for Previous Actions**

This paragraph provides credit for actions required by paragraph (i) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320–53–1251, dated November 16, 2012, which is not incorporated by reference in this AD.

**(l) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

**(m) Related Information**

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013–0261, dated October 28, 2013, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2014-0193-0002.*

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

**(n) Material Incorporated by Reference**

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

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

(i) Airbus Service Bulletin A320–53–1251, Revision 01, dated October 18, 2013.

(ii) Airbus Service Bulletin A320–53–1258, dated October 18, 2012.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airwortheas@airbus.com;* Internet *http://www.airbus.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on November 19, 2014.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2014–28141 Filed 12–4–14; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2013–1066; Directorate Identifier 2013–NM–021–AD; Amendment 39–18029; AD 2014–23–13]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2000–12–12, for certain Airbus Model A300, A300–600, and A310 series airplanes. AD 2000–12–12 required inspecting to detect cracks in the lower spar axis of the nacelle pylon between ribs 9 and 10, and repair if necessary. AD 2000–12–12 also provided for optional modification of the pylon, which terminated the inspections for Model A300 series airplanes. This new AD reduces the initial and repetitive inspection compliance times. This AD was prompted by reports of cracking of the lower pylon spar after accomplishing the existing modification. We are issuing this AD to detect and correct fatigue cracking, which could result in reduced structural integrity of the lower spar of the nacelle pylon.

**DATES:** This AD becomes effective January 9, 2015.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 9, 2015.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of July 28, 2000 (65 FR 39072, June 23, 2000).

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of June 12, 1995 (60 FR 25604, May 12, 1995).

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2013-1066;* or in person at the Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

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

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

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000). AD 2000–12–12 applied to certain Airbus Model A300, A300–600, and A310 series airplanes. The NPRM published in the **Federal Register** on December 30, 2013 (78 FR 79333).

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0016, dated September 17, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus Model A300, A300–600, and A310 series airplanes. The MCAI states:

> Cracks were found between ribs 9 and 10 in the lower pylon spar of A310 aeroplanes equipped with Pratt & Whitney (PW) engines.
>
> For A310, A300 and A300–600 aeroplanes and, in order to prevent crack initiation, the implementation of a first inspection programme of this area was required by DGAC [Direction Générale de l'Aviation Civile] France AD 1992–049–130(B) [which corresponds to certain actions in FAA AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000)], currently at Revision 4.
>
> General Electric (GE) and PW pylons on A300 aeroplanes are also affected, due to similar design.
>
> After that [DGAC] AD was issued, prompted by new findings, a specific inspection programme for A310 aeroplanes was introduced and required by DGAC France AD 1999–237–285(B) [which corresponds to certain actions in FAA AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000)], which was subsequently superseded by EASA AD 2008–0008 [*http://ad.easa.europa.eu/blob/easa_ad_2008_0008_superseded.pdf/AD_2008-0008_1*], which introduced new thresholds and intervals in the frame of the A310 extended service goal exercise.
>
> Some cracks, which were discovered after the implementation of the preventive modification, prompted Airbus to perform a new Fatigue and Damage Tolerance analysis with a refined model of the area with and without repair or preventive reinforcement before crack appearance. Based on the results of this analysis, Airbus revised the related Service Bulletins to introduce more restrictive thresholds and intervals for curative and preventive repair configuration.
>
> EASA issued AD 2013–0014 [*http://ad.easa.europa.eu/blob/easa_ad_2013_0214.pdf/AD_2013-0014_1*], which superseded DGAC France AD 1992–049–130(B) and EASA AD 2008–0008, to mandate a new inspection programme [including related investigative and corrective actions].
>
> After EASA AD 2013–0014 was issued, further analysis allowed to identify one A300 aeroplane model and one retrofitted A300 MSN [manufacturer serial number] missing in the applicability chapter.
>
> For the reason described above, this [EASA] AD retains the requirements of EASA AD 2013–0014, which is superseded, and clarifies the Applicability section and adds one A300 model and one A300 MSN.

The unsafe condition is fatigue cracking, which could result in reduced structural integrity of the lower spar of the nacelle pylon. Related investigative actions include additional eddy current and liquid penetrant inspections for cracking. Corrective actions include repairing cracking. For certain cracking lengths, repairs are described as reinforcing the lower spar with a doubler. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2013-1066-0002.*

### Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM (78 FR 79333, December 30, 2013) and the FAA's response to each comment.

### ''Contacting the Manufacturer'' Paragraph in This AD

United Parcel Service (UPS) requested that we revise the NPRM (78 FR 79333, December 30, 2013) to remove the requirement to include the AD reference in repair approvals. UPS noted its concerns that the proposal would require development of a unique Airbus process for U.S. operators; that it could have significant financial and administrative impacts to existing customer support agreements and different AD records requirements within an operator's fleet; that it will increase requests for approval of alternative methods of compliance

(AMOC) and result in delayed return to service; and that it creates a new requirement that did not exist when the superseded AD was written.

We concur with the commenter's request to remove from this AD the requirement that repair approvals must specifically refer to this AD.

Since late 2006, we have included a standard paragraph titled ''Airworthy Product'' in all MCAI ADs in which the FAA develops an AD based on a foreign authority's AD. The MCAI or referenced service information in an FAA AD often directs the owner/operator to contact the manufacturer for corrective actions, such as a repair. Briefly, the Airworthy Product paragraph allowed owners/operators to use corrective actions provided by the manufacturer if those actions were FAA-approved. In addition, the paragraph stated that any actions approved by the State of Design Authority (or its delegated agent) are considered to be FAA-approved.

In the NPRM (78 FR 79333, December 30, 2013), we proposed to prevent the use of repairs that were not specifically developed to correct the unsafe condition, by requiring that the repair approval provided by the State of Design Authority or its delegated agent specifically refer to this FAA AD. This change was intended to clarify the method of compliance and to provide operators with better visibility of repairs that are specifically developed and approved to correct the unsafe condition. In addition, we proposed to change the phrase ''its delegated agent'' to include a design approval holder (DAH) with State of Design Authority design organization approval (DOA), as applicable, to refer to a DAH authorized to approve required repairs for the proposed AD.

UPS specifically stated the following in its comments to the NPRM (78 FR 79333, December 30, 2013): ''The proposed wording, being specific to repairs, eliminates the interpretation that Airbus messages are acceptable for approving minor deviations (corrective actions) needed during accomplishment of an AD mandated Airbus service bulletin.''

This comment has made the FAA aware that some operators have misunderstood or misinterpreted the Airworthy Product paragraph to allow the owner/operator to use messages provided by the manufacturer as approval of deviations during the accomplishment of an AD-mandated action. The Airworthy Product paragraph does not approve messages or other information provided by the manufacturer for deviations to the requirements of the AD-mandated actions. The Airworthy Product paragraph only addresses the requirement to contact the manufacturer for corrective actions for the identified unsafe condition and does not cover deviations from other AD requirements. However, deviations to AD-required actions are addressed in 14 CFR 39.17, and anyone may request the approval for an alternative method of compliance to the AD-required actions using the procedures found in 14 CFR 39.19.

To address this misunderstanding and misinterpretation of the Airworthy Product paragraph, we have changed that paragraph and retitled it ''Contacting the Manufacturer.'' This paragraph now clarifies that for any requirement in this AD to obtain corrective actions from a manufacturer, the actions must be accomplished using a method approved by the FAA, EASA, or Airbus's EASA DOA.

The Contacting the Manufacturer paragraph also clarifies that, if approved by the DOA, the approval must include the DOA-authorized signature. The DOA signature indicates that the data and information contained in the document are EASA-approved, which is also FAA-approved. Messages and other information provided by the manufacturer that do not contain the DOA-authorized signature approval are not EASA-approved, unless EASA directly approves the manufacturer's message or other information.

This clarification does not remove flexibility afforded previously by the Airworthy Product paragraph. Consistent with long-standing FAA policy, such flexibility was never intended for required actions. This is also consistent with the recommendation of the Airworthiness Directive Implementation Aviation Rulemaking Committee to increase flexibility in complying with ADs by identifying those actions in manufacturers' service instructions that are ''Required for Compliance'' with ADs. We continue to work with manufacturers to implement this recommendation. But once we determine that an action is required, any deviation from the requirement must be approved as an alternative method of compliance.

Commenters to an NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013) pointed out that in many cases the foreign manufacturer's service bulletin and the foreign authority's MCAI may have been issued some time before the FAA AD. Therefore, the DOA may have provided U.S. operators with an approved repair, developed with full awareness of the unsafe condition, before the FAA AD is issued. Under these circumstances, to comply with the FAA AD, the operator would be required to go back to the manufacturer's DOA and obtain a new approval document, adding time and expense to the compliance process with no safety benefit.

Based on these comments, we removed from this AD the requirement that the DAH-provided repair specifically refer to this AD. Before adopting such a requirement, the FAA will coordinate with affected DAHs and verify they are prepared to implement means to ensure that their repair approvals consider the unsafe condition addressed in the AD. Any such requirements will be adopted through the normal AD rulemaking process, including notice-and-comment procedures, when appropriate.

We also have decided to revise the language in paragraphs (g)(3), (g)(4), (h)(3), (h)(4), (i)(3), and (i)(4) of this AD to retain references to repair approvals done by the DGAC (or its delegated agent) from AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), as well as including references to EASA and the specific delegation approval granted by EASA for the DAH. Further, we revised paragraphs (n)(2) and (n)(3) of this AD to remove references to the ''delegated agent'' and the ''DAH with State of Design Authority design organization approval'' and instead provided the specific delegation approval granted by the State of Design Authority for the DAH.

## Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (78 FR 79333, December 30, 2013) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 79333, December 30, 2013).

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

## Costs of Compliance

We estimate that this AD affects 91 airplanes of U.S. registry.

The actions required by AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), and retained in

this AD take about 4 work-hours per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the actions required by AD 2000–12–12 is $340 per product.

We also estimate that it would take about 12 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $92,820, or $1,020 per product.

In addition, we estimate that any necessary follow-on actions would take about 60 work-hours and require parts costing $1,680, for a cost of $6,780 per product. We have no way of determining the number of aircraft that might need these actions.

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2013-1066;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section.

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), and adding the following new AD:

**2014–23–13 Airbus:** Amendment 39–18029. Docket No. FAA–2013–1066; Directorate Identifier 2013–NM–021–AD.

**(a) Effective Date**

This AD becomes effective January 9, 2015.

**(b) Affected ADs**

This AD replaces AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000).

**(c) Applicability**

This AD applies to the Airbus airplanes identified in paragraphs (c)(1) through (c)(4) of this AD, certificated in any category.

(1) Airbus Model A300 B2–203, B2K–3C, B4–103, B4–203, and B4–2C airplanes on which Airbus Modification 2434 has been embodied in production.

(2) Airbus Model A300 airplane having manufacturer serial number 125, on the left hand side pylon only.

(3) Airbus Model A300 B4–620, B4–622R, and B4–622 airplanes, except for airplanes on which Airbus Modification 10149 has been embodied in production.

(4) Airbus Model A310–221, –222, –322, –324, and –325 airplanes, except for airplanes on which Airbus Modification 10149 has been embodied in production.

**(d) Subject**

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

**(e) Reason**

This AD was prompted by reports of cracking of the lower pylon spar after accomplishing an existing modification. We are issuing this AD to detect and correct fatigue cracking, which could result in reduced structural integrity of the lower spar of the nacelle pylon.

**(f) Compliance**

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

**(g) Retained Inspection and Corrective Action for Certain Model A300 Series Airplanes**

This paragraph restates the requirements of paragraph (a) of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), with additional sources for repair approvals. For Model A300 B4–2C, B2K–3C, B2–203, B4–103, and B4–203 series airplanes: Prior to the accumulation of 9,000 total landings, or within 500 landings after June 12, 1995 (the effective date of AD 95–10–03, Amendment 39–9220 (60 FR 25604, May 12, 1995)), whichever occurs later, perform an internal eddy current inspection to detect cracks in the lower spar axis of the pylon between ribs 9 and 10, in accordance with Airbus Service Bulletin A300–54–071, dated November 12, 1991; or Revision 1, dated October 15, 1993. Accomplishment of an inspection required by paragraph (k), (l), or (m) of this AD terminates the inspection requirements of this paragraph.

(1) If no crack is found, repeat the inspection thereafter at intervals not to exceed 2,500 landings.

(2) If any crack is found that is less than or equal to 30 millimeters (mm): Perform subsequent inspections and repair in accordance with the methods and times specified in Airbus Service Bulletin A300–54–071, dated November 12, 1991; or Revision 1, dated October 15, 1993.

(3) If any crack is found that is greater than 30 mm, but less than 100 mm: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent); or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

(4) If any crack is found that is greater than or equal to 100 mm: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent); or the EASA; or Airbus's EASA DOA.

(5) Accomplishment of the modification specified in Airbus Service Bulletin A300–54–0079, dated October 15, 1993, constitutes terminating action for the inspections required by paragraph (g) of this AD.

**(h) Retained Inspection and Corrective Action for Model A300–600 Series Airplanes**

This paragraph restates the requirements of paragraph (b) of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), with additional sources for repair approvals. For Model A300–600, B4–620, C4–620, B4–622R, and B4–622 series airplanes: Except as provided by paragraph (h)(5) of this AD, prior to the accumulation of 4,000 total landings, or within 500 landings after June 12, 1995 (the effective date of AD 95–10–03, Amendment 39–9220 (60 FR 25604, May 12, 1995)), whichever occurs later, perform an internal eddy current inspection to detect cracks in the lower spar axis of the pylon between ribs 9 and 10, in accordance with Airbus Service Bulletin A300–54–6011, dated November 12, 1991, as amended by Airbus Service Bulletin Change Notice O.A., dated July 10, 1992; or Revision 1, dated October 15, 1993. Accomplishment of an inspection required by paragraph (k), (l), or (m) of this AD terminates the inspection requirements of this paragraph.

(1) If no crack is found, repeat the inspection thereafter at intervals not to exceed 2,500 landings.

(2) If any crack is found that is less than or equal to 30 mm: Perform subsequent inspections and repair in accordance with the methods and times specified in Airbus Service Bulletin A300–54–6011, dated November 12, 1991, as amended by Airbus Service Bulletin Change Notice O.A., dated July 10, 1992; or Revision 1, dated October 15, 1993.

(3) If any crack is found that is greater than 30 mm, but less than 100 mm: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent); or the EASA; or Airbus's EASA DOA.

(4) If any crack is found that is greater than or equal to 100 mm: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent); or the EASA; or Airbus's EASA DOA.

(5) Accomplishment of the modification specified in Airbus Service Bulletin A300–54–6019, dated October 15, 1993, increases the threshold and repetitive interval of the inspections required by paragraph (h) of this AD to the threshold and interval specified in paragraph 2.D. of the Accomplishment Instructions of Airbus Service Bulletin A300–54–6011, Revision 1, dated October 15, 1993.

**(i) Retained Inspection and Corrective Action for Model A310 Series Airplanes**

This paragraph restates the requirements of paragraph (c) of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), with additional sources for repair approvals. For Model A310–221, –222, –322, –324, and –325 series airplanes: Perform an internal eddy current inspection to detect cracks in the lower spar axis of the pylon between ribs 9 and 10, in accordance with Airbus Service Bulletin A310–54–2016, dated November 12, 1991; or Revision 1, dated October 15, 1993; or Revision 02, dated June 11, 1999; at the time specified in paragraph (j) of this AD. Accomplishment of an inspection required by paragraph (k), (l), or (m) of this AD terminates the inspection requirements of this paragraph.

(1) If no crack is found, repeat the inspection thereafter at intervals not to exceed 2,500 landings.

(2) If any crack is found that is less than or equal to 30 mm: Perform subsequent inspections and repair in accordance with the methods and times specified in Airbus Service Bulletin A310–54–2016, dated November 12, 1991; or Revision 1, dated October 15, 1993; or Revision 02, dated June 11, 1999.

(3) If any crack is found that is greater than 30 mm, but less than 100 mm: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent); or the EASA; or Airbus's EASA DOA.

(4) If any crack is found that is greater than or equal to 100 mm: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent); or the EASA; or Airbus's EASA DOA.

(5) Accomplishment of the modification specified in Airbus Service Bulletin A310–54–2022, dated October 15, 1993; or Revision 01, dated March 16, 1999; increases the threshold and repetitive interval of the inspections required by paragraph (i) of this AD to the threshold and interval specified in paragraph 2.D. of the Accomplishment Instructions of Airbus Service Bulletin A310–54–2016, Revision 02, dated June 11, 1999.

**(j) Retained Compliance Time for Paragraph (i) of This AD**

This paragraph restates the requirements of paragraph (d) of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), with no changes. Perform the initial inspection required by paragraph (i) of this AD at the earlier of the times specified by paragraphs (j)(1) and (j)(2) of this AD.

(1) Prior to the accumulation of 25,000 total landings, or within 500 landings after June 12, 1995 (the effective date of AD 95–10–03, Amendment 39–9220 (60 FR 25604, May 12, 1995), whichever occurs later.

(2) At the applicable time specified by paragraph (j)(2)(i), (j)(2)(ii), or (j)(2)(iii) of this AD.

(i) For airplanes that have accumulated fewer than 10,000 landings as of July 28, 2000 (the effective date of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000)): Perform the inspection prior to the accumulation of 3,800 total landings, or within 1,500 landings after July 28, 2000, whichever occurs later.

(ii) For airplanes that have accumulated 10,000 total landings or more, but fewer than 20,000 total landings, as of July 28, 2000 (the effective date of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000)): Perform the inspection within 1,000 landings after July 28, 2000.

(iii) For airplanes that have accumulated 20,000 total landings or more as of July 28, 2000 (the effective date of AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000)): Perform the inspection within 500 landings after July 28, 2000.

**(k) New Repetitive Inspections for Cracking**

(1) For airplanes identified in paragraph (k)(2) of this AD: Except as provided by paragraphs (n)(1) and (n)(4) of this AD, at the applicable compliance time specified in paragraph 1.E.(2), ''Compliance,'' of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD, or within 100 flight cycles after the effective date of this AD, whichever occurs later, do an eddy current inspection or liquid penetrant inspection for cracking of the lower spar of the pylon between ribs 9 and 10; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD, except as required by paragraphs (n)(2) and (n)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the inspection of the lower spar of the pylon between ribs 9 and 10 thereafter at intervals not to exceed the applicable interval specified in paragraph 1.E.(2), ''Compliance,'' of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD. Accomplishment of corrective actions required by this paragraph terminates the repetitive inspections required by this paragraph. Accomplishment of an inspection required by this paragraph terminates the inspection requirements of paragraphs (g), (h), and (i) of this AD. Accomplishment of the optional modification specified in the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD terminates the repetitive inspections required by this paragraph.

(i) Airbus Service Bulletin A300–54–0071, Revision 04, dated April 11, 2013 (for Model A300 B2–203, B2K–3C, B4–103, B4–203, and B4–2C airplanes).

(ii) Airbus Service Bulletin A310–54–2016, Revision 06, dated January 16, 2013 (for Model A310–221, –222, –322, –324, and –325 airplanes).

(iii) Airbus Service Bulletin A300–54–6011, Revision 03, dated June 23, 2011 (for Model A300 B4–620, B4–622R, and B4–622 airplanes).

(2) For airplanes that have not been modified or repaired with a doubler as specified in the applicable service bulletin specified in paragraph (k)(2)(i), (k)(2)(ii), or (k)(2)(iii) of this AD, do the inspections required by paragraph (k)(1) of this AD.

(i) Airbus Service Bulletin A300–54–0079 (for Model A300 B2–203, B2K–3C, B4–103, B4–203, and B4–2C airplanes).

(ii) Airbus Service Bulletin A310–54–2022 (for Model A310–221, –222, –322, –324, and –325 airplanes).

(iii) Airbus Service Bulletin A300–54–6019 (for Model A300 B4–620, B4–622R, and B4–622 airplanes).

**(l) New Repetitive Inspections for Post-Repair Airplanes**

For airplanes that have been repaired with a doubler as specified in the applicable Airbus service bulletin specified in

paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD: At the applicable time specified in paragraph 1.E.(2), ''Compliance,'' in the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD, except as specified in paragraphs (n)(1) and (n)(4) of this AD, do an eddy current inspection or liquid penetrant inspection for cracking of the lower spar of the pylon between ribs 9 and 10, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD, except as required by paragraph (n)(2) of this AD. Do all applicable corrective actions before further flight. Repeat the inspection of the lower spar of the pylon between ribs 9 and 10 thereafter at intervals not to exceed the applicable interval specified in paragraph 1.E.(2), ''Compliance,'' of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD. Accomplishment of an inspection required by this paragraph terminates the inspection requirements of paragraphs (g), (h), and (i) of this AD.

**(m) New Repetitive Inspections for Post-Modification Airplanes**

For airplanes that have been modified as specified in the applicable Airbus service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD: At the applicable time specified in paragraph 1.E.(2), ''Compliance,'' in the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD, except as specified in paragraph (n)(1) and (n)(4) of this AD: Do an eddy current inspection or liquid penetrant inspection for cracking of the lower spar of the pylon between ribs 9 and 10; and do all applicable corrective actions; in accordance with the Accomplishment Instructions of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD, except as required by paragraph (n)(2) of this AD. Do all applicable corrective actions before further flight. Repeat the inspection of the lower spar of the pylon between ribs 9 and 10 thereafter at intervals not to exceed the applicable interval specified in paragraph 1.E.(2), ''Compliance,'' of the applicable service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD. Accomplishment of an inspection required by this paragraph terminates the inspection requirements of paragraphs (g), (h), and (i) of this AD.

**(n) New Service Bulletin Exceptions**

(1) Where the service bulletins specified in paragraphs (k)(1)(i), (k)(1)(ii), and (k)(1)(iii) of this AD specify a compliance time ''from the publication date,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) If any crack is detected during any inspection required by paragraph (k), (l), or (m) of this AD, and the service bulletin specified in paragraph (k)(1)(i), (k)(1)(ii), or (k)(1)(iii) of this AD specifies to contact the manufacturer: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) Where the service bulletins specified in paragraphs (k)(1)(i), (k)(1)(ii), and (k)(1)(iii) of this AD specify to contact the manufacturer for inspection requirements: Inspect using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(4) Where the ''Threshold'' column in the tables in paragraph 1.E., ''Compliance,'' of the service bulletins specified in paragraphs (k)(1)(i), (k)(1)(ii), and (k)(1)(iii) of this AD specifies a compliance time in flight cycles/flight hours, this AD requires compliance within the corresponding time in total flight cycles/total flight hours; except that for tables for post-repair and post-modification airplanes, this AD requires compliance within the corresponding time after accomplishing the repair or modification.

**(o) Credit for Previous Actions**

This paragraph provides credit for actions required by paragraph (k) of this AD, if those actions were performed before the effective date of this AD using the applicable service bulletin specified in paragraphs (o)(1) through (o)(4) of this AD.

(1) Airbus Service Bulletin A300–54–071, Revision 02, dated August 25, 2000 (for Model A300 B2–203, B2K–3C, B4–103, B4–203, and B4–2C airplanes), which is not incorporated by reference in this AD.

(2) Airbus Service Bulletin A300–54–0071, Revision 03, dated October 5, 2012 (for Model A300 B2–203, B2K–3C, B4–103, B4–203, and B4–2C airplanes), which is not incorporated by reference in this AD.

(3) Airbus Service Bulletin A310–54–2016, Revision 04, dated November 16, 2007; or Airbus Service Bulletin A310–54–2016, Revision 05, dated October 5, 2012 (for Model A310–221, –222, –322, –324, and –325 airplanes); which are not incorporated by reference in this AD.

(4) Airbus Service Bulletin A300–54–6011, Revision 02, dated August 25, 2000 (for Model A300 B4–620, B4–622R, and B4–622 airplanes), which is not incorporated by reference in this AD.

**(p) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–2125; fax 425–227–1149. Information may be emailed to: *9–ANM–116–AMOC–REQUESTS@faa.gov.*

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(ii) AMOCs approved previously for AD 2000–12–12, Amendment 39–11790 (65 FR 39072, June 23, 2000), are approved as AMOCs for the corresponding provisions of this AD.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

**(q) Related Information**

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency Airworthiness Directive 2013–0216, dated September 17, 2013, for related information. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2013-1066-0002.*

(2) Service information identified in this AD that is not incorporated by reference in this AD is available at the addresses specified in paragraphs (r)(6) and (r)(7) of this AD.

**(r) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on January 9, 2015.

(i) Airbus Service Bulletin A300–54–0071, Revision 04, dated April 11, 2013.

(ii) Airbus Service Bulletin A310–54–2016, Revision 06, dated January 16, 2013.

(iii) Airbus Service Bulletin A300–54–6011, Revision 03, dated June 23, 2011.

(4) The following service information was approved for IBR on July 28, 2000 (65 FR 39072, June 23, 2000).

(i) Airbus Service Bulletin A310–54–2016, Revision 02, dated June 11, 1999.

(ii) Reserved.

(5) The following service information was approved for IBR on June 12, 1995 (60 FR 25604, May 12, 1995).

(i) Airbus Service Bulletin A300–54–071, dated November 12, 1991.

(ii) Airbus Service Bulletin A300–54–071, Revision 1, dated October 15, 1993.

(iii) Airbus Service Bulletin A300–54–6011, dated November 12, 1991.

(iv) Airbus Service Bulletin Change Notice O.A., A300–54–6011, dated July 10, 1992.

(v) Airbus Service Bulletin A300–54–6011, Revision 1, dated October 15, 1993. (Pages 1 through 10 and 12 through 19 of this document are identified as Revision 1, dated October 15, 1993; page 11 is dated November 12, 1991.)

(vi) Airbus Service Bulletin A300–54–6019, dated October 15, 1993.

(6) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(7) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on November 6, 2014.

**Jeffrey E. Duven,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2014–28477 Filed 12–4–14; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2013–0159; Directorate Identifier 2012–SW–010–AD; Amendment 39–18032; AD 2014–23–16]**

**RIN 2120–AA64**

## Airworthiness Directives; Robinson Helicopter Company Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2011–12–10 for Robinson Helicopter Company (Robinson) Model R22, R22 Alpha, R22 Beta, R22 Mariner, R44, and R44 II helicopters with certain main rotor blades (blade) installed. AD 2011–12–10 required inspecting each blade at the skin-to-spar line for debonding, corrosion, a separation, a gap, or a dent and replacing any damaged blade with an airworthy blade. This new AD also requires a terminating action for those inspection requirements. These actions are intended to detect debonding of the blade skin, which could result in blade failure and subsequent loss of control of the helicopter, and to correct the unsafe condition by replacing the main rotor blades with new blades that do not require the AD inspection.

**DATES:** This AD is effective January 9, 2015.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 9, 2015.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of July 5, 2011 (76 FR 35330, June 17, 2011); corrected March 5, 2012 (77 FR 12991).

**ADDRESSES:** For service information identified in this AD, contact Robinson Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com/servelib.htm.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth Texas, 76137.

### 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 AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Fred Guerin, Aviation Safety Engineer, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; telephone (562) 627–5232; email *fred.guerin@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Discussion

On February 25, 2013, at 78 FR 12648, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to supersede AD 2011–12–10, Amendment 39–16717 (76 FR 35330, June 17, 2011), corrected March 5, 2012 (77 FR 12991), that applied to Robinson Model R22, R22 Alpha, R22 Beta, and R22 Mariner helicopters with blade, part number (P/N) A016–4; and Model R44 and R44 II helicopters with blade, P/N C016–2 or C–016–5, installed. AD 2011–12–10 required a pilot check of the blade skin-to-spar joint area for any bare metal before the first flight of each day. AD 2011–12–10 also required repetitively inspecting each blade for corrosion, separation, a gap, or a dent, refinishing any bare metal before further flight, and replacing any damaged blade with an airworthy blade. AD 2011–12–10 was prompted by a fatal accident due to blade delamination.

At the time we issued AD 2011–12–10, Robinson had developed replacement blades on the R22 and R44 model helicopters. AD 2011–12–10 was issued as a Final rule; request for comment; however, the amount of time permitted to replace the blades required allowing the public an opportunity to comment. Thus, the NPRM proposed to retain the pilot check, recurring inspection, and blade refinishing requirements of AD 2011–12–10. An owner/operator (pilot) may perform the visual check required by paragraph (f)(1) of this AD and must enter compliance with that paragraph into the helicopter maintenance records in accordance with 14 CFR 43.9(a)(1) through (4) and 91.417(a)(2)(v). A pilot may perform this check because it involves only looking at a visible area of the blades and can be performed equally well by a pilot or a mechanic. This check is an exception to our standard maintenance regulations. The NPRM also proposed to add a part-numbered blade to its applicability for R22 model helicopters. Lastly, the NPRM proposed to require, within five years of the effective date, replacing both main rotor blades with the new part-numbered aluminum blades, which would constitute terminating action of the recurring inspection requirements. These actions are intended to detect and prevent debonding of the blade skin, which could result in blade failure and subsequent loss of control of the helicopter.

### Comments

After our NPRM (78 FR 12648, February 25, 2013) was published, we received comments from 15 commenters and have given due consideration to each one. We have identified five unique issues and addressed those issues as follows.

### Requests

Ten operators requested that we withdraw the NPRM and allow continued repetitive inspections of the blades for all affected models, as there is insufficient data justifying the termination of the requirement for repetitive inspections and for replacing the main rotor blades with new blades that do not require the AD inspection. One commenter noted that there have been no blade failures since the procedures of AD 2011–12–10 have

been implemented, and therefore the NPRM increases the financial burden to an operator without increasing safety. Another commenter requested that more data be obtained regarding the effect of the operating environment and the inspection accordingly modified. Two commenters stated that a salt air environment caused the debonding due to corrosion. Some commenters state that inspections and routine maintenance, if done correctly, will ensure continued operational safety.

We do not agree. Blade debonding continues to occur in service. The cause of the debonding was determined to be erosion on unpainted blade tip bond lines which allows the bond to weaken and the skin to pull up. The erosion is mechanical and occurs in any environment regardless of salt or moisture in the air. This unsafe condition is sufficient to mandate inspections due to the catastrophic consequences if the blade becomes delaminated. However, airworthiness cannot be assured long-term by reliance on continued repetitive inspections. Although there have been no fatalities since we issued AD 2011–12–10, Robinson continues to report instances of blade delamination found during maintenance checks. Because blades continue to have debond issues, and as using a safety-by-inspection approach for a critical component has been shown to have an inherent amount of risk, it is in the interest of safety to reduce the retirement of the blades from 12 years from the blade manufacturing date to an earlier date.

Five operators requested that we remove the requirement for replacing the blades for the R44 Astro models, because these models are not equipped with hydraulic assisted controls and the new blades cannot be installed on these models unless the helicopter is converted to hydraulic assisted controls, a costly conversion which is not necessary for safe flight. These commenters further stated that the conversion is not only an additional expense but also can only be performed at the Robinson factory. One commenter believed the new blades are compatible with the non-hydraulic airframe and requested we require that Robinson test the new blades on the non-hydraulic R44 Astro airframe, so that the new blades can be installed on the R44 Astro without also having to convert the helicopter. The commenters also stated that Robinson then reserves the right to upgrade any component on the helicopter to their latest revision even though there is no AD or SB stating the Robinson required change, and this Robinson requirement results in additional cost increase. One commenter requested that we justify this requirement for the R44 Astro helicopters by identifying the number of reports of blade delamination on R44 Astros and explain the safety improvement resulting from converting a helicopter to hydraulic assisted controls. Finally, the commenters also stated that requiring replacement of the blades (and thus, conversion) for R44 Astro helicopters significantly reduces the resale value of these helicopters.

We do not agree. The R44 Astro is subject to the same unsafe condition as the other R22 and R44 helicopter models. The purpose of this AD is not to require converting a helicopter to hydraulic assisted controls; the purpose is to correct this unsafe condition on the blades. Robinson's decision whether to test the new blades with the non-hydraulic R44 Astro helicopter is a business decision, and the FAA does not have the authority to mandate a different decision. Similarly, Robinson's decision to discontinue blades designed for the non-hydraulic equipped helicopters is a business decision that the FAA does not have the authority to change. Because the blades for the non-hydraulic equipped R44 Astro helicopters are calendar life limited to 12 years and will no longer be produced, and as the manufacturer has not pursued FAA approval for installation of the new blades on the non-hydraulic R44 Astro, the owners of the Astro helicopter will need to install hydraulic assisted flight controls after 12 years regardless of the AD requirements. The FAA acknowledges that the expense and downtime to accomplish the blade replacement is greater for the R44 helicopters that are not equipped with hydraulic assisted controls. However, this greater cost due to an absence of hydraulic controls, while unfortunate, does not change the blade safety issue or the need to require replacement of the blades prior to their retirement life.

Four operators stated that the FAA has not considered the cost of this AD on operators and requested that Robinson be responsible for the cost of the new blades. One commenter also requested that Robinson be responsible for the cost of converting the R44 Astro to hydraulic assisted flight controls, as this will be required for that model when the new blades are installed.

We do not agree. While we acknowledge that the costs associated with the actions of this AD are not minimal, we have determined that these costs are reasonable given the unsafe condition. As far as request for Robinson to bear these costs, the FAA does not have the authority to require a manufacturer to bear the cost of a repair.

One commenter requested that we require blade replacement at the 2,200 hour overhaul or 12 years instead of the 5-year compliance time. The commenter stated that as Robinson started the production of new blades about 3 years ago, the 5-year replacement period would require some owners to replace the blades long before reaching the 12-year inspection, and this financial cost was not taken into account with the proposed rule.

We do not agree. We determined a replacement period of five years from the date of the AD by using a quantitative and qualitative risk assessment methodology. The risk of blade skin debonding results in a loss of control of the helicopter and is beyond acceptable risk guidelines when allowing the blades to continue in service indefinitely. Although the risk assessment indicates that immediate action is required to correct the unsafe condition, this risk is partially mitigated by the improved inspection techniques, making it acceptable to allow a five year period of time for blades to be replaced. The added cost to retire the blades has been anticipated in the financial burden justification of this AD. The FAA acknowledges that in some situations the cost to the operator may be in excess of the cost of the replacement blades, but we have determined that the costs associated with the actions of this AD are reasonable given the safety issue.

Lastly, one commenter did not make a request but stated that bare metal can be seen on areas of the helicopter and that the helicopter manufacturer provides poor corrosion protection on the helicopter. The commenter explained that metal-to-metal contact causes the corrosion that occurs on the blades.

We disagree. Metal-to-metal contact may be a mechanism that is causing the corrosion in the rotor blade tip cap to skin interface, but it has not been shown to be a mechanism for skin debonding in the area of the blade that has been found in the fleet. Skin debonding is the unsafe condition the actions in this AD are correcting.

**FAA's Determination**

We have reviewed the relevant information, considered the comments received, and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed, except we are allowing compliance with the revised service information as an optional

action. We have also made clarifications in the economic analysis to reflect the correct cost of required parts and labor for R–44 helicopters without hydraulically boosted flight controls installed. The total estimated cost for these model helicopters has not changed. These changes are consistent with the intent of the proposals in the NPRM (78 FR 12648, February 25, 2013) and will not increase the economic burden on any operator nor increase the scope of the AD.

**Related Service Information**

We have reviewed the following Robinson service information:

- Letter titled ''Additional Information Regarding Main Rotor Blade Skin Debonding,'' dated May 25, 2007, discussing blade skin debonding;
- Rotorcraft Flight Manual (RFM) changes to the Normal Procedures Section 4 and Systems Description Section 7, revised April 20, 2007, for each applicable model helicopter containing a ''caution'' about skin-to-spar bond line erosion;
- One Service Letter with two different Nos.: R22 SL–56B and R44 SL–32B, both revised April 30, 2010, specifying proper inspection and protection (refinishing) of bonded areas; and
- Service Bulletins SB–103 for the Model R22 and SB–72 for the Model R44, both dated April 30, 2010, and SB–103A and SB–72A, both dated July 19, 2012, specifying proper inspection and protection (refinishing) of bonded areas for certain affected blades.
- R44 Service Letter SL–37, dated June 18, 2010, specifying the required modifications for a carbureted R–44 to install P/N C016–7 blades.

**Costs of Compliance**

We estimate that this AD affects 1,290 Model R22 helicopters and 1,353 Model R44 helicopters, for a total of 2,643 helicopters of U.S. Registry. At an average labor rate of $85 per hour, we estimate that operators will incur the following costs in order to comply with this AD:

- Time to perform the before flight check each day is negligible.
- Inspecting both blades will require about three work hours, for a total cost per helicopter of $255 and a total cost to the U.S. operator fleet of $673,965.
- Replacing both blades on a Model R22 helicopter will require about 20 work hours, and required parts will cost $29,808, for a total cost per helicopter of $31,508 and a total cost to the U.S. R22 operator fleet of $40,645,320 over a 5-year period.
- Replacing both blades on a Model R44 helicopter with hydraulically boosted flight controls installed (approximately 1,053 helicopters) will require about 20 work hours, and required parts will cost $43,783, for a total cost per helicopter of $45,483 and a total cost to the U.S. R44 operator fleet of $47,893,599 over a 5-year period.
- Replacing both blades on a Model R44 helicopter without hydraulically boosted flight controls installed (approximately 300 helicopters) will require modifying the aircraft with hydraulic flight controls, and adding the P/N C016–7 blades and the required airframe provisions at a cost of 100 work-hours for a total labor cost of $8,500. Parts will cost $103,747 for a total cost per helicopters of $112,247, and a cost to U.S. operators of $33,674,100 over 5 years.

**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**

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**Adoption of the Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2011–12–10, Amendment 39–16717 (76 FR 35330, June 17, 2011); corrected March 5, 2012 (77 FR 12991), and adding the following new AD:

**2014–23–16 Robinson Helicopter Company:** Amendment 39–18032; Docket No. FAA–2013–0159; Directorate Identifier 2012–SW–010–AD.

**(a) Applicability**

This AD applies to Model R22, R22 Alpha, R22 Beta, and R22 Mariner helicopters with main rotor blade (blade), part number (P/N) A016–2 or A016–4; and Model R44 and R44 II helicopters with blade, P/N C016–2 or C–016–5, certificated in any category.

**(b) Unsafe Condition**

This AD defines the unsafe condition as blade skin debonding, which could result in blade failure and subsequent loss of control of the helicopter.

**(c) Affected ADs**

This AD supersedes AD 2011–12–10, Amendment 39–16717 (76 FR 35330, June 17, 2011); corrected March 5, 2012 (77 FR 12991).

**(d) Effective Date**

This AD becomes effective January 9, 2015.

**(e) 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.

**(f) Required Actions**

(1) Before the first flight of each day, visually check for any exposed (bare metal) skin-to-spar joint area on the lower surface of each blade. The actions required by this

paragraph may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a)(1) through (4) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

(2) If there is any bare metal in the area of the skin-to-spar bond line, before further flight, inspect the blade by following the requirements of paragraph (f)(3) of this AD.

(3) Within 10 hours time-in-service (TIS), and at intervals not to exceed 100 hours TIS or at each annual inspection, whichever occurs first, inspect each blade for corrosion, separation, a gap, or a dent by following the Compliance Procedure, paragraphs 1 through 6 and 8, of Robinson R22 Service Bulletin SB–103, dated April 30, 2010 (SB103), or Robinson Service Bulletin SB–72, dated April 30, 2010 (SB72), as appropriate for your model helicopter. Although the Robinson service information limits the magnification to 10X, a higher magnification is acceptable for this inspection. Also, an appropriate tap test tool which provides similar performance, weight, and consistency of tone may be substituted for the ''1965 or later United States Quarter-dollar coin,'' which is specified in the Compliance Procedure, paragraph 2, of SB72 and SB103.

(4) Before further flight, refinish any exposed area of a blade by following the Compliance Procedure, paragraphs 2 through 6, of Robinson R22 Service Letter SL–56B or R44 Service Letter SL–32B, both dated April 30, 2010, as appropriate for your model helicopter.

(5) Before further flight, replace any unairworthy blade with an airworthy blade.

(6) Within 5 years of the effective date of this AD:

(i) For Model R22 series helicopters, replace blade P/N A016–2 or A016–4 with a blade, P/N A016–6.

(ii) For Model R44 series helicopters fitted with hydraulically boosted main rotor flight controls, replace blade P/N C016–2 or C016–5 with a blade, P/N C016–7.

(iii) For Model R44 series helicopters without hydraulically boosted main rotor flight controls, replace blade P/N C016–2 or C016–5 with a blade, P/N C016–7. Prior to installing a blade P/N C016–7, verify the helicopter has been modified as required by Robinson R44 Service Letter SL–37, dated June 18, 2010, Compliance Procedures, paragraphs 1. through 10.

(iv) Installing blades, P/N A016–6 or P/N C016–7, is terminating action for the inspection requirements of paragraphs (f)(1) through (f)(4) of this AD.

(7) As an option for complying with paragraph (f)(3) of this AD, you may perform a blade inspection by following the corresponding provisions of SB–103A or SB–72A, both dated July 19, 2012, as appropriate for your model helicopter.

**(g) Special Flight Permits**

Special flight permits will not be issued.

**(h) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Los Angeles Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Fred Guerin, Aviation Safety Engineer, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; telephone (562) 627–5232; email *fred.guerin@faa.gov.*

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

(3) AMOCs approved for AD 2011–12–10 (76 FR 35330, June 17, 2011); corrected March 5, 2012 (77 FR 12991), are approved as AMOCs for the corresponding requirements in paragraph (f) of this AD.

**(i) Additional Information**

The Robinson letter titled ''Additional Information Regarding Main Rotor Blade Skin Debonding,'' dated May 25, 2007, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Robinson Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com/servelib.htm.* You may review a copy of this information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

**(j) Subject**

Joint Aircraft Service Component (JASC) Code: 6210: Main Rotor Blades.

**(k) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on January 9, 2015.

(i) Robinson R44 Service Letter SL–37, dated June 18, 2010.

(ii) Reserved.

(4) The following service information was previously approved for IBR on July 5, 2011 (76 FR 35330, June 17, 2011); corrected March 5, 2012 (77 FR 12991).

(i) Robinson R22 Service Bulletin SB–103, dated April 30, 2010.

(ii) Robinson R44 Service Bulletin SB–72, dated April 30, 2010.

(iii) Robinson R22 Service Letter SL–56B, dated April 30, 2010.

(iv) Robinson R44 Service Letter SL–32B, dated April 30, 2010.

(5) For Robinson service information identified in this AD, contact Robinson Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com/servelib.htm.*

(6) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued in Fort Worth, Texas, on November 4, 2014.

**Lance T. Gant,**

*Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2014–28478 Filed 12–4–14; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2014–0986; Airspace Docket No. 14–AGL–14]**

**RIN 2120–AA66**

## Amendment of Multiple Air Traffic Service (ATS) Routes; North Central and Northeast United States

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule, technical amendment.

**SUMMARY:** This action amends multiple high altitude Area Navigation (RNAV) routes (Q-routes) in the north central and northeast United States (U.S.) to change 13 fixes identified in the Q-routes to match waypoint (WP) characterizations contained in the FAA and Canadian aeronautical database information establishing the WPs. This action also amends the route termination point and geographic latitude/longitude position in RNAV route Q–822 to reflect changes made by Canada as part of its Windsor-Toronto-Montreal (WTM) airspace redesign effort.

**DATES:** Effective date 0901 UTC, January 8, 2015. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.9Y, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* The Order is also available for inspection at the National Archives and Records

Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15. For further information, you can contact the Airspace Policy and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783.

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

**SUPPLEMENTARY INFORMATION:**

## History

On September 26, 2014, the FAA published in the **Federal Register** a final rule (79 FR 57758) that amended, removed, and established multiple ATS routes in the north central and northeast United States to reflect and accommodate route changes being made in Canadian airspace as part of Canada's WTM airspace redesign project, and corrected a notice of proposed rulemaking (NPRM) publishing error. The rule also made a number of changes or corrections deemed necessary following the NPRM public comment period.

The FAA now has identified in the rule that the following 13 fixes in several route descriptions were established in the FAA and Canadian aeronautical databases as WPs: DUTSH, OH; RICCS, WV; WAYLA, NY; PUPPY, NY; ARKKK, NY; FABEN, NY; STOMP, NY; POSTS, MI; JOSSY, NY; KRAZZ, NY; AGNOB, Canada; LORKA, Canada; and ADVIK, Canada.

Additionally, the final route segment providing cross border connectivity between the U.S. and Canada for the RNAV route Q–822 description was changed within Canadian airspace by NAV CANADA due to route realignment requirements. Also in RNAV route Q–822, the TANGU, Canada, WP was changed to the SINVI, Canada, WP located in a new geographic latitude/longitude position.

This rule makes the corrections to be in concert with FAA and Canadian aeronautical databases.

## The Rule

The FAA is amending Title 14, Code of Federal Regulations (14 CFR) part 71 by modifying RNAV routes Q–29, Q–69, Q–82, Q–84, Q–103, Q–140, Q–812, Q–818, Q–822, Q–907, Q–935, and Q–937. The RNAV route modifications correct fix characterizations to match FAA and Canadian aeronautical database information and support Canadian airspace redesign changes for routes into and out of the Winsor, Toronto, and Montreal areas within Canada to ensure safe and efficient across border connectivity.

The RNAV route modifications accomplished by this action are outlined below.

Q–29: Change the ''DUTSH, OH FIX'' to read ''DUTSH, OH WP.''

Q–69: Change the ''RICCS, WV FIX'' to read ''RICCS, WV WP.''

Q–82: Change the ''WAYLA, NY FIX'' to read ''WAYLA, NY WP.''

Q–84: Change the ''PUPPY, NY FIX'' to read ''PUPPY, NY WP.''

Q–103: Change the ''RICCS, WV FIX'' to read ''RICCS, WV WP.''

Q–140: Change the ''ARKKK, NY FIX'' to read ''ARKKK, NY WP.''

Q–812: Change the ''FABEN, NY FIX'' to read ''FABEN, NY WP;'' the ''ARKKK, NY FIX'' to read ''ARKKK, NY WP;'' and the ''STOMP, NY FIX'' to read ''STOMP, NY WP.''

Q–818: Change the ''STOMP, NY FIX'' to read ''STOMP, NY WP.''

Q–822: Change the route title to read ''Q–822 ''Flint, MI (FNT) to SINVI, Canada;'' the ''PUPPY, NY FIX'' to read ''PUPPY, NY WP;'' and the ''TANGU, Canada WP (lat. 44°50′58.00″ N., long. 063°58′43.00″ W.)'' to read ''SINVI, Canada WP (lat. 44°48′15.00″ N., long. 064°19′27.00″ W.).''

Q–907: Change the ''POSTS, MI FIX'' to read ''POSTS, MI WP;'' the ''AGNOB, Canada FIX'' to read ''AGNOB, Canada WP;'' the ''LORKA, Canada FIX'' to read ''LORKA, Canada WP;'' and the ''ADVIK, Canada FIX'' to read ''ADVIK, Canada WP.''

Q–935: Change the ''JOSSY, NY FIX'' to read ''JOSSY, NY WP;'' and the ''FABEN, NY FIX'' to read ''FABEN, NY WP.''

Q–937: Change the ''TULEG, Canada WP'' to read ''TULEG, Canada FIX;'' and the ''KRAZZ, NY FIX'' to read ''KRAZZ, NY WP.''

Q–951: Change the ''POSTS, MI FIX'' to read ''POSTS, MI WP.''

High altitude United States RNAV routes (Q-routes) are published in paragraph 2006 and high altitude Canadian RNAV routes (Q-routes) are published in paragraph 2007 of FAA Order 7400.9Y dated August 6, 2014, and effective September 15, 2014, which is incorporated by reference in 14 CFR 71.1. The high altitude United States and Canadian RNAV routes (Q-routes) listed in this rule will be subsequently published in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does 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 United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System. In addition, as this rule is correcting errors in certain Q routes and updating RNAV route Q–822 to accommodate changes by Canada that affect these routes, I find that notice and public procedure under 5 U.S.C. 553(b) are impractical, unnecessary and not in the public interest.

## Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

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

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

■ 1. The authority citation for 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 71.1 of FAA Order 7400.9Y, Airspace Designations and Reporting Points, dated August 6, 2014, and effective September 15, 2014, is amended as follows:

*Paragraph 2006 United States Area Navigation Routes*

* * * * *

**Q–29 HARES, LA to DUVOK, Canada (Amended)**

| | | |
|---|---|---|
| HARES, LA | WP | (Lat. 33°00′00.00″ N., long. 091°44′00.00″ W.) |
| BAKRE, MS | WP | (Lat. 33°53′45.85″ N., long. 090°58′04.75″ W.) |
| Memphis, TN (MEM) | VORTAC | (Lat. 35°00′54.42″ N., long. 089°58′59.55″ W.) |
| OMDUE, TN | WP | (Lat. 36°07′47.32″ N., long. 088°58′11.49″ W.) |
| SIDAE, KY | WP | (Lat. 37°20′00.00″ N., long. 087°50′00.00″ W.) |
| CREEP, OH | FIX | (Lat. 39°55′15.28″ N., long. 084°18′31.41″ W.) |
| KLYNE, OH | WP | (Lat. 40°41′54.46″ N., long. 083°18′44.19″ W.) |
| DUTSH, OH | WP | (Lat. 41°08′26.35″ N., long. 082°33′12.68″ W.) |
| WWSHR, OH | WP | (Lat. 41°20′34.09″ N., long. 082°03′05.76″ W.) |
| DORET, OH | FIX | (Lat. 41°48′05.90″ N., long. 080°35′04.64″ W.) |
| Jamestown, NY (JHW) | VOR/DME | (Lat. 42°11′18.99″ N., long. 079°07′16.70″ W.) |
| HANKK, NY | FIX | (Lat. 42°53′41.82″ N., long. 077°09′15.21″ W.) |
| GONZZ, NY | WP | (Lat. 43°05′22.00″ N., long. 076°41′12.00″ W.) |
| KRAZZ, NY | WP | (Lat. 43°25′00.00″ N., long. 074°18′00.00″ W.) |
| NIPPY, NY | FIX | (Lat. 43°41′23.08″ N., long. 073°58′06.74″ W.) |
| CABCI, VT | WP | (Lat. 44°49′19.94″ N., long. 071°42′55.14″ W.) |
| EBONY, ME | FIX | (Lat. 44°54′08.68″ N., long. 067°09′23.65″ W.) |
| DUNOM, ME | WP | (Lat. 44°54′06.95″ N., long. 067°00′00.00″ W.) |
| DUVOK, Canada | WP | (Lat. 44°55′37.33″ N., long. 065°17′11.66″ W.) |

Excluding the portion within Canada.

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**Q–69 BLANN, SC to RICCS, WV (Amended)**

| | | |
|---|---|---|
| BLAAN, SC | WP | (Lat. 33°51′09.38″ N., long. 080°53′32.78″ W.) |
| RYCKI, NC | WP | (Lat. 36°24′43.05″ N., long. 080°25′07.50″ W.) |
| LUNDD, VA | WP | (Lat. 36°44′22.38″ N., long. 080°21′07.11″ W.) |
| ILLSA, VA | WP | (Lat. 37°38′55.85″ N., long. 080°13′18.44″ W.) |
| EWESS, WV | WP | (Lat. 38°21′50.31″ N., long. 080°06′52.03″ W.) |
| RICCS, WV | WP | (Lat. 38°55′14.65″ N., long. 080°05′01.68″ W.) |

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**Q–82 WWSHR, OH to PONCT, NY (Amended)**

| | | |
|---|---|---|
| WWSHR, OH | WP | (Lat. 41°20′34.09″ N., long. 082°03′05.76″ W.) |
| DORET, OH | FIX | (Lat. 41°48′05.90″ N., long. 080°35′04.64″ W.) |
| Jamestown, NY (JHW) | VOR/DME | (Lat. 42°11′18.99″ N., long. 079°07′16.70″ W.) |
| WAYLA, NY | WP | (Lat. 42°20′58.54″ N., long. 077°48′57.18″ W.) |
| VIEEW, NY | FIX | (Lat. 42°26′22.07″ N., long. 077°01′33.30″ W.) |
| MEMMS, NY | FIX | (Lat. 42°30′59.71″ N., long. 076°18′15.43″ W.) |
| LOXXE, NY | FIX | (Lat. 42°34′29.55″ N., long. 075°43′33.49″ W.) |
| PONCT, NY | WP | (Lat. 42°44′48.83″ N., long. 073°48′48.07″ W.) |

**Q–84 Jamestown, NY (JHW) to Cambridge, NY (CAM) (Amended)**

| | | |
|---|---|---|
| Jamestown, NY (JHW) | VOR/DME | (Lat. 42°11′18.99″ N., long. 079°07′16.70″ W.) |
| AUDIL, NY | FIX | (Lat. 42°52′18.74″ N., long. 076°26′35.07″ W.) |
| PUPPY, NY | WP | (Lat. 43°03′26.46″ N., long. 075°17′39.29″ W.) |
| PAYGE, NY | FIX | (Lat. 43°00′50.48″ N., long. 074°15′12.76″ W.) |
| Cambridge, NY (CAM) | VOR/DME | (Lat. 42°59′39.40″ N., long. 073°20′38.50″ W.) |

**Q–103 Pulaski, VA (PSK) to AIRRA, PA (Amended)**

| | | |
|---|---|---|
| Pulaski, VA (PSK) | VORTAC | (Lat. 37°05′15.74″ N., long. 080°42′46.44″ W.) |
| ASBUR, WV | FIX | (Lat. 37°49′24.41″ N., long. 080°27′51.44″ W.) |
| OAKLE, WV | FIX | (Lat. 38°07′13.80″ N., long. 080°21′44.84″ W.) |
| PERRI, WV | FIX | (Lat. 38°17′50.49″ N., long. 080°18′05.11″ W.) |
| PERKS, WV | FIX | (Lat. 38°39′40.84″ N., long. 080°10′29.36″ W.) |
| RICCS, WV | WP | (Lat. 38°55′14.65″ N., long. 080°05′01.68″ W.) |
| EMNEM, WV | WP | (Lat. 39°31′27.12″ N., long. 080°04′28.21″ W.) |
| AIRRA, PA | WP | (Lat. 41°06′16.48″ N., long. 080°03′48.73″ W.) |

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**Q–140 WOBED, WA to YODAA, NY (Amended)**

| | | |
|---|---|---|
| WOBED, WA | WP | (Lat. 48°36′01.07″ N., long. 122°49′46.52″ W.) |
| GETNG, WA | WP | (Lat. 48°25′30.57″ N., long. 119°31′38.98″ W.) |

| | | |
|---|---|---|
| CORDU, ID | FIX | (Lat. 48°10′46.41″ N., long. 116°40′21.84″ W.) |
| PETIY, MT | WP | (Lat. 47°58′46.55″ N., long. 114°36′20.31″ W.) |
| CHOTE, MT | FIX | (Lat. 47°39′56.68″ N., long. 112°09′38.13″ W.) |
| LEWIT, MT | WP | (Lat. 47°23′00.21″ N., long. 110°08′44.78″ W.) |
| SAYOR, MT | FIX | (Lat. 47°13′58.34″ N., long. 104°58′39.28″ W.) |
| WILTN, ND | FIX | (Lat. 47°04′58.09″ N., long. 100°47′43.84″ W.) |
| TTAIL, MN | WP | (Lat. 46°41′28.00″ N., long. 096°41′09.00″ W.) |
| CESNA, WI | WP | (Lat. 45°52′14.00″ N., long. 092°10′59.00″ W.) |
| WISCN, WI | WP | (Lat. 45°18′19.45″ N., long. 089°27′53.91″ W.) |
| EEGEE, WI | WP | (Lat. 45°08′53.00″ N., long. 088°45′58.00″ W.) |
| DAYYY, MI | WP | (Lat. 44°10′10.00″ N., long. 084°22′23.00″ W.) |
| RUBKI, Canada | WP | (Lat. 44°14′56.00″ N., long. 082°15′25.99″ W.) |
| PEPLA, Canada | WP | (Lat. 43°47′51.00″ N., long. 080°01′02.00″ W.) |
| SIKBO, Canada | WP | (Lat. 43°39′13.00″ N., long. 079°20′57.00″ W.) |
| MEDAV, Canada | WP | (Lat. 43°29′19.00″ N., long. 078°45′46.00″ W.) |
| AHPAH, NY | WP | (Lat. 43°18′19.00″ N., long. 078°07′35.11″ W.) |
| HANKK, NY | FIX | (Lat. 42°53′41.82″ N., long. 077°09′15.21″ W.) |
| BEEPS, NY | FIX | (Lat. 42°49′13.26″ N., long. 076°59′04.84″ W.) |
| EXTOL, NY | FIX | (Lat. 42°39′27.69″ N., long. 076°37′06.10″ W.) |
| MEMMS, NY | FIX | (Lat. 42°30′59.71″ N., long. 076°18′15.43″ W.) |
| KODEY, NY | FIX | (Lat. 42°16′47.53″ N., long. 075°47′04.00″ W.) |
| ARKKK, NY | WP | (Lat. 42°03′48.52″ N., long. 075°19′00.41″ W.) |
| RODYY, NY | WP | (Lat. 41°52′25.85″ N., long. 074°35′49.39″ W.) |
| YODAA, NY | FIX | (Lat. 41°43′21.19″ N., long. 074°01′52.76″ W.) |

Excluding the airspace within Canada.

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*Paragraph 2007 Canadian Area Navigation Routes (Amended)*

**Q–812 TIMMR, ND to GAYEL, NY (Amended)**

| | | |
|---|---|---|
| TIMMR, ND | FIX | (Lat. 46°22′49.49″ N., long. 100°54′29.80″ W.) |
| WELOK, MN | WP | (Lat. 45°41′26.32″ N., long. 094°15′28.74″ W.) |
| CEWDA, WI | WP | (Lat. 44°48′32.00″ N., long. 088°33′00.00″ W.) |
| ZOHAN, MI | WP | (Lat. 43°55′57.00″ N., long. 084°23′09.00″ W.) |
| NOSIK, Canada | WP | (Lat. 43°59′00.00″ N., long. 082°11′52.30″ W.) |
| AGDOX, Canada | WP | (Lat. 43°17′01.71″ N., long. 079°05′29.29″ W.) |
| KELTI, NY | WP | (Lat. 43°16′57.00″ N., long. 078°56′00.00″ W.) |
| AHPAH, NY | WP | (Lat. 43°18′19.00″ N., long. 078°07′35.11″ W.) |
| GOATR, NY | WP | (Lat. 43°17′26.08″ N., long. 076°39′07.75″ W.) |
| Syracuse, NY (SYR) | VORTAC | (Lat. 43°09′37.87″ N., long. 076°12′16.41″ W.) |
| FABEN, NY | WP | (Lat. 42°51′12.04″ N., long. 075°57′07.91″ W.) |
| LOXXE, NY | FIX | (Lat. 42°34′29.55″ N., long. 075°43′33.49″ W.) |
| ARKKK, NY | WP | (Lat. 42°03′48.52″ N., long. 075°19′00.41″ W.) |
| STOMP, NY | WP | (Lat. 41°35′46.78″ N., long. 074°47′47.79″ W.) |
| MSLIN, NY | FIX | (Lat. 41°29′30.82″ N., long. 074°33′14.28″ W.) |
| GAYEL, NY | FIX | (Lat. 41°24′24.09″ N., long. 074°21′25.75″ W.) |

Excluding the airspace within Canada.

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**Q–818 Flint, MI (FNT) to GAYEL, NY (Amended)**

| | | |
|---|---|---|
| Flint, MI (FNT) | VORTAC | (Lat. 42°58′00.38″ N., long. 083°44′49.08″ W.) |
| TANKO, Canada | WP | (Lat. 43°01′32.00″ N., long. 082°22′43.00″ W.) |
| KITOK, Canada | WP | (Lat. 43°02′30.00″ N., long. 081°55′34.00″ W.) |
| DERLO, Canada | WP | (Lat. 43°03′59.00″ N., long. 081°05′43.00″ W.) |
| IKNAV, Canada | WP | (Lat. 42°57′43.00″ N., long. 078°59′04.00″ W.) |
| WOZEE, NY | WP | (Lat. 42°56′01.65″ N., long. 078°44′19.64″ W.) |
| KELIE, NY | FIX | (Lat. 42°39′37.32″ N., long. 077°44′41.05″ W.) |
| VIEEW, NY | FIX | (Lat. 42°26′22.07″ N., long. 077°01′33.30″ W.) |
| Binghampton, NY (CFB) | VORTAC | (Lat. 42°09′26.96″ N., long. 076°08′11.30″ W.) |
| BUFFY, PA | FIX | (Lat. 41°56′27.98″ N., long. 075°36′45.35″ W.) |
| STOMP, NY | WP | (Lat. 41°35′46.78″ N., long. 074°47′47.79″ W.) |
| MSLIN, NY | FIX | (Lat. 41°29′30.82″ N., long. 074°33′14.28″ W.) |
| GAYEL, NY | FIX | (Lat. 41°24′24.09″ N., long. 074°21′25.75″ W.) |

Excluding the airspace within Canada.

**Q–822 Flint, MI (FNT) to SINVI, Canada (Amended)**

| | | |
|---|---|---|
| Flint, MI (FNT) | VORTAC | (Lat. 42°58′00.38″ N., long. 083°44′49.08″ W.) |
| TANKO, Canada | WP | (Lat. 43°01′32.00″ N., long. 082°22′43.00″ W.) |
| KITOK, Canada | WP | (Lat. 43°02′30.00″ N., long. 081°55′34.00″ W.) |
| DERLO, Canada | WP | (Lat. 43°03′59.00″ N., long. 081°05′43.00″ W.) |
| HOZIR, NY | WP | (Lat. 43°06′03.59″ N., long. 079°02′05.27″ W.) |
| GONZZ, NY | WP | (Lat. 43°05′22.00″ N., long. 076°41′12.00″ W.) |
| PUPPY, NY | WP | (Lat. 43°03′26.46″ N., long. 075°17′39.29″ W.) |
| PAYGE, NY | FIX | (Lat. 43°00′50.48″ N., long. 074°15′12.76″ W.) |
| Cambridge, NY (CAM) | VOR/DME | (Lat. 42°59′39.44″ N., long. 073°20′38.47″ W.) |

| | | |
|---|---|---|
| Kennebunk, ME (ENE) | VOR/DME | (Lat. 43°25′32.42″ N., long. 070°36′48.69″ W.) |
| AJJAY, ME | WP | (Lat. 43°43′40.55″ N., long. 069°36′08.22″ W.) |
| ALLEX, ME | WP | (Lat. 44°25′00.00″ N., long. 067°00′00.00″ W.) |
| SINVI, Canada | WP | (Lat. 44°48′15.00″ N., long. 064°19′27.00″ W.) |

Excluding the airspace within Canada.

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**Q–907 POSTS, MI to MIILS, Canada (Amended)**

| | | |
|---|---|---|
| POSTS, MI | WP | (Lat. 42°18′00.00″ N., long. 085°02′00.00″ W.) |
| PADDE, MI | WP | (Lat. 42°17′09.00″ N., long. 084°28′28.00″ W.) |
| Salem, MI (SVM) | VORTAC | (Lat. 42°24′31.09″ N., long. 083°35′38.05″ W.) |
| DERLO, Canada | WP | (Lat. 43°03′59.00″ N., long. 081°05′43.00″ W.) |
| SIKBO, Canada | WP | (Lat. 43°39′13.00″ N., long. 079°20′57.00″ W.) |
| AGNOB, Canada | WP | (Lat. 44°12′03.30″ N., long. 077°30′07.20″ W.) |
| LORKA, Canada | WP | (Lat. 44°46′08.70″ N., long. 076°12′59.90″ W.) |
| ADVIK, Canada | WP | (Lat. 45°08′04.00″ N., long. 074°46′33.00″ W.) |
| ATENE, Canada | FIX | (Lat. 46°14′04.20″ N., long. 070°16′21.00″ W.) |
| MIILS, Canada | WP | (Lat. 46°52′42.00″ N., long. 067°02′09.00″ W.) |

Excluding the airspace within Canada.

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**Q–935 MONEE, MI to Boston, MA (BOS) (Amended)**

| | | |
|---|---|---|
| MONEE, MI | FIX | (Lat. 43°14′25.80″ N., long. 084°27′50.95″ W.) |
| HOCKE, MI | WP | (Lat. 43°15′43.38″ N., long. 082°42′38.27″ W.) |
| OMRAK, Canada | WP | (Lat. 43°16′06.00″ N., long. 082°16′25.00″ W.) |
| DERLO, Canada | WP | (Lat. 43°03′59.00″ N., long. 081°05′43.00″ W.) |
| IKNAV, Canada | WP | (Lat. 42°57′43.00″ N., long. 078°59′04.00″ W.) |
| WOZEE, NY | WP | (Lat. 42°56′01.65″ N., long. 078°44′19.64″ W.) |
| HANKK, NY | FIX | (Lat. 42°53′41.82″ N., long. 077°09′15.21″ W.) |
| JOSSY, NY | WP | (Lat. 42°53′29.93″ N., long. 077°02′36.80″ W.) |
| AUDIL, NY | FIX | (Lat. 42°52′18.74″ N., long. 076°26′35.07″ W.) |
| FABEN, NY | WP | (Lat. 42°51′12.04″ N., long. 075°57′07.91″ W.) |
| PONCT, NY | WP | (Lat. 42°44′48.83″ N., long. 073°48′48.07″ W.) |
| Gardner, MA (GDM) | VOR/DME | (Lat. 42°32′45.32″ N., long. 072°03′29.48″ W.) |
| Boston, MA (BOS) | VOR/DME | (Lat. 42°21′26.82″ N., long. 070°59′22.37″ W.) |

Excluding the airspace within Canada.

**Q–937 TULEG, Canada to KRAZZ, NY (Amended)**

| | | |
|---|---|---|
| TULEG, Canada | WP | (Lat. 43°43′54.84″ N., long. 076°43′09.82″ W.) |
| WAYGO, NY | WP | (Lat. 43°25′00.00″ N., long. 075°55′00.00″ W.) |
| KRAZZ, NY | WP | (Lat. 43°25′00.00″ N., long. 074°18′00.00″ W.) |

Excluding the airspace within Canada.

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**Q–951 POSTS, MI to PUXOP, Canada (Amended)**

| | | |
|---|---|---|
| POSTS, MI | WP | (Lat. 42°18′00.00″ N., long. 085°02′00.00″ W.) |
| PADDE, MI | WP | (Lat. 42°17′09.00″ N., long. 084°28′28.00″ W.) |
| Salem, MI (SVM) | VORTAC | (Lat. 42°24′31.09″ N., long. 083°35′38.05″ W.) |
| DERLO, Canada | WP | (Lat. 43°03′59.00″ N., long. 081°05′43.00″ W.) |
| SIKBO, Canada | WP | (Lat. 43°39′13.00″ N., long. 079°20′57.00″ W.) |
| SANIN, Canada | WP | (Lat. 44°04′41.00″ N., long. 077°25′55.00″ W.) |
| OLABA, Canada | WP | (Lat. 44°28′35.00″ N., long. 076°12′12.00″ W.) |
| ALONI, Canada | WP | (Lat. 44°38′54.00″ N., long. 075°39′10.00″ W.) |
| DAVDA, NY | WP | (Lat. 44°43′27.00″ N., long. 075°22′28.20″ W.) |
| SAVAL, NY | WP | (Lat. 44°54′15.00″ N., long. 074°42′01.20″ W.) |
| TALNO, NY | WP | (Lat. 45°00′02.00″ N., long. 074°19′52.00″ W.) |
| RABIK, Canada | WP | (Lat. 45°17′56.00″ N., long. 072°36′37.00″ W.) |
| ANTOV, Canada | WP | (Lat. 45°22′35.00″ N., long. 071°02′15.00″ W.) |
| DANOL, ME | FIX | (Lat. 45°41′54.22″ N., long. 067°47′16.00″ W.) |
| PUXOP, Canada | WP | (Lat. 45°56′41.00″ N., long. 066°26′24.00″ W.) |

Excluding the airspace within Canada.

Issued in Washington, DC, on December 1, 2014.

**Gary A. Norek,**

*Manager, Airspace Policy & Regulations Group.*

[FR Doc. 2014–28618 Filed 12–4–14; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

**[Docket No. USCG–2014–1012]**

## Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Belle Chasse, LA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulation.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Louisiana State Route 23 (LA 23) vertical lift span bridge, also known as the Judge Perez Bridge, across the Gulf Intracoastal Waterway (Algiers Alternate Route), mile 3.8, at Belle Chasse, Plaquemines Parish, Louisiana. This deviation is necessary to provide for the safe movement of vehicular traffic during major plant reconstruction on one side of the waterway and the resulting change in work schedule and increase in workforce transiting the bridge. This deviation allows the bridge to remain temporarily closed to navigation for an additional one hour in the evening during weekdays for five weeks.

**DATES:** This deviation is effective without actual notice from December 5, 2014 through 6:30 p.m. on December 25, 2014. For the purposes of enforcement, actual notice will be used from 5:30 p.m. on November 24, 2014, until December 5, 2014.

**ADDRESSES:** The docket for this deviation, [USCG–2014–1012] is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation. 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 temporary deviation, call or email David Frank, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, email *David.M.Frank@uscg.mil.* If you have questions on viewing the docket, call Cheryl F. Collins, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:** On November 10, 2014, a Notice of Temporary Deviation entitled, ''Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Belle Chasse, LA'' was published in the **Federal Register**. 79 FR 66621.

That temporary deviation allowed for the Louisiana State Route 23 (LA 23) vertical lift span bridge, also known as the Judge Perez Bridge, across the Gulf Intracoastal Waterway (Algiers Alternate Route), mile 3.8, at Belle Chasse, Plaquemines Parish, Louisiana, to remain closed to navigation for an additional one hour in the evenings from 5:30 p.m. to 6:30 p.m. from December 26, 2014, through February 20, 2015.

Subsequent to publication, the Sheriff of Plaquemines Parish requested by letter dated November 18, 2014, that the additional one hour deviation commence immediately because of major safety concerns with regard to parish residents and the ability of emergency vehicles to transit the area. The Sheriff of Plaquemines Parish indicated that the area has experienced increased traffic during a construction pre-shut down phase at the Phillips 66 plant.

The deviation requested allows the bridge to remain closed to navigation for an additional one hour in the evening, Monday through Friday, effecting a total deviation period from Friday, November 24, 2014, through Friday, February 20, 2015. Coordination with local Coast Guard and waterway users was conducted, and immediate commencement of the deviation will not have a significant impact on mariners.

Presently, in accordance with 33 CFR 117.451(b), the draw shall open on signal; except that, from 6 a.m. to 8:30 a.m. and from 3:30 p.m. to 5:30 p.m. Monday through Friday, except Federal holidays, the draw need not open for the passage of vessels.

This temporary deviation allows the vertical lift bridge to remain closed to navigation for one additional hour in the afternoon. This additional hour extends the afternoon curfew hours to 6:30 p.m. Monday through Friday beginning November 24, 2014 through December 25, 2014. In case of an emergency, the bridge will be able to open for the passage of vessels.

The State Route 23 vertical lift span drawbridge across the Gulf Intracoastal Waterway (Algiers Alternate Route), mile 3.8, at Belle Chasse, Louisiana has a vertical clearance of 40 feet above mean high water in the closed-to-navigation position and 100 feet above mean high water in the open-to-navigation position. Navigation on the waterway consists primarily of tugs with tows, commercial fishing vessels, and occasional recreational craft. Mariners may use the Gulf Intracoastal Waterway (Harvey Canal) to avoid unnecessary delays. The Coast Guard has coordinated this closure with the Gulf Intracoastal Canal Association (GICA). The GICA representative indicated that the vessel operators will be able to schedule transits through the bridge to avoid delays and significant impacts on operations. Due to prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels.

In accordance with 33 CFR 117.35, the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation.

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: November 24, 2014.

**David M. Frank,**

*Bridge Administrator, Eighth Coast Guard District.*

[FR Doc. 2014–28602 Filed 12–4–14; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2014–0668; FRL–9918–42]**

## 2,5-Furandione, Polymer With Methoxyethene, Butyl Ethyl Ester, Sodium Salt; Tolerance Exemption

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt; when used as an inert ingredient in a pesticide chemical formulation. The firm Lewis & Harrison, on behalf of International Specialty Products submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a

tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt on food or feed commodities.

**DATES:** This regulation is effective December 5, 2014. Objections and requests for hearings must be received on or before February 3, 2015, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0668, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. 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 OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets*.

**FOR FURTHER INFORMATION CONTACT:** Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

### *B. How can I get electronic access to other related information?*

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl*.

### *C. Can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2014–0668 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 3, 2015. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2014–0668, by one of the following methods.

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html*.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets*.

## II. Background and Statutory Findings

In the **Federal Register** of October 15, 2014 (79 FR 61844) (FRL–9917–24), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP IN–10755) filed by the firm Lewis & Harrison, 122 C Street NW., Suite 505, Washington, DC 20001, on behalf of International Specialty Products. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt (CAS Reg. No. 1471342–08–1). That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. A comment was received on the notice of filing. EPA's response to the comment is discussed in Unit VIII.B.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . .'' and specifies factors EPA is to consider in establishing an exemption.

## III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of

the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

7. The polymer does not contain certain perfluoroalkyl moieties consisting of a CF3- or longer chain length as specified in 40 CFR 723.250(d)(6) and less than 5% oligomeric material below MW 1,000.

Thus, 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt.

## IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt is 18,200 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

## V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt to share a common mechanism of toxicity with any other substances, and 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative*.

## VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

## VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt.

## VIII. Other Considerations

### *A. Analytical Enforcement Methodology*

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

### *B. Response to Comments*

One comment was received for a notice of filing from a private citizen who opposed any pesticide product that leaves a residue above 0.00. The Agency understands the commenter's concerns and recognizes that some individuals believe that no residue of pesticides should be allowed. However, under the existing legal framework provided by FFDCA section 408, EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by the statute.

### *C. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural

practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt.

## IX. Conclusion

Accordingly, EPA finds that exempting residues of 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt from the requirement of a tolerance will be safe.

## X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these rules from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes, or otherwise have any unique impacts on local governments. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

Although this action does not require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994), EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

## XI. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

## List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 24, 2014.

**Susan Lewis,**

*Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, the table is amended by alphabetically adding an entry for ''2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt, minimum number average molecular weight (in amu), 18,200'' after the entry for ''2,5-Furandione, polymer with ethenylbenzene, reaction, products with polyethylene-polypropylene glycol 2-aminopropyl Me ether; minimum number average molecular weight (in amu), 14,000'' to read as follows:

**§ 180.960 Polymers; exemptions from the requirement of a tolerance.**

* * * * *

| Polymer | CAS No. |
|---|---|
| * * * * * | |
| 2,5-Furandione, polymer with methoxyethene, butyl ethyl ester, sodium salt, minimum number average molecular weight (in amu), 18,200 ..... | 1471342–08–1 |
| * * * * * | |

[FR Doc. 2014–28603 Filed 12–4–14; 8:45 am]

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## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Parts 1 and 22

**[WT Docket No. 12–40; RM–11510; FCC 14–181]**

## Cellular Service, Including Changes in Licensing of Unserved Area

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this *Report and Order* (''*R&O*''), the Federal Communications Commission (''Commission'') adopts new and revised rules governing the 800 MHz Cellular (''Cellular'') Service, changing the licensing model from site-based to geographic-based and eliminating numerous filing requirements while preserving direct access to area not yet licensed (''Unserved Area''). The Commission also deletes obsolete and unnecessary provisions in the rules and streamlines requirements remaining in place. The resulting modernized scheme gives greater flexibility to Cellular licensees to make improvements to their systems in response to changing market demands.

**DATES:** Effective January 5, 2015, except for the amendments to 47 CFR 22.165(e), 47 CFR 22.948, and 47 CFR 22.953, which contain information collection requirements that have not yet been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those three amendments.

**FOR FURTHER INFORMATION CONTACT:** Nina Shafran, Mobility Division, Wireless Telecommunications Bureau, (202) 418–2781, TTY (202) 418–7233.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Federal Communications Commission's *Report and Order* (''*R&O*''), WT Docket No. 12–40, RM No. 11510, FCC 14–181, adopted November 7, 2014 and released November 10, 2014. The full text of the *R&O,* including all Appendices, is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Room CY–A157, Washington, DC 20554, or by downloading the text from the Commission's Web site at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1110/FCC-14-181A1.pdf.* The complete text also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. Portals II, 445 12th Street SW., Suite CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Government Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

## Synopsis of the Report and Order

### I. Background

1. Under the current site-based licensing rules, a Cellular applicant requests authorization to construct at a specific transmitter location (or multiple locations) in Unserved Area and may construct only authorized transmitters. Cellular Unserved Area applications specify the area to be licensed as CGSA and, because they are classified as ''major'' applications no matter how small the expansion area, they are subject to a 30-day public comment period during which petitions to deny and competing applications may be filed. In the event that mutually exclusive applications are accepted for a particular Unserved Area, they are resolved through competitive bidding in closed auctions. Unserved Area licenses granted are subject to a one-year construction deadline for the authorized site; failure to build out results in automatic termination of the authorization for that site, and the Unserved Area again is subject to re-licensing.

2. In a *Notice of Proposed Rulemaking* released on February 15, 2012 (''*2012 NPRM*''), the Commission proposed to transition the Cellular Service to geographic-based licensing by issuing geographic-area overlay licenses through competitive bidding in two stages. The Commission also proposed new and revised rules. The Commission sought comment on all aspects of its proposals as well as on other ideas, proposals, and comments discussed in the *2012 NPRM,* and also invited the submission of alternative ideas. In response to the *2012 NPRM,* interested parties submitted comments, reply comments, and *ex parte* letters. The specific reforms adopted by the Commission in the *R&O* are described below.

### II. Report and Order

#### *A. Geographic License Boundaries*

3. While the traditional geographic licensing model, such as the model for the Broadband Personal Communications Service (''PCS'') and other commercial wireless services, entails awarding licenses (via competitive bidding if mutually exclusive applications are accepted) for areas whose boundaries are co-terminus with well-known political boundaries or other market areas established by the Commission, such as Metropolitan Statistical Areas, the Commission concludes that geographic areas should be defined for the Cellular Service at this time by CGSA boundaries. This is consistent with the Commission's goals and recognizes the history and current status of the Cellular Service.

4. As explained in more detail in the *2012 NPRM,* the Commission digitized all CGSAs using the most recent maps on file for licensed CGSAs, creating map files in geographic information system (''GIS'') format. Since then, the staff has regularly updated the files, and in October 2013, made them publicly available online. They draw directly from official Universal Licensing System (''ULS'') station records for the Cellular Service, using the most recent CGSA maps of record, including those accompanying Cellular applications submitted pursuant to Commission rules. The staff uses them to determine the official boundary of an authorized CGSA (and a proposed CGSA when reviewing a Cellular Service application). They will continue to be updated regularly, and licensees as well as new-system applicants should consult them to verify CGSA boundaries.

#### *B. Field Strength Limit*

5. Based on the record in this proceeding, the Commission finds that its proposed 40 dBμV/m field strength limit is appropriate for the Cellular Service and, accordingly, the Commission adopts a new rule establishing this limit. The Commission also finds it appropriate, consistent with other geographic-based wireless services, to permit neighboring co-channel Cellular licensees to negotiate different field strength limits—higher or lower than 40 dBμV/m. The Commission emphasizes that Cellular licensees must comply at all times with the applicable radiated power limits as well as applicable provisions of international agreements and treaties. However, given that the Commission is preserving the ability to expand service coverage into any Unserved Area nationwide, both through CGSA expansions and SAB extensions (as discussed further below), the Commission finds it appropriate to depart from the *2012 NPRM* proposal to subject all Cellular licensees to a 40 dBμV/m (or negotiated) signal field strength limit at their respective license boundaries. Under the approach the Commission has adopted in the *R&O,* a Cellular licensee's CGSA will not always be adjacent to a neighboring co-channel licensee's CGSA; it may in some cases be bordered by Unserved Area. Therefore, increased flexibility for Cellular licensees is warranted when applying the field strength limit rule.

6. Accordingly, the Commission adopts a rule that will apply at every

point along the neighboring co-channel licensee's CGSA boundary. The following two examples illustrate this new rule: (1) If a licensee's CGSA borders Unserved Area (whether currently or through a service coverage expansion in compliance with the new rules), that licensee can exceed the 40 dBμV/m limit at its own CGSA boundary, so long as it complies with that limit (or a negotiated limit) at every point along the neighboring co-channel licensee's CGSA boundary; (2) if two co-channel licensees' CGSAs are adjacent, both licensees will be subject to the field strength limit rule at every point along their shared CGSA boundary to protect one another. The Commission concludes that this more flexible approach serves the public interest.

7. The Commission declines at this time to provide a methodology regarding how the field strength should be determined. Cellular licensees are best positioned to choose a methodology that takes into account factors unique to their systems and the area involved, including, for example, technologies, traffic loading, topography, and location of major roads. The Commission recognizes that the existing regime in the Gulf of Mexico (''Gulf'') Cellular market was carefully crafted following lengthy Commission and judicial proceedings. Accordingly, as set forth in the new field strength limit rule (47 CFR 22.983) and the revised version of 47 CFR 22.912 that the Commission also adopts in this *R&O* (discussed further below), the Commission finds that it serves the public interest to continue to maintain the status quo Gulf regime in most respects and not apply the new field strength limit rule. Specifically, the Commission will continue to require service area extension agreements and associated filings with the Commission as follows: land-based carriers adjoining the Gulf will be required to negotiate any desired SAB extensions into the Gulf of Mexico Exclusive Zone and submit minor modification applications to the Commission, certifying that such consent has been obtained; and licensees in the Gulf of Mexico Exclusive Zone will likewise be required to negotiate any desired SAB extensions into the licensed area of neighboring land-based carriers and submit minor modification applications to the Commission, certifying that such consent has been obtained. The Commission clarifies that all land-based carriers will, however, be subject to the new field strength limit rule to protect the licensed CGSA boundaries of all neighboring co-channel land-based licensees.

8. No commenters objected to the proposal to retain the requirements for mandatory coordination currently set forth in 47 CFR 22.907, and the Commission finds that it serves the public interest to adopt that proposal. As the Commission emphasizes, Cellular licensees will be permitted to expand their CGSAs and extend their SABs (in compliance with the new rules adopted in the *R&O*), which are calculated based on contours. The formulas in 47 CFR 22.911 provide a proven method for the requisite calculation of such contours and the service area within them, and the Commission finds that they do not warrant change at this time. The Commission does, however, revise 47 CFR 22.911 to delete provisions rendered obsolete by its decision to adopt a field strength limit rule and the related decision to eliminate certain requirements governing SAB extensions into another licensee's CGSA, discussed below, in connection with transitioning the Cellular Service to a geographic-based model. These revisions to 47 CFR 22.911 do not affect the formulas for calculating CGSAs and SABs.

### *C. SAB Extensions Negotiated With Another Licensee*

9. *Background.* Under the current Cellular site-based licensing regime, a licensee seeking to extend service coverage on a secondary basis into the licensed area of a neighboring co-channel licensee is required to negotiate an SAB extension agreement and is then required to file a minor modification application for the extension and certify that the neighboring licensee's consent has been obtained. In response to the *2012 NPRM,* some commenters cautioned that previously negotiated SAB extension agreements should not be disrupted by the Commission.

10. Consistent with the approach taken in other commercial wireless services and the Commission's goals in this proceeding, the Commission revises 47 CFR 22.912 to reflect that the Commission will no longer require applications for SAB extensions into neighboring CGSAs, and it adopts a conforming change to 47 CFR 22.911(d). The Commission clarifies that, so long as a licensee either meets the 40 dBμV/m field strength limit or negotiates a different limit (higher or lower) with the neighboring co-channel licensee, resulting SAB extensions into a neighboring licensee's CGSA will be permitted without a minor modification application or a certification that consents have been obtained. The exception is with respect to the Gulf, as discussed above. The Commission emphasizes that it does not seek to disrupt previously negotiated SAB extension agreements between Cellular licensees, nor does it seek to prohibit new ones. The Commission fully expects that parties will continue to comply with the terms of their existing SAB extension agreements or negotiate new terms if they deem warranted.

### *D. SABs Remaining Within CGSA Boundaries*

11. Under the existing site-based licensing regime, Cellular licensees are required to file minor modification applications notifying the Commission of the addition or modification of transmitter sites that form the CGSA boundary—so-called border sites. While system changes to purely internal (non-border) sites generally do not require a Commission filing, changes to border sites require the notifications (but not prior approval) even when the resulting new or modified SAB remains entirely within the CGSA boundary.

12. The Commission finds that it serves the public interest to no longer require that Cellular licensees notify the Commission of changes to cell sites, or the addition of new cell sites, where the SAB remains confined within the existing CGSA boundary. This approach is consistent with the Commission's goals of reducing licensee administrative burdens, enhancing flexibility to adapt quickly to technological and market place changes, and increasing harmonization of the Cellular Service rules with those of other geographically licensed services.

13. *Section 22.165(e).* The introductory clause of 47 CFR 22.165 limits the scope of the entire rule to transmitters that may be added without prior Commission approval, and subsection 22.165(e) governs Cellular licensees solely in that context; it does not address whether adding a Cellular transmitter triggers the requirement to file a notification with the Commission. Consistent with the licensing approach the Commission adopts in this *R&O,* the Commission also adopts a simplified 47 CFR 22.165(e) that eliminates references to the legacy Cellular licensing model (*e.g.,* the five-year construction period of an initial primary license) and clarifies when a Cellular transmitter may be added without prior Commission approval.

### *E. 50-Square-Mile Minimum for CGSA Expansions*

14. There is currently no required minimum for expansion of an existing system's CGSA into Unserved Area, and any expansion no matter how small requires a major modification

application seeking prior Commission approval. All CGSA-expansion applications are placed on public notice for 30 days. This reform proceeding has evaluated whether there is a continued need for modification applications and subsequent buildout notifications for very small system changes. Also, a high number of amendments are subsequently filed, either to cure applicant errors or change the coverage or certain technical parameters initially proposed. The result is a process that consumes significant licensee and FCC resources. Commission data indicate that, by limiting CGSA-expansion major modification applications to those that propose expansion of 50 contiguous square miles or more, together with adopting a streamlined procedure for service coverage expansions of less than 50 contiguous square miles, the volume of major modification applications and associated amendments for CGSA expansions will be dramatically reduced. Likewise, the volume of build-out notification filings would also be significantly reduced.

15. The Commission is persuaded, as noted above, to continue to permit CGSA expansions in all CMA Blocks at this time. The Commission also agrees with the commenters that it serves the public interest to establish by rule a minimum requirement of 50 contiguous square miles (as determined pursuant to the applicable formula in 47 CFR 22.911) for all CGSA expansions (*i.e.,* to expand service coverage on a primary, protected basis). The Commission concludes that this approach balances the concerns of large and smaller carriers alike, particularly because the Commission will not only continue to permit secondary operation to serve smaller parcels (less than 50 contiguous square miles), but will enhance flexibility by eliminating previously required Commission filings for such parcels, as discussed in detail in the next section of this *R&O.* The Commission incorporates this minimum requirement for CGSA expansions into the revised version of 47 CFR 22.949 that the Commission adopts in this *R&O* and, consistent with the Commission's regulatory reform agenda to streamline rules where possible, the Commission consolidates the existing new-system coverage requirements currently set forth in 47 CFR 22.951 into 47 CFR 22.949. The Commission declines at this time to adopt a commenter's proposal to establish a two-year build-out requirement solely for licensees in Alaska; it finds that the one-year build-out requirement applicable to all Cellular licensees has generally worked well and does warrant change at this time.

16. The Commission anticipates that licensees will not make unnecessary filings under the new rules it adopts in this *R&O.* The Commission clarifies that, to the extent that applications are filed claiming Unserved Area as CGSA without meeting the new minimum square mileage requirement, Commission staff will not process them; rather, they will return or dismiss such filings unless first withdrawn by the applicant.

*F. SAB Extensions Into Unserved Area; Shared Service on a Secondary Basis*

17. Since 2004, the Commission has permitted Cellular licensees to extend their SABs into adjacent Unserved Area and provide service on a secondary basis without first filing a major modification application seeking prior Commission approval, so long as the extension is less than 50 square miles. In such instances, the licensee has been required to file only a notification upon commencing service on a secondary (*i.e.,* an unlicensed, unprotected) basis. A licensee seeking to claim the area as part of its CGSA (*i.e.,* for primary, protected service) is required to submit a major modification application subject to a 30-day public comment period, no matter how small the area. The 2004 relaxation of the prior approval requirement in such circumstances was designed to provide licensees with additional flexibility to respond to operational demands immediately in a manner that remained consistent with site-based licensing rules.

18. As explained in the preceding section, to balance the concerns of smaller, more rural carriers and large carriers alike, the Commission adopts revised Cellular rules based on a geographic licensing model while also preserving certain elements of the existing site-based model, including the continued ability to expand CGSAs into Unserved Area so long as the proposed expansion area is at least 50 contiguous square miles. A high volume of applications under current Cellular rules are to make improvements in response to technological changes, demographic changes, and consumer demand that change the CGSA boundary by an extremely small amount. The Commission finds that it serves the public interest to permit continued access to these small parcels of Unserved Area, but the Commission recognizes that filings associated with minor system changes that expand service into these small parcels often constitute hindrances to system improvements.

19. The Commission declines to adopt commenters' unsupported proposals to permit Cellular incumbents simply to absorb small parcels of Unserved Area into their existing CGSAs, even when bordered on all sides by only one incumbent. The Commission finds these proposals to be inconsistent with Commission precedent. Consistent, however, with the approach the Commission adopts in this *R&O* to increase flexibility to make changes to an existing system without Commission filings, the Commission finds it serves the public interest to permit incumbents to extend their SABs (as calculated under 47 CFR 22.911) into adjacent Unserved Area parcels that are less than 50 contiguous square miles and provide service coverage on a secondary basis indefinitely and without any filings with the Commission. The Commission clarifies that this is applicable whether the SAB extension is the result of an added transmitter, modification of a cell site, or both. A licensee extending its SAB into an Unserved Area parcel of less than 50 contiguous square miles must: (1) Pursuant to 47 CFR 22.983 that the Commission adopts in this *R&O,* comply with the 40 dBμV/m field strength limit at the boundary of the neighboring co-channel licensee's CGSA or negotiate a different field strength limit; (2) accept interference from other Cellular systems; and (3) avoid causing harmful interference to any neighboring co-channel licensee's CGSA. To the extent that more than one incumbent borders and wishes to serve the same Unserved Area parcel less than 50 contiguous square miles, such incumbents will be required to provide service in that parcel on a shared secondary (unprotected) basis only. The Commission finds that these revisions serve the public interest and further the Commission's goals in this proceeding.

*G. Submission of Maps*

20. In the *2012 NPRM,* the Commission noted that, pursuant to delegated authority and rules adopted in the ULS proceeding to eliminate paper filings, the Bureau had announced optional electronic filing of CGSA map files in lieu of the large-scale (1:500,000 scale) paper CGSA maps required to be submitted with certain Cellular applications. The Commission also reaffirmed the Bureau's delegated authority to determine and announce the effective date of mandatory electronic filing of such maps, with instructions for the public regarding access to such submissions. The Bureau continued its voluntary policy to allow all Cellular licensees, including the smaller carriers, time to explore and

choose appropriate software for their electronic map filings. The *2012 NPRM* anticipated mandatory electronic filing and sought comment on proposed rules incorporating this requirement.

21. Nearly all large-scale CGSA maps are now submitted by applicants electronically in ULS. The Commission finds that, in conjunction with the numerous other changes adopted in the *R&O* to modernize the Cellular rules, it is appropriate to adopt final rules that require mandatory electronic filing of map files (rather than the large-scale paper CGSA maps) in GIS format with any Cellular applications that require maps. The Commission will continue to accept and preserve large-scale paper maps filed prior to the effective date of the electronic filing requirement that the Commission adopts in this *R&O.* Thereafter, the Commission will not accept paper maps with Cellular applications unless it finds that a large-scale paper map is necessary to review and act on a particular application and requests such a submission. Applications that do not comply with the new requirement will either be returned to the applicant or dismissed.

*H. Elimination of Certain Application Content Requirements*

22. In an effort to streamline and modernize the Cellular Service-specific rules in Subpart H as well as certain Part 1 and other Part 22 rules applicable to Cellular licensing, the Commission proposed in the *2012 NPRM* numerous rule deletions and changes to current requirements. The Commission specifically indicated that, in the future, certain information and exhibits currently required pursuant to 47 CFR 22.929 and 22.953(a) would not be routinely required by the Commission's engineering staff in their review of Cellular new-system and modification applications, and therefore proposed streamlining the information requirements in those rules.

23. Based on the record and consistent with the Commission's regulatory reform agenda, the Commission finds that it serves the public interest to adopt revised provisions to minimize the content requirements for Cellular applications. Specifically, the Commission adopts the proposal to delete 47 CFR 22.929 and consolidate application requirements into a single revised and streamlined rule, 47 CFR 22.953, such that applicants for new systems or system modifications will no longer be required routinely to submit the following information in their exhibits: Height of the center of radiation of the antenna above average terrain; antenna gain in the maximum lobe; antenna model; antenna manufacturer name; antenna type; antenna height to tip above ground level; maximum effective radiated power; beam-width of the maximum lobe of the antenna; polar plot of the horizontal gain pattern of the antenna; electrical field polarization of the wave emitted by the antenna when installed as proposed; channel plan; service proposal; Cellular design; blocking level; start-up expenses; and interconnection.

24. In light of technological advances and maturity of the Cellular Service, the Commission finds that the information and technical exhibits identified above are either no longer routinely necessary for Commission staff in reviewing Cellular applications or can be accessed elsewhere. By eliminating all 16 of these requirements for routine review, the Commission is alleviating to a significant degree the resources that licensees will need to expend on Cellular applications. The Commission concludes that such streamlining and modernization of the current rules serves the public interest.

*I. Mutually Exclusive Applications in the Cellular Service*

1. Initial License for Chambers, Texas Market (CMA672–A)

25. Block A of the Chambers, Texas CMA (CMA672–A) (''Chambers'') is the only CMA in the country for which a Cellular initial primary license has never been issued, and AT&T Mobility of Galveston LLC (''AT&T Galveston'') holds an interim operating authorization—not a permanent license—and provides Cellular service to nearly all of the area under Call Sign KNKP971. The Commission proposed that the entire CMA672–A be licensed on a geographic area basis by auction, with specified build-out benchmarks.

26. In light of the Commission's decision in this *R&O* to adopt a geographic-based licensing model for the Cellular Service, the Commission finds it appropriate to adopt the Commission's proposal regarding the Chambers license, with a few clarifications. The current rules provide for the acceptance of mutually exclusive applications for the initial license for Chambers, which would be resolved by competitive bidding pursuant to section 309(j) of the Communications Act of 1934, as amended. Accordingly, the Wireless Telecommunications Bureau (''Bureau'') will accept applications for a CMA-based initial primary license for Chambers, consistent with initial licensing of other CMA Blocks that have been subject to competitive bidding where mutually exclusive applications have been accepted. The Commission finds that it serves the public interest to adopt the proposed geographic coverage build-out requirements, rather than subjecting the new Chambers licensee to the legacy five-year and Unserved Area licensing build-out/application processes. The Chambers licensee will therefore be required to provide signal coverage and offer service over at least 35% of the geographic area of CMA672–A within four years of initial license grant, and to at least 70% of that same area by the end of the license term, as set forth in new 47 CFR 22.960 that the Commission adopts in this *R&O.* As proposed, for purposes of this geographic benchmark, the licensee is to count total land, and failure to meet these coverage benchmarks will result in automatic termination of the license and its return to the Commission for re-licensing by auction. Any licensee that so fails to meet these benchmarks will not be eligible to regain the Chambers license. The Commission emphasizes that the holder of the interim operating authorization (currently AT&T Galveston) does not have primary authority to operate and would not be afforded incumbent status entitled to protection from the Chambers licensee.

27. The performance obligations for the Chambers license are consistent with those for geographic area licenses in certain other services similarly issued through competitive bidding. Accordingly, consistent with its regulatory reform agenda and as proposed, the Commission finds that it serves the public interest to eliminate—or, where appropriate, update—the numerous existing provisions pertaining to or referencing the legacy build-out periods for the Cellular Service throughout Parts 1 and 22 of the Commission's rules. The Commission discusses these specific rule changes further below.

28. Moreover, the Commission concludes that it is appropriate to deem the boundary of CMA672–A as the CGSA boundary of the Chambers licensee. Neighboring co-channel licensees will not be permitted to claim as CGSA any area within CMA672–A, even if not built out by the Chambers licensee by the end of the initial license term. The Chambers licensee will be permitted to claim, as a CGSA expansion, Unserved Area in a neighboring CMA, provided that it has first met all of its build-out requirements in CMA672–A by the end of the initial license term. Any such CGSA expansion area will not, however, remain part of the Chambers license in the event the Chambers license is

automatically terminated by Commission rule or revoked for any reason, in which case the area within CMA672–A will revert to the Commission for re-licensing by auction, while the CGSA expansion area will revert to the Commission for re-licensing pursuant to the Unserved Area licensing rules.

29. With respect to licensee protection requirements, pursuant to the field strength limit rule the Commission adopts in this *R&O,* the Commission clarifies that the Chambers licensee will have the flexibility to construct anywhere within CMA672–A subject to Cellular Service technical requirements, but must comply with the 40 dBμV/m field strength limit at the CGSA boundaries of neighboring co-channel licensees, unless a different limit is negotiated. Further, consistent with the new Cellular field strength limit rule and with protection requirements in other geographic-based wireless services, a neighboring co-channel Cellular licensee must comply with the 40 dBμV/m field strength limit at the Chambers licensed area boundary (*i.e.,* the boundary of CMA672–A), regardless of whether the Chambers licensee is yet operating near the border of CMA672–A, or else negotiate a different limit.

30. The Commission concludes that this approach provides the most efficient and effective means to foster the provision of additional advanced wireless service by a primary licensee to this Texas market and serves the public interest. In the event that mutually exclusive applications are accepted for this license, the Commission concludes that new 47 CFR 22.961, which the Commission adopts in this *R&O* consistent with the Commission's proposal in the *2012 NPRM,* shall govern. The Commission directs the Bureau to proceed, within a reasonable time following the effective date of the final rules the Commission adopts in this *R&O,* to release the appropriate public notice(s) to implement its decision regarding the Chambers license.

2. Mutually Exclusive CGSA Expansion Applications

31. The Commission emphasizes that, with this *R&O,* the Commission is not eliminating the existing prohibition on CGSA overlaps. Accordingly, whenever CGSA-expansion or new-system CGSA applications are mutually exclusive with other pending proposed operations, they will continue to be set for resolution by competitive bidding in a closed auction unless the competing applicants are able to resolve the mutual exclusivity beforehand (for example, through settlement) in accordance with the Commission's rules. Consistent with the Commission's proposals in the *2012 NPRM,* the Commission adopts new 47 CFR 22.961 not only to govern the Chambers license, but also mutually exclusive Cellular Unserved Area applications, and the Commission consolidates into 47 CFR 22.961 certain other rules to eliminate redundancy and obsolescence in provisions addressing mutually exclusive Cellular Service applications.

*J. Other Amendments; Non-Relocation of Rules*

32. In this section, the Commission explains various other changes to its rules in Part 22, Subpart H, and provisions found elsewhere in Part 22 as well as in Part 1. The Commission urges all parties to review and become familiar with all final rules the Commission adopts in the *R&O* in this proceeding, including the new and revised terms and definitions, all as set forth in Appendix A of this *R&O* and which will take effect as specified in the pertinent Ordering Clauses.

1. Obsolete or Outdated Terminology and Provisions

33. As stated above in the context of its decision concerning the Chambers license, obsolete and outdated terms are pervasive in the current rules applicable to the Cellular Service. Consistent with the Commission's proposal in the *2012 NPRM,* a number of revised rules are being adopted in this *R&O* solely to bring the rules up to date by eliminating legacy terminology and cross-references, and by replacing outdated terms. In addition, the Commission adopts revisions here to conform certain rules in Parts 1 and 22 to the other rule changes the Commission adopts, as described above in this *R&O.*

34. Specifically, the Commission is deleting rules and adopting revised rules as follows: 47 CFR 1.929(b) (revised); 47 CFR 22.99 (deleting defined terms ''Build-out transmitters,'' ''Five-year build-out period,'' and ''Partitioned Cellular market,'' revising slightly the definitions for ''Cellular Geographic Service Area,'' ''Extension,'' and ''Unserved Area,'' and adding and defining the term ''Cellular Market Area''); 47 CFR 22.131 (revising paragraphs (c)(3)(iii) and (d)(2)(iv)); 47 CFR 22.143 (revising paragraph (a)); 47 CFR 22.909 (revised); 47 CFR 22.911 (deleting paragraph (c) and revising paragraph (e)); 47 CFR 22.912 (revised); 47 CFR 22.946 (revised); 47 CFR 22.947 (deleted); 47 CFR 22.948 (revised); and 47 CFR 22.949 (revised). The Commission also proposed to delete 47 CFR 1.919(c) governing the reporting of Cellular cross-ownership interests, which is obsolete because the reporting requirement has sunset. Accordingly, the Commission deletes 47 CFR 1.919(c) as proposed. The Commission finds that adopting these rule changes serves the public interest and advances the Commission's regulatory reform agenda.

2. AMPS-Related Data Collection

35. The Commission noted in the *2012 NPRM* that, with sunset of the requirement to provide analog Cellular service, all of 47 CFR 22.901(b) had been rendered moot. Stating its belief that all Cellular licensees have had ample time to make their choice and file either the one-time AMPS sunset certification or the appropriate revised CGSA showing, the Commission proposed to terminate its collection of such certifications and to delete 47 CFR 22.901(b). Based on the record, the Commission finds that it serves the public interest to adopt revised 47 CFR 22.901, deleting paragraph (b) of the rule as proposed. As of the effective date of revised 47 CFR 22.901 that the Commission adopts in this *R&O,* the Commission will cease collecting AMPS sunset certifications from Cellular licensees.

3. Correction of Section 1.958(d)

36. The Commission proposed in the *2012 NPRM* to correct a clerical error in the distance computation formula in 47 CFR 1.958(d)—an error that was introduced in the process of moving the provision containing the formula from Part 22 (then 47 CFR 22.157) to Subpart F of Part 1 of its rules. The error in this distance computation formula was inadvertent, and correction is obviously warranted. Accordingly, the Commission adopts the corrected rule as proposed.

4. Non-Relocation of Part 22 Cellular and Part 24 PCS Rules to Part 27

37. The Commission invited comment in the *2012 NPRM* on whether the revised Cellular Service-specific rules should be incorporated into Part 27. The Commission further suggested that, if the revised Cellular Service rules were to be moved into Part 27, then the rules for the Part 24 PCS, should also be moved into Part 27, and sought comment on optimal timing and whether a separate rulemaking should be launched to address any such relocations. The Commission concludes that relocating the Part 22, Subpart H Cellular Service rules is not appropriate. Moreover, the Commission also concludes that it is not appropriate to

further consider relocation of the Part 24 PCS rules in this proceeding.

*K. Gulf of Mexico Service Area*

38. The Commission proposed in the *2012 NPRM* generally to exempt the Gulf from the licensing revisions being considered, except that it proposed to subject Gulf licensees to the same field strength limit as all other Cellular licensees and also to certain rule changes designed to update and streamline the Cellular licensing regime. The Commission has already described, earlier in this *R&O,* its decision regarding field strength limit and the related issue of contractually negotiated SAB extensions with respect to the Gulf. The Commission concludes that, to the extent Gulf licensees are subject to Unserved Area licensing procedures under the current rules, consistent with the proposal in the *2012 NPRM,* it serves the public interest that Gulf licensees not be exempt from the revised rules and procedures that the Commission adopts in this *R&O* to modernize and streamline the Cellular Unserved Area licensing model. This does not disrupt the Gulf regime.

*L. Freeze Order Lifted and Related Interim Procedures Terminated*

39. To permit the orderly and effective resolution of the changes and issues raised in the *2012 NPRM,* and consistent with numerous prior proceedings, the Commission adopted a companion *Order* imposing a freeze on the acceptance of certain Cellular applications and imposing other interim procedures. The freeze and related interim procedures were very limited so as to permit continued expansion of service to consumers by incumbents but nonetheless help the Commission identify Unserved Area in substantially licensed CMA Blocks for purposes of conducting the proposed overlay auction. Although the Commission is not concluding this proceeding with this *R&O,* the Commission finds that it no longer serves the goals of this proceeding or the public interest to continue the freeze or the interim procedures. Accordingly, the freeze and the interim procedures that were imposed will no longer be in force as of the date specified in the pertinent Ordering Clause.

## III. Procedural Matters

*A. Paperwork Reduction Act Analysis*

40. Three of the rule amendments adopted by this *R&O*—47 CFR 22.165(e), 22.948, and 22.953—contain modified information collection requirements subject to the Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13. Those rule amendments will be submitted to the Office of Management and Budget (''OMB'') for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the modified information collection requirements. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. The Commission has assessed the effects on small business concerns of the rule changes it is adopting by this *R&O* and finds that businesses with fewer than 25 people will benefit from the elimination of certain filing requirements as well as from the streamlining and updating of various requirements applicable to all Cellular licensees.

*B. Congressional Review Act*

41. The Commission will send a copy of this *R&O* to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

*C. Final Regulatory Flexibility Analysis*

42. The Regulatory Flexibility Act of 1980 (''RFA'') requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA''), set forth in Appendix C of the *R&O,* concerning the possible impact of the rule changes contained in the *R&O.*

*D. Ex Parte Presentations*

43. *Permit-But-Disclose.* The Commission will continue to treat this proceeding as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the Commission's Electronic Comment Filing System (''ECFS'') available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf).

44. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

## IV. Ordering Clauses

45. Accordingly, *it is ordered,* pursuant to Sections 1, 2, 4(i), 4(j), 7, 301, 302, 303, 307, 308, 309, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 157, 301, 302, 303, 307, 308, 309, and 332, that this *report and order* in WT Docket No. 12–40 *is adopted.*

46. *It is further ordered* that Parts 1 and 22 of the Commission's rules, 47 CFR parts 1 and 22, *are amended,* as specified in Appendix A, effective 30 days after publication in the **Federal Register** except as otherwise provided herein. It is the Commission's intention in adopting these rule changes that if any provision of the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law.

47. *It is further ordered* that the amendments adopted in the *report and*

*order,* and specified in Appendix A, to Sections 22.165(e), 22.948, and 22.953 of the Commission's rules, 47 CFR 22.165(e), 22.948, and 22.953, which contain modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, *will become effective* after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

48. *It is futher ordered* that, effective 30 days after publication in the **Federal Register** of a summary of this *report and order,* the freeze and interim procedures that were imposed as of the adoption date of the 2012 Notice of Proposed Rulemaking and Order in this WT Docket No. 12–40 *will no longer be in effect.*

49. *It is further ordered* that, pursuant to Section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), the Commission *shall send* a copy of this *report and order* to Congress and to the Government Accountability Office.

50. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *report and order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects**

*47 CFR Part 1*

Telecommunications, Reporting and recordkeeping requirements.

*47 CFR Part 22*

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 22 as follows:

## PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

■ 2. Section 1.919 is amended by removing and reserving paragraph (c) to read as follows:

**§ 1.919 Ownership information.**

* * * * *

(c) [Reserved]

* * * * *

■ 3. Section 1.929 is amended by revising paragraph (b) to read as follows:

**§ 1.929 Classification of filings as major or minor.**

* * * * *

(b) In addition to those changes listed in paragraph (a) of this section, the following are major changes in the Cellular Radiotelephone Service:

(1) Application requesting authorization to expand the Cellular Geographic Service Area (CGSA) of an existing Cellular system or, in the case of an amendment, as previously proposed in an application to expand the CGSA; or

(2) Application or amendment requesting that a CGSA boundary or portion of a CGSA boundary be determined using an alternative method.

(3) [Reserved]

* * * * *

■ 4. Section 1.958 is amended by revising paragraph (d) to read as follows:

**§ 1.958 Distance computation.**

* * * * *

(d) Calculate the number of kilometers per degree of longitude difference for the mean geodetic latitude calculated in paragraph (b) of this section as follows:

$$KPD_{lon} = 111.41513 \cos ML - 0.09455 \cos 3ML + 0.00012 \cos 5ML$$

* * * * *

## PART 22—PUBLIC MOBILE SERVICES

■ 5. The authority citation for part 22 continues to read as follows:

**Authority:** 47 U.S.C. 154, 222, 303, 309 and 332.

■ 6. Section 22.99 is amended by:

■ a. Removing the definitions of ''Build-out transmitters,'' ''Five year build-out period,'' ''Partitioned Cellular market'', and ''Unserved Areas''.

■ b. Revising the definitions of ''Cellular Geographic Service Area,'' ''Cellular markets'' and ''Extension''.

■ c. Adding the new definitions, ''Cellular Market Area'' and ''Unserved Area''.

The additions and revisions read as follows:

**§ 22.99 Definitions.**

* * * * *

*Cellular Geographic Service Area (CGSA).* The licensed geographic area within which a Cellular system is entitled to protection and adverse effects are recognized, for the purpose of determining whether a petitioner has standing, in the Cellular Radiotelephone Service, and within which the Cellular licensee is permitted to transmit, or consent to allow other Cellular licensees to transmit, electromagnetic energy and signals on the assigned channel block, in order to provide Cellular service. *See* § 22.911.

* * * * *

*Cellular Market Area (CMA).* A standard geographic area used by the FCC for administrative convenience in the licensing of Cellular systems; a more recent term for ''Cellular market'' (and includes Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs)). *See* § 22.909.

* * * * *

*Cellular markets.* This term is obsolescent. *See* definition for ''Cellular Market Area (CMA).''

* * * * *

*Extension.* In the Cellular Radiotelephone Service, an area within the service area boundary (calculated using the methodology of § 22.911) of a Cellular system but outside the licensed Cellular Geographic Service Area boundary. *See* §§ 22.911 and 22.912.

* * * * *

*Unserved Area.* With regard to a channel block allocated for assignment in the Cellular Radiotelephone Service: Geographic area in the District of Columbia, or any State, Territory or Possession of the United States of America that is not within any Cellular Geographic Service Area of any Cellular system authorized to transmit on that channel block. With regard to a channel allocated for assignment in the Paging and Radiotelephone service: Geographic area within the District of Columbia, or any State, Territory or possession of the United States of America that is not within the service contour of any base transmitter in any station authorized to transmit on that channel.

■ 7. Section 22.131 is amended by revising paragraphs (c)(3)(iii) and (d)(2)(iv) to read as follows:

**§ 22.131 Procedures for mutually exclusive applications.**

* * * * *

(c) * * *

(3) * * *

(iii) If all of the mutually exclusive applications filed on the earliest filing date are applications for initial authorization, a 30-day notice and cut-off filing group is used.

* * * * *

(d) * * *

(2) * * *

(iv) Any application to expand the Cellular Geographic Service Area of an existing Cellular system. *See* § 22.911.

* * * * *

■ 8. Section 22.143 is amended by revising paragraph (a) to read as follows:

**§ 22.143 Construction prior to grant of application.**

* * * * *

(a) *When applicants may begin construction.* An applicant may begin construction of a facility 35 days after the date of the Public Notice listing the application for that facility as acceptable for filing.

* * * * *

■ 9. Section 22.165 is amended by revising paragraph (e) to read as follows:

**§ 22.165 Additional transmitters for existing systems.**

* * * * *

(e) *Cellular Radiotelephone Service.* The service area boundaries (SABs) of the additional transmitters, as calculated by the method set forth in § 22.911(a), must not cause an expansion of the Cellular Geographic Service Area (CGSA), and must not extend outside the CGSA boundary into Unserved Area unless such extension is less than 130 contiguous square kilometers (50 contiguous square miles). The licensee must seek prior approval (using FCC Form 601) regarding any transmitters to be added under this section that would cause an expansion of the CGSA, or an SAB extension of 130 contiguous square kilometers (50 contiguous square miles) or more, into Unserved Area. *See* §§ 22.912, 22.953.

* * * * *

**§ 22.228 [Removed]**

■ 10. Remove § 22.228.

■ 11. Revise § 22.901 to read as follows:

**§ 22.901 Cellular service requirements and limitations.**

The licensee of each Cellular system is responsible for ensuring that its Cellular system operates in compliance with this section. Each Cellular system must provide either mobile service, fixed service, or a combination of mobile and fixed service, subject to the requirements, limitations and exceptions in this section. Mobile service provided may be of any type, including two-way radiotelephone, dispatch, one-way or two-way paging, and personal communications services (as defined in part 24 of this chapter). Fixed service is considered to be primary service, as is mobile service. When both mobile and fixed services are provided, they are considered to be co-primary services. In providing Cellular service, each Cellular system may incorporate any technology that meets all applicable technical requirements in this part.

■ 12. Section 22.909 is amended by revising the introductory text to read as follows:

**§ 22.909 Cellular Market Areas (CMAs).**

Cellular Market Areas (CMAs) are standard geographic areas used by the FCC for administrative convenience in the licensing of Cellular systems. CMAs comprise Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs). All CMAs and the counties they comprise are listed in: ''Common Carrier Public Mobile Services Information, Cellular MSA/RSA Markets and Counties,'' *Public Notice,* Rep. No. CL–92–40, 7 FCC Rcd 742 (1992).

* * * * *

■ 13. Section 22.911 is amended by revising the introductory text of paragraph (a), by removing and reserving paragraph (c), and by revising paragraphs (d) and (e) to read as follows:

**§ 22.911 Cellular geographic service area.**

* * * * *

(a) *CGSA determination.* The CGSA is the composite of the service areas of all of the cells in the system, excluding any Unserved Area (even if it is served on a secondary basis) or area within the CGSA of another Cellular system. The service area of a cell is the area within its service area boundary (SAB). The distance to the SAB is calculated as a function of effective radiated power (ERP) and antenna center of radiation height above average terrain (HAAT), height above sea level (HASL), or height above mean sea level (HAMSL).

* * * * *

(c) [Reserved]

(d) *Protection afforded.* Cellular systems are entitled to protection only within the CGSA (as determined in accordance with this section) from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block. Licensees must cooperate in resolving co-channel and first-adjacent channel interference by changing channels used at specific cells or by other technical means.

(e) *Unserved Area.* Unserved Area is area outside of all existing CGSAs on either of the channel blocks, to which the Communications Act of 1934, as amended, is applicable.

■ 14. Revise § 22.912 to read as follows:

**§ 22.912 Service area boundary extensions.**

This section contains rules governing service area boundary (SAB) extensions. SAB extensions are areas (calculated using the methodology of § 22.911) that extend outside of the licensee's Cellular Geographic Service Area (CGSA) boundary into Unserved Area or into the CGSA of a neighboring co-channel licensee. Service within SAB extensions is not protected from interference or capture under § 22.911(d) unless and until the area within the SAB extension becomes part of the CGSA in compliance with all applicable rules.

(a) *Extensions into Unserved Area.* Subject to paragraph (c) of this section, the licensee of a Cellular system may, at any time, extend its SAB into Unserved Area and provide service on a secondary basis only, provided that the extension area comprises less than 130 contiguous square kilometers (50 contiguous square miles). If more than one licensee of a Cellular system extends into all or a portion of the same Unserved Area under this section, all such licensees may provide service in such Unserved Area on a shared secondary (unprotected) basis only.

(b) *Contract extensions.* The licensee of any Cellular system may, at any time, enter into a contract with an applicant for, or a licensee of, a Cellular system on the same channel block to allow one or more SAB extensions into its CGSA (not into Unserved Area).

(c) *Gulf of Mexico Service Area.* Land-based Cellular system licensees may not extend their SABs into the Gulf of Mexico Exclusive Zone (GMEZ) absent written contractual consent of the co-channel GMEZ licensee. GMEZ licensees may not extend their SABs into the CGSA of a licensee on the same channel block in an adjacent CMA or the Gulf of Mexico Coastal Zone absent written contractual consent of the co-channel licensee.

**§ 22.929 [Removed and Reserved]**

■ 15. Remove and reserve § 22.929.

■ 16. Revise § 22.946 to read as follows:

**§ 22.946 Construction period for Unserved Area authorizations.**

The construction period applicable to new or modified Cellular facilities for which an authorization is granted pursuant to the Unserved Area process is one year, beginning on the date the authorization is granted. To satisfy this requirement, a Cellular system must be providing service to mobile stations operated by subscribers and roamers. The licensee must notify the FCC (FCC Form 601) after the requirements of this section are met. *See* § 1.946 of this chapter. *See also* § 22.949.

**§ 22.947 [Removed and Reserved]**

■ 17. Remove and reserve § 22.947.

■ 18. Revise § 22.948 to read as follows:

**§ 22.948 Geographic partitioning and spectrum disaggregation; spectrum leasing.**

Cellular licensees may apply to partition any portion of their licensed Cellular Geographic Service Area (CGSA) or to disaggregate their licensed spectrum at any time following the grant of their authorization(s). Parties seeking approval for partitioning and disaggregation shall request from the FCC an authorization for partial assignment of a license pursuant to § 1.948 of this chapter. See also paragraph (d) of this section regarding spectrum leasing.

(a) *Partitioning, disaggregation, or combined partitioning and disaggregation.* Applicants must file FCC Form 603 (''Assignment of Authorization and Transfer of Control'') pursuant to § 1.948 of this chapter, as well as GIS map files and a reduced-size PDF map pursuant to § 22.953 for both the assignor and assignee.

(b) *Field strength limit.* For purposes of partitioning and disaggregation, Cellular systems must be designed so as to comply with § 22.983.

(c) *License term.* The license term for a partitioned license area and for disaggregated spectrum will be the remainder of the original license term.

(d) *Spectrum leasing.* Cellular spectrum leasing is subject to all applicable provisions of subpart X of part 1 of this chapter as well as the provisions of paragraph (a) of this section, except that applicants must file FCC Form 608 (''Application or Notification for Spectrum Leasing Arrangement or Private Commons Arrangement''), not FCC Form 603.

■ 19. Revise § 22.949 to read as follows:

**§ 22.949 Unserved Area licensing; minimum coverage requirements.**

(a) The Unserved Area licensing process described in this section is on-going and applications may be filed at any time, subject to the following coverage requirements:

(1) Applicants for authority to operate a new Cellular system or expand an existing Cellular Geographic Service Area (CGSA) in Unserved Area must propose a CGSA or CGSA expansion of at least 130 contiguous square kilometers (50 contiguous square miles) using the methodology of § 22.911.

(2) Applicants for authority to operate a new Cellular system must not propose coverage of water areas only (or water areas and uninhabited islands or reefs only), except for Unserved Area in the Gulf of Mexico Service Area.

(b) There is no limit to the number of Unserved Area applications that may be granted on each channel block of each CMA that is subject to the procedures of this section. Consequently, Unserved Area applications are mutually exclusive only if the proposed CGSAs would overlap. Mutually exclusive applications are processed using the general procedures under § 22.131.

(c) Unserved Area applications under this section may propose a CGSA covering more than one CMA. Each Unserved Area application must request authorization for only one CGSA and must not propose a CGSA overlap with an existing CGSA.

(d) Settlements among some, but not all, applicants with mutually exclusive applications for Unserved Area (partial settlements) under this section are prohibited. Settlements among all applicants with mutually exclusive applications under this section (full settlements) are allowed and must be filed no later than the date that the FCC Form 175 (short-form) is filed.

■ 20. Section 22.950 is amended by revising paragraphs (c) and (d) to read as follows:

**§ 22.950 Provision of service in the Gulf of Mexico Service Area (GMSA).**

* * * * *

(c) *Gulf of Mexico Exclusive Zone (GMEZ).* GMEZ licensees have an exclusive right to provide Cellular service in the GMEZ, and may add, modify, or remove facilities anywhere within the GMEZ without prior FCC approval. There is no Unserved Area licensing procedure for the GMEZ.

(d) *Gulf of Mexico Coastal Zone (GMCZ).* The GMCZ is subject to the Unserved Area licensing procedures set forth in § 22.949.

**§ 22.951 [Removed and Reserved]**

■ 21. Remove and reserve § 22.951.

■ 22. Section 22.953 is revised to read as follows:

**§ 22.953 Content and form of applications for Cellular Unserved Area authorizations.**

Applications for authority to operate a new Cellular system or to modify an existing Cellular system must comply with the specifications in this section.

(a) *New Systems.* In addition to information required by subpart B of this part and by FCC Form 601, applications for an Unserved Area authorization to operate a Cellular system must comply with all applicable requirements set forth in part 1 of this chapter, including the requirements specified in §§ 1.913, 1.923, and 1.924, and must include the information listed below. Geographical coordinates must be correct to ±1 second using the NAD 83 datum.

(1) *Exhibit I—Geographic Information System (GIS) map files.* Geographic Information System (GIS) map files must be submitted showing the entire proposed CGSA, the new cell sites (transmitting antenna locations), and the service area boundaries of additional and modified cell sites that extend into Unserved Area being claimed as CGSA. *See* § 22.911. The FCC will specify the file format required for the GIS map files, which are to be submitted electronically via the Universal Licensing System (ULS).

(2) *Exhibit II—Reduced-size PDF map.* This map must be 8½ x 11 inches (if possible, a proportional reduction of a 1:500,000 scale map). The map must have a legend, a distance scale, and correctly labeled latitude and longitude lines. The map must be clear and legible. The map must accurately show the entire proposed CGSA, the new cell sites (transmitting antenna locations), the service area boundaries of additional and modified cell sites that extend beyond the CGSA, and the relevant portions of the CMA boundary. *See* § 22.911.

(3) *Exhibit III—Technical Information.* In addition, upon request by an applicant, licensee, or the FCC, a Cellular applicant or licensee of whom the request is made shall furnish the antenna type, model, the name of the antenna manufacturer, antenna gain in the maximum lobe, the beam width of the maximum lobe of the antenna, a polar plot of the horizontal gain pattern of the antenna, antenna height to tip above ground level, the height of the center of radiation of the antenna above the average terrain, the maximum effective radiated power, and the electric field polarization of the wave emitted by the antenna when installed as proposed to the requesting party within ten (10) days of receiving written notification.

(4)–(10) [Reserved]

(11) *Additional information.* The FCC may request information not specified in FCC Form 601 or in paragraphs (a)(1) through (a)(3) of this section as necessary to process an application.

(b) *Existing systems—major modifications.* Licensees making major modifications pursuant to § 1.929(a) and (b) of this chapter must file FCC Form 601 and comply with the requirements of paragraph (a) of this section.

(c) *Existing systems—minor modifications.* Licensees making minor modifications pursuant to § 1.929(k) of this chapter, must file FCC Form 601 or FCC Form 603. *See also* § 22.169. If the modification involves a contract SAB extension into or from the Gulf of Mexico Exclusive Zone, it must include

a certification that the required written consent has been obtained. *See* § 22.912(c).

■ 23. Revise § 22.960 to read as follows:

**§ 22.960 Cellular operations in the Chambers, TX CMA (CMA672–A).**

This section applies only to Cellular systems operating on channel block A of the Chambers, Texas CMA (CMA672–A).

(a) The geographic boundary of CMA672–A is deemed to be the Cellular Geographic Service Area (CGSA) boundary. This CGSA boundary is not determined using the methodology of § 22.911. The licensee of CMA672–A may not propose an expansion of this CGSA into another CMA unless and until it meets the construction requirement set forth in paragraph (b)(2) of this section.

(b) A licensee that holds the license for CMA672–A must be providing signal coverage and offering service as follows (and in applying these geographic construction benchmarks, the licensee is to count total land area):

(1) To at least 35% of the geographic area of CMA672–A within four years of the grant of such authorization; and

(2) To at least 70% of the geographic area of its license authorization by the end of the license term.

(c) After it has met each of the requirements of paragraphs (b)(1) and (b)(2), respectively, of this section, the licensee that holds the license for CMA672–A must notify the FCC that it has met the requirement by submitting FCC Form 601, including GIS map files and other supporting documents showing compliance with the requirement. *See* § 1.946 of this chapter. *See also* § 22.953.

(d) Failure to meet the construction requirements set forth in paragraphs (b)(1) and (b)(2) of this section by each of the applicable deadlines will result in automatic termination of the license for CMA672–A and its return to the Commission for future re-licensing subject to competitive bidding procedures. The licensee that fails to meet each requirement of this section by the applicable deadline set forth in paragraphs (b)(1) and (b)(2) shall be ineligible to regain the license for CMA672–A.

■ 24. Add § 22.961 to read as follows:

**§ 22.961 Cellular licenses subject to competitive bidding.**

(a) The following applications for Cellular licensed area authorizations are subject to competitive bidding:

(1) Mutually exclusive applications for Unserved Area filed after July 26, 1993; and

(2) Mutually exclusive applications for the initial authorization for CMA672–A (Chambers, TX).

(b) The competitive bidding procedures set forth in § 22.229 and the general competitive bidding procedures set forth in subpart Q of part 1 of this chapter will apply.

**§ 22.969 [Removed]**

■ 25. Remove § 22.969.

■ 26. Add § 22.983 to subpart H to read as follows:

**§ 22.983 Field strength limit.**

(a) Subject to paragraphs (b) and (c) of this section, a licensee's predicted or measured median field strength limit must not exceed 40 dBμV/m at any given point along the Cellular Geographic Service Area (CGSA) boundary of a neighboring licensee on the same channel block, unless the affected licensee of the neighboring CGSA on the same channel block agrees to a different field strength. This also applies to CGSAs partitioned pursuant to § 22.948.

(b) *Gulf of Mexico Service Area.* Notwithstanding the field strength limit provision set forth in paragraph (a) of this section, licensees in or adjacent to the Gulf of Mexico Exclusive Zone are subject to § 22.912(c) regarding service area boundary extensions. *See* § 22.912(c).

(c) Cellular licensees shall be subject to all applicable provisions and requirements of treaties and other international agreements between the United States government and the governments of Canada and Mexico, notwithstanding paragraphs (a) and (b) of this section.

[FR Doc. 2014–28151 Filed 12–4–14; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[MB Docket No. 14–46, RM–11717, DA 14–1334]**

### Radio Broadcasting Services; Rough Rock, Arizona

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** At the request of The Navajo Nation, the Audio Division amends the FM Table of Allotments, by allotting FM Channel 258C2 at Rough Rock, Arizona, as a first local Tribal Allotment and a first local service to the community. A staff engineering analysis confirms that Channel 258C2 can be allotted to Rough Rock consistent with the minimum distance separation requirements of the Commission's Rules with the imposition of a site restriction 7.1 km (4.4 miles) southeast of the community. The reference coordinates are 36–21–08 NL and 109–49–54 WL.

**DATES:** Effective December 5, 2014, and applicable October 31, 2014.

**FOR FURTHER INFORMATION CONTACT:** Rolanda F. Smith, Media Bureau, (202) 418–2700.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order,* MB Docket No. 14–46, adopted September 15, 2014, and released September 16, 2014. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street SW., Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or via email *www.BCPIWEB.com.* This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. The Commission will send a copy of the *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

Federal Communications Commission.

**Nazifa Sawez,**

*Assistant Chief, Audio Division, Media Bureau.*

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336 and 339.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by adding Rough Rock, Channel 258C2.

[FR Doc. 2014–28589 Filed 12–4–14; 8:45 am]

BILLING CODE 6712–01–P

# Proposed Rules

Federal Register

Vol. 79, No. 234

Friday, December 5, 2014

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 HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[Docket No. USCG–2014–0365]**

**RIN 1625–AA09**

## Drawbridge Operation Regulation: Illinois Waterway, Joliet, IL

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of public meeting; request for comments.

**SUMMARY:** The Coast Guard announces a public meeting to receive comments on a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulation; Illinois Waterway, Joliet, IL'' that was published in the **Federal Register** on August 27, 2014. As stated in the NPRM, the Coast Guard proposes to modify the operating regulations for six drawbridges, located between river mile 285.8 and river mile 288.7, across the Illinois Waterway, at Joliet, Illinois. The NPRM proposes to consolidate the current operating regulation, which includes five on-site bridge tender control stations, into one centralized control point for all five drawbridges. The NPRM also proposes to add a sixth drawbridge that will also operate under the centralized control point. The proposed action is intended to improve navigational safety and operational efficiency in the Joliet area.

**DATES:** A public meeting will be held on Tuesday, December 16, 2014, from 3 p.m. until 6 p.m. We are also re-opening the comment period for this proposed rule. Comments and related material submitted after the meeting must be received by the Coast Guard on or before December 26, 2014.

**ADDRESSES:** The public meeting will be held at City of Joliet, City Hall, 150 West Jefferson Street, Planning Conference Room, Joliet, IL 60432.

You may submit written comments identified by docket number USCG–2014–0365 before or after the meeting using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

To avoid duplication, please use only one of these four methods. Our online docket for this rulemaking is available on the Internet at *http://www.regulations.gov* under docket number USCG–2014–0365.

**FOR FURTHER INFORMATION CONTACT:** If you have questions concerning the meeting or the proposed rule, please call or email Mr. Eric Washburn, Bridge Administrator, Western Rivers, (314) 269–2378, email *eric.washburn@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Background and Purpose

We published a NPRM in the **Federal Register** on August 27, 2014 (79 FR 51132), entitled ''Drawbridge Operation Regulation; Illinois Waterway, Joliet, IL.'' We did not plan to hold a public meeting, but we received several valid requests for one and have concluded that a public meeting would aid this proposed rulemaking.

In the NPRM, we proposed to modify the operating regulations for six drawbridges in the Joliet Harbor, based on an Illinois Department of Transportation request.

You may view the NPRM in our online docket and comments submitted thus far by going to *http://www.regulations.gov.* Once there, insert ''USCG–2014–0365'' in the ''Keyword'' box and click ''Search.'' You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

We encourage you to participate in this rulemaking by submitting comments either orally at the meeting or in writing before or at the meeting. If you bring written comments to the meeting, you may submit them to Coast Guard personnel specified at the meeting to receive written comments. These comments will be posted to the public docket for this proposed rulemaking. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Comments submitted after the meeting must reach the Coast Guard on or before December 26, 2014. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility.

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

### Information on Service for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact Mr. Eric Washburn at the telephone number or email address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this document.

### Public Meeting

The Coast Guard will hold a public meeting regarding its Drawbridge Operation Regulation; Illinois Waterway, Joliet, IL proposed rule on Tuesday, December 16, 2014, from 3 p.m. until 6 p.m. at City of Joliet, City Hall, 150 West Jefferson Street, Planning Conference Room, Joliet, IL 60432. We plan to record this meeting using an

audio-digital recorder and then make that audio recording available through a link in our online docket. We will also provide a written summary of the meeting and comments and will place that summary in the docket.

Dated: November 25, 2014.

**Kevin S. Cook,**

*Rear Admiral, Commander, U.S. Coast Guard, Eighth Coast Guard District.*

[FR Doc. 2014–28608 Filed 12–4–14; 8:45 am]

**BILLING CODE 9110–04–P**

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket Number USCG–2014–0718]**

**RIN 1625–AA00**

## Safety Zone: Gallant Channel, Beaufort, NC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a temporary safety zone on the waters of the Gallant Channel at Beaufort, North Carolina. The safety zone is necessary to provide for the safety of mariners on navigable waters during construction of the new U.S. 70 Fixed Bridge crossing the Gallant Channel, mile 203.8, at Beaufort, North Carolina. The safety zone will temporarily restrict vessel movement within the designated area.

**DATES:** Comments and related material must be received by the Coast Guard on or before January 5, 2015.

**ADDRESSES:** You may submit comments identified by docket number using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

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

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rulemaking, call or email LT Derek J. Burrill, U.S. Coast Guard Sector North Carolina; telephone 910–772–2230, email *Derek.J.Burrill@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, 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

### A. Public Participation and Request for Comments

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

*1. Submitting Comments*

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

To submit your comment online, go to *http://www.regulations.gov,* type the docket number [USCG–2014–0718] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

*2. Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2014–0718) 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.

*3. Privacy Act*

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

*4. Public Meeting*

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

### B. Basis and Purpose

The legal basis for this rule is found in 33 U.S.C. 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to propose, establish, and define regulatory safety zones.

This safety zone is necessary to ensure public and maritime safety from the potential hazards associated with bridge construction work.

### C. Discussion of Proposed Rule

North Carolina Department of Transportation has awarded a contract to Conti Enterprises, Inc of Edison, New Jersey and Orion Marine Construction,

Inc. (OMCI) of Houston, Texas to perform construction work that will take place at the Gallant's Channel and surrounding area of that Waterway, mile 203.8, Beaufort, North Carolina. The contract involves pile driving, concrete placement, girder setting and post tensioning assistance to commence on January 15, 2015 with a completion date of September 30, 2015. The contractor will utilize a 40 foot by 60 foot barge as a work platform and for equipment staging. This safety zone will provide a safety buffer to transiting vessels as bridge construction work presents potential hazards to mariners and property due to reduction in horizontal clearance.

The proposed temporary safety zone will encompass the waters directly under the new U.S. 70 Fixed Bridge crossing the Gallant Channel, mile 203.8, at Beaufort, North Carolina (34°43′16″ N, 076°41′37″ W). All vessels transiting this section of the waterway requiring a horizontal clearance of greater than 40 feet will be required to make a two hour advanced notification to the work supervisor while the safety zone is in effect. This zone will be in effect daily, 7 a.m. to 5:30 p.m., from January 15, 2015 through September 30, 2015.

**D. Regulatory Analyses**

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

*1. Regulatory Planning and Review*

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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. This rule does not restrict traffic from transiting the designated portion of the Atlantic Intracoastal Waterway; it imposes a two hour notification to ensure the waterway is clear of impediments to passage of vessels requiring a horizontal clearance of greater than 40 feet.

*2. Impact on Small Entities*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities.

This proposed rule would affect the following entities, some of which may be small entities: The owners or operators of commercial tug and barge companies, recreational and commercial fishing vessels intending to transit the specified portion of Atlantic Intracoastal Waterway, 7 a.m. to 5:30 p.m., from January 15, 2015 through September 30, 2015.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone will apply to this section of the Gallant Channel, vessel traffic requiring a horizontal clearance of greater than 40 feet will be able to request passage by providing a two hour advanced notification to the work supervisor. All those requiring less than 40 feet may pass at any time. Before the effective period, the Coast Guard will issue maritime advisories widely available to the users of the waterway.

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

*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 proposed 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**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

*4. Collection of Information*

This proposed 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 proposed rule under that Order and determined that this rule does not have implications for federalism.

*6. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

*7. Unfunded Mandates Reform Act*

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

*8. Taking of Private Property*

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

*9. Civil Justice Reform*

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

*10. Protection of Children From Environmental Health Risks*

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rulemaking and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

*11. Indian Tribal Governments*

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

*12. Energy Effects*

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

*13. Technical Standards*

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

*14. Environment*

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves the establishment of a temporary safety zone. This rulemaking is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add temporary § 165.T05–0718 to read as follows:

**§ 165.T05–0718 Safety Zone, Gallant Channel; Beaufort, NC.**

(a) Regulated Area. The following area is a safety zone: This zone includes the waters directly under and 100 yards either side of the new U.S. 70 Fixed Bridge crossing the Gallant Channel, mile 203.8, at Beaufort, North Carolina (34°43′16″ N, 076°41′37″ W).

(b) Regulations. The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0718. In addition, the following regulations apply:

(1) All vessels requiring greater than 40 feet horizontal clearance to safely transit through the new U.S. 70 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 203.8, at Beaufort, North Carolina must contact the work supervisor tender on VHF–FM marine band radio channels 10 and 13 or at (732) 520–5000 two hours in advance of intended transit.

(2) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

(3) The operator of any vessel within or in the immediate vicinity of this safety zone shall: (i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) Definitions.

(1) Captain of the Port North Carolina means the Commander, Coast Guard Sector North Carolina.

(2) Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port North Carolina to assist in enforcing the safety zone described in paragraph (a) of this section.

(3) Work Supervisor means the contractors' on site representative.

(d) Enforcement. The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) Enforcement period. This section will be enforced daily 7 a.m. to 5:30 p.m., from January 15, 2015 through September 30, 2015 unless cancelled earlier by the Captain of the Port.

Dated: November 17, 2014.

**S. R. Murtagh,**

*Captain, U.S. Coast Guard, Captain of the Port North Carolina.*

[FR Doc. 2014–28604 Filed 12–4–14; 8:45 am]

BILLING CODE P

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 167

**[USCG–2014–0941]**

## Port Access Route Study: In the Chukchi Sea, Bering Strait and Bering Sea

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of study; request for comments.

**SUMMARY:** This study is a continuation of and an expansion of scope to the Port Access Route Study (PARS) the Coast Guard announced in 2010. Based on comments received from the 2010 notice the Coast Guard has developed a potential vessel routing system for the area. The Coast Guard requests comments on how consolidating vessel traffic into a defined vessel routing system may impact or benefit the region. The goal of the study is to help reduce the risk of marine casualties and increase the efficiency of vessel traffic in the region. The recommendations of the study may lead to future rulemaking action or appropriate international agreements.

**DATES:** Comments must be received on or before June 3, 2015.

**ADDRESSES:**

*Schematic of proposed vessel routing system:* A chart showing the Coast Guard's proposed two-way route can be downloaded from *http://www.regulations.gov*, type ''USCG–2014–0941'' into the search bar and click search, next to the displayed search results click ''Open Docket Folder'', which will display all comments and documents associated with this docket.

*Comment submission:* You may submit comments identified by docket number USCG–2014–0941 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

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

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice of study, call or email LT Kody Stitz, Seventeenth Coast Guard District (dpw); telephone (907) 463–2270; email *Kody.J.Stitz@uscg.mil* or Mr. David Seris, Seventeenth Coast Guard District (dpw); telephone (907) 463–2267; email *David.M.Seris@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl F. Collins, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

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

## Submitting Comments

If you submit a comment, please include the docket number for this notice of availability (USCG–2014–0941), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type ''USCG–2014–0941'' into the search bar and click search, next to the displayed search results click ''Comment Now'', which will open the comment page for this study. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

## Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type ''USCG–2014–0941'' into the search bar and click search, next to the displayed search results click ''Open Docket Folder'', which will display all comments and documents associated with this docket. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

## Privacy Act

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

## Public Meeting

The Coast Guard will hold public meeting(s) if there is sufficient demand to warrant holding a meeting. You must submit a request for one on or before Month Day, Year (30 days from publish date) using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that a public meeting would aid in the study, we will hold a meeting at a time and place announced by a later notice in the **Federal Register**.

## Definitions

The following definitions (except ''Regulated Navigation Area'') are from the International Maritime Organization's (IMO's) publication ''*Ships' Routeing*'' Tenth Edition 2010 and should help you review this notice:

*Area to be avoided (ATBA)* means a routing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or certain classes of ships.

*Deep-water route* means a route within defined limits, which has been accurately surveyed for clearance of sea bottom and submerged obstacles as indicated on the chart.

*Inshore traffic zone* means a routing measure comprising a designated area between the landward boundary of a traffic separation scheme and the adjacent coast, to be used in accordance with the provisions of Rule 10(d), as amended, of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS).

*Precautionary area* means a routing measure comprising an area within defined limits where ships must navigate with particular caution and within which the direction of traffic flow may be recommended.

*Recommended route* means a route of undefined width, for the convenience of ships in transit, which is often marked by centerline buoys.

*Recommended track* is a route which has been specially examined to ensure so far as possible that it is free of dangers and along which vessels are advised to navigate.

*Regulated Navigation Area (RNA)* means a water area within a defined boundary for which regulations for vessels navigating within the area have been established under 33 CFR part 165.

*Roundabout* means a routing measure comprising a separation point or circular separation zone and a circular traffic lane within defined limits. Traffic within the roundabout is separated by moving in a counterclockwise direction around the separation point or zone.

*Separation zone or separation line* means a zone or line separating the traffic lanes in which ships are proceeding in opposite or nearly opposite directions; or separating a traffic lane from the adjacent sea area; or separating traffic lanes designated for particular classes of ship proceeding in the same direction.

*Traffic lane* means an area within defined limits in which one-way traffic is established. Natural obstacles, including those forming separation zones, may constitute a boundary.

*Traffic Separation Scheme (TSS)* means a routing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes.

*Two-way route* means a route within defined limits inside which two-way traffic is established, aimed at providing safe passage of ships through waters where navigation is difficult or dangerous.

*Vessel routing system* means any system of one or more routes or routing measures aimed at reducing the risk of casualties; it includes traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, no anchoring areas, inshore traffic zones, roundabouts, precautionary areas, and deep-water routes.

**Background and Purpose**

**Requirement for Port Access Route Studies**

Under the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1223(c)), the Commandant of the Coast Guard may designate necessary fairways and traffic separation schemes (TSSs) to provide safe access routes for vessels proceeding to and from U.S. ports.

**Port Access Route Study to Date**

The Coast Guard announced a port access route study in the **Federal Register** on November 8, 2010 (75 FR 68568). The purpose of the PARS was to solicit public comments on whether a vessel routing system such as a fairway or TSS was needed and if it could increase vessel safety in the area. The 2010 PARS was limited geographically in scope to a section of water extending approximately 100 nautical miles north of the Bering Strait into the Chukchi Sea to approximately 30 nautical miles south of St. Lawrence Island in the Bering Sea. At that time the Coast Guard did not propose a specific vessel routing system, but instead sought more general comments about whether a vessel routing system was needed or advisable in the study area. The Coast Guard received twenty five comments, and after reviewing them, determined that a vessel route needed to be proposed so more specific comments and concerns could be gathered and evaluated before determining if a routing system would be beneficial. The Coast Guard further determined that the study area should include a larger geographic area than was initially studied before finalizing the study and publishing the results.

**Vessel Routing Comments to Date**

The Coast Guard received twenty five public comments during the open comment period associated with the 2010 announcement. Nearly all of the comments that addressed vessel routing were supportive of the Coast Guard creating and implementing some form of vessel routing measure in the area. Since no specific routing measure was proposed in 2010, the comments received did note that precise concerns and impacts could only be identified after a specific route or measure was proposed.

**Reopening of the Comment Period**

This **Federal Register** notice announces the Coast Guard's intent to continue the PARS started in 2010, expand the study area and release the Coast Guard's proposed vessel routing system for comment. The Coast Guard's goal of the study remains the same in that the study is focused on gathering factual and relevant information to aid the Coast Guard in reducing the risk of marine casualties and increasing the efficiency of vessel traffic in the region.

The study will assess whether the creation of a vessel routing system is advisable to increase the predictability of vessel movements, which may decrease the potential for collisions, oil spills, and other events that could threaten the marine environment.

Based on comments received to date there is a general sense that a designated traffic route could improve traffic predictability thereby reducing marine casualties and oil spills; however, a few comments received did note that a designated traffic route (depending on location) could adversely impact subsistence hunting, marine mammals and other wildlife more so than widely dispersed vessel traffic. Therefore, the Coast Guard puts forth a potential two-way route as a starting point for analyzing where to put a vessel traffic route should one be deemed needed and beneficial to the region.

The Coast Guard will analyze vessel traffic density, agency and stakeholder experience in vessel traffic management, navigation, ship handling, the effects of weather, impacts to subsistence hunting, impacts to marine mammals and other wildlife concerns into the decision making process of the study. We encourage you to participate in the study process by submitting comments in response to this notice.

The expanded study area is described as an area bounded by a line connecting the following geographic positions:

- 67°30′ N, 168°58′37″ W;
- 67°30′ N, 167°30′ W;
- 54°50′ N, 164°40′ W;
- 54°03′ N, 166°25′ W;
- 63°20′ N, 173°43′ W; thence following the Russian Federation/United States maritime boundary line to the first geographical position.

The proposed ship routing measures are described as follows:

(1) A four nautical mile wide, two-way route extending from Unimak Pass in the Aleutian Islands that proceeds Northward through the Bering Sea and Bering Strait before terminating in the Chukchi Sea.

(2) A four nautical mile wide, two-way route extending from a location North of the Western side of St. Lawrence Island and near the U.S./Russian Federation maritime border, then proceeding Northeast to a junction with the first two way route located to the West of King Island.

(3) A total of four precautionary areas, each circular and 8 nautical miles wide in diameter. Three of these precautionary areas will be located at the starting/ending points of the two-way routes, and the fourth will be located at the junction of the recommended two-way routes.

See the **ADDRESSES** section for where to obtain a copy of the chart showing the exact location of the proposed route.

Timeline, Study Area, and Process of this PARS: The Seventeenth Coast Guard District will conduct this PARS. The study will continue upon publication of this notice and may take 24 months to complete.

We will publish the results of the PARS in the **Federal Register**. It is possible that the study may validate the status quo (no routing measures) and conclude that no changes are necessary. It is also possible that the study may recommend one or more changes to enhance navigational safety and the efficiency of vessel traffic management. The recommendations may lead to future rulemakings or appropriate international agreements.

Dated: November 14, 2014.

**D. B. Abel,**

*Rear Admiral, U.S. Coast Guard, Commander, Seventeenth Coast Guard District.*

[FR Doc. 2014–28672 Filed 12–4–14; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2010–0895; FRL–9920–03–OAR]**

**RIN 2060–AQ11**

### National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production; Extension of Comment Period

**AGENCY:** Environmental Protection Agency.

**ACTION:** Supplemental notice of proposed rulemaking; extension of public comment period.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing that the period for providing public comments on the October 6, 2014, supplemental proposed rule titled ''National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production'' is being extended an additional 11 days.

**DATES:** The public comment period for the supplemental proposed rule published October 6, 2014 (79 FR 60238), and initially extended by 18 days on November 14, 2014 (79 FR 68152), is being extended an additional 11 days to December 19, 2014, in order to provide the public additional time to submit comments and supporting information. The EPA received a request for an extension from ERAMET Marietta, Incorporated to gather and analyze data and formulate their comments on the supplemental proposed amendments.

**ADDRESSES:** Written comments on the supplemental proposed rule may be submitted to EPA electronically, by mail, by facsimile or through hand delivery/courier. Please refer to the supplemental proposal (79 FR 60238) for the addresses and detailed instructions.

*Docket.* Publicly available documents relevant to this action are available for public inspection either electronically at *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. The official public docket for this rulemaking is Docket No. EPA–HQ–OAR–2010–0895.

*World Wide Web.* The EPA Web site for this rulemaking is at *http://www.epa.gov/ttn/atw/ferroa/ferropg.html.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Phil Mulrine, Metals and Inorganic Chemicals Group (D243–02), Sector Policies and Programs Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541–5289; Fax number (919) 541–3207; Email address: *mulrine.phil@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Comment Period

After considering the request received from ERAMET Marietta, Incorporated to extend the public comment period, the EPA has decided to extend the public comment period for an additional 11 days. Therefore, the public comment period will end on December 19, 2014, rather than December 8, 2014.

Dated: November 25, 2014.

**Mary E. Henigin,**

*Acting Director, Office of Air Quality Planning and Standards.*

[FR Doc. 2014–28387 Filed 12–4–14; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### 42 CFR Part 136

**RIN 0917–AA12**

### Payment for Physician and Other Health Care Professional Services Purchased by Indian Health Programs and Medical Charges Associated With Non-Hospital-Based Care

**AGENCY:** Indian Health Service, HHS.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend Indian Health Service (IHS) Purchased and Referred Care (PRC), formally known as the Contract Health Services (CHS), regulations to apply Medicare payment methodologies to all physician and other health care professional services and non-hospital-based services that are either authorized under such regulations or purchased by urban Indian organizations. Specifically, it proposes that the health programs operated by IHS, Tribe, Tribal organization, or urban Indian organization (collectively, I/T/U programs) will pay the lowest of the amount provided for under the applicable Medicare fee schedule, prospective payment system, or Medicare waiver; the amount negotiated by a repricing agent, if available; or the usual and customary billing rate. Repricing agents may be used to determine whether IHS may benefit from savings by utilizing negotiated rates offered through commercial health care networks. This proposed rule seeks comment on how to establish reimbursement that is consistent across Federal health care programs, aligns payment with inpatient services, and enables the IHS to expand beneficiary access to medical care.

**DATES:** Comments must be received on or before January 20, 2015.

**ADDRESSES:** In commenting, please refer to file code [**Federal Register** insert No.]. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://regulations.gov.* Follow the ''Submit a Comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Betty Gould, Regulations Officer, Indian Health Service, 801 Thompson Avenue, TMP STE 450, Rockville, Maryland 20852.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the above address.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to the address above.

If you intend to deliver your comments to the Rockville address, please call telephone number (301) 443–1116 in advance to schedule your arrival with a staff member.

Comments will be made available for public inspection at the Rockville address from 8:30 a.m. to 5 p.m., Monday–Friday, approximately three weeks after publication of this notice.

**FOR FURTHER INFORMATION CONTACT:** Carl Harper, Director, Office of Resource Access and Partnerships, Indian Health Service, 801 Thompson Avenue, Rockville, Maryland 20852. Telephone: (301) 443–1553.

**SUPPLEMENTARY INFORMATION:** The Consolidated Appropriation Act of 2014 signed by President Obama in January, 2014, adopted a new name, Purchased/Referred Care (PRC), for the CHS program. The name change was official with passage of the FY 2014 appropriation. The new name better describes the purpose of the program funding, which is for both purchased

care and referred care outside of IHS. The name change does not change the program, and all current policies, practices, will continue and is not intended to have any effect on the laws that govern or apply to CHS. IHS will administer PRC in accordance with all laws applicable to CHS. This proposed rule will use the term PRC. For the purposes of this rule, the terms provider of services (or ''provider'') and supplier have the same meaning as the terms defined at 42 U.S.C. 1395x.

## I. Background

This proposed rule would amend the IHS medical regulations at 42 CFR part 136 to apply Medicare payment methodologies to all physician and other health professional services and non-hospital-based services provided through Contract Health Services (CHS), now Purchased Referred Care (PRC), or purchased by urban Indian organizations, and that are not otherwise subject to Medicare payment rates by law. Under 42 CFR 136.23, when necessary health services are not reasonably accessible or available to IHS beneficiaries, the IHS and Tribes are authorized to pay for medical care provided to IHS beneficiaries by non-IHS or Tribal, public or private health care providers, depending on the availability of funds. Similarly, under section 503 of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1653, urban Indian organizations may refer eligible urban Indians, as defined under section 4 of the IHCIA, to non-I/T/U public and private health care providers and, depending on the availability of funds, may also cover the cost of care.

Sec. 506 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) authorized the Secretary to establish a payment methodology, payment rates, and admissions practices for Medicare-participating hospitals that furnish inpatient services applicable when such hospitals provide to an eligible American Indian/Alaskan Native (AI/AN) beneficiary medical care authorized by an I/T/U. As implemented in 42 CFR part 136 subpart D, Medicare-participating hospitals, including Critical Access Hospitals (CAHs), are reimbursed by I/T/Us using ''Medicare-like'' rates that generally correspond to the applicable Medicare payment methodology for the medical service. In instances where Medicare-participating hospitals furnish inpatient services, but are exempt from Medicare's Prospective Payment System (PPS) and receive reimbursement based on reasonable costs (for example, CAHs, children's hospitals, cancer hospitals, and certain other hospitals reimbursed by Medicare under special arrangements), payment is made per discharge based on the reasonable cost methods established under 42 CFR part 413, except that the interim payment rate, under 42 CFR part 413 subpart E, constitutes payment in full for authorized charges. Notwithstanding, if an amount has been negotiated with the hospital or its agent by the I/T/U, the I/T/U will pay the lesser of the amount determined under the PPS or the amount negotiated with the hospital or its agent.

The Medicare-like rate methodology established by 42 CFR part 136 subpart D does not apply to non-hospital services, including physician and other health professional services, services provided by a comprehensive outpatient rehabilitation facility, a home health agency, or a hospice, or other non-hospital-based items and services. Rather, I/T/Us reimburse for authorized services at the rates provided by contracts negotiated at the local level with individual providers or according to a provider's billed charges. Given the small market share of individual I/T/U programs, I/T/Us historically have paid rates in substantial excess of Medicare's allowable rates or rates paid by private insurers for the same services. Despite establishing medical priorities to cover the most necessary care, IHS is still unable to provide care to all of its beneficiaries. The demand for PRC care consistently exceeds available funding. IHS recently reported to Congress that IHS and tribal PRC programs denied an estimated $760,855,000 for an estimated 146,928 contract care services needed by eligible beneficiaries in FY 2013.[1]

Based on an audit of fiscal year 2012, the Government Accountability Office (GAO) estimated that, by implementing a Medicare-like rate methodology, the IHS PRC programs could have saved $32 million on physician services alone, not including additional savings for other non-hospital services, or savings accrued to Tribal PRC programs. Government Accountability Office, *Indian Health Service: Capping Payment Rates for Non-Hospital Services Could Save Millions of Dollars for Contract Health Services* (April 2013) (''April 2013 Study''). The GAO concluded that by setting PRC physician and other non-hospital payments at rates consistent with Medicare and other Federal agencies, the IHS could expand IHS beneficiary access to care. These findings and recommendations are substantiated by a report from the Department of Health and Human Services' Office of the Inspector General. Department of Health and Human Services, Office of Inspector General, *IHS Contract Health Services Program: Overpayments and Potential Savings* (Sept. 2009).

## II. Provisions of the Proposed Rule

This proposed rule is promulgated pursuant to 42 U.S.C. 2001(b), which provides that the Secretary ''[i]n carrying out [her] functions, responsibilities, authorities, and duties under [the Transfer Act] . . . is authorized, with the consent of the Indian people served, to contract with private or other non-Federal health agencies or organizations for the provision of health services to such people on a fee-for-service basis or on a prepayment or other basis'' and pursuant to 42 U.S.C. 2003, which authorizes the Secretary to promulgate regulations to carry out the Transfer Act. It amends the IHS regulation at 42 CFR part 136 by adding a new subpart I that applies ''Medicare-like'' rate payment methodologies to all physicians and health care professional services and all non-hospital-based services that are not covered currently under 42 CFR part 136 subpart D. The proposed rule is similar to payment methodologies promulgated in other Federal health care programs, including the Department of Veterans Affairs, by applying a consistent reimbursement policy across Federal health care programs. The proposed rule provides that the I/T/U will pay the lowest of the amount provided under the applicable Medicare fee schedule, prospective payment system, or Medicare waiver; the amount negotiated by a repricing agent,[2] if available; or the usual and customary billing rate. In the absence of a Medicare rate or Medicare waiver, or agreement, payment will be made at the amount that the provider or supplier bills the general public for the same service. The rule specifies the circumstances in which a non-hospital health care provider or supplier will be deemed to have accepted the rates established herein.

The rule caps the rate that I/T/Us are authorized to pay non-I/T/U health care providers and suppliers for services and leaves no discretion for the I/T/U and the health care provider to negotiate higher rates. The IHS recognizes this

[1] *See* Congress FY 2015 Congressional Justification Purchased/Referred Care Program Description and Accomplishments page 92–95, available online at: *http://www.ihs.gov/budgetformulation/congressionaljustifications/*.

[2] A repricing agent discounts rates charged by a health care provider to rates that the agent may have established with the health care provider as a condition of participating in the agent's provider network.

constraint could impact the delivery of patient care, particularly in circumstances where the I/T/U cannot find a health care provider or supplier willing to accept the payment rates established herein or the patient receives emergency services from a provider or supplier that refuses to accept the rate. Under 25 U.S.C. 1621u, a patient who receives authorized contract care may not be held liable for the payment of any charges. If the medical provider or supplier does not agree to accept the payment rate as payment in full, the I/T/U is effectively precluded from authorizing the care or paying the health care provider or supplier for services rendered to a beneficiary. In such circumstances, the I/T/U will not authorize payment and the patient may be held financially responsible by the provider or supplier of care for the charges. The IHS also notes that, while Medicare-participating hospitals are required to accept payment rates set forth in 42 CFR part 136 subpart D for facility services, subpart D does not apply to the professional service provided by a physician or practitioner through the hospital. To the extent the physician or practitioner does not agree to accept the rates established by this regulation, the I/T/U will not authorize payment for the service. The IHS seeks comment on whether exceptions should be incorporated into the rule to permit an I/T/U to pay in excess of the calculated rate in circumstances where it may be appropriate for the I/T/U to retain more flexibility over the payment rate. For example, a specialist that does not accept reduced rates and to access this specialty at a reduced rate it is located in another State. The travel costs and burden on the patient is too great to access the needed specialty care.

The proposed rule also specifies that payments made in accordance with the described methodology shall constitute payment in full and that, in accordance with 25 U.S.C. 1621u, the provider, supplier or their agent, may not impose additional charge on an individual for I/T/U authorized items and services. Consistent with IHS regulations, the rule further provides that, if an I/T/U has authorized payment for PRC services provided to an individual who is eligible for benefits under Medicare, Medicaid, or another third party payer, the I/T/U shall be the payer of last resort in accordance with 25 U.S.C. 1623(b). If there are any third party payers, the I/T/U will pay the amount for which the patient is being held responsible after the provider or supplier of services has coordinated benefits and all other alternate resources have been considered and paid, including applicable co-payments, deductibles, and coinsurance owed by the patient. For purposes of the payment methodology specified in § 136.30(a), required co-payments, deductibles, and coinsurance are those that would have been owed by a Medicare beneficiary under the proposed methodology. Because the patient may not be held liable for the payment of costs or charges under 25 U.S.C. 1621u, the I/T/U will assume these costs to the extent all payments made by any payer, do not in aggregate, exceed the maximum payment rate set forth § 136.201(a).

## III. Collection of Information Requirements

These regulations do not impose any new information collection requirements. The requirements for submitting a claim are currently approved under Office and Management and Budget approval number 0917–0002, IHS Contract Health Services Report (Expires: 02/28/2016). Providers and suppliers will not be required to update information technology systems as a result of the provisions of this proposed rule. Claims will be re-priced by the IHS Fiscal Intermediary or the appropriate Tribal administrator according to the methodology adopted herein.

## IV. Regulatory Impact Statement

The IHS has examined the impact of this final rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 12866 directs 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). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). The April 2013 Study released by the GAO found that if federal PRC programs had paid Medicare rates for physicians services in 2010, they could have realized an estimated $32 million in annual savings to pay for additional services. Although the analysis did not include other types of non-hospital services or funding that goes to tribal PRC programs, the increase in purchasing power brought about by this proposed rule would be unlikely to exceed $100 million annually. OMB has determined that this is a significant regulatory action under Executive Order 12866.

The Secretary hereby proposes to certify that this proposed 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 through 612. The proposed rule will not cause significant economic impact on health care providers, suppliers, or entities since only a small portion of the business of such entities concerns IHS beneficiaries. The April 2013 Study released by the GAO found that of the physicians sampled, the PRC program represented a small portion of their practice and was not a significant source of revenue. Although the sampling of physicians was small, all of the sampled physicians were in the top 25% in terms of volume of paid services covered by PRC. IHS believes the sample to be representative of higher volume practitioners currently providing services paid for by PRC. Accordingly, pursuant to 5 U.S.C. 605(b), the proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

In addition, section 1102(b) of the Act requires IHS to prepare a RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, IHS defines a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. For the reasons provided above, IHS has determined that this rule will not have a significant impact on the operations of a substantial number of small rural hospitals. Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose requirements mandate expenditure in any one year by State, local, or Tribal governments, in the aggregate, or by the private sector, of $141 million. This proposal would not impose substantial Federal mandates on State, local or Tribal governments or private sector.

## List of Subjects in 42 CFR Part 136

Alaska Natives, American Indian, Health, Medicare.

Dated: November 6, 2014 .

**Yvette Roubideaux,**

*Acting Director, Indian Health Service.*

Dated: November 18, 2014.

**Sylvia M. Burwell,**

*Secretary, Health and Human Services.*

For the reasons set forth in the preamble, the Indian Health Service proposes to amend 42 CFR chapter I as set forth below:

## PART 136—INDIAN HEALTH

■ 1. The authority citation for part 136 continues to read as follows:

**Authority:** 25 U.S.C. 13; 42 U.S.C. 1395cc(a)(1)(U), 42 U.S.C. 2001 and 2003, unless otherwise noted.

■ 2. Add new subpart I consisting of §§ 136.201 and 136.202, to read as follows:

## Subpart I—Limitation on Charges for Health Care Professional Services and Non-Hospital-Based Care

Sec.

136.201 Payment for physician and other health care professional services purchased by Indian health programs and other medical charges associated with non-hospital-based care.

136.202 Authorization by urban Indian organizations.

### § 136.201 Payment for physician and other health care professional services purchased by Indian health programs and other medical charges associated with non-hospital-based care.

(a) Payment to physicians and health care professionals and all other non-hospital-based entities, for any level of care authorized under part 136, subpart C by a Purchased/Referred Care (PRC) program of the Indian Health Service (IHS); or authorized by a Tribe or Tribal organization carrying out a PRC program of the IHS under the Indian Self-Determination and Education Assistance Act, as amended, Public Law 93–638, 25 U.S.C. 450 *et seq.;* or authorized for purchase under § 136.31 by an urban Indian organization (as that term is defined in 25 U.S.C. 1603(h)) (hereafter ''I/T/U''), shall be determined based on the applicable method in this section: The I/T/U will pay the lowest of the following amounts:

(1) The applicable Medicare payment amount, including payment according to a fee schedule, a prospective payment system or based on reasonable cost (''Medicare rate'') for the period in which the service was provided), or in the event of a Medicare waiver, the payment amount will be calculated in accordance with such waiver.

(2) An amount that has been negotiated with a specific provider or its agent, or supplier or its agent by the I/T/U or the amount negotiated by a repricing agent if the provider or supplier is participating within the repricing agent's network and an I/T/U has a pricing arrangement or contract with that repricing agent. For the purposes of this section, repricing agent means an entity that seeks to connect I/T/U with discounted rates from non-I/T/U public and private providers as a result of existing contracts that the non-I/T/U public or private provider may have within the commercial health care industry.

(3) The amount that the provider or supplier bills the general public for the same service.

(b) Coordination of benefits and limitation on recovery: If an I/T/U has authorized payment for items and services provided to an individual who is eligible for benefits under Medicare, Medicaid, or another third party payer—

(1) The I/T/U is the payer of last resort under 25 U.S.C. 1623(b);

(2) If there are any third party payers, the I/T/U will pay the amount for which the patient is being held responsible after the provider or supplier of services has coordinated benefits and all other alternate resources have been considered and paid, including applicable co-payments, deductibles, and coinsurance that are owed by the patient; and

(3) The maximum payment by the I/T/U will be only that portion of the payment amount determined under this section not covered by any other payer; and

(4) The I/T/U payment will not exceed the rate calculated in accordance with paragraph (a) of this section (plus applicable cost sharing); and

(5) When payment is made by Medicaid it is considered payment in full and there will be no additional payment made by the I/T/U to the amount paid by Medicaid.

(c) Authorized services: Payment shall be made only for those items and services authorized by an I/T/U consistent with part 136 of this title or section 503(a) of the Indian Health Care Improvement Act (IHCIA), Public Law 94–437, as amended, 25 U.S.C. 1653(a).

(d) No additional charges.

(1) The health care provider or supplier shall be deemed to have accepted the applicable Medicare payment amount, including payment according to a fee schedule, a prospective payment system or based on reasonable cost (''Medicare rate'') for the period in which the service was provided), as payment in full if:

(i) The services were provided based on a PRC referral authorized for payment; or,

(ii) The health care provider or supplier submits a Notification of a Claim for payment to the I/T/U; or

(iii) The health care provider or supplier accepts payment for the provision of services from the I/T/U.

(2) A payment made and accepted in accordance with this section shall constitute payment in full and the provider or its agent, or supplier or its agent, may not impose any additional charge—

(i) On the individual for I/T/U authorized items and services; or

(ii) For information requested by the I/T/U or its agent or fiscal intermediary for the purposes of payment determinations or quality assurance.

(e) For physicians and health care professionals and all other non-hospital-based entities required by law to accept the rates specified in this section, the applicable rate shall be the lowest of any amount calculated under paragraph (a)(1) of this section, without regard to paragraph (d)(1) of this section.

(f) No service shall be authorized and no payment shall be issued in excess of the rate authorized by this subpart.

### § 136.202 Authorization by an urban Indian organization.

An urban Indian organization may authorize for purchase items and services for an eligible urban Indian (as those terms are defined in 25 U.S.C. 1603(f) and (h)) according to section 503 of the IHCIA and applicable regulations. Services and items furnished by physicians and other health care professionals and non-hospital-based entities shall be subject to the payment methodology set forth in § 136.30.

[FR Doc. 2014–28508 Filed 12–3–14; 8:45 am]

BILLING CODE 4165–16–P

# Notices

Federal Register

Vol. 79, No. 234

Friday, December 5, 2014

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 1, 2014.

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 and other forms of information technology.

Comments regarding this information collection received by January 5, 2015 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 20503. Commentors 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) 720–8681.

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.

**Forest Service**

*Title:* Generic Clearance for Large Scale Collaborative Project Socio-economic Monitoring.

*OMB Control Number:* 0596—NEW.

*Summary of Collection:* The Forest Landscape Restoration Act of 2009 (16 U.S.C. 7303) requires the Forest Service to monitor socio-economic impacts of collaborative restoration activities within the project site. In addition, the 2012 Planning Rule (36 CFR part 219) requires a transparent, collaborative and informed planning process. Large scale collaborative projects involve interested parties, such as neighboring land owners, state, local and tribal government representatives, businesses, interest groups and nonprofit organizations working with a federal government agency to find common ground pertaining to geographically extensive land management, often across multiple jurisdictions. Bureau of Land Management (BLM) and U.S. Forest Service (FS) collaboration on large scale projects also extends beyond Collaborative Forest Landscape Restoration and Management Plans.

*Need and Use of the Information:* Data will be collected through a variety of methods, including: A census survey of partners/participants of a collaborative project; mail-survey of residents in the large scale collaborative project or planning areas; survey of spending habits of restoration workers; and key informant interviews with business, community, stakeholder leaders in collaborative project and planning areas. Results will assist program managers in evaluating the positive and negative social and economic effects of collaborative project implementation and assist FS and BLM forest planners in meeting collaborative and public input requirement of the 2012 Forest Planning Rule.

*Description of Respondents:* Individuals; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Governments.

*Number of Respondents:* 48,800.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 38,800.

**Forest Service**

*Title:* Generic Clearance for the Stewardship Mapping and Assessment Project (STEW–MAP).

*OMB Control Number:* 0596—NEW.

*Summary of Collection:* The Cooperative Forestry Assistance Act of 1978 (Pub. L. 113–79) Section 9(a); (b)(8); (c) and (d); The Forest and Rangeland Renewable Resources Research Act of 1978 and the National Environmental Policy Act of 1969 authorize the Forest Service to expand and strengthen existing research, education, technical assistance and public information and participation in tree planting and maintenance programs through stewardship. Civic environmental stewards are involved in a range of activities like planting trees, organizing community gardens, offering environment-themed classes, leading local conservation efforts, monitoring plants and animals, and cleaning up nearby parks or natural areas. These stewards may be nonprofit organizations, formal or informal community groups, faith-based organizations, or academic institutions. STEW–MAP will create a publicly available database and map of stewardship groups, their activities, and where they work.

*Need and Use of the Information:* Information will be gathered on civic stewardship groups and their efforts such as where they work, the types of projects they focus on, and how they are organized. There are three phases to a STEW–MAP project: (1) A census to put together a master list of known stewardship groups and their contact information in the target city or region; (2) a survey distributed to all of the organizations identified in phase one to collect information about what they work on, structure of the group and what other groups they collaborate with; and (3) follow-up interviews with key longstanding organizations identified during phase two, to collect more detailed information about organizational histories.

*Description of Respondents:* Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Governments.

*Number of Respondents:* 15,900.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 7,925.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2014–28552 Filed 12–4–14; 8:45 am]

BILLING CODE 3411–15–P

## COMMISSION ON CIVIL RIGHTS

### Sunshine Act Meeting

**AGENCY:** United States Commission on Civil Rights.

**ACTION:** Notice of Commission Business Meeting.

**DATES:** *Date and Time:* Friday, December 12, 2014; 9:30 a.m. EST.

**ADDRESSES:** *Place:* 1331 Pennsylvania Ave. NW., Suite 1150, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591.

Hearing-impaired persons who will attend the briefing 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.

**SUPPLEMENTARY INFORMATION:**

### Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda

II. Program Planning

- Review and Vote of the 2015 Statutory Enforcement Report Discovery Plan
- Discussion and Vote on Updating Select Commission Reports

III. Management and Operations

- Presentations from the Illinois and Georgia SAC Chairs on their Immigration Projects
- Staff Director's Report

IV. State Advisory Committee (SAC) Appointments

- Indiana

V. Adjourn Meeting

Dated: December 2, 2014.

**Marlene Sallo,**

*Staff Director.*

[FR Doc. 2014–28649 Filed 12–3–14; 11:15 am]

BILLING CODE 6335–01–P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–55–2014]**

### Foreign-Trade Zone 221—Mesa, Arizona; Authorization of Production Activity; Apple Inc./GTAT Corp. (Components for Consumer Electronics); Mesa, Arizona

On July 31, 2014, the City of Mesa, grantee of FTZ 221, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of Apple Inc./GTAT Corp., within Subzone 221A, in Mesa, Arizona.

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 (79 FR 47088–47089, 8–12–2014). 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: November 28, 2014.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2014–28582 Filed 12–4–14; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–904]**

### Certain Activated Carbon From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Antidumping Duty Administrative Review; 2009–2010

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** On November 24, 2014, the United States Court of International Trade (''the Court'') issued final judgment in *Albemarle Corp. et al.* v. *United States,* Consol. Court No. 11–00451, sustaining the Department of Commerce's (''the Department'') final results of redetermination pursuant to remand (''Remand'').[1] In the Remand, the Department recalculated the weighted-average dumping margin for Calgon Carbon (Tianjin) Co., Ltd.'s (''Calgon Tianjin'') using revised surrogate values for coal and fine by-products.[2] The Department also recalculated in the Remand the dumping margin for three respondents not selected for individual examination (*i.e.,* the separate rate)—Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. (''Ningxia Guanghua'') and its affiliate Beijing Pacific Activated Carbon Products Co., Ltd. (''Beijing Pacific'') (together, ''Cherishmet''),[3] as well as Shanxi DMD Corporation (''Shanxi DMD'').[4]

Consistent with the decision of the United States Court of Appeals for the Federal Circuit (''CAFC'') in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (''*Timken*''), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results of the antidumping duty administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China (''PRC'') covering the period of review (''POR'') April 1, 2009, through March 31, 2010, and is amending the final results with respect to the weighted-average dumping margins assigned to Ningxia Guanghua, Beijing Pacific, and Shanxi DMD.[5]

**DATES:** *Effective Date:* December 4, 2014.

**FOR FURTHER INFORMATION CONTACT:** Robert Palmer, AD/CVD Operations Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–9068.

**SUPPLEMENTARY INFORMATION:**

[1] *See* Final Results Of Redetermination Pursuant To Court Remand, Consol. Court No. 11–00451, Slip Op. 13–106 (CIT August 15, 2013), dated January 9, 2014, available at *http://enforcement.trade.gov/remands/13-106.pdf.*

[2] *Id.* at 8–10. As we explain below, the Department's recalculation of these surrogate values continued to yield a *de minimis* weighted-average dumping margin for Calgon Tianjin. Thus, consistent with our practice, the Department has not amended the final results with respect to Calgon Tianjin.

[3] The Department found Ningxia Guanghua and Beijing Pacific to be affiliated and a single entity in *First Administrative Review of Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 57995, 57998 (November 10, 2009).

[4] *See* Remand at 10–13.

[5] *See Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review,* 76 FR 67142 (October 31, 2011) (''*AR3 Final Results*'') and the accompanying Issues and Decision Memorandum.

## Background

On October 31, 2011, the Department issued *AR3 Final Results.*[6] Cherishmet and Shanxi DMD, exporters of subject merchandise, timely filed complaints with the Court. Albemarle Corporation (''Albemarle''), a U.S. importer of subject merchandise, and Ningxia Huahui Activated Carbon Co., Ltd. (''Huahui''), an exporter of subject merchandise, also timely filed a complaint with the Court. Together, these parties challenged four aspects of the Department's final results: (1) The surrogate value for Calgon Tianjin's carbonized material; (2) the surrogate values for Calgon Tianjin's coal and fine by-products; (3) the dumping margins assigned to Huahui, Shanxi DMD, Ningxia Guanghua, and Beijing Pacific, which were not selected for individual examination in the review; and (4) the use of a per-unit assessment rate for Shanxi DMD's entries. On August 15, 2013, the Court remanded the Department's *AR3 Final Results* and instructed the Department to reconsider each of these issues.[7]

On January 9, 2014, the Department filed the Remand with the Court. First, the Department continued to calculate Calgon Tianjin's surrogate value for carbonized material with the same data that it used in *AR3 Final Results.*[8] Second, the Department recalculated Calgon Tianjin's surrogate values for coal and fine by-products by capping those values at the value assigned to their main input, carbonized material.[9] The Department's recalculation of the by-products surrogate values continued to yield a *de minimis* weighted-average dumping margin for Calgon Tianjin.[10] Third, and under protest, the Department averaged the zero and *de minimis* rates calculated for the two mandatory respondents in this administrative review (*i.e.,* Jacobi Carbons AB and Calgon Tianjin) and assigned the resulting zero dumping margin to Ningxia Guanghua, Beijing Pacific, and Shanxi DMD.[11] Finally, the Department determined that the issue concerning the use of a per-unit assessment rate for Shanxi DMD's entries was moot, given that the Department assigned Shanxi DMD a dumping margin of zero.[12] On November 24, 2014, the Court entered judgment sustaining the Remand.[13]

## Timken Notice

In its decision in *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* the CAFC held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (''the Act''), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The Court's November 24, 2014, judgment sustaining the Remand constitutes a final decision of the Court that is not in harmony with the Department's *AR3 Final Results.* This notice is published in fulfillment of the publication requirement of *Timken.*

## Amended Final Results

Because there is now a final court decision, the Department amends *AR3 Final Results* with respect to Cherishmet and Shanxi DMD. The revised weighted-average dumping margins for these exporters during the period April 1, 2009, through March 31, 2010, follow:

| Exporter name | Weighted average dumping margin (dollars per kilogram) |
|---|---|
| Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd[14] ..... | 0.00 |
| Shanxi DMD Corporation ..... | 0.00 |

Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. In the event the Court's ruling is not appealed or, if appealed, upheld by the CAFC, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on unliquidated entries of subject merchandise exported by Cherishmet and Shanxi DMD using the assessment rate calculated by the Department in the Remand and listed above.

## Cash Deposit Requirements

The cash deposit rate for Cherishmet will remain the respondent-specific rate established for the subsequent and most-recent period during which the respondent was reviewed, which is $0.04 per kilogram.[15] The cash deposit rate for the PRC-wide rate, which now includes Shanxi DMD, will remain the PRC-wide entity rate established for the subsequent and most-recent period during which the PRC-wide entity was reviewed, which is 2.42 U.S. dollars per kilogram.[16]

## Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(e), 751(a)(1), and 777(i)(1) of the Act.

Dated: December 1, 2014.

**Paul Piquado,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2014–28577 Filed 12–4–14; 8:45 am]

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# DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–570–924]**

## Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments and Partial Rescission of Review; 2012–2013

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (''PET film'') from the People's Republic of China (''PRC''). The period of review (''POR'') is November 1, 2012, through October 31, 2013. The Department initiated the review with respect to five companies. We preliminarily find that two of the mandatory respondents, Shaoxing Xiangyu Green Packing Co., Ltd. and Tianjin Wanhua Co., Ltd. made sales of subject merchandise at less than normal value (''NV''). We are rescinding the review with respect to Huangshi Yucheng Trade Co. Ltd. (''Yucheng''). Further, we preliminarily find that

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[6] *Id.*

[7] *See Albemarle Corp.* v. *United States,* 931 F. Supp. 2d 1280 (CIT 2013). The Court reserved judgment on the dumping margin assigned to Huahui, which was different from the margin that the Department assigned to Shanxi DMD, Ningxia Guanghua, and Beijing Pacific. *Id.* It explained that the Department could, but was not required to, reconsider Huahui's margin on remand. *Id.*

[8] *See* Remand at 3–8.

[9] *Id.* at 10.

[10] *Id.*

[11] *Id.* at 10–13. The Department did not change the dumping margin assigned to Huahui. *Id.* at 22.

[12] *Id.* at 13–15.

[13] *See Albemarle Corp. et al.* v. *United States,* Consol. Court No. 11–00451 (CIT November 24, 2014).

[14] This dumping margin also applies to Beijing Pacific. *See supra* note 3.

[15] *See Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013,* 79 FR 70163, 70165 (November 25, 2014).

[16] *Id.*

Fuwei Films (Shandong) Co., Ltd. (''Fuwei Films'') and Sichuan Dongfang Insulating Material Co., Ltd., (''Dongfang''), did not have any reviewable transactions during the POR. Interested parties are invited to comment on these preliminary results.

**DATES:** *Effective Date:* December 5, 2014.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Hill or Thomas Martin, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3518 or (202) 482–3936, respectively.

**SUPPLEMENTARY INFORMATION:**

## Scope of the Order

The products covered by the order are all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded.[1] PET film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

## Preliminary Determination of No Shipments

Based on our analysis of U.S. Customs and Border Protection (''CBP'') information and information provided by Fuwei Films and Dongfang, we preliminarily determine that Fuwei Films and Dongfang did not have any reviewable transactions during the POR. For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

## Partial Rescission

On December 2, 2013, Now Plastics Inc. (''Now Plastics'') requested an administrative review of subject merchandise exported by Yucheng. Subsequently, on February 12, 2014, Now Plastics timely withdrew its request for an administrative review of Yucheng's exports. No other parties requested a review of Yucheng. The Department, pursuant to 19 CFR 351.213 (d)(1), is therefore rescinding this administrative review with respect to Yucheng.

## Methodology

The Department conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (''the Act''). We calculated export prices in accordance with section 772 of the Act. Because the PRC is a non-market economy (''NME'') within the meaning of section 771(18) of the Act, we calculated NV in accordance with section 773(c) of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum, which is hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS'').[2] ACCESS is available to registered users at *http://access.trade.gov.* The Preliminary Decision Memorandum is also available in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content.

## Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margins exist for the POR:

| Exporter | Weighted-average dumping margin (percent) |
|---|---|
| Shaoxing Xiangyu Green Packing Co., Ltd | 35.10 |
| Tianjin Wanhua Co., Ltd | 67.69 |

## Disclosure and Public Comment

The Department intends to disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review.[3] Rebuttal briefs may be filed no later than five days after case briefs are filed and may respond only to arguments raised in the case briefs.[4] A table of contents, list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. This summary should be limited to five pages total, including footnotes.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement & Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice.[5] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. Oral argument presentations will be limited to issues raised in the briefs. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a date and time to be determined.[6] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

All submissions, with limited exceptions, must be filed electronically using ACCESS.[7] An electronically filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5 p.m. Eastern Time (''ET'') on the due date. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the APO/Dockets Unit in Room 1870 and stamped with the date and time of receipt by 5 p.m. ET on the due date.[8]

The Department intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

## Assessment Rates

Upon issuance of the final results of this review, the Department will determine, and CBP shall assess, antidumping duties on all appropriate

[1] For a complete description of the scope of the order, *see* ''Decision Memorandum for the Preliminary Results of 2012–2013 Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with this notice (''Preliminary Decision Memorandum'').

[2] ''On November 24, 2014, Enforcement and Compliance changed the name of Enforcement and Compliance's AD and CVD Centralized Electronic Service System (''IA Access'') to AD and CVD Centralized Electronic Service System (''Access''). The Web site location was changed from *http://iaaccess.trade.gov* to *http://access.trade.gov.* The Final Rule changing the references to the Regulations can be found at 79 FR 69046 (November 20, 2014.''

[3] *See* 19 CFR 351.309(c).

[4] *See* 19 CFR 351.309(d).

[5] *See* 19 CFR 351.310(c).

[6] *See* 19 CFR 351.310(d).

[7] *See, generally,* 19 CFR 351.303.

[8] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

entries covered by this review.[9] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. Where either a respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For any individually examined respondent and its importer(s) where neither of those situations is the case, in the final results of this review we will calculate an importer-specific per-unit assessment rate by dividing the total dumping margins for reviewed sales to the importer by the total sales quantity associated with those sales.

On October 24, 2011, the Department announced a refinement to its assessment practice in NME antidumping duty cases.[10] Pursuant to this refinement in practice, for merchandise that was not reported in the U.S. sales databases submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.,* at the individually-examined exporter's cash deposit rate), the Department will instruct CBP to liquidate such entries at the PRC-wide rate. Additionally, pursuant to this refinement, if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number will be liquidated at the PRC-wide rate.

## Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is zero or *de minimis,* then the cash deposit rate will be zero for that exporter); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the PRC-wide entity, 76.72 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

## Notification to Importers

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

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: November 28, 2014.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

## Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

1. Summary
2. Background
3. Scope of the Order
4. Preliminary Determination of No Shipments
5. Selection of Respondents
6. Non-Market Economy Country
7. Separate Rate
8. Surrogate Country
9. Date of Sale
10. Fair Value Comparisons
11. U.S. Price
12. Normal Value

[FR Doc. 2014–28579 Filed 12–4–14; 8:45 am]

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[9] *See* 19 CFR 351.212(b)(1).

[10] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

## DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–580–809]**

## Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2012–2013

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on circular welded non-alloy steel pipe (CWP) from the Republic of Korea (Korea).[1] The period of review (POR) is November 1, 2012, through October 31, 2013. This review covers eight producers or exporters of the subject merchandise, Husteel Co., Ltd. (Husteel), Hyundai HYSCO (HYSCO), Dongbu Steel Co., Ltd., SeAH Steel Corporation, A-JU Besteel Co., Ltd., Kumkang Industrial Co., Ltd., Nexteel Co., Ltd., and Union Steel Co., Ltd. We preliminarily find that Husteel and HYSCO have made sales of the subject merchandise at prices below normal value. We are rescinding this review for the remaining six producers or exporters. Interested parties are invited to comment on these preliminary results.

**DATES:** *Effective Date:* December 5, 2014.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Meek or Joseph Shuler, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230; telephone (202) 482–2778 or (202) 482–1293, respectively.

## Scope of the Order

The merchandise subject to the order is circular welded non-alloy steel pipe and tube. The product is currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) numbers: 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, and 7306.30.5090. Although the HTSUS numbers are provided for convenience and customs purposes, the written

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 78 FR 79392 (December 30, 2013).

product description remains dispositive.[2]

## Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to the following parties because the review requests were timely withdrawn: Dongbu Steel Co., Ltd., SeAH Steel Corporation, A-JU Besteel Co., Ltd., Kumkang Industrial Co., Ltd., Nexteel Co., Ltd., and Union Steel Co., Ltd.[3]

## Methodology

The Department has conducted this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).[4] ACCESS is available to registered users at *http://access.trade.gov,* and is available to all parties in the Central Records Unit, Room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://trade.gov/enforcement.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

## Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margins exist for the respondents for the period November 1, 2012, through October 31, 2013.

| Producer or exporter | Weighted-average dumping margin (percent) |
|---|---|
| Husteel Co., Ltd | 1.15 |
| Hyundai HYSCO | 2.02 |

## Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice.[5] Interested parties may submit case briefs no later than 30 days after the date of publication of the preliminary results.[6] Rebuttal briefs, limited to the issues raised in the case briefs, may be filed no later than five days after the submission of case briefs.[7] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[8] All case and rebuttal briefs must be filed electronically using ACCESS, and must also be served on interested parties.[9] An electronically filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5:00 p.m. Eastern Standard Time on the date that the document is due. Executive summaries should be limited to five pages total, including footnotes.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, using Enforcement and Compliance's ACCESS system within 30 days of publication of this notice.[10] Hearing requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined. Parties should confirm by telephone the date, time, and location of the hearing.

Unless the deadline is extended pursuant to section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.213(h)(2), the Department intends to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their case and rebuttal briefs, within 120 days after the publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

## Assessment Rates

For Husteel and HYSCO, upon issuance of the final results, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Both Husteel and HYSCO reported the name of the importer of record and the entered value for all of their sales to the United States during the POR. If Husteel and HYSCO's weighted-average dumping margins are not zero or *de minimis* (*i.e.,* less than 0.50 percent) in the final results of this review, we will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those sales in accordance with 19 CFR 351.212(b)(1).

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* Where either the respondent's weighted-average dumping margin is zero or *de minimis,*[11] or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the POR produced by Husteel and HYSCO for which they did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate

[2] For a full description of the scope of the order, see the Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2012–2013'' (Preliminary Decision Memorandum), dated concurrently with these results and hereby adopted by this notice.

[3] *See* Letter from Wheatland Tube Company (Wheatland) to the Department, ''Circular Welded Non-Alloy Steel Pipe from Republic of Korea/ Partial Withdrawal of Request for Administrative Review,'' dated March 31, 2014 and Letter from United States Steel Corporation (U.S. Steel) to the Department, ''Circular Welded Non-Alloy Steel Pipe from Korea,'' dated March 31, 2014.

[4] On November 24, 2014, Enforcement and Compliance changed the name of Enforcement and Compliance's AD and CVD Centralized Electronic Service System (IA ACCESS) to AD and CVD Centralized Electronic Service System (ACCESS). The Web site location was changed from *http://iaaccess.trade.gov* to *http://access.trade.gov.* The Final Rule changing the references to the Regulations can be found at 79 FR 69046 (November 20, 2014).

[5] *See* 19 CFR 351.224(b).

[6] *See* 19 CFR 351.309(c)(1)(ii).

[7] *See* 19 CFR 351.309(d)(1).

[8] *See* 19 CFR 351.309(c)(2) and (d)(2).

[9] *See* 19 CFR 351.303(f).

[10] *See* 19 CFR 351.310(c).

[11] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101, 8102 (February 14, 2012).

if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

For Husteel and HYSCO, we intend to issue instructions to CBP 15 days after publication of the final results of this review.

For the companies for which the review has been rescinded, antidumping duties shall be assessed at rates equal to the rates for the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice.

**Cash Deposit Requirements**

The following cash deposit requirements for estimated antidumping duties will be effective upon publication of the notice of final results of administrative review for all shipments of CWP from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for HYSCO and Husteel will be equal to the weighted-average dumping margins established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer has been covered in a prior complete segment of this proceeding, the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 4.80 percent, the ''all others'' rate established in the order.[12] These cash deposit requirements, when imposed, shall remain in effect until further notice.

[12] *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992).

**Notification to Importers**

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

The Department is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 28, 2014.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

## Appendix

**List of Topics Discussed in the Preliminary Decision Memorandum**

I. Summary
II. Background
III. Scope of Order
IV. Rescission of Review In Part
V. Discussion of the Methodology
  1. Comparison to Normal Value
  2. Product Comparisons
  3. Treatment of Grade as a Physical Characteristic
  4. Level of Trade/Constructed Export Price Offset
  5. Constructed Export Price
  6. Normal Value
  7. Currency Conversion
VI. Recommendation

[FR Doc. 2014–28580 Filed 12–4–14; 8:45 am]

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## DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–552–801]**

## Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Rescission of Antidumping Duty New Shipper Review; 2013–2014

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** In response to a request from BASA Joint Stock Company (''BASACO''), the Department of Commerce (''Department'') initiated a new shipper review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam (''Vietnam'') covering the period August 1, 2013, through July 31, 2014.[1] On November 4, 2014, BASACO timely withdrew its request for a new shipper review. Accordingly, the Department is rescinding the new shipper review with respect to BASACO.

**DATES:** *Effective Date:* December 5, 2014.

**FOR FURTHER INFORMATION CONTACT:** Alexander Montoro, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0238.

**Rescission of New Shipper Review**

On September 24, 2014, the Department initiated a new shipper review of BASACO.[2] On November 4, 2014, BASACO withdrew its new shipper review request.[3] 19 CFR 351.214(f)(1) provides that the Department may rescind a new shipper review if the party that requested the review withdraws its request for review within 60 days of the date of publication of the notice of initiation of the requested review in the **Federal Register**. Because BASACO timely withdrew its request for a new shipper review (*i.e.,* 33 days after the date of publication of the notice of initiation of the requested review), the Department is rescinding the new shipper review of the antidumping duty order on certain frozen fish fillets from Vietnam with respect to BASACO. Consequently, BASACO will remain part of the Vietnam-wide entity.

**Assessment**

Because BASACO remains part of the Vietnam-wide entity, it remains under review in the ongoing administrative review of the antidumping duty order of certain frozen fish fillets from Vietnam covering the period August 1, 2013, to July 31, 2014.[4] Therefore, the Department will not order liquidation of entries for BASACO. The Department intends to issue liquidation instructions for the Vietnam-wide entity, which will cover any entries by BASACO, 15 days after publication of the final results of the administrative review covering the

[1] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Initiation of Antidumping Duty New Shipper Review; 2013–2014,* 79 FR 59476 (October 2, 2014) (''*Initiation Notice*'').

[2] *Id.*

[3] *See* letter from BASACO entitled ''Withdrawal of Request for New Shipper Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Review Period—8/1/13–7/31/14,'' dated November 4, 2014.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 79 FR 58729, 58731 (Sept. 30, 2014).

period August 1, 2013, to July 31, 2014 in the **Federal Register**.

### Cash Deposit

The Department will notify U.S. Customs and Border Protection (''CBP'') that bonding is no longer permitted to fulfill security requirements for subject merchandise produced and exported by BASACO that is entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this rescission notice in the **Federal Register**. The Department will notify CBP that a cash deposit of 2.11 U.S. Dollars per kilogram should be collected for all shipments of subject merchandise by BASACO entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this rescission notice.[5]

### Notifications to Interested Parties

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

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

We are issuing and publishing this rescission and notice in accordance with sections 751(a)(2)(B) and 777(i) of the Act and 19 CFR 351.214(f)(3).

Dated: November 20, 2014.

**Gary Taverman,**

*Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2014–28583 Filed 12–4–14; 8:45 am]

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[5] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review; 2011–2012,* 79 FR 37714, 37715 (July 2, 2014).

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Proposed Additions and Deletion

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed additions to and deletion from the Procurement List.

**SUMMARY:** The Committee is proposing to add products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and delete a service previously provided by such agency.

*Comments Must Be Received on or Before:* 1/5/2015.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia 22202–4149.

**FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT:** Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

### Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products and services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

**Products**

*Toner Cartridge, Remanufactured, Lexmark*

*NSN:* 7510–00–NSH–0212—Optra T630/T632/T634 Series Compatible.
*NSN:* 7510–00–NSH–1010—Optra T644/X644/X646 Series Compatible.
*NSN:* 7510–00–NSH–1060—E260/E360/E460/E462 Series Compatible.
*NSN:* 7510–00–NSH–1061—E360/E460/E462 Series Compatible.
*NSN:* 7510–00–NSH–1063—Multiple T & X Series, Compatible, 25,000 page.
*NSN:* 7510–00–NSH–1064—Multiple T & X Compatible, 36,000 page.
*NPA:* TRI Industries NFP, Chicago, IL.
*Contracting Activity:* General Services Administration, New York, NY.
*Coverage:* A-List for the Total Government Requirement as aggregated by the General Services Administration, New York, NY.

**Services**

*Service Type/Locations:* Custodial Service.
U.S. Navy, Naval Air Station Oceana and Naval Auxiliary Landing Field Fentress, U.S. Navy, Dam Neck Annex, 1750 Tomcat Boulevard, Virginia Beach, VA.
U.S. Navy, Naval Weapons Station, U.S. Navy, Cheatham Annex, 160 Main Road, Yorktown, VA.
U.S. Navy, Norfolk Naval Shipyard and St. Juliens Creek Annex, Cassin Ave and Hitchcock Street, Portsmouth, VA.
*NPA:* Didlake, Inc., Manassas, VA.
*Contracting Activity:* Dept of the Navy, Naval FAC Engineering CMD MID LANT, Norfolk, VA.

*Service Type/Location:* Operations and Maintenance.
Bureau of Engraving and Printing, Western Currency Facility, 9000 Blue Mound Road, Fort Worth, TX.
*NPA:* PRIDE Industries, Roseville, CA.
*Contracting Activity:* Dept of Treasury, Bureau of Engraving and Printing, Washington, DC.

*Service Type/Locations:* Facility Support Service.
Department of Homeland Security, ICE, Enforcement and Removal Operations Buffalo Command Center, 205 Oak Street, Batavia, NY.
Buffalo Federal Detention Facility, 4250 Federal Drive, Batavia, NY.
*NPA:* New Dynamics Corporation, Middletown, NY.
*Contracting Activity:* U.S. Immigration and Customs Enforcement, Detention Management—DC Office, Washington, DC.

### Deletion

The following service is proposed for deletion from the Procurement List:

**Service**

*Service Type/Location:* Mess Attendant Service.
121st Air Refueling Wing, 7370 Minuteman Way, Redtail Dining Facility, Bldg. 917, Columbus, OH.
*NPA:* First Capital Enterprises, Inc., Chillicothe, OH.
*Contracting Activity:* Dept of the Army, W7NU USPFO ACTIVITY OH ARNG, Columbus, OH.

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2014–28563 Filed 12–4–14; 8:45 am]

BILLING CODE 6353–01–P

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Addition

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Addition to the Procurement List.

**SUMMARY:** This action adds a product to the Procurement List that will be furnished by the nonprofit agency employing persons who are blind or have other severe disabilities.

**DATES:** *Effective Date:* 1/5/2015.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia 22202–4149.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

**SUPPLEMENTARY INFORMATION:**

## Addition

On 10/31/2014 (79 FR 64754), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed addition to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agency to provide the product and impact of the addition on the current or most recent contractors, the Committee has determined that the product listed below is suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

## Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entity other than the small organization that will furnish the product to the Government.

2. The action will result in authorizing small entity to furnish the product to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product proposed for addition to the Procurement List.

## End of Certification

Accordingly, the following product is added to the Procurement List:

### Product

*NSN:* 8520–01–432–2618—Hand Soap, Liquid, Biobased.
*NPA:* TRI Industries NFP, Chicago, IL.
*Contracting Activity:* General Services Administration, Fort Worth, TX.
*Coverage:* A-List for the Total Government Requirement as aggregated by the General Services Administration, Fort Worth, TX.

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2014–28567 Filed 12–4–14; 8:45 am]

**BILLING CODE 6353–01–P**

# ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–9018–3]**

## Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements
Filed 11/24/2014 Through 11/28/2014.
Pursuant to 40 CFR 1506.9.

*Notice*: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html*.

*EIS No. 20140339, Draft EIS, BLM, NV*, Carson City District Draft Resource Management Plan, Comment Period Ends: 03/27/2015, Contact: Colleen Sievers 775–885–6168,

*EIS No. 20140340, Final EIS, USFS, SC*, Chester County Stream and Riparian/Restoration.

*Enhancement Project, Review Period Ends*: 01/05/2015, Contact: Jim Knibbs 803–561–4078.

*EIS No. 20140341, Final EIS, USFWS, CA*, Maricopa Sun Solar Complex Habitat Conservation Plan, Review Period Ends: 01/05/2015, Contact: Mike Thomas 916–414–6600.

*EIS No. 20140342, Final EIS, USFS, WY*, Teckla-Osage-Rapid City 230 kV Transmission Line Project, Review Period Ends: 01/05/2015, *Contact:* Edward Fischer 605–673–9207.

*EIS No. 20140343, Final EIS, NPS, OH*, Cuyahoga Valley National Park, White-tailed Deer Management Plan, Review Period Ends: 01/05/2015, *Contact:* Craig Kenkel 330–657–2752.

*EIS No. 20140344, Final EIS, FHWA, TX*, US 181 Harbor Bridge, Review Period Ends: 01/05/2015, Contact: Gregory S. Punske, 512–536–5960.

*EIS No. 20140345, Final EIS, FEMA, CA*, East Bay Hills, Final Hazardous Fire Risk Reduction, Review Period Ends: 01/07/2015, *Contact:* Alessandro Amaglio 510–627–7222.

*EIS No. 20140346, Final EIS, USDA, AZ*, Four-Forest Restoration Initiative, Coconino and Kaibab National Forests, Review Period Ends: 01/20/2015, Contact: Annette Fredette, 928–226–4684.

### Amended Notices

*EIS No. 20140275, Final EIS, FHWA, AZ*, South Mountain Freeway (Loop 202), Review Period Ends: 12/26/2014, Contact: Alan Hansen, 602–382–8964. Revision to FR Notice Published 09/24/2014; Extending Review Period from 11/25/2014 to 12/26/2014

*EIS No. 20140297, Draft EIS, USFS, OR*, Kahler Dry Forest Restoration Project, Comment Period Ends: 12/29/2014, Contact: John Evans, 541–278–3869. Revision to FR Notice Published 09/24/2014; Extending Review Period from 11/25/2014 to 12/26/2014

*EIS No. 20140298, Draft EIS, USACE, WA*, Puget Sound Nearshore Ecosystem Restoration, *Comment Period Ends:* 01/08/2015, Contact: Nancy Gleason 206–764–6577. Revision to FR Notice Published 11/28/2014; Correcting the Extended Comment Period to 01/08/2015.

*EIS No. 20140317, Final EIS, USACE, AL*, Update of the Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin in Georgia and Alabama, Review Period Ends: 02/05/2015, Contact: Lewis Sumner 251–694–3857. Revision to FR Notice Published 11/07/2014; Extending Review Period from 12/08/2014 to 02/05/2015.

Dated: December 2, 2014.

**Cliff Rader,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2014–28576 Filed 12–4–14; 8:45 am]

**BILLING CODE 6560–50–P**

# EXPORT-IMPORT BANK

## Sunshine Act Meeting

**ACTION:** Notice of an Open Meeting of the Board of Directors of the Export-Import Bank of the United States.

**TIME AND PLACE:** Thursday, December 11, 2014 at 3:00 p.m. The meeting will be held at Ex-Im Bank in Room 1126, 811 Vermont Avenue NW., Washington, DC 20571.

**OPEN AGENDA ITEMS:** Item No. 1 Ex-Im Bank Advisory Committee for 2015 (New Members)

**PUBLIC PARTICIPATION:** The meeting will be open to public observation for Item No. 1 only.

**FURTHER INFORMATION:** Members of the public who wish to attend the meeting

should call Joyce Stone, Office of the Secretary, 811 Vermont Avenue NW., Washington, DC 20571 (202) 565–3336 by close of business Tuesday, December 9, 2014.

**Lloyd Ellis,**

*Program Specialist, Office of the General Counsel.*

[FR Doc. 2014–28662 Filed 12–3–14; 11:15 am]

BILLING CODE 6690–01–P

## FARM CREDIT ADMINISTRATION

### Sunshine Act Meeting

**AGENCY:** Farm Credit Administration.

**SUMMARY:** Notice is hereby given, pursuant to the Government in the Sunshine Act, of the regular meeting of the Farm Credit Administration Board (Board).

**DATES:** *Date and Time:* The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on December 11, 2014, from 9:00 a.m. until such time as the Board concludes its business.

**FOR FURTHER INFORMATION CONTACT:** Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

**ADDRESSES:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090. Submit attendance requests via email to *VisitorRequest@FCA.gov.* See **SUPPLEMENTARY INFORMATION** for further information about attendance requests.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. Please send an email to *VisitorRequest@FCA.gov* at least 24 hours before the meeting. In your email include: Name, postal address, entity you are representing (if applicable), and telephone number. You will receive an email confirmation from us. Please be prepared to show a photo identification when you arrive. If you need assistance for accessibility reasons, or if you have any questions, contact Dale L. Aultman, Secretary to the Farm Credit Administration Board, at (703) 883–4009. The matters to be considered at the meeting are:

**Open Session**

*A. Approval of Minutes*

- November 13, 2014

*B. New Business*

- Organization, Mergers, Consolidations and Charter Amendments of Banks or Associations—Proposed Rule

*C. Reports*

- Quarterly Report on Economic Conditions and Fcs Conditions
- Semi-Annual Report on Office of Examination Operations

**Closed Session***

*Reports*

- Office of Examination Supervisory and Oversight Activities Report

* Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Dated: December 2, 2014.

**Dale L. Aultman,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 2014–28651 Filed 12–3–14; 11:15 am]

BILLING CODE 6705–01–P

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0508; OMB 3060–0800; and OMB 3060–1058]**

### Information Collections 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 burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. 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 collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before February 3, 2015. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0508.

*Title:* Parts 1 and 22 Reporting and Recordkeeping Requirements.

*Form Number:* Not applicable.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities, Individuals or households, and State, Local or Tribal Governments.

*Number of Respondents and Responses:* 15,713 respondents; 15,713 responses.

*Estimated Time per Response:* 15 minutes–10 hours.

*Frequency of Response:* Recordkeeping requirement; On occasion, quarterly, and semi-annual reporting requirements.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 154, 222, 303, 309 and 332.

*Total Annual Burden:* 4,894 hours.

*Annual Cost Burden:* $19,445,250.

*Privacy Act Impact Assessment:* Yes.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information. The information to be collected will be made available for public inspection. Applicants may request materials or information submitted to the Commission be given confidential treatment under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* Part 22 contains the technical and legal requirements for radio stations operating in the Public Mobile Services. The information collected is used to determine on a case-by-case basis, whether or not to grant licenses authorizing construction and operation of wireless telecommunications facilities to

common carriers. Further, this information is used to develop statistics about the demand for various wireless licenses and/or the licensing process itself, and occasionally for rule enforcement purposes.

This revised information collection reflects changes in rules applicable to Part 22 800 MHz Cellular Radiotelephone (''Cellular'') Service licensees and applicants, as adopted by the Commission in a Report and Order (''R&O'') on November 7, 2014 (WT Docket No. 12–40; RM No. 11510; FCC 14–181). By the R&O, the Commission eliminates or streamlines certain Cellular Service filing requirements, thereby reducing the information collection burdens for Cellular Service respondents.

*OMB Control No.:* 3060–0800.

*Title:* FCC Application for Assignments of Authorization and Transfers of Control: Wireless Telecommunications Bureau and/or Public Safety and Homeland Security Bureau.

*Form No.:* FCC Form 603.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Individuals or households; business or other for-profit entities; not-for-profit institutions; State, local or Tribal Government.

*Number of Respondents and Responses:* 2,447 respondents; 2,447 responses.

*Estimated Time per Response:* 0.5–1.75 hours.

*Frequency of Response:* Recordkeeping requirement; occasion reporting requirement.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 4(i), 154(i), 303(r) and 309(j).

*Total Annual Burden:* 2,759 hours.

*Total Annual Cost:* $366,975.

*Nature and Extent of Confidentiality:* In general there is no need for confidentiality. On a case by case basis, the Commission may be required to withhold from disclosure certain information about the location, character, or ownership of a historic property, including traditional religious sites.

*Privacy Act Impact Assessment:* Yes.

*Needs and Uses:* FCC Form 603 is a multi-purpose form used to apply for approval of assignment or transfer of control of licenses in the wireless services. The data collected on this form is used by the FCC to determine whether the public interest would be served by approval of the requested assignment or transfer. This form is also used to notify the Commission of consummated assignments and transfers of wireless and/or public safety licenses that have previously been consented to by the Commission or for which notification but not prior consent is required. This form is used by applicants/licensees in the Public Mobile Services, Personal Communications Services, General Wireless Communications Services, Private Land Mobile Radio Services, Broadcast Auxiliary Services, Broadband Radio Services, Educational Radio Services, Fixed Microwave Services, Maritime Services (excluding ships), and Aviation Services (excluding aircraft).

The purpose of this form is to obtain information sufficient to identify the parties to the proposed assignment or transfer, establish the parties' basic eligibility and qualifications, classify the filing, and determine the nature of the proposed service. Various technical schedules are required along with the main form applicable to Auctioned Services, Partitioning and Disaggregation, Undefined Geographical Area Partitioning, Notification of Consummation or Request for Extension of Time for Consummation.

This revised information collection reflects changes in rules applicable to Part 22 800 MHz Cellular Radiotelephone (''Cellular'') Service licensees and applicants, as adopted by the Commission in a Report and Order (''R&O'') on November 7, 2014 (WT Docket No. 12–40; RM No. 11510; FCC 14–181). In addition to other rule revisions that do not affect this information collection, the Commission adopted a revised rule Section 22.948(a) to require the electronic submission of maps (in GIS format and PDF) when the Cellular applicant submits Form 603 to apply for Partitioning and Disaggregation. This requirement very slightly increases the total annual burden hours for this information collection. FCC Form 603 itself is not being revised.

*OMB Control No.:* 3060–1058.

*Title:* FCC Application or Notification for Spectrum Leasing Arrangement: Wireless Telecommunications Bureau and/or Public Safety and Homeland Security Bureau.

*Form No.:* FCC Form 608.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities; not-for-profit institutions; State, Local or Tribal Government.

*Number of Respondents and Responses:* 991 respondents; 991 responses.

*Estimated Time per Response:* 1 hour.

*Frequency of Response:* Recordkeeping requirement and on occasion reporting requirement.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 151, 154(i), 154(j), 155, 158, 161, 301, 303(r), 308, 309, 310, 332 and 503.

*Total Annual Burden:* 996 hours.

*Annual Cost Burden:* $1,282,075.

*Nature and Extent of Confidentiality:* In general there is no need for confidentiality. On a case by case basis, the Commission may be required to withhold from disclosure certain information about the location, character, or ownership of a historic property, including traditional religious sites.

*Privacy Act Impact Assessment:* Not applicable.

*Needs and Uses:* FCC Form 608 is a multipurpose form. It is used to provide notification or request approval for any spectrum leasing arrangement (''Lease'') entered into between an existing licensee in certain wireless services and a spectrum lessee. This form also is required to notify or request approval for any spectrum subleasing arrangement (''Sublease''). The data collected on the form is used by the FCC to determine whether the public interest would be served by the Lease or Sublease. The form is also used to provide notification for any Private Commons Arrangement entered into between a licensee, lessee, or sublessee and a class of third-party users (as defined in Section 1.9080 of the Commission's Rules).

This revised information collection reflects changes in rules applicable to Part 22 800 MHz Cellular Radiotelephone (''Cellular'') Service licensees and applicants, as adopted by the Commission in a *Report and Order* (''*R&O*'') on November 7, 2014 (WT Docket No. 12–40; RM No. 11510; FCC 14–181). In addition to other rule revisions that do not affect this information collection, the Commission adopted a revised rule Section 22.948(d) to require the electronic submission of maps (in GIS format and PDF) when the Cellular Service applicant submits Form 608.

The requirement very slightly increases the total annual burden hours for this information collection. FCC Form 608 itself is not being revised.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2014–28581 Filed 12–4–14; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Radio Broadcasting Services; AM or FM Proposals To Change The Community of License

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The following applicants filed AM or FM proposals to change the community of license: Marie H. Whitehead, Executrix, Station KWRW, Facility ID 17835, BPH–20140925ABH, From Rusk, TX, To Troup, TX; Top O Texas Educational Broadcasting Foundation, Station KASV, Facility ID 175031, BPED–20141104AEB, From Red River, NM, To Sanford, CO.

**DATES:** The agency must receive comments on or before February 3, 2015.

**ADDRESSES:** Federal Communications Commission, 445 Twelfth Street SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Tung Bui, 202–418–2700.

**SUPPLEMENTARY INFORMATION:** The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.*

A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *www.BCPIWEB.com.*

Federal Communications Commission.

**James D. Bradshaw,**

*Deputy Chief, Audio Division, Media Bureau.*

[FR Doc. 2014–28509 Filed 12–4–14; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL MARITIME COMMISSION

**[Docket No. 14–15]**

### Ngobros and Company Nigeria Limited v. Oceane Cargo Link, LLC, and Kingston Ansah, Individually; Notice of Filing of Complaint and Assignment

Notice is given that a complaint has been filed with the Federal Maritime Commission (Commission) by Ngobros and Company Nigeria Limited (NCNL), hereinafter ''Complainant,'' against Ocean Cargo Link, LLC (OCL) and Kingston Ansah, hereinafter ''Respondents.'' Complainant states that it is a Nigerian Limited Liability Company. Complainant alleges that Respondent OCL is a license ocean freight forwarder and non-vessel-operating common carrier and Respondent Kingston Ansah is a ''member of OCL'' and ''has utilized OCL as his alter egos [sic].''

Complainant alleges that Respondents have violated the Shipping Act, 46 U.S.C. 41102(c), in connection with the failed shipment of three vehicles from the United States to Nigeria. Complainant alleges that Respondent shipped the vehicles to the wrong destination resulting in the loss of the vehicles.

Complainant seeks an Order holding that Respondents violated § 41102(c); an Order compelling Respondents ''to make reparations to Complainant NCNL in the amount of $180,628.66 for shipping its goods intentionally or unintentionally to a wrong destination and abandoning it there''; ''attorney's fees, interests and costs and expenses incurred in this matter''; and ''such other and further relief as the Commission deems just and proper.''

The full text of the complaint can be found in the Commission's Electronic Reading Room at *www.fmc.gov/14-15.*

This proceeding has been assigned to the Office of Administrative Law Judges. The initial decision of the presiding officer in this proceeding shall be issued by December 1, 2015 and the final decision of the Commission shall be issued by June 1, 2016.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2014–28538 Filed 12–4–14; 8:45 am]

BILLING CODE 6730–01–P

## FEDERAL MARITIME COMMISSION

**[Docket No. 14–16]**

### Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc.; Notice of Filing of Complaint and Assignment

Notice is given that a complaint has been filed with the Federal Maritime Commission (Commission) by Baltic Auto Shipping, Inc., hereinafter ''Complainant,'' against Michael Hitrinov (''Hitrinov'') and Empire United Lines Co., Inc. (''EUL''), hereinafter ''Respondents.'' Complainant states that it is an Illinois corporation. Complainant alleges that Respondent EUL is a licensed NVOCC, and Respondent Hitrinov is ''the sole principal and officer of EUL.''

Complainant alleges that Respondents have violated the Shipping Act, 46 U.S.C. 41102, 41104, 40501, and 46 CFR part 515, in connection with shipment of over 4000 used automobiles over a five year period and charging rates ''in excess of the amounts set forth in EUL's tariff.'' Complainant alleges it ''has sustained and continued to sustain injuries and damages in excess of $400,000.''

Complainant seeks that Respondents ''be required to answer the charges herein; that after due hearing, an order be made commanding said respondent to pay to Complainant by way of reparations for the unlawful conduct . . . with interest and attorney's fees or such other sum as the Commission may determine to be proper as an award of reparation; and that such other and further order or orders be made as the Commission determines to be proper in the premises.''

The full text of the complaint can be found in the Commission's Electronic Reading Room at *www.fmc.gov/14-16.*

This proceeding has been assigned to the Office of Administrative Law Judges. The initial decision of the presiding officer in this proceeding shall be issued by December 1, 2015 and the final decision of the Commission shall be issued by June 1, 2016.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2014–28539 Filed 12–4–14; 8:45 am]

BILLING CODE 6730–01–P

## FEDERAL MARITIME COMMISSION

### Sunshine Act Meeting

**AGENCY:** Federal Maritime Commission.

**TIME AND DATE:** December 10, 2014; 11:00 a.m.

**PLACE:** 800 N Capitol Street NW., First Floor Hearing Room, Washington, DC.

**STATUS:** The first portion of the meeting will be held in Open Session; the second in Closed Session.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Briefing on European Maritime Law Organization's (EMLO) Conference.

2. Briefing on South Atlantic Port Forum held October 30th Concerning Causes and Implications of Congestion at U.S. Ports.

3. Briefing on Gulf Coast Port Forum held November 3rd Concerning Causes and Implications of Congestion at U.S. Ports.

**Closed Session**

1. Staff Briefing Concerning International Affairs.

**CONTACT PERSON FOR MORE INFORMATION:** Karen V. Gregory, Secretary, (202) 523 5725.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2014–28726 Filed 12–3–14; 4:15 pm]

**BILLING CODE 6730–01–P**

## FEDERAL TRADE COMMISSION

### Agency Information Collection Activities; Submission for OMB Review; Comment Request

**AGENCY:** Federal Trade Commission (''FTC'' or ''Commission'').

**ACTION:** Notice.

**SUMMARY:** The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC seeks public comments on proposed information requests by compulsory process to a combined ten or more of the largest cigarette manufacturers and smokeless tobacco manufacturers. The information sought would include, among other things, data on manufacturer annual sales and marketing expenditures. The current FTC clearance from the OMB to conduct such information collection expires January 31, 2015. The Commission intends to ask OMB for renewed three-year clearance to collect this information.

**DATES:** Comments must be submitted by January 5, 2015.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' on your comment. File your comment online at *https://ftcpublic.commentworks.com/ftc/tobaccoreportspra2* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be addressed to Shira Modell, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Mailstop CC–10528, Washington, DC 20580. Telephone: (202) 326–3116.

**SUPPLEMENTARY INFORMATION:**

*Title:* FTC Cigarette and Smokeless Tobacco Data Collection.

*OMB Control Number:* 3084–0134.

*Type of Review:* Extension of currently approved collection.

On August 13, 2014, the Commission sought comment on the information collection requirements associated with the Cigarette and Smokeless Tobacco Data Collection. 79 FR 47463 (''August 13, 2014 Notice''). Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing a second opportunity for the public to comment while seeking OMB approval to renew the pre-existing clearance for the information the FTC proposes to seek from cigarette manufacturers and smokeless tobacco manufacturers.

In response to the August 13, 2014 Notice, the Commission received comments from Altria Client Services (''Altria''), the Campaign for Tobacco-Free Kids (''CTFK''), Legacy, and Professor M. Jane Lewis (''Lewis'') of the Rutgers School of Public Health.

Three of the comments (Legacy, Lewis, and CTFK) specifically noted the utility and importance of the Commission's Cigarette and Smokeless Tobacco Reports, and urged the agency to continue collection and reporting industry sales and marketing expenditure data.[1] Legacy and CTFK also noted that these data are not available from other sources.

Three of the commenters (Altria, CTFK, and Legacy) responded to questions raised in the Commission's 60-day notice concerning the future collection of data on cigarette tar, nicotine, and carbon monoxide yields. Altria stated that the Commission should not require the manufacturers to provide yield data on all varieties of cigarettes they sell and should cease requiring the cigarette manufacturers to report any smoke constituent data, given the Food and Drug Administration's (''FDA'') new statutory authority to collect such data. Altria stated further that if the Commission retains or expands the existing reporting requirements (which require the companies to provide yield data only for those varieties for which such data already exist), it should require all cigarette manufacturers, not just the major companies, to submit those data. Altria, at 3.

CTFK acknowledged that tar, nicotine, and carbon monoxide yield data may be important for researchers and regulatory agencies, but noted that ''the tobacco industry's history of manipulating this self-reported data raises concerns about its accuracy and validity,'' and urged the Commission to coordinate with FDA ''to establish a coherent set of product testing requirements that will best serve the statutory missions of both agencies.'' CTFK, at 3.

Legacy encouraged the Commission to cease its collection and reporting of these cigarette yield data, citing their potential to mislead consumers about health risks, the limitations of existing testing methodologies to produce yield results consistent with those actually experienced by smokers, and the ''potential unintended consequences among people of low literacy and low numeracy'' to understand information on smoke constituent yields. Legacy, at 2–3. Instead, Legacy noted, the Commission and the FDA should work together to determine the best methodology for determining the yields of harmful or potentially harmful smoke constituents, and the best means of disseminating that information in a way that protects public health.

The FTC and FDA staff have long worked together on the many areas where the two agencies share jurisdiction, and the Commission fully expects this tradition to continue now that the agencies share jurisdiction over cigarettes and smokeless tobacco. The Commission further agrees that FDA should be the primary agency to determine the best test methodology. The Commission is not aware, however, of another means of preserving the existing record of cigarette yield trends unless it continues to collect these data. Freedom of Information Act requests filed with the Commission also suggest that researchers remain interested in these data. Accordingly, the Commission intends to continue collecting the data to the extent recipients of the 6(b) Orders possess them.[2]

[1] CTFK and Legacy also urged the Commission to collect and report sales and marketing data for cigars and electronic cigarettes, as well as for conventional tobacco cigarettes and smokeless tobacco. CTFK, at 2–3; Legacy, at 5–6. The Commission will consider those recommendations.

[2] The Commission will consider Altria's recommendation that all cigarette manufacturers be required to provide yield data if the major manufacturers are required to do so, although it believes that the five major cigarette manufacturers

Two commenters (CTFK and Lewis) suggested modifications to the Commission's reports. CTFK recommended that the Commission: (1) Report price discount expenditures for retailers and wholesalers separately; (2) clarify the definitions of certain expenditure categories—specifically, in which category coupons obtained online are to be counted; (3) report data on a company-specific or brand-specific basis, rather than on a fully aggregated basis, and on a state-level basis, as well as nationally; and (4) require manufacturers to report expenditures related to corporate sponsorships and advertisements, and expenditures related to promotion of their youth tobacco prevention programs. CTFK, at 2.

The Commission agrees that separating the existing category for price discounts (which have accounted for more than 70% of cigarette industry expenditures and more than 20% of smokeless tobacco industry expenditures in recent years) into two separate categories would be useful, and consistent with past decisions to disaggregate certain expenditure categories when they represent a significant proportion of overall spending.[3] Regarding CTFK's suggestion that data be reported on other than a fully aggregated, nationwide basis, the cigarette and smokeless tobacco companies assert that those data are confidential and, as CTFK acknowledges, the Commission cannot publicly release trade secrets or certain commercial or financial information. *Id.* at 2 n.2. CTFK's contention that much of the information that the companies claim to be confidential is actually available from other sources seems inconsistent with its assertion that:

> The FTC is currently the primary source for data on cigarette and smokeless tobacco companies' marketing and promotional expenditures. No other agency collects and publishes such information directly from the companies, making the FTC reports the most accurate and reliable assessment of tobacco marketing and promotion expenditures available.

*Id.* at 1. Similarly, when the Commission has previously inquired about the feasibility of requiring expenditures to be reported on a state-by-state basis, rather than nationally, the major cigarette companies have stated that this was not possible. The Commission again asks for comment on this question.

The Commission already requires the recipients of its 6(b) Orders to report certain expenditures made in the name of the company, rather than any of its brands,[4] although it does not include them in its Cigarette and Smokeless Tobacco Reports. The Commission will consider whether those expenditures should be reported in the future. Similarly, the companies do report to the Commission the amount they spend on advertising directed to youth or their parents that are intended to reduce youth smoking or smokeless tobacco use (depending on the Order). The Commission includes this information in the textual portions of its industry Reports (unless only one company reported such spending), not in the annual expenditure-by-category tables.

Lewis noted that the Commission's reports do not define the term ''expenditure,'' and she recommended that the reports clearly state what costs (*e.g.,* contracted outside services, in-house costs, and personnel) are covered. Lewis, at 2. The Commission agrees that this would be a useful addition to its Reports.

Lewis stated that the Commission's reports underestimate direct mail spending because the costs of items distributed by direct mail (*e.g.,* coupons and specialty items) are reported in other categories, and recommended that the Commission require the companies to include the costs of those items in their calculations of their direct mail expenditures.[5] Lewis also recommended that the Commission clarify whether spending for brand-specific Web sites should be reported as advertising on the company's Web site, or as spending on the Internet other than on the company's own Web site, and specify whether expenditures for electronic mail messages should be reported as direct mail or as advertising on the Internet other than on the company's own Internet Web site.[6] Lewis, at 2–3.

The Commission will clarify in future Orders that spending on brand-specific Web sites should be counted as spending on the company's Web sites. However, the Commission does not believe that its Orders should distinguish between, for example, expenditures on coupons delivered through direct mail and coupons delivered by other means. The full impact of couponing by the major cigarette and smokeless tobacco manufacturers can be seen only if expenditures for all coupons are reported together, regardless of how those coupons are delivered to consumers.

The Commission believes that its Orders have been clear that spending on electronic mail messages should be reported as advertising expenditures on the Internet other than on the company's Web site, and that the absence of reported expenditures does not mean that those costs are being categorized incorrectly.[7] However, Lewis's comment raises a question about whether spending on electronic mail messages should continue to be reported in the ''other Internet'' category or should be reported as direct mail expenditures. The Commission requests comment on that question.

Finally, the Commission requests comment on two additional subjects: (1) Its intention to have the cigarette and smokeless tobacco companies that receive these Orders submit two separate datafiles (one containing sales-related data, the other containing data on marketing expenditures), rather than one; and (2) whether it should cease collecting expenditure data on transit advertising.

The Commission's Orders require that sales data be reported in actual dollars, while advertising and promotional expenditures are reported in thousands of dollars; sales data are also reported for each individual variety of cigarette and smokeless tobacco sold by the company, while expenditure data are reported at the brand level. The Commission believes that requiring the recipients of these Orders to submit separate datafiles for sales and marketing expenditure data will both help avoid errors in the preparation of the companies' submissions and expedite the agency staff's processing of those data, without imposing additional costs on the Order recipients.

that have received its Orders in recent years already represent at least 95% of domestic cigarette sales.

[3] For example, the Commission reported spending on a single ''promotional allowances'' category through 2001, at which time separate categories were created for price discounts and promotional allowances paid to retailers, wholesalers, and others.

[4] Both the cigarette and smokeless tobacco Orders require submission of data on ''Public entertainment events (including, but not limited to, concerts and sporting events) bearing or otherwise displaying the name of the Company or any variation thereof but not bearing or otherwise displaying the name, logo, or an image of any portion of the package'' of any of its cigarettes or smokeless tobacco products, or otherwise referring to those products.

[5] As noted above, CTFK also asked about the reporting of coupons obtained online.

[6] Lewis correctly noted that the category for spending other than on the company's Web site specifically references ''direct mail advertising using electronic mail messages.'' Based on her review of recent Commission reports, however, she questioned whether the companies might actually be reporting those costs as direct mail.

[7] For example, companies do not report the costs of employing full-time employees. If those employees are producing the electronic mail messages, their salaries would not show up in the companies' submissions to the Commission.

The Commission has collected and reported data on transit advertising (currently defined as ''advertising on or within private or public vehicles and all advertisements placed at, on or within any bus stop, taxi stand, transportation waiting area, train station, airport or any other transportation facility'') for decades. However, the 1998 Tobacco Master Settlement Agreement prohibited transit advertising, and the major cigarette manufacturers have reported no such spending since 2000, while the major smokeless tobacco companies have never reported any transit spending.[8]

*Burden Statement:*[9]

*Estimated Annual Burden:* 2,100 hours.[10]

*Estimated Number of Respondents:* 15 maximum.

The estimated number of respondents include any time spent by separately incorporated subsidiaries and other entities affiliated with the ultimate parent company that has received the information request.

*Estimated Average Burden per Year per Respondent:* 140 hours.

(a) Information requests to the five largest cigarette companies and five largest smokeless tobacco companies, at a per company average each year of 180 hours = 1,800 hours, cumulatively, per year; and

(b) Information requests to five additional respondents, of smaller size, at a per company average each year of 60 hours = 300 hours, cumulatively, per year.

*Estimated Annual Labor Cost:* $210,000.

*Estimated Capital or Other Non-Labor Cost:* de minimis.

*Request for Comment:*

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before January 5, 2015. Write ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential . . ., '' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[11] Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/tobaccoreportspra2* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 5, 2015. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *http://www.ftc.gov/ftc/privacy.htm.* For supporting documentation and other information underlying the PRA discussion in this Notice, see *http://www.reginfo.gov/public/jsp/PRA/praDashboard.jsp.*

Comments on the information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395–5806.

**David C. Shonka,**

*Principal Deputy General Counsel.*

[FR Doc. 2014–28597 Filed 12–4–14; 8:45 am]

**BILLING CODE 6750–01–P**

[8] *See* Federal Trade Commission Cigarette Report for 2011 (2013), at Tables 2B—2E, *available at http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-cigarette-report-2011/130521cigarettereport.pdf;* Federal Trade Commission Smokeless Tobacco Report for 2011 (2013), at Tables 3B—3H, *available at http://www.ftc.gov/reports/federal-trade-commission-smokeless-tobacco-report-2011.*

[9] The details and assumptions underlying these estimates were set forth in the August 13, 2014 **Federal Register** notice.

[10] The Commission intends to use this PRA clearance renewal to collect information from the companies concerning their marketing and sales activities for the years 2014, 2015, and 2016. The Commission expects to issue compulsory process orders seeking this information annually, but it is possible that orders might not be issued in any given year and that orders seeking information for two years would be issued the next year. The figures set forth in this notice for the estimated hours and labor costs associated with this information collection represent average annual burden over the course of the prospective PRA clearance.

[11] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

## FEDERAL TRADE COMMISSION

**[File No. 141 0141]**

## GlaxoSmithKline, PLC and Novartis AG; Analysis of Proposed Consent Orders To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before December 29, 2014.

**ADDRESSES:** Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/gsknovartisconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''GlaxoSmithKline, PLC and Novartis AG—Consent Agreement; File No. 141–01414'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/gsknovartisconsent* by following the instructions on the Web-based form. If you prefer to file your comment on paper, write ''GlaxoSmithKline, PLC and Novartis AG—Consent Agreement; File No. 141–01414'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Mark Silvia, Bureau of Competition, (202–326–3291), 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for November 26, 2014), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 29, 2014. Write ''GlaxoSmithKline, PLC and Novartis AG—Consent Agreement; File No. 141–01414'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/gsknovartisconsent* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''GlaxoSmithKline, PLC and Novartis AG—Consent Agreement; File No. 141–01414'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 29, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

## Analysis of Agreement Containing Consent Orders To Aid Public Comment

### I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Novartis AG (''Novartis''), which is designed to remedy the anticompetitive effects of Novartis's proposed consumer healthcare joint venture with GlaxoSmithKline, PLC (''GSK'').

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (''Order'').

Pursuant to a series of agreements dated April 22, 2014, GSK and Novartis intend to combine the GSK consumer healthcare business and most of the Novartis consumer healthcare business

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

(excluding Novartis's nicotine replacement therapy (''NRT'') transdermal patch business) into a joint venture in which GSK will hold a 63.5% controlling share and Novartis will hold the remaining 36.5% share (the ''Transaction''). Both parties sell over-the-counter (''OTC'') NRT transdermal patches in the United States. The Commission alleges in its Complaint that the Transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for the manufacture, marketing, distribution, and sale of NRT transdermal patches. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Transaction. Specifically, under the terms of the Consent Agreement, Novartis would be required to divest all of its rights and assets related to U.S. NRT transdermal patches, including its branded product, Habitrol. Novartis has proposed Dr. Reddy's Laboratories (''Dr. Reddy's'') as the buyer of these assets.

## II. The Product and Structure of the Market

The proposed joint venture would likely substantially increase concentration in the market for NRT transdermal patches. Tobacco consumption introduces nicotine into the body, and nicotine addiction is a major contributor to addiction to tobacco. Nicotine replacement therapies work by providing nicotine to the body through sources other than smoking, thereby replacing the nicotine that would have come from tobacco and helping to ease tobacco cravings in those who are attempting to quit. Users of NRT products are therefore more likely to have success in quitting tobacco. NRT transdermal patches work by adhering to the skin, much like an adhesive bandage, and slowly providing a steady amount of nicotine through the skin over the course of a day. Patches are usually provided in decreasing dosages to help the user step down their nicotine intake over time.

Novartis markets and sells the branded NRT transdermal patch Habitrol. The only other branded patch is GSK's NicoDerm CQ. Both companies also market private label versions of their branded patch. Private label products are competitive with the branded products, but there is only one other manufacturer of private label patches, Aveva Drug Delivery Systems. Therefore, without a remedy, the Transaction will consolidate the only two providers of branded NRT transdermal patches, and two of the three producers of private label NRT transdermal patches.

## III. Entry

Entry into the manufacture and sale of NRT transdermal patches would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Transaction. Developing a patch that adheres to the skin and properly delivers nicotine to the body over time is expensive and time consuming, and has a high risk of failure. Even if an entrant is able to successfully develop a new patch, it must then obtain an FDA approval to market the product, which adds several years to the entry process.

## IV. Effects

The Transaction is likely to result in significant competitive harm in the market for NRT transdermal patches. Although the Novartis NRT patch business has been excluded from the consumer healthcare joint venture, GSK's patch business will be included. Thus, Novartis's partial interest in the joint venture means it will benefit from any sales lost to GSK NRT patches in the future. With an interest in its most significant competing product, Novartis would have an increased incentive to raise prices for its NRT patches post-transaction. The Transaction, by altering the interactions between Novartis's and GSK's branded and private label NRT transdermal patches, would likely result in price increases for NRT patches in several ways. First, the Transaction would reduce the competition between the only two branded NRT transdermal patches, and reduce the competition between Novartis's branded Habitrol product and GSK's private label patches, both of which would increase the likelihood that Novartis would increase the prices of Habitrol. Second, the Transaction would reduce the competition between Novartis's private label patches and GSK's NicoDerm CQ and private label patches, which would create incentives for Novartis to increase the price of its private label NRT transdermal patches.

## V. The Consent Agreement

The proposed Consent Agreement effectively remedies the Transaction's anticompetitive effects in the relevant market. Pursuant to the Consent Agreement, the parties are required to divest Novartis's rights and assets related to its U.S. NRT transdermal patch business to Dr. Reddy's. Further, the proposed Consent Agreement requires Novartis to assign to Dr. Reddy's its contract manufacturing agreements for the divested assets. Finally, Novartis will provide a short term packaging agreement to Dr. Reddy's for secondary packaging of the product while Dr. Reddy's seeks a contract packager. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the Transaction is consummated.

Dr. Reddy's is well positioned to assume Novartis's role in the NRT transdermal patch market. Dr. Reddy's manufactures a wide range of branded and private label OTC products for sale in the United States, including private label versions of popular allergy and gastrointestinal products. Thus, Dr. Reddy's is already a supplier to most major retailers of OTC consumer healthcare products. In addition, because Novartis will be transferring its existing contract manufacturing arrangement for its NRT transdermal patches, the divestiture to Dr. Reddy's will not require a transfer of manufacturing processes or facilities. Dr. Reddy's will therefore be able to step into Novartis's current position and immediately begin competing in the market for NRT transdermal patches.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Transaction. If the Commission determines that Dr. Reddy's is not an acceptable acquirer of the divested assets, or that the manner of the divestiture is not acceptable, the parties must unwind the sale of rights to Dr. Reddy's, and divest the U.S. NRT transdermal patch assets to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the product if the parties fail to divest the business as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestiture is successful. The Order requires Novartis to take all action necessary to maintain the economic viability, marketability, and competitiveness of the product to be divested until such time that they are transferred to a Commission-approved acquirer. The Order also requires that Novartis transfer all confidential business information, including customer information related to the divestiture product, to Dr. Reddy's.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official

interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2014–28605 Filed 12–4–14; 8:45 am]

**BILLING CODE 6750–01–P**

## FEDERAL TRADE COMMISSION

**[File No. 141 0187]**

## Medtronic, Inc. and Covidien plc; Analysis of Proposed Consent Order To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before December 29, 2014.

**ADDRESSES:** Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/covidienmedtronicconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Medtronic and Covidien—Consent Agreement; File No. 141 0187'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/covidienmedtronicconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, write ''Medtronic and Covidien—Consent Agreement; File No. 141 0187'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Christine E. Tasso, Bureau of Competition, (202–326–2232), 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for November 26, 2014), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 29, 2014. Write ''Medtronic and Covidien—Consent Agreement; File No. 141 0187'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/covidienmedtronicconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Medtronic and Covidien—Consent Agreement; File No. 141 0187'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 29, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

### Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted from Medtronic, Inc. (''Medtronic'') and Covidien plc (''Covidien''), subject to final approval, an Agreement Containing Consent Order (''Consent Agreement'') designed to remedy the anticompetitive effects resulting from

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Medtronic's proposed acquisition of Covidien. Under the terms of the proposed Decision and Order (''Order'') contained in the Consent Agreement, the parties are required to divest Covidien's drug-coated balloon catheter business to The Spectranetics Corporation (''Spectranetics'').

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

Pursuant to a Transaction Agreement dated June 15, 2014, Medtronic proposes to merge with Covidien in exchange for cash and stock valued at approximately $42.9 billion (the ''Proposed Acquisition''). The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in the U.S. market for drug-coated balloon catheters indicated for the femoropopliteal (''fem-pop'') artery. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

**The Parties**

Headquartered in Minneapolis, Minnesota, Medtronic is a global leader in medical technology that develops, manufactures, and sells device-based medical therapies. Medtronic is developing a drug-coated balloon catheter indicated for the fem-pop artery that is currently in the Food and Drug Administration (''FDA'') approval process.

Headquartered in Dublin, Ireland, Covidien develops, manufactures, and sells medical devices and medical supplies. Like Medtronic, Covidien has a drug-coated balloon catheter indicated for the fem-pop artery under development for which it is seeking FDA approval.

**The Relevant Product and Market Structure**

Drug-coated balloon catheters indicated for the fem-pop artery are used to treat peripheral arterial disease in the fem-pop artery, an artery located above the knee. Peripheral arterial disease results from atherosclerosis, the narrowing of blood vessels due to plaque buildup. Percutaneous transluminal angioplasty (''PTA'') balloon catheters are catheters with balloons that, once inserted into an artery, are expanded to push plaque against the artery's lumen wall to reopen blood flow. Drug-coated balloon catheters are a type of PTA balloon catheter that releases paclitaxel, a cell-proliferation inhibiting drug, into the artery wall during a medical procedure to prevent restenosis, or re-narrowing, of the artery.

The United States is the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition. Drug-coated balloon catheters are medical devices that are regulated by the FDA. As such, drug-coated balloon catheters sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

The U.S. market for drug-coated balloon catheters indicated for the fem-pop artery is highly concentrated with only one current supplier, C.R. Bard, Inc. Medtronic and Covidien are likely to enter as the second and third U.S. suppliers, respectively. While there are other firms with drug-coated balloon catheters in development for sale in the U.S. market, Medtronic and Covidien are the only two anticipated market participants that have advanced to the clinical-trial stage of the FDA approval process for drug-coated balloon catheters indicated for the fem-pop artery.

**Entry**

Entry into the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The development process for a drug-coated balloon catheter is difficult, time-consuming, and expensive. It can take tens of millions of dollars of research and development, significant further funding for clinical trials, and an extensive amount of time to even reach the stage of applying to the FDA for approval. The regulatory approval process itself can also be time-consuming as the FDA reviews the volume of material and data a company submits in support of its application.

**Effects of the Acquisition**

The Proposed Acquisition would cause significant competitive harm to consumers in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery. The merger would combine the second and third anticipated entrants into the market, likely prolonging a duopoly in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery. Because Medtronic and Covidien are the only two anticipated entrants that have advanced to the clinical trial stage of the FDA approval process, the consolidation of the two firms would deprive consumers of the benefits of a third competitive entrant into the market for a substantial period of time. As a result, the Proposed Acquisition likely would reduce the substantial additional price competition that would have resulted from an additional U.S. supplier of drug-coated balloon catheters indicated for the fem-pop artery. Further, the Proposed Acquisition likely would reduce innovation in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery.

**The Consent Agreement**

The Consent Agreement eliminates the competitive concerns raised by Medtronic's proposed acquisition of Covidien by requiring the parties divest to Spectranetics all of the assets and resources needed for it to become an independent, viable, and effective competitor in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery.

Spectranetics possesses the industry and regulatory experience to achieve FDA approval of Covidien's drug-coated balloon catheter and become the third entrant into the U.S. market. Headquartered in Colorado Springs, Colorado, Spectranetics is a leader in peripheral vascular solutions with a portfolio of products that is highly complementary to Covidien's drug-coated balloon catheter. Spectranetics manufactures and markets a range of devices to treat peripheral and coronary arterial disease and is well positioned to restore the benefits of competition that would be lost through the Proposed Acquisition.

Pursuant to the Order, Spectranetics will receive all rights and assets related to Covidien's drug-coated balloon catheter products, including all of the intellectual property used in the drug-coated balloon catheter business. In addition, Spectranetics will take over the manufacturing facility where Covidien currently coats the PTA balloon catheters with paclitaxel. The Order further requires that Covidien provide Spectranetics with a worldwide license to produce the PTA balloon catheters incorporated into the drug-coated balloon catheters. In order to

ensure continuity of supply of a critical input, the Order requires that the parties supply Spectranetics with PTA balloon catheters for up to three years while Spectranetics transitions to independent manufacturing. This provision ensures that drug-coated balloon catheters will continue to be available for ongoing clinical trials while Spectranetics works to obtain FDA approval to manufacture the PTA balloon catheters independently.

To ensure that the divestiture is successful, the Order requires the parties to enter into a transitional services agreement with Spectranetics to assist the company in establishing its manufacturing capabilities and securing all necessary FDA approvals. Further, the Order requires that the parties transfer all confidential business information to Spectranetics, as well as provide access to employees who possess or are able to identify such information. Spectranetics also will have the right to interview and offer employment to employees associated with Covidien's drug-coated balloon catheter business.

The parties must accomplish the divestiture no later than ten days after the consummation of the Proposed Acquisition. If the Commission determines that Spectranetics is not an acceptable acquirer, or that the manner of the divestiture is not acceptable, the Order requires the parties to unwind the sale and accomplish the divestiture within 180 days of the date the Order becomes final to another Commission-approved acquirer.

To ensure compliance with the Order, the Commission has agreed to appoint an Interim Monitor to ensure that Medtronic and Covidien comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to Spectranetics. Further, the Order allows the Commission to appoint a Divestiture Trustee to accomplish the divestiture should the parties fail to comply with their divestiture obligations. Lastly, the Order terminates after ten years.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2014–28609 Filed 12–4–14; 8:45 am]

**BILLING CODE 6750–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–6056–N]**

### Medicare, Medicaid, and Children's Health Insurance Programs; Provider Enrollment Application Fee Amount for Calendar Year 2015

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces a $553.00 calendar year (CY) 2015 application fee for institutional providers that are initially enrolling in the Medicare or Medicaid program or the Children's Health Insurance Program (CHIP); revalidating their Medicare, Medicaid, or CHIP enrollment; or adding a new Medicare practice location. This fee is required with any enrollment application submitted on or after January 1, 2015 and on or before December 31, 2015.

**DATES:** This notice is effective on January 1, 2015.

**FOR FURTHER INFORMATION:** Frank Whelan, (410) 786–1302 for Medicare enrollment issues. Alvin Anderson, (410) 786–2188 for Medicaid and CHIP enrollment issues.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In the February 2, 2011 **Federal Register** (76 FR 5862), we published a final rule with comment period titled ''Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers.'' This rule finalized, among other things, provisions related to the submission of application fees as part of the Medicare, Medicaid, and CHIP provider enrollment processes. As provided in section 1866(j)(2)(C)(i) of the Social Security Act (as amended by section 6401 of the Affordable Care Act) and in 42 CFR 424.514, ''institutional providers'' that are initially enrolling in the Medicare, Medicaid, or CHIP program, revalidating their enrollment, or adding a new Medicare practice location are required to submit a fee with their enrollment application. An ''institutional provider'' for purposes of Medicare is defined at § 424.502 as ''(a)ny provider or supplier that submits a paper Medicare enrollment application using the CMS–855A, CMS–855B (not including physician and non-physician practitioner organizations), CMS–855S, or associated Internet-based PECOS enrollment application.'' As we explained in the February 2, 2011 final rule (76 FR 5914), in addition to the providers and suppliers subject to the application fee under Medicare, Medicaid-only, and CHIP-only institutional providers would include nursing facilities, intermediate care facilities for persons with mental retardation (ICF/MR), psychiatric residential treatment facilities, and may include other institutional provider types designated by a state in accordance with their approved state plan.

As indicated in §§ 424.514 and 455.460, the application fee is not required for either of the following:

- A Medicare physician or non-physician practitioner submitting a CMS–855I.
- A prospective or revalidating Medicaid or CHIP provider—

++ Who is an individual physician or non-physician practitioner; or

++ That is enrolled in Title XVIII of the Act or another state's Title XIX or XXI plan and has paid the application fee to a Medicare contractor or another state.

## II. Provisions of the Notice

### *A. CY 2014 Fee Amount*

In the December 2, 2013 **Federal Register** (78 FR 72089), we published a notice announcing a fee amount for the period of January 1, 2014 through December 31, 2014 of $542.00. This figure was calculated as follows:

- Section 1866(j)(2)(C)(i)(I) of the Act established a $500 application fee for institutional providers in CY 2010.
- Consistent with section 1866(j)(2)(C)(i)(II) of the Act, § 424.514(d)(2) states that for CY 2011 and subsequent years, the preceding year's fee will be adjusted by the percentage change in the consumer price index (CPI) for all urban consumers (all items; United States city average, CPI–U) for the 12-month period ending on June 30 of the previous year.
- The CPI–U increase for CY 2011 was 1.0 percent, based on data obtained from the Bureau of Labor Statistics (BLS). This resulted in an application fee amount for CY 2011 of $505 (or $500 × 1.01).
- The CPI–U increase for the period of July 1, 2010 through June 30, 2011 was 3.54 percent, based on BLS data. This resulted in an application fee amount for CY 2012 of $522.87 (or $505 × 1.0354). In the aforementioned February 2, 2011 final rule, we stated

that if the adjustment sets the fee at an uneven dollar amount, we would round the fee to the nearest whole dollar amount. Accordingly, the application fee amount for CY 2012 was rounded to the nearest whole dollar amount, or $523.00.

- The CPI–U increase for the period of July 1, 2011 through June 30, 2012 was 1.664 percent, based on BLS data. This resulted in an application fee amount for CY 2013 of $531.70 ($523 × 1.01664). Rounding this figure to the nearest whole dollar amount resulted in a CY 2013 application fee amount of $532.00.
- The CPI–U increase for the period of July 1, 2012 through June 30, 2013 was 1.8 percent, based on BLS data. This resulted in an application fee amount for CY 2014 of $541.576 ($532 × 1.018). Rounding this figure to the nearest whole dollar amount resulted in a CY 2014 application fee amount of $542.00.

*B. CY 2015 Fee Amount*

Using BLS data, the CPI–U increase for the period of July 1, 2013 through June 30, 2014 was 2.1 percent. This results in a CY 2015 application fee amount of $553.382 ($542 × 1.021). As we must round this to the nearest whole dollar amount, the resultant application fee amount for CY 2015 is $553.00. This represents a $6.00 difference from the $547 application fee amount that we had originally projected for CY 2015 in the February 2, 2011 final rule.

## III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995. However, it does reference previously approved information collections. The forms CMS–855A, CMS–855B, and CMS–855I are approved under OMB control number 0938–0685; the CMS–855S is approved under OMB control number 0938–1056.

## IV. Regulatory Impact Statement

*A. Background*

We have examined the impact of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, 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 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. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As explained in this section of the notice, we estimate that the total cost of the increase in the application fee will not exceed $100 million. Therefore, this notice does not reach the $100 million economic threshold and is not considered a major notice.

*B. Costs*

The costs associated with this notice involve the increase in the application fee amount that certain providers and suppliers must pay in CY 2015.

1. Initial Estimates in February 2011 Final Rule

In the RIA for the February 2, 2011 final rule, as indicated earlier, we estimated the total amount of application fees for CYs 2011 through 2015. For CY 2015, and based on a projected $547 application fee amount, we estimated in Tables 11 and 12 (76 FR 5955 and 5956) a total cost in fees of $63,465,675 ($17,066,400 + $46,399,275) for 116,025 affected Medicare institutional providers (31,200 newly enrolling + 84,825 revalidating). We also projected in Tables 13 and 14 (76 FR 5957 and 5958) a total cost in CY 2015 application fees of $13,748,298 ($4,615,586 + $9,132,712) for 25,134 affected Medicaid and CHIP providers (8,438 newly enrolling + 16,696 revalidating).

2. Estimates of Number of Affected Institutional Providers in December 2, 2013 Fee Notice

In the December 2, 2013 application fee notice, we estimated that—

- 4,800 newly enrolling Medicare institutional providers would be subject to an application fee in CY 2014. This was based on CMS statistics for the final quarter of CY 2012 and represented a substantial decrease from our estimate in the February 2, 2011 final rule of 31,200 affected, newly enrolling institutional providers for CY 2014.
- 580,000 Medicare providers and suppliers would be subject to revalidation in CY 2014, of which 116,000 would be institutional providers required to pay a fee.
- 27,859 Medicaid and CHIP providers (8,438 newly enrolling + 19,421 revalidating) would be subject to an application fee in CY 2014.

3. CY 2015 Estimates

a. Medicare

Based on CMS data, we estimate that in CY 2015 approximately—

- 10,000 newly enrolling institutional providers will pay an application fee; and
- 35,000 institutional providers will be subject to revalidation and will pay an application fee.

Using a figure of 45,000 (10,000 newly enrolling + 35,000 revalidating) institutional providers, we estimate an increase in the cost of the Medicare application fee requirement in CY 2015 of $270,000 (or 45,000 x $6.00) from the CY 2015 projections we had made in the February 2, 2011 final rule.

b. Medicaid and CHIP

As we did for CY 2014, we continue to estimate that 27,859 (8,438 newly enrolling + 19,421 revalidating) Medicaid and CHIP providers would be subject to an application fee in CY 2015. Using this figure, we project an increase in the cost of the Medicaid and CHIP application fee requirement in CY 2015 of $167,154 (27,859 x $6.00) from the CY 2014 projections we had made in the February 2, 2011 final rule.

c. Total

Based on the foregoing, we estimate the total increase in the cost of the application fee requirement for Medicare, Medicaid, and CHIP providers and suppliers in CY 2015 to be $437,154 ($270,000 + $167,154) from the CY 2015 projections we had made in the February 2, 2011 final rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.5 million to $38.5 million in any 1 year. Individuals and states are not included in the definition of a small entity. As we stated in the RIA for the February 2, 2011 final rule with comment period (76 FR 5952), we do not believe that the application fee

will have a significant impact on small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this notice would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately $141 million. The Agency has determined that there will be minimal impact from the costs of this notice, as the threshold is not met under the UMRA.

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. Since this notice does not impose substantial direct costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

Dated: October 22, 2014.

**Marilyn Tavenner,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2014–28503 Filed 12–2–14; 4:15 pm]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2014–D–1891]**

### How To Obtain a Letter From the Food and Drug Administration Stating That Bioequivalence Study Protocols Contain Safety Protections Comparable to Applicable Risk Evaluation and Mitigation Strategies for Reference Listed Drugs; Draft Guidance for Industry; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''How to Obtain a Letter from FDA Stating that Bioequivalence Study Protocols Contain Safety Protections Comparable to Applicable REMS for RLD.'' This draft guidance describes how a prospective abbreviated new drug application (ANDA) applicant may request a letter stating that FDA has determined the following: The potential applicant's bioequivalence (BE) study protocol contains safety protections comparable to those in the risk evaluation and mitigation strategy (REMS) with elements to assure safe use (ETASU) applicable to the reference listed drug (RLD) and FDA will not consider it a violation of the REMS for the RLD sponsor to provide a sufficient quantity of the RLD to the interested generic firm or its agent to allow the firm to perform the testing necessary to support its ANDA.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 3, 2015.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Giaquinto, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1670, Silver Spring, MD 20993, 240–402–7930, *Elizabeth.Giaquinto@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''How to Obtain a Letter from FDA Stating that Bioequivalence Study Protocols Contain Safety Protections Comparable to Applicable REMS for RLD.'' Section 505–1(a)(1) of the FD&C Act authorizes FDA to require applicants to submit a proposed REMS as a part of the relevant application [1] if FDA determines that a REMS is necessary to ensure that the benefits of a drug outweigh its risks (21 U.S.C. 355–1(a)(1)). A REMS is a required risk management plan that uses tools beyond routine professional labeling (such as a medication guide, a patient package insert, and/or a communication plan) to ensure that the benefits of a drug outweigh its risks (section 505–1(f) of the FD&C Act). In addition, FDA may require ETASU in some circumstances when such elements are necessary to mitigate the risks associated with the drug. ETASU may include, for example, requirements that health care providers who prescribe or administer the drug have particular training or certification; that patients using the drug be monitored and/or enrolled in a registry; or that pharmacies, practitioners, or health care settings that dispense the drug be specially certified.

FDA is aware of instances in which an RLD sponsor has refused to sell drug products to a prospective ANDA applicant seeking to conduct the testing needed to obtain approval, and the RLD sponsor has cited the REMS ETASU as justification. In the interest of facilitating prospective generic applicants' access to RLD products to conduct the testing necessary to support ANDA approval, FDA has, on request, reviewed the BE study protocols proposed by a prospective ANDA

[1] Section 505–1 of the FD&C Act applies to any application for approval of a prescription drug submitted under section 505(b) or (j) of the FD&C Act (including both NDAs submitted under section 505(b)(2) and ANDAs submitted under section 505(j)), as well as applications submitted under section 351 of the Public Health Service Act (42 U.S.C. 262).

applicant to assess whether they provide safety protections comparable to those in the applicable REMS ETASU. When the Agency has determined that comparable protections existed, FDA has issued letters to the RLD sponsor stating so, and indicating that FDA would not consider it to be a violation of the REMS for the RLD sponsor to provide drug product to the prospective ANDA applicant or its agent.

Requesting or obtaining such a letter from FDA is not a legal requirement. If a prospective ANDA applicant chooses to request such a letter, this guidance is intended to clarify the process for doing so.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on how a prospective generic applicant can obtain a letter stating that its BE study protocols contain safety protections comparable to those in the applicable REMS for the RLD. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public.

## II. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

## III. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR parts 312 and 314 have been approved under OMB control numbers 0910–0014 and 0910–0001.

## IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: December 1, 2014.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2014–28540 Filed 12–4–14; 8:45 am]

BILLING CODE 4164–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

**[Docket No. FDA–2014–N–1795]**

## Mallinckrodt Inc. et al.; Withdrawal of Approval of 23 New Drug Applications and 68 Abbreviated New Drug Applications

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is withdrawing approval of 23 new drug applications (NDAs) and 68 abbreviated new drug applications (ANDAs) from multiple applicants. The holders of the applications notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

**DATES:** *Effective Date:* January 5, 2015.

**FOR FURTHER INFORMATION CONTACT:** Florine P. Purdie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6248, Silver Spring, MD 20993–0002, 301–796–3601.

**SUPPLEMENTARY INFORMATION:** The holders of the applications listed in table 1 in this document have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications pursuant to the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

TABLE 1

| Application No. | Drug | Applicant |
|---|---|---|
| NDA 002852 | Plexofer (multivitamins) Syrup | Mallinckrodt Inc., 675 McDonnell Blvd., Hazelwood, MO 63042. |
| NDA 008719 | Levo-Dromoran (levorphanol tartrate) Injection, 2 milligrams (mg)/milliliter (mL). | Valeant Pharmaceuticals North America LLC, 400 Somerset Corporate Blvd., Bridgewater, NJ 08807. |
| NDA 008720 | Levo-Dromoran (levorphanol tartrate) Tablets, 2 mg | Do. |
| NDA 011777 | Sodium Phosphate P 32 Solution | Mallinckrodt Inc. |
| NDA 012366 | Soma Compound with Codeine (carisoprodol, aspirin, and codeine phosphate). | Meda Pharmaceuticals Inc., 265 Davidson Ave., Suite 300, Somerset, NJ 08873–4120. |
| NDA 012708 | Diutensen-R (methyclothiazide and reserpine) Tablets, 2.5 mg/0.1 mg. | Do. |
| NDA 016245 | Vercyte (pipobroman) Tablets | AbbVie, Inc., 1 North Waukegan Rd., Dept. PA 77/Bldg. AP30, North Chicago, IL 60064. |
| NDA 017463 | Motrin (ibuprofen) Tablets, 300 mg, 400 mg, 600 mg, and 800 mg. | McNeil Consumer Healthcare Division of McNeil-PPC, Inc., 7050 Camp Hill Rd., Fort Washington, PA 19034–2299. |
| NDA 018310 | Lymphazurin (isosulfan blue), 1% | Covidien, 60 Middletown Ave., North Haven, CT 06473. |
| NDA 018340 | Aerobid (flunisolide) Inhalation Aerosol [1] | Roche Palo Alto LLC, c/o Genentech Inc., 1 DNA Way, South San Francisco, CA 94080–4990. |
| NDA 018731 | Buspar (buspirone hydrochloride (HCl)) Tablets, 5 mg, 10 mg, 15 mg, and 30 mg. | Bristol-Myers Squibb Co., P.O. Box 4000, Princeton, NJ 08543–4000. |
| NDA 019453 | Drixoral (dexbrompheniramine maleate, pseudoephedrine sulfate, and acetaminophen) Extended-Release Tablets, 3 mg, 60 mg, and 500 mg. | Merck Consumer Care, 556 Morris Ave., Summit, NJ 07901. |

TABLE 1—Continued

| Application No. | Drug | Applicant |
|---|---|---|
| NDA 019842 | Motrin (ibuprofen) Suspension, 100 mg/5 mL | McNeil Consumer Healthcare Division of McNeil-PPC, Inc. |
| NDA 020150 | Nicotrol TD (nicotine transdermal system), 5 mg/16 hour (hr), 10 mg/16 hr, and 15 mg/16 hr. | Do. |
| NDA 020707 | Skelid (tiludronate disodium) Tablets | Sanofi-Aventis U.S. LLC, 55 Corporate Dr., Mailstop 55C–205A, Bridgewater, NJ 08807. |
| NDA 021043 | RID Mousse (pyrethrins 0.33% and piperonyl butoxide 4.0%) Topical Aerosol. | Bayer Healthcare LLC, 100 Bayer Blvd., Whippany, NJ 07981–0915. |
| NDA 021082 | Tavist Allergy Sinus Headache (clemastine fumarate, pseudoephedrine HCl, and acetaminophen) Tablets, 0.335 mg, 30 mg, and 500 mg. | Novartis Consumer Health, Inc., 200 Kimball Dr., Parsippany, NJ 07054. |
| NDA 021190 | Buspar (buspirone HCl) Capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg. | Bristol-Myers Squibb Co. |
| NDA 021335 | Gleevac (imatinib mesylate) Capsules, 50 mg and 100 mg | Novartis Pharmaceuticals Corp., One Health Plaza, East Hanover, NJ 07936. |
| NDA 021745 | Ryzolt (tramadol HCl) Extended-Release Tablets, 100 mg, 200 mg, and 300 mg. | Purdue Pharma Products L.P., One Stamford Forum, Stamford, CT 06901–3431. |
| NDA 022217 | Valturna (aliskiren and valsartan) Tablets | Novartis Pharmaceuticals Corp. |
| NDA 022470 | Nexcede (ketoprofen) Oral Soluble Films, 12.5 mg | Novartis Consumer Health, Inc. |
| ANDA 040034 | Theophylline Extended-Release Tablets, 450 mg | Inwood Laboratories, Inc., Subsidiary of Forest Laboratories, Inc., Harborside Financial Center, Plaza Five, Suite 1900, Jersey City, NJ 07311. |
| ANDA 040052 | Theophylline Extended-Release Capsules, 100 mg, 125 mg, 200 mg, and 300 mg. | Do. |
| ANDA 040365 | Dextroamphetamine Sulfate Tablets, 5 mg | Nesher Pharmaceutical (USA) LLC, 13910 Saint Charles Rock Rd., Bridgeton, MO 63044. |
| ANDA 040367 | Dextroamphetamine Sulfate Tablets, 10 mg | Do. |
| ANDA 060578 | Mycostatin Topical Powder (nystatin topical powder USP) 100,000 units/gram (g). | Delcor Asset Corp., c/o Prestium Pharma Inc., 411 South State St., Suite E–100, Newtown, PA 18940. |
| ANDA 062162 | Erythromycin Estolate Capsules USP, 125 mg and 250 mg | Barr Laboratories, Inc., Subsidiary of Teva Pharmaceuticals USA, 400 Chestnut Ridge Rd., Woodcliff Lake, NJ 07677. |
| ANDA 062256 | Erythromycin Ethylsuccinate Tablets USP, 400 mg | Do. |
| ANDA 062773 | Cephalexin Capsules USP 250 mg | Do. |
| ANDA 062850 | Cephradine Capsules USP 250 mg | Do. |
| ANDA 062851 | Cephradine Capsules USP 500 mg | Do. |
| ANDA 062858 | Cephradine for Oral Suspension USP 125 mg/5 mL | Do. |
| ANDA 062859 | Cephradine for Oral Suspension USP, 250 mg/5 mL | Do. |
| ANDA 063016 | Cefazolin for Injection USP 250 mg/vial, 500 mg/vial, and 1 g/vial. | Teva Pharmaceuticals USA, 425 Privet Rd., Horsham, PA 19044. |
| ANDA 063028 | Erythromycin Delayed-Release Tablets USP, 333 mg | Barr Laboratories, Inc., Subsidiary of Teva Pharmaceuticals USA. |
| ANDA 063086 | Erythromycin Delayed-Release Tablets, 333 mg | Do. |
| ANDA 063098 | Erythromycin Delayed-Release Capsules USP, 250 mg | Do. |
| ANDA 063179 | Erythromycin Stearate Tablets USP 500 mg | ANI Pharmaceuticals, Inc., 210 Main St. West, Baudette, MN 56623. |
| ANDA 064191 | Cefuroxime for Injection USP 7.5 g/vial | Teva Pharmaceuticals USA. |
| ANDA 064192 | Cefuroxime for Injection USP 750 mg/vial and 1.5 g/vial | Do. |
| ANDA 065032 | Doxycycline Capsules USP 50 mg and 100 mg | Sandoz Inc., 4700 Sandoz Dr., Wilson, NC 27893. |
| ANDA 065227 | Ceftriaxone for Injection USP, 250 mg/vial, 500 mg/vial, 1 g/vial, and 2 g/vial. | Teva Pharmaceuticals USA. |
| ANDA 065262 | Ceftriaxone for Injection USP, 1 g/vial and 2 g/vial | Do. |
| ANDA 065274 | Ceftriaxone for Injection USP, 10 g/vial | Do. |
| ANDA 070034 | Sulfamethoxazole and Trimethoprim Tablets USP 400 mg/80 mg. | Teva Pharmaceuticals USA. |
| ANDA 070216 | Sulfamethoxazole and Trimethoprim Tablets USP 800 mg/160 mg. | Barr Laboratories Inc., Subsidiary of Teva Pharmaceuticals. |
| ANDA 072410 | Indomethacin Extended-Release Capsules, 75 mg | Inwood Laboratories, Inc., Subsidiary of Forest Laboratories, Inc. |
| ANDA 072499 | Propranolol HCl Extended-Release Capsules, 60 mg | Do. |
| ANDA 072500 | Propranolol HCl Extended-Release Capsules, 80 mg | Do. |
| ANDA 072501 | Propranolol HCl Extended-Release Capsules, 120 mg | Do. |
| ANDA 072502 | Propranolol HCl Extended-Release Capsules, 160 mg | Do. |
| ANDA 072619 | Albuterol Sulfate Tablets USP 2 mg | Teva Pharmaceuticals USA. |
| ANDA 072620 | Albuterol Sulfate Tablets USP 4 mg | Do. |
| ANDA 073095 | Clemastine Fumerate Syrup, 0.5 mg/5 mL | Do. |
| ANDA 073531 | Potassium Chloride Extended-Release Capsules USP, 8 milliequivalents (mEq). | Do. |
| ANDA 073532 | Potassium Chloride Extended-Release Capsules USP, 10 mEq. | Do. |
| ANDA 073667 | Nortriptyline HCl Capsules, 10 mg, 25 mg, 50 mg, and 75 mg. | Do. |
| ANDA 074043 | Piroxicam Capsules USP, 10 mg and 20 mg | Mylan Pharmaceuticals, Inc., 781 Chestnut Ridge Rd., P.O. Box 4310, Morgantown, WV 26505. |

TABLE 1—Continued

| Application No. | Drug | Applicant |
|---|---|---|
| ANDA 074126 | Atenolol Tablets USP, 25 mg, 50 mg, and 100 mg | Do. |
| ANDA 074589 | Minoxidil Topical Solution, 2% | Teva Pharmaceuticals USA. |
| ANDA 074828 | Acyclovir Capsules, 200 mg | Do. |
| ANDA 074849 | Clomipramine HCl Capsules, 25 mg, 50 mg, and 75 mg | Do. |
| ANDA 074879 | Ketoprofen Extended-Release Capsules, 200 mg | Alkermes Gainesville LLC, 1300 Gould Dr., Gainesville, GA 30504. |
| ANDA 074976 | Acyclovir Tablets USP, 400 mg and 800 mg | Mylan Pharmaceuticals, Inc. |
| ANDA 074977 | Acyclovir Capsules USP, 200 mg | Do. |
| ANDA 075161 | Ticlopidine HCl Tablets USP, 250 mg | Do. |
| ANDA 075472 | Enalapril Maleate Tablets USP, 2.5 mg, 5 mg, 10 mg, and 20 mg. | Do. |
| ANDA 075934 | Nizatidine Capsules USP, 150 mg and 300 mg | Do. |
| ANDA 076036 | Quinapril Tablets USP, 5 mg, 10 mg, 20 mg, and 40 mg | Do. |
| ANDA 076969 | Metoprolol Succinate Extended-Release Tablets USP, 25 mg, 50 mg, 100 mg, and 200 mg. | Sandoz, Inc. |
| ANDA 077136 | Terbinafine HCl Tablets, 250 mg | Mylan Pharmaceuticals, Inc. |
| ANDA 077163 | Sumatriptan Succinate Tablets, 25 mg, 50 mg, and 100 mg | Do. |
| ANDA 077254 | Divalproex Sodium Delayed-Release Tablets USP, 125 mg, 250 mg, and 500 mg. | Do. |
| ANDA 077486 | Glimepiride Tablets USP, 1 mg, 2 mg, and 4 mg | Do. |
| ANDA 077705 | Fosinopril Sodium and Hydrochlorothiazide Tablets, 10 mg/12.5 mg and 20 mg/12.5 mg. | Do. |
| ANDA 077934 | Meloxicam Tablets USP, 7.5 mg and 15 mg | Do. |
| ANDA 077976 | Cromolyn Sodium Nasal Solution USP, 5.2 mg/1 spray | HH & P LLC, c/o Kuker Regulatory Consulting, LLC, 18 Dunbar Way, Mahtomedi, MN 55115. |
| ANDA 078638 | Alendronate Sodium Tablets USP, 35 mg and 70 mg | Mylan Pharmaceuticals, Inc. |
| ANDA 078731 | Levetiracetam Tablets, 250 mg, 500 mg, 750 mg, and 1,000 mg. | Do. |
| ANDA 079184 | Ursodiol Tablets USP, 250 mg and 500 mg | Teva Pharmaceuticals USA. |
| ANDA 081295 | Estradiol Tablets USP, 0.5 mg | Bristol-Myers Squibb Co. |
| ANDA 084499 | Estradiol Tablets USP, 1 mg | Do. |
| ANDA 084500 | Estradiol Tablets USP, 2 mg | Do. |
| ANDA 085794 | Acetaminophen and Codeine Phosphate Tablets USP, 300 mg/30 mg. | Mutual Pharmaceutical Co., Inc., 1100 Orthodox St., Philadelphia, PA 19124. |
| ANDA 085795 | Acetaminophen and Codeine Phosphate Tablets USP, 300 mg/15 mg. | Do. |
| ANDA 087176 | Chlorthalidone Tablets USP, 50 mg | Ivax Pharmaceuticals, Inc., Subsidiary of Teva Pharmaceuticals USA, 400 Chestnut Ridge Rd., Woodcliff Lake, NJ 07677. |
| ANDA 087653 | Acetaminophen and Codeine Phosphate Tablets USP, 300 mg/60 mg. | Mutual Pharmaceutical Co., Inc. |
| ANDA 088833 | Triprolidine HCl, pseudoephedrine HCl, and Codeine Phosphate Cough Syrup, 1.25 mg/5 mL, 30 mg/5 mL, and 10 mg/5 mL. | Wockhardt Bio AG, c/o Morton Grove Pharmaceuticals, Inc., 6451 Main St., Morton Grove, IL 60053. |
| ANDA 088896 | Promethazine VC with Codeine (promethazine HCl, phenylephrine HCl, and codeine phosphate) Cough Syrup, 6.25 mg/5 mL, 5 mg/5 mL, and 10 mg/5 mL. | Do. |
| NDA 202343 | Juvisync (sitagliptin and simvastatin) Tablets, 100 mg/10 mg, 100 mg/20 mg, and 100 mg/40 mg. | Merck Sharp & Dohme Corp., 351 North Sumneytown Pike, P.O. Box 1000, UG2CD–015, North Wales, PA 19454. |

[1] This product included an oral pressurized metered-dose inhaler that contained chlorofluorocarbons (CFCs) as a propellant. CFCs may no longer be used as a propellant for any flunisolide metered-dose inhalers (see 75 FR 19213, April 14, 2010).

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research, by the Commissioner, approval of the applications listed in table 1 in this document, and all amendments and supplements thereto, is hereby withdrawn, effective January 5, 2015. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the FD&C Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in Table 1 that are in inventory on the date that this notice becomes effective (see the **DATES** section) may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: December 1, 2014.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2014–28541 Filed 12–4–14; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3507(a)(1)(D) of the Paperwork

Reduction Act of 1995, the Health Resources and Services Administration (HRSA) has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

**DATES:** Comments on this ICR should be received no later than January 5, 2015.

**ADDRESSES:** Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Health Professions Student Loan (HPSL) Program and Nursing Student Loan (NSL) Program Administrative Requirements (Regulations and Policy).

OMB No. 0915–0047—Extension.

*Abstract:* The statutory authorities for the Health Professions Student Loan (HPSL) Program, as authorized by Public Health Service (PHS) Act sections 721–722, and 725–735, and the Nursing Student Loan (NSL) Program, as authorized by PHS Act sections 835–842, contain a number of recordkeeping and reporting requirements for academic institutions and loan applicants. The applicable regulations for these programs under 42 CFR part 57 details the various requirements (see chart below).

*Need and Proposed Use of the Information:* The requirements are essential for assuring that borrowers are aware of their rights and responsibilities, academic institutions have accurate records of the history and status of each loan account in order to pursue aggressive collection efforts to reduce default rates, and that academic institutions maintain adequate records for audit and assessment purposes to help the U.S. Department of Health and Human Services safeguard federal funds made through the Federal Capital Contribution (FCC). Academic institutions are free to use improved information technology to manage the information required by the regulations.

*Likely Respondents:* Financial Aid Directors working at institutions participating in the HPSL and NSL Programs.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS
RECORDKEEPING REQUIREMENTS

| Regulatory/section requirements | Number of record keepers | Hours per year | Total burden hours |
|---|---|---|---|
| HPSL Program: | | | |
| 57.206(b)(2), Documentation of Cost of Attendance | 50 | 325 | 16,250 |
| 57.208(a), Promissory Note | 90 | 325 | 29,250 |
| 57.210((b)(1)(i), Documentation of Entrance Interview | 40 | 325 | 13,000 |
| 57.210(b)(1)(ii), Documentation of Exit Interview | 80 | 334 | 26,720 |
| 57.215(a)&(d), Program Records | 140 | 334 | 46,760 |
| 57.215(b), Student Records | 70 | 334 | 23,380 |
| 57.215(c), Repayment Records | 150 | 334 | 50,100 |
| HPSL Subtotal | | | 205,460 |
| NSL Program: | | | |
| 57.306(b)(2)(ii), Documentation of Cost of Attendance | 16.0 | 282 | 4,512 |
| 57.308(a), Promissory Note | 4.5 | 282 | 1,269 |
| 57.310(b)(1)(i), Documentation of Entrance Interview | 1.5 | 282 | 423 |
| 57.310(b)(1)(ii), Documentation of Exit Interview | 1.5 | 348 | 522 |
| 57.315(a)(1)&(a)(4), Program Records | 21.0 | 348 | 7,308 |
| 57.315(a)(2), Student Records | 8.5 | 348 | 2,958 |
| 57.315(a)(3), Repayment Records | 5.0 | 348 | 1,740 |
| NSL Subtotal | | | 18,732 |

* Includes active and closing schools.
HPSL data includes active and closing Loans for Disadvantaged Students (LDS) program schools.

REPORTING REQUIREMENTS

| Regulatory/section requirements | Number of respondents | Responses per respondent | Total annual responses | Hours per response | Total hour burden |
|---|---|---|---|---|---|
| HPSL Program: | | | | | |
| 57.206(a)(2), Student Financial Aid Transcript | n/a | | | | |
| 57.208(c), Loan Information Disclosure | 325 | 299.5 | 97,338 | 0.63 | 60,836 |
| 57.210(b)(1)(i), Entrance Interview | 325 | 139.5 | 45,338 | 0.50 | 22,669 |
| 57.210(b)(1)(ii), Exit Interview | 334 | 113.5 | 37,909 | 1.00 | 37,909 |

REPORTING REQUIREMENTS—Continued

| Regulatory/section requirements | Number of respondents | Responses per respondent | Total annual responses | Hours per response | Total hour burden |
|---|---|---|---|---|---|
| 57.210(b)(1)(iii), Notification of Repayment | 334 | 862.5 | 288,075 | 0.38 | 108,028 |
| 57.210(b)(1)(iv), Notification During Deferment | 334 | 17.0 | 5,678 | 0.63 | 3,549 |
| 57.210(b)(1)(vi), Notification of Delinquent Accounts | 334 | 172.5 | 57,615 | 1.25 | 72,019 |
| 57.210(b)(1)(x), Credit Bureau Notification | 334 | 6 | 2,004 | 0.50 | 1,002 |
| 57.210(b)(4)(i), Write-off of Uncollectible Loans | 5 | 1 | 5 | 3.00 | 15 |
| 57.211(a) Disability Cancellation | 3 | 1 | 3 | 1.00 | 3 |
| 57.215(a)(2), Administrative Hearings | 0 | 0 | 0 | 0 | 0 |
| 57.215(a)(d), Administrative Hearings | 0 | 0 | 0 | 0 | 0 |
| HPSL Subtotal | | | | | 306,029 |
| NSL Program: | | | | | |
| 57.306(a)(2), Student Financial Aid Transcript | | | | | |
| 57.310(b)(1)(i), Entrance Interview | 282 | 17.5 | 4,935 | 0.42 | 2,048 |
| 57.310(b)(1)(ii), Exit Interview | 348 | 9.0 | 3,132 | 0.42 | 1,300 |
| 57.301(b)(1)(iii), Notification of Repayment | 348 | 9.0 | 3,132 | 0.27 | 830 |
| 57.310(b)(1)(iv), Notification During Deferment | 348 | 1.5 | 522 | 0.29 | 151 |
| 57.310(b)(1)(vi), Notification of Delinquent Accounts | 348 | 42.5 | 14,790 | 0.04 | 592 |
| 57.310(b)(1)(x), Credit Bureau Notification | 348 | 709.0 | 246,732 | 0.00 | 86 |
| 57.310(b)(4)(i), Write-off of Uncollectible Loans | 23 | 1.0 | 23 | 3.00 | 69 |
| 57.311(a), Disability Cancellation | 16 | 1.0 | 16 | 1.00 | 16 |
| 57.315(a)(1)(ii), Administrative Hearings | 0 | 0 | 0 | 0 | 0 |
| 57.316(a)(d), Administrative Hearings | 0 | 0 | 0 | 0 | 0 |
| NSL Subtotal | | | | | 5,092 |

*Includes active and closing schools.

**Jackie Painter,**

*Acting Director, Division of Policy and Information Coordination.*

[FR Doc. 2014–28555 Filed 12–4–14; 8:45 am]

**BILLING CODE 4165–15–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 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; Outstanding Investigator Award 2.

*Date:* March 24–26, 2015.

*Time:* 6:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Peter J. Wirth, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W154, Rockville, MD 20850, 240–276–6434, *pw2q@nih.gov*.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Outstanding Investigator Award 1.

*Date:* March 24–26, 2015.

*Time:* 6:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Michael B. Small, Ph.D., Chief, Program and Review Extramural Staff Training Office, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W412, Rockville, MD 20850, 240–276–6438, *smallm@mail.nih.gov*.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Outstanding Investigator Award 3.

*Date:* March 24–26, 2015.

*Time:* 6:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Shamala K. Srinivas, Ph.D., Scientific Review Officer, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, 7W530, Rockville, MD 20850, 240–276–6442, *ss537t@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: December 1, 2014.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2014–28530 Filed 12–4–14; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Human Genome Research Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, National Human Genome Research Institute.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Human Genome Research Institute, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Board of Scientific Counselors, National Human Genome Research Institute.

*Date:* December 10–11, 2014.

*Closed:* December 10, 2014, 5:00 p.m. to 7:00 p.m.

*Agenda:* To review and evaluate personal qualifications and performance, and competence of individual investigators.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Open:* December 10, 2014, 7:00 p.m. to 9:30 p.m.

*Agenda:* To discuss matters of program relevance.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Open:* December 11, 2014, 8:00 a.m. to 1:45 p.m.

*Agenda:* To discuss matters of program relevance.

*Place:* National Institutes of Health, Natcher Conference Center, Room F1/F2 (lower level), 45 Center Drive, Bethesda, MD 20892.

*Closed:* December 11, 2014, 1:45 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate personal qualifications and performance, and competence of individual investigators.

*Place:* National Institutes of Health, Natcher Conference Center, Room F1/F2 (lower level), 45 Center Drive, Bethesda, MD 20892.

*Open:* December 11, 2014, 3:30 p.m. to 5:00 p.m.

*Agenda:* Closing Keynote.

*Place:* National Institutes of Health, Natcher Conference Center, Room F1/F2 (lower level), 45 Center Drive, Bethesda, MD 20892.

*Contact Person:* Monica Berger, Executive Secretary, Office of the Scientific Director, National Human Genome Research Institute, 50 South Drive, Bldg. 50, Rm. 5222, Bethesda, MD 20892, 301–294–6873, *bergerm@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: December 1, 2014.

**David Clary,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2014–28529 Filed 12–4–14; 8:45 am]

**BILLING CODE 4140–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Clinical Center; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors of the NIH Clinical Center.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the CLINICAL CENTER, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Board of Scientific Counselors of the NIH Clinical Center.

*Date:* January 5–6, 2015.

*Time:* 8:00 a.m. to 4:45 p.m.; 8:00 a.m. to 11:45 a.m.

*Agenda:* To review and evaluate the Bioethics Department.

*Place:* National Institutes of Health, Building 10, 4–2551, 10 Center Drive, Bethesda, MD 20892.

*Contact Person:* Mary Sparks, Nurse Consultant for the Deputy Director for Clinical Care, Office of the Deputy Director, Clinical Center, National Institutes of Health, Building 10, Room 6–3521, Bethesda, MD 20892, (301) 496–3515.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: December 1, 2014.

**Michelle Trout,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2014–28527 Filed 12–4–14; 8:45 am]

**BILLING CODE 4140–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cognition, Diabetic Neuropathy and Metabolomics.

*Date:* December 19, 2014.

*Time:* 3:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Suzan Nadi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217B, MSC 7846, Bethesda, MD 20892, 301–435–1259, *nadis@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: December 1, 2014.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2014–28528 Filed 12–4–14; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### United States Immigration and Customs Enforcement

### Agency Information Collection Activities: Extension, With Changes, of an Existing Information Collection; Comment Request

**ACTION:** 30-Day notice of information collection for review; Form No. I–901; fee remittance for certain F, J and M non-immigrants; OMB Control No. 1653–0034.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), is submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. The information collection was previously published in the **Federal Register** on September 25, 2014, Vol. 79 No. 22829 allowing for a 60 day comment period. No comments were received on this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

Written comments and suggestions regarding items contained in this notice and especially with regard to the estimated public burden and associated response time should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for U.S. Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

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

**Overview of This Information Collection**

(1) *Type of Information Collection:* Extension, with changes, of a currently approved information collection.

(2) *Title of the Form/Collection:* Fee Remittance for Certain F, J and M Non-immigrants.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–901, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Public Law 104–208, Subtitle D, Section 641 directs the Attorney General, in consultation with the Secretary of State and the Secretary of Education, to develop and conduct a program to collect information on nonimmigrant foreign students and exchange visitors from approved institutions of higher education, as defined in section 101(a) of the Higher Education Act of 1965, as amended or in a program of study at any other DHS approved academic or language-training institution, to include approved private elementary and secondary schools and public secondary schools, and from approved exchange visitor program sponsors designated by the Department of State (DOS). It also authorized a fee, not to exceed $200, to be collected from these students and exchange visitors to support this information collection program. DHS has implemented the Student and Exchange Visitor Information System (SEVIS) to carry out this statutory requirement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 805,786 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The burden figures have been updated since the publication of the 60 day **Federal Register** notice to provide better estimates—201,447 annual burden hours.

Dated: December 1, 2014.

**Scott Elmore,**

*Program Manager, Forms Management Office, Office of the Chief Information Officer, U.S. Immigration and Customs Enforcement, Department of Homeland Security.*

[FR Doc. 2014–28504 Filed 12–4–14; 8:45 am]

**BILLING CODE 9111–28–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5752–N–102]**

### 30-Day Notice of Proposed Information Collection: Survey Questions for Small Contractor Marketplace

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

**DATES:** *Comments Due Date:* January 5, 2015.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *ColettePollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the

information collection for a period of 60 days was published on September 29, 2014.

**A. Overview of Information Collection**

*Title of Information Collection:* Survey Form for Small Contractor Initiative.

*OMB Approval Number:* 2506—New.

*Type of Request:* New collection.

*Form Number:* N/A.

*Description of the need for the information and proposed use:* Survey collection form for the Small Contractor Initiative. HUD is partnering with the U.S. Small Business Administration (SBA) and BusinessUSA to promote the HUD Small Contractor Initiative through the BusinessUSA FBOpen Web site. The Web site will be used by HUD and other federal agencies to notify small contractors for bid opportunities nationwide in one place online. Surveys will be collected from grantees in the BusinessUSA online system and follow-up user surveys for different user groups such as HUD grantees, contracting companies, lenders, surety bond agents, and business counseling organizations.

*Respondents:* (*i.e.* affected public): State, local, and tribal governments. HUD grantees, contracting companies, lenders, surety bond agents, and business counseling organizations.

*Estimated Number of Responses:* 5,000.

*Estimated Number of Responses:* 20,000.

*Frequency of Response:* 4.

*Average Hours per Response:* 1.

*Total Estimated Burdens:* 20,000.

| Information collection | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response | Annual cost |
|---|---|---|---|---|---|---|---|
| Survey Form ..... | 5,000 | 4 | 20,000 | 1 | 20,000 | $0 | $0 |
| Total ..... | 5,000 | 4 | 20,000 | 1 | 20,000 | 0 | 0 |

**B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(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;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 28, 2014.

**Colette Pollard,**

*Department Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2014–28621 Filed 12–4–14; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5752–N–101]**

## 30-Day Notice of Proposed Information Collection: Use Restriction Agreement Monitoring and Compliance

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

**DATES:** *Comments Due Date:* January 5, 2015.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Colette Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on June 25, 2014.

**A. Overview of Information Collection**

*Title of Information Collection:* Use Restriction Agreement Monitoring and Compliance.

*OMB Approval Number:* 2502–0577.

*Type of Request:* Revision or extension of currently approved collection.

*Form Number:* (HUD–90060, HUD–90061, HUD–90065, HUD–90066, HUD–93140, HUD–93142, HUD–93143, HUD–93144, HUD–90067, HUD–90068, HUD–90069, HUD–90070, HUD–93150, HUD–93155, HUD–90075).

*Description of the need for the information and proposed use:* This information is necessary for HUD to ensure that owners of certain multifamily housing projects comply with use restriction requirements once the mortgage agreement is terminated. This information is also used to monitor owner compliance with the Use Restriction Agreement provisions.

*Estimated Number of Respondents:* Non-profit institutions.

*Estimated Number of Responses:* 848.

*Estimated Number of Responses:* 848.

*Frequency of Response:* 1.

*Average Hours per Response:* 2.

*Total Estimated Burdens:* 1,696.

**B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of

information described in Section A on the following:

(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;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 26, 2014.

**Colette Pollard,**

*Department Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2014–28629 Filed 12–4–14; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5756–N–41]**

## 60-Day Notice of Proposed Information Collection: Application for Energy Innovation Fund—Multifamily Pilot Program

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

**DATES:** *Comments Due Date:* February 3, 2015.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

**FOR FURTHER INFORMATION CONTACT:** Office Of Portfolio Management, Claude Dickson, Bonds and Appeals Manager, Office of Multifamily Housing, *claude.c.dickson@hud.gov,* Phone Number: (202) 402–8372, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

### A. Overview of Information Collection

*Title of Information Collection:* Application for Energy Innovation Fund—Multifamily Pilot Program.

*OMB Approval Number:* 2502–0599.

*Type of Request:* Extension of currently approved collection.

*Form Number:* Sample Final Report.

*Description of the need for the information and proposed use:* Application information will be used to evaluate, score and rank applications for grant funds.

*Estimated Number of Respondents:* 12.

*Estimated Number of Responses:* 120.

*Frequency of Response:* 4.

*Average Hours per Response:* 25.

*Total Estimated Burdens:* 464.

### B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(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;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: December 1, 2014.

**Laura M. Marin**

*Associate General Deputy Assistant Secretary for Housing–Associate Deputy Federal Housing Commissioner.*

[FR Doc. 2014–28594 Filed 12–4–14; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5752–N–100]**

## 30-Day Notice of Proposed Information Collection: Multifamily Insurance Benefits Claims Package

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

**DATES:** *Comments Due Date:* January 5, 2015.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email at *Colette Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 21, 2014.

**A. Overview of Information Collection**

*Title of Information Collection:* Multifamily Insurance Benefits Claims Package.

*OMB Approval Number:* 2502–0418.

*Type of Request:* Extension of currently approved collection.

*Form Number:* HUD–2741, HUD–2742, HUD–2744A, HUD–2744B, HUD–2744C, HUD–2744D, HUD–2744E, HUD–434, HUD–1044D.

*Description of the need for the information and proposed use:* We need this information to pay a claim. This has to do with all the backup paperwork to pay a complete and accurate claim for the mortgagee company.

*Estimated Number of Respondents:* Business or other for-profit.

*Estimated Number of Responses:* 125.

*Frequency of Response:* On occasion.

*Average Hours per Response:* 4.25.

*Total Estimated Burdens:* 531.25.

**B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(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;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 26, 2014.

**Colette Pollard,**

*Department Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2014–28631 Filed 12–4–14; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5750–N–49]**

## Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Ms. Theresa M. Ritta, Chief Real Property Branch, the Department of Health and Human Services, Room 5B–17, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–6672 (This is not a toll-free number). HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Army:* Ms. Veronica Rines, Office of the Assistant Chief of Staff for Installation Management, Department of Army, Room 5A128, 600 Army Pentagon,

Washington, DC 20310, (571) 256–8145; (This is not a toll-free number).

Dated: November 25, 2014.

**Brian P. Fitzmaurice,**

*Director, Division of Community Assistance, Office of Special Needs Assistance Programs.*

**TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM, FEDERAL REGISTER REPORT FOR 12/05/2014**

**Suitable/Available Properties**

*Building*

Arizona

Building 90890
Fort Huachuca
Fort Huachuca AZ 85613
Landholding Agency: Army
Property Number: 21201440051
Status: Unutilized
Comments: Off-site removal only; no future agency need; 40 sq. ft.; 80+ months vacant; repairs needed; contact Army for more information

California

Building 00054
Los Alamitos Joint Forces Training Base
Los Alamitos CA 90720
Landholding Agency: Army
Property Number: 21201440019
Status: Unutilized
Comments: Off-site removal only; no future agency need; relocation extremely difficult due to size/type; 13,680 sq. ft.; national guard readiness center; very poor conditions; contact Army for more information

Colorado

Building 01431
6101 Wetzel Ave.
Ft. Carson CO 80913
Landholding Agency: Army
Property Number: 21201440050
Status: Unutilized
Comments: Off-site removal only; no future agency need; 202 sq. ft.; 4+ months vacant; repair needed; contact Army for more information

Georgia

Building 7097
Fort Stewart
Ft. Stewart GA 31314
Landholding Agency: Army
Property Number: 21201440007
Status: Underutilized
Comments: Off-site removal only; no future agency need; relocation difficult due to size/type; 9,520 sq. ft.; child development center; 6+ months vacant; poor conditions; contact Army for more information

100
Hunter Army Airfield
Hunter Army Airfield GA 31409
Landholding Agency: Army
Property Number: 21201440008
Status: Excess
Comments: Off-site removal only; relocation extremely difficult due to size; 13,331 sq. ft.; classroom; poor conditions; contact Army for more information

1020
Hunter Army Airfield
Hunter Army Airfield GA 31409
Landholding Agency: Army
Property Number: 21201440009
Status: Underutilized
Comments: Off-site removal only; no future agency need; relocation extremely difficult due to size/type; 39,653 sq.; storage; 1+ month vacant; contact Army for more information

9002
Hunter Army Airfield
Hunter Army Airfield GA 31406
Landholding Agency: Army
Property Number: 21201440010
Status: Underutilized
Comments: Off-site removal only; no future agency need; relocation difficult due to type; 221 sq. ft.; 12+ months vacant; poor conditions; asbestos; contact Army for more information

5 Buildings
Fort Benning
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201440013
Status: Underutilized
Directions: 8744; 8780; 8782; 8787; 9045
Comments: Off-site removal only; no future agency need; sq. ft. varies; poor conditions; contact Army for more information

Building 8510
5037 Moye Rd.
Fort Benning GA 31905
Landholding Agency: Army
Property Number: 21201440014
Status: Unutilized
Comments: Off-site removal only; no future agency need; 10,800 sq. ft.; relocation extremely difficult due to size/type; 8+ yrs.-old; poor conditions; contact Army for more information

2 Buildings
Fort Benning
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201440016
Status: Underutilized
Directions: 9208; 9211
Comments: Off-site removal only; no future agency need; relocation difficult due to size/type; sq. ft. varies; poor conditions; secured area; contact Army for more information

Tennessee

9 Buildings
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440002
Status: Excess
Directions: 00039; 00846; 05123; 05638; 05640; 05641; 05646; 07540; 07811
Comments: Off-site removal only; relocation may be extremely difficult due to size/type; sq. ft. varies; poor conditions; contamination; contact Army for more information

09R28
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440003
Status: Underutilized
Comments: Off-site removal only; no future agency need; 552 sq. ft.; 26+ yrs.-old; range support facility; repairs needed; secured area; contact Army for more information

04R28
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440004
Status: Underutilized
Comments: Off-site removal only; no future agency need; 800 sq. ft.; 26+ yrs.-old; major repairs; secured area; contact Army for more information

03R28, 02r28, & 01R28
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440005
Status: Underutilized
Comments: Off-site removal only; no future agency need; 552 sq. ft.; range support facility; major repairs; secured area; contact Army for more information

05127
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440058
Status: Excess
Comments: Off-site removal only; 224 sq. ft.; storage; fair conditions; contact Army for more information on accessibility/removal requirements

4 Buildings
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440059
Status: Excess
Directions: 05211 (320 sq. ft.); 05665 (800 sq. ft.); 00100 (800 sq. ft.); 01604 (126 sq. ft.)
Comments: Off-site removal only; fair conditions; usage varies; contact Army for more information on a specific property

Texas

07133
Fort Bliss
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201440011
Status: Unutilized
Comments: Off-site removal only; no future agency need; relocation difficult due to size/type; 12,178 sq. ft.; storage; 120+ months vacant; poor conditions; contact Army for more information

5 Buildings
Fort Bliss
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201440012
Status: Unutilized
Directions: 07134; 07142; 07153; 07162; 07178
Comments: Off-site removal only; no future agency need; relocation difficult due to size/type; sq. ft. varies; 120+ months vacant; poor conditions; contact Army for more information

05095
Fort Bliss
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201440022
Status: Unutilized

Comments: Off-site removal only; no future agency need; 12+ months vacant; good conditions; secured area; contact Army for more information

07113
Fort Bliss
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201440023
Status: Unutilized
Comments: Off-site removal only; 8,855 sq. ft.; no future agency need; relocation difficult due to size/type; 120+ months vacant; child-care center; poor conditions; contact Army for more information

2 Buildings
Yoakum USARC
Yoakum TX 77995
Landholding Agency: Army
Property Number: 21201440035
Status: Underutilized
Directions: P1005; P1006
Comments: Off-site removal only; no future agency need; 30 sq. ft.; storage for flammable materials; 53+ yrs.-old; remediation needed; contact Army for more information

01113
Red River Army Depot
Texarkana TX 75507
Landholding Agency: Army
Property Number: 21201440043
Status: Excess
Comments: Off-site removal only; 257 sq. ft.; access control facility; 50+ yrs.-old; contact Army for more information

00940
Red River Army Depot
Texarkana TX 75507
Landholding Agency: Army
Property Number: 21201440044
Status: Excess
Comments: Off-site removal only; 200 sq. ft.; break room; extensive deterioration; 19+ yrs.-old; secured area; contact Army for more information

00930
Red River Army Depot
Texarkana TX 75507
Landholding Agency: Army
Property Number: 21201440046
Status: Excess
Comments: Off-site removal only; 200 sq. ft.; ammunition storage; 31+ yrs.-old; extensive deterioration; secured area; contact Army for more information

Washington

Building 02080
Joint Base Lewis McChord
JBLM WA 98433
Landholding Agency: Army
Property Number: 21201440048
Status: Underutilized
Comments: Off-site removal only; no future agency need; relocation may be difficult due to type/size; 2,031 sq. ft.; storage; 1+ month vacant; major repairs needed; contact Army for more information

2 Buildings
Joint Base Lewis McChord
JBLM WA 98433
Landholding Agency: Army
Property Number: 21201440057
Status: Underutilized
Directions: 01036; 01037
Comments: Off-site removal only; no future agency need; relocation extremely difficult due to size; 8,142 sq. ft. for each; major repairs needed; contact Army for more information

Wisconsin

7 Buildings
Fort McCoy
Ft. McCoy WI 54656
Landholding Agency: Army
Property Number: 21201440053
Status: Unutilized
Directions: 00822; 01146; 01350; 02559; 02866; 09020; 09030
Comments: Off-site removal only; no future agency need; relocation may be difficult due to size/type; contamination; poor conditions; sq. varies; secured area; contact Army for more info.

**Unsuitable Properties**

*Building*

Alabama

C1310
Fort McClellan
Ft. McClellan AL 36205
Landholding Agency: Army
Property Number: 21201440032
Status: Unutilized
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

7134
Redstone Arsenal
Redstone Arsenal AL 35898
Landholding Agency: Army
Property Number: 21201440038
Status: Unutilized
Comments: Documented deficiencies: suffered severe flood damage; severe structural damage; clear threat to physical safety
Reasons: Extensive deterioration

4812
Redstone Arsenal
Redstone Arsenal AL 35898
Landholding Agency: Army
Property Number: 21201440039
Status: Unutilized
Comments: Documented deficiencies: suffered major damage from tornado; roof torn completely off; clear threat to physical safety
Reasons: Extensive deterioration

Arkansas

5 Buildings
Pine Bluff Arsenal
Pine Bluff AR 71602
Landholding Agency: Army
Property Number: 21201440045
Status: Unutilized
Directions: 32070; 33150; 34133; 51650; 55040
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Colorado

Building 07303
Fort Carson
Ft. Carson CO 80913
Landholding Agency: Army
Property Number: 21201440020
Status: Unutilized
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Illinois

343
USAG-Rock Island Arsenal
Rock Island Arsenal IL 61299
Landholding Agency: Army
Property Number: 21201440037
Status: Underutilized
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Maryland

10 Buildings
Aberdeen Proving Ground
Aberdeen MD 21005
Landholding Agency: Army
Property Number: 21201440025
Status: Unutilized
Directions: 00351; 00379; 00893; E2570; E3365; E4100; E4162; E5307; E5359; E6000
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

E6100
Aberdeen Proving Ground
Abingdon MD 21009
Landholding Agency: Army
Property Number: 21201440027
Status: Unutilized
Comments: Entire property located w/in floodway where it has not been contained or corrected
Reasons: Floodway

6 Buildings
Aberdeen Proving Ground
Aberdeen MD 21010
Landholding Agency: Army
Property Number: 21201440028
Status: Unutilized
Directions: E6101; E6102; E6105; E6110; E6111; E6112
Comments: Entire property located in a floodway where it has not been contained/corrected; public access denied and no alternative method to gain access w/out compromising national security
Reasons: Floodway; Secured Area

Missouri

13 Buildings
Fort Leonard Wood
Fort Leonard Wood MO 65473
Landholding Agency: Army
Property Number: 21201440024
Status: Unutilized
Directions: 02431; 02433; 02435; 02462; 02464; 02466; 02468; 02470; 02472; 02474; 02476; 02478;02480
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Building 00500
Fort Leonard Wood
Fort Leonard Wood MO 65049
Landholding Agency: Army
Property Number: 21201440026

Status: Unutilized
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

11 Buildings
Fort Leonard Wood
Fort Leonard Wood MO 65473
Landholding Agency: Army
Property Number: 21201440029
Status: Unutilized
Directions: 02461; 02463; 02465; 02467; 02469; 02471; 02473; 02475; 02477; 02479; 02481
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

3 Buildings
Fort Leonard Wood
Fort Leonard Wood MO 65473
Landholding Agency: Army
Property Number: 21201440030
Status: Unutilized
Directions: 02430; 02432; 02434
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

2 Buildings
Fort Leonard Wood Lake of Ozarks Rec. Area
Fort Leonard Wood MO 65473
Landholding Agency: Army
Property Number: 21201440031
Status: Unutilized
Directions: 00550; 00500
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

New Jersey

2 Buildings
Picatinny Arsenal
Dover NJ 07806
Landholding Agency: Army
Property Number: 21201440056
Status: Unutilized
Directions: 3208B; 3208G
Comments: Documented deficiencies: roof caving in; walls are rotted; overgrown vegetation; clear threat to physical safety
Reasons: Extensive deterioration

North Carolina

4 Buildings
Fort Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201440001
Status: Unutilized
Directions: M6450; M2346; 14865; 03554
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

7 Buildings
Fort Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201440021
Status: Underutilized
Directions: 12732; 69262; 69357; 85703; 85706; 86103; 42102
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Oklahoma

Buildings
Fort Sill
Ft. Sill OK 73503
Landholding Agency: Army
Property Number: 21201440054
Status: Unutilized
Directions: 6280; 6281; 6283; 6292; 6295; 6293
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Pennsylvania

6 Buildings
Tobyhanna Army Depot
Tobyhanna PA 18466
Landholding Agency: Army
Property Number: 21201440036
Status: Unutilized
Directions: 00046; 00245; 00246; A0031; A0132; S0051
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Rhode Island

Building 000P2
570 Read Schoolhouse Rd.
NG Coventry RI 02816
Landholding Agency: Army
Property Number: 21201440049
Status: Excess
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Building OSKRG
Camp Fogarty
East Greenwich RI 02818
Landholding Agency: Army
Property Number: 21201440052
Status: Unutilized
Comments: Documented Deficiencies: structural damage; several large holes; severely rotten foundation; extreme rodent infestation; clear threat to physical safety
Reasons: Extensive deterioration

Tennessee

19 Buildings
Fort Campbell
Ft. Campbell TN 42223
Landholding Agency: Army
Property Number: 21201440055
Status: Excess
Directions: A5212; 06099; 05860; 05800; 05223; 05217; 05668; 05214; 05213; 05212; 05160; 05128; 05125; 05121; 03068; 02604; 00893; 00892; 00849
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Texas

01445
Red River Army Depot
Texarkana TX 75507
Landholding Agency: Army
Property Number: 21201440040
Status: Excess
Comments: Public access denied and no alternative method to gain access w/out compromising national security; documented deficiencies: roof caving-in; clear threat to physical safety
Reasons: Extensive deterioration; Secured Area

3 Buildings
Red River Army Depot
Red River Army Depot TX 75507
Landholding Agency: Army
Property Number: 21201440041
Status: Excess
Directions: 01161; 01162; 01165
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

01154
Red River Army Depot
Texarkana TX 75507
Landholding Agency: Army
Property Number: 21201440042
Status: Excess
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Virginia

5 Buildings
Fort Pickett Training Center
Blackstone VA 23824
Landholding Agency: Army
Property Number: 21201440006
Status: Unutilized
Directions: T2362; T2363; T2364; T2411; T2603
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

6 Buildings
Fort Belvoir
Ft. Belvoir VA 22060
Landholding Agency: Army
Property Number: 21201440017
Status: Excess
Directions: 1151; 1906; 1141; 1186; 1194; 1195
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

2 Buildings
Defense Distribution San Joaquin
Tracy Site 00046, 0234A
Tracy VA 95304
Landholding Agency: Army
Property Number: 21201440018
Status: Unutilized
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Washington

23 Buildings
Joint Base Lewis McChord
JBLM WA 98433
Landholding Agency: Army
Property Number: 21201440047
Status: Underutilized
Directions: 07517; 07514; 07507; 07500; 03422; 03421; 03420; 03419; 03416; 03415; 03414; 03413; 03412; 03324; 03287; 03286; 03279; 03278; 03277; 03214;03212; 03213; 03080

Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

Wisconsin

09003
Fort McCoy
Ft. McCoy WI 54656
Landholding Agency: Army
Property Number: 21201440034
Status: Unutilized
Comments: Public access denied and no alternative method to gain access w/out compromising national security
Reasons: Secured Area

[FR Doc. 2014–28336 Filed 12–4–14; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

**[156D0102DM/DS64600000/DLSN00000.000000/DX.64601]**

### Notice of Senior Executive Service Performance Review Board Appointments

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice provides the names of individuals who have been appointed to serve as members of the Department of the Interior Senior Executive Service (SES) Performance Review Board.

**DATES:** These appointments are effective upon publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Thomas Mulhern, Director, Office of Human Resources, Office of the Secretary, Department of the Interior, 1849 C Street NW., Washington, DC 20240, Telephone Number: (202) 208–6761.

**SUPPLEMENTARY INFORMATION:** The members of the Department of the Interior SES Performance Review Board are as follows:

**Name**

ALTEMUS, MICHELE J.
ANDERSON, ALLYSON K.
ANDREW, JONATHAN M.
APPLEGATE, JAMES D. R.
ARROYO, BRYAN
ATKINSON, KAREN J
AUSTIN, STANLEY J.
AWNI, MUHAMMAD H.
BALES, JERAD D.
BARCHENGER, ERVIN J
BATHRICK, MARK L.
BAYANI, THERESA WALSH
BEALL, JAMES W
BEAN, MICHAEL J.
BEARPAW, GEORGE WATIE
BEAUDREAU, TOMMY P.
BECK, RICHARD T.
BELIN, ALLETTA D.
BERRIGAN, MICHAEL J.
BIRDSONG, BRET CREECH
BLACK, MICHAEL S.
BLAIR, JOHN WATSON
BLANCHARD, MARY JOSIE
BLEDSOE DOWNES, ANN MARIE
BOLING, EDWARD A.
BOLTON, HANNIBAL
BOWKER, BRYAN L.
BROUN, LAURENCE I.
BROWN, LAURA B.
BROWN, WILLIAM Y
BUFFA, NICOLE NMN
BURCH, MELVIN E.
BURCKMAN, JAMES N.
BURDEN, JOHN W.
BURNS, SYLVIA W.
CALDWELL, MICHAEL A.
CARAMANIAN, LORI L.
CARL, LEON M.
CARTER-PFISTERER, CAROLE
CLARK, HORACE G.
CLEMENT, JOEL P.
COLANDER, BRANDI ADELE
COMPTON, JEFFREY S.
CONNELL, JAMIE E.
CORDOVA-HARRISON, ELIZABE
CRAFF, ROBERT C.
CRIBLEY, BUD C
CRUICKSHANK, WALTER D.
CRUZAN, DARREN A.
DARNELL, JOSEPH D.
DAVIS, MARK H
DEAN, FRANCIS J.
DEERINWATER, DANIEL J.
DICKINSON, WILLIAM K.
DOHNER, CYNTHIA
DOUGLAS, JAMES C.
DREHER, ROBERT GEOFFREY
DUTSCHKE, AMY L.
EDSALL, DONNA LYNN
ELLIS, STEVEN A
ESQUIVEL, FRANCIS O.
ESTENOZ, SHANNON A.
ETHRIDGE, MAX M.
FAETH, LORRAINE V.
FARBER, MICHAEL D
FERRITER, OLIVIA B.
FLANAGAN, DENISE A.
FORD, JEROME E.
FORREST, VICKI L.
FRAZER, GARY D.
FREEMAN, SHAREE M.
FREIHAGE, JASON E.
FROST, HERBERT C.
FULP, TERRANCE J
GALLAGHER, KEVIN T
GIDNER, JEROLD L.
GIMBEL, JENNIFER L
GLENN, DOUGLAS A
GLOMB, STEPHEN J.
GOKLANY, INDUR M.
GOLDFUSS, CHRISTINA WHITE
GONZALES-SCHREINER, ROSEA
GOODWIN, JANET A.
GOULD, GREGORY J.
GOULD, ROWAN W.
GRAZIANO, ANGELA V.
GREENBERGER, SARAH D.
GROSS, LAWRENCE NMN JR.
GUERTIN, STEPHEN D.
HAINES, DAVID ELSWORTH
HAMLEY, JEFFREY L.
HANNA, JEANETTE D.
HARRIS, SARAH E
HART, PAULA L.
HARTLEY, DEBORAH J.
HASKETT, GEOFFREY L.
HAUGRUD, KEVIN JACK
HAWBECKER, KAREN S.
HERBST, LARS T.
HILDEBRANDT, BETSY J.
HOSKINS, DAVID WILLIAM
HUMBERT, HARRY L
IMPSON, ROBERT K.
ISEMAN, THOMAS M
IUDICELLO, FAY S.
JAMES, JAMES D. JR.
JOHNSTON, MICHAEL J.
JUEN, JESSE J.
KEABLE, EDWARD T.
KELLY, FRANCIS P.
KELLY, KATHERINE P
KENDALL, JAMES J. JR.
KENNA, JAMES G
KIMBALL, SUZETTE M.
KINSINGER, ANNE E.
KLEIN, ELIZABETH A.
KNOX, VICTOR W.
KURTH, JAMES W.
LAIRD, JOSHUA RADBILL
LANCE, LINDA L
LAPOINTE, TIMOTHY L.
LAROCHE, DARRELL WILLIAM
LAURO, SALVATORE R.
LEE, LORRI J
LEHNERTZ, CHRISTINE S.
LOFTIN, MELINDA J.
LOHOEFENER, RENNE R.
LOPEZ, ESTEVAN R
LORDS, DOUGLAS A.
LOUDERMILK, WELDON B.
LUEBKE, THOMAS A
LUEDERS, AMY L.
LYONS, JAMES R
MABRY, SCOTT L.
MASICA, SUE E.
MCCAFFERY, JAMES G.
MCDOWALL, LENA E
MCKEOWN, MATTHEW J.
MEHLHOFF, JOHN J.
MELIUS, THOMAS O
MENTORE-SMITH, HOPE Y.
MILAKOFSKY, BENJAMIN E
MONACO, JENNIFER ROMERO
MORRIS, DOUGLAS W.
MOSS, ADRIANNE L.
MULHERN, THOMAS A.
MULLER, BRUCE C JR
MURILLO, DAVID G.
MURPHY, TIMOTHY M.
MUSSENDEN, PAUL A.
NEDD, MICHAEL D.
NEIMEYER, SARAH C
NEUBACHER, DONALD L.

O'DELL, MARGARET G.
ONEILL, KEITH JAMES
ORR, L. RENEE
ORTIZ, HANKIE P.
OWENS, GLENDA HUDSON
PALMA, JUAN M
PAYNE, GRAYFORD F.
PEREZ, JEROME E
PETERSON, PENNY LYNN
PIMLEY, LOWELL D.
PINTO, SHARON ANN
PLETCHER, MARY F.
PRINCE, VENUS MCGHEE
PULA, NIKOLAO IULI
QUINLAN, MARTIN J.
QUINT, ROBERT J
RAUCH, PAUL A.
REYNOLDS, MICHAEL T.
REYNOLDS, THOMAS G.
RIDEOUT, STERLING J. JR
ROBERSON, EDWIN L
ROBERTS, LAWRENCE SCOTT
RODI, JOHN L.
ROESSEL, CHARLES M.
ROSEN, DIANE K.
ROSS, JOHN W
ROTH, BARRY N.
ROUNTREE, CARL D.
RUGEN, CATHERINE E.
RUHS, JOHN F
RUSS, DAVID P.
RYAN, MICHAEL J.
SALERNO, BRIAN M
SALOTTI, CHRISTOPHER P.
SARRI, KRISTEN JOAN
SCHNEIDER, MARGARET N.
SCHOCK, JAMES H.
SHEEHAN, DENISE E.
SHOLLY, CAMERON H
SHOPE, THOMAS D.
SIMMONS, SHAYLA F.
SIMPSON, DONALD A
SINGER, MICHELE F.
SLACK, JAMES J.
SMILEY, KARLA J.
SMITH, MICHAEL R.
SOGGE, MARK K.
SONDERMAN, DEBRA E.
SOUZA, PAUL
SPEAKS, STANLEY M.
STEVENS, BARTHOLOMEW S.
STEWARD, JAMES D.
SUAZO, RAYMOND
TABER, TERESA RENEE
TAYLOR, WILLIE R.
TEITZ, ALEXANDRA ELIZABET
THOMPSON, THOMAS D
THORNHILL, ALAN D.
THORSEN, KIMBERLEY A.
THORSON, ROBYN
TOOTHMAN, STEPHANIE S.
TSCHUDY, DEBORAH GIBBS
TUGGLE, BENJAMIN N.
UBERUAGA, DAVID V.
VELA, RAYMOND DAVID
VELASCO, JANINE M.
VOGEL, ROBERT A.
WAINMAN, BARBARA W.
WALKER, WILLIAM T.
WALSH, NOREEN E.
WARD, JOSEPH M JR
WASHBURN, ELIZABETH R
WASHBURN, JULIA L.
WAYSON, THOMAS C.
WEAVER, JESS D.
WEBER, WENDI
WELCH, RUTH L.
WENK, DANIEL N.
WERKHEISER, WILLIAM H.
WHITE, JOHN ETHAN
WHITTINGTON, SAMUEL Q.
WILLIAMS, LC
WILLIAMS, MARGARET C.
WOLF, ROBERT W
WOODY, WILLIAM C.
WORONKA, THEODORE
YU, DONALD YOON

**Thomas Mulhern,**

*Director, Office of Human Resources.*

[FR Doc. 2014–28568 Filed 12–4–14; 8:45 am]

**BILLING CODE 4334–12–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

**[DR.5B711.IA000815]**

### Indian Gaming

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Tribal-State Class III Gaming Compact taking effect.

**SUMMARY:** This notice publishes the Class III Amended and Restated Tribal-State Compact between the Viejas Band of Kumeyaay Indians [1] and the State of California taking effect.

**DATES:** Effective December 5, 2014.

**FOR FURTHER INFORMATION CONTACT:** Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

**SUPPLEMENTARY INFORMATION:** Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Amended and Restated Tribal-State Compact (Compact) between the State of California (State) and the Viejas Band of Kumeyaay Indians (Tribe) modifies the revenue sharing requirements. The expiration date of the Compact was not extended and remains December 31, 2030. The Secretary took no action on the Compact within 45 days of its submission by the Tribe and the State. Therefore, the compact is considered to have been approved, but only to the extent that the Compact is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Dated: December 1, 2014.

**Kevin K. Washburn,**

*Assistant Secretary—Indian Affairs.*

[FR Doc. 2014–28600 Filed 12–4–14; 8:45 am]

**BILLING CODE 4310–4N–P**

[1] The Tribe is identified as the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation in the Department's List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 FR 4748, 4749 (January 29, 2014).

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NRNHL–17160; PPWOCRADI0, PCU00RP14.R50000]**

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before November 7, 2014. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 22, 2014. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: November 17, 2014.

**J. Paul Loether,**

*Chief, National Register of Historic Places/ National Historic Landmarks Program.*

**ILLINOIS**

**Cook County**

Polish National Alliance Headquarters, (Ethnic (European) Historic Settlement in the city of Chicago 1860–1930 MPS), 1514–1520 W. Division St., Chicago, 14001063

Robertson, John, Jr., House, 145 W. Main St., Barrington, 14001064

Strauss, Jesse L., Estate, 110 Maple Hill Rd., Glencoe, 14001065

**Du Page County**

Coffeen, William and Helen, House, 306 S. Garfield, Hinsdale, 14001066

**Kane County**

Elgin Downtown Commercial District, Roughly bound by Division, Villa Center, Fulton & Grove, Elgin, 14001067

**Whiteside County**

Martin House, 707 10th Ave., Fulton, 14001068

**IOWA**

**Lee County**

Park-to-Park Residential Historic District, 400–1100 blks. of Ave. F & 400–1100 blks. of Ave. E, Fort Madison, 14001069

**MARYLAND**

**Baltimore Independent city**

Brewers Hill Historic District, Roughly bounded by Eastern Ave., S. Conkling, S. Haven & Dillon Sts., Baltimore, 14001070

**MISSOURI**

**St. Louis Independent city**

General Electric Supply Corporation Building, 2653 Locust St., St. Louis (Independent City), 14001071

**NEW YORK**

**Rensselaer County**

Marsh-Link-Pollock Farm, 66 White Church Ln., Brunswick, 14001072

**OHIO**

**Cuyahoga County**

Hubbard Cooke Block, 2206–2220 Superior Viaduct, Cleveland, 14001073

Liquid Carbonic Corporation Dry Ice Plant, 1318 W. 58th St., Cleveland, 14001074

**Hamilton County**

St. Aloysius-on-the-Ohio, 134 Whipple & 6207, 6214 & 6218 Portage Sts., 6206 Gracely Dr., Cincinnati, 14001075

**OREGON**

**Multnomah County**

Rutherford House, 833 NE. Shaver St., Portland, 14001076

**RHODE ISLAND**

**Kent County**

Cedar Hill, 4157 Post Rd., Warwick, 14001077

**Providence County**

Edgewood Historic District—Taft Estate Plat (Boundary Increase), (Edgewood Neighborhood, Cranston, R.I. MPS), E. side of Narragansett Blvd. between Windsor Rd. & Ocean Ave., Cranston, 14001078

**VIRGINIA**

**Fairfax County**

Great Falls Park Historic District, Bounded by Potomac R., Georgetown Pike & River Bend Rd., Great Falls, 14001079

**WYOMING**

**Converse County**

Dorr Ranch, Approx. 5 mi. NE. of Woody Creek & Steinle Rds., Bill, 14001080

A request for removal has been received for the following resources:

**IOWA**

**Boone County**

Boone Bridge, Old US 30 over Des Moines R., Boone, 98000761

**Pottawattamie County**

Hancock Savings Bank, 311 Main St., Hancock, 83000401

**Scott County**

Cook, Clarissa C., Library—Blue Ribbon News Building, 528 Brady St., Davenport, 83002415

Lend-A-Hand Club, 105 S. Main St., Davenport, 84001459

Petersen's, J. H. C., Sons Wholesale Building, 122–124 W. River Dr., Davenport, 83002484

Riepe Drug Store—G. Ott Block, 403 W. 2nd St., Davenport, 83002493

Schauder Hotel, 126 W. River Dr., Davenport, 83002495

Schick's Express and Transfer Co., 118–120 W. River Dr., Davenport, 83002497

Young, Col. Joseph, Block, 502 Brady St., Davenport, 83002526

**Washington County**

Johnson, Thomas, Polygonal Barn, (Iowa Round Barns: The Sixty Year Experiment TR), Off IA 114, Wellman, 86001451

**Winneshiek County**

Big Stone Mills, 113 N. Main St., Spillville, 09000516

[FR Doc. 2014–28537 Filed 12–4–14; 8:45 am]

BILLING CODE 4312–51–P

## DEPARTMENT OF THE INTERIOR

## Bureau of Reclamation

**[RR02331000, 14XR0680A4, RX.00224994.2000000]**

## Notice of Proposed New Fee Site, Stony Gorge Reservoir, Elk Creek, California; Federal Lands Recreation Enhancement Act

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice.

**SUMMARY:** The Bureau of Reclamation is proposing to charge and retain fees for overnight camping at Stony Gorge Reservoir. Special Recreation Event authorization fees are also proposed to be retained under this authority.

**DATES:** Submit written comments on the new fee site on or before June 3, 2015. New fees are scheduled to begin on this date. Public meeting dates and locations will be announced locally.

**ADDRESSES:** Send written comments on the proposed new fee site to Brian Person, Area Manager, Northern California Area Office, Bureau of Reclamation, 16349 Shasta Dam Boulevard, Shasta Lake, California 96019.

**FOR FURTHER INFORMATION CONTACT:** Richard Robertson, Chief, Water and Lands Division, P.O. Box 988, Willows, California 95988–0988; or call 530–934–1383. Information about proposed fee changes can also be found on the Bureau of Reclamation, Northern California Area Office Web site: *http://www.usbr.gov/mp/ncao.*

**SUPPLEMENTARY INFORMATION:** The proposed fee for overnight camping will be $15 per site per night for all non-group site camping. Group site overnight fees will be $75. Interagency Senior Passes will be accepted for individual overnight camping. An analysis of the nearby Federal and state recreation offerings with similar amenities shows that the proposed fees are reasonable and typical of similar sites in the area. Funds from fees will be used for the continued operation, maintenance, and improvements of the reservoir area recreation amenities and related programs.

The Federal Lands Recreation Enhancement Act (Title VII, Pub. L. 108–447) directed the Secretary of the Interior to publish a 6-month advance notice in the **Federal Register** whenever new recreation fee areas are established. Once public involvement is complete, these new fees will be reviewed by the Bureau of Reclamation Mid-Pacific Regional Director prior to a final decision and implementation. People wanting to reserve these recreation sites would need to do so through the National Recreation Reservation Service at *www.recreation.gov,* or by calling 1–877–444–6777 when it becomes available.

### Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may

be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 1, 2014.

**Brian Person,**

*Area Manager, Northern California Area Office.*

[FR Doc. 2014–28569 Filed 12–4–14; 8:45 am]

**BILLING CODE 4332–90–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–1020 (Second Review)]**

## Barium Carbonate From China; Revised Schedule for the Subject Review

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**DATES:** Effective December 2, 2014.

**FOR FURTHER INFORMATION CONTACT:** Keysha Martinez (202–205–2136) or Douglas Corkran (202–205–3057), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On July 24, 2014, the Commission established a schedule for the conduct of this review (79 FR 44864, August 1, 2014). Subsequently, counsel for the domestic interested party filed a request to appear at the hearing and for consideration of cancellation of the hearing. Counsel indicated a willingness to submit written testimony and responses to any Commission questions in lieu of an actual hearing. No other party filed a timely request to appear at the hearing. Consequently, the public hearing in connection with this review, scheduled to begin at 9:30 a.m. on December 3, 2014, at the U.S. International Trade Commission Building, is cancelled. Parties to this review should respond to any written questions posed by the Commission in their posthearing briefs, which are due to be filed on December 12, 2014.

For further information concerning this review see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

**Authority:** This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 2, 2014.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2014–28574 Filed 12–4–14; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–524–525 and 731–TA–1260–1261 (Preliminary)]**

## Certain Welded Line Pipe From Korea and Turkey

### Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (''the Act''), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Korea and Turkey of certain welded line pipe, provided for in subheadings 7305.11, 7305.12, 7305.19, and 7306.19 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (''LTFV''), and that are allegedly subsidized by the governments of Korea and Turkey.

### Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (''Commerce'') of affirmative preliminary determinations in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under sections 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

### Background

On October 16, 2014, a petition was filed with the Commission and Commerce by American Cast Iron Pipe Company, Birmingham, Alabama; Energex, a division of JMC Steel Group, Chicago, Illinois; Maverick Tube Corporation, Houston, Texas; Northwest Pipe Company, Vancouver, Washington; Stupp Corporation, Baton Rouge, Louisiana; Tex-Tube Company, Houston, Texas; TMK IPSCO, Houston, Texas; and Welspun Tubular LLC USA, Little Rock, Arkansas, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of certain welded line pipe from Korea and Turkey and LTFV imports of certain welded line pipe from Korea and Turkey. Accordingly, effective October 16, 2014, the Commission instituted countervailing duty investigation Nos. 701–TA–524–525 and antidumping duty investigation Nos. 731–TA–1260–1261 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 23, 2013 (79 FR 63438). The conference was held in Washington, DC, on November 6, 2014, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on December 1, 2014. The views of the Commission

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

are contained in USITC Publication 4505 (December 2014), entitled *Certain Welded Line Pipe from Korea and Turkey: Investigation Nos. 701–524–525 and 731–1260–1261 (Preliminary).*

By order of the Commission.

Issued: December 1, 2014.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2014–28533 Filed 12–4–14; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. Nexstar Broadcasting Group, Inc., Mission Broadcasting, Inc., Communications Corporation of America and Silver Point Capital Fund, L.P.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Nexstar Broadcasting Group, Inc., Mission Broadcasting, Inc., Communications Corporation of America and Silver Point Capital Fund, L.P.,* Civil Action No. 1:14–cv–02007. On November 26, 2014, the United States filed a Complaint alleging that Nexstar's proposed acquisition of Communications Corporation of America (CCA), by the acquisition of control of WEVV–TV in Evansville, Indiana, would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires Nexstar to divest WEVV–TV to Bayou City Broadcasting Evansville, Inc. or an alternative buyer approved by the United States.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Department of Justice, Antitrust Division's internet Web site, filed with the Court and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Scott A. Scheele, Chief, Telecommunications & Media Enforcement Section, Antitrust Division, Department of Justice, Washington, DC 20530 (telephone: 202–514–5621).

**Patricia A. Brink,**

*Director of Civil Enforcement.*

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street N.W., Suite 7000
Washington, D.C. 20530

*Plaintiff,*

v.

NEXSTAR BROADCASTING GROUP, INC.,
545 E. John Carpenter Freeway, Suite 700
Irving, Texas 75062

MISSION BROADCASTING, INC.,
30400 Detroit Road
Westlake, Ohio 44145

CORPORATION OF AMERICA,
700 Saint John Street
Suite 300
Lafayette, Louisiana 70501

and

SILVER POINT CAPITAL FUND, L.P.,
2 Greenwich Plaza, 1st Floor
Greenwich, Connecticut 06830

*Defendants.*

Case: 1:14–cv–02007

### COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition of Communications Corporation of America (CCA), a wholly-owned subsidiary of Silver Point Capital Fund, L.P., by Nexstar Broadcasting, Inc. (Nexstar) and Mission Broadcasting, Inc. (Mission) (Nexstar and Mission are referred to collectively as the Buyers), and to obtain other equitable relief. The transaction would likely lessen competition substantially in the sale of broadcast television spot advertising in the Evansville, Indiana Designated Marketing Area (DMA) of the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The United States alleges as follows:

### I. NATURE OF THE ACTION

1. Pursuant to a Stock Purchase Agreement dated April 24, 2013, Nexstar and Mission will acquire all of the issued and outstanding voting securities of CCA for $270 million. Both Nexstar and CCA own or operate many broadcast television stations in multiple television DMAs across the United States. Through various local services agreements, Nexstar sells the advertising for all of the television stations owned by Mission, which Nexstar effectively controls.

2. In Evansville, Indiana, Nexstar owns and operates WEHT, an ABC broadcast network affiliate. As the owner-operator of that station, Nexstar sells WEHT's advertising. Pursuant to a local services agreement, Nexstar also sells the advertising of WTVW, a CW broadcast network affiliate in Evansville that is owned by Mission. Accordingly, WEHT and WTVW do not meaningfully compete with one another for advertisers.

3. In Evansville, CCA owns and operates WEVV, a CBS broadcast network affiliate. WEVV also operates a digital subchannel on which it runs television programming affiliated with the FOX broadcast network. Although Nexstar and Mission intend to transfer CCA's WEVV license to a related third party, the third party is expected to have Nexstar sell its advertising pursuant to a local services or similar agreement. Nexstar would likely have effective control of this third party as it does of Mission.

4. Currently, Nexstar (on behalf of WEHT and WTVW) and CCA (on behalf of WEVV) compete for the business of local and national advertisers that seek spot advertising on broadcast television stations in the Evansville, Indiana DMA. Advertisers benefit from this competition.

5. If consummated, Nexstar's acquisition of control of CCA's advertising would result in Nexstar controlling the sale of advertising for three out of four major broadcast network affiliates (WEHT (ABC) and WEVV (CBS & FOX)) and a fourth network affiliation (WTVW (CW)) in the Evansville, Indiana DMA. Nexstar's already high market share of spot advertising in the DMA would increase from approximately 42 to 60 percent.

6. The transaction would eliminate head-to-head competition between Nexstar and CCA and all the benefits from this competition. Unless the transaction is blocked, it will lead to higher prices for broadcast television spot advertising in the Evansville, Indiana DMA in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

### II. JURISDICTION AND VENUE

7. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

8. Nexstar and CCA sell broadcast television spot advertising, a commercial activity that substantially

affects, and is in the flow of, interstate commerce. The Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

9. Nexstar transacts business and is found in the District of Columbia. Defendants have consented to venue and personal jurisdiction in this District. Therefore, venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c). Venue is also proper in the District of Columbia for defendant Nexstar under 28 U.S.C. 1391(d).

## III. THE DEFENDANTS

10. Nexstar, a Delaware corporation with headquarters in Irving, Texas, owns or operates 72 broadcast television stations located in 41 DMAs in 18 states. Nexstar reported revenues of $378 million for 2013.

11. Mission, a Delaware corporation with headquarters in Westlake, Ohio, owns 17 broadcast television stations. Nexstar receives substantially all of Mission's available cash and is deemed to have a controlling interest in Mission under generally accepted accounting principles. Accordingly, Mission's economic incentives are aligned with Nexstar's.

12. CCA, a Delaware corporation with headquarters in Lafayette, Louisiana, owns or operates 25 broadcast television stations in 10 DMAs throughout Louisiana, Texas, and Indiana. CCA reported revenues of $98.3 million for 2012.

13. Silver Point Capital Fund, L.P., based in Greenwich, Connecticut, controls and is the ultimate parent entity of CCA.

## IV. TRADE AND COMMERCE

### *A. Broadcast Television Spot Advertising Is a Relevant Product Market*

14. Broadcast television stations attract viewers through their programming, which is delivered for free over the air or retransmitted to viewers, mainly through wired cable or other terrestrial television systems and through satellite television systems. Broadcast television stations then sell advertising time to businesses that want to advertise their products to television viewers. Broadcast television ''spot'' advertising is sold directly by the station itself or through its national representative on a localized basis and is purchased by advertisers who want to target potential customers in specific geographic areas. Spot advertising differs from network and syndicated television advertising, which are sold by the major television networks and producers of syndicated programs on a nationwide basis and broadcast in every geographic area where the network or syndicated program is aired.

15. Broadcast television spot advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media. Television combines sight, sound, and motion, thereby creating a more memorable advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular target geographic market and is therefore especially effective in introducing, establishing, and maintaining the image of a product or service. For a significant number of advertisers, broadcast television spot advertising, because of its unique attributes, is an advertising medium for which there is no close substitute. Advertisers generally do not consider other media, such as radio, newspapers, or outdoor billboards, to be desirable substitutes for broadcast television advertising. None of these media can provide the important combination of sight, sound, and motion that makes television unique and impactful as a medium for advertising.

16. Like broadcast television, subscription television channels, such as those carried over cable or satellite television, combine elements of sight, sound, and motion, but they are not generally considered within the advertising industry as a desirable substitute for broadcast television spot advertising for two important reasons. First, satellite, cable, and other subscription content delivery systems do not generally have the ''reach'' of broadcast television. Typically in the United States, broadcast television can reach well over 90% of homes in a DMA, while cable television often reaches fewer homes. Second, because subscription services may offer more than 100 channels, they fragment the audience into small demographic segments. Because broadcast television programming typically has higher rating points than subscription television programming, broadcast television is generally viewed as providing a much easier and more efficient means for an advertiser to reach a high proportion of its target demographic. Generally in the industry, media buyers purchase time on subscription television channels not so much as a substitute for broadcast television, but rather to supplement a broadcast television message, to reach a narrow demographic (*e.g.,* 18–24 year olds) with greater frequency, or to target narrow geographic areas within a DMA.

17. Typically, advertisers do not consider internet-based media to be a substitute for broadcast television spot advertising. Although online video distributors (OVDs) such as Netflix and Hulu are important sources of video programming, as with cable television advertising, the local video advertising of OVDs lacks the reach of broadcast television spot advertising. And non-video internet advertising (*e.g.,* Web site banner advertising) lacks the important combination of sight, sound, and motion that gives television its impact. Consequently, the typical local media advertiser purchases internet-based advertising primarily as a supplement to broadcast television spot advertising.

18. Consequently, a small but significant increase in the price of broadcast television spot advertising is unlikely to cause a sufficient number of broadcast television spot advertising customers to switch enough of their advertising purchases to other media such that the price increase would be unprofitable.

19. The sale of broadcast television spot advertising is a line of commerce under Section 7 of the Clayton Act and a relevant product market for purposes of analyzing the proposed transaction under Section 7 of the Clayton Act.

### *B. The Evansville, Indiana DMA Is the Relevant Geographic Market*

20. A Designated Marketing Area or DMA is a geographic unit defined by A.C. Nielsen Company, a firm that surveys television viewers and furnishes broadcast television stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. The Evansville, Indiana DMA encompasses 21 counties in Indiana, Kentucky, and Illinois. Signals from broadcast television stations located in the Evansville, Indiana DMA reach viewers located throughout the DMA, but signals from broadcast television stations located outside the DMA reach few viewers within the DMA. DMAs are used to analyze revenues and shares of broadcast television stations in the *Investing in Television BIA Market Report 2014* (1st ed.), a standard industry reference.

21. Advertisers use broadcast television stations within the Evansville, Indiana DMA to reach the largest possible number of viewers within the entire DMA. Some of these advertisers are located in the Evansville, Indiana DMA and need to reach customers there; others are regional or national businesses that want to target

consumers in the Evansville, Indiana DMA. Advertising on television stations outside the Evansville, Indiana DMA is not an alternative for these advertisers because such stations cannot be viewed by the vast majority of potential customers within the DMA. Thus, if there were a small but significant increase in broadcast television spot advertising prices within the Evansville, Indiana DMA, advertisers would not switch enough advertising purchases to television stations outside the Evansville, Indiana DMA to render the price increase unprofitable.

22. The Evansville, Indiana DMA is a section of the country under Section 7 of the Clayton Act and a relevant geographic market for the sale of broadcast television spot advertising for the purposes of analyzing the proposed transaction under Section 7 of the Clayton Act.

*C. The Transaction Will Lead to Harm to Competition in the Evansville, Indiana DMA*

23. Broadcast television stations compete for advertisers by offering programs that attract viewers to their stations. Broadcast television stations select programs that appeal to the greatest number of viewers and that differentiate their stations from other stations by appealing to specific demographic groups. Advertisers, in turn, are interested in using broadcast television spot advertising to reach a large audience, as well as to reach a high proportion of the type of viewers that are most likely to buy their products.

24. By virtue of its ownership and operation of WEHT and the existing local services agreement with Mission to sell the advertising of WTVW, Nexstar currently controls the advertising of two broadcast television stations in the Evansville, Indiana DMA. Post-transaction, the market would effectively become a duopoly, with Nexstar controlling the advertising of three of the four major network affiliates (WEHT (ABC) and WEVV (CBS & FOX)) and a fourth network affiliation (WTVW (CW)) in the Evansville, Indiana DMA. Nexstar's market share of broadcast television spot advertising revenue in the Evansville, Indiana DMA would increase from 42 to 60 percent. A single television station would control the vast majority of the remaining 40 percent.

25. Using the Herfindahl-Hirschman Index (HHI), a standard measure of market concentration (defined and explained in Appendix A), the proposed transaction would increase substantially the already high concentration in the Evansville, Indiana DMA broadcast television spot advertising market. The post-transaction HHI would be approximately 5100, representing an increase of about 1500 points. Under the *Horizontal Merger Guidelines* issued by the Department of Justice and Federal Trade Commission, mergers resulting in highly concentrated markets (with an HHI in excess of 2500) with an increase in the HHI of more than 200 points are presumed to be likely to enhance market power.

26. In the Evansville, Indiana DMA, Nexstar and CCA compete head-to-head against each other in the sale of broadcast television spot advertising and are close substitutes for a significant number of advertisers. Advertisers benefit from this competition. The proposed transaction would end this competition and thereby adversely affect a substantial volume of interstate commerce.

27. After the transaction, a significant number of Evansville, Indiana DMA advertisers would not be able to reach their desired audiences with equivalent efficacy unless they advertised on the television stations controlled by Nexstar. Advertisers would have available only one alternative broadcast channel. The transaction, therefore, will enable Nexstar unilaterally to raise prices. Given the structure of the Evansville, Indiana DMA, the economics of this industry suggest that the remaining major competitor will have substantial incentives to follow suit.

*D. Entry*

28. De novo entry into the Evansville, Indiana DMA is unlikely as the Federal Communications Commission (FCC) regulates entry through the issuance of broadcast television spectrum licenses, which are difficult to obtain. Even if a new license became available, commercial success would come, at best, over a period of many years. Thus, entry into the Evansville, Indiana DMA broadcast television spot advertising market would not be timely, likely, or sufficient to deter post-merger anticompetitive effects.

*E. Absence of Efficiencies*

29. Defendants cannot demonstrate cognizable, merger-specific efficiencies that are sufficient to reverse the anticompetitive effects of the proposed transaction.

## V. VIOLATION ALLEGED

30. The United States hereby repeats and realleges the allegations of paragraphs 1 through 29 as if fully set forth herein.

31. The Buyers' proposed acquisition of CCA would likely lessen competition substantially in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and would likely have the following effects, among others:

(a) Competition in the sale of broadcast television spot advertising in the Evansville, Indiana DMA would be lessened substantially;

(b) Competition in the Evansville, Indiana DMA between Nexstar and CCA in the sale of broadcast television spot advertising would be eliminated; and

(c) The prices for broadcast television spot advertising in the Evansville, Indiana DMA would likely increase.

## VI. REQUEST FOR RELIEF

32. The United States requests:

(a) That the Court adjudge the proposed transaction to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) That the Court permanently enjoin and restrain the Defendants from carrying out the proposed transaction or from entering into or carrying out any other agreement, understanding, or plan by which CCA would be acquired by, acquire, or merge with the Buyers;

(c) That the Court award the United States the costs of this action; and

(d) That the Court award such other relief to the United States as the Court may deem just and proper.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

/s/ _____
William J. Baer (D.C. Bar #324723)
*Assistant Attorney General*
/s/ _____
Leslie Overton (D.C. Bar #454493)
*Deputy Assistant Attorney General*
/s/ _____
Patricia A. Brink
*Director of Civil Enforcement*
/s/ _____
Scott A. Scheele (D.C. Bar #429061)
*Chief, Telecom & Media Section*
/s/ _____
Lawrence M. Frankel (D.C. Bar #441532)
*Assistant Chief, Telecom & Media Section*
/s/ _____
Matthew C. Hammond *
*Trial Attorney, Telecom & Media Section.*
*United States Department of Justice, Antitrust Division, 450 Fifth Street N.W., Suite 7000, Washington, D.C. 20530, Phone: 202–305–8541, Facsimile: 202–514–6381, Email: matthew.hammond@usdoj.gov.*
** Attorney of Record*

Dated: November 26, 2014

## APPENDIX A

*Herfindahl-Hirschman Index*

The tern ''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted

measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 5.3 (2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the *Guidelines. See id.*

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street N.W., Suite 7000
Washington, D.C. 20530

*Plaintiff,*

v.

NEXSTAR BROADCASTING GROUP, INC.,
545 E. John Carpenter Freeway, Suite 700
Irving, Texas 75062

MISSION BROADCASTING, INC.,
30400 Detroit Road
Westlake, Ohio 44145

COMMUNICATIONS CORPORATION OF AMERICA,
700 Saint John Street, Suite 300
Lafayette, Louisiana 70501

and

SILVER POINT CAPITAL FUND, L.P.,
2 Greenwich Plaza, 1st Floor
Greenwich, Connecticut 06830

Defendants.

Case: 1:14–cv–02007

**COMPETITIVE IMPACT STATEMENT**

Plaintiff United States of America (United States), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (APPA or the Tunney Act), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. NATURE AND PURPOSE OF THE PROCEEDING**

Pursuant to a Stock Purchase Agreement dated April 24, 2013, Nexstar Broadcasting Group, Inc. (Nexstar) and Mission Broadcasting Inc. (Mission) will acquire all of the issued and outstanding voting securities of Communications Corporation of America (CCA) for $270 million. Both Nexstar and CCA own or operate many broadcast television stations in multiple television Designated Marketing Areas (DMAs) across the United States. Through various local services agreements, Nexstar sells the advertising for all of the television stations owned by Mission, which Nexstar effectively controls.

In Evansville, Indiana, Nexstar owns and operates WEHT, an ABC broadcast network affiliate. As the owner-operator of that station, Nexstar sells WEHT's advertising. Pursuant to a local services agreement, Nexstar also sells the advertising of WTVW, a CW broadcast network affiliate in Evansville that is owned by Mission. Accordingly, WEHT and WTVW do not meaningfully compete with one another for advertisers.

In Evansville, CCA owns and operates WEVV, a CBS broadcast network affiliate. WEVV also operates a digital subchannel on which it runs television programming affiliated with the FOX broadcast network. Although Nexstar and Mission intend to transfer CCA's WEVV license to a related third party, the third party is expected to have Nexstar sell its advertising pursuant to a local services or similar agreement. Nexstar would likely have effective control of this third party as it does of Mission.

Currently, Nexstar (on behalf of WEHT and WTVW) and CCA (on behalf of WEVV) compete for the business of local and national advertisers that seek spot advertising on broadcast television stations in the Evansville, Indiana DMA. Advertisers benefit from this competition. If consummated, Nexstar's acquisition of control of CCA's advertising would result in Nexstar controlling the sale of advertising for three out of four major broadcast network affiliates (WEHT (ABC) and WEVV (CBS & FOX)) and a fourth network affiliation (WTVW (CW)) in the Evansville, Indiana DMA. Nexstar's already high market share of spot advertising in the DMA would increase from approximately 42 to 60 percent. Thus, the transaction would eliminate head-to-head competition between Nexstar and CCA and all the benefits from this competition, leading to higher prices for broadcast television spot advertising in the Evansville, Indiana DMA in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

The United States filed a civil antitrust Complaint on November 26, 2014, seeking to enjoin the proposed transaction. The Complaint alleges that the likely effect of this transaction would be to lessen competition substantially for broadcast television spot advertising in the Evansville, Indiana DMA in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would result in advertisers paying higher prices.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (Hold Separate Order) and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the transaction. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest WEVV located in the Evansville, Indiana DMA. Under the terms of the Hold Separate Order, Defendants are required to take certain steps to ensure that WEVV is operated as a competitively independent, economically viable, and ongoing business concern, that will remain independent and uninfluenced by the consummation of the transaction, and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

**II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION**

*A. The Defendants and the Proposed Transaction*

Nexstar, a Delaware corporation with headquarters in Irving, Texas, owns or operates 72 broadcast television stations located in 41 DMAs in 18 states. Nexstar reported revenues of $378 million for 2013. Mission, a Delaware corporation with headquarters in Westlake, Ohio, owns 17 broadcast television stations. Nexstar receives substantially all of Mission's available cash and is deemed to have a controlling interest in Mission under generally accepted accounting principles. Accordingly, Mission's economic incentives are aligned with Nexstar's.

CCA, a Delaware corporation with headquarters in Lafayette, Louisiana, owns or operates 25 broadcast television stations in 10 DMAs throughout Louisiana, Texas, and Indiana. CCA reported revenues of $98.3 million for 2012. Silver Point Capital Fund, L.P., based in Greenwich, Connecticut, controls and is the ultimate parent entity of CCA.

The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially in broadcast television spot advertising in the Evansville, Indiana DMA as a result of Nexstar's acquisition of CCA. This transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on November 26, 2014.

*B. Anticompetitive Consequences of the Proposed Transaction*

1. The Relevant Product Market

The Complaint alleges that the sale of broadcast television spot advertising constitutes a relevant product market for analyzing this transaction under Section 7 of the Clayton Act. Broadcast television stations attract viewers through their programming, which is delivered for free over the air or retransmitted to viewers, mainly through wired cable or other terrestrial television systems and through satellite television systems. Broadcast television stations then sell advertising time to businesses that want to advertise their products to television viewers. Broadcast television ''spot'' advertising is sold directly by the station itself or through its national representative on a localized basis and is purchased by advertisers who want to target potential customers in specific geographic areas. Spot advertising differs from network and syndicated television advertising, which are sold by the major television networks and producers of syndicated programs on a nationwide basis and broadcast in every geographic area where the network or syndicated program is aired.

Broadcast television spot advertising possesses a unique combination of attributes that sets it apart from advertising using other

types of media. Television combines sight, sound, and motion, thereby creating a more memorable advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular target geographic market and is therefore especially effective in introducing, establishing, and maintaining the image of a product or service. For a significant number of advertisers, broadcast television spot advertising, because of its unique attributes, is an advertising medium for which there is no close substitute. Advertisers generally do not consider other media, such as radio, newspapers, or outdoor billboards, to be desirable substitutes for broadcast television advertising. None of these media can provide the important combination of sight, sound, and motion that makes television unique and impactful as a medium for advertising.

Like broadcast television, subscription television channels, such as those carried over cable or satellite television, combine elements of sight, sound, and motion, but they are not generally considered within the advertising industry as a desirable substitute for broadcast television spot advertising for two important reasons. First, satellite, cable, and other subscription content delivery systems do not generally have the ''reach'' of broadcast television. Typically in the United States, broadcast television can reach well over 90% of homes in a DMA, while cable television often reaches fewer homes. Second, because subscription services may offer more than 100 channels, they fragment the audience into small demographic segments. Because broadcast television programming typically has higher rating points than subscription television programming, broadcast television is generally viewed as providing a much easier and more efficient means for an advertiser to reach a high proportion of its target demographic. Generally in the industry, media buyers purchase time on subscription television channels not so much as a substitute for broadcast television, but rather to supplement a broadcast television message, to reach a narrow demographic (*e.g.,* 18–24 year olds) with greater frequency, or to target narrow geographic areas within a DMA.

Typically, advertisers do not consider internet-based media to be a substitute for broadcast television spot advertising. Although online video distributors (OVDs) such as Netflix and Hulu are important sources of video programming, as with cable television advertising, the local video advertising of OVDs lacks the reach of broadcast television spot advertising. And non-video internet advertising (*e.g.,* Web site banner advertising) lacks the important combination of sight, sound, and motion that gives television its impact. Consequently, the typical local media advertiser purchases internet-based advertising primarily as a supplement to broadcast television spot advertising.

Consequently, a small but significant price increase in broadcast television spot advertising is unlikely to cause enough advertising customers to switch advertising purchases to other media to make the price increase unprofitable.

2. The Relevant Geographic Market

The Complaint alleges that the Evansville, Indiana DMA constitutes a relevant geographic market for purposes of analyzing this acquisition under Section 7 of the Clayton Act. A Designated Marketing Area or DMA is a geographic unit defined by A.C. Nielsen Company, a firm that surveys television viewers and furnishes broadcast television stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. DMAs are used to analyze revenues and shares of broadcast television stations in the *Investing in Television BIA Market Report 2014* (1st ed.), a standard industry reference. The Evansville, Indiana DMA encompasses 21 counties in Indiana, Kentucky, and Illinois. Signals from broadcast television stations located in the Evansville, Indiana DMA reach viewers throughout the DMA, but signals from broadcast television stations located outside the DMA reach few viewers within the DMA.

Advertisers can use television stations in the DMA to target the largest possible number of viewers within the DMA. Some of these advertisers are located in the Evansville, Indiana DMA and are trying to reach consumers that live in the DMA; others are regional or national businesses wanting to target consumers in the Evansville, Indiana DMA. Advertising on television stations outside each of the Evansville, Indiana DMA is not an alternative for either local, regional, or national advertisers, because signals from television stations outside of the DMA reach relatively few viewers within the DMA. Thus, advertising on those stations outside the Evansville, Indiana DMA does not reach a significant number of potential customers within the DMA.

Consequently, a small but significant increase in broadcast television spot advertising prices within the Evansville, Indiana DMA would not cause advertisers to switch enough advertising purchases to television stations outside the Evansville, Indiana DMA to render the price increase unprofitable.

3. Harm to Competition in the Evansville, Indiana DMA

The Complaint alleges that the proposed acquisition would likely lessen competition substantially in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and likely would have the following effects, among others:

(a) competition in the sale of broadcast television spot advertising in the Evansville, Indiana DMA would be lessened substantially;

(b) competition in the Evansville, Indiana DMA between Nexstar and CCA in the sale of broadcast television spot advertising would be eliminated; and

(c) the prices for broadcast television spot advertising on broadcast television stations in the Evansville, Indiana DMA likely would increase.

By virtue of its ownership and operation of WEHT and the existing local services agreement with Mission to sell the advertising of WTVW, Nexstar currently controls the advertising of two broadcast television stations in the Evansville, Indiana DMA. Post-transaction, the market would effectively become a duopoly, with Nexstar controlling the advertising of three of the four major network (WEHT (ABC) and WEVV (CBS & FOX)) and a fourth network affiliation (WTVW (CW)) in the Evansville, Indiana DMA. Nexstar's market share of broadcast television spot advertising revenue in the DMA would increase from 42 to 60 percent. A single television station would control the vast majority of the remaining 40 percent.

Using the Herfindahl-Hirschman Index (HHI), a standard measure of market concentration (defined and explained in Appendix A to the Complaint), the proposed transaction would increase substantially the already high concentration in the Evansville, Indiana DMA broadcast television spot advertising market. The post-transaction HHI would be approximately 5100, representing an increase of about 1500 points. Under the *Horizontal Merger Guidelines* issued by the Department of Justice and Federal Trade Commission, mergers resulting in highly concentrated markets (with an HHI in excess of 2500) with an increase in the HHI of more than 200 points are presumed to be likely to enhance market power.

In the Evansville, Indiana DMA, Nexstar and CCA compete head-to-head against each other in the sale of broadcast television spot advertising. They are close substitutes for each other for a significant number of advertisers. Moreover, advertisers typically find it cost-effective to reach their target audience by buying time from multiple stations in a DMA. In negotiating rates with any one television station, advertisers benefit from competition between stations because they can put together an ad buy with the other stations in the DMA. The proposed transaction would end this type of competition between Nexstar and CCA and thereby adversely affect a substantial volume of interstate commerce. After the transaction, it is likely that a significant number of Evansville, Indiana DMA advertisers would not be able to reach their desired audiences with equivalent efficacy unless they advertised on the television stations controlled by Nexstar. By leaving advertisers with only one alternative broadcast channel, the transaction will enable Nexstar unilaterally to raise prices. Given the structure of the Evansville, Indiana DMA, the economics of this industry suggest that the remaining major competitor will have substantial incentives to follow suit.

4. Lack of Countervailing Factors

The Complaint alleges that entry in the Evansville, Indiana DMA's broadcast television spot advertising market would not be timely, likely, or sufficient to prevent any anticompetitive effects. New entry is unlikely since any new station would require a Federal Communications Commission (FCC) license, which is difficult to obtain. Even if a new station became operational, commercial success would come over a period of many years. In addition, there are no merger-specific efficiencies that would alleviate the harm from the transaction.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the transaction in the Evansville, Indiana DMA by establishing a new, independent, and economically viable competitor, which will maintain the status quo in the DMA. The proposed Final Judgment requires Defendants to divest the Divestiture Assets to Bayou City Broadcasting Evansville, Inc. (Bayou City), an acquirer selected by Defendants and approved by the United States, in a manner consistent with the Final Judgment and the Hold Separate Order in this case. If Bayou City is unable to complete the purchase, the Defendants would be required to divest the Divestiture Assets to another buyer, approved by the United States in its sole discretion. Defendants are required to use their best efforts to accomplish the divestitures ordered by this Final Judgment as expeditiously as possible and in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Because the transfer of the Divestiture Assets to Bayou City requires Federal Communications Commission (FCC) approval, Defendants are specifically required to use their best efforts to obtain all necessary FCC approvals as expeditiously as possible. The divestiture pursuant to this Section shall take place within five (5) calendar days of entry of the Final Judgment or within 90 days of the filing of the Complaint, whichever is later. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, or it becomes apparent that Bayou City is unwilling or unable to complete its purchase of the Divestiture Assets, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. The United States may, after three months, determine not to seek appointment of a trustee if it believes the circumstances warrant allowing the Defendants more time. Under such circumstances, however, the United States may, at any time, exercise its right to select a trustee for the Court to appoint. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the transaction in broadcast television spot advertising in the Evansville, Indiana DMA.

The proposed Final Judgment also bars Nexstar from reacquiring the Divestiture Assets for the ten-year period of the decree. Nexstar can only affiliate with either FOX or CBS (WEVV's current network affiliates) a year or more from the filing of the Complaint, contingent on the United States' approval in its sole discretion.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: Scott A. Scheele, Chief, Telecom & Media Enforcement Section, Antitrust Division, U.S. Department of Justice, 450 5th Street NW., Suite 7000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the contemplated transaction. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of broadcast television spot advertising in the Evansville, Indiana DMA. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *U.S. Airways Group, Inc.,* No. 13-cv-1236(CKK), 2014–1Trade Cas. (CCH) ¶ 78,748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting court has broad discretion to review adequacy of relief at issue); *United States* v. *InBev N.V./S.A.,* No. 08–1965(JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11,

2009) (noting that court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'''' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also U.S. Airways,* 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft,* 56 F.3d at 1461); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the APPA). The language wrote into the statute what Congress intended when it enacted the APPA in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3] A court may make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways,* 2014 U.S. Dist. LEXIS 57801, at *9.

## VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

/s/

Matthew C. Hammond

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*Counsel for Plaintiff United States of America*

Dated: November 26, 2014

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

NEXSTAR BROADCASTING GROUP, INC., MISSION BROADCASTING, INC., COMMUNICATIONS CORPORATION OF AMERICA

and

SILVER POINT CAPITAL FUND, L.P.,

*Defendants.*

[1] The 2004 amendments to the APPA substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to APPA review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'''').

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

Case: 1:14–cv–02007

**PROPOSED FINAL JUDGMENT**

WHEREAS, plaintiff, the United States of America, having filed its Complaint on ____, and plaintiff and defendants Nexstar Broadcasting Group, Inc. (''Nexstar''); Mission Broadcasting, Inc. (''Mission''); Communications Corporation of America (''CCA'') and Silver Point Capital Fund, L.P., by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

AND WHEREAS, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of the Divestiture Assets to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires certain divestitures to be made for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, defendants have represented to the United States that the divestitures required below can and will be made, and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW, THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby ORDERED, ADJUDGED, AND DECREED:

**I. Jurisdiction**

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

**II. Definitions**

As used in this Final Judgment:

A. ''Nexstar'' means defendant Nexstar Broadcasting Group, Inc., a Delaware corporation with its headquarters in Irving, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Mission'' means defendant Mission Broadcasting, Inc. a Delaware corporation with its headquarters in Westlake, Ohio, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''CCA'' means Communications Corporation of America, a Delaware corporation headquartered in Lafayette, Louisiana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. ''Silver Point'' means Silver Point Capital Fund, L.P., a Delaware limited partnership headquartered in Greenwich, Connecticut, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. ''Acquirer'' means BCBE, or another entity to which the defendants divest the Divestiture Assets.

F. ''BCBE'' means Bayou City Broadcasting Evansville, Inc., a Delaware corporation headquartered in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

G. ''WEVV–TV'' means the broadcast television station located in the Evansville, Indiana DMA owned by defendant CCA operating on virtual Channel 44.

H. ''Divestiture Assets'' means all of the assets, tangible or intangible, used in the operation of WEVV–TV, including, but not limited to, all real property (owned or leased) used in the operation of the station, all broadcast equipment, office equipment, office furniture, fixtures, materials, supplies, and other tangible property used in the operation of the station; all licenses, permits, authorizations, and applications therefore issued by the Federal Communications Commission (''FCC'') and other government agencies related to that station; all contracts (including programming contracts and rights), agreements, network affiliation agreements, leases and commitments and understandings of defendant CCA relating to the operation of WEVV–TV; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials, and promotional materials relating to WEVV–TV; all customer lists, contracts, accounts, and credit records; and all logs and other records maintained by defendant CCA in connection with WEVV–TV.

I. ''DMA'' means designated market area as defined by A.C. Nielsen Company based upon viewing patterns and used by the *Investing In Television BIA Market Report 2014* (1st ed.). DMAs are ranked according to the number of households therein and are used by broadcasters, advertisers and advertising agencies to aid in evaluating television audience size and composition.

**III. Applicability**

A. This Final Judgment applies to Nexstar, Mission, CCA, and Silver Point as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the defendants' Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to the Final Judgment.

**IV. Divestitures**

A. Defendants are ordered and directed to divest the Divestiture Assets to an Acquirer acceptable to the United States in its sole discretion, in a manner consistent with this Final Judgment and the Hold Separate Stipulation and Order in this case. The divestiture pursuant to this Section shall take place within ninety (90) calendar days after the filing of the Complaint in this matter or five (5) days after notice of entry of this Final Judgment by the Court, whichever is later. The United States, in its sole discretion, may agree to an extension of this time period not to exceed thirty (30) calendar days, and shall notify the Court in such circumstances. Defendants shall use their best efforts to accomplish the divestiture ordered by this Final Judgment as expeditiously as possible, including using their best efforts to obtain all necessary FCC approvals as expeditiously as possible.

B. In the event that defendants are attempting to divest the assets to an Acquirer other than BCBE, in accomplishing the divestiture ordered by this Final Judgment,

(1) Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets;

(2) Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment;

(3) Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine; and

(4) Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the operation and management of the Divestiture Assets to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer to employ or contract with any employee of any defendant whose primary responsibility is the operation or management of the Divestiture Assets.

D. Defendants shall permit the Acquirer of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of WEVV-TV; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

G. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and

that following the sale of the Divestiture Assets, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V of this Final Judgment, shall include the entire Divestiture Assets, and be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing commercial television broadcasting business and the divestiture of such assets will achieve the purposes of this Final Judgment and remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment:

(1) shall be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the television broadcasting business in the Evansville, Indiana DMA; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and defendants gives defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

**V. Appointment of Trustee**

A. If either (a) the defendants have not divested the Divestiture Assets within the time period specified in Paragraph IV(A), or (b) the defendants have reason to believe that BCBE may be unable to complete the purchase of the Divestiture Assets, defendants shall notify the United States of that fact in writing.

B. If (a) the defendants have not divested the Divestiture Assets within the time period specified in Paragraph IV(A), or (b) the United States decides in its sole discretion that BCBE is likely to be unable to complete the purchase of the Divestiture Assets, upon application of the United States in its sole discretion, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

C. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer, and in a manner, acceptable to the United States in its sole discretion at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Paragraph V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment and contact information for the trustee.

D. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objection by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

E. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The trustee shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the trustee and Defendants are unable to reach agreement on the trustee's compensation or other terms and conditions within fourteen (14) calendar days of appointment of the trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court.

F. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

G. After his or her appointment, the trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

H. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture have not been accomplished, and (3) the trustee's recommendations. To the extent that such report contains information that the trustee deems confidential, such report shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

I. If the United States determines that the trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute trustee.

**VI. Notice of Proposed Divestiture**

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States, in its sole discretion, shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the

proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Paragraph V(D) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Paragraph V(D), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

**VII. Financing**

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

**VIII. Hold Separate**

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

**IX. Affidavits**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period.

B. Each such affidavit shall also include a description of the efforts defendants have taken to complete the sale of the Divestiture Assets—including efforts to secure regulatory approvals—and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on information, shall be made within fourteen (14) days of receipt of such affidavit.

C. Within twenty (20) calendar days of the filing of the Complaint in this matter, each defendant shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Each such affidavit shall also include a description of the efforts defendants have taken to complete the sale of the Divestiture Assets, including efforts to secure FCC or other regulatory approvals. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

D. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

**X. Compliance Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copies or electronic copies of, all books, ledgers, accounts, records, data and documents in the possession, custody or control of defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit such written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**XI. No Reacquisition**

A. Defendants may not (1) reacquire any part of the Divestiture Assets, (2) acquire any option to reacquire any part of the Divestiture Assets or to assign the Divestiture Assets to any other person, (3) enter into any local marketing agreement, joint sales agreement, other cooperative selling arrangement, or shared services agreement, or conduct other business negotiations jointly with the Acquirer with respect to the Divestiture Assets, or (4) provide financing or guarantees of financing with respect to the Divestiture Assets, during the term of this Final Judgment. The shared services prohibition does not preclude Defendants from continuing or entering into agreements in a form customarily used in the industry to (1) share news helicopters or (2) pool generic video footage that does not include recording a reporter or other on-air talent, and does not preclude defendants from entering into any non-sales-related shared services agreement that is approved in advance by the United States in its sole discretion.

B. Notwithstanding any prohibition in this section, Defendants may acquire an affiliation with the FOX or CBS broadcast networks serving the Evansville, Indiana DMA during the period of this Final Judgment only if all of the following conditions are met:

(1) at least one year has elapsed from the date of the filing of the Complaint in this matter;

(2) Defendants notify the Department of Justice in writing of their intention to acquire the FOX or CBS affiliation in Evansville; and

(3) the Department of Justice acting in its sole discretion gives its approval for the Defendants to acquire the FOX or CBS affiliation in Evansville.

Within ten (10) business days of receiving notice from the Defendants, the Department will respond in writing giving its approval or requesting additional information from the Defendants. Within fifteen (15) business days of receiving the requested additional information, the Department will respond in writing either giving or withholding its approval.

**XII. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**XIII. Expiration of Final Judgment**

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

**XV. Public Interest Determination**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon, and the United States'

responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

_____

*United States District Judge*

[FR Doc. 2014–28585 Filed 12–4–14; 8:45 am]

BILLING CODE 4410–11–P

## DEPARTMENT OF JUSTICE

### Foreign Claims Settlement Commission

**[F.C.S.C. Meeting and Hearing Notice No. 11–14]**

### Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR part 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings as follows:

Tuesday, December 16, 2014: 10:00 a.m.—Oral hearings on Objection to Commission's Proposed Decisions in Claim Nos. IRQ–I–023 and IRQ–I–024.

*Status:* Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Patricia M. Hall, Foreign Claims Settlement Commission, 600 E Street NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

**Brian M. Simkin,**

*Chief Counsel.*

[FR Doc. 2014–28663 Filed 12–3–14; 11:15 am]

BILLING CODE 4410–BA–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Focus Groups for Evaluating the Effectiveness of Employee Retirement Income Security Act Section 408(b)(2) Disclosure Requirements

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) proposal titled, ''Focus Groups for Evaluating the Effectiveness of Employee Retirement Income Security Act Section 408(b)(2) Disclosure Requirements,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before January 5, 2015.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201408-1210-004* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov*. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov*.

**FOR FURTHER INFORMATION:** Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks PRA authority for focus groups to be used for evaluating the effectiveness of Employee Retirement Income Security Act (ERISA) section 408(b)(2) disclosure requirements. The ERISA requires a plan fiduciary, when selecting and monitoring service providers and plan investments, to act prudently and solely in the interest of plan participants and beneficiaries. A responsible plan fiduciary must also ensure that any arrangement with a service provider is reasonable and that only reasonable compensation is paid for services. Fundamental to the ability of fiduciaries to discharge these obligations is obtaining information sufficient to enable them to make informed decisions about an employee benefit plan's services, the costs of such services, and the service providers. This ICR is designed to explore current practices and effects of a final regulation published in the **Federal Register** on February 3, 2012, to implement section 408(b)(2) and to gather information about the need for a guide, summary, or similar tool to help a responsible plan fiduciary navigate through and understand the disclosures. *See* 77 FR 5632. The EBSA intends to use information collected from the focus groups: (1) To assess responsible plan fiduciaries' experience in receiving the disclosures the 408(b)(2) regulations require; (2) to assess the effectiveness of the disclosures in helping plan fiduciaries make decisions; (3) to determine how well plan fiduciaries understand the disclosures, especially in the small plan marketplace (100 participants or less); and (4) to evaluate whether, and how, a guide, summary, or similar tool would help a fiduciary understand the disclosures. The focus group results will be used to inform and support a notice of final rulemaking for the guide requirement.

This proposed information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on March 12, 2014 (79 FR 14085).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB ICR Reference Number 201408–1210–004. The OMB is particularly interested in comments that:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

*Agency:* DOL–EBSA.

*Title of Collection:* Focus Groups for Evaluating the Effectiveness of Employee Retirement Income Security Act Section 408(b)(2) Disclosure Requirements.

*OMB ICR Reference Number:* 201408–1210–004.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 85.

*Total Estimated Number of Responses:* 85.

*Total Estimated Annual Time Burden:* 128 hours.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: December 1, 2014.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2014–28592 Filed 12–4–14; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Workforce Investment Act; Native American Employment and Training Council, Meeting

**AGENCY:** Employment and Training Administration, U.S. Department of Labor.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (FACA) (Public Law 92–463), as amended, and Section 166(h)(4) of the Workforce Investment Act (WIA) [29 U.S.C. 2911(h)(4)], notice is hereby given of the next meeting of the Native American Employment and Training Council (Council), as constituted under WIA.

**DATES:** The meeting will begin at 9:00 a.m. (Eastern Standard Time) on Wednesday, December 17, 2014, and continue until 5:00 p.m., that day. The meeting will reconvene at 9:00 a.m. on Thursday, December 18, 2014, and adjourn at 5:00 p.m., that day. The period from 3:30 p.m. to 5:30 p.m., on December 17, 2014, will be reserved for participation and comment by members of the public.

**ADDRESSES:** The meeting will be held at the Bureau of Labor Statistics, Postal Square Building, 2 Massachusetts Ave. NE., Washington DC 20212, in the conference center, Rooms 7 and 8.

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public. Members of the public not present may submit a written statement on or before December 10, 2014, to be included in the record of the meeting. Statements are to be submitted to Ms. Athena R. Brown, Designated Federal Officer (DFO), U.S. Department of Labor, 200 Constitution Avenue NW., Room S–4209, Washington, DC 20210. Persons who need special accommodations should contact Mr. Craig Lewis at (202) 693–3384, at least two business days before the meeting. The formal agenda will focus on the following topics: (1) U.S. Department of Labor, Employment and Training Administration Update and the Workforce Innovation and Opportunity Act of 2014; (2) Training and Technical Assistance; (3) Council and Workgroup Updates and Recommendations; (4) New Business and Next Steps; and (5) Public Comment.

**FOR FURTHER INFORMATION CONTACT:** Ms. Athena R. Brown, DFO, Division of Indian and Native American Programs, Employment and Training Administration, U.S. Department of Labor, Room S–4209, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number (202) 693–3737 (VOICE) (this is not a toll-free number).

**Portia Wu,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2014–28566 Filed 12–4–14; 8:45 am]

**BILLING CODE 4501–FR–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Notice of Proposed Information Collection Requests: Let's Move Museums, Let's Move Gardens

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (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. Chapter 35). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this notice, IMLS is soliciting comments concerning a survey to gather information to identify museums that are currently or have plans to provide interactive experiences (exhibitions); afterschool, summer and other targeted programs, and food service operations that help fight childhood obesity. The data collection will help to identify best practices and collect information about the capacity of museums to reach the public with important public health messages.

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 February 5, 2015.

IMLS is particularly interested in comments that help the agency to:

• 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:** Send comments to: Claudia French, Institute of Museum and Library Services, 1800 M Street NW., 9th Floor, Washington, DC 20036. *Telephone:* (202) 653–4717. *Email: cfrench@imls.gov* or by *teletype* (TTY/TDD) for persons with hearing difficulty at (202) 653–4614.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Institute of Museum and Library Services is the primary source of federal support for the Nation's 123,000 libraries and 35,000 museums. The Institute's mission is to inspire libraries and museums to advance innovation, learning and civic engagement. The Institute works at the national level and in coordination with state and local organizations to sustain heritage, culture, and knowledge; enhance learning and innovation; and support professional development. 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**

• 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.

*Agency:* Institute of Museum and Library Services.

*Title: Let's Move* Museums, *Let's Move* Gardens.

*OMB Number:* 3137–0084.

*Agency Number:* 3137.

*Frequency:* Annual.

*Affected Public:* Museums, state, local, tribal government and not-for-profit institutions.

*Number of Respondents:* 50.

*Estimated Time per Respondent:* .17.

*Total Annual Costs to Respondents:* $164.

*Total Annualized to Federal Government:* $4,615

**FOR FURTHER INFORMATION CONTACT:** Claudia French, Institute of Museum and Library Services, 1800 M Street NW., 9th Floor, Washington, DC 20036. *Telephone:* (202) 653–4717. *Email: cfrench@imls.gov* or by *teletype* (TTY/TDD) for persons with hearing difficulty at (202) 653–4614.

Dated: December 2, 2014.

**Kim Miller,**

*Management Analyst.*

[FR Doc. 2014–28572 Filed 12–4–14; 8:45 am]

**BILLING CODE P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permits Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation

**ACTION:** Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

**FOR FURTHER INFORMATION CONTACT:** Li Ling Hamady, ACA Permit Officer, Division of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Or by email: *ACApermits@nsf.gov.*

**SUPPLEMENTARY INFORMATION:** On October 30, 2014 the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on December 1, 2014 to:

Dr. Diana H. Wall Permit No. 2015–012

**Nadene G. Kennedy,**

*Polar Coordination Specialist, Division of Polar Programs.*

[FR Doc. 2014–28578 Filed 12–4–14; 8:45 am]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Astronomy and Astrophysics Advisory Committee; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub., L. 92–463, as amended), the National Science Foundation announces the following meeting:

*Name and Committee Code:* Astronomy and Astrophysics Advisory Committee #13883.

*Date and Time:*

January 28, 2015 9:00 a.m.–5:00 p.m.
January 29, 2015 9:00 a.m.–12:00 p.m.

*Place:* National Science Foundation, Room 1235, Stafford I Building, 4201 Wilson Blvd., Arlington, VA 22230.

*Type of Meeting:* Open.

*Contact Person:* Dr. Jim Ulvestad, Division Director, Division of Astronomical Sciences, Suite 1045, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: 703–292–7165.

*Purpose of Meeting:* To provide advice and recommendations to the National Science Foundation (NSF), the National Aeronautics and Space Administration (NASA) and the U.S. Department of Energy (DOE) on issues within the field of astronomy and astrophysics that are of mutual interest and concern to the agencies.

*Agenda:* To hear presentations of current programming by representatives from NSF, NASA, DOE and other agencies relevant to astronomy and astrophysics; to discuss current and potential areas of cooperation between the agencies; to formulate recommendations for continued and new areas of cooperation and mechanisms for achieving them.

Dated: December 2, 2014.

**Suzanne Plimpton,**

*Acting Committee Management Officer.*

[FR Doc. 2014–28573 Filed 12–4–14; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. M–52–033–COL; NRC–2008–0566]**

### In the Matter of DTE Electric Company, Combined License for Enrico Fermi Unit 3; Notice of Hearing

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of hearing.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC or the Commission) will convene an evidentiary session to receive testimony and exhibits in the uncontested portion of this proceeding regarding the application of DTE Electric Company for a combined license (COL) to construct and operate a new nuclear power generation facility at the Enrico Fermi Nuclear Plant Unit 3 (Fermi 3). This mandatory hearing will concern safety and environmental matters relating to the requested COL.

**DATES:** The hearing will be held on February 4, 2015, beginning at 8:30 a.m. Eastern Time. For the schedule for submitting pre-filed documents and deadlines affecting Interested Government Participants, see Section VI of the **SUPPLEMENTARY INFORMATION** section of this document.

**ADDRESSES:** Please refer to Docket ID M–52–033–COL when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- NRC's Electronic Hearing Docket: You may obtain publicly available documents related to this hearing on line at *http://www.nrc.gov/about-nrc/regulatory/adjudicatory.html.*
- NRC's Agencywide Documents Access and Management System (ADAMS): You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852.

**FOR FURTHER INFORMATION CONTACT:** Glenn Ellmers, Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–0442; email: *Glenn.Ellmers@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Commission hereby gives notice that, pursuant to Section 189a of the Atomic Energy Act of 1954, as amended (the Act), it will convene an evidentiary session to receive testimony and exhibits in the uncontested portion of this proceeding regarding DTE Electric Company's September 18, 2008, application for a COL under part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR) to construct and operate a new nuclear power generation facility at the Enrico Fermi Nuclear Plant Unit 3 site in Monroe County, Michigan (ADAMS Accession No. ML082630034). This mandatory hearing will concern safety and environmental matters relating to the requested COL, as more fully described below. Participants in the hearing are not to address any contested issues in their written filings or oral presentations.

## II. Evidentiary Uncontested Hearing

The Commission will conduct this hearing beginning at 8:30 a.m., Eastern Time on February 4, 2015, at the Commission's headquarters in Rockville, Maryland. The hearing will continue on subsequent days, if necessary.

## III. Presiding Officer

The Commission is the presiding officer for this proceeding.

## IV. Matters To Be Considered

The matter at issue in this proceeding is whether the review of the application by the Commission's staff has been adequate to support the findings found in 10 CFR 52.97 and 10 CFR 51.107. Those findings are as follows:

*Issues Pursuant to the Atomic Energy Act of 1954, as Amended*

With respect to the COL: (1) Whether the applicable standards and requirements of the Act and the Commission's regulations have been met; (2) whether any required notifications to other agencies or bodies have been duly made; (3) whether there is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission's regulations; (4) whether the applicant is technically and financially qualified to engage in the activities authorized; and (5) whether issuance of the license will not be inimical to the common defense and security or the health and safety of the public.

*Issues Pursuant to the National Environmental Policy Act (NEPA) of 1969*

With respect to the COL: (1) Determine whether the requirements of Sections 102(2) (A), (C), and (E) of NEPA and the applicable regulations in 10 CFR part 51 have been met; (2) independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; (3) determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; and (4) determine whether the NEPA review conducted by the NRC staff has been adequate.

## V. Schedule for Submittal of Pre-Filed Documents

No later than January 14, 2015, unless the Commission directs otherwise, the staff and the applicant shall submit a list of its anticipated witnesses for the hearing.

No later than January 14, 2015, unless the Commission directs otherwise, the applicant shall submit its pre-filed written testimony. The staff submitted its testimony on November 20, 2014.

The Commission may issue written questions to the applicant or the staff before the hearing. If such questions are issued, an order containing such questions will be issued no later than December 30, 2014. Responses to such questions are due January 14, 2015, unless the Commission directs otherwise.

## VI. Interested Government Participants

No later than December 19, 2014, any interested U.S. State, local government body, federally-recognized Indian tribe, Canadian Province, local government body, or First Nation [1] may file with the Commission a statement of any issues or questions that the U.S. State, local government body, Indian tribe, Canadian Province, local government body, or First Nation wishes the Commission to give particular attention to as part of the uncontested hearing process. Such statement may be accompanied by any supporting documentation that the U.S. State, local government body, Indian tribe, Canadian Province, local government body, or First Nation sees fit to provide. Any statements and supporting documentation (if any) received by the Commission using the agency's E-filing

[1] Due to the proximity of the Fermi 3 site to the Canadian border, the Commission is expanding the list of interested government participants to include Canadian Provinces, local governments, and First Nations in this proceeding.

system [2] by the deadline indicated above will be made part of the record of the proceeding. The Commission will use such statements and documents as appropriate to inform its pre-hearing questions to the staff and applicant, its inquiries at the oral hearing, and its decision following the hearing. The Commission may also request, on or about January 7, 2015, that one or more particular U.S. States, local government bodies, Indian tribes, Canadian Provinces, local government bodies, or First Nations send one representative each to the evidentiary hearing to answer Commission questions and/or make a statement for the purpose of assisting the Commission's exploration of one or more of the issues raised by the U.S. State, local government body, Indian tribe, Canadian Province, local government body, or First Nation in the pre-hearing filings described above. The decision whether to request the presence of a representative of a U.S. State, local government body, Indian tribe, Canadian Province, local government body, or First Nation at the evidentiary hearing to make a statement and/or answer Commission questions is solely at the Commission's discretion. The Commission's request will specify the issue or issues that each representative should be prepared to address.

U.S. States, local governments, Indian tribes, Canadian Provinces, local governments, and First Nations should be aware that this evidentiary hearing is separate and distinct from the NRC's contested hearing process. Issues within the scope of contentions that have been admitted or contested issues pending before the Atomic Safety and Licensing Board or the Commission in a contested proceeding for a COL application are outside the scope of the uncontested proceeding for that COL application. In addition, although U.S. States, local governments, Indian tribes, Canadian Provinces, local governments, or First Nations participating as described above may take any position they wish, or no position at all, with respect to issues regarding the COL application or the NRC staff's associated environmental review that do fall within the scope of the uncontested proceeding (*i.e.,* issues that are not within the scope of admitted contentions or pending contested issues), they should be aware that many of the procedures and rights applicable to the NRC's contested hearing process due to the inherently adversarial nature of such proceedings are not available in the uncontested hearing. Participation in the NRC's contested hearing process is governed by 10 CFR 2.309 (for persons or entities, including U.S. States, local governments, Indian tribes, Canadian Provinces, local governments, or First Nations, seeking to file contentions of their own) and 10 CFR 2.315(c) (for interested U.S. States, local governments, Indian tribes, Canadian Provinces, local governments, or First Nations seeking to participate with respect to contentions filed by others). Participation in this uncontested hearing does not affect a U.S. State's, local government's, Indian tribe's, Canadian Province's, local government's, or First Nation's right to participate in the separate contested hearing process.

Dated at Rockville, Maryland, this 1st day of December, 2014.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. 2014–28610 Filed 12–5–14; 8:45 am]

**BILLING CODE 7590–01–P**

[2] The process for accessing and using the agency's E-filing system is described in the March 17, 2009, notice of hearing that was issued by the Commission for this proceeding. See Notice of Hearing 74 FR 836. Participants who are unable to use the electronic information exchange (EIE), or who will have difficulty complying with EIE requirements in the time frame provided for submission of written statements, may provide their statements by electronic mail to *hearingdocket@nrc.gov.*

## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

### National Science and Technology Council

### Notice of Public Meetings: Public Meetings of the National Science and Technology Council; Committee on Technology; Nanoscale Science, Engineering, and Technology Subcommittee; National Nanotechnology Coordination Office

**ACTION:** Notice of public meetings.

**SUMMARY:** The National Nanotechnology Coordination Office (NNCO), on behalf of the Nanoscale Science, Engineering, and Technology (NSET) Subcommittee of the Committee on Technology, National Science and Technology Council (NSTC) and in collaboration with the European Commission, will hold the 2015 ''EU-U.S.: Bridging NanoEHS Research Efforts'' joint workshop on March 12–13, 2015, in Venice, Italy. The workshop will bring together the U.S.-EU Communities of Research (CORs), which serve as a platform for U.S. and EU scientists to share information on nanoEHS research. The six Communities were established in 2012 and are listed below. This workshop—the 4th since 2011—is intended to further develop and support the CORs' activities.

- Exposure through the Life Cycle, with Material Characterization.
- Ecotoxicity Testing and Predictive Models, with Material Characterization.
- Predictive Modeling for Human Health, with Material Characterization.
- Databases and Ontologies.
- Risk Assessment.
- Risk Management and Control.

**DATES:** Thursday, March 12, 2015, from 8:30 a.m. until 6:00 p.m. and Friday, March 13, 2015, from 8:30 a.m. until 3:30 p.m.

**ADDRESSES:** The workshop will be held at Ca' Foscari University of Venice at Dorsoduro 3689—30123 in Venice, Italy.

**FOR FURTHER INFORMATION CONTACT:** For information regarding this Notice, please contact Stacey Standridge at National Nanotechnology Coordination Office, by telephone (703–292–8103) or email (*sstandridge@nnco.nano.gov*). Additional information about the workshop, including the agenda, is posted at *http://us-eu.org/2015workshop/.*

*Registration:* Due to space limitations, pre-registration for the workshop is required. Registration is on a first-come, first-served basis and will be capped at approximately 100 participants. Registration will open on Thursday, December 4, 2014. Individuals planning to attend the workshop should register online at *http://www.sun-fp7.eu/events/upcoming-events/eu-us-bridging-nanoehs-research-efforts-a-joint-workshop-2015/.* Written notices of participation by email should be sent to *sstandridge@nnco.nano.gov* or mailed to Stacey Standridge, 4201 Wilson Blvd., Stafford II, Suite 405, Arlington, VA 22230. Written notices must be received by February 15, 2015, to be considered.

*Meeting Accomodations:* Individuals requiring special accommodation to access this public meeting should contact Stacey Standridge (telephone 703–292–8103) at least ten business days prior to the meeting so that appropriate arrangements can be made.

**Ted Wackler,**

*Deputy Chief of Staff and Assistant Director.*

[FR Doc. 2014–28570 Filed 12–4–14; 8:45 am]

**BILLING CODE 3270–F5–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–146, OMB Control No.3235–0134]**

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of FOIA Services, Washington, DC 20549–2736.

*Extension:*
Rule 15c1–7.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 15c1–7 (17 CFR 240.15c1–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 15c1–7 states that any act of a broker-dealer designed to effect securities transactions with or for a customer account over which the broker-dealer (directly or through an agent or employee) has discretion will be considered a fraudulent, manipulative, or deceptive practice under the federal securities laws, unless a record is made of the transaction immediately by the broker-dealer. The record must include (a) the name of the customer, (b) the name, amount, and price of the security, and (c) the date and time when such transaction took place. The Commission estimates that 446 respondents collect information related to approximately 400,000 transactions annually under Rule 15c1–7 and that each respondent would spend approximately 5 minutes on the collection of information for each transaction, for approximately 33,333 aggregate hours per year (approximately 74.7 hours per respondent).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view the background documentation for this information collection at the following Web site: *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Pamela Dyson, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to *PRA_Mailbox@sec.gov.* Comments must be submitted within 30 days of this notice.

Dated: December 1, 2014.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28550 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–418, OMB Control No. 3235–0485]**

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736.

Extension:
Rule 15c2–1.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 15c2–1, (17 CFR 240.15c2–1), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15c2–1 (17 CFR 240.15c2–1) prohibits the commingling under the same lien of securities of margin customers (a) with other customers without their written consent and (b) with the broker or dealer. The rule also prohibits the re-hypothecation of customers' margin securities for a sum in excess of the customer's aggregate indebtedness. Pursuant to Rule 15c2–1, respondents must collect information necessary to prevent the re-hypothecation of customer securities in contravention of the rule, issue and retain copies of notices of hypothecation of customer securities in accordance with the rule, and collect written consents from customers in accordance with the rule. The information is necessary to ensure compliance with the rule and to advise customers of the rule's protections.

There are approximately 61 respondents (*i.e.,* broker-dealers that conducted business with the public, filed Part II or Part IICSE of the FOCUS Report, did not claim an exemption from the Rule 15c3–3 reserve formula computation, and reported that they had a bank loan during at least one quarter of the current year) that require an aggregate total of 1,373 hours to comply with the rule. Each of these approximately 61 registered broker-dealers makes an estimated 45 annual responses. Each response takes approximately 0.5 hours to complete. Thus, the total compliance burden per year is 1,373 burden hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site: *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Pamela Dyson, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: December 1, 2014.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28551 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–423, OMB Control No.3235–0472]**

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of FOIA Services, Washington, DC 20549–2736.

*Extension:*
Rule 15c1–6.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 15c1–

6 (17 CFR 240.15c1–6) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (Exchange Act).

Rule 15c1–6 states that any broker-dealer trying to sell to or buy from a customer a security in a primary or secondary distribution in which the broker-dealer is participating or is otherwise financially interested must give the customer written notification of the broker-dealer's participation or interest at or before completion of the transaction. The Commission estimates that 446 respondents collect information annually under Rule 15c1–6 and that each respondent would spend approximately 10 hours annually complying with the collection of information requirement (approximately 4,460 hours in aggregate).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Background documentation for this information collection may be viewed at the following Web site: *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Pamela Dyson, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or by sending an email to *PRA_Mailbox@sec.gov.* Comments must be submitted within 30 days of this notice.

Dated: December 1, 2014.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28549 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73712; File No. SR–OPRA–2014–03]**

## Options Price Reporting Authority; Order Approving an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Amend OPRA's Definition of the term ''Nonprofessional''

December 1, 2014.

### I. Introduction

On March 11, 2014, the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[3] The proposed OPRA Plan amendment would revise the definition of the term ''Nonprofessional.'' The proposed OPRA Plan amendment was published for comment in the **Federal Register** on August 18, 2014.[4] The Commission received no comment letters in response to the Notice.

This order approves the proposed OPRA Plan amendment.

### II. Description of the Proposal

The purpose of the proposed amendment is to revise the definition of the term ''Nonprofessional'' as that term is used in the ''Addendum for Nonprofessionals'' that is attached to OPRA's Electronic Form of Subscriber Agreement and its Hardcopy Form of Subscriber Agreement.[5]

Paragraph (c) of OPRA's current definition of the term ''Nonprofessional'' specifies that to qualify as a ''Nonprofessional'' a person must not be: ''(i) registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange/association, or any commodities/futures contract market/association, (ii) engaged as an ''investment adviser,'' as that term is defined in the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under Federal and/or state securities laws to perform functions that would require you to be so registered or qualified if you were to perform such functions for an organization not so exempt.'' According to OPRA, a literal reading of this language could lead to the conclusion that a person who works outside of the United States as (for example) a securities broker could qualify as a ''Nonprofessional,'' because the person is not covered by clauses (i), (ii) or (iii) of Paragraph (c).

OPRA is not aware of any instances in which an OPRA Vendor has determined that Subscribers who work outside the United States qualify to be Nonprofessional Subscribers on the basis of reading the definition of the term ''Nonprofessional'' in this manner.[6] However, OPRA believes that it is appropriate to modify the language to prevent such a reading. Accordingly, OPRA proposes to modify the current definition by adding a phrase at the beginning of paragraph (c) to clarify that the current language applies to persons who work in the United States and adding a sentence to paragraph (c) to say that ''For a natural person who works outside of the United States, a 'Professional' is a natural person who performs the same functions as someone who would be considered a 'Professional' in the United States.''

### III. Discussion

After careful review, the Commission finds that the proposed OPRA Plan amendment is consistent with the requirements of the Act and the rules and regulations thereunder.[7]

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder. *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 SE.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com.* The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The twelve participants to the OPRA Plan are BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, International Securities Exchange, LLC, Miami International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, NASDAQ Stock Market LLC, NYSE MKT LLC, NYSE Arca, Inc., and Topaz Exchange, LLC (d/b/a ISE Gemini).

[4] *See* Securities Exchange Act Release No. 72824 (August 12, 2014), 79 FR 48780 (''Notice'').

[5] These two forms are Attachments B–1 and B–2 to OPRA's Form of Vendor Agreement and they are available on OPRA's Web site at *www.opradata.com.*

[6] According to OPRA, the definition of the term ''Nonprofessional Subscriber'' used by the Consolidated Tape Association (''CTA''), which is substantively similar to OPRA's definition in almost all respects, prevents a similar reading of its definition.

[7] In approving this proposed OPRA Plan Amendment, the Commission has considered its

Continued

Specifically, the Commission finds that the proposed OPRA Plan amendment is consistent with Section 11A of the Act [8] and Rule 608 thereunder [9] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, and to remove impediments to, and perfect the mechanisms of, a national market system. The proposed change to the definition of the term Nonprofessional is designed to clarify that the term is meant to apply to persons engaged in the same type of business whether they are located in the United States or elsewhere. The Commission believes that OPRA's proposal is consistent with Section 11A of the Act [10] and Rule 608 thereunder [11] because the proposal is designed to add clarity to OPRA's existing term and should therefore help to avoid investor confusion. In addition, the Commission notes that the proposed revisions to the term ''Nonprofessional'' will make the term used by OPRA consistent with the similar term used by CTA.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 11A of the Act,[12] and Rule 608 thereunder,[13] that the proposed OPRA Plan amendment (SR–OPRA–2014–03) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28546 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78k–1.

[9] 17 CFR 242.608.

[10] 15 U.S.C. 78k–1.

[11] 17 CFR 242.608.

[12] 15 U.S.C. 78k–1.

[13] 17 CFR 242.608.

[14] 17 CFR 200.30–3(a)(29).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73711; File No. SR–OPRA–2013–03]**

## Options Price Reporting Authority; Order Approving an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Amend Sections 5.4 and 7.1 of the OPRA Plan

December 1, 2014.

## I. Introduction

On October 21, 2013, the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[3] The proposed OPRA Plan amendment would modify Sections 5.4 and 7.1 of the OPRA Plan as they relate to operations of OPRA outside of OPRA's regular hours of operations.[4] The proposed OPRA Plan amendment was published for comment in the **Federal Register** on August 18, 2014.[5] The Commission received no comment letters in response to the Notice.

This order approves the proposed OPRA Plan amendment.

## II. Description of the Proposal

The purpose of the proposed amendment is to (1) amend the OPRA Plan so that it provides for the aggregation of costs for operations of OPRA outside of its regular hours of operations (''after-hours operations'') with costs for operations of OPRA during its regular hours of operations (''regular-hours operations''); and (2) state expressly that OPRA may establish separate fees for access to OPRA data during periods of after-hours operations.[6]

Currently, the OPRA Plan provides that the costs of OPRA's after-hour operations are to be allocated separately from the costs of OPRA's regular-hour operations and in a somewhat different manner. The OPRA Plan currently provides that the costs of OPRA's regular-hour operations below a specified ceiling [7] and OPRA's revenues from regular-hour operations are both to be allocated among the OPRA member exchanges on the basis of the relative number of compared trades in options contracts traded on each of the OPRA member exchanges.[8]

The current provisions of the OPRA Plan state that, if the OPRA System operates outside of OPRA's regular hours, any costs attributable to such operation will be allocated to the exchange or exchanges that are actually operating during the after-hours period. The OPRA Plan does not make any special provision for the allocation of revenues derived from fees for access to OPRA data generated in the course of after-hours operations, and the OPRA Plan therefore provides that these revenues will be allocated among the OPRA member exchanges in the same way that revenues derived from regular-hours operations are allocated. The result is that the OPRA Plan currently provides for the allocation of costs of after-hours trading only to the exchange or exchanges that are actually operating during the after-hours period, but for the allocation of revenues resulting from fees for access to quotation and last sale information generated in the course of after-hours operations to all of the OPRA member exchanges on the basis of the relative number of compared trades in options contracts traded on each of the OPRA member exchanges in trading during both regular hours and outside of regular hours.

OPRA is therefore proposing to revise the OPRA Plan to provide that the costs of after-hours operations will be aggregated with the costs of operating the OPRA System during regular hours of operation. As a result of the proposed change, the aggregated costs of operating the System during all hours of operation would be allocated among all of OPRA's member exchanges, regardless of whether any particular exchange operates its market outside of regular hours.

In addition, OPRA's Fee Schedule does not currently provide specific fees for access to OPRA data during periods

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder. *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 SE.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com.* The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The twelve participants to the OPRA Plan are BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, International Securities Exchange, LLC, Miami International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, NASDAQ Stock Market LLC, NYSE MKT LLC, NYSE Arca, Inc., and Topaz Exchange, LLC (d/b/a ISE Gemini).

[4] OPRA's regular hours of operations are from 7:30 a.m. to 6:00 p.m. Eastern time. *See* Section 5.3 of the OPRA Plan.

[5] *See* Securities Exchange Act Release No. 72820 (August 12, 2014), 79 FR 48779 (''Notice'').

[6] OPRA does not currently operate outside of its regular hours of operations. However, according to OPRA, one of its member exchanges has indicated that it is planning to initiate after-hours trading and requested that OPRA operate during the after-hours period when its market will be open for trading. The current OPRA Plan provides that the OPRA System will operate outside of its regular hours of operation at the request of any one or more of its member exchanges. *See* Section 5.3 of the OPRA Plan. OPRA is not proposing any changes to Section 5.3 of the OPRA Plan.

[7] Clause 7.1(a)(iii)(2) of the OPRA Plan provides that costs above a ''specified ceiling'' are to be allocated in accordance with OPRA's Capacity Guidelines. The ''ceiling'' is described in Guideline 7 of the Capacity Guidelines. OPRA is not proposing any changes in the allocation of costs as described in the Capacity Guidelines.

[8] *See* Section 7.1 of the OPRA Plan.

of after-hours operations. Therefore, OPRA is proposing to add a sentence to Section 5.4(d) of the OPRA Plan to state expressly that it may establish such fees.[9]

## III. Discussion

After careful review, the Commission finds that the proposed OPRA Plan amendment is consistent with the requirements of the Act and the rules and regulations thereunder.[10] Specifically, the Commission finds that the proposed OPRA Plan amendment is consistent with Section 11A of the Act[11] and Rule 608 thereunder[12] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, and to remove impediments to, and perfect the mechanisms of, a national market system. OPRA believes that the proposed amendment will better align the provisions of the OPRA Plan relating to the allocation of costs of after-hours operations with the provisions of the OPRA Plan relating to the allocation of revenues derived from after-hours trading. The Commission believes that OPRA's proposal is consistent with Section 11A of the Act[13] and Rule 608 thereunder.[14]

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 11A of the Act,[15] and Rule 608 thereunder,[16] that the proposed OPRA Plan amendment (SR–OPRA–2013–03) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28545 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

[9] OPRA is also proposing to make a non-substantive change to Section 5.4(d) of the OPRA Plan to reflect that the OPRA Fee Schedule is no longer identified as ''Exhibit B'' to the OPRA Plan but is publicly available on the OPRA Web site under the ''Fees'' tab.

[10] In approving this proposed OPRA Plan Amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78k–1.

[12] 17 CFR 242.608.

[13] 15 U.S.C. 78k–1.

[14] 17 CFR 242.608.

[15] 15 U.S.C. 78k–1.

[16] 17 CFR 242.608.

[17] 17 CFR 200.30–3(a)(29).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73705; File No. SR–NASDAQ–2014–118]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify NASDAQ Rule 7001(c)

December 1, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2014, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to modify NASDAQ Rule 7001(c) concerning market maker participant identifier[3] (''MPID'') fees. The Exchange proposes to implement the proposed rule change on December 1, 2014.

The text of the proposed rule change is available at *nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] When applied to a market maker, sometimes referred to as a ''maker participant identifier.''

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

NASDAQ is proposing to amend the fees assessed under Rule 7001(c) for MPIDs. MPIDs are special numerical identifiers assigned to certain broker-dealers to identify the firms' transaction and quoting activity. NASDAQ administers the assignment of MPIDs, which may be requested by a broker-dealer for use on NASDAQ systems, reporting to Financial Industry Regulatory Authority (''FINRA''), or a combination of the two. NASDAQ member firms are provided with a Primary MPID upon gaining NASDAQ membership, but may also request additional MPIDs. These additional MPIDs are called Supplemental MPIDs and may be used by member firms to separate orders or quotes entered into the NASDAQ system for affiliates, segregated business units or trading desks, or sponsored access firms. Member firms also may use Supplemental MPIDs exclusively for reporting information to facilities of the FINRA, such as the FINRA/NASDAQ Trade Reporting Facility.

Under Rule 7001(c), NASDAQ provides a Primary MPID at no cost, and Supplemental MPIDs for a fee of $1,000 per month, per additional identifier. The Exchange also provides Supplemental MPIDs at no cost if they are used exclusively for reporting information to facilities of FINRA. The Exchange has not modified the fees assessed for MPIDs since adopting Rule 7001(c) in July 2010.[4] NASDAQ is proposing to eliminate the distinction between Primary and Supplemental MPIDs and assess a fee of $500 per month, per identifier. As is currently the case, NASDAQ will not assess a fee for MPIDs used exclusively for reporting to the facilities of FINRA. A consequence of the proposed change is that some member firms will experience an overall fee increase. Specifically, a member firm that currently has only one MPID (a ''Primary MPID'' under the current rule) would now have to pay $500 per month for the MPID under the proposed change, whereas that member firm pays nothing under the current rule. A member firm that has two MPIDs currently, none of which are [sic] used exclusively for reporting to the facilities of FINRA, would experience no change in the total monthly fee assessed for its

[4] *See* Securities Exchange Act Release No. 62564 (July 23, 2010), 75 FR 44830 (July 29, 2010) (SR–NASDAQ–2010–089).

MPIDs.[5] A member firm that has three or more MPIDs, none of which are [sic] used exclusively for reporting to the facilities of FINRA, would experience a fee reduction. The Exchange notes that its membership fees will continue to remain lower than the analogous fees assessed by the New York Stock Exchange for membership.[6]

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

NASDAQ believes that the proposed simplification and uniform application of the fee assessed for MPIDs is an equitable allocation of a reasonable fee because it removes a distinction from the rule based on the number of MPIDs held and allocates a lower per MPID fee based strictly on the number of MPIDs subscribed. Although the proposed rule change reduces the per MPID fee assessed, it will result in a higher fee for some member firms that subscribe only to a Primary MPID currently. The Exchange believes that applying the proposed fee to all MPIDs subscribed that are used for Exchange trading activity allocates the fee more precisely with the benefit received. NASDAQ notes that it incurs the same cost in administering all MPIDs, including what is currently known as a Primary MPID. The Exchange believes that the proposed fee is reasonable because it lowers the fee to a level that more closely aligns the costs NASDAQ incurs in administering an individual MPID with the fee received. NASDAQ currently provides a Primary MPID at no cost, while Supplemental MPIDs not used exclusively for reporting to the facilities of FINRA are assessed a fee. NASDAQ had adopted the Supplemental MPID fees in an effort to help cover the costs of administering MPIDs and to also bring efficiency to their use by member firms.[9] When it adopted the Supplemental MPID fees, NASDAQ noted that it had observed that many member firms subscribed to multiple MPIDs through which very little activity occurred.[10] NASDAQ notes that the current fee structure has had the desired effect. Accordingly, NASDAQ now believes that reducing the per MPID fee, yet applying it to all MPIDs, is reasonable as it better aligns the fees assessed for MPIDs with the costs incurred by NASDAQ while also retaining an incentive to use MPIDs efficiently. NASDAQ anticipates that the proposed change will result in an overall increase in income received from MPID subscription fees. The Exchange believes that it is reasonable to adjust fees from time to time so that it can continue to make a profit on the products and services it offers. Ensuring that its products and services provide the Exchange with a profit allows it continue to offer and enhance such products and services, such as MPIDs. As noted above, the Exchange believes it is more equitable to allocate the fees on a per MPID basis because it better aligns the fees assessed with the costs incurred in offering MPIDs.

NASDAQ also believes that the proposed rule change is not designed to permit unfair discrimination between member firms because the proposed fee will be assessed based on the number of MPIDs subscribed. The Exchange notes that all member firms will be assessed a fee for what is now considered a Primary MPID. As a consequence, member firms that currently subscribe only to a Primary MPID and have no Supplemental MPIDs or only Supplemental MPIDs used exclusively for reporting to the facilities of FINRA, will experience a fee increase. Other member firms, however, will either see no increase in fee [sic] or experience a fee reduction under the proposed change. NASDAQ believes that the proposed change is not unfairly discriminatory because all subscribing member firms will be assessed a fee for what is currently known as a Primary MPID. As noted above, all member firms derive benefit from each MPID used in transacting on NASDAQ, and NASDAQ is adjusting the fee to ensure that each subscribing member firm pays for the benefit received.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.[11] NASDAQ does not believe that the proposed rule change places an unnecessary burden on competition because it more equitably applies the fee among subscribers. Specifically, the proposed change ties the fee directly to the number of MPIDs subscribed and eliminates the free Primary MPID. NASDAQ notes that, although all member firms will have to pay a fee for what is currently known as a Primary MPID and some member firms will experience a fee increase as a result of the proposed change, such a change is appropriate because it more closely aligns the subscription fee assessed for an MPID with the cost incurred by NASDAQ in administering it and ensures that offering the service is profitable to the Exchange. As discussed above, NASDAQ's membership fees remain lower than the analogous fees of the NYSE, and membership fees are subject to competition from other exchanges. Accordingly, if the changes proposed herein are unattractive to market participants, it is likely that NASDAQ will experience a decline in membership and/or order flow as a result.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing change has become effective pursuant to Section 19(b)(3)(A) of the Act,[12] and paragraph (f) [13] of Rule 19b–4, thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[5] Such a member firm currently receives the Primary MPID at no cost and the Supplemental MPID at $1,000 per month. Under the proposed change, such a member firm would pay $500 per month for each of the MPIDs, totaling $1,000 per month.

[6] The Exchange believes that the New York Stock Exchange (''NYSE'') Trading License Fee is analogous to membership fees of NASDAQ as they both provide access to the trading facilities of their respective exchanges. In this regard, NYSE assesses an annual fee of $40,000 for the first two licenses held by a member organization, and $25,000 for each additional license. *See https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.* By contrast, NASDAQ would assess the proposed monthly fee of $500 per MPID, an annual membership fee of $3,000, and a trading rights fee of $1,000 per month ($12,000 annually). *See* NASDAQ Rule 7001(a).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] *Supra* note 4.

[10] *Id.*

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2014–118 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2014–118. 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 proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2014–118, and should be submitted on or before December 26, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Kevin M. O' Neill,**

*Deputy Secretary.*

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**BILLING CODE 8011–01–P**

[14] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73706; File No. SR–NYSEArca–2014–89]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change Relating To Listing and Trading of Shares of Eight PIMCO Exchange-Traded Funds

December 1, 2014.

## I. Introduction

On August 15, 2014, NYSE Arca, Inc. (''NYSEArca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the following eight PIMCO exchange-traded funds, pursuant to NYSE Arca Equities Rule 8.600: PIMCO StocksPLUS® Absolute Return Exchange-Traded Fund (''StocksPLUS AR Fund''), PIMCO Small Cap StocksPLUS® AR Strategy Exchange-Traded Fund (''Small Cap StocksPLUS AR Fund''), PIMCO Fundamental IndexPLUS® AR Exchange-Traded Fund (''Fundamental IndexPLUS Fund''), PIMCO Small Company Fundamental IndexPLUS® AR Strategy Exchange-Traded Fund (''Small Company Fundamental IndexPLUS Fund''), PIMCO EM Fundamental IndexPLUS® AR Strategy Exchange-Traded Fund (''EM Fundamental IndexPLUS Fund''), PIMCO International Fundamental IndexPLUS® AR Strategy Exchange-Traded Fund (''International Fundamental IndexPLUS Fund''), PIMCO EM StocksPLUS® AR Strategy Exchange-Traded Fund (''EM StocksPLUS Fund''), and PIMCO International StocksPLUS® AR Strategy Exchange-Traded Fund (Unhedged) (''International StocksPLUS Fund'') (each a ''Fund'' and collectively the ''Funds.''). The proposed rule change was published for comment in the **Federal Register** on September 3, 2014.[3] The Commission received no comments on the proposal. On October 15, 2014, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] This order institutes proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

## II. Description of the Proposal

The Exchange proposes to list and trade shares (''Shares'') of the Funds under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares.[7]

### *A. Characteristics and Holdings of the Funds*[8]

1. Investment Objective and Principal Holdings

Each Fund would seek total return that exceeds the total return of its equity securities index benchmark, and under normal circumstances would seek to achieve its investment objective by investing in derivatives overlying its benchmark and a portfolio of Fixed Income Instruments (defined below), which would be managed using an absolute return approach. Typically, the Funds would use derivative instruments as a substitute for taking a position in

[3] *See* Securities Exchange Act Release No. 72937 (Aug. 27, 2014), 79 FR 52385 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 73364, 79 FR 62988 (Oct. 21, 2014). The Commission determined that it was appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission designated December 2, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[8] Additional information regarding the Shares and the Funds, including investment strategy, risks, creation and redemption procedures, portfolio holdings, and investment restrictions, is included in the Notice, *supra* note 3.

the underlying asset [9] or as part of a strategy designed to reduce exposure to other risks. The Funds may also use derivative instruments to enhance returns.

The Exchange states that ''Fixed Income Instruments'' may include: Securities issued or guaranteed by the U.S. Government, its agencies, or government-sponsored enterprises (''U.S. Government Securities''); corporate debt securities of U.S. and non-U.S. issuers, including convertible securities and corporate commercial paper; mortgage-backed and other asset-backed securities; inflation-indexed bonds issued both by governments and corporations; structured notes, including hybrid or ''indexed'' securities, and event-linked bonds; [10] bank capital and trust preferred securities; loan participations and assignments; [11] delayed funding loans and revolving credit facilities; bank certificates of deposit, fixed time deposits and bankers' acceptances; repurchase agreements on Fixed Income Instruments and reverse repurchase agreements on Fixed Income Instruments; debt securities issued by states or local governments and their agencies, authorities and other government-sponsored enterprises; obligations of non-U.S. governments or their subdivisions, agencies, and government-sponsored enterprises; and obligations of international agencies or supranational entities. The Exchange also states that derivative instruments may include the following: Forwards; exchange-traded and over-the-counter (''OTC'') options contracts; exchange-traded futures contracts; exchange-traded and OTC swap agreements; exchange-traded and OTC options on futures contracts; and OTC options on swap agreements.[12]

2. Other Investments

The Funds may invest in securities and instruments that are economically tied to foreign (non-U.S.) countries. The Funds may invest in securities denominated in foreign (non-U.S.) currencies and in U.S. dollar-denominated securities of foreign (non-U.S.) issuers, subject to applicable limitations set forth in the Notice. With respect to the Funds' absolute return investments, each Fund will normally limit its foreign currency exposure (from non-U.S. dollar-denominated securities or currencies) to 20% of its total assets. With respect to the Funds' absolute return investments, each Fund may invest up to 25% of its total assets in securities and instruments that are economically tied to emerging market countries.

The Funds may engage in foreign currency transactions on a spot (cash) basis or forward basis, and they may invest in foreign currency futures contracts and options contracts. The Funds may enter into these contracts to hedge against foreign exchange risk, to increase exposure to a foreign currency, or to shift exposure to foreign currency fluctuations from one currency to another. Suitable hedging transactions may not be available in all circumstances and there can be no assurance that the Funds will engage in such transactions at any given time or from time to time.

The Funds may, without limitation, seek to obtain market exposure to the securities in which they primarily invest by entering into a series of purchase and sale contracts. The Funds may purchase or sell securities on a when-issued, delayed delivery or forward commitment basis and may engage in short sales.

3. Additional Investment Limits

According to the Exchange, each of the Funds may invest up to 10% of its total assets in preferred stocks, convertible securities, and other equity-related securities. Each Fund may invest up to 20% of its total assets in: (i) Variable and floating rate securities that are not Fixed Income Instruments; (ii) floaters and inverse floaters that are not Fixed Income Instruments; (iii) trade claims, privately placed and unregistered securities, exchange-traded and OTC-traded structured products, including credit-linked securities and commodity-linked notes; (iv) Brady Bonds; and (v) bank loans.

Each Fund may, with up to 20% of its total assets, enter into repurchase agreements on instruments other than Fixed Income Instruments. Each Fund may also, with up to 20% of its total assets, enter into reverse repurchase agreements on instruments other than Fixed Income Instruments, subject to the Fund's limitations on borrowings.

Each Fund may invest up to 20% of its total assets in ''high yield securities'' or unrated securities determined by PIMCO to be of comparable quality (except that within such limitation, the Fund may invest in mortgage-related securities rated below B).

Each Fund may invest up to 20% of its assets in mortgage-related and other asset-backed securities, although this 20% limitation does not apply to securities issued or guaranteed by Federal agencies and/or U.S. government sponsored instrumentalities.

## III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [13] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[14] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change's consistency with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' [15]

## IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposal. In particular, the Commission

[9] The Exchange states that derivatives may be purchased with a small fraction of the assets that would be needed to purchase the benchmark index securities directly, so that the remainder of the Funds' assets may be invested in Fixed Income Instruments. Accordingly, the Funds generally would not invest directly in benchmark index component stocks, but the Exchange states that the Funds may invest in stocks and exchange-traded funds.

[10] The Exchange states that such investments will constitute only up to 20% of a Fund's total assets.

[11] The Exchange states that such investments will constitute only up to 20% of a Fund's total assets.

[12] According to the Exchange, all investment guidelines and limitations will apply to a Fund's aggregate investment exposure to a particular type of investment that is the subject of the guideline or limitation, whether such exposure is obtained through direct holdings or through derivative instruments. *See* Notice, *supra* note 3, at 52387.

[13] 15 U.S.C. 78s(b)(2)(B).

[14] *Id.*

[15] 15 U.S.C. 78f(b)(5).

invites the written views of interested persons concerning (1) the transparency and liquidity of the markets for the assets in which each Fund would be permitted to invest a substantial portion of its portfolio and (2) the expected effectiveness and efficiency of arbitrage with respect to the market price of the Funds' shares and the value of the underlying portfolio assets, given the transparency and liquidity of the markets for those underlying assets.

Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[16]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by December 26, 2014. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by January 9, 2015.

Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2014–89 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Numbers SR–NYSEArca–2014–89. 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 proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–89 and should be submitted on or before December 26, 2014. Rebuttal comments should be submitted by January 9, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28547 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

[16] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[17] 17 CFR 200.30–3(a)(57).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73710; File No. SR–OCC–2014–805]**

## Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Withdrawal of an Advance Notice Concerning Enhancements to the Risk Management Framework Applied to the Clearance of Confirmed Trades Executed in Extended and Overnight Trading Sessions

December 1, 2014.

On September 17, 2014, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission''), 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] an advance notice concerning enhancements to the risk management framework applied to the clearance of confirmed trades executed in extended and overnight trading sessions. Notice of the advance notice was published in the **Federal Register** on October 20, 2014.[3] The Commission did not receive any comments in response to the advance notice.

On October 28, 2014, OCC filed a withdrawal of its advance notice (SR–OCC–2014–805) from consideration by the Commission. The Commission is hereby publishing notice of the withdrawal.

By the Commission.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28544 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] *See* Securities Exchange Act Release No. 73343 (October 14, 2014), 79 FR 62684 (October 20, 2014) (SR–OCC–2014–805).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73708; File No. SR–MSRB–2014–08]**

## Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to MSRB Rules G–1, on Separately Identifiable Department or Division of a Bank; G–2, on Standards of Professional Qualification; G–3, on Professional Qualification Requirements; and D–13, on Municipal Advisory Activities

December 1, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on November 18, 2014, the Municipal Securities Rulemaking Board (the ''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change consisting of proposed amendments to MSRB Rules G–1, on separately identifiable department or division of a bank; G–2, on standards of professional qualification; G–3, on professional qualification requirements; and D–13, on municipal advisory activities (the ''proposed rule change''). The MSRB is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

proposing that these amendments become effective 60 days following the date of SEC approval.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2014-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Description of the Proposed Rule Change

The purpose of the proposed rule change is to establish professional qualification requirements for municipal advisors and their associated persons and to make related changes to select MSRB rules. The MSRB is charged with setting professional standards and continuing education requirements for municipal advisors. Specifically, the Act requires associated persons of brokers, dealers and municipal securities dealers (''dealers'') and municipal advisors to pass examinations as the MSRB may establish to demonstrate that such individuals meet the standards of competence as the MSRB finds necessary or appropriate in the public interest or for the protection of investors and municipal entities or obligated persons.[3] A professional qualification examination is intended to determine whether an individual meets the MSRB's basic qualification standards for a particular registration category. The examination measures a candidate's knowledge of the business activities, as well as the regulatory requirements, including MSRB rules, rule interpretations and federal law applicable to a particular registration category.

MSRB Rule G–3 establishes classifications and qualification requirements for associated persons of dealers. The proposed rule change would add the following two new registration classifications for municipal advisors under Rule G–3: (a) Municipal advisor representatives—those individuals who engage in municipal advisory activities; and (b) municipal advisor principals—those individuals who engage in the management, direction or supervision of the municipal advisory activities of the municipal advisor and its associated persons.[4] The proposed amendments also would require each prospective municipal advisor representative to take and pass the municipal advisor representative qualification examination being developed by the MSRB prior to being qualified as a municipal advisor representative. Qualification as a municipal advisor representative would be a prerequisite to qualification as a municipal advisor principal. Each municipal advisor would be required to designate at least one individual as a municipal advisor principal who would be responsible for supervising the municipal advisory activities of the municipal advisor, and each municipal advisor principal would be required to pass the municipal advisor representative qualification examination to perform the supervisory activities of a principal.

To provide prospective municipal advisor representatives with sufficient time to prepare for and take the examination, the MSRB proposes a one-year grace period for test takers to pass the examination. In addition, given the general view of industry participants that the 90-day apprenticeship requirement for municipal securities representatives in Rule G–3 does not provide any additional benefit, the MSRB proposes to eliminate the requirement for municipal securities representatives and, similarly, does not propose an apprenticeship requirement for municipal advisor representatives.

MSRB Rule G–2 establishes the standards of professional qualification for dealers and currently provides that no dealer shall engage in municipal securities activities unless such dealer and every natural person associated with such dealer is qualified in accordance with MSRB rules. The proposed rule change amends Rule G–2 to add a basic requirement that no municipal advisor shall engage in municipal advisory activities unless such municipal advisor and every natural person associated with such municipal advisor is qualified in accordance with MSRB rules.

The proposed rule change would also amend Rule D–13, on municipal advisory activities, to incorporate SEC rules by providing that the term ''municipal advisory activities'' means, except as otherwise specifically provided by rule of the Board, the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act[5] and the rules and regulations promulgated thereunder. In recognition of the new regulatory scheme for municipal advisors, the proposed rule change would amend Rules G–1 and G–3 to provide that dealers and their municipal securities representatives may continue to perform financial advisory or consultative services for issuers in connection with the issuance of municipal securities, except to the extent the municipal securities representatives engaged in the activities must be qualified as municipal advisor representatives to perform such services. Finally, Rule G–1 also would be amended to provide that, for purposes of its municipal advisory activities, the term ''separately identifiable department or division of a bank'' would have the same meaning as in Securities Exchange Act Rule 15Ba1–1(d)(4).[6]

New Registration Classifications

The proposed amendments to Rule G–3 would create two new registration classifications: (a) Municipal advisor representative and (b) municipal advisor principal. These classifications are consistent with other regulatory schemes, including those for broker-dealers.[7]

The new classifications would distinguish between municipal advisor representatives who would be qualified to engage in municipal advisory activities and municipal advisor principals who would be qualified to engage in and supervise the municipal advisory activities of the municipal

[3] *See* Section 15B(b)(2)(A) of the Act, 15 U.S.C. 78o–4(b)(2)(A).

[4] The definition of municipal advisor representative would be substantially identical to the category of individuals for whom a Form MA–I is required to be completed as part of a municipal advisor's registration with the SEC—natural persons associated with the municipal advisor engaged in municipal advisory activities on behalf of the firm.

[5] *See* Section 15B(e)(4)(A)(i) and (ii) of the Act, 15 U.S.C. 78o–4(e)(4)(A)(i) and (ii).

[6] 17 CFR 240.15Ba1–1(d)(4).

[7] Examples of these other schemes include the following classifications: Series 7 (General Securities Representative) and Series 24 (General Securities Principal); Series 42 (Registered Options Representative) and Series 4 (Registered Options Principal); Series 22 (Direct Participation Programs Limited Representative) and Series 39 (Direct Participation Programs Limited Principal).

advisor and its associated persons. The proposed amendments to Rule G–3 would define a municipal advisor representative as a natural person associated with a municipal advisor, other than a person performing only clerical, administrative, support or similar functions.[8]

The proposed amendments would define a municipal advisor principal as a natural person associated with a municipal advisor who is directly engaged in the management, direction or supervision of the municipal advisory activities, as defined in Rule D–13, of the municipal advisor. In addition, the proposed amendments to Rule G–3 would require each municipal advisor to designate at least one municipal advisor principal to be responsible for the municipal advisory activities of the municipal advisor.[9] Further, the proposed rule change would require each municipal advisor representative and municipal advisor principal to take and pass the municipal advisor representative qualification examination prior to being qualified as a municipal advisor representative or municipal advisor principal, respectively. The examination is discussed in more detail below.

Grace Period

To provide for an orderly transition to the new professional qualification requirements for municipal advisors, the MSRB proposes that prospective municipal advisor representatives have one year from the effective date of the examination to pass it.[10] During this grace period, municipal advisor professionals could continue to engage in municipal advisory activities. The grace period is intended to provide municipal advisor representatives with sufficient time to study and take (and, if necessary retake) the examination without causing undue disruption to the business of the municipal advisor. As is the case for all MSRB qualification examinations, individuals who do not pass the examination would be permitted to retake the examination after 30 days. However, any person who fails the examination three or more times in succession would be prohibited from taking the examination for six months.[11]

Prior to the effective date of the examination and prior to the commencement of the one-year grace period, the MSRB will file a study outline describing the topics on the examination, the percentage of the examination devoted to the topic areas, and the number of questions on the examination. The study outline will also contain reference material and sample examination questions to assist examination takers. The MSRB expects that it will provide more information about the study outline through a webinar or other means, subsequent to the filing of the study outline with the SEC. A pilot examination is expected to be delivered in 2015. The MSRB will use the results of the pilot examination to set the passing grade, which will be added to the study outline.

Uniform Requirement—Grandfathering

The proposed rule change would require that all persons deemed municipal advisor representatives under Rule G–3 pass the qualification examination, regardless of whether such persons have passed other MSRB or MSRB-recognized examinations (such as the Series 52 or 7 examinations), or previously have been engaged in municipal advisory activities. While commenters requested, as discussed below, that the MSRB waive the requirement or ''grandfather'' those individuals who have passed certain other professional qualifications examinations or have experience in providing municipal advisory services, the MSRB believes that the significant changes that accompany the new regulatory regime for municipal advisors dictate that each individual engaged in municipal advisory activities demonstrate a minimum level of knowledge of the job responsibilities and regulatory requirements by passing a general qualification examination.

The MSRB has considered this issue carefully and has determined that the practice of grandfathering will not effectively ensure a minimum level of competency by those individuals acting as municipal advisor representatives. For example, the MSRB has no practical means to determine whether an individual is competent based on experience. The MSRB believes that Congress, through the Act, requires more than reliance on a representation of competence.[12] As for those who suggest they have demonstrated a basic competence by passing another qualification examination, the MSRB believes the job responsibilities of a municipal advisor professional and the regulations governing such individuals are sufficiently distinct in application as to require that they pass a separate examination.

Waivers

The Board will consider waiving the requirement that a municipal advisor representative or municipal advisor principal pass the municipal advisor representative qualification examination in extraordinary cases: (1) Where the applicant participated in the development of the municipal advisor representative qualification examination as a member of the Board's Professional Qualifications Advisory Committee (PQAC); or (2) where good cause is shown by an applicant who previously qualified as a municipal advisor representative by passing the municipal advisor representative qualification examination and such qualification lapsed. The Board will review each waiver request on its individual merits, taking into consideration relevant facts presented by the applicant. For example, the Board may consider granting a waiver for an individual whose municipal advisor representative qualification lapsed but who demonstrated subsequent investment industry or related professional experience.

Apprenticeship

MSRB Rule G–3 currently requires a municipal securities representative to serve an apprenticeship period of 90 days before transacting business with any member of the public or receiving compensation for such activities. The intent of the provision was to ensure that persons with no prior experience in the securities industry would learn from an experienced professional before conducting business with the public. Regulated entities have provided feedback that the requirement does not provide any additional benefit because the 90-day training period is short and the rule provides no specific training requirements. Moreover, the SEC approved a similar rule change by Financial Industry Regulatory Authority

[8] Rule D–13 defines municipal advisory activities as the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act. Rule D–13 would be amended to reflect the SEC's interpretation of the statutory definition of municipal advisor. Hence, ''municipal advisory activities'' would mean the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Act and the rules and regulations promulgated thereunder.

[9] MSRB Rule G–44 sets forth the obligation of municipal advisors to supervise the municipal advisory activities of the municipal advisor and its associated persons to ensure compliance with applicable MSRB and SEC rules. Exchange Act Release No. 73415 (Oct. 23, 2014), 79 FR 64423 (Oct. 29, 2014), File No. SR–MSRB–2014–06, available at *http://www.sec.gov/rules/sro/msrb/2014/34-73415.pdf.*

[10] The MSRB will announce the effective date of the municipal advisor representative qualification examination at a later date.

[11] *See* MSRB Rule G–3(f), proposed MSRB Rule G–3(g) in Exhibit 5.

[12] *See* Exchange Act Release No. 70462 at 6 (Sept. 20, 2013), 78 FR 67467 at 67469 (Nov. 12, 2013) (''SEC Final Registration Rule'') and Section 15B(b)(2)(A) of the Act, 15 U.S.C. 78o–4(b)(2)(A).

(FINRA) in eliminating the apprenticeship requirement established under prior New York Stock Exchange (NYSE) Rule 345 for certain registered persons, noting that the change would permit its member firms to determine, consistent with their supervisory obligations, the extent and duration of the initial training of such registered persons.[13] The MSRB believes that dealers and municipal advisors should determine the length and nature of the initial training for newly registered persons, consistent with the approach taken by FINRA. Consequently, the MSRB proposes to eliminate the apprenticeship requirement for municipal securities representatives and proposes no such requirement for municipal advisor representatives.

Technical Amendments

The MSRB is amending Rule G–3(a)(ii) to correctly re-letter G–3(a)(ii)(D) as G–3(a)(ii)(C).

Effective Date

The MSRB is proposing that these amendments become effective 60 days following the date of SEC approval. The effective date and the compliance date of the municipal advisor representative qualification examination will be announced by the MSRB with at least 30 days notice. The one-year grace period will extend from the effective date to the compliance date.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(A) of the Act,[14] which provides that the MSRB's rules shall:

> provide that no municipal securities broker or municipal securities dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any municipal security, and no broker, dealer, municipal securities dealer, or municipal advisor shall provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, unless . . . such municipal securities broker or municipal securities dealer and every natural person associated with such municipal securities broker or municipal securities dealer meet such standards of training, experience, competence, and such other qualifications as the Board finds necessary or appropriate in the public interest or for the protection of investors and municipal entities or obligated persons.

This provision provides the MSRB with authority to establish standards of competence as the MSRB finds necessary to carry out its regulatory duties. It also provides that, in connection with the definition and application of such standards, the MSRB may appropriately classify municipal advisors and their associated persons, specify that all or any portion of such standards shall be applicable to any such class, and require persons in any such class to pass an examination regarding such standards of competence.

Professional qualification examinations are an established means for determining the basic competency of individuals in a particular class. The proposed rule change would require individuals who engage in or supervise municipal advisory activities to pass such an examination. The MSRB believes that requiring prospective municipal advisor representatives to pass a basic qualification examination will protect investors, municipal entities and obligated persons by ensuring such representatives have a basic understanding of the role of a municipal advisor representative and the rules and regulations governing such individuals.

In its final rule on the permanent registration of municipal advisors, the SEC noted that ''[t]he new registration requirements and regulatory standards are intended to mitigate some of the problems observed with the conduct of some municipal advisors, including . . . advice rendered by financial advisors without adequate training or qualifications. ''[15] The municipal advisor representative qualification examination is consistent with the intent to mitigate problems associated with advice provided by those individuals without adequate training or qualifications.

Additionally, the MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iii) of the Act,[16] which provides that the MSRB's rules shall, with respect to municipal advisors, provide professional standards. The proposed rule change would establish professional standards for those individuals engaged in or supervising municipal advisory activities by requiring such individuals to demonstrate a basic competency regarding the role of municipal advisor representatives and the rules and regulations governing the conduct of such persons.

Section 15B(b)(2)(L)(iv) of the Act[17] requires that rules adopted by the Board not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes that the proposed rule change is consistent with this provision. While the proposed rule change would affect all municipal advisors, including small municipal advisors, it would be a necessary and appropriate regulatory burden in order to establish the baseline competence of those individuals engaged in municipal advisory activities, and it also would promote compliance with MSRB rules. While there will be one-time costs associated with preparing for and taking the municipal advisor representative qualification examination, the MSRB does not believe that such costs will impose a regulatory burden on small municipal advisors that is not necessary or appropriate to protect investors, municipal entities and obligated persons. A discussion of the economic analysis of the proposed rule change and its impact on small municipal advisors is provided below.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Section 15B(b)(2)(C) of the Act[18] requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In determining whether this standard has been met, the MSRB has been guided by the Board's recently-adopted policy to more formally integrate economic analysis into the rulemaking process. In accordance with this policy the Board has evaluated the potential impacts of the proposed rule change, including in comparison to reasonable alternative regulatory approaches.

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, in so far as the proposed rule change merely establishes baseline professional qualification standards for all municipal advisors. The baseline standard would provide the MSRB assurance that individuals

[13] *See* FINRA Regulatory Notice 08–64 (Oct. 2008). Exchange Act Release No. 58103 (Jul. 3, 2008), 73 FR 40403 (Jul. 14, 2008), File No. SR–FINRA–2008–036.

[14] *See* Section 15B(b)(2)(A) of the Act, 15 U.S.C. 78o–4(b)(2)(A).

[15] *See* 78 FR 67467 at 67469 (Nov. 12, 2013).

[16] *See* Section 15B(b)(2)(L)(iii) of the Act, 15 U.S.C. 78o–4(b)(2)(L)(iii).

[17] *See* Section 15B(b)(2)(L)(iv) of the Act, 15 U.S.C. 78o–4(b)(2)(L)(iv).

[18] *See* Section 15B(b)(2)(C) of the Act, 15 U.S.C. 78o–4(b)(2)(C).

who take and pass the municipal advisor representative qualification examination demonstrate a basic knowledge of the role of a municipal advisor representative and the rules and regulations governing the conduct of individuals engaging in municipal advisory activities. The MSRB has considered whether it is possible that the costs associated with preparing for and taking the municipal advisor representative qualification examination, relative to the baseline of no professional qualification examination, may affect the competitive landscape by leading some municipal advisors to exit the market, curtail their activities or consolidate with other firms. For example, some municipal advisors may determine to consolidate with other municipal advisors in order to benefit from economies of scale (*e.g.,* by leveraging existing resources of a larger firm to prepare candidates to take the qualification examination) rather than to incur separately the costs associated with the proposed rule change. Others may exit the market, rather than incurring the cost of preparing for and taking a qualification examination.

In the SEC Final Registration Rule, the SEC recognized that municipal advisors would incur programmatic costs, including ''costs to meet standards of training, experience, competence, and other qualifications, as well as continuing education requirements, that the MSRB may establish in the future.'' [19] Such exits from the market may lead to a reduced pool of municipal advisors. However, the SEC also noted that the market for municipal advisory services is likely to remain competitive despite the potential exit of some municipal advisors (including small entity municipal advisors), consolidation of municipal advisors, or lack of new entrants into the market.[20]

It is also possible that competition for municipal advisory services can be affected by whether incremental costs associated with the municipal advisor representative qualification examination are passed on to advisory clients. The amount of costs passed on may be influenced by the size of the municipal advisory firm. For smaller municipal advisors with fewer clients, the incremental costs associated with the qualification examination may represent a greater percentage of annual revenues, and, thus, such advisors may be more likely to pass those costs along to their advisory clients. As noted above, however, the costs of preparing for and taking the examination would be incurred only once for each municipal advisor representative, assuming the representative passed the examination on the first occasion.

The Act provides that MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons provided that there is robust protection of investors against fraud.[21] The MSRB is sensitive to the potential impact of the requirements contained in the proposed rule change on small municipal advisors. The MSRB understands that some small municipal advisors and sole proprietors, unlike larger municipal advisory firms, may not employ full-time staff to train individuals to take and pass professional qualification examinations and that the cost of complying with the requirements of the proposed rule change may be proportionally higher for these smaller firms. To minimize potential disruption to firms' business activities and to allow sufficient time for municipal advisor professionals to study for the examination, the proposed rule change would provide covered registered persons with a one-year grace period to pass the examination. The MSRB recognizes that requiring all individuals engaged in municipal advisory activities to take the examination means that many individuals with ongoing business obligations would be required to prepare for and take the examination in addition to fulfilling their business commitments. The MSRB believes that the one-year grace period would provide such individuals with sufficient flexibility to plan their examination preparation time around their existing and ongoing business obligations. Going forward, new municipal advisor professionals entering the market would be able to study for and take the examination before incurring municipal advisory business commitments. The MSRB believes that the proposed rule change is consistent with the Act's provision with respect to burdens imposed on small municipal advisors because the financial burden of preparing for and taking the qualification examination is offset by the need to ensure that municipal advisor professionals have a basic level of competency.

On March 17, 2014, the MSRB published a request for public comment on a draft of the proposed rule change.[22] In response, the MSRB received thirty-five comment letters.[23] The comments, which are summarized in Section 5 below, focused principally on the qualification examination.

The qualification examination is intended to determine whether a municipal advisor representative meets a minimum level of competency and, in general, commenters acknowledged that municipal advisor representatives should meet or exceed a minimum level of competency. However, several commenters expressed concerns about implementation costs associated with the proposed examination. These commenters suggested that the MSRB consider alternatives for determining a municipal advisor representative's competency. Although the suggested alternatives vary, they fall into two main categories. First, several commenters asked the MSRB to reconsider the scope of the proposed qualification examination, suggesting the examination should be administered separately or as part of an existing qualification examination. Second, commenters suggested that municipal advisor professionals be grandfathered based on either their experience or their existing professional qualifications. These options are discussed in Section 5 below.

Commenters expressed concerns about the costs of preparing for and taking a qualification examination. SIFMA offered estimates of the costs to firms and individuals associated with taking the examination. These costs included fees per examination, study materials, the value of time used to

[19] *See* 78 FR 67467 at 67611 (Nov. 12, 2013).

[20] *See* 78 FR 67467 at 67630 (Nov. 12, 2013).

[21] *See* Section 15B(b)(2)(L)(iv) of the Act, 15 U.S.C. 78o–4(b)(2)(L)(iv).

[22] *See* MSRB Notice 2014–08 (Mar. 17, 2014) (March Notice).

[23] Letters were received from Arrow Partners (''Arrow''), Association of Registration Management (''ARM''), Bond Dealers of America (''BDA''), Cedar Partners, Ltd (''Cedar''), Central States Capital Markets (''Central States''), CFA Institute (''CFA''), Compass Securities Corporation (''Compass''), Dixworks LLC (''Dixworks''), Fitzgibbon Toigo Associates (''Fitzgibbon''), Fortress Group, Inc. (''Fortress''), Frank Taylor, George K. Baum & Company (''George K. Baum''), Government Credit Corporation (''GCC''), Hamersley Partners, LLC (''Hamersley''), IMMS LLC (''IMMS''), Investment Company Institute (''ICI''), Jorge Rosso, Monahan & Roth, LLC (''Monahan''), MVision Private Equity Advisers USA LLC (''MVision''), National Association of Independent Public Finance Advisors (''NAIPFA''), New Albany Capital Partners, LLC (''New Albany''), Oyster River Capital LP (''Oyster River''), Perkins Fund Marketing LLC (''Perkins''), Raftelis Financial Consultants, Inc. (''Raftelis''), Securities Industry and Financial Markets Association (''SIFMA''), Sonja Sullivan, Stacy Havener, Stonehaven, Tessera Capital Partners (''Tessera''), Third Party Marketers Association (''3PM''), Tibor Partners Inc. (''Tibor''), Timothy D. Wasson, Yuba Group (''Yuba''), Zions First National Bank, by W. David Hemingway (''Zions Bank I''), Zions First National Bank, by James G. Livingston (''Zions Bank II'').

study for the exam, recordkeeping costs, and compliance costs. Although many of these costs are unknown, SIFMA estimates that the known likely costs to individuals and firms will be at least $5,000 per individual taking the examination. In addition, SIFMA noted that costs also would be incurred by the MSRB to support development of questions for the new examination and by FINRA to administer the examination. SIFMA argued that these costs would ''multiply exponentially'' as potentially thousands of people who are or will be dually registered as municipal securities representatives and municipal advisory representatives—or will be moving from one classification to another—will need to take an additional qualification examination and incur additional expenses. SIFMA suggested that costs could be reduced by broadening the scope of the Series 52 examination to include questions related to competency as a municipal advisor representative.

BDA estimated costs of up to $100,000 per individual to meet the requirements as a municipal securities representative and as a municipal advisor representative. BDA did not explain how it arrived at this estimate, although it indicated that the figure includes the lost time of municipal advisor representatives that could have been used serving clients. BDA assumes that 75,000 individuals (33,000 individuals from non-dealer municipal advisors and 42,000 from dealer-municipal advisors) would need to take the new examination.[24] The product of BDA's estimated cost per individual and their estimated number of test takers yields a total estimated cost in the billions of dollars. Although BDA admits that it performed a ''back of the envelope'' assessment of the costs, the MSRB does not believe this cost estimate has adequate foundation.

SIFMA's estimates of cost per individual are better supported. Although cost estimates will vary, the SIFMA estimates appear to be more credible and useful and were considered by the MSRB. SIFMA notes that there will be unknown costs, so their estimate should be regarded as a minimum amount. The costs to the MSRB and FINRA in creating and administering the examination are relevant. However, a portion of those costs will likely be covered by examination fees. Given that these fees have been considered as part of the costs borne by individuals and firms, the relevant costs to the MSRB and FINRA would be those costs not covered by examination fees.

The BDA estimate of 75,000 test takers appears high and inconsistent with the permanent municipal advisor registration information received by the SEC to date. A more accurate figure has been provided by the SEC, which estimates in the SEC Final Registration Rule that municipal advisors will need to submit a new Form MA–I for approximately 950 individuals annually.[25] Using SIFMA's cost estimate, the total cost to the industry per year, excluding unknown recordkeeping and compliance costs, yields an estimate of approximately $4,750,000 in annual costs. Of course, in the first year the costs would be higher because those individuals currently engaged in municipal advisory activities will take the examination. Based on the initial analysis, the Board expects approximately 3,000 initial examination takers. This could result in a total cost of $15 million, using SIFMA's cost estimate of $5,000 per person. Most of this cost will be borne by large dealer-municipal advisors that elect to qualify a large number of their associated persons as municipal advisor representatives. The MSRB expects that many of these firms will leverage their training resources to lower the cost per examination candidate. The MSRB also believes that the total cost to municipal advisors to prepare individuals to take the qualification examination will drop significantly after the one-year grace period, as the number of examination takers decreases and then levels off.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Scope of the Qualification Examination

Commenters expressed varying views about the proper scope of a qualification examination. BDA offered three alternatives for the Board to consider: (a) Qualifying municipal advisor professionals using the Series 52 examination; (b) creating a single, new, comprehensive examination for all municipal securities and advisor professionals; and (c) creating a supplemental examination for previously registered municipal securities professionals that would cover the new municipal advisor material.

SIFMA recommended that the Board consider adding questions to the existing Series 52 qualification examination. SIFMA stated that this alternative would be less burdensome to the industry, and would ensure that there was no delay in developing examination material and administering the examination. SIFMA also stated that examining municipal securities and advisory competency in one examination would aid small dealers, many of whom perform both functions and are very sensitive to compliance costs. Further, SIFMA stated that there are potentially thousands of individuals who are dually registered and would benefit from having a single examination. This is essentially the same approach as the universal examination recommended by BDA.

Consistent with SIFMA's recommendation for a single qualification examination, ARM also suggested that if the MSRB feels that the duties of municipal advisor representatives require additional expertise that additional questions be added to existing examinations rather than creating entirely new examinations.

The Board maintains there is a need for separate qualification examinations because the content of such an examination will be designed to meet the MSRB's goal of determining whether a prospective municipal advisor representative meets the minimum level of competency required of a municipal advisor professional. The examination, while covering a variety of municipal advisory activities, will be more targeted than a combined examination that attempts to evaluate the competence of individuals engaged in varied municipal securities and municipal advisory activities. As discussed below, certain commenters take issue with the breadth of the proposed municipal advisor representative examination because of the more limited nature of their functions. These concerns could be exacerbated by combining the municipal advisor and securities representative examinations. Although a combined examination may be less costly to create and administer, and may place a smaller cost burden on dealers, such an examination may place a larger cost burden on non-dealer municipal advisors and their associated persons who have no need for or interest in demonstrating competency as a municipal securities representative but

[24] BDA also expressed concern about the administration of the qualification examination, positing that the number of individuals taking the examination would create congestion at examination centers and may result in professionals unable to complete their required testing. The MSRB is confident that FINRA—assuming it is designated as the administrator of the municipal advisor representative qualification examination under Section 15B(c)(7)(A)(iii) of the Act—and the examination centers employed by FINRA have the capacity to accommodate all individuals who will be required to take the qualification examination during the one-year grace period and thereafter.

[25] *See* 78 FR 67467 at 67589 (Nov. 12, 2013).

would be required to prepare for and pass an examination that included significant content relating to the role and regulation of municipal securities representatives.

BDA suggests, alternatively, that the MSRB develop a supplemental examination for municipal securities representatives. Under this approach, municipal advisor professionals not qualified as municipal securities representatives could take the municipal securities representative qualification examination and municipal advisor supplement or a new municipal advisor representative qualification examination developed by the MSRB. The net effect of this alternative is a separate examination for municipal advisory activities. While a supplemental examination might require fewer questions than a stand-alone examination, the practicalities of maintaining many different examinations should not be underestimated. Moreover, to maintain consistency, the MSRB would then need to develop a supplemental examination for municipal advisors seeking to register as municipal securities representatives, which would necessitate a total of four examinations, adding further and unnecessary complexity to the registration process. Lastly, the MSRB believes that existing municipal securities representatives should be proficient on those portions of a municipal advisor representative examination that overlap with the municipal securities representative examination.

In contrast to other commenters, ICI argued against a single general qualification exam. ICI recommended that the MSRB create a separate qualification examination for those who provide advice regarding municipal fund securities. ICI cites the MSRB's policy on economic analysis that allows for consideration of different rule specifications or differing requirements for different market participants. Alternatively, ICI recommends grandfathering those individuals who have passed the Series 6 examination.[26] The Board believes that passing the Series 6 examination would demonstrate only a basic competency in servicing retail customers who purchase mutual funds, interests in 529 college savings plans and variable annuities and, hence, would not establish an individual's competency as a municipal advisor representative. The Board appreciates ICI's contention that the activities of municipal advisors who provide advice to municipal entities regarding municipal fund securities are different than the municipal advisory activities of traditional municipal advisors. The MSRB also acknowledges that some of the content on the examination will not be directly related to municipal fund securities. Nevertheless, the Board believes that individuals who engage in municipal advisory activities regarding municipal fund securities should demonstrate knowledge of the rules and regulations governing municipal advisors by taking the municipal advisor representative qualification examination.

Grandfathering

ARM suggested that the MSRB consider grandfathering individuals who have corresponding registrations as a municipal securities representative or municipal securities principal on the grounds that these individuals have completed more encompassing examinations and that they are experienced municipal securities professionals whose expertise should be sufficient to engage in municipal advisory activities. SIFMA, BDA and 3PM also recommended that individuals who are currently qualified to perform municipal securities activities be grandfathered.

Yuba commented that the Board should make the supervisor examination available before, or simultaneously with, the representative examination and eliminate the need for a supervisor to take both examinations. The Board believes it is important that the representative examination be introduced prior to any principal examination because the examination will determine the basic competency of those individuals who are engaged in municipal advisory activity and have the most direct impact on municipal entities and investors. While the supervisory activities of municipal advisor principals are important, the MSRB will consider an examination for principals at a later date, and should not delay the introduction of an examination that has been in preparation for nearly four years. And in any event, a principal is customarily required to pass the representative examination.[27]

A focused examination for municipal advisor professionals will likely be more effective in meeting the MSRB's goal of determining whether a municipal advisor representative meets a minimum level of competency than recognizing a professional qualification examination for municipal securities representatives or accepting the self-reported experience of an individual who worked in a previously unregulated environment. While it is self-evident that relying on existing qualifications (such as having passed the Series 52 examination) or general experience would place a smaller cost burden on firms and individuals than requiring all individuals engaged in municipal advisory activities to take and pass a new qualification examination, the MSRB believes such an examination is necessary to establish a baseline of competency for municipal advisors.

The Board determined that grandfathering would not be consistent with the intent of Congress and the SEC in creating a new municipal advisor regulatory regime. The new regulation was created in response to problems that Congress and the SEC observed regarding the activities of municipal advisors. Requiring municipal advisor professionals to take and pass a basic qualification examination ensures that such individuals demonstrate a minimum level of understanding of the role and responsibilities of municipal advisors and applicable rules and regulations.

By contrast, grandfathering presumes that each municipal advisor representative has a basic competency in the subject matter. Congress explicitly called for the development of professional standards for municipal advisors.[28] Given the MSRB's statutory obligation to protect investors, municipal entities and obligated persons that interact with and/or rely on municipal advisor professionals, there should be a compelling reason to rely on their prior experience as evidence of their competence. Even if an individual passed the Series 7 or 52 examinations, the content was not specifically related to municipal advisory activities or the regulation of such activities. While examinations such as the Series 52 may have some overlapping content, the examination questions being developed for municipal advisor professionals by PQAC are being drafted based on the particular job responsibilities of municipal advisor professionals and the rules and regulations governing such responsibilities. In this regard, the Series 7 and 52 examinations do not adequately test the specific job responsibilities of municipal advisor professionals.

The focus of the Series 52 examination is on underwriting, trading,

[26] The Investment Company and Variable Contracts Products Representative Qualifications Examination, (Series 6) authorizes individuals to sell a limited set of securities products including, mutual funds and variable annuities.

[27] *See* MSRB Rule G–3(b)(ii)(B).

[28] *See* Section 15B(b)(2)(L) of the Act, 15 U.S.C. 78o–4(b)(2)(L).

research and sales, not municipal advisory activities. Approximately one-quarter of the examination covers rules and regulations applicable to these activities and over half of the examination covers municipal securities features and principles relevant to municipal securities activities. There are few questions directly related to the job responsibilities of municipal advisor professionals, and those that exist are generally written from the perspective as municipal securities representative. Without significant content related to the job responsibilities of municipal advisor professionals, the Board believes that passing the Series 52 examination does not establish an individual's basic competency to perform municipal advisory activities.[29] Moreover, the municipal advisor regulatory regime is still being developed by the Board, and individuals who have passed the Series 52 examination would not have demonstrated knowledge of the new core municipal advisor regulations.

Certain commenters urged the Board to adopt the approach taken by FINRA when implementing the investment banking representative qualification examination (Series 79).[30] FINRA grandfathered general securities representatives (Series 7 or Series 7 equivalent) if they opted-in within six months of the effective date of the rule.[31] FINRA explained that the new examination would provide a more targeted assessment (than the Series 7 examination) of the competency of investment banking professionals. Some commenters further suggested that, if grandfathering is permitted, the MSRB could ensure that relevant municipal advisor content is delivered through the continuing education program. While continuing education is important, it should not serve as a substitute for a basic competency examination unless other alternatives are not feasible. The Board believes the approach taken by FINRA (then National Association of Securities Dealers, ''NASD'') in implementing the research analyst qualification examination (Series 86/87) is a more appropriate analogue. In that instance, no grandfathering was permitted due to the FINRA's desire that all research analysts demonstrate the same level of analytical competency and knowledge of the law.[32]

The argument for grandfathering individuals based on experience is not persuasive because the MSRB has no way of determining the competence of individuals who have been acting as municipal advisors but have been unregulated at the federal level. While it is likely that many municipal advisor professionals are experienced and knowledgeable and have more than a basic level of competency, the MSRB is not in a position to review the background and experience of each professional to determine whether such individual is qualified. Qualifying all individuals as municipal advisor representatives based solely on their experience would likely result in the qualification of some individuals who could not demonstrate a basic competency regarding the responsibilities of municipal advisors and the regulations governing municipal advisory activities.

Given the new regulatory regime for municipal advisors, the differences in size and type of municipal advisors, as well as the varied experience and background of municipal advisor professionals, it is important that each individual demonstrate a basic competency.

*Apprenticeship, Grace Period, and Classifications*

Commenters broadly supported the elimination of the apprenticeship requirement for municipal securities representatives and not establishing one for municipal advisor representatives.[33] There also was broad support for establishing a one-year grace period to provide municipal advisor representatives with sufficient time to study and take the examination without causing undue disruption to the business of the municipal advisor.[34] 3PM, however, suggested that more time was necessary, and NAIPFA said it could not opine as to whether the one-year grace period would be sufficient because it was unsure if the study guide would be available before the grace period commenced. As noted above, prior to the commencement of the grace period, the MSRB will file with the SEC a study outline for the examination and then conduct a pilot examination. The pilot examination will likely be administered in 2015 and will enable the Board to establish a passing score for the examination. After a passing score is established, the MSRB will issue a regulatory notice establishing an effective date and compliance date for the examination. The grace period will commence on the effective date and conclude on the compliance date.

Municipal Advisor Representative Examination Delivery and Administration

Several commenters raised questions regarding the administration and delivery of the examination, specifically about retention of the registration information for non-dealer municipal advisors that are not included in FINRA's central registration depository.[35] Commenters want to ensure a similar process is in place for non-dealer municipal advisors. Similarly, commenters asked that the MSRB utilize the existing securities industry registration forms (*e.g.,* Form U4). These issues are beyond the scope of the proposed rule change. The MSRB will address the administration of the examination at a later date.

Comment on the Implication of Revising Rule G–1

In response to the proposed revisions to MSRB Rule G–1, Zions Bank (Zions Bank I) commented that the proposed amendments should not be interpreted or applied in any way that would preclude a bank, or a separately identifiable department or division of a bank (''SID''), or a bank affiliate, from engaging in municipal securities and municipal advisory activities. It is not the intent of the amendments to preclude banks, SIDS, or bank affiliates from engaging in a broad range of municipal securities and/or municipal advisory activities, so long as they are properly registered under MSRB rules and the federal securities laws and otherwise comply with any limitations therein.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period of 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:

[29] While the Series 52 examination covers concepts related to the activities of a traditional financial advisor, those concepts are discrete and do not extend to the broader set of municipal advisory activities that will be covered on the municipal advisor representative qualification examination.

[30] The following commenters suggested using FINRA's approach to grandfathering: BDA, George K. Baum, SIFMA, and 3PM.

[31] *See* FINRA Regulatory Notice 09–41 (Jul. 2009).

[32] *See* NASD Notice to Members 04–25 (Mar. 2004).

[33] The following commenters were supportive of eliminating the apprenticeship requirement: George K. Baum, SIFMA, Zions Bank II, Yuba and 3PM.

[34] The following commenters were supportive of the one-year grace period: BDA, New Albany, ICI, SIFMA, Zions Bank II and 3PM.

[35] The following commenters raised issues regarding the administration and delivery of the examination: ARM, BDA and George K. Baum.

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MSRB–2014–08 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–MSRB–2014–08. 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 proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. 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–MSRB–2014–08 and should be submitted on or before December 26, 2014.

For the Commission, pursuant to delegated authority.[36]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28543 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73707; File No. SR–MSRB–2014–09]**

## Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Consisting of Amendments to MSRB's Electronic Municipal Market Access (EMMA) System To Add Disclosures Related to Municipal Asset-Backed Securities

December 1, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 25, 2014, the Municipal Securities Rulemaking Board (the ''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing with the Commission a proposed rule change consisting of amendments to the MSRB's Electronic Municipal Market Access (''EMMA'') system to add disclosures related to municipal asset-backed securities (''ABS'') required under Exchange Act Rule 15Ga–1[3] to be filed on Form ABS–15G to the list of categories of continuing disclosures that EMMA will accept and disseminate publicly (the ''proposed rule change''). The proposed rule change also makes minor changes of a technical nature, including removing outdated language, updating the naming convention used for published submitter and subscriber specification documents and updating information concerning how users can access submitter and subscriber specification documents (''technical amendments''). The MSRB filed the proposed rule change under Section 19(b)(3)(A)(iii) of the Exchange Act[4] and Rule 19b–4(f)(6)[5] thereunder as a noncontroversial rule change that renders the proposal effective upon filing. The proposed rule change will be made operative no earlier than January 9, 2015 and no later than January 31, 2015, with the precise effective date in that range to be announced by the MSRB in a notice published on the MSRB Web site.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2014-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Pursuant to Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[6] the SEC adopted new rules related to representations and warranties in ABS. One of these rules, Exchange Act Rule 15Ga–1,[7] requires, among other things, certain disclosures related to municipal ABS to be filed on Form ABS–15G. Pursuant to Rule 314 of Regulation S–T,[8] the SEC identified EMMA, in addition to the Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR''), as a venue that a municipal securitizer may use to make submissions of Form ABS–15G in compliance with Exchange Act Rule 15Ga–1.[9] Accordingly, the proposed rule change consists of amendments to the EMMA system to add disclosures related to municipal ABS required

[36] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.15Ga–1.

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

[5] 17 CFR 240.19b–4(f)(6).

[6] Pub. L. 111–203, 124 Stat. 1376 (2010).

[7] *See* 17 CFR 240.15Ga–1.

[8] 17 CFR 232.314.

[9] 17 CFR 240.15Ga–1.

under Exchange Act Rule 15Ga–1 [10] on Form ABS–15G to the list of categories of continuing disclosures that EMMA will accept and disseminate publicly.[11]

2. Statutory Basis

The MSRB has adopted the proposed rule change pursuant to Section 15B(b)(2)(C) of the Exchange Act,[12] which provides that the MSRB's rules shall

> be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Exchange Act because it facilitates the implementation of Exchange Act Rule 15Ga–1.[13] In addition, the proposed rule change serves to remove impediments to and help perfect the mechanism of a free and open market in municipal securities and promotes the statutory mandate of the MSRB to protect investors and the public interest. The proposed rule change would aid in making additional information for making investment decisions more easily accessible to all participants in the municipal securities market on an equal basis throughout the life of the securities without barriers to obtaining such information. Broad access to the disclosures related to municipal ABS required under Exchange Act Rule 15Ga–1 [14] on Form ABS–15G through the continuing disclosure service of EMMA should assist in preventing fraudulent and manipulative acts and practices by improving the opportunity for public investors to access material information about issuers and their securities.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The SEC identified EMMA as a venue that a municipal securitizer may use to make submissions of Form ABS–15G in compliance with Exchange Act Rule 15Ga–1.[15] In identifying EMMA, in addition to EDGAR, as a venue for the disclosures on Form ABS–15G the SEC stated that ''filing on EMMA will facilitate use by investors, since the demand, repurchase and replacement disclosures will generally be available in the same repository where investors are most likely to look for other municipal ABS disclosures.'' [16] The proposed rule change would facilitate a requirement that already has been adopted by the SEC and carries the benefits articulated by the SEC as a result of permitting submissions of Form ABS–15G in compliance with Exchange Act Rule 15Ga–1 [17] and Rule 314 of Regulation S–T [18] to be provided to investors on EMMA with other municipal ABS disclosures. While the SEC's adoption of Exchange Act Rule 15Ga–1 [19] and Rule 314 of Regulation S–T [20] are themselves significant, the proposed rule change to accommodate the intended alternative disclosure venue of EMMA and to make technical amendments to the EMMA service would not significantly affect the protection of investors or the public interest and would not impose any significant burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate,

it has become effective pursuant to Section 19(3)(A) of the Exchange Act [21] and Rule 19(b)–4(f)(6) [22] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MSRB–2014–09 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–MSRB–2014–09. 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 proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. 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–MSRB–2014–09 and should be submitted on or before December 26, 2014.

[10] *Id.*

[11] The proposed rule change also consists of technical amendments to the EMMA service.

[12] 15 U.S.C. 78o–4(b)(2)(C).

[13] 17 CFR 240.15Ga–1.

[14] *Id.*

[15] *Id.*

[16] *See* Exchange Act Release Nos. 33–9175 and 34–63741 (January 20, 2011), 76 FR 4489, 4509 (January 26, 2011).

[17] 17 CFR 240.15Ga–1.

[18] 17 CFR 232.314.

[19] 17 CFR 240.15Ga–1.

[20] 17 CFR 232.314.

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6).

For the Commission, pursuant to delegated authority.[23]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28548 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73713; File No. SR–NASDAQ–2014–113]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Amendment To Conform Rule Text

December 1, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on November 18, 2014, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to modify Chapter XV, entitled ''Options Pricing,'' at Section 2 governing pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options.

Specifically, NOM proposes to conform certain language related to Penny Pilot Options[3] rebates currently applicable to Customers,[4] Professionals[5] and NOM Market Makers.[6]

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to conform rule text in Chapter XV, entitled ''Options Pricing,'' at Section 2(1) governing the rebates and fees assessed for options orders entered into NOM. Specifically, the Exchange proposes to amend rule text describing the volume required to qualify for certain Customer and Professional Penny Pilot Options Rebate to Add Liquidity tiers and also certain NOM Market Maker Penny Pilot Options Rebate to Add Liquidity tiers.

With respect to the Customer and Professional Tier 8 Penny Pilot Options Rebate to Add Liquidity, the NOM Market Maker Tier 6 Penny Pilot Options Rebate to Add Liquidity and the $0.02 per contract Tier 8 incentive for the Customer and Professional Penny Pilot Options Rebate to Add Liquidity,[7] the Exchange proposes to amend the language which describes the required national customer volume in multiply-listed equity and ETF options classes in a month in these sections. The Exchange is proposing to conform this language with current rule text which describes total industry customer equity and ETF option average daily volume (''ADV'') contracts per day in a month. This proposed amendment is non-substantive as the two concepts are not different. The Exchange is proposing to conform the language to avoid confusion. This amendment will not amend the manner in which those rebates are paid today.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(5) of the Act[9] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, in that

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through December 31, 2014. *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR–NASDAQ–2009–091) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR–NASDAQ–2009–097) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010) (SR–NASDAQ–2010–013) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR–NASDAQ–2010–053) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 65969 (December 15, 2011), 76 FR 79268 (December 21, 2011) (SR–NASDAQ–2011–169) (notice of filing and immediate effectiveness extension and replacement of Penny Pilot); 67325 (June 29, 2012), 77 FR 40127 (July 6, 2012) (SR–NASDAQ–2012–075) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2012); 68519 (December 21, 2012), 78 FR 136 (January 2, 2013) (SR–NASDAQ–2012–143) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through June 30, 2013); 69787 (June 18, 2013), 78 FR 37858 (June 24, 2013) (SR–NASDAQ–2013–082) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2013); 71105 (December 17, 2013), 78 FR 77530 (December 23, 2013) (SR–NASDAQ–2013–154) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through June 30, 2014); and 79 FR 31151 (May 23, 2014), 79 FR 31151 (May 30, 2014) (SR–NASDAQ–2014–056) ((notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through December 31, 2014). *See also* NOM Rules, Chapter VI, Section 5.

[4] The term ''Customer'' applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Chapter I, Section 1(a)(48)).

[5] The term ''Professional'' means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

[6] The term ''NOM Market Maker'' means a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

[7] Participants that add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.25% or more of national customer volume in multiply-listed equity and ETF options classes in a month will receive an additional $0.02 per contract Penny Pilot Options Customer Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

the amendments will provide greater clarity to the pricing of these options.

The Exchange believes that the amendments provide greater specificity and conform word usage with respect to rebates and incentives offered by NOM. The Exchange is not proposing to amend the pricing, rather the Exchange believes the amendments make clear that the terms national customer volume and total industry volume are equivalent.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The amendments to the options pricing are non-substantive and merely seek to conform rule text to make clear that the same standard of measure is being applied to determine the qualifications for the volume tiers and incentives.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and subparagraph (f)(6) of Rule 19b–4 thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved. The Exchange has provided the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2014–113 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2014–113. 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 proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2014–113, and should be submitted on or before December 26, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–28584 Filed 12–4–14; 8:45 am]

**BILLING CODE 8011–01–P**

[10] 15 U.S.C. 78s(b)(3)(a)(ii).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Data Collection Available for Public Comments

**ACTION:** 60-Day notice and request for comments.

**SUMMARY:** The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. Chapter 35 requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

**DATES:** Submit comments on or before February 3, 2015.

**ADDRESSES:** Send all comments to Craig Heilman, Director of Veteran Programs, Office of Veteran Business Development, Small Business Administration, 409 3rd Street, 5th Floor, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Tyrenna Tolbert, Program Support Specialist, Office of Veteran Business Development, *tyrenna.tolbert@sba.gov,* 202–205–7526, or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

**SUPPLEMENTARY INFORMATION:** Boots to Business is an entrepreneurial education initiative offered by the U.S. Small Business Administration (SBA) as a career track within the Department of Defense's revised Training Assistance Program called Transition Goals, Plans, Success (Transition GPS). The curriculum provides valuable assistance to transitioning service members exploring self-employment opportunities by leading them through the key steps for evaluating business concepts and the foundational knowledge required for developing a business plan. Participants are also introduced to SBA resources available to help access startup capital and additional technical assistance.

This form facilitates online registration for the Boots to Business

course for eligible service members and their spouses. The information collected provides pertinent data to the management and participation of the course in addition to assisting instructors to better tailor the individual classes based on the experience and interests of the participants.

*Solicitation of Public Comments:* SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

*Summary of Information Collection:*

*Title:* Boots to Business Registration.

*Description of Respondents:* Transitioning service members and spouses.

*Total Estimated Annual Responses:* 10,000.

*Total Estimated Annual Hour Burden:* 1,667 hours.

**Curtis B. Rich,**

*Management Analyst.*

[FR Doc. 2014–28512 Filed 12–4–14; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #13985]**

### Colorado Disaster #CO–00068 Declaration of Economic Injury

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Economic Injury Disaster Loan (EIDL) declaration for the State of COLORADO, dated 05/14/2014.

*Incident:* Red Mountain Pass Rockslide.

*Incident Period:* 01/13/2014 and continuing through 06/12/2014.

*Effective Date:* 11/26/2014.

*EIDL Loan Application Deadline Date:* 02/16/2015.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the Administrative EIDL disaster declaration for the State of Colorado, dated 05/14/2014 is hereby amended to establish the incident period for this disaster as beginning 01/13/2014 and continuing through 06/12/2014.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59002)

Dated: November 26, 2014.

**Maria Contreras-Sweet,**

*Administrator.*

[FR Doc. 2014–28514 Filed 12–4–14; 8:45 am]

**BILLING CODE 8025–01–P**

## SOCIAL SECURITY ADMINISTRATION

**[Docket No. SSA–2014–0074]**

### 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 and an extension 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, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2014–0074].

I. The information collection below is pending at SSA. SSA will submit it 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 February 3, 2015. Individuals can obtain copies of the collection instruments by writing to the above email address.

*Application for Mother's or Father's Insurance Benefits—20 CFR 404.339–404.342, 20 CFR 404.601–404.603—0960–0003.* Section 202(g) of the Social Security Act provides for the payment of monthly benefits to the widow or widower of an insured individual if the surviving spouse is caring for the deceased worker's child (who is entitled to Social Security benefits). SSA uses the information on Form SSA–5–BK to determine an individual's eligibility for mother's or father's insurance benefits. The respondents are individuals caring for a child of the deceased worker who is applying for mother's or father's insurance benefits under the Old Age, Survivors, and Disability Insurance program (OASDI).

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Total estimated annual burden (hours) |
|---|---|---|---|---|
| SSA–5–F6 (paper) | 1,611 | 1 | 15 | 403 |
| MCS | 26,045 | 1 | 15 | 6,511 |
| MCS/Signature Proxy | 26,044 | 1 | 14 | 6077 |
| Total | 53,700 | | | 12,991 |

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 January 5, 2015. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov.*

1. *Letter to Employer Requesting Information About Wages Earned by Beneficiary—20 CFR 416.703, 404.801 & 404.820—0960–0034.* Social Security disability recipients receive payments based on their inability to engage in substantial gainful activity (SGA) because of a physical or mental condition. If the recipients work, SSA must evaluate and determine if they continue to meet the disability requirements of the law. Therefore, we use Form SSA–L725 to request monthly earnings information from the recipient's employer. We then use the earnings data to determine whether the recipient is engaging in SGA, since work after a recipient becomes entitled to benefits can cause a cessation of disability. The respondents are businesses that employ Social Security disability recipients.

*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–L725 | 150,000 | 1 | 40 | 100,000 |

2. *Letter to Employer Requesting Wage Information—0960–0138.* SSA must establish and verify wage information for Supplemental Security Income (SSI) applicants and recipients when determining SSI eligibility and payment amounts. SSA uses Form SSA–L4201 to collect wage data from employers. SSA uses the information to determine eligibility and proper payment amounts for SSI applicants and recipients. The respondents are employers of SSI applicants and recipients.

*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–L4201 | 133,000 | 1 | 30 | 66,500 |

3. *Statement of Living Arrangements, In-Kind Support, and Maintenance—20 CFR 416.1130–416.1148—0960–0174.* SSA determines SSI payment amounts based on applicants' and recipients' needs. We measure individuals' needs, in part, by the amount of income they receive, including in-kind support and maintenance in the form of food and shelter provided by other persons. SSA uses Form SSA–8006–F4 to determine if in-kind support and maintenance exists for SSI applicants and recipients. This information also assists SSA in determining the income value of in-kind support and maintenance SSI applicants and recipients receive. The respondents are individuals who apply for SSI payments, or who complete an SSI eligibility redetermination.

*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–8006–F4 | 173,380 | 1 | 7 | 20,228 |

4. *Claimant's Recent Medical Treatment—20 CFR 404.1512 and 416.912—0960–0292.* When Disability Determinations Services (DDS) deny a claim at the reconsideration level, the claimant has a right to request a hearing before an administrative law judge (ALJ). For the hearing, SSA asks the claimant to complete and return the HA–4631 if the claimant's file does not reflect a current, complete medical history as the claimant proceeds through the appeals process. ALJs must obtain the information to update and complete the record and to verify the accuracy of the information. Through this process, ALJs can ascertain whether the claimant's situation has changed. The ALJs and hearing office staff use the response to make arrangements for consultative examination(s) and the attendance of an expert witness(es), if appropriate. During the hearing, the ALJ offers any completed questionnaires as exhibits and may use them to: (1) Refresh the claimant's memory, and (2) shape their questions. The respondents are claimant's requesting hearings on entitlement to OASDI benefits or SSI payments.

*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) |
|---|---|---|---|---|
| HA–4631 | 200,000 | 1 | 10 | 33,333 |

5. *Certification of Low Birth Weight for SSI Eligibility of Funds You Provided to Another and Statement of Funds You Received—20 CFR 416.931, 416.926a(m), and 416.924—0960–0720.* Hospitals and claimants use Form SSA–3380 to provide medical information to local field offices (FO) and the DDS on behalf of infants with low birth weight. FOs use the form as a protective filing statement and the medical information to make presumptive disability findings, which allow expedited payment to eligible claimants. DDSs use the medical information to determine disability and continuing disability. The respondents are hospitals and claimants who have information identifying low birth weight babies and their medical conditions.

*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–3380 | 28,125 | 1 | 15 | 7,031 |

6. *Request to Show Cause for Failure to Appear—20 CFR 404.938, 20 CFR 416.1438, and 20 CFR 404.957(a)(ii)—0960–0794.* When claimants who requested a hearing before an ALJ fail to appear at their scheduled hearing, the ALJ may reschedule the hearing if the claimants establish good cause for missing the hearings. To establish good cause, claimants must show one of the following: (1) SSA did not properly notify the claimant of the hearing, or (2) an unexpected event occurred without sufficient time for the claimant to request a postponement. The claimants can use paper Form HA–L90 to provide their reason for not appearing at their scheduled hearings; or the claimants' representatives can use Electronic Records Express to submit the HA–L90 online. If the ALJ determines the claimants established good cause for failure to appear at the hearing, the ALJ will schedule a supplemental hearing; if not, the ALJ will make a claims eligibility determination based on the claimants' evidence of record. Respondents are claimants, or their representatives, seeking to establish good cause for failure to appear at a scheduled hearing before an ALJ.

*Type of Request:* Extension 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) |
|---|---|---|---|---|
| HA–L90 (paper or Electronic Records Express) | 40,000 | 1 | 10 | 6,667 |

Dated: December 2, 2014.

**Faye Lipsky,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 2014–28562 Filed 12–4–14; 8:45 am]

**BILLING CODE 4191–02–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Request To Release Airport Property at Eufaula Municipal Airport, Eufaula, Arkansas

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Request to Release Airport Property.

**SUMMARY:** The FAA proposes to rule and invites public comment on the release of land at Eufaula Municipal Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

**DATES:** Comments must be received on or before January 5, 2015.

**ADDRESSES:** Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Glenn A Boles, Manager, Federal Aviation Administration, Southwest Region, Airports Division, AR/OK Airports Development Office, ASW–630, Fort Worth, Texas 76137.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to The Honorable Selina Jayne-Dornan, Mayor of Eufaula at the following address: City of Eufaula, Oklahoma, 64 Memorial Drive, Eufaula, OK 74432.

**FOR FURTHER INFORMATION CONTACT:** Mrs Kathy Franklin, Program Manager, Federal Aviation Administration, AR/OK Airports Development Office, ASW–630, 2601 Meacham Blvd., Fort Worth, Texas 76137.

The request to release property may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA invites public comment on the request to release property at the Eufaula Municipal Airport under the provisions of the AIR 21.

On November 18, 2014, the FAA determined that the request to release property at Eufaula Municipal Airport submitted by the City of Eufaula met the procedural requirements of the Federal aviation Regulations, Part 155. The FAA may approve the request, in whole or in part, no later than January, 2015.

The following is a brief overview of the request: The City of Eufaula requests the release of 14.68 acres of airport property valued at $29,360.00. The release of property will allow for the sale of the property to the Oklahoma Department of Transportation for the development of an industrial facility for maintenance activities. The City of Eufaula will use the $29,360.00

resulting from the sale to fund construction of a pilots lounge and restrooms which are not presently available at the airport.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Eufaula Municipal Airport.

Issued in Fort Worth, Texas, on November 18, 2014.

**Byron K. Huffman,**

*Acting Manager, Airports Division.*

[FR Doc. 2014–28611 Filed 12–4–14; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Office of Commercial Space Transportation; Amended Waiver for Launch and Mission Risk

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of amended waiver.

**SUMMARY:** This notice concerns an amendment to a waiver related to the launch and reentry of an Orion Multi-Purpose Crew Vehicle. On March 10, 2014, the FAA issued United Launch Alliance (ULA) and Lockheed Martin (Lockheed) waivers to certain risk requirements of the FAA's regulations. Since that time, changes to the mission's flight plan have increased its risk profile. After analyzing this updated risk profile, the FAA finds that the analysis underlying the original waiver decisions still applies. The FAA, therefore, amends its original waiver to permit launch risk from debris of $217 \times 10^{-6}$ and total mission risk from debris of up to $218 \times 10^{-6}$.

**FOR FURTHER INFORMATION CONTACT:** For technical questions concerning this waiver, contact Charles P. Brinkman, Aerospace Engineer, AST–200, Office of Commercial Space Transportation (AST), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–7715; email: *phil.brinkman@faa.gov.* For legal questions concerning this waiver, contact Benjamin Jacobs, Attorney-Advisor, Regulations Division (AGC–210), Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–7240; email: *benjamin.jacobs@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

Lockheed and ULA are private commercial space flight companies. Lockheed entered into a contract with the National Aeronautics and Space Administration (NASA) to provide the first orbital flight test for NASA's Orion Multi-Purpose Crew Vehicle (Orion) Program. Lockheed has contracted with ULA to provide launch services for the mission.

The FAA is responsible for licensing, among other things, the launch of a launch vehicle and the reentry of a reentry vehicle, under authority granted to the Secretary of Transportation by 51 U.S.C. Subtitle V, chapter 509 (Chapter 509), and delegated to the FAA's Administrator and Associate Administrator for Commercial Space Transportation.

The mission at issue in this notice is Orion Exploration Flight Test 1, which is scheduled to launch from Cape Canaveral Air Force Station in Florida in early December. The mission tests the Orion Multi-Purpose Crew Vehicle in an un-crewed, limited-capability configuration, and serves as a stepping stone towards a crew-capable vehicle that would enable human exploration missions beyond Earth orbit. The mission is comprised of a launch, which is conducted by ULA, and a reentry, which is conducted by Lockheed. The launch vehicle is ULA's Delta IV Heavy launch vehicle, which consists of a Common Booster Core (CBC) as the first stage with two additional strap-on CBCs and a Delta IV Cryogenic Second Stage (DCSS). The first burn of the DCSS places the Orion and the DCSS in orbit, and a second DCSS burn places the Orion into a highly elliptical, negative-perigee trajectory, to simulate the thermal conditions and high reentry speeds the module would experience returning from missions beyond Earth orbit. After separating from the DCSS, the Orion module reenters over the eastern Pacific Ocean, splashing down 231 nautical miles west of Baja California, Mexico.[1]

Section 417.107(b)(1) of Title 14 of the Code of Federal Regulations (14 CFR) prohibits, in relevant part, the launch of a launch vehicle if the expected casualty ($E_c$) rate for the flight exceeds $30 \times 10^{-6}$ for impacting inert and explosive debris (debris). Section 435.35 establishes acceptable risk for reentry vehicles, and requires operators to comply with §§ 431.35(a) and 431.35(b)(1)(i),[2] which in turn prohibit an $E_c$ for debris in excess of $30 \times 10^{-6}$ for both launch and reentry combined.

On February 27, 2014, ULA petitioned the FAA for waivers of these provisions because the projected risk from debris during launch was $164 \times 10^{-6}$, and the projected risk from debris during reentry was less than $1 \times 10^{-6}$—for a total-mission debris risk of approximately $165 \times 10^{-6}$. The FAA issued a waiver and, on March 10, 2014, gave notice in the **Federal Register**. *Notice of Waiver*, Mar. 10, 2014 (79 FR 13375). This initial waiver allowed a maximum-allowable $E_c$ value for ULA and Lockheed's proposed mission of $165 \times 10^{-6}$,[3] based on the risk increase the launch operators requested.

On November 3, 2014, ULA and Lockheed transmitted to the FAA the mission's final trajectory and an updated risk analysis. Since that time, ULA and Lockheed have continued to submit updated risk information, as it becomes available, to the FAA. According to these documents, it is necessary for ULA and Lockheed to modify the mission's launch trajectory, for two reasons: To lower the mission's maximum heating temperature constraint, and to adjust the flight azimuth to be the same as what was flown in previous missions. On November 20, 2014, in light of the changed mission trajectory, ULA petitioned for an amendment to its waiver to allow an $E_c$ of $207 \times 10^{-6}$ for debris from launch. On November 21, 2014, Lockheed petitioned for an amendment to its waiver to allow total mission risk of $208 \times 10^{-6}$.

Using ULA's updated trajectory, the FAA calculates the debris-related $E_c$ for failure during the de-orbit burn, after the first 120 seconds, increases to $76 \times 10^{-6}$ from $53 \times 10^{-6}$. In addition, calculations by the FAA and the United States Air Force indicate an increased debris risk, from launch to orbital insertion, of approximately $30 \times 10^{-6}$ above original estimates. As a result, the FAA calculates that overall launch risk increases from $164 \times 10^{-6}$ to $217 \times 10^{-6}$, and total mission risk increases from $165 \times 10^{-6}$ to $218 \times 10^{-6}$. The FAA believes these risk figures best

[1] We note that, due to the unique characteristics of this mission, FAA regulations require us to account for risks that are typically not included in our § 417.107 analysis—namely, the uncontrolled reentry of an upper stage after orbital insertion.

[2] Although the module is a reentry vehicle and not a reusable launch vehicle, 14 CFR 435.33 incorporates and applies § 431.43 to all reentry vehicles.

[3] Our March 2014 Notice correctly identified the total mission debris risk as $165 \times 10^{-6}$, but when breaking down the sources of that risk, we listed four risk factors adding up to a total of only $164 \times 10^{-6}$. 79 FR at 13376. This breakdown mistakenly omitted the debris risk related from controlled disposal of the upper stage, with an $E_c$ of $< 1 \times 10^{-6}$.

capture the uncertainties due to weather and the inability to perform significant mitigation at the launch site on the day of launch.

**A. Analysis of the Updated Risk Assessment**

The FAA's original waiver analyzed ULA and Lockheed's proposals using the waiver criteria established by our statutory and regulatory framework. Section 50905(b)(3) allows the FAA to waive a license requirement if the waiver (1) will not jeopardize public health and safety, and safety of property; (2) is in the public interest; and (3) will not jeopardize national security and foreign policy interests of the United States. *See also* 49 CFR 404.5(b). We reapply those same criteria here.

*1. Public Health and Safety, and Safety of Property*

The FAA's initial waiver examined ULA and Lockheed's proposal in comparison with the historically acceptable launch risk levels at other Federal agencies to determine whether the mission would fall within those parameters. The rationale for our approval of ULA and Lockheed's prior waiver requests applies equally to their revised risk assessment. Although the FAA's regulations prohibit debris risk in excess of $30 \times 10^{-6}$, a waiver is warranted in this case because the United States Government's experience conducting other space missions with risk in excess of $100 \times 10^{-6}$ demonstrates that the risks of this mission are consistent with the public health and safety, and the safety of property. As we stated in our March 10, 2014, *Notice of Waiver,* the United States Government has repeatedly accepted risk for government launches in excess of the FAA's $30 \times 10^{-6}$, without negative consequences for safety. 79 FR at 13376. The Space Shuttle, for example, used a debris risk criterion of $200 \times 10^{-6}$ for launch risk to the public. *See* NASA's Implementation Plan for Space Shuttle Return to Flight and Beyond, Vol. 1 Final Edition, at 2–39 (May 15, 2007). In addition, in 2005, the U.S. Air Force accepted risk levels in a government launch ranging from 145 to $317 \times 10^{-6}$. Dept. of the Air Force Memorandum, Overflight Risk Exceedance Waiver for Titan IV B–30, Mission (Apr. 4, 2005).

ULA's updated launch risk of $217 \times 10^{-6}$ is still less than the risk levels previously approved for a government launch. Accordingly, granting a waiver of §§ 417.107(b)(1) and 431.35(b)(1)(i) in this case does not jeopardize the public health and safety, or the safety of property.

*2. Public Interest*

The FAA looks to its enabling statute to determine how Congress has defined the public interest. The FAA implements the agency's statutory mandate to encourage the development of commercial space capabilities and the continuous improvement of the safety of launch vehicles designed to carry passengers. 51 U.S.C. 50901(b).

As with their initial petition, ULA and Lockheed's petition for an amended waiver are consistent with the public interest because the test flight is necessary to the development of NASA's human-missions capability beyond Earth orbit.

**D. National Security and Foreign Policy Interests**

The FAA has not identified any national security or foreign policy implications associated with amending this waiver.

**Summary and Conclusion**

The FAA determines that amending the waivers associated with this mission will not jeopardize public health and safety or safety of property. In addition, amending the waivers is in the public interest because it accomplishes the goals of Chapter 509 and does not unduly increase risk to the public. Finally, amending the waivers will not jeopardize national security and foreign policy interests of the United States. The FAA therefore amends its prior waivers of the requirements of 14 CFR 417.107(b)(1) and 431.35(b)(1)(i) for launch and mission risk, respectively, to allow launch risk of an $E_c$ of $217 \times 10^{-6}$ and total mission risk of $218 \times 10^{-6}$.

Issued in Washington, DC, on November 26, 2014.

**Kenneth Wong,**

*Licensing and Evaluation Division Manager.*

[FR Doc. 2014–28614 Filed 12–4–14; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. FRA–2014–0011–N–22]**

### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the renewal Information Collection Requests (ICR) abstracted below are being forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on September 5, 2014 (79 FR 56616).

**DATES:** Comments must be submitted on or before January 5, 2015.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 25, Washington, DC 20590 (Telephone: (202) 493–6292), or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590 (Telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, sec. 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On September 5, 2014, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICR that the agency is seeking OMB approval. *See* 79 FR 56616. FRA received no comments in response to this notice.

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)-(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5

CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summary below describes the nature of the information collection request (ICR) and the expected burden. The revised request is being submitted for clearance by OMB as required by the PRA.

*Title:* Identification of Cars Moved in Accordance with Order 13528.

*OMB Control Number:* 2130–0506.

*Abstract:* This collection of information identifies a freight car being moved within the scope of Order 13528 (now codified at under 49 CFR 232.3). Otherwise, an exception will be taken, and the car will be set out of the train and not delivered. The information that must be recorded is specified at 49 CFR 232.3(d)(3), which requires that a car be properly identified by a card attached to each side of the car and signed stating that such movement is being made under authority of the Order. Section 232.2(d)(3) does not require retaining cards or tags. When a car bearing a tag for movement under this provision arrives at its destination, the tags are simply removed. This requirement/record comes into play only when a railroad finds it necessary to move equipment as specified above. FRA estimates that approximately 400 cars per year are moved under this Order.

*Request:* Extension without change of a currently approved information collection.

*Affected Public:* Businesses (Railroads).

*Form(s):* N/A.

*Annual Estimated Burden:* 67 hours.

*Title:* U.S. Locational Requirement for Dispatching U.S. Rail Operations.

*OMB Control Number:* 2130–0556.

*Abstract:* Part 241 requires, in the absence of a waiver, that all dispatching of railroad Operations that occurs in the United States be performed in this country, with a minor exception. A railroad is allowed to conduct extraterritorial dispatching from Mexico or Canada in emergency situations, but only for the duration of the emergency. A railroad relying on the exception must provide written notification of its action to the FRA Regional Administrator of each FRA region in which the railroad operation occurs; such notification is not required before addressing the emergency situation. The information collected under this rule will be used as part of FRA's oversight function to ensure that extraterritorial dispatchers comply with applicable safety regulations.

*Request:* Extension without change of a currently approved information collection.

*Affected Public:* Businesses (Railroads).

*Form(s):* N/A.

*Annual Estimated Burden:* 8 hours.

*Addressee:* Send comments regarding this information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street NW., Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to OMB at the following address: *oira_submissions@omb.eop.gov.*

*Comments are invited on the following:* Whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

**Authority:** 44 U.S.C. 3501–3520.

Issued in Washington, DC, on December 1, 2014.

**Rebecca Pennington,**

*Chief Financial Officer.*

[FR Doc. 2014–28506 Filed 12–4–14; 8:45 am]

**BILLING CODE 4910–06–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket Number FRA–2009–0074]**

### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations, this document provides the public notice that by a document dated October 14, 2014, the Canadian National Railway Company (CN), Brotherhood of Locomotive Engineers and Trainmen (BLET), and International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART), have jointly petitioned the Federal Railroad Administration (FRA) for an extension of their waiver of compliance from certain provisions of the Federal hours of service laws contained at 49 U.S.C. 21103(a)(4). FRA assigned the petition Docket Number FRA–2009–0074.

In their petition, CN, BLET, and SMART seek relief from 49 U.S.C. 21103(a)(4), which, in part, requires a train employee to receive 48 hours off duty after initiating an on-duty period for 6 consecutive days. Specifically, CN, BLET, and SMART seek a waiver to allow a train employee to initiate an on-duty period, each day, for 6 consecutive days followed by 24 hours off duty. In support of the request, CN, BLET, and SMART explained that CN has operated these schedules of 6 consecutive on-duty periods followed by 24 hours off duty successfully since 2002. CN, BLET, and SMART indicate that these schedules have not had an adverse impact on safety.

CN provided work schedules for the employees covered by the waiver, which shows them reporting for work within pre-set 4-hour calling spreads with a regular rest day. CN also provided an analysis of the most current 12-month period of train-employee on-duty human factor-related accidents and injuries. CN indicates that its analyses revealed that of the 22 human factor-related accidents involving CN employees in the preceding 12 months, none involved employees covered under the waiver working 6 consecutive days followed by 24 hours off duty. Finally, CN said that all employees covered by the waiver were provided information about the waiver extension petition, and that there were no objections to the waiver extension by these employees.

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 Avenue 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 January 20, 2015 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as 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.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be viewed at *www.dot.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of regulations.gov.

Issued in Washington, DC, on December 1, 2014.

**Ron Hynes,**

*Director, Office of Technical Oversight.*

[FR Doc. 2014–28518 Filed 12–4–14; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. DOT–NHTSA–2014–0122]**

### Notice and Request for Comments

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of Transportation (DOT) invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

**DATES:** Written comments should be submitted by February 3, 2015.

**ADDRESSES:** You may submit comments [identified by Docket No. DOT–OST–200X–XXXX] through one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.

• *Fax:* 1–202–493–2251

• *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.

**FOR FURTHER INFORMATION CONTACT:** Walter Culbreath, 202–366–1566, Office of the Chief Information Officer, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2127–0682

*Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

*Type of Review:* Renewal of an information collection.

*Abstract:* The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery.

This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

• The collections are voluntary;

• The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;

• The collections are non-controversial and do not raise issues of concern to other Federal agencies;

• Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;

• Personally identifiable information (PII) is collected only to the extent necessary and is not retained;

• Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, the agency must indicate the qualitative nature of the information);

• Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

• Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be

eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

*Affected Public:* Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

*Estimated number of Respondents:* 162,350.

*Frequency:* Once per request.

*Number of Responses:* 162,350.

*Estimated Total Annual Burden:* 83,191.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

**Kevin Mahoney,**

*Director, Office of Corporate Customer Services.*

[FR Doc. 2014–28542 Filed 12–4–14; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35877]**

### Genesee & Wyoming Inc.—Acquisition of Control Exemption (Including Existing Interchange Commitment)—Arkansas Midland Railroad Company, Inc., The Prescott and Northwestern Railroad Company, and Warren & Saline River Railroad Company

Genesee & Wyoming Inc. (GWI),[1] a publicly traded non-carrier holding company, has filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(2), to acquire control of the following Class III rail carriers: Arkansas Midland Railroad Company, Inc. (AKMD), The Prescott and Northwestern Railroad Company (PNW), and Warren & Saline Railroad Company (WSR) (collectively, the Acquired Railroads).[2] The Acquired Railroads are currently owned and under the common control of Pinsly Railroad Company (Pinsly).[3] GWI has submitted to the Board a redacted, public version of its Stock Purchase Agreement with Pinsly.[4]

GWI states that: (1) The Acquired Railroads do not connect with any of GWI's subsidiary railroads;[5] (2) the proposed transaction is not part of a series of anticipated transactions to connect the Acquired Railroads and any of GWI's subsidiary railroads; and (3) the proposed transaction does not involve a Class I rail carrier. The proposed transaction is therefore exempt from the prior approval requirements of 49 U.S.C. 11323 pursuant to 49 CFR 1180.2(d)(2).

Through its verified notice of exemption, GWI seeks to acquire all of the issued and outstanding stock of the Acquired Railroads from Pinsly. GWI states that the proposed transaction would allow the Acquired Railroads to take advantage of the administrative, financial, marketing, and operational support that GWI could provide, which would, in turn, promote the ability of the Acquired Railroads to provide safe and efficient service to their shippers. GWI claims that, although the Acquired Railroads do not connect with any of the railroads already controlled by GWI, the newly acquired railroads will expand the presence of GWI's affiliates in Arkansas.

GWI states that no interchange commitment is being imposed as part of this transaction but that one of the Acquired Railroads, AKMD, has an existing lease agreement with UP that includes an interchange commitment.[6] GWI notes that this existing commitment is part of AKMD's lease of several lines from UP[7] and was negotiated as part of the overall economic package in the original lease transactions. Because GWI is acquiring control of AKMD through a stock purchase, GWI states that there will be no effect on AKMD's operating rights under the UP Lease.

The earliest the transaction could be consummated is December 20, 2014, the effective date of the exemption (30 days after the exemption was filed). The parties expect to consummate the transaction shortly after the exemption becomes effective, assuming all other conditions to closing have been satisfied by that time.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Because the transaction involves the control of one or more Class III rail carriers and two Class II rail carriers, the transaction is subject to the labor protective requirements of 49 U.S.C. 11326(a) and *New York Dock Railway—Control—Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979).

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 by December 12, 2014 (at least

[1] Most recently, GWI was authorized to control Rapid City, Pierre & Eastern Railroad, Inc. (RCP&E), in common control with other carriers in GWI's corporate family, upon RCP&E's becoming a Class II carrier. *See Genesee & Wyo. Inc.—Continuance in Control Exemption—Rapid City, Pierre & E. R.R.,* FD 35800 (STB served Mar. 27, 2014). GWI provides with its verified notice of exemption a map showing the locations of the GWI-controlled railroads.

[2] AKMD connects with WSR at Warren, Ark. *See Pinsly R.R.—Control Exemption—Warren & Saline River R.R.,* FD 35293 (STB served Nov. 3, 2009). The Board has previously issued notices of exemption under 49 CFR 1180.2(d)(2) where some of the railroads to be acquired connect with each other. *See, e.g., SteelRiver Infrastructure Partners—Control Exemption—Patriot Rail* (*SteelRiver*), FD 35622 (STB served May 23, 2012); *Patriot Woods R.R.—Acquis. & Operation Exemption—Weyerhaeuser NR Co., Weyerhaeuser Woods R.R. Operating Div.,* FD 35431 (STB served Nov. 5, 2010) (authorizing two of the railroads later involved in *SteelRiver* to connect with each other).

[3] The Acquired Railroads own and operate rail lines solely within the State of Arkansas.

[4] With its verified notice of exemption, GWI filed under seal an unredacted version of its Stock Purchase Agreement and a motion for protective order to allow limited access to that agreement and other materials GWI has filed under seal. That motion is being addressed separately.

[5] According to GWI, AKMD and one of GWI's existing subsidiaries, Little Rock & Western Railway, L.P. (LRWN) both interchange with Union Pacific Railroad Company (UP) in the same yard in Little Rock, Ark. GWI states, however, that neither AKMD nor LRWN have the right to use any UP facilities to connect with each other.

[6] GWI states that it does not believe that the Board's interchange commitment disclosure requirements are intended to apply to equity control transactions in which no new interchange commitment is being imposed as part of the transaction. Without waiving that argument, GWI provides, in its verified notice and a confidential appendix, information about the interchange commitment that GWI notes ''would be required'' under 49 CFR 1180.4(g)(4)(i).

[7] Under this lease, as supplemented (UP Lease), AKMD operates the North Little Rock Branch in North Little Rock, the Warren Branch between Dermott and Warren, and the Cypress Bend Branch between McGehee and Cypress Bend. *See also Ark. Midland R.R.—Lease & Operation Exemption—Union Pac. R.R.,* FD 33908 (STB served Aug. 23, 2000); *Ark. Midland R.R.—Change in Operators Exemption—Line of Union Pac. R.R.,* FD 34567 (STB served Nov. 17, 2004); and *Ark. Midland R.R.—Lease & Operation Exemption—Union Pac. R.R.,* FD 34714 (STB served Aug. 30, 2005).

seven days before the exemption becomes effective).

An original and ten copies of all pleadings, referring to Docket No. FD 35877, 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: Eric M. Hocky, Clark Hill PLC, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103.

Board decisions and notices are available on our Web site at *WWW.STB.DOT.GOV.*

Decided: December 2, 2014.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Raina S. White,**

*Clearance Clerk.*

[FR Doc. 2014–28571 Filed 12–4–14; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### Agency Information Collection Activities: Revision of an Approved Information Collection; Comment Request; Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions With Total Consolidated Assets of $50 Billion or More Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC).

**ACTION:** Notice.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a revision to this information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Currently, the OCC is soliciting comment concerning a revision to a regulatory reporting requirement for national banks and Federal savings associations titled, ''Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $50 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.''

**DATES:** Comments must be received by January 5, 2015.

**ADDRESSES:** Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0319, 400 7th St. SW., 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 St. 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.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information from Johnny Vilela or Mary H. Gottlieb, OCC Clearance Officers, (202) 649–5490, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th St. SW., Washington, DC 20219. In addition, copies of the templates referenced in this notice can be found on the OCC's Web site under News and Issuances (*http://www.occ.treas.gov/tools-forms/forms/bank-operations/stress-test-reporting.html*).

**SUPPLEMENTARY INFORMATION:** The OCC is requesting comment on the following revision to an approved information collection:

*Title:* Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $50 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

*OMB Control No.:* 1557–0319.

*Description:* Section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] (Dodd-Frank Act) requires certain financial companies, including national banks and Federal savings associations, to conduct annual stress tests [2] and requires the primary financial regulatory agency [3] of those financial companies to issue regulations implementing the stress test requirements.[4] A national bank or Federal savings association is a ''covered institution'' and therefore subject to the stress test requirements if its total consolidated assets are more than $10 billion. Under section 165(i)(2), a covered institution is required to submit to the Board of Governors of the Federal Reserve System (Board) and to its primary financial regulatory agency a report at such time, in such form, and containing such information as the primary financial regulatory agency may require.[5] On October 9, 2012, the OCC published in the **Federal Register** a final rule implementing the section 165(i)(2) annual stress test requirement.[6] This rule describes the reports and information collections required to meet the reporting requirements under section 165(i)(2). These information collections will be given confidential treatment (5 U.S.C. 552(b)(4)).

In 2012, the OCC first implemented the reporting templates referenced in the final rule. *See* 77 FR 49485 (August 16, 2012) and 77 FR 66663 (November 6, 2012). The OCC is now revising them as described below. The OCC proposed these revisions on September 10, 2014.[7] The OCC received one comment and is adopting the revisions as final, with some adjustments described below.

The OCC intends to use the data collected to assess the reasonableness of the stress test results of covered institutions and to analyze forward-looking regarding a covered institution's capital adequacy. The OCC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered institution. The stress test results are expected to support ongoing improvement in a covered institution's stress testing practices with respect to its internal assessments of capital adequacy and overall capital planning.

The OCC recognizes that many covered institutions with total consolidated assets of $50 billion or more are required to submit reports using the Comprehensive Capital Analysis and Review (CCAR) reporting form FR Y–14A.[8] The OCC also recognizes the Board has modified the FR Y–14A reporting form, and to the extent practical the OCC will keep its reporting requirements consistent with the Board's FR Y–14A in order to minimize burden on covered institutions.[9] Therefore, the OCC is revising its reporting requirements to remain consistent with the Board's FR Y–14A for covered institutions with total consolidated assets of $50 billion

[1] Pub. L. 111–203, 124 Stat. 1376, July 2010.

[2] 12 U.S.C. 5365(i)(2)(A).

[3] 12 U.S.C. 5301(12).

[4] 12 U.S.C. 5365(i)(2)(C).

[5] 12 U.S.C. 5365(i)(2)(B).

[6] 77 FR 61238 (October 9, 2012).

[7] 79 FR 53835.

[8] *http://www.federalreserve.gov/reportforms.*

[9] 79 FR 64026 (Oct. 27, 2014).

or more. Furthermore, the OCC is revising the Scenario schedule, which collects information on scenario variables beyond those provided by regulators. The purpose of this revision is to require further clarity on the definitions of the additional scenario variables as well as information on how the additional scenario variables are used by covered institutions.

**Revisions To Reporting Templates for Institutions With $50 Billion or More in Assets**

The revisions to the DFAST–14A reporting templates consist of adding data items, deleting data items, redefining existing data items, and renumbering data items. These changes would provide additional information to enhance the ability of the OCC to analyze the validity and integrity of firms' projections and increase consistency between the FR Y–14A reporting templates and DFAST–14A reporting templates. The OCC has conducted a thorough review of the changes and believes that the incremental burden of these changes is justified given the need for this data to properly conduct the OCC's supervisory responsibilities related to the stress testing.

**Summary Schedule**

The OCC is making a number of changes to the Summary schedule to better assess covered institutions' calculation of risk-weighted assets (RWA) and certain other items detailed below. Please note that all line item numbers referenced in this Notice refer to the existing reporting schedules, not the revised reporting schedules. Because the changes add and delete some data items, line-item numbering between the existing and templates may be different (*e.g.,* Income Statement item 125, Total Other Losses, in the existing reporting template is now item 124 in the template).

*Revisions to Income Statement Worksheet*

In order to accurately collect information for the Income Statement, the OCC is changing items 127 and 128 (Realized Gains/Losses on available-for-sale securities and held-to-maturity securities, including OTTI) to be reported items instead of being equal to the total amounts on the Securities OTTI by Portfolio worksheet. Additionally, for consistency with changes to the Counterparty Risk Worksheet described below, items 59 and 62 (Trading Incremental Default Losses and Other CCR Losses) would be modified to be Trading Issuer Default Losses and CCR Losses, and line item 61 (Counterparty Incremental Default Losses) is being removed.

*Revisions to RWA and Capital Worksheets*

To better align the collection of regulatory capital components with the Board's FR Y–14A, the OCC is modifying the definitions of the items on the Capital—DFAST worksheet to refer to or mirror the definitions that appear on revisions to the FR Y–14A. Respondents are required to apply the appropriate transition provisions to all transition-affected items of the Capital—DFAST schedule consistent with revisions to regulatory capital rules. With regard to the RWA worksheets, the standardized approach RWA and market RWA items of the General RWA worksheet have been changed in accordance with proposed modifications to Schedule RC–R of the Call Report [10] and modifications to the FR Y–14A that are currently being considered, and moved to a separate worksheet (Standardized RWA). These changes include both the modification and addition of items, for an overall addition of 12 items. Additionally, the computed items one through five of the current Advanced RWA worksheet are being removed.

*Revisions to Retail Repurchase Worksheet*

Due to recent activity by respondents involving settlements related to their representation and warranty (R&W) liabilities related to residential mortgages, the OCC will collect additional detail about the R&W liabilities. Specifically, line items are being added that collect the unpaid principal balance (UPB) of loans covered by completed settlements for which liability remains and for which no liability remains by vintage beginning with 2004, as well as total settlement across vintages, for the following categories of loans: Loans sold to Fannie Mae, loans sold to Freddie Mac, loans insured by the U.S. government, loans securitized with monoline insurance, loans secured without monoline insurance, and whole loans sold.

*Revisions to Securities Worksheets*

Because covered bonds have unique characteristics relative to other asset categories currently on this worksheet, the OCC is adding a separate covered bond category to the Securities worksheets to evaluate respondents' projections of these assets. Additionally, two columns would be added to collect information for the Securities AFS OCI by Portfolio worksheet that would allow changes in market value to be distinguished from changes in portfolio allocation for each projected quarter: Beginning Fair Market Value and Fair Value Rate of Change, which is the weighted average percent change in fair value over the quarter. Finally, to reduce reporting burden and increase efficiency in reporting, the nine sub-asset categories of Domestic Non-Agency Residential Mortgage-Backed Securities (RMBS) are being removed from the same worksheet, and the available-for-sale and held-to-maturity portions of the Securities OTTI by Portfolio worksheet are being combined with the addition of a column to identify AFS amounts versus HTM amounts.

*Revisions to Trading Worksheet*

Because credit valuation adjustment (CVA) losses are modeled separately from trading portfolio losses, the OCC is requiring that the profit (loss) amount related to CVA hedges be reported separately from other trading activity.

*Revisions to Counterparty Risk Worksheet*

To allow respondents to use alternative methodologies for estimating losses related to the default of issuers and counterparties, the requirement of using the incremental default risk (IDR) methodology are being removed. Accordingly, line items 1, 1a and 1b (Trading Incremental Default Losses, Trading Incremental Default Losses from securitized products, and Trading Incremental Default Losses from other credit sensitive instruments) are modified to be Issuer Default Losses. Additionally, line items 3 (Counterparty Incremental Default Losses) and 3a (Impact of CCR IDR Hedges) are being removed, line item 4 (Other CCR Losses) are modified to be CCR Losses, and the line item Effect of CCR Hedges is being added.

**Regulatory Capital Instruments Schedule**

Changes to the Regulatory Capital Instruments schedule are consistent with changes to the FR Y–14A. Specifically, the OCC is (1) adding an item that collects employee stock compensation to the four quarterly redemption/repurchase and issuance activity sub-sections; (2) adding 18 items to the general risk-based capital rules section and 28 items to the revised regulatory capital section; and (3) changing the capital balance items in the general risk-based capital rules

[10] 70 FR 35634 (June 23, 2014).

section and the revised regulatory capital section from reported items to formulas to permit the capital balance items to be automatically computed using the new items.

**Regulatory Capital Transitions Schedule**

Similar to the changes being made to the RWA and Capital worksheets of the Summary schedule, changes to the Regulatory Capital Transitions schedule will better align the collection of regulatory capital components with revisions to the FR Y–14A and proposed revisions to Schedule RC–R of the Call Report. The OCC is (1) aligning the definitions of the items on the Capital Composition worksheet to be consistent with the FR Y–14A; (2) modifying the RWA General worksheet to align with revisions to the FR Y–14A, including changing the name to Standardized RWA and modifying, removing and adding items for a net increase of 15 items; (3) modifying, adding and removing items on the Advanced RWA worksheet to align with the Advanced RWA worksheet on the Summary schedule, for a net increase of 21 items; and (4) revising the Leverage Exposure worksheet in accordance with changes to the supplementary leverage requirement, for a net increase of ten items.

**Counterparty Credit Risk Schedule**

Significant additions are being made to the CCR schedule to more adequately and accurately capture exposure information related to derivatives and securities financing transactions (SFTs) used in supervisory loss estimates and supervisory activities. These additions would remediate deficiencies discovered in the current collection related to exposure, including a lack of information regarding collateral, asset types, and total exposure to a given counterparty.

The OCC is (1) adding a worksheet that collects the derivative exposures at a legal-entity netting-agreement level for the top 25 non-central clearing counterparties (non-CCP) and non-G–7 counterparties, as well as all CCPs and the G–7 counterparties that includes a breakout of collateral into cash and non-cash, and exposures into 14 asset categories; (2) changing the current SFT sub-schedule to collect exposures and collateral separately at a counterparty legal-entity netting-agreement level for the top 25 non-CCP and non-G–7 counterparties as well as all CCPs and the G–7 counterparties and adding asset sub-categories for a total of 30 specific asset types; (3) removing all columns with the bank specification of margin period of risk (MPOR) under the global market shocks from worksheets 1(a)–1(e); (4) removing the column LGD Derived from Unstressed PD on the EE profile by CP worksheet; and (5) adding columns to worksheet 1(e) to collect both gross and net stressed and unstressed current exposure to CCPs.

**Scenario Schedule**

Additional scenario variables, which are collected on this schedule, are key drivers in projection methodologies. The OCC is revising the Scenario schedule to further clarify the definitions of the additional scenario variables as well as to gather further information on how the additional scenario variables are used by covered institutions. It is expected that this additional clarity and information will assist in comparing information in this schedule across covered institutions.

The OCC is (1) providing additional guidance on the syntax for naming additional scenario variables to increase the comparability of additional scenario variables across covered institutions; (2) adding a column to explicitly capture the ''unit of measure'' of the additional scenario variables, *e.g.,* basis points, percentages, dollars; (3) adding a column to explicitly capture the frequency of the variable, *e.g.,* monthly or 3-month average; and (4) adding multiple columns to understand where the additional scenario variables are used in modeling. These last additional columns align with the methodology documentation framework described in Appendix A of the instructions.

**Supporting Documentation**

The instructions provide that banks must provide a comprehensive inventory of models used in the projection of losses, revenues, expenses, balances, and RWAs. Additionally, the instructions provide that covered institutions must submit written procedures or other documentation that outlines internal controls and processes used to ensure the accuracy of the submissions

**Technical Changes**

The OCC received one comment letter. The commenter expressed concerns about certain differences between the DFAST–14A reporting templates and the FR Y–14A reporting form used by the Board, particularly the additional information on the DFAST–14A Scenario schedule. While the OCC has attempted to keep the DFAST–14A reporting templates very similar to the FR Y–14A, the OCC supervises different legal entities than the Board and is required to administer different statutory and regulatory requirements.

Therefore, some differences exist between the final DFAST–14A reporting templates and FR Y–14A. The revised templates include changes to some line items in order to match the FR Y–14A as much as possible. With respect to the additional information required on the DFAST–14A Scenario schedule, the OCC believes that additional scenario variables are key model inputs that are critical to assessing the reasonableness of a covered institution's model-based estimates. Accordingly, the final revised templates require submission of this additional information. The revised templates also contain various technical, syntax, and reference changes.

*Type of Review:* Revision.

*Affected Public:* Businesses or other for-profit.

*Estimated Number of Respondents:* 23.

*Estimated Total Annual Burden:* 16,466 hours.

The OCC recognizes that the Board has estimated 67,848 hours for bank holding companies to prepare the reporting schedules submitted for the FR Y–14A. The OCC believes that the systems the covered institutions use to prepare the FR Y–14A reporting schedules will also be used to prepare the reporting schedules described in this notice. Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection 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.

Dated: December 2, 2014.

**Stuart Feldstein,**

*Director, Legislative and Regulatory Activities Division.*

[FR Doc. 2014–28575 Filed 12–4–14; 8:45 am]

BILLING CODE P

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Unblocking of a Specially Designated Global Terrorist Pursuant to Executive Order 13224

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Treasury Department's Office of Foreign Assets Control (OFAC) is removing from the List of Specially Designated Nationals and Blocked Persons (SDN List) the name of one individual whose property and interests in property have been unblocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

**DATES:** OFAC's actions described in this notice are effective November 26, 2014.

**FOR FURTHER INFORMATION CONTACT:** Associate Director for Global Targeting, tel.: 202/622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202/622–2490, Assistant Director for Licensing, tel.: 202/622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

**SUPPLEMENTARY INFORMATION:**

#### Electronic and Facsimile Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treasury.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs is also available via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

#### Notice of OFAC Action

On September 11, 2014, OFAC unblocked the property and interests in property of the following individual pursuant to E.O. 13224, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.'' All property and interests in property of the individual that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

*Individual*

1. AL–QADI, Yasin Abdullah Ezzedine (a.k.a. KADI, Shaykh Yassin Abdullah; a.k.a. KAHDI, Yasin), Jeddah, Saudi Arabia; DOB 23 Feb 1955; POB Cairo, Egypt; nationality Saudi Arabia; Passport B 751550; alt. Passport E 976177 issued 06 Mar 2004 expires 11 Jan 2009; alt. Passport A 848526 (Saudi Arabia) expires 29 Mar 2001 (individual) [SDGT].

Dated: November 26, 2014.

**John E. Smith,**

*Acting Director, Office of Foreign Assets Control.*

[FR Doc. 2014–28598 Filed 12–4–14; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0013]**

### Agency Information Collection (Application for United States Flag for Burial Purposes): Activity Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before January 5, 2015.

**ADDRESSES:** Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0013'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492 or email *crystal.rennie@va.gov.* Please refer to ''OMB Control No. 2900–0013.''

**SUPPLEMENTARY INFORMATION:**

*Title:* Application for United States Flag for Burial Purposes, VA Form 27–2008.

*OMB Control Number:* 2900–0013.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 27–2008 is used for the sole purpose of gathering the necessary information to determine eligibility for issuance of a burial flag to the next-of-kin or friend of a deceased Veteran.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on August 26, 2014, at page 50987.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 162,500 hours.

*Estimated Average Burden per Respondent:* 15 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 650,000.

Dated: December 2, 2014.

By direction of the Secretary.

**Crystal Rennie,**

*Department Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2014–28558 Filed 12–4–14; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900—NEW (10–10139)]**

### Proposed Information Collection (PACT Evaluating Peer Notifications To Improve Statin Medication Adherence Among Patients With Coronary Artery Disease); Comment Request

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to evaluate the project aims to enhance PACT implementation by evaluating the effects of the VA PACT initiative and by

test new, innovative strategies for patient care that can be spread if proven effective.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before February 3, 2015.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov;* or Audrey Revere, Office of Regulatory and Administrative Affairs, Veterans Health Administration (10B4), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *Audrey.revere@va.gov.* Please refer to ''OMB Control No. 2900—NEW (PACT Evaluating Peer Notifications to Improve Statin Medication Adherence among Patients with Coronary Artery Disease)'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

**FOR FURTHER INFORMATION CONTACT:** Audrey Revere at (202) 461–5694.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Titles:* PACT Evaluating Peer Notifications to Improve Statin Medication Adherence among Patients with Coronary Artery Disease, VA Form 10–10139.

*OMB Control Number:* 2900—NEW.

*Type of Review:* New data collection.

*Abstract:* Despite the importance of medication adherence, we have few effective tools to help patients improve taking their medications. One strategy to improve medication adherence is using newer technology to make engagement with patients significantly easier and more immediate. These studies evaluating how best to use these technologies and engage different support providers (family/friends/or peers) to improve medication adherence.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 336 burden hours.

*Estimated Average Burden per Respondent:* 90 minutes.

*Frequency of Response:* Once annually.

*Estimated Number of Respondents:* 224.

By direction of the Secretary.

**Crystal Rennie,**

*Department Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2014–28556 Filed 12–4–14; 8:45 am]

**BILLING CODE 8320–01–P**

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## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900—NEW (10–10138)]**

## Proposed Information Collection (Using Peer Mentors To Support PACT Team Efforts To Improve Diabetes); Comment Request

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection needed to evaluate the project aims to enhance PACT implementation by evaluating the effects of the VA PACT initiative and by test new, innovative strategies for patient care that can be spread if proven effective.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before February 3, 2015.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov;* or Audrey Revere, Office of Regulatory and Administrative Affairs, Veterans Health Administration (10B4), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *Audrey.revere@va.gov.* Please refer to ''OMB Control No. 2900—NEW (Using Peer Mentors to Support PACT Team Efforts to Improve Diabetes)'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

**FOR FURTHER INFORMATION CONTACT:** Audrey Revere at (202) 461–5694.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Titles:* Using Peer Mentors to Support PACT Team Efforts to Improve Diabetes, VA Form 10–10138.

*OMB Control Number:* 2900—NEW.

*Type of Review:* New data collection.

*Abstract* This project is being conducted under the auspices of the VISN 4 Demonstration Lab, which was funded by Patient Care Services to assess the Patient Aligned Care Team (PACT) model of care for Veterans. There is considerable interest in and urgency to implement the PACT model—reflecting both a desire to improve health care for Veterans and to sustain the VA's leadership in health care quality. CEPACT aims to contribute to these goals by evaluating the effects of the VA PACT initiative and by test new, innovative strategies for patient care that can be spread if proven effective.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 1,473 burden hours.

*Estimated Average Burden per Respondent:* 147 minutes.

*Frequency of Response:* Once annually.

*Estimated Number of Respondents:* 600.

Dated: December 2, 2014.

By direction of the Secretary.

**Crystal Rennie,**

*Department Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2014–28557 Filed 12–4–14; 8:45 am]

**BILLING CODE 8320–01–P**

# FEDERAL REGISTER

Vol. 79 Friday,

No. 234 December 5, 2014


Part II

## Securities and Exchange Commission

17 CFR Parts 240, 242, and 249

Regulation Systems Compliance and Integrity; Final Rule

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 240, 242, and 249**

**[Release No. 34–73639; File No. S7–01–13]**

**RIN 3235–AL43**

## Regulation Systems Compliance and Integrity

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule and form; final rule amendment; technical amendment.

**SUMMARY:** The Securities and Exchange Commission (''Commission'') is adopting new Regulation Systems Compliance and Integrity (''Regulation SCI'') under the Securities Exchange Act of 1934 (''Exchange Act'') and conforming amendments to Regulation ATS under the Exchange Act. Regulation SCI will apply to certain self-regulatory organizations (including registered clearing agencies), alternative trading systems (''ATSs''), plan processors, and exempt clearing agencies (collectively, ''SCI entities''), and will require these SCI entities to comply with requirements with respect to the automated systems central to the performance of their regulated activities.

**DATES:** *Effective date:* February 3, 2015.

*Compliance date:* The applicable compliance dates are discussed in Section IV.F of this release.

**FOR FURTHER INFORMATION CONTACT:** David Liu, Senior Special Counsel, Office of Market Supervision, at (312) 353–6265, Heidi Pilpel, Senior Special Counsel, Office of Market Supervision, at (202) 551–5666, Sara Hawkins, Special Counsel, Office of Market Supervision, at (202) 551–5523, Yue Ding, Special Counsel, Office of Market Supervision, at (202) 551–5842, David Garcia, Special Counsel, Office of Market Supervision, at (202) 551–5681, and Elizabeth C. Badawy, Senior Accountant, Office of Market Supervision, at (202) 551–5612, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

**SUPPLEMENTARY INFORMATION:** Regulation SCI will, with regard to SCI entities, supersede and replace the Commission's current Automation Review Policy (''ARP''), established by the Commission's two policy statements, each titled ''Automated Systems of Self-Regulatory Organizations,'' issued in 1989 and 1991.[1] Regulation SCI also will supersede and replace aspects of those policy statements codified in Rule 301(b)(6) under the Exchange Act, applicable to significant-volume ATSs that trade NMS stocks and non-NMS stocks.[2] Regulation SCI will require SCI entities to establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that they operate in a manner that complies with the Exchange Act. It will also require SCI entities to mandate participation by designated members or participants in scheduled testing of the operation of their business continuity and disaster recovery plans, including backup systems, and to coordinate such testing on an industry- or sector-wide basis with other SCI entities. In addition, Regulation SCI will require SCI entities to take corrective action with respect to SCI events (defined to include systems disruptions, systems compliance issues, and systems intrusions), and notify the Commission of such events. Regulation SCI will further require SCI entities to disseminate information about certain SCI events to affected members or participants and, for certain major SCI events, to all members or participants of the SCI entity. In addition, Regulation SCI will require SCI entities to conduct a review of their systems by objective, qualified personnel at least annually, submit quarterly reports regarding completed, ongoing, and planned material changes to their SCI systems to the Commission, and maintain certain books and records. Finally, the Commission also is adopting modifications to the volume thresholds in Regulation ATS[3] for significant-volume ATSs that trade NMS stocks and non-NMS stocks, applying them to SCI ATSs (as defined below), and moving this standard from Regulation ATS to adopted Regulation SCI for these asset classes.

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6. SCI Entity Business Continuity and Disaster Recovery Plans Testing Requirements for Members or Participants—Rule 1004
C. Recordkeeping, Electronic Filing on Form SCI, and Access—Rules 1005–1007
1. Recordkeeping—Rules 1005–1007
2. Electronic Filing and Submission of Reports, Notifications, and Other Communications—Rule 1006
3. Access to the Systems of an SCI Entity
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VIII. Statutory Authority and Text of Amendments

## I. Introduction

The U.S. securities markets attract a wide variety of issuers and broad investor participation, and are essential for capital formation, job creation, and economic growth, both domestically and across the globe. The U.S. securities markets have been transformed by regulatory and related technological developments in recent years. They have, among other things, substantially enhanced the speed, capacity, efficiency, and sophistication of the trading functions that are available to

[1] *See* Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989) (''ARP I Release'' or ''ARP I'') and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991) (''ARP II Release'' or ''ARP II'' and, together with ARP I, the ''ARP Policy Statements'').

[2] *See* 17 CFR 242.301(b)(6). *See also* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (''ATS Release'').

[3] 17 CFR 242.300–303 (''Regulation ATS'').

market participants.[4] At the same time, these technological advances have generated an increasing risk of operational problems with automated systems, including failures, disruptions, delays, and intrusions. Given the speed and interconnected nature of the U.S. securities markets, a seemingly minor systems problem at a single entity can quickly create losses and liability for market participants, and spread rapidly across the national market system, potentially creating widespread damage and harm to market participants, including investors.

This transformation of the U.S. securities markets has occurred in the absence of a formal regulatory structure governing the automated systems of key market participants. Instead, for over two decades, Commission oversight of the technology of the U.S. securities markets has been conducted primarily pursuant to a voluntary set of principles articulated in the Commission's ARP Policy Statements,[5] applied through the Commission's Automation Review Policy inspection program (''ARP Inspection Program'').[6]

Section 11A(a)(2) of the Exchange Act,[7] enacted as part of the Securities Acts Amendments of 1975 (''1975 Amendments''),[8] directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under the Exchange Act to facilitate the establishment of a national market system for securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act.[9] Among the findings and objectives in Section 11A(a)(1) is that ''[n]ew data processing and communications techniques create the opportunity for more efficient and effective market operations'' [10] and ''[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the economically efficient execution of securities transactions.'' [11] In addition, Sections 6(b), 15A, and 17A(b)(3) of the Exchange Act impose obligations on national securities exchanges, national securities associations, and clearing agencies, respectively, to be ''so organized'' and ''[have] the capacity to . . . carry out the purposes of [the Exchange Act].'' [12]

In March 2013, the Commission proposed Regulation Systems Compliance and Integrity (''Regulation SCI'') [13] to require certain key market participants to, among other things: (1) Have comprehensive policies and procedures in place to help ensure the robustness and resiliency of their technological systems, and also that their technological systems operate in compliance with the federal securities laws and with their own rules; and (2) provide certain notices and reports to the Commission to improve Commission oversight of securities market infrastructure. As discussed in further detail below and in the SCI Proposal, Regulation SCI was proposed to update, formalize, and expand the Commission's ARP Inspection Program, and, with respect to SCI entities, to supersede and replace the Commission's ARP Policy Statements and rules regarding systems capacity, integrity and security in Rule 301(b)(6) of Regulation ATS.[14]

A confluence of factors contributed to the Commission's proposal of Regulation SCI and to the Commission's current determination that it is necessary and appropriate at this time to address the technological vulnerabilities, and improve Commission oversight, of the core technology of key U.S. securities markets entities, including national securities exchanges and associations, significant alternative trading systems, clearing agencies, and plan processors. These considerations include: the evolution of the markets to become significantly more dependent upon sophisticated, complex and interconnected technology; the current successes and limitations of the ARP Inspection Program; a significant number of, and lessons learned from, recent systems issues at exchanges and other trading venues,[15] increased concerns over ''single points of failure'' in the securities markets; [16] and the views of a wide variety of commenters received in response to the SCI Proposal.

The Commission received 60 comment letters on the proposal from national securities exchanges, registered securities associations, registered clearing agencies, ATSs, broker-dealers, institutional and individual investors, industry trade groups, software and technology vendors, and academics.[17] Commenters generally supported the goals of the proposal, but as further discussed below, some expressed concern about various specific elements of the proposal, and recommended certain modifications or clarifications.

After careful review and consideration of the comment letters,

[4] *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3598 (January 21, 2010) (Concept Release on Equity Market Structure).

[5] While participation in the ARP Inspection Program is voluntary, the underpinnings of ARP I and ARP II are rooted in Exchange Act requirements. *See infra* notes 7–12 and accompanying text.

[6] *See infra* Section II.A (discussing the ARP Inspection Program). *See also supra* note 1. The ARP Inspection Program has historically been administered by the Commission's Division of Trading and Markets. In February 2014, to consolidate the inspection function of the group with the Commission's Office of Compliance Inspections and Examinations (''OCIE''), the ARP Inspection Program was transitioned to OCIE and has been renamed the Technology Controls Program (''TCP''). However, for ease of reference to the historical ARP Inspection Program, relevant portions of the SCI Proposal, and references in comment letters, this Release will continue to use the terms ARP, ARP Inspection Program, and ARP staff, unless the context otherwise requires.

[7] 15 U.S.C. 78k–1(a)(2).

[8] Pub. L. 94–29, 89 Stat. 97 (1975).

[9] 15 U.S.C. 78k–1(a)(1).

[10] Section 11A(a)(1)(B) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(B).

[11] Section 11A(a)(1)(C)(i) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C)(i).

[12] *See* Sections 6(b)(1), 15A(b)(2), and 17A(b)(3) of the Exchange Act, 15 U.S.C. 78f(b)(1), 78*o*–3(b)(2), 78q–1(b)(3), respectively. *See also* Section 2 of the Exchange Act, 15 U.S.C. 78b, and Section 19 of the Exchange Act, 15 U.S.C. 78s.

[13] Securities Exchange Act Release No. 69077 (March 8, 2013), 78 FR 18083 (March 25, 2013) (''Proposing Release'' or ''SCI Proposal'').

[14] *See* 17 CFR 242.301(b)(6) and ATS Release, *supra* note 2.

[15] *See* Proposing Release, *supra* note 13, at 18085–91 for a further discussion of these developments and *infra* Section II.B (discussing recent events related to technology issues). In addition, prior to issuing the Proposing Release, in October 2012 the Commission convened a roundtable entitled ''Technology and Trading: Promoting Stability in Today's Markets'' (''Technology Roundtable''). The Technology Roundtable examined the relationship between the operational stability and integrity of the securities market and the ways in which market participants design, implement, and manage complex and interconnected trading technologies. *See* Securities Exchange Act Release No. 67802 (September 7, 2012), 77 FR 56697 (September 13, 2012) (File No. 4–652) and Technology Roundtable Transcript, available at: *http://www.sec.gov/news/otherwebcasts/2012/ttr100212-transcript.pdf.* A webcast of the Roundtable is available at: *www.sec.gov/news/otherwebcasts/2012/ttr100212.shtml.* As noted in the Proposing Release, the Commission believes that the information presented at the Technology Roundtable further highlighted that quality standards, testing, and improved response mechanisms are among the issues needing very thoughtful and focused attention in today's securities markets. *See* Proposing Release, *supra* note 13, at 18090–91 for further discussion of the Technology Roundtable.

[16] *See infra* Section IV.A.2.c (discussing single points of failure in the securities markets in conjunction with the adopted term ''critical SCI system'').

[17] Comments received on the proposal are available on the Commission's Web site, available at: *http://www.sec.gov/comments/s7-01-13/s70113.shtml. See* Exhibit A for a citation key to the comment letters cited in this release.

Upon request from some commenters, the Commission extended the comment period for an additional 45 days in order to give the public additional time to comment on the matters addressed by the SCI Proposal. *See* Securities Exchange Act Release No. 69606 (May 20, 2013), 78 FR 30803 (May 23, 2013).

the Commission is adopting Regulation SCI (''Rule'') and Form SCI (''Form'') with certain modifications from the SCI Proposal, as discussed below, to respond to concerns expressed by commenters and upon further consideration by the Commission of the more appropriate approach to further the goals of the national market system by strengthening the technology infrastructure of the U.S. securities markets.

## II. Background

### *A. Automation Review Policy Inspection Program*

For over two decades, the Commission's ARP Inspection Program has helped the Commission oversee the technology infrastructure of the U.S. securities markets. This voluntary information technology review program was developed by staff of the Commission to implement the Commission's ARP Policy Statements issued in 1989 and 1991.[18] Through these Policy Statements, the Commission articulated its views on the steps that SROs should take with regard to their automated systems, set forth recommendations for how SROs should conduct independent reviews, and provided that SROs should notify the Commission of material systems changes and significant systems problems.[19] In 1998, the Commission adopted Regulation ATS which, among other things, imposed by rule certain aspects of the ARP Policy Statements on significant-volume ATSs.[20] Further, Commission staff subsequently provided additional guidance regarding various aspects of the ARP Inspection Program through letters to ARP entities, including recommendations regarding reporting planned systems changes and systems issues to the Commission.[21]

Under the ARP Inspection Program, Commission staff (''ARP staff'') conducts inspections of the trading and related systems of national securities exchanges and associations, certain ATSs, clearing agencies, and plan processors (collectively ''ARP entities''), attends periodic technology briefings by ARP entities, monitors planned significant system changes, and responds to reports of system failures, disruptions, and other systems problems of ARP entities. The goal of the ARP inspections is to evaluate whether an ARP entity's controls over its information technology resources in nine general areas, or information technology ''domains,''[22] is consistent with ARP and industry guidelines. Such guidelines are identified by ARP staff from a variety of information technology publications that ARP staff believes reflects industry standards for securities market participants.[23] At the conclusion of an ARP inspection, ARP staff typically issues a report to the ARP entity with an assessment of the ARP entity's information technology program for its key systems, including any recommendations for improvement.[24]

Because the ARP Inspection Program was established pursuant to Commission policy statements rather than Commission rules, participation in and compliance with the ARP Inspection Program by ARP entities is voluntary. As such, despite its general success in working with SROs to improve their automated systems, there are certain limitations with the ARP Inspection Program. In particular, because of the voluntary nature of the ARP Inspection Program, the Commission is constrained in its ability to assure compliance with ARP standards. The Government Accountability Office (''GAO'') has identified the voluntary nature of the ARP Inspection Program as a limitation and recommended that the Commission make compliance with ARP guidelines mandatory.[25] In addition, as more fully discussed in the SCI Proposal, the evolution of the U.S. securities markets in recent years to become almost entirely electronic and highly dependent on sophisticated trading and other technology, including complex and interconnected routing, market data, regulatory, surveillance and other systems, has posed challenges for the ARP Inspection Program.[26]

### *B. Recent Events*

A series of high-profile recent events involving systems-related issues further highlights the need for market participants to bolster the operational integrity of their automated systems in this area. In the SCI Proposal, the Commission identified several systems problems experienced by SROs and ATSs that garnered significant public attention and illustrated the types and risks of systems issues affecting today's markets.[27] Since Regulation SCI's proposal in March 2013, additional systems problems among market participants have occurred, further underscoring the importance of bolstering the robustness of U.S. market infrastructure to help ensure its stability, integrity, and resiliency.

In particular, since Regulation SCI's proposal, disruptions have continued to occur across a variety of market participants. For example, with respect to the options markets, some exchanges have delayed the opening of trading,[28]

[18] *See* ARP Policy Statements, *supra* note 1. For a detailed discussion of the ARP Policy Statements, *see* Proposing Release, *supra* note 13, at 18085–86.

[19] *See* ARP Policy Statements, *supra* note 1.

[20] *See* 17 CFR 242.301(b)(6) and ATS Release, *supra* note 2.

[21] In June 2001, staff from the Division of Market Regulation sent a letter to the SROs and other participants in the ARP Inspection Program regarding Guidance for Systems Outage and System Change Notifications (''2001 Staff ARP Interpretive Letter''). *See* Proposing Release, *supra* note 13, at 18087, n. 35. The 2001 Staff ARP Interpretive Letter is available at: *http://www.sec.gov/divisions/marketreg/sroautomation.shtml.*

[22] These information technology ''domains'' include: application controls; capacity planning; computer operations and production environment controls; contingency planning; information security and networking; audit; outsourcing; physical security; and systems development methodology. Each domain itself contains subcategories. For example, ''contingency planning'' includes business continuity, disaster recovery, and pandemic planning, among other things. *See id.* at 18086.

[23] *See id.* at 18086–87.

[24] In addition, Commission staff conducts inspections of SROs, as part of the Commission's oversight of them. Unlike ARP inspections, however, which focus on information technology controls, such Commission staff primarily conducts risk-based examinations of securities exchanges, FINRA, and other SROs to evaluate whether they and their member firms are complying with the Exchange Act, the rules thereunder, and SRO rules, as applicable. As part of the Commission's oversight of the SROs, Commission staff also reviews systems compliance issues reported to Commission staff. The information gained from the Commission staff review of reported systems compliance issues helps to inform its examination risk-assessments for SROs. *See id.* at 18087.

[25] *See* GAO, Financial Market Preparedness: Improvements Made, but More Action Needed to Prepare for Wide-Scale Disasters, Report No. GAO–04–984 (September 27, 2004). GAO cited instances in which the GAO believed that entities participating in the ARP Inspection Program failed to adequately address or implement ARP staff recommendations as the reasoning behind its recommendation to make compliance with ARP guidelines mandatory.

[26] *See* Proposing Release, *supra* note 13, at 18087–89.

[27] *See id.* at 18089–90. The Proposing Release also discussed the effects of Superstorm Sandy on the U.S. securities exchanges, noting certain weaknesses in business continuity and disaster recovery planning that were highlighted by the event. *See id.* at 18091.

[28] On April 25, 2013, the Chicago Board Options Exchange, Inc. (''CBOE'') delayed the opening of trading on its exchange for over three hours due to what CBOE described as an internal ''software bug.'' *See* CBOE Information Circular IC13–036, April 29, 2013, available at: *http://www.cboe.com/publish/InfoCir/IC13-036.pdf.* During this time, while trading in many products was able to continue on the other options exchanges, trading was completely halted for those products that are singly-listed on CBOE, including options on the S&P 500 Index and the CBOE Volatility Index (''VIX''). Trading was able to resume by approximately 1:00 p.m. ET, though some residual systems problems continued. Specifically, certain auction mechanisms were unavailable for the remainder of the day and some of the trade data from April 25 was erroneously re-transmitted to OCC on April 26. *See id.* and CBOE System Status notifications for

halted trading,[29] or experienced other errors as a result of systems issues,[30] and trading in options was halted due to a systems issue with the securities information processor for options market information.[31] Systems issues have also impacted consolidated market data in the equities markets, including one incident that led to a trading halt in all securities listed on a particular exchange.[32] Systems issues have also affected trading off of national securities exchanges, including an incident where FINRA halted trading in all OTC equity securities due to a lack of availability of quotation information resulting from a connectivity issue experienced by an ATS.[33] Systems issues during this time have not been limited to systems disruptions, but have also included allegations of systems compliance issues.[34]

Systems issues are not unique to the U.S. securities markets, with similar incidents occurring in the U.S. commodities markets as well as foreign markets.[35] However, the Commission

April 25, 2013, available at: *http://www.cboe.com/aboutcboe/systemstatus/search.aspx.* CBOE subsequently reported that preliminary staging work related to a planned reconfiguration of CBOE's systems in preparation for extended trading hours on the CBOE Futures Exchange and CBOE options exchange ''exposed and triggered a design flaw in the existing messaging infrastructure configuration.'' *See* CBOE Information Circular IC13–036, April 29, 2013, available at: *http://www.cboe.com/publish/InfoCir/IC13-036.pdf.*

[29] On November 1, 2013, Nasdaq halted trading on the Nasdaq Options Market (''NOM'') for more than five hours through the close of the trading day. Nasdaq stated that the halt was a result of ''a significant increase in order entries which inhibited the system's ability to accept orders and disseminate quotes on a subset of symbols.'' As Nasdaq stated, Nasdaq determined that it was in the best interest of market participants and investors to cancel all orders on the NOM book and continue the market halt through the close. *See* Nasdaq Market System Status Updates for November 1, 2013, available at: *https://www.nasdaqtrader.com/Trader.aspx?id=MarketSystemStatusSearch.*

[30] On April 29, 2014, NYSE Arca and NYSE Amex Options experienced a systems issue that resulted in numerous complex orders booking at incorrect prices. In some cases, this resulted in erroneous fill reports, all of which were subsequently nullified. *See* Trader Update to All NYSE Amex Options and NYSE Arca Options Participants, ''Erroneous Complex Order Executions,'' dated April 29, 2014, available at: *http://www1.nyse.com/pdfs/2014_04_29_NYSE_Amex_and_Arca_Options_Erroneous_Complex_Order_Executions.pdf.*

[31] On September 16, 2013, options market trading was halted for approximately 20 minutes due to a systems issue with the Options Price Reporting Authority (''OPRA''), the securities information processor for options market information that disseminates option quotation and last sale information to market data vendors. OPRA reported that it experienced problems processing quotes as a result of a software issue originating from a limited rollout of certain software upgrades. *See* Notice to All OPRA Market Data Recipients from OPRA, LLC, dated September 18, 2013, available at: *http://www.opradata.com/specs/16-sept-2013-opra-outage.pdf.*

[32] On August 22, 2013, the NASDAQ Stock Market LLC (''Nasdaq'') halted trading in all Nasdaq-listed securities for more than three hours after the Nasdaq UTP Securities Information Processor (''SIP''), the single source of consolidated market data for Nasdaq-listed securities, was unable to process quotes from exchanges for dissemination to the public. According to Nasdaq, a sequence of events created a spike in message traffic volume into the SIP exceeding the SIP's capacity and causing the system to fail. Nasdaq cited ''more than 20 connect and disconnect sequences from NYSE Arca'' and a ''stream of quotes for inaccurate symbols from NYSE Arca'' as events contributing to the systems problem. Nasdaq noted that the stream of messages, which was 26 times greater than usual activity, degraded the system and exceeded its capacity, ultimately resulting in the failure. Nasdaq stated that these events exposed a flaw in the SIP's software code which prevented a successful failover to the backup system. *See* ''NASDAQ OMX Provides Updates on Events of August 22, 2013,'' by NASDAQ OMX (August 29, 2013), available at: *http://www.nasdaqomx.com/newsroom/pressreleases/pressrelease?messageId=1204807&displayLanguage=en;* and Nasdaq Market System Status notifications for August 22, 2013, available at: *https://www.nasdaqtrader.com/Trader.aspx?id=MarketSystemStatusSearch.*

Nasdaq experienced another outage related to the SIP on September 4, 2013. This incident lasted only several minutes and affected only a subset of Nasdaq-listed securities. *See* ''NASDAQ OMX Issues Statement on the Securities Information Processor,'' by NASDAQ OMX (September 4, 2013), available at: *http://ir.nasdaqomx.com/releasedetail.cfm?ReleaseID=788700.*

The SIP consolidates quotation information and transaction reports from market centers and disseminates such consolidated information to market participants pursuant to the Commission-approved Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, available at: *http://www.utpplan.com/. See generally* Rule 608 of Regulation NMS, 17 CFR 242.608 (''Filing and amendment of national market system plans'').

More recently, on October 30, 2014, according to the NYSE, a network hardware failure impacted the Consolidated Tape System, Consolidated Quote System, and Options Price Reporting Authority data feeds at the primary data center. Exchanges experienced issues publishing and receiving trades and quotes as a result. After investigation of the issue, the Securities Industry Automation Corporation (''SIAC'') (the processor for the affected data feeds) switched over to the secondary data center for these data feeds and normal processing subsequently resumed. The exchanges then connected to the secondary data center as provided for in SIAC's business continuity plan. *See* ''Service Advisory—CTA Update,'' by NYSE (October 30, 2014), available at: *https://markets.nyx.com/nyse/market-status/view/13467* and ''NMS SIP market wide issue,'' by NYSE (October 30, 2014), available at: *https://markets.nyx.com/nyse/market-status/view/13465.*

[33] On November 7, 2013, FINRA halted trading for over 3½ hours in all OTC equity securities due to a lack of availability of quotation information resulting from a connectivity issue experienced by OTC Markets Group Inc.'s OTC Link ATS. *See* ''Market-Wide Quotation and Trading Halt for all OTC Equity Securities,'' FINRA Uniform Practice Advisory, UPC #47–13, November 7, 2013, available at: *http://www.finra.org/web/groups/industry/@ip/@comp/@mt/documents/upcnotices/p381590.pdf;* ''Quotation and Trading Halt for OTC Equity Securities,'' FINRA Uniform Practice Advisory, UPC #48–13, November 7, 2013, available at: *http://www.finra.org/web/groups/industry/@ip/@comp/@mt/documents/upcnotices/p381593.pdf;* ''OTC Markets Group Issues Statement on OTC Link® ATS Trading on November 7, 2013,'' OTC Disclosure & News Service, November 7, 2013, available at: *http://www.otcmarkets.com/stock/OTCM/news/OTC-Markets-Group-Issues-Statement-on-OTC-Linkreg-ATS-Trading-on-November-7-2013?id=71144.* OTC Markets Group subsequently reported that a network outage at one of its core network providers caused the lack of connectivity to its primary data center in New Jersey. *See* ''OTC Markets Group Issues Statement on OTC Link® ATS Trading on November 7, 2013,'' OTC Disclosure & News Service, November 7, 2013, available at: *http://www.otcmarkets.com/stock/OTCM/news/OTC-Markets-Group-Issues-Statement-on-OTC-Linkreg-ATS-Trading-on-November-7-2013?id=71144.*

[34] For example, in June 2013, the Commission charged CBOE and its affiliate (C2 Options Exchange, Incorporated (''C2'')) for various systemic breakdowns in their regulatory and compliance responsibilities as self-regulatory organizations, including failure to enforce the federal securities laws and Commission rules. *See* Securities Exchange Act Release No. 69726, In the Matter of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated (settled action: June 11, 2013), available at: *http://www.sec.gov/litigation/admin/2013/34-69726.pdf* (''CBOE Order''). CBOE and C2 consented to an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Sanctions and a Cease-and-Desist Order. In the CBOE Order, among other charges, the Commission stated that ''CBOE's automated surveillance programs for manually handled trades were ineffective'' and that ''CBOE failed to maintain a reliable or accurate audit trail of orders'' on its trading facility. *See id.* at 11, 13.

In addition, in May 2014, the Commission sanctioned the New York Stock Exchange LLC (''NYSE'') and two of its affiliated exchanges (NYSE Arca, Inc. (''NYSE Arca''), NYSE MKT LLC (''NYSE MKT'')) for alleged failure to comply with their responsibilities as self-regulatory organizations to conduct their business operations in accordance with Commission-approved exchange rules and the federal securities laws. *See* Securities Exchange Act Release No. 72065, In the Matter of New York Stock Exchange LLC, NYSE Arca, Inc., NYSE MKT LLC, and Archipelago Securities, L.L.C. (settled action: May 1, 2014), available at: *http://www.sec.gov/litigation/admin/2014/34-72065.pdf* (''NYSE Order''). NYSE, NYSE Arca, NYSE MKT, and Archipelago Securities consented to an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Sanctions and a Cease-and-Desist Order. In the NYSE Order, the Commission cited various instances of NYSE systems not operating in compliance with their effective rules, such as NYSE's block trading facility not functioning in accordance with applicable rules; NYSE distributing an automated feed of closing order imbalance information to its floor brokers at an earlier time than specified in NYSE rules; and NYSE failing to execute certain orders in locked markets contrary to exchange rules. *See id.* In the NYSE Order, the Commission stated that the exchanges ''lacked comprehensive and consistently-applied policies and procedures for . . . evaluating whether business operations were being conducted fully in accordance with existing exchange rules and the federal securities laws.'' *Id.* at 3.

[35] *See, e.g.,* Jacob Bunge, Bradley Hope, and Leslie Josephs, ''Technical Glitch Hits CME Trading,'' Wall St. J., April 8, 2014; Jeremy Grant, ''Glitch Delays Singapore Derivative Trade,'' Fin. Times, April 9, 2013; Tamsyn Parker, ''NZX Trading

Continued

believes that it is critical that key U.S. securities market participants bolster their operational integrity to prevent, to the extent reasonably possible, these types of events, which can not only lead to tangible monetary losses,[36] but which commenters believe to have the potential to reduce investor confidence in the U.S. markets.[37]

The SCI Proposal also noted that the risks associated with cybersecurity, and how to protect against systems intrusions, are increasingly of concern to all types of entities.[38] On March 27, 2014, the Commission conducted a Cybersecurity Roundtable (''Cybersecurity Roundtable'').[39] The Cybersecurity Roundtable addressed the cybersecurity landscape and cybersecurity issues faced by participants in the financial markets today, including exchanges, broker-dealers, investment advisers, transfer agents and public companies.[40] Panelists discussed, among other topics, the scope and nature of cybersecurity threats to the financial industry; how market participants can effectively manage cybersecurity threats, including public and private sector coordination efforts and information sharing; the role that government should play to promote cybersecurity in the financial markets and market infrastructure; cybersecurity disclosure issues faced by public companies; and the identification of appropriate best practices and standards with regard to cybersecurity. Although the views of panelists varied, many emphasized the significant risk that cybersecurity attacks pose to the financial markets and market infrastructure today and the need to effectively manage that risk through measures such as testing, risk assessments, adoption of consistent best practices and standards, and information sharing.

## III. Overview

The Commission acknowledges that the nature of technology and the level of sophistication and automation of current market systems prevent any measure, regulatory or otherwise, from completely eliminating all systems disruptions, intrusions, or other systems issues.[41] However, given the issues outlined above, the Commission believes that the adoption of, and compliance by SCI entities with Regulation SCI, with the modifications from the SCI Proposal as discussed below, will advance the goals of the national market system by enhancing the capacity, integrity, resiliency, availability, and security of the automated systems of entities important to the functioning of the U.S. securities markets, as well as reinforce the requirement that such systems operate in compliance with the Exchange Act and rules and regulations thereunder, thus strengthening the infrastructure of the U.S. securities markets and improving its resilience when technological issues arise. In this respect, Regulation SCI establishes an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems.

As proposed, Regulation SCI would have applied to ''SCI entities'' (estimated in the SCI Proposal to be 44 entities), a term which would have included all self-regulatory organizations (excluding security futures exchanges), ATSs that exceed specified volume thresholds, plan processors for market data NMS plans, and certain exempt clearing agencies. The most significant elements of the SCI Proposal[42] would have required each SCI entity to:

- Implement policies and procedures reasonably designed to ensure that its ''SCI systems'' and ''SCI security systems'' have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and

Resumes After Technical Glitch,'' The New Zealand Herald, July 1, 2013; Matt Clinch, ''Flash Crash: Israel Stocks Hit by Typo,'' CNBC.com, available at: *http://www.cnbc.com/id/100986999;* and Ksenia Galouchko, ''Moscow Exchange Halts Derivatives Trading for Almost an Hour,'' Bloomberg, November 13, 2013.

[36] *See, e.g.,* Proposing Release, *supra* note 13 (discussing systems issues affecting the initial public offerings (''IPO'') of BATS Global Markets, Inc. and Facebook, Inc.). In a rule change approved by the Commission in March 2013, Nasdaq implemented a $62 million accommodation program to compensate certain members for their losses in connection with the Facebook IPO. Securities Exchange Act Release No. 69216 (March 22, 2013), 78 FR 19040 (March 28, 2013). In its quarterly earnings announcement for the second quarter of 2013, UBS reported a $356 million loss tied to Facebook's IPO, while The Knight Capital Group and Citadel Investment Group claimed losses of $30 million to $35 million and Citigroup cited losses close to $20 million. *See* Michael J. De La Merced, ''Behind the Huge Facebook Loss at UBS,'' N.Y. Times, July 21, 2012. *See also* Angel Letter at 15 (stating that catastrophic failures in exchange systems are extremely costly in terms of direct losses to participants and result in reduced investor confidence in markets); and Better Markets Letter at 2 (citing to the systems related problems at Knight Capital, Direct Edge, BATS, and during the Facebook IPO that resulted in investor or company losses).

[37] *See, e.g.,* Angel2 Letter at 2; Sungard Letter at 2; Better Markets Letter at 2; Leuchtkafer Letter at 3; FSI Letter at 3; and Angel Letter at 10, 15.

[38] *See* Proposing Release, *supra* note 13, at 18089–90.

[39] *See* Securities Exchange Act Release No. 71742 (March 19, 2014), 79 FR 16071 (March 24, 2014) (File No. 4–673). A webcast of the Cybersecurity Roundtable is available at: *http://www.sec.gov/news/otherwebcasts/2014/cybersecurity-roundtable-032614.shtml.*

[40] The first panel discussed the cybersecurity landscape, and panelists included: Cyrus Amir-Mokri, Assistant Secretary for Financial Institutions, Department of the Treasury; Mary E. Galligan, Director, Cyber Risk Services, Deloitte and Touche LLP; Craig Mundie, Member, President's Council of Advisors on Science and Technology; Senior Advisor to the Chief Executive Officer, Microsoft Corporation; Javier Ortiz, Vice President, Strategy and Global Head of Government Affairs, TaaSera, Inc.; Andy Roth, Partner and Co-Chair, Global Privacy and Security Group, Dentons US LLP; Ari Schwartz, Acting Senior Director for Cybersecurity Programs, National Security Council, The White House; Adam Sedgewick, Senior Information Technology Policy Advisor, national Institute of Standards and Technology; and Larry Zelvin, Director, National Cybersecurity and Communications Integration Center, U.S. Department of Homeland Security.

The second panel discussed public company disclosure of cybersecurity risks and incidents, and panelists included: Peter Beshar, Executive Vice President and General Counsel, Marsh & McLennan Companies, Inc.; David Burg, Global and U.S. Advisor Cyber Security Leader, PricewaterhouseCoopers LLP; Roberta Karmel, Centennial Professor of Law, Brooklyn Law School; Jonas Kron, Senior Vice President, Director of Shareholder Advocacy, Trillum Asset Management LLC; Douglas Meal, Partner, Ropes & Gray LLP; and Leslie T. Thornton, Vice President and General Counsel, WGL Holdings, Inc. and Washington Gas Light Company.

The third panel addressed cybersecurity issues faced by the securities markets, and panelists included: Mark G. Clancy, Managing Director and Corporate Information Security Officer, The Depository Trust and Clearing Corporation; Mark Graff, Chief Information Security Officer, Nasdaq OMX; Todd Furney, Vice President, Systems Security, Chicago Board Options Exchange; Katheryn Rosen, Deputy Assistant Secretary, Office of Financial Institutions Policy, Department of the Treasury; Thomas Sinnott, Managing Director, Global Information Security, CME Group; and Aaron Weissenfluh, Chief Information Security Officer, BATS Global Markets, Inc.

The final panel discussed how broker-dealers, investment advisers, and transfer agents address cybersecurity issues, and panelists included: John Denning, Senior Vice President, Operational Policy Integration, Development and Strategy, Bank of America/Merrill Lynch; Jimmie H. Lenz, Senior Vice President, Chief Risk and Credit Officer, Wells Fargo Advisors LLC; Mark R. Manley, Senior Vice President, Deputy General Counsel and Chief Compliance Officer, AllianceBernstein L.P.; Marcus Prendergast, Director and Corporate Information Security Officer, ITG; Karl Schimmeck, Managing Director, Financial Services Operations, Securities Industry and Financial Markets Association; Daniel M. Sibears, Executive Vice President, Regulatory Operations/Shared Services, FINRA; John Reed Stark, Managing Director, Stroz Friedberg; Craig Thomas, Chief Information Security Officer, Computershare; and David G. Tittsworth, Executive Director and Executive Vice President, Investment Adviser Association.

[41] *See, e.g.,* October 2, 2012 remarks by Dr. Nancy Leveson, Professor of Aeronautics and Astronautics and Professor of Engineering Systems, MIT, Technology Roundtable (stating, for example, that ''it is impossible to build totally secure software systems'' and ''we've learned that we cannot build an unsinkable ship and cannot build unfailable software''), available at: *http://www.sec.gov/news/otherwebcasts/2012/ttr100212-transcript.pdf.*

[42] Each provision of the SCI Proposal is described in further detail below in Section IV. *See also* Proposing Release, *supra* note 13, at Section III.

promote the maintenance of fair and orderly markets, with deemed compliance for policies and procedures that are consistent with current SCI industry standards, including identified information technology publications listed on proposed Table A;

• Implement policies and procedures reasonably designed to ensure that its systems operate in the manner intended, including in compliance with the federal securities laws and rules, and the entity's rules and governing documents, with safe harbors from liability for SCI entities and individuals;

• Upon any ''responsible SCI personnel'' becoming aware of the occurrence of an ''SCI event'' (defined to include systems disruptions, systems compliance issues, and systems intrusions), begin to take appropriate corrective action, including mitigating potential harm to investors and market integrity and devoting adequate resources to remedy the SCI event as soon as practicable;

• Report to the Commission the occurrence of any SCI event; and notify its members or participants of certain types of SCI events;

• Notify the Commission 30 days in advance of ''material systems changes'' (subject to an exception for exigent circumstances) and provide semi-annual summary progress reports on such material systems changes;

• Conduct an annual review, to be performed by objective, qualified personnel, of its compliance with Regulation SCI and submit a report of such annual review to its senior management and to the Commission;

• Designate those of its members or participants that would be required to participate in the testing (to occur at least annually) of its business continuity and disaster recovery plans, and coordinate such testing with other SCI entities on an industry- or sector-wide basis; and

• Meet certain other requirements, including maintaining records related to compliance with Regulation SCI and providing Commission representatives reasonable access to its systems to assess compliance with the rule.

The Commission received substantial comment on the SCI Proposal from a wide range of entities. Commenters generally expressed support for the goals of the rule, but many suggested that the SCI Proposal's scope was unnecessarily broad and could be more tailored to lower compliance costs and still achieve the goal of reducing significant technology risk in the markets. Broadly speaking, the areas of concern garnering the greatest comment included the: (i) Breadth of certain key proposed definitions; (ii) costs associated with the scope of the proposed rule, including its reporting obligations; (iii) publications designated on Table A as proposed examples of ''current SCI industry standards;'' (iv) proposed entity safe harbor for systems compliance policies and procedures; (v) breadth of the proposed mandatory testing requirements; and (vi) proposed access provision.[43]

The Commission has carefully considered the views of commenters in crafting Regulation SCI to meet its goals to strengthen the technology infrastructure of the securities markets and improve its resilience when technology falls short. Many of these modifications are intended to further focus the scope of the requirements from the proposal and to lessen the costs and burdens on SCI entities, while still allowing the Commission to achieve its goals. While Section IV below provides a detailed discussion of the changes the Commission has made to the SCI Proposal in adopting Regulation SCI today,[44] broadly speaking, the key changes include:

• Refining the scope of the proposal by, among other things, revising certain key definitions (including the definition of SCI systems and the definition of SCI ATS to exclude ATSs that trade only municipal securities or corporate debt securities (together, ''fixed-income ATSs'')), refining the reporting framework for SCI events, and replacing the proposed 30-day advanced reporting requirement for material systems changes with a quarterly reporting requirement;

• Modifying the proposal to differentiate certain obligations and requirements, including tailoring certain obligations based on the criticality of a system (by, for example, adopting a new defined term ''critical SCI system'' for which heightened requirements will apply), and based on the significance of an event (such as adopting a new defined term ''major SCI event'' for purposes of the dissemination requirements, and establishing differing reporting obligations for SCI events that have had no or a de minimis impact on the SCI entity's operations or on market participants);

• Modifying the proposed policies and procedures requirements relating to both operational capability and the maintenance of fair and orderly markets, as well as systems compliance;

• Refining the scope of SCI entity members and participants that would be required to participate in mandatory business continuity/disaster recovery plan testing; and

• Eliminating the proposed requirement that SCI entities provide Commission representatives reasonable access to their systems because the Commission can adequately assess an SCI entity's compliance with Regulation SCI through existing recordkeeping requirements and examination authority, as well as through the new recordkeeping requirement in Rule 1005 of Regulation SCI.

In addition, the Commission notes that proposed Regulation SCI consisted of a single rule (Rule 1000) that included subparagraphs ((a) through (f)) addressing the various obligations of the rule. However, for clarity and simplification, adopted Regulation SCI is renumbered as Rules 1000 through 1007, as follows:

• Adopted Rule 1000 (which corresponds to proposed Rule 1000(a)) contains definitions for terms used in Regulation SCI;

• Adopted Rule 1001 (proposed Rules 1000(b)(1)–(2)) contains the policies and procedures requirements for SCI entities relating to both operational capability and the maintenance of fair and orderly markets, as well as systems compliance;

• Adopted Rule 1002 (proposed Rules 1000(b)(3)–(5)) contains the obligations of SCI entities with respect to SCI events, which include corrective action, Commission notification, and information dissemination;

• Adopted Rule 1003 (proposed Rules 1000(b)(6)–(8)) contains requirements relating to material systems changes and SCI reviews;

• Adopted Rule 1004 (proposed Rule 1000(b)(9)) contains requirements relating to business continuity and disaster recovery testing;

• Adopted Rule 1005 (proposed Rule 1000(c)) contains requirements relating to recordkeeping;

• Adopted Rule 1006 (proposed Rule 1000(d)) contains requirements relating to electronic filing and submission;

• Adopted Rule 1007 (proposed Rule 1000(e)) contains requirements for service bureaus.

## IV. Description of Adopted Regulation SCI and Form SCI

### *A. Definitions Establishing the Scope of Regulation SCI—Rule 1000*

A series of definitions set forth in Rule 1000 relate to the scope of Regulation SCI. These include the definitions for ''SCI entity'' (as well as the types of entities that are SCI entities,

[43] A more detailed discussion of commenters' views can be found below in Section IV.

[44] The Economic Analysis, *infra* Section VI, discusses the economic effects, including the costs and benefits, of the provisions of Regulation SCI, as adopted.

namely ''SCI SRO,'' SCI ATS,'' ''plan processor,'' and ''exempt clearing agency subject to ARP''), ''SCI systems'' (and related definitions for ''indirect SCI systems'' and ''critical SCI systems''), and ''SCI event'' (as well as the types of events that constitute SCI events, namely ''systems disruption,'' ''systems compliance issue,'' and ''systems intrusion'').[45]

1. SCI Entities

Regulation SCI imposes requirements on entities meeting the definition of ''SCI entity'' under the rule. Proposed Rule 1000(a) defined ''SCI entity'' as an ''SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to ARP.''[46] The Commission is adopting the definition of ''SCI entity'' in Rule 1000 as proposed.[47]

Some commenters discussed the definition of SCI entity generally and advocated for an expansion of the proposed definition, asserting that additional categories of market participants may have the potential to impact the market in the event of a systems issue.[48] For example, one commenter suggested that the definition of ''SCI entity'' be extended to include the ATS and broker-dealer entities covered by the Regulation NMS definition of a ''trading center.''[49] Another commenter stated that the Commission should potentially expand the definition of SCI entity to also include dark pools if they met the volume thresholds of ATSs.[50]

Other commenters believed that the scope of the definition should be more limited.[51] For example, one commenter suggested that the definition should only include those entities that are systemically important to the functioning of the U.S. securities markets and should utilize volume thresholds for exchanges and ATSs to make this determination.[52]

Several commenters advocated the adoption of a ''risk-based'' approach, which would entail categorizing market participants based on the criticality of the functions performed rather than applying Regulation SCI to all ''SCI entities'' equally.[53] Some commenters suggested replacing the term ''SCI entity'' with categories of participants based on potential market impact or including in the definition only those participants that are essential to continuous market-wide operation or that are the sole providers of a service in the securities markets.[54] Other commenters agreed with the proposed scope of the term ''SCI entity,'' but believed that the various requirements under the rule should be tiered based on risk profiles.[55] Several commenters identified various factors that should be considered in conducting a risk-assessment such as whether an entity is a primary listing market, is the sole market where the security is traded, or performs a monopoly or utility type role where there is no redundancy built into the marketplace, among others.[56] Some commenters identified specific functions that they believed to be highly critical to the functioning of the securities markets and thus pose the greatest risk to the markets in the event of a systems issue, including securities information processing, clearance and settlement systems, and trading of exclusively listed securities, among others.[57]

After careful consideration of the comments, the Commission has determined to adopt the overall scope of entities covered by Regulation SCI as proposed.[58] As discussed below, the Commission continues to believe that it is appropriate and would further the goals of the national market system to subject all SROs (excluding securities futures exchanges), ATSs meeting certain volume thresholds with respect to NMS stocks and non-NMS stocks (discussed further below), plan processors, and certain exempt clearing agencies to the requirements of Regulation SCI. The Commission believes that this definition appropriately includes those entities that play a significant role in the U.S. securities markets and/or have the potential to impact investors, the overall market, or the trading of individual securities.[59]

While some commenters supported expanding the definition of SCI entity to encompass various other types of entities, the Commission has determined not to expand the scope of entities subject to Regulation SCI at this time. As noted in the SCI Proposal, Regulation SCI is based, in part, on the ARP Inspection Program, which has included the voluntary participation of all active registered clearing agencies, all registered national securities exchanges, the only registered national securities association—Financial Industry Regulatory Authority (''FINRA''), one exempt clearing agency, and one ATS.[60] The ARP Inspection Program has also included the systems of entities that process and disseminate quotation and transaction data on behalf of the Consolidated Tape Association System (''CTA Plan''), Consolidated Quotation System (''CQS Plan''), Joint Self-Regulatory Organization Plan

[45] Rule 1000 contains additional defined terms that are discussed in subsequent sections below. *See infra* Section IV.B.3 (discussing the definition of ''responsible SCI personnel''), Section IV.B.3.d (discussing ''major SCI event'' and deletion of the proposed definition of ''dissemination SCI event''), Section IV.B.4 (discussing deletion of the proposed definition for ''material systems change''), Section IV.B.5 (discussing ''SCI review'' and ''senior management''), and Section IV.C.2 (discussing ''electronic signature'').

[46] *See* proposed Rule 1000(a) and Proposing Release *supra* note 13, at Section III.B.1.

[47] Proposed Rule 1000(a) also defined each of the terms within the definition of SCI entity for the purpose of designating specifically the entities that would be subject to Regulation SCI. As described in the Sections IV.A.1.a–d below, the Commission is also adopting these terms as proposed and without modification, with the exception of the definition of ''SCI ATS,'' which is being revised to exclude ATSs that trade only municipal securities or corporate debt securities.

[48] *See, e.g.,* NYSE Letter at 8–9 and Liquidnet Letter at 2–3. *See also* BlackRock Letter at 4 (stating, among other things, that Regulation SCI should extend to any trading platforms that transact significant volume because these venues have a meaningful role and impact on the equity market). *See also infra* Section IV.E (discussing comments regarding the potential inclusion of other types of entities, such as broker-dealers generally, within the scope of Regulation SCI).

[49] Specifically, Section 600(b)(78) of Regulation NMS includes within the definition of a ''trading center'' ''an ATS, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.'' 17 CFR 242.600(b)(68). *See* NYSE Letter at 8–9.

[50] *See* CoreOne Letter at 7–9. CoreOne recommended that the Commission require dark pools to publicly disclose their aggregate volume in a manner similar to disclosures made by exchanges and ATSs. CoreOne stated that, once dark pools publicly disclose their volumes, it would be easier to evaluate whether dark pools should be included as SCI entities. *Id.*

[51] *See, e.g.,* KCG Letter at 6–8; ITG Letter at 2–4; and CME Letter at 2–5.

[52] *See* ITG Letter at 2–4, 7. This commenter argued that, alternatively, the Commission could impose a lower set of obligations on ''lesser'' SCI entities. *See id.,* at 9–11. *See also infra* notes 81–82 (discussing this commenter's suggested thresholds for exchanges) and note 131 (discussing this commenter's recommended thresholds for ATSs). *See* discussion in Sections IV.A.1.a and IV.A.1.b (relating to SCI SROs and SCI ATSs, respectively).

[53] *See, e.g.,* BIDS Letter at 5–6; SIFMA Letter at 4–5; KCG Letter at 2–3, 6–8; Fidelity Letter at 2–4; UBS Letter at 2–4; and LiquidPoint Letter at 2–3.

[54] *See, e.g.,* BIDS Letter at 3–6; Direct Edge Letter at 1–2; and KCG Letter at 2–3, 6–8. Specifically, Direct Edge stated that SCI entities should include Commission-registered exchanges, securities information processors under approved NMS plans for market data, and clearance and settlement systems.

[55] *See, e.g.,* SIFMA Letter at 4 and Fidelity Letter at 3–4.

[56] *See, e.g.,* SIFMA Letter at 4 and Fidelity Letter at 3–4.

[57] *See, e.g.,* SIFMA Letter at 4; Direct Edge Letter at 1–2; and KCG Letter at 2–3.

[58] *But see infra* Section IV.A.1.b (discussing revisions to the definition of ''SCI ATS'').

[59] *See infra* Sections IV.A.1.a–d (discussing more specifically each category of entity included within the definition of ''SCI entity'').

[60] *See* Proposing Release, *supra* note 13, at 18086.

Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''Nasdaq UTP Plan''), and Options Price Reporting Authority (''OPRA Plan'').[61] Significant-volume ATSs have also been subject to certain aspects of the ARP Policy Statements pursuant to Regulation ATS.[62] In addition, one entity that has been granted an exemption from registration as a clearing agency has been subject to the ARP Inspection Program pursuant to the conditions of the exemption order issued by the Commission.[63] The scope of the definition of SCI entity is intended to largely reflect the historical reach of the ARP Inspection Program and existing Rule 301 of Regulation ATS, while also expanding the coverage to certain additional entities that the Commission believes play a significant role in the U.S. securities markets and/or have the potential to impact investors, the overall market, or the trading of individual securities. The Commission acknowledged in the SCI Proposal that there may be other categories of entities not included within the definition of SCI entity that, given their increasing size and importance, could pose risks to the market should an SCI event occur.[64] However, as discussed in further detail below,[65] the Commission believes that, at this time, the entities included within the definition of SCI entity, because of their current role in the U.S. securities markets and/or their level of trading activity, have the potential to pose the most significant risk in the event of a systems issue. Although some commenters suggested that Regulation SCI should cover a greater range of market participants,[66] the Commission believes that it is important to move forward now on rules that will meaningfully enhance the technology standards and oversight of key markets and market infrastructure. Further, the Commission believes that a measured approach that takes an incremental expansion from the entities covered under the ARP Inspection Program is an appropriate method for imposing the mandatory requirements of Regulation SCI at this time given the potential costs of compliance. This approach will enable the Commission to monitor and evaluate the implementation of Regulation SCI, the risks posed by the systems of other market participants, and the continued evolution of the securities markets, such that it may consider, in the future, extending the types of requirements in Regulation SCI to additional categories of market participants, such as non-ATS broker-dealers, security-based swap dealers, investment advisers, investment companies, transfer agents, and other key market participants. As noted in the SCI Proposal, should the Commission decide to propose to apply some or all of the requirements of Regulation SCI to additional types of entities, the Commission will issue a separate release discussing such a proposal and seeking public comment.[67]

With respect to another commenter's recommendation regarding dark pools, to the extent that this commenter intended its comment to refer to ATSs, ATSs would be included within the scope of Regulation SCI if they met the applicable volume thresholds discussed below.[68] To the extent that this commenter intended its comment to refer to other types of non-ATS dark venues where broker-dealers internalize order flow, the Commission notes that it has determined not to extend the scope of Regulation SCI to other types of broker-dealers at this time for the reasons discussed below.[69]

The Commission has also determined not to further limit the scope of entities subject to Regulation SCI as suggested by some commenters. As discussed in more detail below, the Commission continues to believe that each of the identified categories of entities plays a significant role in the U.S. securities markets and/or has the potential to impact investors, the overall market, or the trading of individual securities, and thus should be subject to the requirements of Regulation SCI. Accordingly, the Commission does not agree that it should adopt a ''risk-based'' approach to *further limit* the categories of market participants subject to Regulation SCI. The Commission believes that limiting the applicability of Regulation SCI to only the most systemically important entities posing the highest risk to the markets is too limited of a category of market participants, as it would exclude certain entities that, in the Commission's view, have the potential to pose significant risks to the securities markets should an SCI event occur. However, the Commission believes it is appropriate to incorporate risk-based considerations in various other aspects of Regulation SCI. Consistent with the views of some commenters advocating that the requirements of Regulation SCI should be tailored to the specific risk-profile of a particular entity or particular system,[70] the Commission notes that Regulation SCI, as proposed, was intended to incorporate a consideration of risk within its requirements and believes it is appropriate to more explicitly incorporate risk considerations in various provisions of adopted Regulation SCI. For example, as discussed in further detail below, the requirement to have reasonably designed policies and procedures relating to operational capability was designed to permit SCI entities to take a risk-based approach in developing their policies and procedures based on the criticality of a particular system.[71] In addition, the Commission believes that it is appropriate to further incorporate a risk-based approach into other aspects of the regulation, and thus, as discussed below, is adopting a new term—''critical SCI systems''—to identify systems that the Commission believes should be subject to heightened requirements in certain areas.[72] Further, the Commission has determined that certain other definitions (such as the definition of ''SCI systems''), and certain requirements of the rule (such as Commission notification for SCI events and material systems changes), should be scaled back and refined consistent with a risk-based approach, as discussed

[61] *See infra* note 196 and accompanying text.

[62] *See* Rule 301(b)(6) of Regulation ATS, 17 CFR 242.301(b)(6).

[63] *See* Proposing Release, *supra* note 13, at 18096–97. *See also infra* Section IV.A.1.d (discussing the inclusion in Regulation SCI of exempt clearing agencies subject to ARP).

[64] *See* Proposing Release, *supra* note 13, at 18138–39.

[65] *See infra* Sections IV.A.1.a-d (discussing more specifically each category of entity included within the definition of ''SCI entity'').

[66] *See supra* notes 48–50 and accompanying text.

[67] *See* Proposing Release, *supra* note 13, at 18138.

[68] *See infra* Section IV.A.1.b (discussing definition of ''SCI ATS''). This commenter also recommended that the Commission require dark pools to publicly disclose their aggregate volume to make it easier to evaluate whether dark pools should be included as SCI entities, and supported FINRA's plans to require such trading volume disclosures. The Commission notes that FINRA recently adopted new Rule 4552, which requires each ATS to report to FINRA weekly volume information regarding transactions in NMS stocks and OTC equity securities, and FINRA makes such information publicly available on its Web site. *See* Securities Exchange Act Release No. 71341 (January 17, 2014), 79 FR 4213 (January 24, 2014) (approving FINRA Rule 4552 requiring each ATS to report to FINRA weekly volume information and number of securities transactions). The Commission also notes that all ATSs (including dark pool ATSs) are required under Regulation ATS to provide the Commission with quarterly trading volume information. *See* Rule 301(b)(9) of Regulation ATS, 17 CFR 242.301(b)(9).

[69] *See infra* text accompanying notes 121–125.

[70] *See supra* note 55 and accompanying text.

[71] *See infra* Section IV.B.1 (discussing the policies and procedures requirement under adopted Rule 1001(a)).

[72] *See infra* Section IV.A.2.c (discussing the definition of ''critical SCI systems'').

below. The Commission believes that these modifications, further incorporating risk-based considerations in the requirements and scaling back certain requirements, provide the proper balance between requiring that the appropriate entities are subject to baseline standards for systems capacity, integrity, resiliency, availability, security, and compliance, while reducing the overall burden of the rule for all SCI entities, which is consistent with, and responsive to, the views of those commenters that the Commission take a more risk-based approach to SCI entities.

a. SCI Self-Regulatory Organization or SCI SRO

Proposed Rule 1000(a) defined ''SCI self-regulatory organization,'' or ''SCI SRO,'' to be consistent with the definition of ''self-regulatory organization'' set forth in Section 3(a)(26) of the Exchange Act.[73] This definition covered all national securities exchanges registered under Section 6(b) of the Exchange Act,[74] registered securities associations,[75] registered clearing agencies,[76] and the Municipal Securities Rulemaking Board (''MSRB'').[77] The definition, however, excluded an exchange that lists or trades security futures products that is notice-registered with the Commission as a national securities exchange pursuant to Section 6(g) of the Exchange Act, as well as any limited purpose national securities association registered with the Commission pursuant to Exchange Act Section 15A(k).[78] Accordingly, the proposed definition of SCI SRO in Rule 1000(a) included all national securities exchanges registered under Section 6(b) of the Exchange Act, all registered securities associations, all registered clearing agencies, and the MSRB.[79] The definition of ''SCI self-regulatory organization'' or ''SCI SRO'' is being adopted in Rule 1000 as proposed.[80]

One commenter suggested that the rule should include volume thresholds for exchanges.[81] Specifically, this commenter recommended that, with regard to exchanges, the definition should include only those exchanges that have five percent or more of average daily dollar volume in at least five NMS stocks for four of the previous six months.[82] Another commenter asked the Commission to adopt certain specific exceptions to the definition of SCI SRO and SCI entity for entities that are dually registered with the CFTC and Commission where the CFTC is the entity's ''primary regulator'' and for any entity that does not play a ''significant role'' in the markets subject to the Commission's jurisdiction and that cannot have a ''significant impact'' on the markets subject to the Commission's jurisdiction.[83]

The Commission does not believe that a trading volume threshold is

[73] *See* 15 U.S.C. 78c(a)(26): ''The term 'self-regulatory organization' means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 19(b), 19(c), and 23(b) of this title) the Municipal Securities Rulemaking Board established by section 15B of this title.''

[74] Currently, these registered national securities exchanges are: (1) BATS Exchange, Inc. (''BATS''); (2) BATS Y-Exchange, Inc. (''BATS–Y''); (3) Boston Options Exchange LLC (''BOX''); (4) CBOE; (5) C2; (6) Chicago Stock Exchange, Inc. (''CHX''); (7) EDGA Exchange, Inc. (''EDGA''); (8) EDGX Exchange, Inc. (''EDGX''); (9) International Securities Exchange, LLC (''ISE''); (10) Miami International Securities Exchange, LLC (''MIAX''); (11) NASDAQ OMX BX, Inc. (''Nasdaq OMX BX''); (12) NASDAQ OMX PHLX LLC (''Nasdaq OMX Phlx''); (13) Nasdaq; (14) National Stock Exchange, Inc. (''NSX''); (15) NYSE; (16) NYSE MKT; (17) NYSE Arca; and (18) ISE Gemini, LLC (''ISE Gemini'').

[75] FINRA is the only registered national securities association.

[76] Currently, there are seven clearing agencies (Depository Trust Company (''DTC''); Fixed Income Clearing Corporation (''FICC''); National Securities Clearing Corporation (''NSCC''); Options Clearing Corporation (''OCC''); ICE Clear Credit; ICE Clear Europe; and CME) with active operations that are registered with the Commission. The Commission notes that in 2012 it adopted Rule 17Ad–22, which requires registered clearing agencies to have effective risk management policies and procedures in place. *See* Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (''Clearing Agency Standards Release''). The Commission believes that Regulation SCI, to the extent it addresses areas of risk management similar to those addressed by Rule 17Ad–22(d)(4), complements Rule 17Ad–22(d)(4).

Additionally, on March 12, 2014, the Commission proposed rules that would apply to SEC-registered clearing agencies that have been designated as systemically important by the Financial Stability Oversight Council or that are involved in activities with a more complex risk profile, such as clearing security-based swaps. *See* Securities Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 16865 (March 26, 2014) (''Covered Clearing Agencies Proposal''). Regulation SCI and proposed Rule 17Ad–22(e)(17) are intended to be consistent and complementary. *See also* Covered Clearing Agencies Proposal, 79 FR at 16866, n.1 and accompanying text (discussing the Commission's consideration of the relevant international standards).

[77] 15 U.S.C. 78c(a)(26). As noted in the Proposing Release, historically, the ARP Inspection Program did not include the MSRB, but instead focused on entities having trading, quotation and transaction reporting, and clearance and settlement systems more closely connected to the equities and options markets. The Commission believes that it is appropriate to apply Regulation SCI to the MSRB, particularly given the fact that the MSRB is the only SRO relating to municipal securities and is a key provider of consolidated market data for the municipal securities market. Accordingly, as proposed, the term ''SCI SRO'' included the MSRB. In 2008, the Commission amended Rule 15c2–12 to designate the MSRB as the single centralized disclosure repository for continuing municipal securities disclosure. In 2009, the MSRB established the Electronic Municipal Market Access system (''EMMA''). EMMA now serves as the official repository of municipal securities disclosure, providing the public with free access to relevant municipal securities data, and is the central database for information about municipal securities offerings, issuers, and obligors. Additionally, the MSRB's Real-Time Transaction Reporting System (''RTRS''), with limited exceptions, requires municipal bond dealers to submit transaction data to the MSRB within 15 minutes of trade execution, and such near real-time post-trade transaction data can be accessed through the MSRB's EMMA Web site. While pre-trade price information is not as readily available in the municipal securities market, the Commission's Report on the Municipal Securities Market also recommended that the Commission and MSRB explore the feasibility of enhancing EMMA to collect best bids and offers from material ATSs and make them publicly available on fair and reasonable terms. *See* Report on the Municipal Securities Market (July 31, 2012), available at: *http://www.sec.gov/news/studies/2012/munireport073112.pdf.* The Commission believes that the MSRB's SCI systems currently are limited to those operated by or on behalf of the MSRB that directly support market data (*i.e.,* currently limited to the EMMA, RTRS, and SHORT systems). As discussed more fully below, the EMMA, RTRS, and SHORT systems referenced by the MSRB in its comment letter would be market data systems within the definition of SCI systems because they provide or directly support price transparency. *See infra* note 253 and accompanying text.

[78] *See* 15 U.S.C. 78f(g); 15 U.S.C. 78*o*-3(k). These entities are security futures exchanges and the National Futures Association, for which the CFTC serves as their primary regulator. *See generally* CFTC Concept Release on Risk Controls and System Safeguards for Automated Trading Environments, 78 FR 56542 (September 12, 2013) (''CFTC Concept Release'') (describing the CFTC's regulatory scheme for addressing risk controls relating to automated systems).

[79] For any SCI SRO that is a national securities exchange, any facility of such national securities exchange, as defined in Section 3(a)(2) of the Exchange Act, 15 U.S.C. 78c(a)(2), also is covered because such facilities are included within the definition of ''exchange'' in Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1).

[80] The Commission notes that NSX ceased trading as of the close of business on May 30, 2014. *See* Securities Exchange Act Release No. 72107 (May 2, 2014), 79 FR 27017 (May 12, 2014) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Cease Trading on Its Trading System) (''NSX Trading Cessation Notice''). In the NSX Trading Cessation Notice, NSX stated: ''[T]he Exchange will continue to be registered as a national securities exchange and will continue to retain its status as a self-regulatory organization[;]'' and further, that it ''shall file a proposed rule change pursuant to Rule 19b–4 of the Exchange Act prior to any resumption of trading on the Exchange pursuant to Chapter XI (Trading Rules).'' Because NSX remains a national securities exchange registered under Section 6(b) of the Exchange Act, it continues to meet the definition of SCI entity, and is counted as an SCI entity for purposes of this release.

[81] *See* ITG Letter at 10. This commenter also suggested similar revised thresholds for SCI ATSs. *See also infra* note 131 and accompanying text. Although only one commenter specifically commented on the proposed inclusion of SCI SROs within the scope of Regulation SCI, as discussed above, some commenters believed that Regulation SCI should generally take a more risk-based or tiered approach generally which, in some cases, would affect which entities (including SCI SROs) would be subject to Regulation SCI. *See supra* notes 53–56 and accompanying text.

[82] *See* ITG Letter at 10.

[83] *See* CME Letter at 2.

appropriate for SCI SROs that are exchanges, but instead believes that Regulation SCI should apply to all SCI SROs. The threshold suggested by the commenter would exclude from Regulation SCI those exchanges with volumes below the suggested threshold; however, the Commission believes that all exchanges play a significant role in our securities markets. For example, all stock exchanges are subject to a variety of specific public obligations under the Exchange Act, including the requirements of Regulation NMS which, among other things, designates the best bid or offer of such exchanges to be protected quotations.[84] Accordingly, every exchange may have a protected quotation that can obligate market participants to send orders to that exchange. Among other reasons, given that market participants may be required to send orders to any one of the exchanges at any given time if such exchange is displaying the best bid or offer, the Commission believes that it is important that the safeguards of Regulation SCI apply equally to all exchanges irrespective of trading volume.

With regard to one commenter's suggestion to except from the definition of SCI SRO those entities dually registered with the CFTC and Commission where the CFTC is the entity's ''primary regulator,''[85] the Commission disagrees that such entities should be relieved from the requirements of Regulation SCI solely because they are dually registered.[86] While the CFTC is responsible for overseeing such an entity with regard to its futures activities, it does not have oversight responsibility for the entity's securities-related activities and systems. While the commenter stated that it (as a dual registrant) is already subject to similar requirements to adopt controls and procedures with regard to operational risk and reliability, security, and capacity of its systems pursuant to CFTC regulations, the Commission again notes that such requirements do not apply to such an entity's securities-related systems as such systems are outside of the CFTC's jurisdiction and, as such, such systems would not be subject to inspection and examination by the CFTC for compliance with such requirements.[87] Further, Regulation SCI imposes a notification framework to inform the Commission of SCI events and material systems changes, as well as other requirements unique to Regulation SCI. Accordingly, the Commission believes that such entities should be subject to the requirements of Regulation SCI. In addition, as noted above, this commenter also asked the Commission to create an exception for any entity that does not play a ''significant role'' in the markets subject to the Commission's jurisdiction and that cannot have a ''significant impact'' on the markets subject to the Commission's jurisdiction.[88] While the Commission disagrees with excluding SROs from coverage as discussed above, the Commission notes that it is revising the proposed definition of SCI systems to clarify that the term SCI systems encompasses only those systems that, *with respect to securities,* directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance, as discussed below.[89] Accordingly, the Commission believes this change should address the commenter's concerns about the requirements applying to entities whose systems cannot affect the markets subject to the Commission's jurisdiction, *i.e.,* the U.S. securities markets.

b. SCI Alternative Trading System

Proposed Rule 1000(a) defined the term ''SCI alternative trading system,'' or ''SCI ATS,'' as an alternative trading system, as defined in § 242.300(a), which during at least four of the preceding six calendar months, had: (1) With respect to NMS stocks—(i) five percent or more in any single NMS stock, and 0.25 percent or more in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan, or (ii) one percent or more, in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan; (2) with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, five percent or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported; or (3) with respect to municipal securities or corporate debt securities, five percent or more of either—(i) the average daily dollar volume traded in the United States, or (ii) the average daily transaction volume traded in the United States.[90]

The proposed definition would have modified the thresholds currently appearing in Rule 301(b)(6) of Regulation ATS that apply to significant-volume ATSs.[91] Specifically,

[84] *See generally* 17 CFR 242.600–612. In addition, as the commenter's suggested thresholds would apply only with respect to exchanges that trade NMS stocks, national securities exchanges that do not trade NMS stocks (*i.e.,* options exchanges) would also be excluded from Regulation SCI under the commenter's suggestion. The Commission believes that it would be inappropriate to exclude options exchanges from the requirements of Regulation SCI, because technology risks are equally applicable to such exchanges, as evidenced by recent significant technology incidents affecting the options markets. *See supra* notes 28–31 and accompanying text. As such, systems issues at options exchanges can pose significant risks to the markets, and the Commission believes that the inclusion of options exchanges within the scope of Regulation SCI is necessary to achieve the goals of Regulation SCI.

[85] *See supra* note 83 and accompanying text.

[86] The commenter notes that the Commission has proposed to exclude from the definition of SCI SRO those exchanges that list or trade security futures products that are notice-registered with the Commission pursuant to Section 6(g), as well as limited purpose national securities associations registered with the Commission pursuant to Exchange Act Section 15A(k). *See* Proposing Release, *supra* note 13, at 18093, n. 97 and accompanying text. The Commission notes that such entities are subject to the joint jurisdiction of the Commission and the CFTC. To avoid duplicative regulation, however, the CFMA established a system of notice registration under which trading facilities and intermediaries that are already registered with either the Commission or the CFTC may register with the other agency on an expedited basis for the limited purpose of trading security futures products. A ''notice registrant'' is then subject to primary oversight by one agency, and is exempted under the CFMA from all but certain specified provisions of the laws administered by the other agency. *See* Section 6(g)(4) and Section 15A(k)(3)–(4) (enumerating the provisions of the Exchange Act from which a notice-registered exchange and limited purpose national securities association, respectively, are exempted). Given this, the Commission believes that it is appropriate to defer to the CFTC regarding the systems integrity of these entities). *See also generally* CFTC Concept Release, *supra* note 78. This regulatory scheme does not apply outside of the specific contexts of security futures exchanges and associations. In contrast, entities that are registered with both the Commission and the CFTC in other capacities, such as clearing agencies, are subject to a full set of regulations by each regulator. The Exchange Act and Commodity Exchange Act do not exempt these entities, due to any dual regulatory scheme, from any provisions of the laws administered by the Commission and, as discussed further below, the Commission believes they should not be afforded an exclusion from Regulation SCI.

[87] The Commission notes that, to the extent that such an entity's systems for its functions that fall in the purview of the Commission (relating to securities and securities-based swaps) and that fall in the purview of the CFTC (relating to futures and swaps) are integrated, it believes that the focus of the CFTC's exams and inspections of such systems would be on such systems' functionality related to non-securities-related activities, such as swaps or futures, and not those related to securities activities. Thus, the Commission believes that the potential examination and inspection of such integrated systems by both the CFTC and SEC does not support the exclusion of the SCI entities operating such systems, or the systems themselves, from the scope of Regulation SCI.

[88] *See supra* note 83 and accompanying text.

[89] *See* adopted Rule 1000 (emphasis added). *See also infra* Section IV.A.2.b (discussing the definition of ''SCI systems'').

[90] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.1.

[91] 17 CFR 242.301(b)(6).

the proposed definition would have: Used average daily dollar volume thresholds, instead of an average daily share volume threshold, for ATSs that trade NMS stocks or equity securities that are not NMS stocks (''non-NMS stocks''); used alternative average daily dollar and transaction volume-based tests for ATSs that trade municipal securities or corporate debt securities; lowered the volume thresholds applicable to ATSs for each category of asset class; and moved the proposed thresholds to Regulation SCI. In particular, with respect to NMS stocks, the Commission proposed to change the volume threshold from 20 percent of average daily volume in any NMS stock such that an ATS that traded NMS stocks that met either of the following two alternative threshold tests would be subject to the requirements of proposed Regulation SCI: (i) Five percent or more in any NMS stock, and 0.25 percent or more in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan; or (ii) one percent or more, in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan. With respect to non-NMS stocks, municipal securities, and corporate debt securities, the Commission proposed to reduce the standard from 20 percent to five percent for these types of securities,[92] the same percentage threshold for such types of securities that triggers the fair access provisions of Rule 301(b)(5) of Regulation ATS.[93]

The proposed definition of ''SCI ATS'' is being adopted substantially as proposed with regard to ATSs trading NMS stocks and ATSs trading non-NMS stocks, with the addition of a six-month compliance period for entities satisfying the thresholds in the definition for the first time, as discussed in more detail below. However, for the reasons discussed below, the Commission has determined to exclude from the definition of ''SCI ATS'' ATSs that trade only municipal securities or corporate debt securities and accordingly, such ATSs will not be subject to the requirements of Regulation SCI.

Inclusion of ATSs Generally

Many commenters provided comment on the inclusion of ATSs within the scope of Regulation SCI. Some commenters believed that more ATSs should be covered by Regulation SCI.[94] For example, some commenters suggested that the term ''SCI ATS'' should include all ATSs, because these commenters believed that they have the potential to negatively impact the market in the event of a systems issue.[95] Moreover, one commenter stated that the Commission should not distinguish between ATSs based on calculated thresholds because an ATS might limit trading on its system so as to avoid being subject to the requirements of Regulation SCI.[96]

Conversely, other commenters stated that fewer, or even no, ATSs should be covered.[97] Such commenters generally argued that there are key differences between ATSs and exchanges, and thus, ATSs should be regulated differently from exchanges and not be included in Regulation SCI with exchanges.[98] The differences identified by commenters included: ATSs' relative market shares and sizes; the fact that ATSs are already subject to various regulations as broker-dealers (including Rule 15c3–5 under the Exchange Act, various FINRA rules, and Regulation ATS); and certain fundamental economic differences between the two types of entities (including that exchanges can gain revenue from listing and market data, have self-clearing, and have a protected quote).[99] One commenter argued that, if the Commission were to include ATSs in Regulation SCI, it should treat ATSs and SROs equally by allowing ATSs to have the same benefits of SROs, including allowing ATSs to derive an income stream from contributions to the SIP, have access to clearing, and have immunity from lawsuits.[100] Other commenters also noted that, although ATSs have an increasingly large, collective market share, ATSs have not contributed to any of the recent major systems issues that have impacted the market.[101]

Another commenter stated that the SCI Proposal unfairly discriminated against ATSs by including them within the definition of SCI entity.[102] Specifically, although this commenter did not believe that Regulation SCI should be expanded to include more entities, it stated that the SCI Proposal's failure to capture certain entities (such as clearing firms, market makers, block positioners, and order routing firms) that it believed could have a greater impact on market stability in the event of a systems issue, while including ATSs, demonstrates that the proposal is arbitrary, capricious, and unfairly discriminatory in nature.[103]

After careful consideration of the comment letters, the Commission continues to believe that the inclusion of ATSs that trade NMS stocks and non-NMS stocks in Regulation SCI is appropriate.[104] The Commission believes that certain of those ATSs play an important role in today's securities markets, and thus should be subject to the safeguards and obligations of Regulation SCI. As noted in the SCI Proposal, the equity markets have evolved significantly over recent years, resulting in an increase in the number of trading centers and a reduction in the concentration of trading activity.[105] As such, even smaller trading centers, such as certain higher-volume ATSs, now collectively represent a significant source of liquidity for NMS stocks and some ATSs have similar and, in some cases, greater trading volume than some national securities exchanges, with no single national securities exchange executing more than approximately 19 percent of volume in NMS stocks in today's securities markets.[106] Accordingly, the Commission believes that ATSs meeting certain volume thresholds can play a significant role in the securities markets and, given their heavy reliance on automated systems, have the potential to significantly impact investors, the overall market,

[92] *See* proposed Rule 1000(a).

[93] *See* Rule 301(b)(5) of Regulation ATS under the Exchange Act. 17 CFR 242.301(b)(5). In addition, as noted above, the proposed rule used alternative average daily dollar and transaction volume-based tests for ATSs that trade municipal securities or corporate debt securities.

[94] *See, e.g.,* NYSE Letter at 9–10; Lauer Letter at 4; and CoreOne Letter at 7–8.

[95] *See, e.g.,* NYSE Letter at 9–10; and Lauer Letter at 4.

[96] *See, e.g.,* NYSE Letter at 9–10.

[97] *See, e.g.,* BIDS Letter at 3; ITG Letter at 3; KCG Letter at 8; and OTC Markets Letter at 9.

[98] *See, e.g.,* BIDS Letter at 3; ITG Letter at 3; KCG Letter at 9, 14–17; TMC Letter at 2; and OTC Markets Letter at 9.

[99] *Id.*

[100] *See* OTC Markets Letter at 9.

[101] *See* ITG Letter at 4; and BIDS Letter at 3.

[102] *See* ITG Letter at 9.

[103] *See id.*

[104] Given the inclusion of ATSs that trade NMS stocks and non-NMS stocks within the scope of Regulation SCI, Regulation ATS is also being amended to remove paragraphs (b)(6)(i)(A) and (b)(6)(i)(B) of Rule 301 so that Rule 301(b)(6) will no longer apply to ATSs trading NMS stocks and non-NMS stocks. However, as described below, the Commission has determined to exclude ATSs that trade only municipal securities or corporate debt securities from the scope of Regulation SCI, and such ATSs will remain subject to the requirements of Rule 301(b)(6) if they meet the volume thresholds therein. 17 CFR 242.301(b)(6). *See supra* notes 14 and 20 and accompanying text.

[105] *See* Proposing Release, *supra* note 13, at 18094.

[106] *See* market volume statistics reported by BATS, available at: *http://www.batstrading.com/market_summary/* (no single stock exchange executed more than approximately 19 percent during the second quarter of 2014, with Nasdaq having the highest market share of 18.6 percent). In comparison, according to data from Form ATS–R for the second quarter of 2014, approximately 18 percent of consolidated NMS stocks dollar volume took place on ATSs.

and the trading of individual securities should an SCI event occur.

Commenters identified certain differences between exchanges and ATSs, which commenters argued justified different treatment under Regulation SCI for ATSs or exclusion of ATSs from the regulation completely.[107] While the Commission recognizes that there are some fundamental differences between ATSs and exchanges, including certain of those identified by commenters, the Commission does not agree that all ATSs should be excluded from Regulation SCI because, as discussed above, it believes that there are certain significant-volume ATSs that have the potential to significantly impact investors, the overall market, or the trading of individual securities should an SCI event occur. At the same time, the risk-based considerations permitted in adopted Regulation SCI may result in the systems of those ATSs that are subject to Regulation SCI (*i.e.,* SCI ATSs) being subject to less stringent requirements than the systems of SROs or other SCI entities in certain areas. For example, as discussed in further detail below, the Commission is adopting a definition of ''critical SCI systems,'' which are a subset of SCI systems that are subject to certain heightened requirements under Regulation SCI. This definition is intended to capture those systems that are core to the functioning of the securities markets or that represent ''single points of failure'' and thus, pose the greatest risk to the markets. The Commission believes that, as currently constituted, relative to the systems of SCI SROs, the systems of SCI ATSs generally would not fall within this category of critical SCI systems, and thus such SCI ATSs would not be subject to the more stringent requirements that would be applicable to the critical SCI systems of other SCI entities. The Commission also notes that other requirements under Regulation SCI are designed to be consistent with a risk-based approach. The Commission believes that this approach recognizes the different roles played by different SCI systems at various SCI entities and, where permitted, allows each SCI entity, including SCI ATSs, to tailor the applicable requirements accordingly.

While some commenters noted that ATSs have not contributed to any of the recent high-profile systems issues,[108] the Commission does not believe that the relative lack of high-profile systems issues at ATSs to date is an indication that ATSs do not have the potential to have a significant impact on the market in the event of a future systems issue.[109]

Other commenters noted the competitive environment of ATSs and argued that, if one ATS experiences a systems issue and becomes temporarily unavailable, trading can be easily rerouted to other venues.[110] The Commission acknowledges that a temporary outage at an ATS (or at a SCI SRO, for that matter) may not lead to a widespread systemic disruption. However, the Commission notes that Regulation SCI is not designed to solely address system issues that cause widespread systemic disruption, but also to address more limited systems malfunctions and other issues that can harm market participants or create compliance issues.[111]

Some commenters also stated that inclusion of ATSs is not necessary because ATSs are already subject to sufficient regulations as broker-dealers, citing Rule 15c3–5 under the Exchange Act, various FINRA rules, and Regulation ATS.[112] While the Commission acknowledges that these rules similarly impose requirements related to the capacity, integrity and/or security of a broker-dealer's systems and are designed to address some of the same concerns that Regulation SCI is intended to address, the Commission notes that these rules generally take a different approach than Regulation SCI. For example, the obligations of an ATS under Rule 15c3–5 address vulnerability in the national market system that relate specifically to market access,[113] whereas Regulation SCI is designed to further the goals of the national market system more broadly by helping to ensure the capacity, integrity, resiliency, availability, and security of the automated systems of entities important to the functioning of the U.S. securities markets.[114] Thus, the Commission has determined to include ATSs within the scope of Regulation SCI because of their role as markets and a potential significant source of liquidity. With regard to the FINRA rules identified by commenters, the Commission does not believe that these rules, even when considered in combination with Rule 15c3–5, are an appropriate substitute for the comprehensive approach in Regulation SCI for ATSs in their role as markets.[115] Finally, as noted above,

[107] *See supra* notes 98–99 and accompanying text.

[108] *See supra* note 101 and accompanying text.

[109] The Commission also notes that, as discussed above, in November 2013, a systems issue at OTC Link ATS led FINRA to halt trading in all OTC securities for over three hours. *See supra* note 33 and accompanying text.

[110] *See* ITG Letter at 3; and KCG Letter at 9.

[111] The Commission notes that each ATS provides different services in terms of, among other things, pricing, latency, and order fills to meet investors' specific needs. Thus, for example, an ATS outage could interfere with the supply of certain services that investors demand and, thus, could impose costs on investors.

[112] *See supra* notes 98–99 and accompanying text.

[113] *See* Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (''Market Access Release'').

[114] The Commission notes that Rule 15c3–5 focuses on addressing the particular risks that arise when broker-dealers provide electronic access to exchanges or ATSs and therefore does not address the same range of technology-related issues as Regulation SCI is designed to address. Both Rule 15c3–5 and Regulation SCI are policies and procedures-based rules that are designed to address the risks presented by the pervasive use of technology in today's markets.The policies and procedures required by Regulation SCI apply broadly to technology that supports trading, clearance and settlement, order routing, market data, market regulation, and market surveillance and, among other things, address their overall capacity, integrity, resilience, availability, and security. Rule 15c3–5, by contrast, is more narrowly focused on those technology and other errors that can create some of the more significant risks to broker-dealers and the markets, namely those that arise when a broker-dealer enters orders into an exchange or ATS, including when it provides sponsored or direct market access to customers or other persons, where the consequences of such an error can rapidly magnify and spread throughout the markets. *See also infra* note 115 (discussing FINRA rules applicable to broker-dealers). The Commission will continue to monitor and evaluate the risks posed by broker-dealer systems to the market and the implementation of the Market Access Rule, and may consider extending the types of requirements in Regulation SCI to additional market participants in the future.

[115] For example, NASD Rule 3010(b)(1) requires a member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations. This rule relates to policies and procedures to achieve compliance with applicable securities laws and regulations, and thus the Commission believes that this requirement is broadly related to adopted Rule 1001(b) regarding policies and procedures to ensure systems compliance. However, the Commission notes that, unlike adopted Rule 1001(b), which focuses on ensuring that an entity's systems operate in compliance with the Exchange Act, the rules and regulations thereunder and the entity's rules and governing documents, this NASD rule does not specifically address compliance of the systems of FINRA members. Further, the Commission does not believe this provision covers more broadly policies and procedures akin to those in adopted Rule 1001(a) that are designed to ensure that SCI systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain the SCI entity's operation capability and promote fair and orderly markets. Similarly, while FINRA Rule 3130 relates to adopted Rule 1001(b) regarding policies and procedures to ensure systems compliance in that it requires a member's chief compliance officer to certify that the member has in place written policies and procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules, and federal securities laws and regulations, it does not specifically address compliance of the *systems* of FINRA members, and does not require similar policies and procedures to those in adopted Rule 1001(a) regarding operational capability of SCI entities. Further, while FINRA Rule 4530 imposes a reporting regime for, among other things,

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Rule 301(b)(6) of Regulation ATS imposed by rule certain aspects of the ARP Policy Statements on significant-volume ATSs. As described in detail herein, Regulation SCI seeks to expand upon, update, and modernize the requirements of the ARP Policy Statements and Rule 301(b)(6), by, for example, expanding the requirements to a broader set of systems, imposing new requirements for information dissemination regarding SCI events, and requiring Commission notification for additional types of events, among others. Accordingly, the Commission believes that, for SCI ATSs, the existing broker-dealer rules and regulations identified by commenters are complemented by the requirements of Regulation SCI (other than Rule 301(b)(6), which will no longer apply to ATSs that trade NMS stocks and non-NMS stocks), and do not serve as substitutes for the regulatory framework being adopted today.

The Commission also believes that, unlike with respect to exchanges, it is appropriate that Regulation SCI not apply to all ATSs. Exchanges, as self-regulatory organizations, play a special role in the U.S. securities markets, and as such, are subject to certain requirements under the Exchange Act and are able to enjoy certain unique benefits.[116] Accordingly, as discussed above, the Commission believes it is appropriate to subject all national securities exchanges to the requirements of Regulation SCI regardless of trading volume.[117] In contrast, in recognition of the more limited role that certain ATSs may play in the securities markets and the costs that will result from compliance with the requirements of the regulation, the Commission believes that it is appropriate to adopt volume thresholds, as discussed below, to identify those ATSs that have the potential to significantly impact the market should an SCI event occur, therefore warranting inclusion within the scope of the regulation. One commenter, in advocating for the application of the regulation to all ATSs, stated that the Commission should not adopt volume thresholds because ATSs may limit trading so as to avoid being subject to the requirements of Regulation SCI.[118] The Commission does not believe that the possibility of some ATSs structuring their business to fall below the thresholds of the rule is a sufficient justification for applying the rule to all ATSs. The Commission notes that, to the extent that an ATS limits its trading so as not to reach the volume thresholds for SCI ATSs, it would have less potential to impact investors and the market and may appropriately not be subject to the requirements of the rules. As discussed further below, the Commission believes that the dual dollar volume threshold for NMS stocks being adopted today is appropriately designed to ensure that ATSs that have either the potential to significantly impact the market as a whole or the potential to significantly impact the market for a single NMS stock (and have some impact on the market as a whole at the same time) will be subject to the requirements of Regulation SCI. Thus, only those ATSs that limit their trading so as to fall below both the single NMS stock threshold and the broad NMS stocks threshold will not be subject to the requirements of Regulation SCI.

As noted above, one commenter asserted that, if ATSs are subject to the same requirements of Regulation SCI as exchanges, they similarly should be entitled to the benefits afforded to SROs.[119] The Commission notes that, as discussed above, SROs are subject to a variety of obligations as self-regulatory organizations under the Exchange Act—including filing proposed rules with the Commission and enforcing those rules and the federal securities laws with respect to their members—that do not apply to other market participants, including ATSs.[120] Although SRO and non-SRO markets are subject to different regulatory regimes, with a different mix of benefits and obligations, the Commission believes it is appropriate to subject them to comparable requirements for purposes of Regulation SCI given the importance of assuring that the technology of key trading centers, regardless of regulatory status, is reliable, secure, and functions in compliance with the law.[121] At the same time, while questions have been raised as to whether the broader regulatory regimes for exchanges and ATSs should be harmonized, the Commission does not believe it appropriate to delay implementing Regulation SCI or necessary to resolve these issues before proceeding with Regulation SCI. The Commission notes that ATSs have the ability to apply for registration as a SRO should they so wish and, if such application were to be approved by the Commission, such entities could assume the additional responsibilities that are imposed on SROs, as well as avail themselves of the same benefits.

As noted above, one commenter objected to the regulation's inclusion of ATSs while excluding certain other entities that the commenter believed similarly had the potential to impact the market, concluding that the proposal was therefore arbitrary, capricious, and unfairly discriminatory in nature.[122] At the same time, this commenter stated that it did not recommend that additional entities be included within the scope of the regulation.[123] First, as noted above, the Commission has determined to include ATSs meeting the adopted volume thresholds within the scope of Regulation SCI because of their unique role as markets rather than because of their role as traditional broker-dealers. All broker-dealers are subject to Rule 15c3–5 and other FINRA rules as noted by some commenters, which impose certain requirements

compliance issues and other events where a member has concluded or should have reasonably concluded that a violation of securities or other enumerated law, rule, or regulation of any domestic or foreign regulatory body or SRO has occurred, the Commission notes that these reporting requirements are different in several respects from the Commission notification requirements relating to systems compliance issues (*e.g.,* scope, timing, content, the recipient of the reports) and, importantly, would not cover reporting of systems disruptions or systems intrusions that did not also involve a violation of a securities law, rule, or regulation. In addition, FINRA Rule 4370 generally requires that a member maintain a written continuity plan identifying procedures relating to an emergency or significant business disruption, which is akin to adopted Rule 1001(a)(2)(v) requiring policies and procedures for business continuity and disaster recovery plans. Unlike Regulation SCI, however, the FINRA rule does not include the requirement that the business continuity and disaster recovery plans be reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, nor does it require the functional and performance testing and coordination of industry or sector-testing of such plans, which the Commission believes to be instrumental in achieving the goals of Regulation SCI with respect to SCI entities.

[116] *See supra* Section IV.A.1.a (discussing the definition of ''SCI SRO'') and *infra* notes 120–121 and accompanying text. As identified by one commenter, benefits afforded to SROs include, among others, the ability to receive market data revenue and immunity from private liability for regulatory activities. *See supra* note 100. *See also* ATS Release, *supra* note 2, at 70902–03 (discussing generally some of the obligations and benefits to be considered when determining whether to register as a national securities exchange or as a broker-dealer acting as an ATS).

[117] *See supra* notes 81–83 and accompanying text.

[118] *See supra* notes 95–96 and accompanying text.

[119] *See supra* note 100 and accompanying text.

[120] *See supra* Section IV.A.1.a (discussing the definition of ''SCI SRO''); *see also* Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b)(1), and Section 6(b) of the Exchange Act, 15 U.S.C. 78f(b). Because these important regulatory responsibilities are imposed upon SROs, SROs also are afforded certain unique benefits, such as immunity from private liability with respect to their regulatory functions and the ability to receive market data revenue. *See supra* note 116 and accompanying text.

[121] *But see* discussion *supra* regarding potentially different requirements for ATSs and exchanges, including those relating to SCI ATSs and critical SCI systems.

[122] *See supra* note 103 and accompanying text.

[123] *See supra* note 103 and accompanying text.

related to the capacity, integrity and/or security of a broker-dealer's systems appropriately tailored to their role as broker-dealers. Further, as noted above, the scope of Regulation SCI is rooted in the historical reach of the ARP Inspection Program and Rule 301 of Regulation ATS (which applies to significant-volume ATSs).[124] The Commission acknowledged in the SCI Proposal that there may be other categories of broker-dealers not included within the definition of SCI entity that, given their increasing size and importance, could pose a significant risk to the market should an SCI event occur.[125] The Commission solicited comment on whether there are additional categories of market participants that should be subject to all or some of the requirements of Regulation SCI and noted that, were the Commission to decide to apply the requirements of Regulation SCI to such additional entities, it would issue a separate release outlining such a proposal and the rationale therefor.[126] As discussed above, the Commission believes that, at this time, the entities included within the scope of Regulation SCI, because of their current role in the U.S. securities markets and/or their level of trading activity, have the potential to pose the most significant risk in the event of a systems issue. Further, the Commission believes that a measured approach that takes an incremental expansion from the entities covered under the ARP Inspection Program is an appropriate method for imposing the mandatory requirements of Regulation SCI at this time. As such, while the Commission believes that the types of entities subject to Regulation SCI as adopted are appropriate, the Commission may consider extending the types of requirements in Regulation SCI to additional market participants in the future.

SCI ATS Thresholds

Several commenters discussed the specific proposed volume thresholds for SCI ATSs, and many offered what they believed to be more appropriate alternative methods for including ATSs within Regulation SCI.[127] For example, some commenters urged the Commission to retain the existing 20 percent threshold under Regulation ATS for purposes of Regulation SCI or asked the Commission to provide further explanation as to why the current threshold under Regulation ATS should be altered.[128] One commenter agreed with the Commission that the 20 percent threshold currently in Regulation ATS might be too high, and suggested using a threshold for ATSs trading NMS stocks of five percent or more of the volume in all NMS stocks during a 12-month period, to be determined once a year in the same given month.[129] Another commenter suggested that the Commission apply its ATS threshold for NMS stocks to only the 500 most active securities.[130] An additional recommendation by one commenter with regard to NMS stocks was to include only those ATSs with five percent or more of at least five NMS stocks with an aggregate average daily share volume greater than 500,000 shares and 0.25 percent or more of all NMS stocks for four of the previous six months, or those ATSs that have three percent or more of all NMS stocks in four of the previous six months.[131] Another commenter suggested retaining Rule 301(b)(6) as part of Regulation ATS, but amending the rule by lowering the average daily volume threshold to 2.5 percent.[132]

One commenter requested clarification on the phrase ''0.25 percent or more in all NMS stocks, of the average daily dollar volume reported by an effective transaction reporting plan.'' [133] Because there is more than one transaction reporting plan, this commenter asked whether the proposed volume thresholds would be calculated per plan or calculated based on all NMS volume.[134]

Some commenters provided suggestions with regard to the proposed measurement methodology for the thresholds.[135] A few commenters argued that the proposed time period measurement of ''at least four of the preceding six calendar months'' is cumbersome to apply in practice and believed that the time period should be over a longer term.[136] For example, two commenters stated that the rule should utilize a 12-month measurement period.[137] Conversely, another commenter generally opposed the thresholds stating that all ATSs should be subject to the rule, but noted that if the rule includes a trading volume metric, the measurement period should be much shorter (such as two to four weeks).[138] In addition, one commenter stated that the measurement should be based on number of shares traded rather than dollar value.[139]

Two commenters also suggested that ATSs should be given six months after meeting the given threshold in the definition of SCI ATS to come into compliance with Regulation SCI.[140]

The Commission is adopting the thresholds for ATSs that trade NMS stocks and non-NMSs stock as proposed. In setting the thresholds for Regulation SCI, the Commission believes it is establishing an appropriate and reasonable scope for the application of the regulation. Although commenters provided various suggestions for different thresholds, nothing persuaded the Commission that these suggestions would better accomplish the goals of Regulation SCI than the thresholds the Commission is adopting. As discussed below, the Commission has analyzed the number of entities it believes are likely to be covered by the thresholds it is establishing. The Commission recognizes that these thresholds ultimately represent a matter of judgment by the Commission as it takes the step of promulgating Regulation SCI, and the Commission intends to monitor these thresholds to determine whether they continue to be appropriate.

With regard to the threshold for ATSs trading NMS stocks, the Commission has determined to adopt this threshold as proposed. After careful consideration of the comments, the Commission continues to believe that this threshold is an appropriate measure of when a market is of sufficient significance so as to warrant the protections and requirements of Regulation SCI.[141] The

[124] *See supra* notes 60–67 and accompanying text.

[125] *See* Proposing Release, *supra* note 13, at 18138–39.

[126] *See id.*

[127] *See, e.g.,* Direct Edge Letter at 2; SIFMA Letter at 6–7; BIDS Letter at 6; ITG Letter at 10; and OTC Markets Letter at 11. *But see* BlackRock Letter at 4 (agreeing with the Commission's approach in the SCI Proposal of lowering the thresholds for SCI ATSs from the thresholds in Rule 301(b)(6) of Regulation ATS).

[128] *See, e.g.,* Direct Edge Letter at 2; and KCG Letter at 10–11.

[129] *See* SIFMA Letter at 6.

[130] *See* BIDS Letter at 6.

[131] *See* ITG Letter at 10.

[132] *See* OTC Markets Letter at 11. This commenter also suggested leaving in place the existing five percent average daily share volume threshold for the display requirement of Rule 301(b)(3) under Regulation ATS.

[133] *See* SIFMA Letter at 6–7.

[134] *See* SIFMA Letter at 6–7.

[135] *See, e.g.,* BIDS Letter at 6; KCG Letter at 19; SIFMA Letter at 7; and Lauer Letter at 4–5.

[136] *See, e.g.,* BIDS Letter at 6; and KCG Letter at 19.

[137] *See* BIDS Letter at 6; and KCG Letter at 19.

[138] *See* Lauer Letter at 4–5.

[139] *See* BIDS Letter at 6.

[140] *See* KCG Letter at 19; and SIFMA Letter at 7.

[141] The numerical thresholds in the definition of SCI ATS reflect an informed assessment by the Commission, based on qualitative and quantitative analysis, of the likely economic consequences of the specific numerical thresholds included in the definition. In making such assessment and, in turn, selecting the numerical thresholds, in addition to considering the views of commenters, the Commission has reviewed relevant data. *See infra* notes 150 and 175 and accompanying text.

Commission is, however, making one technical modification in response to a commenter to clarify that the threshold will be calculated based on all NMS volume, rather than on a per plan basis.[142] The Commission agrees with the commenter that the proposed language should be clarified and, as such, the threshold language within the definition of ''SCI ATS'' in Rule 1000 is being revised to refer to ''applicable effective transaction reporting plans,'' rather than ''an effective transaction reporting plan.'' [143]

Under the adopted definition of SCI ATS, with regard to NMS stocks, an ATS will be subject to Regulation SCI if, during at least four of the preceding six calendar months, it had: (i) Five percent or more in any single NMS stock, and 0.25 percent or more in all NMS stocks, of the average daily dollar volume reported by applicable effective transaction reporting plans, or (ii) one percent or more, in all NMS stocks, of the average daily dollar volume reported by applicable effective transaction reporting plans.[144] The Commission continues to believe that this threshold will identify those ATSs that could have a significant impact on the overall market or that could have a significant impact on a single NMS stock and some impact on the market as a whole at the same time.[145]

While some commenters advocated for thresholds higher than those proposed and/or retaining the 20 percent threshold in Regulation ATS,[146] as the Commission discussed in the SCI Proposal, the securities markets have significantly evolved since the time of the adoption of Regulation ATS, resulting in trading activity in stocks being more dispersed among a variety of trading centers. For example, in today's markets, national securities exchanges, once the predominant type of venue for trading stocks, each account for no more than approximately 19 percent of volume in NMS stocks.[147] By way of contrast, based on data collected from ATSs pursuant to FINRA Rule 4552 for 18 weeks of trading in 2014, the trading volume of ATSs accounted for approximately 18 percent of the total dollar volume in NMS stocks, with no individual ATS executing more than five percent.[148] Given this dispersal of trading volume among an increasing number of trading venues, the increasingly interconnected nature of the markets, and the increasing reliance on a variety of automated systems, the Commission believes that there is a heightened potential for systems issues originating from a number of sources to significantly affect the market. Due to these developments, the Commission believes that the 20 percent threshold as adopted in Regulation ATS is no longer an appropriate measure for determining those entities that can have a significant impact on the market and thus should be subject to the protections of Regulation SCI. Rather, the Commission believes that lower volume thresholds are appropriate, and as noted in the SCI Proposal, the Commission believes that the adopted thresholds would include ATSs having NMS stock dollar volume comparable to or in excess of the NMS stock dollar volume of certain national securities exchanges subject to Regulation SCI.[149]

Based on data collected from ATSs pursuant to FINRA Rule 4552 for 18 weeks of trading in 2014,[150] the Commission believes that approximately 12 ATSs trading NMS stocks would exceed the adopted thresholds and fall within the definition of SCI entity, accounting for approximately 66 percent of the dollar volume market share of all ATSs trading NMS stocks.[151] The Commission acknowledges that its analysis of the FINRA ATS data did not reveal an obvious threshold level above which a particular subset of ATSs may be considered to have a significant impact on individual NMS stocks or the overall market, as compared to another subset of ATSs. However, for the following reasons, the Commission continues to believe that the adopted thresholds for ATSs trading NMS stock are an appropriate measure to identify those ATSs that should be subject to the requirements of Regulations SCI. First, by imposing both a single NMS stock threshold and an all NMS stocks threshold in the first prong of the definition, the thresholds will help to ensure that Regulation SCI will not apply to an ATS that has a large volume in a small NMS stock and little volume in all other NMS stocks. At the same time, the Commission believes that inclusion of the dual-prong dollar volume thresholds is appropriate. Specifically, it will require not only that ATSs that have significant trading volume in all NMS stocks are subject to the requirements of Regulation SCI, but also that ATSs that have large trading volume in a single NMS stock and could significantly affect the market for that stock are also covered by the safeguards of Regulation SCI provided they have levels of trading in all NMS stocks that could allow such ATSs to also have some impact on the market as a whole. The Commission also believes that, as discussed further below, the adopted thresholds will also appropriately capture not only ATSs that have significant trading volume in active stocks, but also those that have significant trading volume in less active stocks. The Commission believes that a systems issue at an ATS that is a significant market for the trading of a less actively traded stock could similarly impose significant risks to the market for such securities, because a systems outage at such a venue could significantly impede the ability to trade

[142] *See supra* note 134 and accompanying text. As noted above, this commenter asked the Commission for clarification on this aspect of the rule.

[143] Because the threshold has two prongs, one of which is based on *all* NMS volume, it is necessary to specify that there is more than one transaction reporting plan that would be applicable in calculating all NMS stock trading volume. At the same time, since the other prong of the threshold is based on the trading volume of single NMS stocks, it is necessary to also add the term ''applicable'' before the term ''transaction reporting plans'' as only one transaction reporting plan would be applicable per security. The definition of ''eligible securities'' in each of the transaction reporting plans are mutually exclusive, ensuring that each security is subject to only one transaction reporting plan. *See* CTA Plan, available at: *http://www.nyxdata.com/cta;* and Nasdaq UTP Plan, available at: *http://www.utpplan.com.*

[144] *But see infra* notes 169–170 and accompanying text (discussing a six-month compliance period for SCI entities satisfying the thresholds for the first time).

[145] Under the adopted thresholds, because of the requirement to meet the threshold for at least four of the preceding six calendar months, inactive and newly operating ATSs would not be included in the definition of SCI ATS. *See infra* note 152.

[146] *See supra* note 128 and accompanying text.

[147] *See supra* note 106.

[148] *See infra* note 150.

[149] *See* Proposing Release, *supra* note 13, at 18094.

[150] *See* Securities Exchange Act Release No. 71341 (January 17, 2014), 79 FR 4213 (January 24, 2014) (approving FINRA Rule 4552 requiring each ATS to report to FINRA weekly volume information and number of securities transactions). Commission staff analyzed FINRA ATS data for the period of May 19, 2014 through September 19, 2014. The recently available FINRA ATS data is consistent with the OATS data used in the SCI Proposal. In addition, the analysis of FINRA ATS data examines a threshold of trading volume over four out of six time periods, each period defined as a period of three consecutive weeks as a rough approximation of the threshold test on four out of the preceding six calendar months as prescribed in the definition of SCI ATS. The Commission noted in the SCI Proposal that the staff analysis of OATS data may overestimate the number of ATSs that may meet the proposed thresholds. While the calculation based on FINRA ATS data may not overestimate the number of ATSs as much as the data analysis in the proposal, it could still overestimate the number of ATSs that would meet the thresholds. Nevertheless, the Commission believes the analysis of FINRA ATS data offers useful insights. *See* Proposing Release, *supra* note 13, at 18094.

[151] According to the FINRA ATS data, during this time period, a total of 44 ATSs traded NMS stocks. The Commission notes that the number of ATSs exceeding the adopted thresholds, and the percentage of volume of trading in NMS stocks that they represent, may change over time in response to market and competitive forces.

such securities, thereby having a significant impact on the market for such less-actively traded securities. In addition, the Commission continues to believe that thresholds that account for 66 percent of the dollar volume market share of all ATSs trading NMS stocks is a reasonable level that would not exclude new entrants to the ATS market.[152] Further, as noted above, the thresholds would include ATSs having NMS stock dollar value comparable to the NMS stock dollar volume of the equity exchanges subject to Regulation SCI. Finally, the Commission believes that the adopted thresholds are appropriate to help ensure that entities that have determined to participate (in more than a limited manner) in the national market system as markets that bring buyers and sellers together, are subject to the requirements of Regulation SCI.

As noted above, several commenters provided specific suggestions for alternative standards for determining which ATSs should be included within the scope of Regulation SCI.[153] While the Commission recognizes that some of the suggested alternatives could have certain benefits, it also believes that each recommended standard also has corresponding limitations, and thus believes that the adopted thresholds are an appropriate measure for identifying those ATSs that should be subject to Regulation SCI. First, as described above, the Commission believes that adopting a two-prong standard is necessary to identify those ATSs that, in the event of a systems issue, could have a significant impact on the overall market or that could have a significant impact on a single NMS stock and some impact on the market as a whole at the same time. The Commission notes that several of the thresholds suggested by commenters lacked such a dual-prong standard (and, in particular, the prong relating to individual NMS stocks) and thus do not provide the advantages associated with the adopted threshold in protecting the trading venues for a single NMS stock. With regard to one commenter's suggestion that the first prong of the threshold should, among other things, consider five NMS stocks, rather than a single stock, the Commission does not believe the commenter has provided any clear rationale for this standard.[154] As discussed, the purpose of the first prong is to identify significant trading venues (or markets) for a single security where a systems disruption could have a significant effect on the market for that security, and setting the threshold to consider five NMS securities could potentially exclude trading venues that host large trading activity for a single NMS security. Additionally, the Commission notes that the suggested alternative approach would be unlikely to have any significant practical effect when used in conjunction with the second prong of the threshold, which looks at trading across all NMS stocks, because the second prong would likely capture an ATS with five percent or more volume in five NMS stocks. With regard to one commenter's suggestion to apply the threshold to only the 500 most active NMS stocks [155] and another commenter's suggestion to include only stocks with an aggregate average daily share volume greater than 500,000,[156] the Commission disagrees that the threshold should be structured to capture only ATSs that have significant trading volume in active stocks. Rather, the first prong of the adopted threshold is designed to capture any ATS that has five percent or more of the trading volume of *any* NMS stock, irrespective of how actively traded it is, so that Regulation SCI can effectively address risks relating to the trading of all NMS stocks, and not only the most active of NMS stocks. If the Commission were to apply the threshold only to the 500 most active NMS stocks or stocks only with average daily share volumes greater than 500,000, an ATS that, for example, served as the primary venue for the trading of less actively traded NMS stocks, but had negligible market share for more actively traded NMS stocks, would not be subject to Regulation SCI. However, an SCI event that resulted in an outage of such an ATS could have a significant impact on the market for such less actively traded NMS stocks. As such, failure to include such an ATS within the scope of Regulation SCI would be contrary to the goals of the regulation. Finally, with regard to one commenter's suggestion to retain Rule 301(b)(6) as part of Regulation ATS and amend the threshold to 2.5 percent,[157] as discussed throughout this release, Regulation SCI is intended to expand upon the requirements of Rule 301(b)(6) and to supersede and replace such requirements for ATSs that trade NMS stocks.[158] For the reasons noted above, the Commission believes it is appropriate to include ATSs meeting the adopted volume thresholds within the scope of Regulation SCI, and the Commission does not believe it is appropriate to retain Rule 301(b)(6) as part of Regulation ATS, thereby subjecting ATSs to a separate and differing set of regulatory requirements than other SCI entities with regard to systems capacity, integrity, resiliency, availability, security, and compliance.[159] For all of the reasons discussed above, the Commission does not believe that any of the alternative standards suggested by commenters would better capture those entities that

[152] Consistent with the Commission's statement in the SCI Proposal, the Commission has considered barriers to entry and the promotion of competition in setting the threshold such that new ATSs trading NMS stocks would be able to commence operations without, at least initially, being required to comply with—and thereby not incurring the costs associated with—Regulation SCI. *See* Proposing Release, *supra* note 13, at n. 102. In particular, a new ATS could engage in limited trading in any one NMS stock or all NMS stocks, until it reached an average daily dollar volume of five percent or more in any one NMS stock and 0.25 percent or more in all NMS stocks, or one percent in all NMS stocks, over four of the preceding six months. Because a new ATS could begin trading in NMS stocks for at least three months (*i.e.,* less than four of the preceding six months), and conduct such trading at any dollar volume level without being subject to Regulation SCI, and would have to exceed the specified volume levels for the requisite period to become so subject, the Commission believes that these thresholds should not prevent a new ATS entrant from having the opportunity to initiate and develop its business. Further, the Commission notes that, as discussed below, it is adopting an additional six-month compliance period (in addition to the general nine-month compliance period from the Effective Date of Regulation SCI afforded to all SCI entities) for ATSs newly meeting the thresholds, so that once an ATS meets the threshold, it will have six months from that time to become fully compliant with Regulation SCI. *See infra* Section IV.F (discussing effective dates and compliance periods). The Commission believes that, for ATSs that have newly entered the market, this additional compliance period will give such ATSs additional opportunity to develop and grow their business without incurring the costs of compliance with Regulation SCI during this time. This additional compliance period should also provide such ATSs with time to plan on how they would meet the requirements of Regulation SCI, and could also potentially allow SCI ATSs to become more equipped to bear the cost of Regulation SCI once compliance is required, and thus not significantly discourage new ATSs from entering the market and growing. *See infra* Section VI.C.1.c (discussing further barriers to entry and the potential effects on competition of the adopted thresholds).

[153] *See supra* notes 127–132 and accompanying text.

[154] *See supra* note 131 and accompanying text. This commenter argued generally that the thresholds should be revised so as to only include those entities that would have an ''immediate and substantial impairment of a functioning marketplace.'' However, the commenter did not explain why it advocated the use of five NMS stocks, rather than a single NMS stock. *See* ITG Letter at 9.

[155] *See supra* note 130 and accompanying text.

[156] *See supra* note 131 and accompanying text.

[157] *See supra* note 132 and accompanying text.

[158] *But see infra* notes 189–192 and accompanying text (discussing the Commission's determination to retain the applicability of Rule 301(b)(6) to fixed-income ATSs).

[159] The Commission notes that, with regard to the specific threshold level suggested by this commenter (2.5%), the Commission believes the adopted thresholds to be an appropriate measure to identify those ATSs that should be subject to the requirements of Regulations SCI for the reasons discussed above. *See supra* note 141.

have the potential to pose significant risk to the market.

One commenter urged the Commission to utilize number of shares traded rather than dollar value, stating that while most of the world uses value traded, available data for the U.S. equity markets is share-based.[160] The Commission disagrees with this commenter and notes that daily dollar volume is readily available from a number of sources, including the SIPs.[161]

The time measurement period for ATSs that trade NMS stocks and non-NMS stocks is also being adopted as proposed. Thus, ATSs will be subject to Regulation SCI only if they meet the numerical thresholds for at least four of the preceding six months.[162] The Commission notes that the adopted time measurement period is consistent with the current standard in Rule 301(b)(6) of Regulation ATS.[163] The Commission believes that this time measurement period is an appropriate time period over which to evaluate the trading volume of an ATS and should help to ensure that it does not capture ATSs with relatively low trading volume that may have had an anomalous increase in trading on a given day or few days. Contrary to concerns raised by some commenters,[164] under this time measurement methodology, an ATS would not qualify as an SCI entity simply by trading a single large block of an illiquid security during one month (or even two or three months). While one commenter suggested that the time measurement period be shorter and recommended a period of two to four weeks,[165] the Commission believes that this could cause ATSs to fall within the scope of the definition solely as a result of an atypical, short-term increase in trading or a small number of large block trades that is not reflective of ATSs' general level of trading. Specifically, with such a short period of measurement, a short-term spike in trading volume uncharacteristic of an ATS's overall trading volume history could (and if large enough, likely would) skew the overall trading volume for that time period, causing an ATS to meet the volume thresholds and thus become subject to Regulation SCI even though the overall risk posed by the ATS does not warrant it. Further, the Commission believes that such a shorter time measurement period could provide more barriers to entry for ATSs, because new ATSs would not have as long of a time period to develop their business prior to having to incur the costs of compliance associated with being subject to the requirements of Regulation SCI.[166] This potential to incur such costs almost immediately after the initial start of operations could act as a barrier to entry for some new ATSs.

Other commenters recommended a longer measurement period, such as 12 months.[167] The Commission does not believe, however, that a longer time period is necessary or more appropriate to identify those entities that play a significant role in the market for a particular asset class and/or that have the potential to significantly impact investors or the market, warranting inclusion in the scope of Regulation SCI. The Commission believes that the adopted time measurement period provides sufficient trading history data so as to indicate an ATS's significance to the market, and that the structure of the test (*i.e.,* requiring an ATS to meet the threshold for four out of six months) ensures sustainability of such trading levels. In addition, modifying the time measurement period to 12 months (and thus eliminating the four out of six month measurement period) would make such a measure more susceptible to capturing ATSs that have a major but isolated spike in trading during a single month. Specifically, as noted above, a single anomalous large increase in trading volume during one month (or such a spike in two or three months) could never result in an ATS becoming subject to Regulation SCI solely as a result of such a spike in trading, because the ATS would meet the threshold only for one month, rather than the four months required by the rule. On the other hand, a threshold based on an average over 12 months could be skewed by the occurrence of one large spike in trading that results in the overall average for the 12-month period being increased to such a level that it meets the volume threshold levels. Thus, contrary to one commenter's suggestion that a 12-month period would require ''a sustained trading level at the threshold,'' [168] the Commission believes that the structure of the adopted measurement period test (*i.e.,* four out of six months) may be a better indicator of actual sustained trading levels at the threshold warranting the protections of the rule. Further, the Commission believes that 12 months is a less appropriate time measurement period than the period adopted because, for example, an ATS could have significant trading volume early on during such a time period such that it may pose significant risk to the markets in the event of a systems issue at such an ATS without being subject to Regulation SCI for a significant period of time. The Commission believes that the adopted time period strikes an appropriate balance between being a long enough period so as to not be triggered by atypical periods of increased trading or a few occurrences of very large trades, while also not causing unnecessary delay in requiring that ATSs playing an important role in the market are subject to Regulation SCI.

Finally, as discussed further in Section IV.F, the Commission agrees with commenters that it is appropriate to provide ATSs meeting the volume thresholds in the definition of SCI ATS for the first time a period of time before they are required to comply with Regulation SCI.[169] Thus, consistent with the recommendation of these commenters, the Commission is revising the definition of SCI ATS to provide that an SCI ATS will not be required to comply with the requirements of Regulation SCI until six months after satisfying any of the applicable thresholds in the definition of SCI ATS for the first time.[170]

ATSs Trading Non-NMS Stocks

Some commenters addressed whether Regulation SCI should apply to ATSs trading non-NMS stocks.[171] Specifically,

[160] *See supra* note 139 and accompanying text.

[161] *See also* Proposing Release, *supra* note 13, at 18094 (stating that the use of dollar thresholds may better reflect the economic impact of trading activity).

[162] *See* adopted Rule 1000 (definition of ''SCI ATS''). The Commission notes that if an ATS that was not previously subject to Regulation SCI meets the SCI ATS volume threshold for four consecutive months, it would become subject to Regulation SCI at the end that four-month period. However, as discussed further below, such an ATS would have an additional six months from that time to comply with the requirements of Regulation SCI. *See infra* text accompanying notes 169–170.

[163] 17 CFR 242.301(b)(6).

[164] *See, e.g.,* BIDS Letter at 6.

[165] *See supra* note 138 and accompanying text.

[166] *See supra* note 152 and accompanying text. *See also infra* Section VI.C.1.c (discussing barriers to entry and the effects on competition of the adopted thresholds and time measurement period for SCI ATSs).

[167] *See supra* notes 136–137 and accompanying text. One of these commenters noted that the ''four out of the preceding six months'' measurement is cumbersome to apply in practice. *See* KCG Letter at 19. The Commission does not believe this measurement period to be overly cumbersome to apply in practice, as it would require only that an ATS undertake an assessment once at the end of each month as to whether the ATSs had exceeded the volume thresholds set forth in the rule and then make a determination at the end of a six month period whether the ATS met this threshold for four out of the six preceding months.

[168] *See* KCG Letter at 19. *See also supra* notes 136–137 and accompanying text.

[169] *See supra* note 140 and accompanying text.

[170] *See* Rule 1000 (definition of SCI ATS).

[171] *See, e.g.,* OTC Markets Letter at 7; SIFMA Letter at 7; TMC Letter at 1–3 (asserting that retail

one commenter stated that the rules should apply only to trading in NMS securities because non-NMS stock trading—which is dispersed among broker-dealers—does not have a single point of failure and is therefore less susceptible to rapid, widespread issues that occur as a result of a high degree of linkage or inter-dependency.[172] Another commenter stated that, with respect to non-NMS stocks (as well as municipal securities and corporate debt securities), the proposed five percent threshold was too low and would unnecessarily include ATSs for these product types that are ''not systemic to maintaining fair, orderly, and efficient markets'' and asked the Commission to further study the appropriate threshold for these ATSs.[173]

With regard to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, the adopted thresholds remain unchanged from the SCI Proposal. Thus, for such securities, an ATS will be subject to the requirements of Regulation SCI if, during four of the preceding six calendar months, it had five percent or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported.[174] The Commission continues to believe that this threshold will appropriately identify ATSs that play a significant role in the market for those securities and, thus, should be subject to the requirements of Regulation SCI.

Using data from the second quarter of 2014, an ATS executing transactions in non-NMS stocks at a level exceeding five percent of the average daily dollar volume traded in the United States would be executing trades at a level exceeding $45.2 million daily.[175] Based on data collected from Form ATS–R for the second quarter of 2014, the Commission estimates that two ATSs would exceed this threshold and fall within the definition of SCI entity, accounting for approximately 99 percent of the dollar volume market share of all ATSs trading non-NMS stocks.[176] These thresholds reflect an assessment by the Commission, based on qualitative and quantitative analysis, of the likely consequences of the specific quantitative thresholds included in the definition. From this analysis and in conjunction with considering the views of commenters, the Commission has derived what it believes to be an appropriate threshold to identify those ATSs that should be subject to the requirements of Regulation SCI.

As discussed above, one commenter objected to the inclusion of ATSs trading non-NMS stocks within the scope of Regulation SCI.[177] This commenter argued that non-NMS trading is not susceptible to the issues that Regulation SCI is designed to address because such trading is dispersed among broker-dealers and does not create the types of single points of failure that pose widespread systemic risk.[178] First, as noted above, while the Commission is particularly concerned with systems issues that pose the greatest risk to our markets and have the potential to cause the most widespread effects and damage (such as those that are single points of failure), Regulation SCI is intended to address a broader set of risks of systems issues. Accordingly, the adopted threshold for non-NMS stock ATSs is designed to identify those ATSs that play a significant role in the market for such securities. Further, the Commission disagrees with the commenter's assertion that trading in non-NMS stocks cannot result in widespread disruptions.[179]

While one commenter stated that the five percent threshold was too low, this commenter did not provide an alternative threshold but rather asked the Commission to further study this issue.[180] As noted above, based on qualitative and quantitative analysis, the Commission believes the five percent threshold to be an appropriate measure to determine which ATSs are of sufficient significance in the current market for non-NMS stocks to warrant their inclusion within the scope of Regulation SCI. The Commission notes that it intends to monitor the level of this threshold, and other thresholds being adopted today, to ensure that they continue to be appropriate.

The Commission notes that adoption of a higher threshold for non-NMS stocks than for NMS stocks reflects the Commission's acknowledgement of certain differences between the two markets. In particular, as noted in the SCI Proposal, while the Commission believes that similar concerns about the trading of NMS stocks on ATSs apply to the trading of non-NMS stocks, the Commission also believes that certain characteristics of the market for non-NMS stocks, such as the lower degree of automation, electronic trading, and interconnectedness, generally result in an overall lower risk to the market in the event of a systems issue.[181] In particular, the Commission believes that a systems issue at an SCI entity that trades non-NMS stocks would not be as likely to have as significant or widespread an impact as readily as a systems issue at an SCI entity that trades NMS stocks. Therefore, the Commission believes that there is less risk of market impact in the markets for those securities at this time. As such, the Commission has determined not to adopt the same, more stringent, thresholds that would trigger the requirements of Regulation SCI that the Commission is adopting for ATSs trading NMS stocks. The Commission also believes that imposition of a threshold that is set too low in markets that lack automation could have the unintended effects of discouraging automation in these markets and discouraging new entrants into these markets. Specifically, it could increase the cost of automation in relation to other methods of executing trades, and thus market participants might make a determination that the costs associated with becoming subject to Regulation SCI preclude a shift to automated trading or the development of a new automated trading system, particularly given the expected lower trading volume when beginning operations. Further, the Commission notes that it has traditionally provided special safeguards with regard to NMS stocks in its rulemaking efforts relating to market structure.[182] For these reasons, the Commission believes that it is appropriate at this time to apply a different threshold to ATSs trading NMS stocks than those ATSs trading non-NMS stocks.

fixed-income ATSs should not be subject to Regulation SCI); and KCG Letter at 3, 10–11.

[172] *See* OTC Markets Letter at 7.

[173] *See* SIFMA Letter at 7.

[174] However, as noted above, an ATS meeting the definition of SCI ATS for the first time will be afforded a six-month compliance period. *See supra* notes 169–170 and accompanying text.

[175] In the Proposing Release, the Commission used data from the first six months of 2012 to estimate that an ATS executing transactions in non-NMS stocks at a level exceeding five percent of the average daily volume traded in the United States would be executed trades at a level exceeding $31 million daily. See Proposing Release, *supra* note 13, at n.111 and accompanying text. The Commission has updated this estimate using over-the-counter reporting facility data available from FINRA.

[176] The Commission notes that the number of ATSs exceeding the adopted threshold, and the percentage of volume of trading in non-NMS stocks that they represent, may change over time in response to market and competitive forces.

[177] *See supra* note 172 and accompanying text.

[178] *See id.*

[179] *See supra* note 33 and accompanying text.

[180] *See supra* note 173.

[181] *See* Proposing Release, *supra* note 13, at 18096.

[182] *See, e.g.,* Regulation NMS, 17 CFR 242.600–612; Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 27496 (June 29, 2005) (Regulation NMS Adopting Release).

ATSs Trading Fixed-Income Securities

Several commenters specifically addressed the inclusion of municipal security and corporate debt security ATSs within the scope of Regulation SCI, stating that these ATSs should not be subject to Regulation SCI or that the proposed thresholds should be modified.[183] These commenters identified differences in the nature of fixed-income trading as compared to the markets for NMS securities and concluded that the thresholds were inappropriate and would be detrimental to the market for these types of securities.[184] In particular, commenters stated that inclusion of fixed-income ATSs and/or the adoption of the proposed thresholds would impose unduly high costs on these entities given their size, scope of operations, lack of automation, low speed, and resulting low potential to pose risk to systems.[185] Further, one commenter noted that the cost of compliance for these types of entities would discourage the shift from manual fixed-income trading in the OTC markets to more transparent and efficient automated trading venues.[186]

In addition, one commenter stated that if retail fixed-income ATSs are included in the final rule, a better measurement would be to look at par amount traded rather than volume.[187] Finally, one commenter requested that the Commission clarify that ATSs relating to listed-options are not subject to the obligations of proposed Regulation SCI.[188]

While the adopted definition of SCI ATS remains unchanged from the proposal for NMS stocks and non-NMS stocks, the Commission, after considering the views of commenters, has determined to exclude ATSs that trade only municipal securities or corporate debt securities from the definition of SCI ATS at this time.[189] Accordingly, such fixed-income ATSs will not be subject to the requirements of Regulation SCI. Rather, fixed-income ATSs will continue to be subject to the existing requirements in Rule 301(b)(6) of Regulation ATS regarding systems capacity, integrity and security if they meet the twenty percent threshold for municipal securities or corporate debt securities provided by that rule.[190] The Commission believes that this change is warranted given the unique nature of the current fixed-income markets, as noted by several commenters. In particular, fixed-income markets currently rely much less on automation and electronic trading than markets that trade NMS stocks or non-NMS stocks.[191] In addition, the municipal and corporate fixed-income markets tend to be less liquid than the equity markets, with slower execution times and less complex routing strategies.[192] As such, the Commission believes that a systems issue at a fixed-income ATS would not have as significant or widespread an impact as in other markets. Thus, while ensuring the capacity, integrity and security of the systems of fixed-income ATSs is important, the benefits of lowering the threshold applicable to fixed-income ATSs from the current twenty percent threshold in Regulation ATS and subjecting such ATSs to the safeguards of Regulation SCI would not be as great as for ATSs that trade NMS stock or non-NMS stock. As commenters pointed out, the cost of the requirements of Regulation SCI could be significant for fixed-income ATSs relative to their size, scope of operations, and more limited potential for systems risk. The Commission is cognizant that lowering the current threshold applicable to fixed-income ATSs in Regulation ATS and subjecting such ATSs to the requirements of Regulation SCI could have the unintended effect of discouraging automation in these markets and discouraging the entry of new fixed-income ATSs into the market, which could impede the evolving transparency and efficiency of these markets and negatively impact liquidity in these markets.

For these reasons, the Commission believes that it is appropriate to continue to apply the requirements in Rule 301(b)(6) of Regulation ATS to fixed-income ATSs that meet the volume thresholds of that rule and to exclude ATSs that trade only municipal securities or corporate debt securities from the scope of Regulation SCI at this time.

c. Plan Processor

Under Proposed Rule 1000(a), the term ''plan processor'' had the meaning set forth in Rule 600(b)(55) of Regulation NMS, which defines ''plan processor'' as ''any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.'' [193] The Commission is adopting the definition of ''plan processor'' as proposed.[194]

The Commission received no comments on the proposed definition of ''plan processor.'' [195] As noted in the SCI Proposal, the ARP Inspection Program included the systems of the plan processors of four national market system plans—the CTA Plan, CQS Plan, Nasdaq UTP Plan, and OPRA Plan.[196]

[183] *See, e.g.,* SIFMA Letter at 7; TMC Letter at 1–3; and KCG Letter at 2–3, 10–11.

[184] *See, e.g.,* SIFMA Letter at 7; TMC Letter at 1–3; and KCG Letter at 2–3, 10–11.

[185] *See, e.g.,* SIFMA Letter at 7; TMC Letter at 1–3; and KCG Letter at 2–3, 10–11.

[186] *See* KCG Letter at 3, 10–11 (noting that the vast majority of fixed-income trades are done in the OTC markets and only a few ATSs for the fixed-income market have emerged in recent years).

[187] *See* TMC Letter at 1–3.

[188] *See* LiquidPoint Letter at 2–3.

[189] *See supra* notes 183–186.

[190] *See* 17 CFR 242.301(b)(6).

[191] *See, e.g., supra* notes 183–186 and accompanying text (discussing the unique nature of fixed-income trading). *See also* Tracy Alloway and Michael Mackenzie, ''Goldman Retreats from Bond Platform,'' Fin. Times, February 17, 2014 (noting that, despite efforts to make the market for bond trades more electronic, large bond trading continues to occur overwhelmingly by 'voice-brokered' transactions); and Lisa Abramowicz, ''Humans Beat Machines as Electronic Trading Slows: Credit Markets,'' Bloomberg, February 19, 2014 (stating that a shift in corporate bond transactions to electronic systems is failing to keep up with total volume).

[192] *See, e.g.,* TMC Bonds Letter at 1 (stating that fixed-income markets have significantly lower volumes and slower execution times than equity markets and have no meaningful connectivity between fixed-income ATS participants).

[193] *See* 17 CFR 242.600(b)(55).

[194] *See* proposed Rule 1000(a) and Proposing Release *supra* note 13, at Section III.B.1.

[195] However, some commenters did support the overall scope of the term ''SCI entity'' or agreed specifically that plan processors should be included within the definition of that term. *See, e.g.,* Lauer Letter at 3 (urging the Commission to expand the scope of entities covered) and KCG Letter at 5–6 (recommending that Regulation SCI be targeted to services offered by only one or a few entities, such as plan processors). In addition, one commenter, although commenting specifically on the definition of ''SCI system,'' stated that Regulation SCI should be tailored to focus only on systems impacting the core functions of the overall market, which should include the exclusive SIPs that transmit market data. *See* OTC Markets Letter at 12–13.

[196] *See* ARP I Release, *supra* note 1, at n. 8 and n. 17. Each of the CTA Plan, CQS Plan, Nasdaq UTP Plan, and OPRA Plan, is a ''national market system plan'' (''NMS Plan'') as defined under Rule 600(a)(43) of Regulation NMS under the Exchange Act, 17 CFR 242.600(a)(43). Rule 600(a)(55) of Regulation NMS under the Exchange Act, 17 CFR 242.600(a)(55), defines a ''plan processor'' as ''any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.'' Section 3(a)(22)(B) of the Exchange Act, 15 U.S.C. 78c(22)(B), defines ''exclusive processor'' to mean ''any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations

Although an entity selected as the processor of an SCI Plan acts on behalf of a committee of SROs, such entity is not required to be an SRO, nor is it required to be owned or operated by an SRO.[197] The Commission believes, however, that the systems of such entities, because they deal with key market data, are central features of the national market system [198] and should be subject to the same systems standards as SCI SROs. The inclusion of plan processors in the definition of SCI entity is designed to ensure that the processor for an SCI Plan, regardless of its identity, is independently subject to the requirements of Regulation SCI. The Commission believes that it is important for such plan processors to be subject to the requirements of Regulation SCI because of the important role they serve in the national market system: Operating and maintaining computer and communications facilities for the receipt, processing, validating, and dissemination of quotation and/or last sale price information generated by the members of the plan.

Recent SIP incidents further highlighted the importance of plan processors to the U.S. securities markets and the necessity of including such processors within the scope of Regulation SCI.[199] As evidenced by the incidents, the availability of consolidated market data is central to the functioning of the securities markets. The unavailability of a system, such as a plan processor, that is a single point of failure with no backups or alternatives can result in a significant impact on the entire national market system. Accordingly, the Commission believes that that it is essential to ensure that the automated systems of the entities responsible for the consolidation and processing of important market data, namely, plan processors, have adequate levels of capacity, integrity, resiliency, availability, and security.[200]

Further, pursuant to its terms, each SCI Plan is required to periodically review its selection of its processor, and may in the future select a different processor for the SCI Plan than its current processor.[201] Thus, the definition of ''plan processor'' covers any entity selected as the processor for a current or future SCI Plan.[202]

d. Exempt Clearing Agency Subject to ARP

Proposed Rule 1000(a) defined the term ''exempt clearing agency subject to ARP'' to mean ''an entity that has received from the Commission an exemption from registration as a clearing agency under Section 17A of the Act, and whose exemption contains conditions that relate to the Commission's Automation Review Policies, or any Commission regulation that supersedes or replaces such policies.'' This definition is being adopted as proposed.

As noted in the SCI Proposal, this definition of ''exempt clearing agency subject to ARP'' currently covers one entity, Omgeo Matching Services—US, LLC (''Omgeo'').[203] In its comment letter, Omgeo stated that it believed its inclusion as an SCI entity was reasonable because clearing agencies that provide matching services, such as Omgeo, perform a critical role in the infrastructure of the U.S. financial markets in handling large amounts of highly confidential proprietary trade data.[204] Omgeo requested, however, that the Commission clarify that other similarly situated clearing agencies would also be subject to the requirements of Regulation SCI, and further requested that the Commission expand the definition of SCI entity, as applied to clearing agencies, to include, without limitation, any entity providing either matching services or confirmation/affirmation services for depository eligible securities that settle in the United States, as contemplated by FINRA Rule 11860.[205]

The Commission notes that the adopted definition of ''exempt clearing agency subject to ARP'' does provide that any entity that receives from the Commission an exemption from registration as a clearing agency under Section 17A of the Act, and whose exemption contains conditions that relate to the Automation Review Policies or any Commission regulation that supersedes or replaces the Commission's Automation Review Policies (such as Regulation SCI) would be included within the scope of Regulation SCI. Therefore, clearing agencies that are similarly situated as Omgeo (*i.e.,* those that are subject to an exemption that contains the relevant conditions) will be subject to Regulation SCI.[206] The Commission does not believe, therefore, that an expansion of the definition as suggested by Omgeo is necessary to further clarify that

distributed or published by means of any electronic system operated or controlled by such association.''

As a processor involved in collecting, processing, and preparing for distribution transaction and quotation information, the processor of each of the CTA Plan, CQS Plan, Nasdaq UTP Plan, and OPRA Plan meets the definition of ''exclusive processor;'' and because each acts as an exclusive processor in connection with an NMS Plan, each also meets the definition of ''plan processor'' under Rule 600(a)(55) of Regulation NMS, as well as Rule 1000(a) of Regulation SCI. For ease of reference, an NMS Plan having a current or future ''plan processor'' is referred to herein as an ''SCI Plan.'' The Commission notes that not every processor of an NMS Plan would be a ''plan processor'' under Rule 1000, and therefore not every processor of an NMS Plan would be an SCI entity subject to the requirements of Regulation SCI. For example, the processor of the Symbol Reservation System associated with the National Market System Plan for the Selection and Reservation of Securities Symbols (File No. 4–533) would not be a ''plan processor'' subject to Regulation SCI because it does not meet the ''exclusive processor'' statutory definition, as it is not involved in collecting, processing, and preparing for distribution transaction and quotation information.

[197] Pursuant to Section 11A of the Exchange Act (15 U.S.C. 78k–1), and Rule 609 of Regulation NMS thereunder (17 CFR 242.609), such entities, as ''exclusive processors,'' are required to register with the Commission as securities information processors on Form SIP. *See* 17 CFR 249.1001 (Form SIP, application for registration as a securities information processor or to amend such an application or registration).

[198] *See* Concept Release on Equity Market Structure, *supra* note 4, at 3594–95.

[199] As noted above, a disruption of the Nasdaq SIP on August 22, 2013 resulted in a three hour halt in trading in all Nasdaq-listed securities because of the SIP's inability to process quotes. *See supra* note 32 and accompanying text. Also as noted above, on October 30, 2014, according to the NYSE, a network hardware failure impacted the Consolidated Tape System, Consolidated Quote System, and Options Price Reporting Authority data feeds at the primary data center, and SIAC switched over to the secondary data center for these data feeds. *See id.*

[200] Systems directly supporting functionality relating to the provision of consolidated market data are included within the definition of ''critical SCI systems,'' for which heightened obligations under Regulation SCI will apply. *See* adopted Rule 1000. *See also supra* Section IV.A.2.c (discussing the definition of ''critical SCI systems'').

[201] *See* CTA Plan Section V(d) and CQS Plan Section V(d), available at: *http://www.nyxdata.com/cta;* OPRA Plan Section V, available at: *http://www.opradata.com/pdf/opra_plan.pdf;* and Nasdaq UTP Plan Section V, available at: *http://www.utpplan.com.*

[202] Currently, SIAC is the processor for the CTA Plan, CQS Plan, and OPRA Plan, and Nasdaq is the processor for the Nasdaq UTP Plan. SIAC is wholly owned by NYSE Euronext. Both SIAC and Nasdaq are registered with the Commission as securities information processors, as required by Section 11A(b)(1) of the Exchange Act, 15 U.S.C. 78k–1(b)(1), and in accordance with Rule 609 of Regulation NMS, 17 CFR 242.609.

[203] On April 17, 2001, the Commission issued an order granting Omgeo an exemption from registration as a clearing agency subject to certain conditions and limitations in order that Omgeo might offer electronic trade confirmation and central matching services. *See* Global Joint Venture Matching Services—US, LLC; Order Granting Exemption from Registration as a Clearing Agency, Securities Exchange Act Release No. 44188 (April 17, 2001), 66 FR 20494 (April 23, 2001) (File No. 600–32) (''Omgeo Exemption Order''). Because the Commission granted it an exemption from clearing agency registration, Omgeo is not a self-regulatory organization.

[204] *See* Omgeo Letter at 2–3.

[205] *See id.*

[206] Any entity seeking an exemption from registration as a clearing agency is responsible for requesting and obtaining such an exemption from the Commission.

similarly situated entities will be subject to the requirements of Regulation SCI.

Among the operational conditions required by the Commission in the Omgeo Exemption Order were several that directly related to the ARP policy statements.[207] For the same reasons that it required Omgeo to abide by the conditions relating to the ARP policy statements set forth in the Omgeo Exemption Order, the Commission believes it is appropriate that Omgeo (or any similarly situated exempt clearing agency) should be subject to the requirements of Regulation SCI, and thus is including any ''exempt clearing agency subject to ARP'' within the definition of SCI entity.

2. SCI Systems, Critical SCI Systems, and Indirect SCI Systems

a. Overview

Regulation SCI, as adopted, distinguishes three categories of systems of an SCI entity: ''SCI systems;'' ''critical SCI systems,'' and ''indirect SCI systems.'' The SCI Proposal broadly defined SCI systems to mean ''all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity, whether in production, development, or testing, that directly support trading, clearance and settlement, order routing, market data, regulation, or surveillance.'' The SCI Proposal also defined the term SCI security systems (to which only the provisions of Regulation SCI relating to security and intrusions would apply) as: ''any systems that share network resources with SCI systems that, if breached, would be reasonably likely to pose a security threat to SCI systems.'' [208]

Many commenters stated that the proposed definitions of SCI systems and SCI security systems were too broad and urged the Commission to target systems that pose the greatest risk to the market if they malfunction.[209] After careful consideration of the comments, and as discussed more fully below, the Commission agrees that certain types of systems included in the proposed definition of SCI systems may be appropriately excluded from the adopted definition. However, because U.S. securities market infrastructure is highly interconnected and seemingly minor systems problem at a single entity can spread rapidly across the national market system, the Commission does not believe it is appropriate to apply Regulation SCI only to the most critical SCI systems, as some commenters suggested. Instead, the adopted regulation applies to a broader set of systems than urged by some commenters, but a more targeted set of systems than proposed. In addition, the adopted approach recognizes that some systems pose greater risk than others to the maintenance of fair and orderly markets if they malfunction. To this end, adopted Regulation SCI identifies three broad categories of systems of SCI entities that are subject to the regulation: ''SCI systems,'' ''critical SCI systems,'' and ''indirect SCI systems,'' with each category subject to differing requirements under Regulation SCI.

As discussed more fully below, the adopted definition of ''SCI systems'' includes those systems that directly support six areas that have traditionally been considered to be central to the functioning of the U.S. securities markets, namely trading, clearance and settlement, order routing, market data, market regulation, and market surveillance. SCI systems are subject to all provisions of Regulation SCI, except for certain requirements applicable only to critical SCI systems.

In addition, the Commission is adopting a definition of ''critical SCI systems,'' a subset of SCI systems that are subject to certain heightened resilience and information dissemination provisions of Regulation SCI. Guided significantly by commenters' views on those systems that are most critical, the Commission is defining the term ''critical SCI systems'' as SCI systems that: (1) Directly support functionality relating to: (i) Clearance and settlement systems of clearing agencies; (ii) openings, reopenings, and closings on primary trading markets; (iii) trading halts; (iv) initial public offerings; (v) the provision of consolidated market data (*i.e.,* SIPs); or (vi) exclusively-listed securities; or (2) provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.[210] As more fully discussed below, systems in this category are those that, if they were to experience systems issues, the Commission believes would be most likely to have a widespread and significant impact on the securities markets.

In addition, the Commission is adopting a definition of ''indirect SCI systems,'' in place of the proposed definition of ''SCI security systems.'' ''Indirect SCI systems'' are subject only to the provisions of Regulation SCI relating to security and intrusions. The term ''indirect SCI systems'' is defined to mean ''any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems'' and, if an SCI entity puts in place appropriate security measures, is intended to refer to few, if any, systems of the SCI entity.

b. SCI Systems

SCI Systems Generally

Proposed Rule 1000(a) defined the term ''SCI systems'' to mean ''all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity, whether in production, development, or testing, that directly support trading, clearance and settlement, order routing, market data, regulation, or surveillance.'' [211] After careful consideration of the comments, the Commission is refining the scope of the systems covered by the definition of ''SCI systems.'' As adopted, the term ''SCI systems'' in Rule 1000 means ''all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.''

One commenter generally supported the proposed definition of SCI systems, and stated that the definition should be expanded to include any technology system that has direct market access.[212] In response to this comment, the Commission believes that many systems with direct market access are captured by the adopted definition. However, as

[207] These conditions require Omgeo to, among other things: Provide the Commission with an audit report addressing all areas discussed in the Commission ARP policy statements; provide annual reports prepared by competent, independent audit personnel in accordance with the annual risk assessment of the areas set forth in the ARP policy statements; report all significant systems outages to the Commission; provide advance notice of any material changes made to its electronic trade confirmation and central matching services; and respond and require its service providers to respond to requests from the Commission for additional information relating to its electronic trade confirmation and central matching services, and provide access to the Commission to conduct inspections of its facilities, records and personnel related to such services. *See supra* note 203.

[208] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.2.

[209] *See, e.g.,* NYSE Letter at 10; Joint SROs Letter at 5; Omgeo Letter at 4; KCG Letter at 3; DTCC Letter at 4; FIF Letter at 3; Liquidnet Letter at 3; and OTC Markets Letter at 12–13.

[210] *See* Rule 1000.

[211] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.2.

[212] *See* Lauer Letter at 5.

discussed above, the Commission has determined not to propose to expand the scope of Regulation SCI to include other broker-dealer entities and their systems at this time.[213]

Contrary to the commenter who urged expansion of the proposed definition, many commenters believed the term to be too broad and recommended that it be revised in various ways.[214] These commenters argued that the definition was over-inclusive, with some believing that it could potentially apply to all systems of an SCI entity.

Specifically, several commenters recommended that the definition of SCI systems be revised to include a more limited set of systems than proposed.[215] Commenters advocating this general approach provided various suggestions for the specific standard that they believed should apply. For example, among commenters' recommendations were suggestions that the definition of SCI systems should include only those systems: whose failure or degradation would reasonably be expected to have an adverse material impact on the sound operation of financial markets;[216] that are highly critical to functioning as an SCI entity;[217] that have the potential to impact the protection of securities investors and the maintenance of fair and orderly markets;[218] that directly support trading, clearance and settlement, order routing, market data, regulation, or surveillance in real-time;[219] that support the SCI entity's ''core functions . . . which the SCI entity performs pursuant to applicable Commission regulations;''[220] that are reasonably likely to pose a plausible risk to the markets (namely, systems that route or execute orders, clear and settle trades, or transmit required market data);[221] or that impact the core functions of the overall market, which, according to the commenter, would include exclusive SIPs that transmit market data and systems responsible for primary NMS auction markets that set daily opening and closing prices.[222] In addition, one commenter suggested that the term should be defined as a production system that connects to and is part of the electronic network that comprises the market.[223] This commenter also noted that the definition should distinguish between systems that connect to the markets and those that are used to run a business.[224] Another commenter suggested that, if Regulation SCI were to apply only to exchanges and ATSs, the term should be limited to exchange and ATS systems operated by the entity and should not include, for example, brokerage systems.[225]

The Commission is further focusing the scope of the definition of SCI systems in response to these comments.[226] The Commission is replacing the proposed language referring to ''systems . . . whether in production, development, or testing that directly support trading, clearance and settlement, order routing, market data, regulation, or surveillance'' with the following language: ''systems, with respect to securities, that directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.'' As such, the adopted definition has been limited to apply to production systems that relate to securities market functions, and in particular to those six functions—trading, clearance and settlement, order routing, market data, market regulation, or market surveillance—that traditionally have been considered to be central to the functioning of the U.S. securities markets, as urged by several commenters.[227] The Commission believes that systems providing these six functions may pose a significant risk to the maintenance of fair and orderly markets if their capacity, integrity, reliability, availability or security is compromised, and therefore that they should be covered by the definition of ''SCI systems.''

Although some commenters pointed to the phrase ''directly support'' in the proposed rule as vague and overbroad,[228] the Commission has retained this phrase in the adopted definition. The term ''directly support,'' is retained to acknowledge that systems of SCI entities are complex and highly interconnected and that the definition of SCI systems should not exclude functionality or supporting systems on which the six identified categories of systems rely to remain operational.[229] In response to comment that the definition of SCI systems should distinguish between systems that connect to the markets and those that are used to run a business,[230] the Commission notes that the adopted definition would not include systems ''used to run a business'' if they are not within the six identified categories of market-related production systems and not necessary to their continued functioning. Further, the adopted definition clarifies that SCI systems encompass only those systems that, *with respect to securities,* directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance. The Commission believes

[213] *See supra* Section IV.A.1 (discussing scope of SCI entities covered by Regulation SCI) and *infra* Section IV.E (discussing comments on the inclusion of broker-dealers generally within the scope of Regulation SCI).

[214] *See, e.g.,* NYSE Letter at 10–11; Omgeo Letter at 3–6; MSRB Letter at 7–9; FIF Letter at 3; ICI Letter at 4; BIDS Letter at 15–16; ITG Letter at 5; Liquidnet Letter at 3; CME Letter at 5; DTCC Letter at 3–5; OCC Letter at 3–4; Joint SROs Letter at 5; FINRA Letter at 5–10; SIFMA Letter at 8; Oppenheimer Letter at 3; OTC Markets Letter at 12; and Direct Edge Letter at 2.

[215] *See, e.g.,* NYSE Letter at 10; Joint SROs Letter at 5; Omgeo Letter at 4; KCG Letter at 3; DTCC Letter at 4; FIF Letter at 3; Liquidnet Letter at 3; and OTC Markets Letter at 12–13. *See infra* text accompanying notes 216–225.

[216] *See* Omgeo Letter at 4.

[217] *See* KCG Letter at 3. *See also* ICI Letter at 3 and Oppenheimer Letter at 3 (stating generally that the proposed definitions should be revised to more specifically focus on system events that are truly disruptive to the markets and the systems themselves that are likely to pose a risk to the fair and orderly operation of the markets or participants in the markets).

[218] *See* CME Letter at 5.

[219] *See* Joint SROs Letter at 5. This group of commenters further stated that non-real-time systems should not be included, as they do not warrant the level of oversight and added costs that the regulation imposes.

[220] *See* DTCC Letter at 4.

[221] *See* NYSE Letter at 3, 10. In addition, this commenter added that the key to whether a proposed ''supporting'' function should be included is whether or not it is critical to the proper operation of a core functionality.

[222] *See* OTC Markets Letter at 13.

[223] *See* BIDS Letter at 15–16. Thus, this commenter argued that, for a venue that does not route orders, the reporting of trade executions to the tape should not be enough to qualify such a system as an ''SCI system.''

[224] *See id.*

[225] *See* Liquidnet Letter at 3.

[226] *See supra* notes 215–218, 220–222, and 224–225, and accompanying text. The definition is not limited strictly to real-time systems, however, or those that ''connect to'' and are ''part of the electronic network that comprises the market,'' because those limitations could exclude relevant systems, such as certain market regulation or market surveillance systems operated by or on behalf of an SCI entity, which the Commission views as integral to one or more of the six functions identified in the definition. In response to the commenter requesting that ''brokerage'' systems be excluded from the definition of SCI systems, the Commission notes that the adopted definition of SCI systems applies to systems that directly support the enumerated six functions, operated by or on behalf of an SCI entity. The definition therefore would exclude systems, including brokerage systems, that are not operated by or on behalf of an SCI entity. *See,* respectively, *supra* notes 219 and 223 and accompanying text.

[227] *See supra* notes 219–221 and accompanying text.

[228] *See* OCC Letter at 3; and NYSE Letter at 10.

[229] The Commission notes that it believes that specifying that the definition applies to those systems that ''directly support'' these core functions is necessary so as to not result in a definition that is overly broad and would capture systems that only peripherally or indirectly support these functions. *See generally supra* notes 214–225 and accompanying text (discussing comments that urged revisions to the definition of SCI systems). *See also infra* Section IV.A.2.d (discussing the definition of ''indirect SCI systems'').

[230] *See supra* note 224 and accompanying text.

that this change appropriately responds to one commenter's concerns that the proposed definition would capture systems operated by an SCI entity that have ''practically no relevance or relation to SEC markets'' and suggested that the definition should be revised to include only those systems that would directly impact a market *that was subject to the Commission's jurisdiction.*[231] As a result of this modification, if an SCI SRO does not use its systems to conduct business with respect to securities, its systems would not fall within the definition of ''SCI systems.'' Further, if an SCI entity operates systems for the trading of both futures and securities, only its trading systems for securities would be subject to the requirements of Regulation SCI.[232]

In addition, one commenter urged that the Commission should initially limit the scope of SCI systems to those systems covered by the ARP Policy Statements (trading, clearance and settlement, and order routing) and phase in other types of systems later.[233] The Commission believes that the adopted definition of SCI systems obviates the need for such an approach, as many systems for which the commenter urged a delay in compliance will not be covered by the regulation, as adopted.

SCI Systems: Inclusions and Exclusions

Various commenters objected to specific categories proposed to be included in the definition of SCI systems. First, many commenters opposed the proposed inclusion of development and testing systems in the definition, noting that issues in development and testing systems would have little or no impact on the operations of SCI entities and that such systems are designed to identify and address problems before they are introduced into production systems.[234] Some commenters argued that inclusion of development and testing systems in the definition of SCI systems would subject such systems to more requirements under Regulation SCI than was necessary and noted that certain other provisions of Regulation SCI would necessarily include reporting information to the Commission on such systems, even without their inclusion in the definition of SCI systems.[235] For example, one commenter stated that application of most provisions of Regulation SCI to testing and development systems would provide little benefit, and noted that updates regarding systems in development and material new features of existing systems could instead be done through the semi-annual reports to the Commission under proposed Rule 1000(b)(8).[236] Similarly, one commenter noted that information regarding the status of systems that are in development and testing would be captured in the notices regarding material systems changes under proposed Rule 1000(b)(6) and in the updates under proposed Rule 1000(b)(8).[237] Alternatively, this commenter suggested that the Commission could require that any testing errors be corrected (and such corrections be retested) prior to implementation of those changes in production.[238]

The Commission believes that certain modifications to the elements of the proposed definition of SCI systems are appropriate. First, in response to comments, the reference to development and testing systems in the proposed definition of SCI systems has been deleted.[239] As commenters pointed out, development and testing systems are generally designed to identify and address problems before new systems or systems changes are introduced into production systems and, by their nature, can often experience issues, both intentional and unplanned, during the testing process. The Commission believes that systems issues that occur with respect to such systems are less likely to have a significant impact on the operations of an SCI entity or on the securities markets as a whole than issues occurring with respect to production systems. Further, subjecting these systems to the Commission notification requirements in adopted Rule 1002(b) could have the unintended effect of deterring SCI entities from fully utilizing the testing and development processes to test new systems and systems changes and develop solutions to issues prior to implementation of such systems or changes in production. At the same time, the Commission notes that, in order to have policies and procedures reasonably designed to achieve capacity, integrity, resiliency, availability, and security for SCI systems in accordance with adopted Rule 1001(a), an SCI entity will be required to have policies and procedures that include a program to review and keep current systems development and testing methodology for SCI systems.[240] Accordingly, review of programs relating to systems development and testing for SCI systems is within the scope of Regulation SCI, and an SCI entity should reasonably expect Commission staff to review such processes and systems during the course of its exams and inspections. In addition, the Commission notes that the definition of SCI review in adopted Rule 1000 and corresponding requirements for an annual SCI review in adopted Rule 1003(b) require an assessment of internal control design and effectiveness, which includes development processes.[241] Further, if development and testing systems are not appropriately walled off from production systems, such systems could be captured under the definition of indirect SCI systems as discussed below and be subject to the requirements of Regulation SCI. If an SCI entity's development and testing systems are not walled off from production systems, the SCI entity should consider whether its policies and procedures should specify safeguards to ensure that its personnel can clearly distinguish the development and testing systems from the production systems, in order to avoid inadvertent errors that may result in an SCI event.

Some commenters also opposed the proposed inclusion of regulatory and surveillance systems within the definition of SCI systems or suggested that the Commission refine or clarify the scope of such systems.[242] Some of these

[231] *See* CME Letter at 5.

[232] However, the Commission notes that, if an SCI entity has systems that do not relate to securities, and that have not been properly walled off from its SCI systems for securities, they may be captured by the definition of ''indirect SCI systems'' (as discussed below) and subject to certain requirements of the rule including those relating to security and intrusions standards. *See infra* Section IV.A.2.d (discussing definition of ''indirect SCI systems'').

[233] *See* MSRB Letter at 9.

[234] *See* NYSE Letter at 11; FINRA Letter at 10–11; Omgeo Letter at 5; DTCC Letter at 4; SIFMA Letter at 8; BIDS Letter at 16; MSRB Letter at 7–8; OCC Letter at 5; CME Letter at 6; Joint SROs Letter at 5; and Direct Edge Letter at 2. One commenter qualified this position by stating that, to the extent that a systems issue in a development and testing environment were to give rise to an issue affecting an SCI system, the proposal should apply to that development and testing environment. *See* OCC Letter at 5.

[235] *See* MSRB Letter at 7; and DTCC Letter at 4.

[236] *See* MSRB Letter at 7.

[237] *See* DTCC Letter at 4.

[238] *See id.*

[239] Because the Commission is removing development and testing systems from the definition of SCI systems, the reference to production systems in the definition of SCI systems is also being deleted as it is unnecessary to distinguish between development, testing and production systems within the definition. *See* adopted Rule 1000 (definition of ''SCI systems'').

[240] *See* adopted Rule 1001(a) and discussion in *infra* Section IV.B.1 (discussing the policies and procedures requirement under adopted Rule 1001(a)).

[241] *See* adopted Rule 1000 and 1003(b) and discussion in *infra* Section IV.B.5 (discussing the SCI review requirement). The Commission also notes that development processes include testing processes.

[242] *See* NYSE Letter at 11; BATS Letter at 5; MSRB Letter at 8–9; and FINRA Letter at 7–8.

commenters argued that inclusion of such systems was not necessary because these systems do not operate on a real-time basis or have a real-time impact on trading.[243] Further, one commenter suggested that periodic reporting of material outages or delays in the operation of regulatory and surveillance systems, pursuant to appropriate policies and procedures, would support the goals of Regulation SCI without imposing undue burdens on SCI entities or raising the risk that market participants would purposefully direct order flow to SCI entities experiencing regulatory or surveillance systems issues.[244] Another commenter advocated for replacing the terms ''regulation'' and ''surveillance'' with ''market regulation'' and ''market surveillance,'' respectively, and asked the Commission to clarify the difference between ''regulatory'' and ''surveillance'' systems.[245]

In consideration of these comments, the Commission has determined to limit SCI systems to those systems relating to *market* regulation and *market* surveillance rather than including all regulation and surveillance systems. As proposed, the definition contained no such limitations and could potentially be interpreted to cover systems used for member regulation and member surveillance. The Commission does not believe that inclusion of member regulation or member surveillance systems such as those, for example, relating to member registration, capital requirements, or dispute resolution, would advance the goals of Regulation SCI. Issues relating to such systems are unlikely to have the same level of impact on the maintenance of fair and orderly markets or an SCI entity's operational capability as those systems identified in the definition of SCI systems. The Commission believes that this change will more appropriately capture only those regulatory and surveillance systems that are related to core market functions, such as trading, clearance and settlement, order routing, and market data.[246] Another element of the proposed definition of ''SCI systems'' that some commenters addressed was the inclusion of market data systems. Specifically, one commenter believed that the inclusion of all market data systems was too broad, and argued that only ''systems that directly support 'the transmission of market data as required by the Exchange Act''' should be included, thus limiting the types of market data systems to those relating to consolidated data and excluding those that transmit proprietary market data.[247] Although the term ''market data'' is not defined in Regulation SCI, that term generally refers to price information for securities, both pre-trade and post-trade, such as quotations and transaction reports.[248] In response to the commenter urging that only market data systems relating to consolidated data be included, the term ''market data'' does not refer exclusively to consolidated market data, but includes proprietary market data generated by SCI entities as well. The Commission notes that both consolidated and proprietary market data systems are widely used and relied upon by a broad array of market participants, including institutional investors, to make trading decisions, and that if a consolidated or a proprietary market data feed became unavailable or otherwise unreliable, it could have a significant impact on the trading of the securities to which it pertains, and could interfere with the maintenance of fair and orderly markets. Therefore, systems of an SCI entity directly supporting proprietary market data or consolidated market data are both within the scope of the definition of SCI systems and subject to Regulation SCI. However, the Commission has repeatedly emphasized the importance of consolidated market data to the national market system and the protection of investors[249] and the severe impact of its unavailability was evidenced by the SIP outage in August 2013.[250] Thus, as discussed below, systems directly supporting functionality related to the provision of consolidated market data are distinguished by their inclusion in the definition of ''critical SCI systems.''[251]

Further, one commenter questioned whether the phrase ''market data systems'' was intended to be limited to data-driven systems devoted to price transparency or whether the Commission also intended to include document-based systems devoted to public disclosure.[252] In response to this comment, the Commission notes that systems providing or directly supporting price transparency are within the scope of SCI systems.[253] However, systems solely providing or directly supporting other types of data, such as systems used by market participants to submit disclosure documents, or systems used by SCI entities to make disclosure documents publicly available, are not within the scope of SCI systems, so long as they do not also directly support price transparency.

Several commenters also argued that the term SCI systems should not include systems operated on behalf of an SCI entity by a third party.[254] Some of these commenters pointed to potential difficulties with meeting the requirements of Regulation SCI with regard to third party systems.[255] One

[243] *See* NYSE Letter at 11; and Joint SROs Letter at 5.

[244] *See* NYSE Letter at 11 (citing concerns regarding the potential that dissemination of information regarding issues with regulatory or surveillance systems to members or participants could provide a ''roadmap for violative market behavior'').

[245] *See* FINRA Letter at 7–8.

[246] The Commission notes that Rule 613 of Regulation NMS requires the creation of an NMS plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository. *See* 17 CFR 242.613. *See also* Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (''Consolidated Audit Trail Adopting Release''). Although the consolidated audit trail central repository has not yet been created, the Commission believes that the consolidated audit trail repository will be a market regulation system that falls within the definition of SCI systems, and further that it will be an SCI system of each SCI SRO that is a member of an approved NMS plan under Rule 613, because it will be a facility of each SCI SRO that is a member of such plan. *See* Consolidated Audit Trail Adopting Release, 77 FR at 45774 (stating, ''[T]he central repository will be jointly owned by, and be a facility of, each SRO that is a sponsor of the NMS plan.''). *See also* SCI Proposing Release, *supra* note 13, at 18099 (contemplating inclusion of the consolidated audit trail central repository as an SCI system).

[247] *See* NYSE Letter at 10–11.

[248] *See* Exchange Act Section 11A (15 U.S.C. 78K–1(a)(1)(C)(iii)), granting the Commission authority to assure the availability to brokers, dealers, and investors of ''information with respect to quotations for and transactions in securities''). *See also Regulation of Market Information Fees and Revenues,* Securities Exchange Act Release No. 42208, 64 FR 70613 (December 17, 1999) (describing ''market information'' as information concerning quotations for and transactions in equity securities and options that are actively traded in the U.S. markets).

[249] *See, e.g.,* Concept Release on Equity Market Structure, *supra* note 198; and Regulation NMS Adopting Release, *supra* note 182, at 37503–04.

[250] *See supra* note 32 and accompanying text.

[251] *See infra* Section IV.A.2.c (discussing definition of ''critical SCI systems'').

[252] *See* MSRB Letter at 8–9 (citing its EMMA Primary Market Disclosure Service and EMMA Continuing Disclosure Service system as an example of a document-based system devoted to public disclosure).

[253] With regard to this particular comment, the Commission notes that the specific systems referenced—the RTRS, EMMA Primary Market Disclosure Service, EMMA Continuing Disclosure Service and SHORT System—all include pricing information for securities, and thus would fall within the definition of ''SCI systems.''

[254] *See* Omgeo Letter at 5–6; DTCC Letter at 4; SIFMA Letter at 8–9; BIDS Letter at 16; and BATS Letter at 4. *See also* ITG Letter at 5 (expressing concern about the inclusion of systems of third parties operated on behalf of an SCI entity and systems that are unrelated to the trading operations of an ATS).

[255] *See, e.g.*, Omgeo Letter at 5–6; and BATS Letter at 4 (arguing that it would be difficult for SCI entities to ensure compliance by third party

Continued

commenter specifically suggested that the proposal should be limited to those systems under the control of the SCI entity.[256] Another commenter noted that the SCI entity should instead be responsible for managing these relationships through due diligence, contract terms, and monitoring of third party performance.[257] One commenter also requested that the Commission clarify how SCI entities should comply with the oversight of vendor systems as part of Regulation SCI.[258]

Although several commenters argued that the term SCI systems should not include third-party systems, the Commission continues to believe that, if a system is operated *on behalf of* an SCI entity and directly supports one of the six key functions listed within the definition of SCI system, it should be included as an SCI system subject to the requirements of Regulation SCI. The Commission believes that any system that directly supports one of the six functions enumerated in the definition of SCI system is important to the functioning of the U.S. securities markets, regardless of whether it is operated by the SCI entity directly or by a third party. The Commission believes that permitting such systems to be excluded from the requirements of Regulation SCI would significantly reduce the effectiveness of the regulation in promoting the national market system by ensuring the capacity, integrity, resiliency, availability, and security of those systems important to the functioning of the U.S. securities markets. Further, if the definition did not include systems operated on behalf of an SCI entity, the Commission is concerned that some SCI entities might be inclined to outsource certain of their systems solely to avoid the requirements of Regulation SCI, which would further undermine the goals of Regulation SCI. The Commission agrees with the comment that an SCI entity should be responsible for managing its relationship with third parties operating systems on behalf of the SCI entity through due diligence, contract terms, and monitoring of third party performance. However, the Commission believes that these methods may not be sufficient in all cases to ensure that the requirements of Regulation SCI are met for SCI systems operated by third parties. The fact that they might be sufficient some of the time is therefore not a basis for excluding these systems from the definition of SCI systems. Instead, if an SCI entity determines to utilize a third party for an applicable system, it is responsible for having in place processes and requirements to ensure that it is able to satisfy the requirements of Regulation SCI for systems operated on behalf of the SCI entity by a third party. The Commission believes that it would be appropriate for an SCI entity to evaluate the challenges associated with oversight of third-party vendors that provide or support its applicable systems subject to Regulation SCI. If an SCI entity is uncertain of its ability to manage a third-party relationship (whether through due diligence, contract terms, monitoring, or other methods) to satisfy the requirements of Regulation SCI,[259] then it would need to reassess its decision to outsource the applicable system to such third party.[260] For example, if a third-party vendor is unwilling to disclose to an SCI entity information regarding the vendor's intellectual property or proprietary system that the SCI entity believes it needs to satisfy the requirements of Regulation SCI, as some commenters suggested might be the case, an SCI entity will need to reassess its relationship with that vendor, because the vendor's unwillingness to provide necessary information or other assurances would not exclude the outsourced system from the definition of SCI systems. Accordingly, the definition of SCI system, as adopted in Rule 1000, retains the reference to systems operated ''on behalf of'' SCI entities.

Finally, some commenters asked for clarification on miscellaneous aspects of the definition. For example, one commenter requested that the Commission clarify that the definition of SCI system for purposes of Regulation SCI is separate and distinct from the definition of a facility set forth in Section 3(a)(2) of the Exchange Act.[261] The Commission notes that the term ''SCI system'' under Regulation SCI is distinct from the term ''facility'' in Section 3(a)(2) of the Exchange Act.[262] Because a facility of an exchange would only fall within the definition of ''SCI systems'' if it is a system that directly supports any one of the six functions provided in the definition of ''SCI systems,'' not all systems that are facilities of an exchange will be SCI systems. For example, as noted in the SCI Proposal, the definition of SCI systems would apply to systems of exchange-affiliated routing brokers that are facilities of national securities exchanges.[263] But a system used for member regulation that may meet the definition of a facility under the Exchange Act, would not be within the scope of the definition of ''SCI systems.''

Another commenter requested confirmation that internal systems are excluded from the definition of SCI system.[264] The Commission notes that the definition of ''SCI system'' does not differentiate between ''internal systems'' and those systems accessed by market participants or other outside parties.[265] The Commission notes that, while some internal systems of an SCI entity may not meet the definition of SCI system, it does not believe that that all internal systems (as described by this commenter) would be outside of the scope of the definition of SCI system.[266]

Other commenters advocated that SCI entities should be permitted to conduct their own risk-based assessment to determine which of their systems should be considered SCI systems.[267] One commenter noted that SCI entities should be required to develop and maintain an established methodology for identifying which systems qualify as SCI systems,[268] while other commenters advocated for coordination with the Commission in establishing criteria to be used in conducting such risk-based assessments or review by the Commission of an SCI entity's own risk-based assessment.[269] The Commission has carefully considered these comments and generally agrees that

vendors absent their willingness to disclose to SCI entities highly detailed information about their intellectual property and proprietary systems).

[256] *See* SIFMA Letter at 9.

[257] *See* BIDS Letter at 16.

[258] *See* FIF Letter at 3.

[259] *See* BIDS Letter at 16 (suggesting these methods of managing third-party relationships to comply with the proposed rule).

[260] *See* FIF Letter at 3 and FINRA Letter at 22–23 (requesting Commission guidance on how an SCI entity should manage third-party relationships in the context of adopted Regulation SCI). *See also infra* notes 851–852 and accompanying text (discussing comments on the risk of noncompliance by an SCI entity in connection with reporting SCI events and material systems changes due to challenges posed by third-party systems).

[261] *See* NYSE Letter at 10.

[262] *See* 15 U.S.C. 78c3(a)(2).

[263] *See* Proposing Release, *supra* note 13, at 18099.

[264] *See* FINRA Letter at 10.

[265] *See* adopted Rule 1000 (definition of SCI systems).

[266] In addition, the Commission notes that, while certain internal systems may not be ''SCI systems,'' they may instead meet the definition of ''indirect SCI systems'' under adopted Rule 1000, if they are not properly walled off from SCI systems. However, as discussed below, the Commission is clarifying the meaning of this defined term to note that systems that are effectively physically or logically separated from SCI systems would be outside of the definition of indirect SCI systems and thus outside of the scope of Regulation SCI. *See infra* Section IV.A.2.d (discussing the definition of ''indirect SCI systems'').

[267] *See* DTCC Letter at 3–5; Omgeo Letter at 5–6; and OCC Letter at 3–4.

[268] *See* Omgeo Letter at 5.

[269] *See* OCC Letter at 3–4; and DTCC Letter at 3–4.

certain systems pose greater risk to the markets in the event of a systems issue and are of paramount importance to the functioning of the U.S. securities markets. Rather than include only those in the definition of SCI systems, the Commission believes that it is more prudent to instead identify these systems as ''critical SCI systems'' subject to certain heightened obligations. Further, adopted Rule 1001(a) requiring SCI entities to have policies and procedures *reasonably designed* to ensure that their systems have *adequate* levels of capacity, integrity, resiliency, availability, and security is consistent with a risk-based approach.[270] Specifically, as discussed in further detail below, an SCI entity may tailor its policies and procedures based on the relative criticality of a given SCI system to the SCI entity and to the securities markets generally.[271]

c. Critical SCI Systems

As discussed above, in response to comments, the Commission is incorporating a risk-based approach in certain aspects of Regulation SCI.[272] To that end, the Commission is adopting a definition of ''critical SCI systems'' to designate SCI systems that the Commission believes should be subject to the highest level of requirements. As a subset of ''SCI systems,'' ''critical SCI systems'' are subject to the same provisions as ''SCI systems,'' except that critical SCI systems are subject to certain heightened resilience and information dissemination provisions of Regulation SCI. In these respects, critical SCI systems are subject to an increased level of obligation as compared to other SCI systems.[273]

Rule 1000 defines ''critical SCI systems'' as ''any SCI systems of, or operated by or on behalf of, an SCI entity that: (1) Directly support functionality relating to: (i) Clearance and settlement systems of clearing agencies; [274] (ii) openings, reopenings, and closings on the primary listing market; (iii) trading halts; (iv) initial public offerings; (v) the provision of consolidated market data; or (vi) exclusively-listed securities; or (2) provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.''

As noted above, many commenters advocated for a risk-based approach to Regulation SCI and either suggested that only the entities or systems that pose the greatest risk to the markets should be within the scope of the regulation or, alternatively, that the requirements of Regulation SCI be tailored to the specific risk-profile of a particular entity or particular system.[275] While the Commission disagrees with commenters who suggested that Regulation SCI should apply only to ''critical systems,'' as it believes that these are not the only systems that could pose a significant risk to the securities markets, the Commission believes that it is appropriate to hold systems that pose the greatest risk to the markets if they malfunction to higher standards and more stringent requirements under Regulation SCI. Recent events have also demonstrated the importance of certain critical systems functionality, including those that represent ''single points of failure'' to the securities markets, and the need for more robust market infrastructure, particularly with regard to critical market systems.[276]

The Commission believes that the adoption of the definition of ''critical SCI systems'' and heightened requirements for such systems recognizes that some systems are critical to the continuous and orderly functioning of the securities markets more broadly and, as such, ensuring their capacity, integrity, resiliency, availability, and security is of the utmost importance. Therefore, as discussed further below, the Commission believes that it is appropriate for such critical SCI systems to be held to heightened requirements (as compared to those for SCI systems) related to capacity, integrity, resiliency, availability, and security generally; rapid recovery following wide-scale disruptions; and disclosure of SCI events. The Commission believes that the definition of critical SCI systems is appropriately designed to identify those SCI systems whose functions are critical to the operation of the markets, including those systems that represent potential single points of failure in the securities markets. Systems in this category are those that, if they were to experience systems issues, the Commission believes would be most likely to have a widespread and significant impact on the securities markets.

The first prong of the definition identifies six specific categories of systems that the Commission believes are the most critical to the securities markets, and the most likely to have widespread and significant market impact should a systems issue occur. These are: clearance and settlement systems of clearing agencies; openings, reopenings, and closings on the primary listing market; trading halts; initial public offerings; the provision of consolidated market data (*i.e.,* SIPs); and exclusively-listed securities.

In the context of suggesting the adoption of a risk-based approach for Regulation SCI, some commenters identified those functions that they believed were most critical to the functioning of the markets. Among those identified were clearance and settlement, opening and closing auctions, IPO auctions, the provision of consolidated market data by the SIPs; and trading of exclusively-listed securities.[277] The Commission agrees with commenters who characterized these categories of systems as critical. In addition, as discussed below, the Commission believes that systems that directly support functionality relating to

[270] *See* adopted Rule 1001(a). *See also infra* Section IV.B.1 (discussing policies and procedures for operational capability).

[271] *See infra* Section IV.B.1.a–b (discussing the use of risk-based considerations to tailor policies and procedures for operational capability).

[272] *See supra* notes 53–56 and accompanying text (discussing comments on a risk-based approach).

[273] *See infra* Sections IV.B.1.b and IV.B.3.d (discussing the two-hour resumption goal for ''critical SCI systems'' and information dissemination requirement for ''major SCI events,'' respectively).

[274] ''Clearance and settlement systems of clearing agencies'' includes systems of registered clearing agencies and exempt clearing agencies subject to ARP. *See* Rule 1000 (definition of ''exempt clearing agency subject to ARP,'' which by its terms would also include an entity that has received from the Commission an exemption from registration as a clearing agency under Section 17A of the Act, and whose exemption contains conditions that relate to ARP, or any Commission regulation that supersedes or replaces such policies, including Regulation SCI).

[275] *See supra* notes 53–56 and 216–222 and accompanying text (discussing comments on a risk-based approach and limiting SCI systems to only core or critical systems).

[276] *See supra* Section II.B (describing recent events involving systems-related issues). In particular, the Nasdaq SIP incident, which caused a disruption in the dissemination of consolidated market data in the equity markets and led to a trading halt in all Nasdaq-listed stocks for several hours, confirmed that disruptions in systems that represent single points of failure can have a major and detrimental impact across an entire national market system.

[277] *See, e.g.,* Direct Edge Letter at 2 (citing, among others, SIPs and clearance and settlement systems as essential to continuous market-wide operation); KCG Letter at 2–3 (identifying opening and closing auctions, IPO auctions, trading of exclusively-listed options, market data consolidators, and settlement and central clearing as ''single points of failure'' that should be subject to heightened regulatory requirements); and SIFMA Letter at 4 (stating that highly critical functions should include primary listing exchanges, trading exclusively listed securities, SIPs, clearance and settlement, distribution of unique post-trade transparency information, and real-time market surveillance). Although these commenters were urging that Regulation SCI apply only to these critical systems, as explained above, the Commission believes that such an approach would be too limited.

trading halts should be included in the definition of critical SCI systems.

With respect to ''clearance and settlement systems of clearing agencies,'' the clearance and settlement of securities is fundamental to securities market activity.[278] Clearing agencies perform a variety of services that help ensure that trades settle on time and at the agreed upon terms. For example, clearing agencies compare transaction information (or report to members the results of exchange comparison operations), calculate settlement obligations (including net settlement), collect margin (such as initial and variation margin), and serve as a depository to hold securities as certificates or in dematerialized form to facilitate automated settlement. Because of their role, clearing agencies are critical central points in the financial system. A significant portion of securities activity flows through one or more clearing agencies. Clearing agencies have direct links to participants and indirect links to the customers of participants. Clearing agencies are also linked to each other through common participants and, in some cases, by operational processes. Safe and reliable clearing agencies are essential not only to the stability of the securities markets they serve but often also to payment systems, which may be used by a clearing agency or may themselves use a clearing agency to transfer collateral.[279] The safety of securities settlement arrangements and post-trade custody arrangements is also critical to the goal of protecting the assets of investors from claims by creditors of intermediaries and other entities that perform various functions in the operation of the clearing agency.[280] Investors are more likely to participate in markets when they have confidence in the safety and reliability of clearing agencies as well as settlement systems.[281] Accordingly, the Commission believes ''clearance and settlement systems of clearing agencies'' are appropriate for inclusion in the definition of critical SCI systems.[282]

Similarly, reliable openings, reopenings, and closings on primary listing markets are key to the establishment and maintenance of fair and orderly markets. NYSE and Nasdaq, for example, each have an opening cross for their listed securities that solicits trading interest and generates a single auction price that attracts widespread participation and is relied upon as a benchmark by other markets and market participants.[283] Similar processes are used, and heavy levels of participation typically are generated, at the primary listing markets in the reopening cross that follows a trading halt.[284] Closing auctions at the primary listing markets also attract widespread participation, and the closing prices they establish are commonly used as benchmarks, such as to value derivative contracts and generate mutual fund net asset values. As such, during these critical trading periods, market participants rely on the processes of the primary listing markets to effect transactions, and establish benchmark prices that are used in a wide variety of contexts so that the unavailability or disruption of systems directly supporting the opening, reopening and closing processes on the primary listing markets could have widespread detrimental effects.[285]

In addition, the Commission believes that systems directly supporting functionality relating to trading halts [286] are essential to the orderly functioning of the securities markets, and therefore should be included in the definition of critical SCI systems. In the event a trading halt is necessary, it is essential that the systems responsible for communicating the trading halt—typically maintained by the primary listing market—are robust and reliable so that the trading halt is effective across the U.S. securities markets. For example, when there is material ''news pending'' with respect to an issuer, it is the responsibility of the primary listing market to call a regulatory halt by generating a halt message which, when received by other trading centers, requires them to cease trading the security.[287] Similar responsibilities are placed on the primary listing market with respect to calling trading halts under the National Market System Plan to Address Extraordinary Market Volatility, as well as on plan processors to disseminate this information to the public.[288] Thus, systems which communicate information regarding trading halts provide an essential service in the U.S. markets and, should a systems issue occur affecting the ability of an SCI entity to provide such notifications, the fair and orderly functioning of the securities markets may be significantly impacted.

Companies offer shares of capital stock to the general public for the first time through the IPO process, in which the primary listing market initiates public trading in a company's shares. The IPO is conducted exclusively on that exchange, and secondary market trading cannot commence on any other exchange until the opening trade is printed on the primary listing market.[289] As such, the Commission believes that an exchange's systems that directly support the IPO process and the initiation of secondary market trading are a critical element of the capital formation process and the effective functioning of the securities markets. The Commission believes that these

[278] *See* Clearing Agency Standards Release, *supra* note 76, at 66220, 66264.

[279] *See* Clearing Agency Standards Release, *supra* note 76, at 66264.

[280] *See id.*

[281] *See id.*

[282] The Commission notes that systems of SCI entities other than clearing agencies that are used in connection with the clearance and settlement of trades are not captured by the definition of ''critical SCI systems,'' but rather would fall within the definition of ''SCI systems,'' as discussed above. *See supra* Section IV.2. The Commission believes that such systems of other SCI entities, such as SROs and ATSs, do not provide the same critical functions or pose the same level of risk to the market as the clearance and settlement systems of clearing agencies as discussed above.

[283] *See* Nasdaq Rule 4752 (Opening Process) and NYSE Rules 115A (Orders at the Opening) and 123D (Openings and Halts in Trading).

[284] *See, e.g.*, Nasdaq Rule 4753 (Nasdaq Halt and Imbalance Crosses) and NYSE Rules 115A (Orders at the Opening) and 123D (Openings and Halts in Trading).

[285] For example, press reports indicated that the decision to close the New York Stock Exchange in the wake of Superstorm Sandy, and the resulting lack of availability of the NYSE opening and closing prices, was a significant contributing cause of the unscheduled closure of the U.S. national securities exchanges. *See, e.g.,* Jenny Strasburg, Jonathan Cheng, and Jacob Bunge, ''Behind Decision to Close Markets,'' Wall St. J., October 29, 2012. *See also* Proposing Release, *supra* note 13, at 18091 (discussing the effects of Superstorm Sandy on the securities markets). While other exchanges outside of the path of Superstorm Sandy did not experience the same risks to their electronic trading systems as the NYSE and could have otherwise opened for business, the risk that opening and closing prices might not be set by NYSE for its listed securities contributed to the consensus recommendation of market participants that the markets remain closed. *See* Jenny Strasburg, Jonathan Cheng, and Jacob Bunge, ''Behind Decision to Close Markets,'' Wall St. J., October 29, 2012.

[286] For purposes of clarity, the Commission notes that the term ''trading halts'' as used in this context is intended to capture market-wide halts, such as regulatory halts, rather than a halt to trading for securities on a particular market (for example, caused by a systems issue specific to that market).

[287] *See, e.g.*, CTA Plan Section IX(a), available at: *http://www.nyxdata.com/cta*; National Market System Plan To Address Extraordinary Market Volatility, Section VII (''Limit Up/Limit Down Plan''); NYSE Arca Rule 7.12, BATS Rule 11.18, and EDGA Rule 11.14. *See also* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (Order Approving, on a Pilot Basis, the National Market System Plan To Address Extraordinary Market Volatility) (''Limit Up/Limit Down Plan Approval Order'').

[288] *See* Limit Up/Limit Down Plan, *supra* note 287 and Limit Up/Limit Down Plan Approval Order, *supra* note 287.

[289] *See* Rule 12f–2 under the Exchange Act, 17 CFR 240.12f–2 (providing that a national securities exchange may extend unlisted trading privileges to a security when at least one transaction in the security has been effected on the national securities exchange upon which the security is listed and the transaction has been reported pursuant to an effective transaction reporting plan).

systems, which are the sole responsibility of the primary listing market, can adversely affect not only the IPO of a particular issuer, but may also result in significant monetary losses and harm to investors if they fail.[290] As noted in the SCI Proposal, systems issues affecting the two recent high-profile IPOs highlighted how disruptions in IPO systems can have a significant impact on the market.[291]

Systems directly supporting the provision of consolidated market data are also critical to the functioning of U.S. securities markets and represent potential single points of failure in the delivery of important market information. When Congress mandated a national market system in 1975, it emphasized that the systems for collecting and distributing consolidated market data would be central features of the national market system.[292] Further, one of the findings of the recent report by the staffs of the Commission and the CFTC on the market events of May 6, 2010 was that ''fair and orderly markets require that the standards for robust, accessible, and timely market data be set quite high.'' [293] Accurate, timely, and efficient collection, processing, and dissemination of consolidated market data provides the public with ready access to a comprehensive and reliable source of information for the prices and volume of any NMS stock at any time during the trading day.[294] This information helps to ensure that the public is aware of the best displayed prices for a stock, no matter where they may arise in the national market system.[295] It also enables investors to monitor the prices at which their orders are executed and serves as a data point that helps them to assess whether their orders received best execution.[296]

Finally, systems directly supporting functionality relating to exclusively-listed securities represent single points of failure in the securities markets, because exclusively-listed securities, by definition, are listed and traded solely on one exchange.[297] As such, a trading disruption on the exclusive listing market necessarily will disrupt trading by all market participants in those securities.[298]

The second prong of the definition is a broader catch-all provision intended to capture any SCI systems, beyond those specifically identified within the first prong of the definition, that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets. The Commission is not aware of any SCI systems that would fall under this prong of the critical SCI systems definition at this time, and notes that this prong of the definition is intended to account for further technology advancements and the continual evolution of the securities markets, in recognition that such developments could result in additional or new types of systems that would, similar to the enumerated categories of systems in the first prong of the definition, become so critical to the continuous and orderly functioning of the securities markets such that they should be subject to the requirements of Regulation SCI imposed on those systems specifically enumerated in the first prong of the definition.

The Commission also notes that the definition applies to those systems ''of, or operated by or on behalf of, an SCI entity.'' This language mirrors the language in the definitions of SCI system and indirect SCI system, and as discussed above, is intended to cover systems that are third-party systems operated on behalf of SCI entities.[299]

d. Indirect SCI Systems (Proposed as ''SCI Security Systems'')

Proposed Rule 1000 defined the term ''SCI security systems'' to mean ''any systems that share network resources with SCI systems that, if breached, would be reasonably likely to pose a security threat to SCI systems.'' [300] As adopted, Regulation SCI includes the new term ''indirect SCI systems,'' in place of the proposed term ''SCI security systems.'' The term ''indirect SCI systems'' is defined to mean ''any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.''

As an initial matter, the Commission has determined to replace the proposed term ''SCI security systems'' with the adopted term ''indirect SCI systems'' because it believes that the latter term, in using the word ''indirect,'' better reflects that it is intended to cover non-SCI systems only if they are not appropriately secured and segregated from SCI systems, and therefore could indirectly pose risk to SCI systems.[301] The adopted definition of indirect SCI systems includes systems ''of, or operated by or on behalf of'' of an SCI entity that, ''if breached, would be reasonably likely to pose a security threat to SCI systems.'' As discussed below, in response to comment that the proposed term would cover too many systems unrelated to SCI systems, the adopted term excludes the phrase ''share network resources.''

One commenter expressly supported the definition of SCI security systems and urged that it be expanded to include any technology system that has direct market access.[302] In response to this comment, the Commission notes that the adopted definition includes any technology system of, or operated by or on behalf of an SCI entity, that has direct market access if that system meets the definition's test: whether a breach of

[290] *See, e.g., supra* note 36 (discussing the losses associated with Nasdaq's Facebook IPO).

[291] Specifically, in March 2012, BATS announced that a ''software bug'' caused BATS to shut down the IPO of its own stock, and in May 2012, issues with Nasdaq's trading systems delayed the start of trading in the IPO of Facebook, Inc. and some market participants experienced delays in notifications of whether orders had been filled. *See* Proposing Release, *supra* note 13, at 18089; and Securities Exchange Act Release No. 69655, In the Matter of The NASDAQ Stock Market, LLC and NASDAQ Execution Services, LLC (settled action: May 29, 2013), available at: *http://www.sec.gov/litigation/admin/2013/34-69655.pdf.* Nasdaq and Nasdaq Execution Services, LLC consented to an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Sanctions and a Cease-and-Desist Order.

[292] See H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 93 (1975). *See also* Concept Release on Equity Market Structure, *supra* note 4, at 3600, and Proposing Release, *supra* note 13, at 18108 (each discussing the importance of consolidated market data).

[293] *See* Findings Regarding The Market Events Of May 6, 2010, Report Of The Staffs Of The CFTC And SEC To The Joint Advisory Committee On Emerging Regulatory Issues, September 30, 2010, at 8 (''May 6 Staff Report'').

[294] *See id.*

[295] *See id.*

[296] *See id.* Also, as discussed above, the recent Nasdaq SIP disruption demonstrated that the availability, accuracy, and reliability of consolidated market data is currently central to the functioning of the securities markets, and systems issues affecting such systems can result in major disruptions to the national market system, undermining the maintenance of fair and orderly markets.

[297] As noted above, commenters identified the systems supporting the trading of exclusively-listed securities as representing critical points of failure or critical functionality in the securities markets. *See, e.g.*, KCG Letter at 2–3; and SIFMA Letter at 4.

[298] For example, as noted above, in April 2013, CBOE delayed the opening of trading on its exchange for over three hours due to an internal ''software bug,'' preventing investors from trading in those products that are singly-listed on CBOE, including options on the S&P 500 Index and the VIX. *See supra* note 28 and accompanying text.

[299] *See supra* notes 254–260 and accompanying text.

[300] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.2.

[301] The Commission also believes that eliminating the word ''security'' from the defined term will help clarify that the term is not limited to systems relating only to security of the SCI entity and its systems (*e.g.*, firewalls, VPNs).

[302] *See* Lauer Letter at 5.

that system would be reasonably likely to pose a security threat to SCI systems.

This commenter also suggested that the Commission additionally require SCI entities to have independent security audits performed and allow the auditor to have the ability to define which systems should be included and which can be safely excluded.[303] The Commission is not requiring ''independent security audits'' to determine which systems would fall within the definition of indirect SCI system as suggested by this commenter,[304] because the Commission believes its adopted rule requiring an annual SCI review addresses the commenter's request. The Commission notes that the adopted annual SCI review requirement requires that such review be performed by objective, qualified personnel, and that it include an assessment of logical and physical security controls for SCI systems and indirect SCI systems. The Commission believes that an SCI entity is generally in the best position to assess in the first instance which of its systems may fall within the definition of indirect SCI systems, and that having an independent third party audit to make that determination should be optional rather than required at this time.

Contrary to the commenter urging expansion of the proposed definition of SCI security systems, many commenters argued that the proposed definition was overbroad,[305] with several of these same commenters suggesting that the term be deleted from the rule entirely.[306] The Commission believes that Regulation SCI warrants inclusion of a definition of indirect SCI systems because an issue or systems intrusion with respect to a non-SCI system still could cause or increase the likelihood of an SCI event with respect to an SCI entity's SCI systems.[307] In particular, because systems that are not adequately walled off from SCI systems may present potential entry points to an SCI entity's network and thus represent potential vulnerabilities to SCI systems, the Commission believes that it is important that the provisions of Regulation SCI relating to security standards and systems intrusions apply to such systems (*i.e.*, indirect SCI systems).

Many commenters objecting to the proposed definition as too broad addressed particular elements of the proposed definition of SCI security systems or provided specific recommendations for modifications or limitations to the definition.[308] For example, some commenters criticized the use of the phrase ''share network resources,'' noting that it was vague and too broad, potentially encompassing almost any system of an SCI entity.[309] Similarly, one commenter stated that the definition of SCI security system should include only systems that ''directly'' share network resources with an SCI system.[310] One commenter argued that the definition should only include those systems that are materially and directly connected to the trading operations of an SCI entity.[311] Several commenters recommended that systems that are logically and/or physically separated from SCI systems should be excluded from the definition.[312] Some commenters qualified this position by stating that such systems should be excluded, for example, as long as SCI entities monitor those systems for security breaches and have the ability to shut the system off if they detect a security breach;[313] or provided that the separation is routinely monitored and has appropriate risk controls in place and the system is ''air gapped'' (*i.e.*, has no point of entry) from the public internet.[314] One commenter believed that the definition should exclude any system with ''compensatory controls in place,'' which it stated would protect and secure SCI systems from vulnerabilities that could arise from shared network links.[315] Another commenter asked for greater clarity on the extent to which SCI security systems that are isolated from production, such as email and intranet sites, raise security issues that are within the scope of the proposal.[316]

After careful consideration of these comments, the Commission believes that inclusion of the phrase ''share network resources'' in the proposed definition could be interpreted in a manner that would include almost any system that is part of an SCI entity's network. In response to commenters who expressed concern about the breadth of the proposed definition, the Commission has determined to eliminate the phrase ''share network resources'' from the definition, so that the adopted result-oriented test depends on whether a system ''if breached, would be reasonably likely to pose a security threat to SCI systems.'' As a result, the inquiry into whether any system is an indirect SCI system will depend on whether it is effectively physically or logically separated from SCI systems. Systems that are adequately physically or logically separated (*i.e.*, isolated from SCI systems, such that they do not provide vulnerable points of entry into SCI systems) will not fall within the definition of indirect SCI systems.

The Commission believes that having adequate separation and security controls should protect SCI systems from vulnerabilities caused by other systems. To the extent that non-SCI systems are sufficiently walled off from SCI systems using appropriate security measures, and thus are not reasonably likely to pose a security threat to SCI systems if breached, they would not be included in the definition of indirect SCI systems, and thus would be outside of the scope of Regulation SCI.

The Commission notes that the definition of indirect SCI systems will not include any systems of an SCI entity for which the SCI entity establishes reasonably designed and effective controls that result in SCI systems being logically or physically separated from such non-SCI systems. Thus, the universe of an SCI entity's indirect SCI systems is in the control of each SCI entity, and SCI entities should reasonably expect Commission staff to assess its security controls around SCI systems in connection with an inspection or examination for compliance with Regulation SCI. If these controls are not present or are not reasonably designed, the applicable non-SCI systems would be within the scope of the definition of indirect SCI systems and subject to the security

[303] *See id.*

[304] *See* adopted Rule 1000 (definition of ''SCI review'') and *infra* Section IV.B.5 (discussing the SCI review requirement).

[305] *See, e.g.*, NYSE Letter at 11; Omgeo Letter at 6; MFA Letter at 6 (noting specifically that the definition could be read to extend to broker-dealers or other third parties); SIFMA Letter at 8; ITG Letter at 5, 12; BIDS Letter at 16–17; MSRB Letter at 7; OCC Letter at 4; FINRA Letter at 12–13; CME Letter at 6; DTCC Letter at 5; Oppenheimer Letter at 3; and Direct Edge Letter at 3.

[306] *See, e.g.*, NYSE Letter at 11; Omgeo Letter at 6; MFA Letter at 6; SIFMA Letter at 2; FIF Letter at 3; LiquidPoint Letter at 3; KCG Letter at 18; OCC Letter at 3; and Joint SROs Letter at 5.

[307] *See* Proposing Release, *supra* note 13, at 18099.

[308] *See* NYSE Letter at 12; BATS Letter at 5–6; ISE Letter at 7–8; BIDS Letter at 16–17; SROs Letter at 15; Direct Edge Letter at 3; FINRA Letter at 13; ISE Letter at 8; and DTCC Letter at 5; and ITG Letter at 12.

[309] *See* NYSE Letter at 12; BATS Letter at 5; and ISE Letter at 7–8.

[310] *See* BIDS Letter at 16–17.

[311] *See* ITG Letter at 12 (stating that its suggested approach would, in its case, cover systems for order handling and execution, processing of market data, transaction reporting, and clearing and settlement of trades).

[312] *See, e.g.*, Joint SROs Letter at 15 (stating that the term ''SCI security systems'' should be deleted, but if retained, should exclude those systems that are physically and logically separated); BATS Letter at 5–6; Direct Edge Letter at 3; FINRA Letter at 13; ISE Letter at 8; and DTCC Letter at 5.

[313] *See* BATS Letter at 5–6.

[314] *See* Direct Edge Letter at 3.

[315] *See* FINRA Letter at 13.

[316] *See* ISE Letter at 8.

standards and systems intrusions provisions of Regulation SCI.

Some commenters recommended that, rather than including SCI security systems in the scope of the regulation, the Commission should instead require SCI entities to establish policies and procedures designed to ensure the security of their systems.[317] According to these commenters, such an approach would require an evaluation of the risks posed to SCI systems by non-SCI systems. As noted, the Commission believes that the adopted definition of ''indirect SCI systems'' will effectively require SCI entities to evaluate the risks posed to SCI systems by non-SCI systems. However, the Commission believes that the adopted approach will incentivize SCI entities to seek to have in place strong security controls around SCI systems. As noted, if an SCI entity designs and implements security controls so that none of its non-SCI systems would be reasonably likely to pose a security threat to SCI systems, then it will have no indirect SCI systems. If, however, an SCI entity does have indirect SCI systems, then certain provisions of Regulation SCI will apply to those indirect SCI systems.[318] The Commission believes this approach to indirect SCI systems is more appropriate than the policies and procedures approach suggested by some commenters because the Commission believes that its approach is more comprehensive as it includes, for example, the requirements to take corrective action, provide notifications to the Commission, and disseminate information for certain SCI events relating to indirect SCI systems which, by definition, if breached, would be reasonably likely to pose a security threat to SCI systems. Another commenter stated that a more precise definition of SCI security systems is important and that it would be valuable for the Commission to work with representatives within the securities industry to collectively craft the most appropriate definition that will ensure that critical security systems are captured.[319] In crafting the definition, the Commission has taken into account comments received, with such commenters representing a wide variety of types of participants in the securities markets, and believes the adopted definition of indirect SCI systems, along with the definition of SCI systems, is responsive to a broad range of commenters' concerns.[320]

Another commenter suggested that the definition be limited to systems ''of, or operated by or on behalf of, an SCI entity,'' noting that the definition of SCI security systems should have parallel construction to the definition of ''SCI systems'' and without this phrase, SCI entities would be tasked inappropriately with controlling for systems outside of their effective control.[321] As noted, the adopted definition of ''indirect SCI systems'' applies to those systems ''of, or operated by or on behalf of, an SCI entity.'' As a result, the adopted definition of indirect SCI systems provides (as is the case for SCI systems) that systems ''of, or operated by or on behalf of'' an SCI entity, are included in the definition of indirect SCI systems if their breach would be reasonably likely to pose a security threat to SCI systems.[322] The Commission believes that the addition of this language is warranted to make clear that security of SCI systems is not limited solely to threats from systems operated directly by the SCI entity. If it were, outsourced systems of SCI entities would not be subject to the requirements of Regulation SCI, which would undermine the goals of Regulation SCI.

As discussed in further detail below, unlike SCI systems, those systems meeting the definition of ''indirect SCI systems'' will only be subject to certain provisions of Regulation SCI. Specifically, references to ''indirect SCI systems'' are included in the definitions of ''responsible SCI personnel,'' ''SCI review,'' and ''systems intrusion'' in adopted Rule 1000.[323] Rule 1001(a), requiring reasonably designed policies and procedures to ensure operational capability, will apply to indirect SCI systems only for purposes of security standards.[324] In addition, Rule 1002, which relates to an SCI entity's obligations with regard to SCI events, will apply to indirect SCI systems only with respect to systems intrusions.[325] Further, pursuant to Rule 1003(a), the obligations related to systems changes will apply to material changes to the *security* of indirect SCI systems.[326] In addition, the requirements regarding an SCI review will apply to indirect SCI systems.[327] Finally, Rules 1005 through 1007, relating to recordkeeping and electronic filing and submission of Form SCI, respectively, will also apply to indirect SCI systems.[328] The Commission believes that it is appropriate to subject indirect SCI systems to only these specified provisions because the Commission believes that the primary risk posed by indirect SCI systems is that they may serve as vulnerable entry points to SCI systems. The Commission's objective with respect to indirect SCI systems is to guard against a non-SCI system being breached in a manner that threatens the security of any SCI system. The Commission believes that its approach to defining indirect SCI systems, and requiring SCI entities to consider, address, and report on security changes and intrusions into systems where vulnerabilities have been identified, is tailored to meet this objective.

3. SCI Events

Regulation SCI specifies the types of events—*i.e.,* SCI events—that give rise to certain obligations under the rule, including taking corrective action, reporting to the Commission, and disseminating information about such SCI events.[329] Proposed Rule 1000(a) defined the term ''SCI event'' as ''an event at an SCI entity that constitutes: (1) A systems disruption; (2) a systems compliance issue; or (3) a systems intrusion.'' [330] The Commission is adopting the definition of ''SCI event'' as proposed.

Many commenters believed that the proposed definition of ''SCI event'' was vague [331] or overly broad because it was not limited to capturing material SCI events [332] or events that the commenters believed are truly disruptive and pose a risk to the market.[333] Specifically,

[317] *See, e.g.,* NYSE Letter at 12; MFA Letter at 6; SIFMA Letter at 2; FIF Letter at 3; LiquidPoint Letter at 3; KCG Letter at 18; OCC Letter at 3; and Joint SROs Letter at 5.

[318] *See infra* notes 323–328 (discussing the provisions of Regulation SCI applicable to indirect SCI systems).

[319] *See* DTCC Letter at 5.

[320] *See supra* note 17 and accompanying text.

[321] *See* MSRB Letter at 7.

[322] *See supra* Section IV.A.2.b (discussing the inclusion of third party systems in the definition of ''SCI systems'').

[323] *See* adopted Rule 1000.

[324] *See* adopted Rule 1001(a) and *supra* Section IV.B.1 (discussing the policies and procedures requirement under Rule 1001(a)).

[325] *See* adopted Rule 1000 (definitions of system compliance and systems disruption, which do not include indirect SCI systems, and the definition of systems intrusion, which includes indirect SCI systems) and *supra* Section IV.B.3 (discussing an SCI entity's obligations with respect to SCI events).

[326] *See* adopted Rule 1003(a)(i) and Section IV.B.4 (discussing requirements relating to material systems changes).

[327] *See* adopted Rule 1003(b) and Section IV.B.5 (discussing the SCI review requirement).

[328] *See* adopted Rules 1005–1007 and Section IV.C (discussing the recordkeeping and electronic filing of Form SCI).

[329] *See infra* Section IV.B.3 (discussing an SCI entity's obligations with respect to SCI events).

[330] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.3.

[331] *See* ITG Letter at 12; and OTC Markets Letter at 16.

[332] *See* FIF Letter at 2; ITG Letter at 12; DTCC Letter at 5; and OTC Markets Letter at 16.

[333] *See* NYSE Letter at 3; ICI Letter at 4; Oppenheimer Letter at 3. *See also supra note* 231 and accompanying text (discussing comment that

Continued

several commenters recommended that the definition of SCI event include a materiality threshold, so that only events determined by the SCI entity to be material would trigger certain obligations under the rule.[334] One commenter stated that the definition of SCI event could be interpreted to include trivial events, and therefore believed that the definition needed clarity.[335] Finally, one commenter suggested that SCI event be defined as outlined in Rule 301(b)(6)(ii)(G) under Regulation ATS,[336] which requires a qualifying ATS to notify the Commission of material systems outages and significant systems changes.[337]

After careful consideration of the views of commenters, although the Commission is adopting the definition of ''SCI event'' as proposed, the requirements of Regulation SCI are tiered in a manner that the Commission believes is responsive to the concerns of commenters about the breadth of the definition.[338] Specifically, and as explained in further detail below, the Commission is incorporating a risk-based approach to the obligations of SCI entities with respect to SCI events.[339]

The Commission is not incorporating a materiality threshold as requested by some commenters,[340] including by limiting the definition of SCI event to only those events that are considered by SCI entities to be truly disruptive to the market.[341] Rather, the Commission believes that the adopted Commission notification and information dissemination requirements for SCI events will help to focus the Commission's and SCI entities' resources on the more significant SCI events by providing appropriate exceptions from reporting and dissemination for events that have no or de minimis impacts on an SCI entity's operations or market participants. In addition, the Commission believes that SCI event should not be defined as outlined in Rule 301(b)(6)(ii)(G) under Regulation ATS as suggested by one commenter,[342] because Rule 301(b)(6)(ii)(G) requires Commission notification of ''material systems outages.'' [343] Such an approach would exclude any systems compliance issues or systems intrusions, two types of events that the Commission believes should be included as SCI events. This approach would also create a materiality threshold for systems disruptions, which the Commission believes would not be appropriate, as discussed below.

In addition, by not including a materiality threshold within the definition, SCI entities will be required to assess, take corrective action, and keep records of all such events, some of which may initially seem insignificant to an SCI entity, but which may later prove to be the cause of significant systems issues at the SCI entity. An SCI entity's records of de minimis SCI events may also be useful to the Commission in that they may, for example, aid the Commission in identifying patterns of de minimis SCI events that together might result in a more impactful SCI event, either at an SCI entity or across a group of SCI entities, or circumstances in which an SCI event causes de minimis systems issues for one particular SCI entity but results in significant issues for another SCI entity. The Commission also believes that the ability to view such events in the aggregate and across multiple SCI entities is important to allow the Commission and its staff to be able to gather information about trends related to SCI events that could not otherwise be properly discerned. Information about trends will assist the Commission in fulfilling its oversight role by keeping Commission staff informed about the nature and frequency of the types of de minimis SCI events that SCI entities encounter. Moreover, information about trends and notifications of de minimis SCI events generally can also inform the Commission of areas of potential weaknesses, or persistent or recurring problems, across SCI entities and also should help the Commission better focus on common types of SCI events or issues with certain types of SCI systems across SCI entities. This information also will permit the Commission and its staff to issue industry alerts or guidance if appropriate. In addition, this information would allow the Commission and its staff to review SCI entities' classification of SCI events as de minimis SCI events.

In addition, although the definition of SCI event is unchanged, to address commenters' concerns, the Commission has determined to modify the various components of that definition (*i.e.,* the definition of systems disruption, systems compliance issue, and systems intrusion), in certain respects, as discussed below.

a. Systems Disruption

Proposed Rule 1000(a) would have defined ''systems disruption'' as ''an event in an SCI entity's SCI systems that results in: (1) A failure to maintain service level agreements or constraints; (2) a disruption of normal operations, including a switchover to back up equipment with near-term recovery of primary hardware unlikely; (3) a loss of use of any SCI system; (4) a loss of transaction or clearance and settlement data; (5) significant backups or delays in processing; (6) a significant diminution of ability to disseminate timely and accurate market data; or (7) a queuing of data between systems components or queuing of messages to or from customers of such duration that normal service delivery is affected.'' [344] As discussed below, in response to comments, the Commission is substantially modifying the proposed definition of systems disruption in adopted Rule 1000.

One commenter stated that the proposed definition of systems disruption was reasonable, but recommended that it be expanded to encompass disruptions originating from a third party.[345] However, many other commenters believed that the definition of systems disruption was too broad and would include minor events that they believed should be excluded from the

the definition of SCI systems should be revised to cover only those systems where a disruption, compliance issue, intrusion or material systems change would impact investors and markets that are subject to the Commission's jurisdiction).

[334] *See, e.g.,* FIF Letter at 2 (suggesting factors for determining what is a material SCI event, and urging that only material SCI events be subject to notification requirements); ITG Letter at 12 (suggesting that a Commission notification requirement apply only to those events that have a material impact on the ongoing maintenance of fair and orderly markets in an NMS security); and DTCC Letter at 5 (recommending that each component of the term SCI event be limited by a materiality threshold and be ''risk-based'' so that the term includes events that cause a disruption to the SCI entity's ability to conduct its core functions).

[335] *See* ITG Letter at 12.

[336] 17 CFR 242.301(b)(6)(ii)(G).

[337] *See* OTC Markets Letter at 16. In addition, some commenters objected to the inclusion of systems compliance issues within the definition of SCI events. *See infra* notes 403–405 and accompanying text.

[338] *See supra* notes 331–337 and accompanying text.

[339] Under this risk-based approach, for example, de minimis SCI events will not be subject to the immediate Commission reporting requirements as proposed, but rather, SCI entities will only be required to make, keep, and preserve records regarding de minimis SCI events and submit de minimis systems disruptions and de minimis systems intrusions to the Commission in quarterly summary reports. *See* Rule 1002(b)(5).

[340] *See supra* notes 334 and 337 and accompanying text.

[341] *See supra* note 333 and accompanying text.

[342] *See supra* note 337 and accompanying text.

[343] *See* 17 CFR 242.301(b)(6)(ii)(G). Rule 301(b)(6)(ii)(G) also requires that ATSs promptly notify the Commission of significant systems changes.

[344] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.3.a.

[345] *See* Lauer Letter at 5–6.

definition.[346] Several commenters suggested ways to limit the scope of the defined term. For example, some commenters suggested limiting the definition to material disruptions.[347] One of these commenters added that systems disruptions should exclude any regularly planned outages occurring during the normal course of business.[348] Another commenter recommended that development and testing environments should be excluded from the definition of systems disruption.[349] One commenter suggested modifying the definition to include only two elements: (1) Disruptions of either the SCI systems or of the operations of the SCI entity that have the effect of disrupting the delivery of the SCI service provided by those systems; and (2) degradations of SCI systems processing creating backups or delays of such a degree and duration that the delivery of service is effectively disrupted or unusable by the market participants who use the systems.[350]

Two commenters believed that the proposed definition of systems disruption was too rigid and should provide for more flexibility and discretion.[351] Both commenters were skeptical that an event should be reportable solely because it matched the description of one of the seven elements of the definition.[352] One of these commenters noted that the Commission's proposed definition seeks to codify as a formal definition language used by the ARP Inspection Program that was meant to provide flexibility and latitude in determining what constitutes a systems disruption.[353] The other commenter thought that the seven prongs of the proposed definition of ''systems disruption'' were appropriate considerations in determining whether a systems disruption had occurred, but that an SCI entity should be afforded more discretion and flexibility in determining whether a particular issue meets the definition.[354]

Service Level Agreements

Two commenters believed that the first element of the definition regarding service level agreements should be eliminated.[355] One of these commenters stated that an SCI entity's regulatory requirements should not depend upon the negotiated language of an agreement between business partners, while the other commenter noted that, in some cases, a private contract might have more stringent requirements than required by regulation, which would, in effect, transform such agreements into new regulatory obligations.[356] Other commenters stated this element should be revised to capture only the most significant disruptions to a service level agreement.[357] In addition, one commenter expressed concern that SCI entities may forgo negotiating detailed and stringent service level agreements if the first element were to be adopted as proposed.[358]

Disruptions of Normal Operations

Two commenters stated that the second element of the definition needs clarification because the phrase ''disruption of normal operations'' is vague and overbroad and therefore could potentially include minor events.[359] Two commenters stated that, if a switchover is utilized and there is no material impact on the core services, then there should not be a requirement to notify the Commission of a systems disruption.[360] One of these commenters added that programming errors that occur prior to production and regularly scheduled maintenance should not be considered disruptions.[361] Several commenters also recommended that testing errors should not be included in the definition,[362] and one commenter stated that testing errors should only be included if they result in a material impact on an SCI entity's operations.[363]

Loss of Use of Any System

One commenter stated that the term ''loss of use of any SCI system'' is unclear and expressed concern that the lack of clarity may lead to interpretive differences and inconsistencies in application among SCI entities.[364] Three commenters discussed failovers to backup systems, with one commenter stating the Commission should clarify whether this constitutes a loss of use of a system,[365] another commenter stating that it should not be considered a systems disruption,[366] and the third commenter stating that it should only be considered a systems disruption if there is an impact on normal operations.[367]

Loss of Data

Several commenters stated that losses of transaction or clearance and settlement data that are immediately retrieved, promptly corrected, or, for clearance and settlement data, resolved prior to the close of the trading day should not be systems disruptions.[368] One commenter suggested that the rule be revised to include as a systems disruption data that is altered or corrupted in some way.[369] Another commenter stated that this prong of the definition should include a materiality qualifier.[370]

Backups or Delays and Market Data Dissemination

With respect to the fifth and sixth elements of the definition regarding significant backups or delays in processing and a significant diminution of ability to disseminate timely and accurate market data, one commenter expressed support for the inclusion of such performance degradations in the definition of systems disruptions but stated that it believed that the Commission's interpretation of the term ''significant'' in the SCI Proposal was overly broad because it would encompass delays that are small and, in fact, insignificant.[371]

[346] *See, e.g.,* FINRA Letter at 16; BATS Letter at 9; Omgeo Letter at 7; NYSE Letter at 14; Joint SROs Letter at 6; OCC Letter at 6; SIFMA Letter at 9–10; and OTC Markets Letter at 21.

[347] *See* DTCC Letter at 6; SIFMA Letter at 9; OCC Letter at 6; OTC Markets Letter at 21; and Joint SROs Letter at 6.

[348] *See* DTCC Letter at 7.

[349] *See* FINRA Letter at 11, 16 (noting also that the many elements of the defined term were vague). *See also* Section IV.A.2.b (discussing the definition of ''SCI systems,'' including the elimination of test and development systems from its definition).

[350] *See* Omgeo Letter at 11.

[351] *See* Omgeo Letter at 7; and OCC Letter at 6–8.

[352] *See* Omgeo Letter at 7; and OCC Letter at 6–8.

[353] *See* Omgeo Letter at 7.

[354] *See* OCC Letter at 6. This commenter also critiqued or requested clarification for each prong of the definition, as discussed further below.

[355] *See* NYSE Letter at 13; and BATS Letter at 9.

[356] *See* NYSE Letter at 13; and BATS Letter at 9.

[357] *See* DTCC Letter at 7 (suggesting that the definition capture only the most significant disruptions to a service level agreement that are caused by the SCI entity and that impede its ability to perform its core functions and critical operations); and OCC Letter at 7. *See also* Omgeo Letter at 9 (noting concerns that this element could require reporting of events too minor to be noticed by participants and that do not cause any disruptions of service or material risks to the entity or users).

[358] *See* OCC Letter at 7.

[359] *See* NYSE Letter at 13; and Omgeo Letter at 8.

[360] *See* BATS Letter at 9; and SIFMA Letter at 10.

[361] *See* BATS Letter at 10.

[362] *See* BATS Letter at 11; SIFMA Letter at 10; and NYSE Letter at 13.

[363] *See* Omgeo Letter at 9 (noting that inclusion of testing errors would discourage SCI entities from conducting effective quality assurance programs and could undermine good quality engineering practices).

[364] *See* OCC Letter at 7.

[365] *See id.*

[366] *See* NYSE Letter at 13.

[367] *See* Direct Edge Letter at 3.

[368] *See, e.g.,* OCC Letter at 7; DTCC Letter at 7; SIFMA Letter at 10; and Omgeo Letter at 11.

[369] *See* Omgeo Letter at 11.

[370] *See* NYSE Letter at 14.

[371] *See* Omgeo Letter at 9. *See also* Proposing Release, *supra* note 13, at 18101–02.

Data Queuing

With respect to the seventh element, one commenter stated that queuing of data is a very good indicator of a problem, but also noted that it is not necessarily being properly monitored by most firms and suggested that the Commission require SCI entities to monitor queue depth.[372] However, several other commenters stated that queuing of data is normal and necessary.[373] Some commenters suggested that the Commission should only require reporting of such queuing if it materially affects the delivery of core services to customers.[374] One commenter asked for additional clarification on this element because all systems have queues to some extent with normal functionality and only certain queues should trigger recovery actions.[375] One commenter expressed concern that language in the SCI Proposal stating that ''queuing of data is a warning signal of significant disruption'' [376] would make events that are precursors to system disruptions themselves become system disruptions.[377]

Customer Complaints

Several commenters objected to the Commission's discussion in the SCI Proposal regarding customer complaints,[378] stating that the Commission should not consider each instance in which a customer or systems user complains or inquires about a slowdown or disruption of operations as an indicator of a systems disruption.[379] For example, one commenter noted that customer complaints are often ultimately determined to be the result of system errors or discrepancies on the customer's end, and stated that requiring an SCI entity to treat these complaints as significant systems disruptions simply because they are made would impose an unnecessary burden on the SCI entity.[380]

Definition of ''Systems Disruption'' as Adopted

After careful consideration of the views of commenters, the Commission is removing the seven specific types of systems malfunctions that were proposed to define systems disruption. As adopted, ''systems disruption'' is defined in Rule 1000 to mean ''an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system.'' The Commission has considered commenters' suggestions and feedback with respect to the proposed definition, including the criticisms of various aspects of the seven specific types of systems malfunctions delineated in the SCI Proposal and believes that the adopted definition, which largely follows the definition suggested by a commenter, is appropriate.[381] Specifically, this commenter recommended that the definition of systems disruption be revised to have two elements: (1) Disruptions of either the SCI systems or of the operations of the SCI entity that have the effect of disrupting the delivery of the SCI service provided by those systems; and (2) degradations of SCI systems processing creating backups or delays of such a degree and duration that the delivery of service is effectively disrupted or unusable by the market participants who use the systems.[382]

The Commission agrees with commenters that the proposed definition of systems disruption had the potential to be both over-inclusive and under-inclusive. The Commission believes that the adopted definition appropriately represents a change in focus of the definition from the prescriptive seven prongs in the SCI Proposal's definition that represented the effects caused by a disruption of an SCI entity's systems to, instead, whether a system is halted or degraded in a manner that is outside of its normal operation. The Commission believes the revised definition sets forth a standard that SCI entities can apply in a wide variety of circumstances to determine in their discretion whether a systems issue should be appropriately categorized as a systems disruption. Further, because the adopted definition of systems disruption takes into account whether a systems problem is outside of normal operations, the Commission also believes that partly addresses the concerns of the commenters suggesting that the definition of systems disruption include a materiality qualifier.[383]

Because the Commission agrees with commenters regarding the difficulties of the proposed definition of ''systems disruption,'' it is not including any of the specific types of systems malfunctions in the adopted definition of ''systems disruption.'' Thus, the Commission believes SCI entities would likely find it helpful to establish parameters that can aid them and their staff in determining what constitutes the ''normal operation'' [384] of each of its SCI systems, and when such ''normal operation'' has been disrupted or significantly degraded because those parameters have been exceeded. The Commission agrees with commenters who noted that, given its voluntary nature, entities that participate in the ARP Inspection Program are afforded a certain degree of flexibility and discretion in reporting systems outages, and agrees that, given its proposed application to a mandatory rule, the proposed definition limited the flexibility and discretion of SCI entities in a manner that was overly rigid.[385] Although the specific types of systems malfunctions have been removed from the adopted definition of systems disruption, the Commission nonetheless continues to believe, as suggested by one commenter,[386] that the types of systems malfunctions that comprised the proposed definition may be useful to SCI entities to consider as indicia of a systems disruption.

[372] *See* Lauer Letter at 5.

[373] *See, e.g.,* BATS Letter at 10; DTCC Letter at 7; SIFMA Letter at 10; Omgeo Letter at 10; and Joint SROs Letter at 6.

[374] *See, e.g.,* BATS Letter at 10–11; DTCC Letter at 7; Omgeo Letter at 10; and OCC Letter at 8.

[375] *See* NYSE Letter at 14.

[376] *See* Proposing Release, *supra* note 13, at 18102.

[377] *See* Omgeo Letter at 9.

[378] *See* Proposing Release, *supra* note 13, at 18102.

[379] *See, e.g.,* DTCC Letter at 7; Omgeo Letter at 10; BATS Letter at 11; NYSE Letter at 14; and OCC Letter at 8.

[380] *See* Omgeo Letter at 10–11.

[381] *See id.* at 11.

[382] *See supra* note 353 and accompanying text.

[383] As discussed more fully below, an SCI entity's assessment of the impact of an event meeting the definition of a systems disruption will affect whether it is subject to an immediate Commission notification obligation, or a recordkeeping and quarterly reporting obligation. *See infra* Section IV.B.3.c (discussing the exclusion of de minimis systems disruptions from immediate Commission notification requirements in Rule 1002(b)(5)).

[384] The Commission notes that, for certain SCI systems, ''normal operation'' may include a certain degree of operational variability that would allow for a given amount of degradation of functionality (*e.g.,* some data queuing or some slowing of response times) before the system's operations reach the point of being ''significantly degraded.'' However, such variability parameters may be included as part of an SCI entity's policies and procedures so that the SCI entity and its personnel would be aware of them before the occurrence of systems issues.

[385] Commenters highlighted many examples where a rigid interpretation of the proposed definition had the potential to incorporate into the definition events that could be considered part of normal operation. *See, e.g., supra* notes 361, 364, 368, 369, 374, and 379 and accompanying text. As adopted, however, such events would not be captured by the definition of systems disruptions because an event that disrupts, or significantly degrades, the normal operation of an SCI system would not be considered the ''normal operation'' of such SCI system.

[386] *See supra* note 354 and accompanying text.

As discussed in the SCI Proposal [387] and by certain commenters,[388] the seven categories of malfunctions in the proposed definition of ''systems disruption'' have their origin in ARP staff guidance regarding when ARP participants should notify the Commission of system outages and represent practical examples that SCI entities should consider to be systems disruptions in many circumstances. The Commission notes that the revised definition is intended to address some commenters' concerns with the particular elements of the definition of systems disruption as originally proposed. For example, under the modified definition, if an SCI system experiences an unplanned outage but fails over smoothly to its backup system such that there is no disruption or significant degradation of the normal operation of the system, the outage of the primary system would not constitute a systems disruption. On the other hand, an SCI entity may determine that, even when a primary system fails over smoothly to its backup system such that users are not impacted by the failover, operating from the backup system without additional redundancy would not constitute normal operation. In this case, the outage of the primary system would fall within the definition of systems disruption. Further, the Commission believes it would be appropriate for an SCI entity to take into account regularly scheduled outages or scheduled maintenance as part of ''normal operations.'' [389] In particular, a planned disruption to an SCI system that is a part of regularly scheduled outages or scheduled maintenance would not constitute a systems disruption or be subject to the requirements of Regulation SCI, if such regularly scheduled outages or scheduled maintenance are part of the SCI entity's normal operations. With regard to data queuing, to the extent that such queuing is part of the normal functionality of a system and does not cause a disruption or significant degradation of normal operations, it would not be captured by the rule, which is limited to events occurring to an SCI system that are outside its normal operations.[390] Additionally, by eliminating the seven types of malfunctions from the definition as proposed, the Commission has responded to commenters who expressed concern that events that are precursors to system disruptions, such as the queuing of data, would themselves be systems disruptions.[391] Similarly, by eliminating the seven types of malfunctions, the Commission has addressed comments that called for the elimination of specific elements of the proposed definition, such as service level agreements.[392]

Further, the Commission agrees with commenters that customer complaints may be indicia of a systems issue,[393] but that a customer complaint alone would not be determinative of whether a system problem has occurred that meets the definition of systems disruption under Regulation SCI.[394] With respect to the commenters who stated that losses of transaction or clearance and settlement data that are immediately retrieved, promptly corrected, or, for clearance and settlement data, resolved prior to the close of the trading day should not be systems disruptions, the adopted definition would exclude these events if they do not disrupt or significantly degrade the normal operations of an SCI system.[395] However, if loss of transaction or clearance and settlement data disrupts or significantly degrades the normal operation of an SCI system, it would constitute a systems disruption and be subject to the requirements of Regulation SCI (*e.g.,* immediate or quarterly Commission notification, depending on the impact of the disruption).

Several commenters also suggested that testing errors or other disruptions in development and testing environments should be excluded from the definition of systems disruption.[396] The Commission notes that, as discussed above, development and testing systems have been excluded from the definition of SCI systems, and thus such disruptions would not be subject to the requirements of Regulation SCI.[397]

The Commission is not incorporating a materiality threshold into the definition of systems disruption as requested by some commenters.[398] Rather, as discussed below, the requirements of Regulation SCI are tiered in a manner that the Commission believes is responsive to commenters' concerns regarding the breadth of the definition of systems disruption (while stopping short of including a materiality standard).[399] In particular, the Commission believes that the adopted Commission notification and information dissemination requirements for SCI events (*i.e.,* quarterly Commission reporting of de minimis systems disruptions, and an exception for de minimis systems disruptions from the information dissemination requirement) will help to focus the Commission's and SCI entities' resources on the more significant systems disruptions. In addition, by not including a materiality threshold within the definition, SCI entities will be required to assess, take corrective action, and keep records of all systems disruptions, some of which may initially seem insignificant to an SCI entity, but which may later prove to be the cause of significant systems disruptions at the SCI entity. An SCI entity's records of de minimis systems disruptions may also be useful to the Commission in that they may, for example, aid the Commission in identifying patterns of de minimis systems disruptions that together might result in a more impactful SCI event, either at an SCI entity or across a group of SCI entities, or circumstances in which a systems disruption causes de minimis systems issues for one particular SCI entity but results in significant issues for another SCI entity. The Commission also believes that the ability to view de minimis SCI events in the aggregate and across multiple SCI

[387] *See* Proposing Release, *supra* note 13, at 18101.

[388] *See supra* note 353 and accompanying text.

[389] *See supra* note 361 and accompanying text.

[390] *See supra* notes 372–377 and accompanying text.

[391] *See supra* note 377 and accompanying text.

[392] *See supra* notes 355 and 358 and accompanying text.

[393] The Commission agrees, as noted by some commenters, that in some instances, customer complaints may be the result of a problem at a system not operated by (or on behalf of) an applicable SCI entity, but rather a system operated by the customer itself. *See supra* note 380 and accompanying text.

[394] *See supra* notes 379–380 and accompanying text.

[395] *See supra* note 368. The Commission notes that for clearance and settlement systems, normal operations would include all steps necessary to effectuate timely and accurate end of day settlement. In response to the commenter who stated that the definition of systems disruption should be revised to include data that is altered or corrupted in some way, because the Commission has determined to eliminate the pronged approach to the definition of systems disruption, the Commission notes that, under the adopted definition, data that is altered or corrupted in some way may be a systems disruption if such altered or corrupted data disrupt or significantly degrade the affected SCI system's normal operation. *See supra* note 369.

[396] *See supra* notes 361–363 and accompanying text.

[397] *See supra* Section IV.A.2.b (discussing the definition of ''SCI systems'').

[398] *See supra* note 347 and accompanying text.

[399] *See* Rule 1002(b)(5) and *infra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events and requiring a quarterly summary report for de minimis systems disruptions). *See also* Rule 1002(c)(4) and *infra* Section IV.B.3.d (discussing information dissemination requirement for certain SCI events, but excluding de minimis systems disruptions).

entities is important to the Commission and its staff to be able to gather information about trends related to such systems disruptions that could not otherwise be properly discerned. Information about trends will assist the Commission in fulfilling its oversight role by keeping Commission staff informed about the nature and frequency of the types of de minimis systems disruptions that SCI entities encounter. Moreover, information about trends can also inform the Commission of areas of potential weaknesses, or persistent or recurring problems, across SCI entities and also should help the Commission better focus on common types of systems disruptions with certain types of SCI systems across SCI entities. This information also would permit the Commission and its staff to issue industry alerts or guidance if appropriate. In addition, this information would allow the Commission and its staff to review SCI entities' classification of events as de minimis systems disruptions. Moreover, the Commission believes that, even without adopting a materiality threshold, the adopted definition of SCI systems further focuses the scope of the definition of systems disruption.[400]

The Commission also believes that it is unnecessary to modify the definition of systems disruption specifically to encompass disruptions originating from a third party, as one commenter suggested.[401] The definition of systems disruption does not limit such events with respect to the source of the disruption, whether an internal source at the SCI entity or an external third party source.

b. Systems Compliance Issue

Proposed Rule 1000(a) would have defined the term ''systems compliance issue'' as ''an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the federal securities laws and rules and regulations thereunder or the entity's rules or governing documents, as applicable.'' [402] The Commission is adopting the definition of systems compliance issue substantially as proposed, with modifications to refine its scope.

Two commenters stated that the term ''systems compliance issue'' should be deleted from the definition of SCI event entirely.[403] One of these commenters stated that the inclusion of systems compliance issue as an SCI event would be a departure from the ARP Inspection Program and ARP Policy Statements.[404] The other commenter argued that any report regarding a systems compliance issue is an admission that the SCI entity has violated a law, rule, or one of its governing documents, creating a risk of an enforcement action or other liability for the SCI entity.[405]

Other commenters stated that the proposed definition is too broad and should be refined to include only those issues that are material or significant.[406] Commenters' specific recommendations included limiting the definition to those systems compliance issues that: have a material and significant effect on members; [407] can be reasonably expected to result in significant harm or loss to market participants or impact the operation of a fair and orderly market; [408] or have a materially negative impact on the SCI entity's ability to perform its core functions.[409] One commenter also noted that the term should be specifically defined to take account of an SCI entity's function, such as clearing agencies' ability to comply with Section 17A.[410]

After considering the view of commenters that the proposed definition of systems compliance issue is too broad,[411] the Commission is revising the definition to mean an event that has caused an SCI system to operate ''in a manner that does not comply with the Act'' and the rules and regulations thereunder and the entity's rules and governing documents, as applicable.[412] The Commission believes the refinement from ''federal securities laws'' to ''the Act'' (*i.e.,* the Securities Exchange Act of 1934) will appropriately focus the definition on Exchange Act compliance rather than other areas of the federal securities laws. Although the Commission did not receive specific comment suggesting that it amend the definition of systems compliance issue by using the term ''the Act'' instead of the broader ''federal securities laws,'' commenters did suggest that the Commission limit the scope of the definition to only apply to those sections of the Act that are applicable to a particular SCI entity [413] or the SCI entity's rules.[414] The Commission agrees with these commenters insofar as they advocated for focusing the scope to a more specific set of securities laws and for reducing the burden on SCI entities, and further believes this refinement does not compromise the objective of the definition, which is to capture systems compliance issues with respect to SCI entities' obligations under the Exchange Act. The Commission believes that the refinement provides additional clarity to SCI entities that, for purposes of Regulation SCI, their obligations are with respect to compliance with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents.[415]

The Commission disagrees with commenters who suggested removing systems compliance issues from the definition of SCI event altogether.[416] Although systems compliance issues have not been within the scope of the ARP Inspection Program,[417] the Commission believes that inclusion of systems compliance issues in the definition of SCI event and the resulting applicability of the Commission reporting, information dissemination, and recordkeeping requirements to systems compliance issues is important to help ensure that SCI systems are operated by SCI entities in compliance with the Exchange Act, rules thereunder, and their own rules and governing documents.

[400] *See supra* Sections IV.A.2.b (discussing the definition of ''SCI systems'').

[401] *See supra* note 345.

[402] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.3.b.

[403] *See* Omgeo Letter at 13; and NYSE Letter at 16.

[404] *See* Omgeo Letter at 14.

[405] *See* NYSE Letter at 16.

[406] *See, e.g.,* Joint SROs Letter at 2, 8; ISE Letter at 6; SIFMA Letter at 13; Liquidnet Letter at 3; CME Letter at 8; DTCC Letter at 6; OCC Letter at 13; and FINRA Letter at 17 (stating that systems compliance issues should be reportable only if they would directly impact the market or a member firm's ability to comply with FINRA rules). *See also* BATS Letter at 13.

[407] *See* ISE Letter at 6–7.

[408] *See* Liquidnet Letter at 3; and CME Letter at 8. *See also* FINRA Letter at 17.

[409] *See* DTCC Letter at 6; and OCC Letter at 13.

[410] *See* DTCC Letter at 6. *See also infra* Sections IV.B.3.c and IV.B.3.d (discussing comments with respect to systems compliance issues and their relation to Commission notification and information dissemination to members or participants).

[411] *See supra* note 406 and accompanying text.

[412] As noted above, proposed Rule 1000 defined systems compliance issue as an event at an SCI entity that has caused any SCI system of such entity to operate ''in a manner that does not comply with the federal securities laws'' and rules and regulations thereunder or the entity's rules and governing documents, as applicable.

[413] *See supra* note 410 and accompanying text.

[414] *See supra* note 406 and accompanying text.

[415] Notwithstanding this provision's focus on compliance with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents, the Commission notes that its objective in adopting Regulation SCI is not, for example, to change the obligations of SCI entities that are public companies with respect to their disclosure obligations under the Securities Act of 1933. *See* 15 U.S.C. 77a *et seq.*

[416] *See supra* notes 403–405 and accompanying text.

[417] *See supra* note 404 and accompanying text. *See also* Proposing Release, *supra* note 13, at 18087.

In addition, the Commission is not adopting a materiality qualifier[418] or other limiting threshold[419] in the definition of systems compliance issue as suggested by some commenters. Instead, the requirements of Regulation SCI are tiered in a manner that the Commission believes is responsive to commenters' concerns regarding the breadth of the definition of systems compliance issue.[420] In particular, the Commission believes that the adopted Commission notification requirement and the information dissemination requirement (each of which provides an exception for systems compliance issues that have no or de minimis impacts on an SCI entity's operations or market participants) will help to focus the Commission's and SCI entities' resources on those systems compliance issues with more significant impacts. In addition, by not including a materiality threshold within the definition, SCI entities will be required to assess, take corrective action, and keep records of all systems compliance issues, some of which may initially seem to have little or no impact, but which may later prove to be the cause of significant systems compliance issues at the SCI entity. The Commission notes that all SCI entities are required to comply with the Exchange Act, the rules and regulations thereunder, and their own rules, as applicable. Therefore, even if an SCI entity determines that a systems compliance issue has no or a de minimis impact, the Commission believes that it is important that it have ready access to records regarding such de minimis systems compliance issues to allow it to more effectively oversee SCI entities' compliance with the Exchange Act and relevant rules. An SCI entity's records of de minimis systems compliance issues may also be useful to the Commission in that they may, for example, aid the Commission in identifying areas of potential weaknesses, or persistent or recurring problems, at an SCI entity or across multiple SCI entities. This information also would permit the Commission and its staff to issue industry alerts or guidance if appropriate. In addition, this information would allow the Commission and its staff to review SCI entities' classification of events as de minimis systems compliance issues.

Finally, the Commission believes that, even without adopting a materiality threshold, the adopted definition of SCI systems, as described in Section IV.A.2 above, further focuses the scope of the definition of systems compliance issue.

With respect to a commenter's concern that any report regarding a systems compliance issue would be an admission of a violation and thus create a risk of enforcement action or other liability,[421] the Commission notes that the Commission notification requirement is not triggered until a responsible SCI personnel has a reasonable basis to conclude that a systems compliance issue has occurred.[422] The Commission acknowledges that it could consider the information provided to the Commission in determining whether to initiate an enforcement action. However, the Commission notes that the occurrence of a systems compliance issue also does not necessarily mean that the SCI entity will be subject to an enforcement action. Rather, the Commission will exercise its discretion to initiate an enforcement action if the Commission determines that action is warranted, based on the particular facts and circumstances of an individual situation.[423] With respect to the potential for other types of liability as suggested by this commenter, many entities that fall within the definition of SCI entity already currently disclose to the Commission and their members or participants certain information regarding systems issues, including issues that may potentially give rise to liability.[424] Moreover, the Commission recognizes that compliance with Regulation SCI will increase the amount of information about SCI events available to the Commission and SCI entities' members and participants, and that the greater availability of this information has some potential to increase litigation risks for SCI entities, including the risk of private civil litigation. The Commission believes that the value of disclosure to the Commission, market participants and investors justifies the potential increase in litigation risk. Moreover, the Commission notes that, to the extent members and participants or the public suffer damages when SCI events occur, SCI entities are already subject to litigation risk.

As adopted, Rule 1000 defines ''systems compliance issue'' as ''an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Act and the rules and regulations thereunder or the entity's rules or governing documents, as applicable.'' As noted in the SCI Proposal, a systems compliance issue could, for example, occur when a change to an SCI system is made by information technology staff, without the knowledge or input of regulatory staff, that results in the system operating in a manner that does not comply with the Act and rules thereunder or the entity's rules and other governing documents.[425] For an SCI SRO, systems compliance issues would include SCI systems operating in a manner that does not comply with the SCI SRO's rules as defined in the Act and the rules thereunder.[426] For a plan processor, systems compliance issue would include SCI systems operating in a manner that does not comply with an applicable effective national market system plan. For an SCI ATS or exempt clearing agency subject to ARP, a systems compliance issue would include SCI systems operating in a manner that does not comply with documents such as subscriber agreements and any rules provided to subscribers and users and, for an ATS, described in its Form ATS filings with the Commission.[427]

c. Systems Intrusion

Proposed Rule 1000(a) defined ''systems intrusion'' as ''any unauthorized entry into the SCI systems or SCI security systems of an SCI entity.''[428] The proposed definition is being adopted as proposed, with one technical modification to replace the term ''SCI security systems'' with ''indirect SCI systems.''[429]

While one commenter noted its general support for the inclusion of systems intrusions within the scope of

[418] *See supra* notes 406–407 and 409 and accompanying text.

[419] *See supra* note 408.

[420] *See* Rule 1002(b)(5) and *infra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events and the exclusion for de minimis systems compliance issues). *See also* Rule 1002(c)(4) and *infra* Section IV.B.3.d (discussing the information dissemination requirement for certain SCI events, but excluding de minimis systems compliance issues).

[421] *See supra* note 405 and accompanying text.

[422] *See supra* Section IV.B.3.a (discussing the triggering standard).

[423] *See, e.g., infra* notes 626–628 and accompanying text.

[424] *See supra* Section II.B (discussing recent events related to systems issues).

[425] *See* Proposing Release, *supra* note 13, at 18103.

[426] The rules of an SCI SRO include, among other things, its constitution, articles of incorporation, and bylaws. *See* 15 U.S.C. 78c(a)(27)–(28). *See also* 17 CFR 240.19b–4(c).

[427] Subscriber agreements and other similar documents that govern operations of SCI ATSs and exempt clearing agencies subject to ARP are generally not publicly available, but are typically provided to subscribers and users of such entities. *See* 17 CFR 242.301(b) for a description of the filing requirements for ATSs.

[428] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.B.3.c.

[429] *See supra* Section IV.A.2.d (discussing the definition of ''indirect SCI systems'').

Regulation SCI,[430] this commenter and others stated that the proposed definition was too broad or vague.[431] Several commenters asserted that the proposed definition would capture too many insignificant and minor incidents.[432] Some commenters recommended limiting the definition to material systems intrusions, and offered various suggestions for how to do so.[433]

One commenter stated that the proposed definition was overbroad because it would include both intentional and unintentional conduct, as well as events that have no adverse impact.[434] Another commenter also stated that the definition should be modified to make clear that an intrusion that is inadvertent would not qualify as a systems intrusion.[435] This commenter further stated that a systems intrusion should be limited to unauthorized access to confidential information or to the SCI systems of an SCI entity that materially disrupts the operations of such systems.[436] Another commenter suggested that the definition focus on the unauthorized control of the confidentiality, integrity, or availability of an SCI system and/or its data.[437]

Some commenters noted that the proposed definition of systems intrusion did not take into account the multi-layered nature of today's technology systems. Two commenters stated that the multi-layered protections of systems architecture are designed to anticipate intrusions into the outer layer without material risk or impact, thus intrusions into such a peripheral system should not constitute a systems intrusion under the rule.[438]

Several commenters stated that only successful systems intrusions should be covered in the definition.[439] One commenter suggested that this concept be made explicit in the rule text by adding the term ''successful'' to the definition.[440] Two commenters, while supporting the inclusion of only successful systems intrusions in the definition, pointed out the value of sharing information regarding unsuccessful systems intrusions, stating that this practice already occurs today among SCI entities, their regulators, and appropriate law enforcement agencies.[441]

As adopted, Rule 1000 defines ''systems intrusion'' to mean ''any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.'' This definition is intended to cover any unauthorized entry into SCI systems or indirect SCI systems, regardless of the identity of the person committing the intrusion (whether they are outsiders, employees, or agents of the SCI entity), and regardless of whether or not the intrusion was part of a cyber attack, potential criminal activity, or other unauthorized attempt to retrieve, manipulate, or destroy data, or access or disrupt systems of SCI entities. Thus, for example, this definition is intended to cover the introduction of malware or other attempts to disrupt SCI systems or indirect SCI systems provided that such systems were actually breached. In addition, the definition is intended to cover unauthorized access, whether intentional or inadvertent, by employees or agents of the SCI entity that resulted from weaknesses in the SCI entity's access controls and/or procedures. In response to comments, the Commission emphasizes that the definition of systems intrusion does not include unsuccessful attempts at unauthorized entry because an unsuccessful systems intrusion is much less likely to disrupt the systems of an SCI entity than a successful intrusion. The Commission believes that it is unnecessary and redundant to specifically state in the definition of systems intrusion that unauthorized entries must be ''successful'' because the term ''entry'' incorporates the concept of *successfully* gaining access to an SCI system or indirect SCI system.

Further, the Commission is not incorporating a materiality threshold for the definition of systems intrusion or otherwise limiting the definition of systems intrusion to only those systems intrusions that are major or significant as requested by some commenters. The Commission believes that, even without adopting a materiality threshold, the adopted definitions of SCI systems and indirect SCI systems further focus the scope of the definition of systems intrusion. Further, because any unauthorized entry into an SCI system or indirect SCI system is a security breach of which the Commission, having responsibility for oversight of the U.S. securities markets, should be notified, the Commission is not including a materiality threshold. In addition, as discussed below, the requirements of Regulation SCI are tiered in a manner that the Commission believes is responsive to commenters' concerns regarding the breadth of the definition of systems intrusion.[442] By not including a materiality threshold within the definition, SCI entities will be required to assess, take corrective action, and keep records of all systems intrusions, some of which may initially seem insignificant to an SCI entity, but which may later prove to be the cause of significant systems issues at the SCI entity. An SCI entity's records of de minimis systems intrusions may also be useful to the Commission in that they may, for example, aid the Commission in identifying patterns of de minimis systems intrusions that together might result in a more impactful SCI event, either at an SCI entity or across a group of SCI entities, or circumstances in which a systems intrusion causes de minimis systems issues for one particular SCI entity but results in significant issues for another SCI entity. The Commission also believes that the ability to view de minimis systems intrusions in the aggregate and across multiple SCI entities is important to allow the Commission and its staff to be able to gather information about trends related to such systems intrusions that could not otherwise be properly discerned. Information about trends will

[430] *See* NYSE Letter at 15.

[431] *See, e.g.,* NYSE Letter at 15; BATS Letter at 12; DTCC Letter at 7; Omgeo Letter at 11; SIFMA Letter at 10–11; and Joint SROs Letter at 7.

[432] *See, e.g.,* BATS Letter at 12; DTCC Letter at 7; Omgeo Letter at 11; SIFMA Letter at 10–11; and Joint SROs Letter at 7.

[433] *See, e.g.,* NYSE Letter at 15 (recommending that the definition include only major intrusions that pose a plausible risk to the trading, routing, or clearance and settlement operations of the exchange or to required market data transmission); Omgeo Letter at 11–12 (expressing concern that the definition did not contain a reference to the materiality of an intrusion, nor the intrusion's impact on markets or market participants); DTCC Letter at 7 (suggesting that the definition capture only unauthorized entries where the SCI entity has reason to believe such entry could materially impact its ability to perform its core functions or critical operations); Joint SROs Letter at 7 (stating that the definition should include only those intrusions that the SCI entity reasonably estimated would result in significant harm or loss to market participants); FINRA Letter at 18 (arguing that only intrusions that have a material impact on the SCI system or a direct impact on the market or market participants should be included); and OCC Letter at 13 (suggesting, as an alternative to a ''risk-based'' approach, that the definition be limited to any unauthorized entry into the SCI systems or SCI security systems of an SCI entity, which the SCI entity reasonably believes may materially impact its ability to perform its core functions or critical operations).

[434] *See, e.g.,* BATS Letter at 12.

[435] *See* SIFMA Letter at 11.

[436] *See id.*

[437] *See* NYSE Letter at 15.

[438] *See* SIFMA Letter at 11; and Omgeo Letter at 12. The Commission discusses below the comments that advocated greater Commission use of FS–ISAC for reporting systems intrusions.

[439] *See* BIDS Letter at 17; SIFMA Letter at 11; NYSE Letter at 15; DTCC Letter at 8.

[440] *See* NYSE Letter at 15.

[441] *See* BIDS Letter at 17; and DTCC Letter at 8.

[442] *See* Rule 1002(b)(5) and *infra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events and requiring a quarterly summary report for de minimis systems intrusions). *See also* Rule 1002(c)(4) and *infra* Section IV.B.3.d (discussing information dissemination requirement for certain SCI events, but excluding de minimis systems intrusions).

assist the Commission in fulfilling its oversight role by keeping Commission staff informed about the nature and frequency of the types of de minimis systems intrusions that SCI entities encounter. Moreover, information about trends and notifications of de minimis systems intrusions generally can also inform the Commission of areas of potential weaknesses, or persistent or recurring problems, across SCI entities and also should help the Commission better focus on common types of systems intrusions or issues with certain types of SCI systems across SCI entities. This information also would permit the Commission and its staff to issue industry alerts or guidance if appropriate. In addition, this information would allow the Commission and its staff to review SCI entities' classification of events as de minimis systems intrusions.

The Commission also is not distinguishing between intentional and unintentional systems intrusions, as suggested by some commenters.[443] The Commission acknowledges that intentional systems intrusions may result in more severe disruptions to the systems of an SCI entity than unintentional or inadvertent intrusions. On the other hand, the Commission believes that it should be notified of successful unintentional or inadvertent systems intrusions because they can still indicate weaknesses in a system's security controls. To the extent that these systems intrusions have no or a de minimis impact on the SCI entity's operations or on market participants, they will only be subject to a quarterly reporting requirement and will be excepted from the information dissemination requirement.[444]

Additionally, the Commission does not agree that the definition of systems intrusion should be limited to unauthorized access to confidential information[445] or should be focused on the unauthorized control of the confidentiality, integrity, or availability of an SCI system and/or its data[446] because the Commission believes that these modifications would create a definition that would limit the Commission's ability to be aware of events that fall outside the limited definition that commenters suggested but that could, for example, have industry-wide implications. Similarly, with respect to the comment that intrusions into a peripheral system should not constitute a systems intrusion because the multi-layered protections of systems architecture are designed to anticipate intrusions into the outer layer and help prevent material risk or impact,[447] the Commission believes that its discussion of indirect SCI systems in Section IV.A.2.d above responds to commenters' concerns by explaining that systems intrusions into an indirect SCI system could cause or increase the likelihood of an SCI event with respect to an SCI system. And to the extent a system intrusion occurs with respect to an SCI system or indirect SCI system but the SCI entity's multi-layered systems architecture helps prevent material risk or impact, the Commission notes that de minimis systems intrusions (if such a system intrusion was determined to be de minimis) would be subject to less frequent Commission reporting requirements and would not be subject to the information dissemination requirements.

*B. Obligations of SCI Entities—Rules 1001–1004*

Proposed Rules 1000(b)(1)–(9) are renumbered as adopted Rules 1001–1004. Adopted Rule 1001 corresponds to proposed Rules 1000(b)(1)–(2) and contains the policies and procedures requirements for SCI entities with respect to operational capability and the maintenance of fair and orderly markets (Rule 1001(a)), systems compliance (Rule 1001(b)), and identification and designation of responsible SCI personnel and escalation procedures (Rule 1001(c)).[448] Adopted Rule 1002 corresponds to proposed Rules 1000(b)(3)–(5) and contains the obligations of SCI entities with respect to SCI events, which include corrective action, Commission notification, and information dissemination. Adopted Rule 1003 corresponds to proposed Rules 1000(b)(6)–(8) and contains requirements relating to material systems changes and SCI reviews. Finally, adopted Rule 1004 corresponds to proposed Rule 1000(b)(9) and contains requirements relating to business continuity and disaster recovery plan testing, including requiring participation of designated members or participants of SCI entities in such testing.

1. Policies and Procedures To Achieve Capacity, Integrity, Resiliency, Availability and Security—Rule 1001(a)

a. Proposed Rule 1000(b)(1)

Proposed Rule 1000(b)(1) would have required an SCI entity to: (1) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, SCI security systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets; and (2) include certain required elements in such policies and procedures. As proposed, these policies and procedures were required to provide for: (A) The establishment of reasonable current and future capacity planning estimates; (B) periodic capacity stress tests of systems to determine their ability to process transactions in an accurate, timely, and efficient manner; (C) a program to review and keep current systems development and testing methodology; (D) regular reviews and testing of systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters; (E) business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse to ensure next business day resumption of trading and two-hour resumption of clearance and settlement services following a wide-scale disruption; and (F) standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data.

Proposed Rule 1000(b)(1)(i) also provided that an SCI entity's applicable policies and procedures would be deemed to be reasonably designed if they were consistent with ''current SCI industry standards.'' Proposed Rule 1000(b)(1)(ii) provided that ''current SCI industry standards'' were to be comprised of ''information technology practices that are widely available for free to information technology professionals in the financial sector . . . and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely

[443] *See supra* notes 434–435 and accompanying text.

[444] *See* Rule 1002(b)(5) and *infra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events and requiring a quarterly summary report for de minimis systems intrusions). *See* Rule 1002(c)(4), and *infra* Sections IV.B.3.d (discussing the information dissemination requirements for certain SCI events, but excluding de minimis systems intrusions).

[445] *See supra* note 436 and accompanying text.

[446] *See supra* note 437 and accompanying text.

[447] *See supra* note 438 and accompanying text.

[448] The discussion of Rule 1001(c), which relates to the triggering standard for Rule 1002, is discussed below in Section IV.B.3.a.

recognized organization.'' [449] The SCI Proposal also included, on ''Table A,'' a list of publications that the Commission had preliminarily identified as examples of current SCI industry standards in each of nine information security domains.[450] The SCI Proposal stated that an SCI entity, taking into account its nature, size, technology, business model, and other aspects of its business, could, but would not be required to, use the publications listed on Table A to establish, maintain, and enforce reasonably designed policies and procedures that satisfy the requirements of proposed Rule 1000(b)(1).[451] The SCI Proposal also stated that ''current SCI industry standards'' were not limited to those identified in the publications on Table A and could include other publications meeting the proposed criteria for ''current SCI industry standards.'' [452] In addition, proposed Rule 1000(b)(1)(ii) stated that compliance with ''current SCI industry standards'' would not be the exclusive means to comply with the requirements of proposed Rule 1000(b)(1).[453]

b. Comments Received on Proposed Rule 1000(b)(1) and Commission Response

i. Policies and Procedures Generally—Rules 1001(a)(1) and (3)

The Commission received a wide range of comments on proposed Rule 1000(b)(1). With respect to policies and procedures generally, some commenters believed the proposal was too prescriptive.[454] Several characterized it as a ''one-size-fits-all'' approach that did not adequately take into account differences between SCI entities and SCI entity systems.[455] Several commenters objecting to the rule as too prescriptive urged that the adopted rule incorporate a risk-based framework, so that SCI entities and/or systems of greater criticality would be required to adhere to a stricter set of policies and procedures than SCI entities and/or systems of lesser criticality.[456] These commenters maintained that each SCI entity should have discretion to calibrate its policies and procedures based on its own assessment of the criticality of the SCI entity and its systems to market stability, or that the Commission should ''tier'' the obligations of SCI entities or SCI entity systems based on their market function.[457]

In contrast, some commenters stated that the Commission's proposed approach was too vague or insufficient.[458] For example, one commenter characterized the minimum elements of policies and procedures in proposed Rule 1000(b)(1)(A)–(F) as ''so vague that they will fail to provide any meaningful improvement in technological systems.'' [459] Another commenter stated that the proposed scope of required policies and procedures was appropriate, but that further elaboration on the details was warranted.[460] One commenter stated that the proposed rule lacked adequate discussion of what it means for policies and procedures to be reasonably designed ''to maintain . . . operational capability and promote the maintenance of fair and orderly markets.'' [461]

The Commission has carefully considered the views of commenters on its proposed policies and procedures approach to ensuring adequate capacity, integrity, resiliency, availability, and security of SCI systems (and security for indirect SCI systems). The Commission agrees with commenters who stated that requiring SCI entities to have policies and procedures relating to the capacity, integrity, resiliency, availability, and security of SCI systems (and security for indirect SCI systems) should not be a ''one-size-fits-all'' approach and, as discussed in detail below, is therefore clarifying that the adopted rule is consistent with a risk-based approach, as it allows an SCI entity's policies and procedures to be tailored to a particular system's criticality and risk. As noted above, while some commenters characterized the proposed rule as too vague and sought further specificity, others found the rule to be too prescriptive. The Commission believes that the adopted rule provides an appropriate balance between these two opposing concerns by providing a framework that identifies the minimum areas that are required to be addressed by an SCI entity's policies and procedures without prescribing the specific policies and procedures that an SCI entity must follow, or detailing how each element in Rule 1001(a)(2) should be addressed. Given the various types of systems at SCI entities, each of which represent a different level of criticality and risk to each SCI entity and to the securities markets more broadly, the adopted rule seeks to provide flexibility to SCI entities to design their policies and procedures consistent with a risk-based approach, as discussed in further detail below. At the same time, because the Commission believes that additional guidance on how an SCI entity may comply with the rule is warranted in certain areas, the Commission is providing further guidance below. In response to comment, the Commission is adopting Rule 1001(a) with modifications that it believes will better provide SCI entities with sufficient flexibility to develop their policies and procedures to achieve robust systems, while also providing guidance on how an SCI entity may comply with the final rule. Specifically, adopted Rule 1001(a) is modified to: (i) Clarify that the rule is consistent with a risk-based approach that requires more robust policies and procedures for higher-risk systems and provides an SCI entity with flexibility to tailor its policies and procedures to the nature of its business, technology, and the relative criticality of each of its SCI systems; (ii) make clear that an SCI entity's reasonable policies and procedures remain subject to ongoing self-assessment; (iii) provide increased flexibility in the manner in which an SCI entity may satisfy the minimum elements of required policies and procedures; and (iv) revise the criteria for ''current SCI industry standards.'' In addition, proposed Table A is recharacterized and will be issued as staff guidance that will evolve over time.

Response to Commenters Advocating a Risk-Based Approach

Adopted Rule 1001(a)(1) requires each SCI entity to establish, maintain, and enforce written policies and procedures

[449] *See* Proposing Release, *supra* note 13, at 18178.

[450] The domains covered in Table A of the SCI Proposal are: application controls; capacity planning; computer operations and production environment controls; contingency planning; information security and networking; audit; outsourcing; physical security; and systems development methodology. *See id.* at 18111.

[451] *See id.* at 18110.

[452] *See id.* at 18110 (stating that an SCI entity could elect standards contained in publications other than those identified on proposed Table A to comply with the rule).

[453] *See id.* at 18109.

[454] *See, e.g.,* Angel Letter at 2, 8; BIDS Letter at 7; FIF Letter at 3–4; Joint SROs Letter at 4; LiquidPoint Letter at 3–4; MFA Letter at 3; and SIFMA Letter at 12–13.

[455] *See, e.g.,* FIF Letter at 3–4; FINRA Letter at 31; Joint SROs Letter at 4; KCG Letter at 2–3, 6–8; Liquidpoint Letter at 3–4; MFA Letter at 3; OCC Letter at 3–4; SIFMA Letter at 12–13; UBS Letter at 2–4; Tellefsen Letter at 13; and BIDS Letter at 2–3, 6–9.

[456] *See, e.g.,* Joint SROs Letter at 4; LiquidPoint Letter at 3; MFA Letter at 3; and SIFMA Letter at 8, 12–13. *See also* FIF Letter at 4; MSRB Letter at 3; Fidelity Letter at 2; NYSE Letter at 3, 4, 21; FINRA Letter at 13–14; and OCC Letter at 3.

[457] *See, e.g.,* Joint SROs Letter at 4; FINRA Letter at 13–14; MSRB Letter at 3; MFA Letter at 6; NYSE Letter at 3, 4, and 21; SIFMA Letter at 12–13; FIF Letter at 4; Fidelity Letter at 2; and OCC Letter at 3.

[458] *See* Better Markets Letter at 3–5; CAST Letter at 4; CISQ Letter at 2, 5; CISQ2 Letter at 5; and Direct Edge Letter at 4.

[459] *See* Better Markets Letter at 3.

[460] *See* CISQ Letter at 2.

[461] *See* Direct Edge Letter at 4.

reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. The text of this part of the rule is largely unchanged from the proposal. Although several commenters expressed concern that the proposed rule would have imposed a ''one-size-fits-all'' approach, requiring all SCI entities to hold all of their SCI systems to the same standards,[462] this was not the intent of proposed Rule 1000(b)(1), nor is it what adopted Rule 1001(a)(1) requires. By requiring an SCI entity to have policies and procedures ''reasonably designed'' and ''adequate'' to maintain operational capability and promote the maintenance of fair and orderly markets, the adopted rule provides an SCI entity with flexibility to determine how to tailor its policies and procedures to the nature of its business, technology, and the relative criticality of each of its SCI systems.[463] Although the adopted rule does not assign differing obligations to an SCI entity based on its registration status, or its general market function, as some commenters urged, by allowing each SCI entity to tailor its policies and procedures accordingly, the adopted approach recognizes that there are differences between, and varying roles played by, different systems at various SCI entities. In tandem with the refined definition of ''SCI systems,'' the modified definition of ''SCI security systems'' (adopted as ''indirect SCI systems''), and the new definition of ''critical SCI systems,[464] adopted Rule 1001(a)(1) explicitly recognizes that policies and procedures that are ''reasonably designed'' and ''adequate'' to maintain operational capability and promote the maintenance of fair and orderly markets for critical SCI systems may differ from those that are ''reasonably designed'' and ''adequate'' to maintain operational capability and promote the maintenance of fair and orderly markets for other SCI systems, or indirect SCI systems. As such, the Commission believes that its adopted approach in Regulation SCI is consistent with a risk-based approach, and that adopted Regulation SCI may result in the systems of certain SCI entities (for example, those that have few or no critical SCI systems) generally being subject to less stringent policies and procedures than the systems of other SCI entities. Thus, a risk assessment is appropriate for an SCI entity to determine how to tailor its policies and procedures for its SCI systems and indirect SCI systems.

The Commission also believes that requiring an SCI entity to tailor its policies and procedures so that they are reasonably designed and adequate will entail that an SCI entity assess the relative criticality and risk of each of its SCI systems and indirect SCI systems. Evaluation of the risk posed by any particular SCI system to the SCI entity's operational capability and the maintenance of fair and orderly markets will be the responsibility of the SCI entity in the first instance. The Commission believes this approach will achieve the goal of improving Commission review and oversight of U.S. securities market infrastructure, but will do so within a more focused framework than as proposed. By being subject to requirements for a more targeted set of SCI systems, and guided by consideration of the relative risk of each of its SCI systems, SCI entities may more easily determine how to allocate their resources to achieve compliance with the regulation than they would have under the proposed regulation.

As noted above, one commenter urged the Commission to discuss what it means for policies and procedures to be reasonably designed ''to maintain . . . operational capability and promote the maintenance of fair and orderly markets.'' [465] This commenter characterized the proposed standard of ''maintaining operational capability'' as an ''introspective standard relevant to the applicable SCI entity,'' and the proposed standard of ''promoting the maintenance of fair and orderly markets'' as implying ''some incremental responsibility to the collective market.'' [466] The Commission agrees with this commenter's characterization and believes that it is appropriate for SCI entities to assess the risk of their systems taking into consideration both objectives, which are related and complementary.[467] Specifically, the Commission believes that it is important that an SCI entity's policies and procedures are reasonably designed to ensure its own operational capability, including the ability to maintain effective operations, minimize or eliminate the effect of performance degradations, and have sufficient backup and recovery capabilities. At the same time, an SCI entity's own operational capability can have broader effects and, as entities that play a significant role in the U.S. securities markets and/or have the potential to impact investors, the overall market, or the trading of individual securities,[468] the Commission believes that the policies and procedures should also be reasonably designed to promote the maintenance of fair and orderly markets.

Periodic Review

Some commenters expressed concern that, when an SCI entity's policies and procedures fail to prevent an SCI event, the Commission might use such failure as the basis for an enforcement action, charging that the policies and procedures were not reasonable.[469] One commenter suggested that the Commission's focus should be on an entity's adherence to its own set of policies and procedures, developed based on ''experience, annual SCI reviews, and other inputs,'' rather than a ''set of generic standards.'' [470]

In response to these comments, the Commission notes that the reasonably designed policies and procedures approach taken in adopted Rule 1001(a) does not require an entity to guarantee flawless systems. But the Commission believes it should be understood to require diligence in maintaining a reasonable set of policies and procedures that keeps pace with changing technology and circumstances and does not become outdated over time. The Commission is therefore adopting a requirement for periodic review by an SCI entity of the effectiveness of its policies and procedures required by Rule 1001(a), and prompt action by the SCI entity to

[462] *See supra* note 455 and accompanying text.

[463] *See* Proposing Release, *supra* note 13, at 18109 (stating: ''The Commission intends to . . . provide SCI entities sufficient flexibility, based on the nature, size, technology, business model, and other aspects of their business, to identify appropriate policies and procedures that would meet the articulated standard, namely that they be reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets.'').

[464] As a result of these changes, the adopted rule applies to fewer systems than as proposed, and only to those types of systems that the Commission believes pose significant risk to market integrity if not adequately safeguarded.

[465] *See supra* note 461 and accompanying text.

[466] *See* Direct Edge Letter at 4.

[467] The Commission notes that the identification of ''critical SCI systems'' in Regulation SCI emphasizes that some systems pose greater risk than others to the maintenance of fair and orderly markets if they malfunction, and that it is appropriate for an SCI entity to consider the risk to other SCI entities and market participants in the event of a systems malfunction.

[468] *See supra* note 59 and accompanying text.

[469] *See, e.g.*, BATS Letter at 3–4; Angel Letter at 2; and FSR Letter at 5. *See also* ITG Letter at 14 (stating that no set of policies and procedures could guarantee perfect operational compliance); and NYSE Letter at 32 (urging inclusion of a good faith safe harbor).

[470] *See* FIF Letter at 4.

remedy deficiencies in such policies and procedures.[471] An SCI entity will not be found to be in violation of this maintenance requirement solely because it failed to identify a deficiency in its policies and procedures immediately after the deficiency occurred if the SCI entity takes prompt action to remedy the deficiency once it is discovered, and the SCI entity had otherwise reviewed the effectiveness of its policies and procedures and took prompt action to remedy those deficiencies that were discovered, as required by Rule 1001(a)(3).

Further, the occurrence of a systems disruption or systems intrusion will not necessarily mean that an SCI entity has violated Rule 1001(a), or that it will be subject to an enforcement action for violation of Regulation SCI. The Commission will exercise its discretion to initiate an enforcement action if the Commission determines that such action is warranted, based on the particular facts and circumstances. While a systems problem may be probative as to the reasonableness of an SCI entity's policies and procedures, it is not determinative.

ii. Minimum Elements of Reasonable Policies and Procedures—Rule 1001(a)(2)

Proposed Rule 1000(b)(1)(i) would have required that an SCI entity's policies and procedures provide for, at a minimum: (A) The establishment of reasonable current and future capacity planning estimates; (B) periodic capacity stress tests of systems to determine their ability to process transactions in an accurate, timely, and efficient manner; (C) a program to review and keep current systems development and testing methodology; (D) regular reviews and testing of systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters; (E) business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse to ensure next business day resumption of trading and two-hour resumption of clearance and settlement services following a wide-scale disruption; and (F) standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data. References to ''systems'' in the proposed rule were to the proposed definition of SCI systems, and with respect to security standards only, the proposed definition of SCI security systems.

Adopted Rule 1001(a)(2) includes the items formerly proposed as Rules 1001(b)(1)(i)(A)–(F) as renumbered Rules 1001(2)(i)–(vi) and a new item (vii), relating to monitoring of SCI systems. Proposed items (A), (D), and (E) are revised in certain respects in response to comment. In addition, the Commission discusses below each of the adopted provisions of Rule 1001(a)(2) in the context of the adopted definitions of SCI systems and indirect SCI systems, where relevant.[472]

Capacity Planning

The SCI Proposal stated that policies and procedures for the establishment of reasonable current and future capacity planning (proposed item (A)) would help an SCI entity determine its systems' ability to process transactions in an accurate, timely, and efficient manner, and thereby help ensure market integrity.[473] One commenter expressed support for the requirement in proposed item (A),[474] and another commenter recommended that proposed item (A) be revised to make clear that SCI entity capacity planning estimates apply to ''technology infrastructure'' capacity, as opposed to capacity with respect to non-technology infrastructure of an SCI entity.[475] Because the Commission intended proposed item (A) to relate to capacity planning for SCI systems, rather than capacity planning more broadly (for example, in relation to an SCI entity's office space), the Commission is including this suggested clarification in adopted Rule 1001(a)(2)(i), and thus requires that an SCI entity's policies and procedures include the establishment of reasonable current and future *technology* infrastructure capacity planning estimates.

Stress Testing

A few commenters raised concerns about proposed item (B), which required periodic capacity stress tests.[476] Some of these commenters urged that the adopted rule provide an SCI entity with flexibility to determine, using a risk-based assessment, when capacity stress tests are appropriate.[477] Others suggested that capacity stress tests be required in specified circumstances or time frames, such as when new capabilities are released into production,[478] whenever required system capacity increases by 10 percent, on a quarterly basis, or in conjunction with any material systems change.[479] One commenter suggested that SCI entities should supplement dynamic stress and load testing with static analysis, a technique used to help uncover structural weaknesses in software.[480] In proposing item (B), the Commission intended for SCI entities to engage in a careful risk-based assessment (as suggested by some commenters)[481] of its SCI systems to determine when to stress test its systems.[482] Rule 1001(a)(2)(ii), as adopted, affords SCI entities the flexibility to consider the factors suggested by commenters, as appropriate for their specific systems and circumstances.[483] The adopted rule does not prescribe a particular frequency or trigger for stress testing; however, because the Commission believes that, in light of the variability in SCI systems, an SCI entity's experience with its particular systems

[471] *See* Rule 1001(a)(3).

[472] In particular, the Commission is adopting the language of items (B) and (C) as proposed (renumbered as Rule 1001(a)(2)(ii) and (iii), respectively) but elaborates on the scope of these provisions, as well as the scope of revised item (D) (renumbered as Rule 1001(a)(2)(iv)) and in the context of the adopted definitions of SCI systems and indirect SCI systems.

[473] *See* Proposing Release, *supra* note 13, at 18107.

[474] *See* MSRB Letter at 9.

[475] *See* DTCC Letter at 14–15. The Commission also received comments in regard to capacity planning as it relates to proposed industry standards on the capacity planning domain set out in proposed Table A. *See, e.g., infra* note 580 and accompanying text.

[476] *See, e.g.*, CISQ Letter at 5; DTCC Letter at 14; Lauer Letter at 6; MSRB Letter at 9; OCC Letter at 10; and SIFMA Letter at 12.

[477] *See* DTCC Letter at 14; and OCC Letter at 10. *See also* SIFMA Letter at 12 (suggesting that periodic capacity monitoring would be more appropriate and cost-effective than periodic capacity stress testing).

[478] *See* MSRB Letter at 9.

[479] *See* Lauer Letter at 6.

[480] *See* CISQ Letter at 5. *See also infra* notes 491 and 497, and 498 and accompanying text (further discussing this comment and the commenter's views on the value of assessing the structural quality of software).

[481] *See supra* note 477 and accompanying text.

[482] In response to the commenter that suggested periodic capacity monitoring would be more appropriate and cost-effective than periodic capacity stress testing, *see supra* note 477 and accompanying text, the Commission believes that such monitoring is appropriate and may play an important role in an SCI entity's assessing when to stress tests its systems. However, the Commission continues to believe that stress testing is necessary to help an SCI entity determine its systems' ability to process transactions in an accurate, timely, and efficient manner, and thereby help ensure market integrity. *See* Proposing Release, *supra* note 13, at 18107. While monitoring may be a cost-effective method to determine when a stress test is warranted, the Commission does not believe monitoring alone will be an effective substitute for stress testing, which, unlike monitoring, is designed to challenge systems capacity.

[483] *See supra* notes 478–479 and accompanying text.

and assessment of risk in this area will dictate when capacity stress testing is warranted. The requirement for periodic capacity stress tests of systems to determine their ability to process transactions in an accurate, timely, and efficient manner is therefore adopted as proposed as Rule 1001(a)(2)(ii).

Systems Development and Testing Methodology

In the SCI Proposal, the Commission explained that proposed item (C), which would require SCI entities to have policies and procedures for a ''program to review and keep current systems development and testing methodology,'' would help an SCI entity monitor and maintain systems capacity and availability.[484] The Commission is adopting the language of this item as proposed as Rule 1001(a)(2)(iii).

Two commenters supported this requirement as proposed.[485] Another commenter argued that sufficient controls were in place with respect to production systems, as proposed, and therefore that separate policies and procedures specifically for the development and testing environment would be unnecessary and duplicative.[486] This commenter added that, if development and testing systems were not excluded from the definition of SCI systems altogether, then the policies and procedures requirements regarding systems development and testing methodology should not apply separately to these environments. The Commission agrees with this comment, and believes it logically follows that policies and procedures requiring a program to review and keep current systems development and testing methodology for SCI systems, and indirect SCI systems, as applicable, are important if development and testing systems are excluded from the definition of SCI systems, as they are under the adopted regulation.[487] An SCI entity's systems development and testing methodology is a core part of the systems development life cycle for any SCI system. Therefore, the Commission believes that if an SCI entity did not have a program to review and keep current systems development and testing methodology for SCI systems, and indirect SCI systems, as applicable, its ability to assess the capacity, integrity, reliability, availability and security of its SCI systems and indirect SCI systems, as applicable, would be undermined. In complying with this adopted requirement, an SCI entity may wish to consider how closely its testing environment simulates its production environment; whether it designs, tests, installs, operates, and changes SCI systems through use of appropriate development, acquisition, and testing controls by the SCI entity and/or its third-party service providers, as applicable; whether it identifies and corrects problems detected in the development and testing stages; whether it verifies change implementation in the production stage; whether development and test environments are segregated from SCI systems in production; and whether SCI entity personnel have adequately segregated roles between the development and/or test environment, and the production environment.

Reviews of SCI Systems and Indirect SCI Systems

The SCI Proposal explained that proposed item (D), which would have required an SCI entity to establish, maintain, and enforce policies and procedures to review and test regularly SCI systems (and SCI security systems, as applicable), including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters, would assist an SCI entity in ascertaining whether such systems are and remain sufficiently secure and resilient.[488] Proposed item (D) garnered a range of comments. Some commenters addressing this item focused on internal SCI entity testing,[489] whereas others focused more broadly on industry-wide testing and testing of backup systems.[490]

With respect to comments on internal testing, one commenter suggested that the proposed requirement be expanded beyond testing to cover a range of ''quality assurance activities'' with each release of software into production.[491] Two commenters advocated for requiring an SCI entity to focus on identifying structural deficiencies, which they stated pose much greater risks than functional deficiencies.[492] A few commenters urged that groups independent of the team that designed and developed the systems should be involved in testing to offer a diverse perspective.[493] One of these commenters further suggested that enforcement of the policies governing development and testing activities should be conducted by a ''process audit'' role that evaluates compliance with policies, provides guidance to development and testing teams on how to comply, and reports on compliance to senior management.[494]

After careful consideration of the comments, the Commission is adopting this provision with modifications as Rule 1001(a)(2)(iv). Specifically, adopted Rule 1001(a)(2)(iv) requires an SCI entity's reasonably designed policies and procedures to include ''[r]egular reviews and testing, as applicable, of [its SCI systems and, for purposes of security standards, indirect SCI systems], including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters.''

As adopted, this provision will afford an SCI entity greater flexibility, through the addition of the phrase ''as applicable,'' to determine how to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters. Specifically, the adopted rule replaces the proposed rule's requirement that an SCI entity conduct ''regular reviews and testing'' of relevant systems (including backup systems) with a more flexible requirement that an SCI entity conduct ''regular reviews and

[484] *See* Proposing Release, *supra* note 13, at 18107.

[485] *See* CISQ Letter at 2; and MSRB Letter at 9.

[486] *See* FINRA Letter at 12.

[487] *See supra* Section IV.A.2.b (discussing the definition of ''SCI systems''). Because development and testing systems are not part of the adopted definition of ''SCI systems,'' systems issues with regard to development and testing systems would not be subject to the requirements of adopted Rule 1002 relating to corrective action, Commission notification, and dissemination of information on SCI events; or Rule 1003(a) regarding notification of systems changes.

[488] *See* Proposing Release, *supra* note 13, at 18107.

[489] *See, e.g.*, CAST Letter at 4; CISQ Letter at 3–7; FIA PTG Letter at 4; Lauer Letter at 6; and MSRB Letter at 10.

[490] *See, e.g.*, Angel Letter at 2; CoreOne Letter at 3–5; DTCC Letter at 13; FIA PTG Letter at 2; FIX Letter at 1–2; Tradebook Letter at 1–4; UBS Letter at 4; and CISQ Letter at 6. *See also infra* Section IV.B.6 (discussing adopted Rule 1004, requiring business continuity and disaster recovery testing, including required participation of designated members or participants of SCI entities in such testing).

[491] *See* CISQ Letter at 3–7 (encouraging the Commission to require quality assurance activities other than testing, including that an SCI entity evaluate and measure the structural quality of its SCI systems because ''the attributes of an SCI system most critically affecting its capacity, integrity, resiliency, availability, and security are predominantly structural (engineering) rather than functional (correctness)'').

[492] *See* CAST Letter at 4; and CISQ Letter at 3–7.

[493] *See, e.g.*, CISQ Letter at 7; and Lauer Letter at 6.

[494] *See* CISQ Letter at 7. This commenter further recommended that such process audits be conducted at least annually for each SCI system, and more often for SCI systems with operational problems, a record of non-compliance, or those being developed, tested, or operated by an inexperienced staff, and stated that process auditors who perform a mentoring role to software teams have proven a cost-effective mechanism for on-the-job training.

testing, as applicable'' of relevant systems, including backup systems. In response to some commenters' concerns that the proposed requirement focused too much on regular testing and not enough on other methods to assess systems operation,[495] the adopted rule provides an SCI entity the flexibility to determine an assessment methodology that would be most appropriate for a given system, or particular functionality of a system. Thus, consistent with commenters' views, the adopted provision does not specifically require both regular reviews and regular testing in connection with an SCI entity's identification of vulnerabilities. Instead, the provision requires reviews or testing (or both) to occur as applicable, so long as the approach is effective to identify vulnerabilities in SCI systems, and indirect SCI systems, as applicable.

While Rule 1001(a)(2)(iv) specifically identifies reviews and testing as means to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters, it does not dictate the precise manner or frequency of reviews and testing, and does not prohibit an SCI entity from determining that there are methods other than reviews and testing that may be effective in identifying vulnerabilities. For example, reviews and testing would each be one of the methods that an SCI entity could employ, and each SCI entity would be able to determine which method(s) are most appropriate for each SCI system (or indirect SCI system, as applicable) or particular functionality of a given system, as well as the frequency with which such method(s) should be employed.[496] In addition, in response to commenters advocating that SCI entities should focus on identifying structural vulnerabilities or weaknesses,[497] an SCI entity may also find it useful to conduct reviews of its software and systems architecture and design to assess whether they have flaws or dependencies that constitute structural risks that could pose a threat to SCI systems' operational capability.[498] Likewise, an inspection by an SCI entity of its physical premises may be a method of assessing some of the vulnerabilities listed in the rule (such as physical hazards).

Business Continuity and Disaster Recovery

Proposed item (E) would have required an SCI entity to have business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse to ensure next business day resumption of trading and two-hour resumption of clearance and settlement services following a wide-scale disruption. The Commission received significant comment on this aspect of the proposal, with several commenters questioning or challenging the principle that securities market infrastructure resilience is achieved by requiring both geographic diversity and specific recovery times for the backup and recovery capabilities of all SCI entities.[499] Although several commenters were supportive of the broad goals of the proposed requirement,[500] others maintained that, because the national market system has built-in redundancies, the proposed geographic diversity and resumption requirements need not apply to all SCI entities to ensure securities market resilience.[501] Some of these commenters urged that the specific redundancy requirement implicit in the proposed geographic diversity provision should apply to a more limited set of SCI entities.[502] In addition, some commenters stated that proposed time frames were too inflexible.[503]

The Commission has carefully considered commenters' views and is revising this provision from the proposal to: (i) Specify that the stated recovery timeframes in Regulation SCI are goals, rather than inflexible requirements; [504] and (ii) provide that the stated two-hour recovery goal applies to critical SCI systems generally. In addition, the Commission is adopting the geographic diversity requirement, which does not specify any minimum distance for an SCI entity's backup and recovery facilities, as proposed. As explained below, the Commission continues to believe that geographic diversity of physical facilities is an important component of every SCI entity's BC/DR plan.

Recovery Timeframes as Goals

Several commenters addressing proposed item (E) focused their comments specifically on the proposed recovery timeframes.[505] A few commenters that are clearing agencies specifically expressed concern about the proposed requirement for the two-hour resumption of clearance and settlement services, urging that the two-hour standard be a goal rather than a requirement.[506] One commenter noted

[495] *See supra* notes 491–492 and accompanying text.

[496] Rule 1001(a)(2)(iv) would also permit an SCI entity to engage personnel independent of the team that designed and developed the systems in testing, or to employ a process audit role, to comply with this requirement, as some commenters suggested. *See supra* notes 493–494 and accompanying text. Like other methods of review and testing, such engagements could identify vulnerabilities in a number of ways, such as through assessments of the SCI entity's compliance with applicable standards, its risk management and control framework, or its use of resources.

In response to the comment suggesting that process audits be conducted at least annually for each SCI system, and more often for SCI systems with operational problems, a record of non-compliance, or those being developed, tested, or operated by an inexperienced staff, the Commission notes that Rule 1001(a)(2)(iv) does not specify the precise manner or frequency of reviews and tests. Rather, Rule 1001(a)(2)(iv) provides flexibility to an SCI entity in determining the precise manner and frequency of reviews and/or tests. For example, an SCI entity could determine that, in order for its policies and procedures to be reasonably designed, as required by Rule 1001(a), its policies and procedures should provide that process audits be conducted at least annually for some SCI systems, and more frequently for certain other SCI systems.

[497] *See supra* note 492 and accompanying text.

[498] As noted by one commenter, static analysis could be a technique SCI entities could choose to utilize to help uncover structural weaknesses in software. *See supra* note 480 and accompanying text.

[499] *See, e.g.*, BIDS Letter at 8; FIA PTG Letter at 4; FIF Letter at 3; Group One Letter at 2–3; KCG Letter at 6–8, 11–14; FINRA Letter at 35–36; Angel Letter at 12; and ITG Letter at 15.

[500] *See* Direct Edge Letter at 4; FINRA Letter at 35; ISE Letter at 2; and MSRB Letter at 10.

[501] *See, e.g.*, BIDS Letter at 8; FIA PTG Letter at 4; FIF Letter at 3; Group One Letter at 2–3; and KCG Letter at 6–8, 11–14. According to these commenters, because of the ease with which market participants are able to shift their order flow when there is an issue at one or more markets, the proposed requirements are burdensome and unnecessary. *See also* Angel Letter at 12 (stating that, if an exchange experiences an issue, other exchanges have more than enough capacity to handle the trading volume, and suggesting that it is not necessary for each exchange to have totally redundant backup facilities if the market network as a whole has sufficient capacity).

[502] *See, e.g.*, FIA PTG Letter at 4. *See also supra* note 53 and accompanying text.

[503] *See, e.g.*, SIFMA Letter at 13; and Joint SROs Letter at 17.

[504] *See* Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial Systems, Securities Exchange Act Release No. 47638 (April 7, 2003), 68 FR 17809, 17812 (April 11, 2003) (''Interagency White Paper''), stating: ''Recovery-time objectives provide concrete goals to plan for and test against. They should not be regarded as hard and fast deadlines that must be met in every emergency situation;'' and 2003 Policy Statement on Business Continuity Planning for Trading Markets, Securities Exchange Act Release No. 48545 (September 25, 2003), 68 FR 56656, 56658 (October 1, 2003) (''2003 BCP Policy Statement''), stating: ''Consistent with the approach taken in the Interagency Paper, the next-day resumption objective should provide a concrete goal to plan for and test against. This should not be regarded as a hard and fast deadline that must be met in every emergency situation.''

[505] *See, e.g.*, SIFMA Letter at 3, 13, 18; KCG Letter at 11–12; DTCC Letter at 15; OCC Letter at 9–10; Omgeo Letter at 27–28; Angel Letter at 16–17; Direct Edge Letter at 4–5; ISE Letter at 2–5; Joint SROs Letter at 16–17; FINRA Letter at 36; MSRB Letter at 10; Tellefsen Letter at 6; and Group One Letter at 2.

[506] *See* DTCC Letter at 15 (''[P]roposed Rule 1000(b)(l)(i)(E) has made what is currently a target within the 2003 Interagency White Paper that

that the ''Interagency White Paper itself recognizes that 'various external factors surrounding a disruption such as time of day, scope of disruption, and status of critical infrastructure—particularly telecommunications can affect actual recovery times,' and concludes that '[r]ecovery-time objectives provide concrete goals to plan for and test against . . . they should not be regarded as hard and fast deadlines that must be met in every emergency situation.' '' [507] Several commenters suggested that SCI entities generally be given more discretion to decide when to resume trading following a wide-scale disruption.[508] Other commenters stated more broadly that the proposed recovery timeframes were too rigid and inconsistent with the Interagency White Paper and the 2003 BCP Policy Statement.[509] Other commenters similarly noted that it might be in the public interest and consistent with the protection of investors and the maintenance of fair and orderly markets for the markets to remain closed following a wide-scale disruption.[510]

In response to comments that the proposed two-hour recovery time frame was too inflexible,[511] the Commission is eliminating the proposed requirement that an SCI entity must ''ensure'' next business day resumption of trading and two-hour resumption of clearance and settlement services following a wide-scale disruption. The Commission acknowledges that a hard and fast resumption timeframe may not be achievable in each and every case, given the variety of disruptions that potentially could arise and pose challenges even for well-designed business continuity and disaster recovery. For this reason, the Commission is revising the proposed requirement by replacing it with a requirement that an SCI entity have policies and procedures that include ''business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are *reasonably designed to achieve* next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption.'' Replacement of the phrase ''to ensure'' with the phrase ''reasonably designed to achieve'' means that Regulation SCI's enumerated recovery timeframes are concrete goals, consistent with the Interagency White Paper and 2003 BCP Policy Statement.[512] As such, the rule's specified recovery timeframes are the standards against which the reasonableness of business continuity and disaster recovery (''BC/DR'') plans will be assessed by the Commission and its inspection staff. Moreover, as recovery goals, rather than hard and fast deadlines, the enumerated time frames in the rule will continue to allow for SCI entities to account for the specific facts and circumstances that arise in a given scenario to determine whether it is appropriate to resume a system's operation following a wide-scale disruption.

Recovery Timeframe Distinctions

In the SCI Proposal, the Commission solicited comment on whether the proposed next business day resumption of trading following a wide-scale disruption and proposed two-hour resumption of clearance and settlement services following a wide-scale disruption were appropriate.[513] The Commission also solicited comment on whether it should consider revising the proposed next business day resumption requirement for trading to a shorter period for certain entities that play a significant role within the securities markets.[514] One commenter stated that it agreed with imposing more stringent requirements for resumption of clearance and settlement services than for trading services following a wide-scale disruption.[515] However, this commenter also urged more broadly that the Commission take into account the criticality of the functions performed by an SCI entity to the maintenance of fair and orderly markets in order to tailor the obligations of the rule more effectively.[516] According to this commenter, ''[n]otification and remediation requirements . . . should be tailored to the time sensitivity of each of the functions performed, not applied uniformly across all activities of an SCI entity.'' This commenter identified ''highly critical functions'' as including the primary listing exchanges, trading of securities on an exclusive basis, securities information processors, clearance and settlement agencies, distribution of unique post-trade transparency information, and real-time market surveillance,'' and urged the Commission to ''leverage the best practices of the Interagency White Paper, and expand them to include the [highly] critical functions. . . .'' [517] Other commenters also urged the Commission to consider the criticality of SCI systems functionality and tailor requirements accordingly.[518] One

clearing and settling services be resumed within 2 hours of a disruption into a requirement that may not be attainable in all circumstances. . . .''); OCC Letter at 9–10 (''While a two-hour recovery time objective is a laudable goal . . . current guidelines remain appropriate to recover and resume clearing and settlement activities within the business day on which the disruption occurs, with the overall aspiration of achieving recovery and resumption within two hours''); and Omgeo Letter at 27–28 (''While Omgeo agrees that SCI entities should be required to rapidly recover from a wide-scale disruption and resume operations to avoid disrupting the critical markets beyond a single business day, it is unreasonable to require these operations to be resumed within two hours.'').

[507] *See* Omgeo Letter at 27–28.

[508] *See* Angel Letter at 16–17; Direct Edge Letter at 4–5; ISE Letter at 2; Joint SROs Letter at 16–17; and Group One Letter at 2.

[509] *See* SIFMA Letter at 13 (noting that the Interagency White Paper recommends that ''core clearing and settlement organizations develop the capacity to recover and resume clearing and settlement activities within the business day on which the disruption occurs with the overall goal of achieving recovery and resumption within two hours after an event.'' *See also* Joint SROs Letter at 17 (noting that the 2003 BCP Policy Statement, *supra* note 504, provides that rapid recovery should not be regarded as a hard and fast deadline that must be met in every emergency situation).

[510] *See, e.g.*, Angel Letter at 16–17; Direct Edge Letter at 4–5, 9; ISE Letter at 2–5; and Joint SROs Letter at 16–17.

[511] *See supra* notes 506–510 and accompanying text.

[512] *See* Interagency White Paper, *supra* note 504, at 17812–13, and the 2003 BCP Policy Statement, *supra* note 504, at 56658.

[513] *See* Proposing Release, *supra* note 13, at 18112, question 73.

[514] *See id.* at 18112, question 76.

[515] *See* SIFMA Letter at 12–13. Specifically, this commenter noted that the Interagency White Paper, *supra* note 504, distinguishes between ''core clearing and settlement organizations'' and firms that play ''significant roles in the financial markets'' and recommended that the Commission continue to distinguish between SCI entities that are responsible for the highly critical function of centralized counterparties (*e.g.,* clearing agencies registered with the Commission) and SCI entities that are not.

[516] *See* SIFMA Letter at 4.

[517] *See id.* at 4, 18. SIFMA also listed the distribution of unique post-trade transparency information and real-time market surveillance as highly critical functions. While such systems are not specifically identified in the first prong of the definition of critical SCI systems (as are SCI systems that directly support functionality relating to: (1) Clearance and settlement systems of clearing agencies; (2) openings, reopenings, and closings on the primary listing market; (3) trading halts; (4) initial public offerings; (5) the provision of consolidated market data; or (6) exclusively-listed securities), the Commission notes that systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets are considered critical SCI systems under its second prong. *See supra* Section IV.A.2.c (discussing the definition of ''critical SCI systems'').

[518] *See, e.g.,* KCG Letter at 8, 13–14 (suggesting that proposed item (E) apply only to SCI entities that perform critical, unique functions in the market), and at 5 (stating ''when critical services are provided, additional heightened regulatory requirements, as proposed in Regulation SCI, may be appropriate''). *See also* UBS Letter at 3 (urging the Commission to take into consideration the difference between ''interruptions of activities that hold significant implications for the National Market System'' and ''low criticality activities [that] are much more manageable and localized in impact

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commenter noted that the August 2013 Nasdaq SIP outage revealed each of SIAC and Nasdaq (in their roles as plan processors) as a potential ''single point of failure'' in the national market system, and specifically urged improved backup capabilities for these systems.[519] Another commenter, in the context of questioning the need for all markets to have geographically diverse backups, acknowledged that specific redundancy might be appropriate in certain areas, such as where an instrument is traded only on one exchange or in the case of a primary market during the open and closing periods of the market.[520]

The Commission has carefully considered these comments and believes they support revising the proposed rule to provide that the two-hour recovery goal specified in the adopted rule, as the standard against which BC/DR plans are to be assessed, should apply not only to ''clearance and settlement services,'' but more generally to the functions performed by critical SCI systems. Given that the securities markets are dependent upon the reliable operation of critical SCI systems, the Commission believes it is reasonable to distinguish the two-hour and next-business day recovery goals in a manner consistent with other provisions of adopted Regulation SCI: Specifically, to have the shorter recovery goal apply to critical SCI systems, and the longer recovery goal apply to resumption of trading by non-critical SCI systems. The Commission also notes that, because the proposed recovery timeframes are being adopted as concrete goals that the policies and procedures must be reasonably designed to achieve, rather than hard and fast requirements, the adopted approach is somewhat more flexible than that proposed. Accordingly, adopted Rule 1001(a)(2)(v) holds BC/DR plans for critical SCI systems (as defined in Rule 1000) to a higher standard than BC/DR plans for resumption of trading operations more generally. Specifically, an SCI entity responsible for a given critical SCI system will be expected to design BC/DR plans that contemplate resumption of critical SCI system functionality to meet a recovery goal of two hours or less. The Commission believes that this approach is consistent with the broader risk-based approach urged by commenters.[521] The Commission also believes that its approach to holding critical SCI systems to stricter resiliency standards than other systems is an appropriate measure that responds not only to comments received, but also to recent events highlighting the effects of malfunctions in critical SCI systems.[522]

Two commenters requested clarification on the expectations for resumption of SCI systems that are not related to trading, clearance, or settlement.[523] In response to this comment, the Commission notes that the adopted definition of SCI systems has been refined from the proposed definition of SCI systems and that all SCI systems could be considered to be ''related to'' trading. However, systems that directly support market regulation and/or market surveillance will not be held to the resumption goals of Rule 1001(a)(2)(v) (unless they are critical SCI systems) because the Commission believes that the resumption of trading and critical SCI systems could occur following a wide-scale disruption without the immediate availability of market regulation and/or market surveillance systems (unless they are critical SCI systems). However, systems that directly support trading, order routing, and market data would be subject to the next-business day resumption goal, unless they are also critical SCI systems, in which case they would be subject to the two-hour resumption goal.

One commenter questioned what the expectations are with respect to next-day resumption if an SCI entity loses functionality towards the end of the trading day.[524] In response to this comment, the Commission notes that neither the next-business day resumption of trading goal nor the two-hour recovery goal for critical SCI systems is dependent on the time of day that the loss of functionality occurs. Consistent with the Interagency White Paper and 2003 BCP Policy Statement, however, the Commission acknowledges that the time of day of a disruption can affect actual recovery times.[525] The Commission believes it is important, particularly with respect to clearing agencies, that SCI entities endeavor to take all steps necessary to effectuate end of day settlement.

Geographic Diversity To Ensure Resilience

Several commenters addressing proposed item (E) expressed concern about the proposed geographic diversity requirement.[526] Some commenters cited a reluctance on the part of SCI entity members or participants to incur the cost or assume the risk of connecting to a backup site that would only be used infrequently.[527] In addition, some commenters cited concerns, such as challenges to market makers generating quotes, if a backup site did not have the same low latency as the primary site.[528] One of these commenter suggested that allowing other fully operational exchanges to fill in and perform the duties of an exchange experiencing an outage would offer the advantages of continued operation on tested systems and the introduction of fewer variables.[529] Another of these commenters argued that, in many respects, the goal of resilient and redundant markets is already in place due to the existence of multiple competing and interconnected venues, operating as a collective system under Regulation NMS.[530]

One commenter agreed that it is a best business practice for a market to have backup disaster recovery facilities and robust BC/DR plans, but stated that ''significant geographic diversity'' should not be an absolute requirement,'' because a wide-scale disruption in New York or Chicago would make next day resumption difficult, even with a geographically diverse backup.[531] This commenter noted that the more remote the backup, the more difficult it would be to staff such a facility, and even more so in a surprise disaster, unless the backup was fully staffed at all times.[532] Several commenters also argued that SCI entities that are ATSs are less critical to market stability, and therefore

. . . because market participants are not directly touched or are equipped to quickly route around the problem''). According to this commenter, activities that hold such significant implications would include: ''disruption at primary exchange during [the] open/close, [a] problem with protected quote data, [an] outage at listing exchange during [an] IPO, [and] SIP data disruptions.''

[519] *See* Angel Letter 2 at 3–4.

[520] *See* FIA PTG Letter at 4.

[521] *See supra* notes 53–57 and accompanying text (summarizing commenters' recommendations with regard to adopting a risk-based approach generally).

[522] *See supra* Section II.B (discussing recent systems issues, including a systems problem that resulted in certain exclusively-listed securities being unable to trade for over three hours, and a systems problem affecting the SIP that halted trading in all Nasdaq-listed securities for more than three hours).

[523] *See* FINRA Letter at 36; and MSRB Letter at 10.

[524] *See* Tellefsen Letter at 6.

[525] *See* Interagency White Paper, *supra* note 504, at 17812, and the 2003 BCP Policy Statement, *supra* note 504, at 56658.

[526] *See, e.g.,* KCG Letter at 13; FIA PTG Letter at 3–4; Group One Letter at 2–3; ISE Letter at 2–5; BIDS Letter at 8; and ITG Letter at 15.

[527] *See* KCG Letter at 13; FIA PTG Letter at 3–4; and Group One Letter at 2–3.

[528] *See* KCG Letter at 13; and FIA PTG Letter at 3–4.

[529] *See* Group One Letter at 2–3.

[530] *See* FIA PTG Letter at 4. *See also* Angel 2 Letter at 3.

[531] *See* ISE Letter at 2–5.

[532] *See id.*

should be subject to less stringent geographic diversity and recovery requirements.[533] One commenter suggested eliminating the reference to ''geographic diversity'' in favor of requiring ''comprehensive business continuity and disaster recovery plans with recovery time objectives of the next business day for trading and two hours for clearance and settlement,'' and emphasizing as guidance that geographic diversity of physical facilities would be an expected component of any such plan.[534]

The Commission has carefully considered commenters' views on the proposed geographic diversity requirement and continues to believe that geographic diversity of physical facilities is an important component of every SCI entity's BC/DR plan.[535] The Commission believes that challenges to recovery are increased when a disruption impacts a broad geographic area, and therefore that an SCI entity's arrangements to assure resilience in the event of a wide-scale disruption cannot reliably be achieved without geographic diversity of its BC/DR resources.[536] The Commission does not agree with commenters who argued that the existence of multiple competing and interconnected venues operating as a collective system under Regulation NMS obviates the need for geographic diversity at the individual SCI entity level.[537] For example, a wide-scale disruption, such as a natural disaster or man-made attack, could affect a large number of SCI entities, and absent individual SCI entity responsibility for maintaining geographic diversity, there could be a greater likelihood that a critical mass of SCI entities would not be operational, so that the continued maintenance of fair and orderly markets could be impacted. The Commission notes that some of the practical difficulties commenters cited as the basis for objecting to a backup site requirement, such as the cost and operational risk of maintaining a redundant connection to an SCI entity backup facility that would be used infrequently, are concerns raised on behalf of SCI entity members and participants.[538] In response to commenters who expressed concern regarding the cost for members or participants to co-locate their systems at backup sites to replicate the speed and efficiency of the primary site, the Commission emphasizes that adopted Rule 1001(a)(2)(v) does not require an SCI entity to require members or participants to use the backup facility in the same way it uses the primary facility. Rather, the assessment of the effectiveness of a BC/DR plan that includes geographically diverse backup facilities is whether it is reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption.

In response to comments that geographic diversity should be encouraged but not required for all SCI entities, the Commission does not believe that it would be appropriate to eliminate the proposed requirement that SCI entities maintain geographically diverse backup and recovery capabilities (which the Commission understands many SCI entities already have) because, as stated, absent individual SCI entity responsibility for maintaining geographic diversity, there could be a greater likelihood that a critical mass of SCI entities would not be operational following a wide-scale disruption. In response to comment that ATSs are less critical to market stability, and therefore should be subject to less stringent geographic diversity and recovery requirements, the Commission notes that ATSs that do not have critical SCI systems will be subject to less stringent geographic diversity and recovery requirements than SCI entities that do.[539] However, because the Commission believes that SCI ATSs have the potential to significantly impact investors, the overall market, and the trading of individual securities as a result of an SCI event, the Commission believes that these entities are appropriate for inclusion in the definition of SCI entity and for the application of the geographic diversity requirement.[540]

Like the proposed rule, the adopted rule does not specify any particular minimum distance or geographic location that would be necessary to achieve geographic diversity.[541] However, as stated in the SCI Proposal, the Commission continues to believe that backup sites should not rely on the same infrastructure components, such as for transportation, telecommunications, water supply, and electric power.[542] The Commission also continues to believe that an SCI entity should have a reasonable degree of flexibility to determine the precise nature and location of its backup site depending on the particular vulnerabilities associated with those sites, and the nature, size, technology, business model, and other aspects of its business.'' [543] In response to comment that a geographically diverse backup facility is impractical if key personnel do not live sufficiently close to the backup facility, the Commission notes that adopted Regulation SCI does not require an SCI entity to have a geographically diverse backup facility so distant from the primary facility that the SCI entity may not rely primarily on the same labor pool to staff both facilities if it believed it to be appropriate.[544] Given that the Commission did not propose a specified minimum distance to achieve geographic diversity, the Commission believes that the geographic diversity requirement is reasonable and appropriate for all SCI entities. The

[533] *See* BIDS Letter at 8; FIA PTG Letter at 4; ITG Letter at 15; and KCG Letter at 8, 13. These commenters believed that the proposed geographic diversity requirements are burdensome and unnecessary because of the ease with which market participants are able to shift their order flow when there is an issue at one or more markets. In addition, two commenters argued that, because ATSs are subject to FINRA regulations with respect to BC/DR plans, further regulation would be redundant and unnecessary. *See* ITG Letter at 15; and OTC Markets Letter at 9.

[534] *See* Direct Edge Letter at 4.

[535] The Commission's view is consistent with the 2003 BCP Policy Statement. *See* 2003 BCP Policy Statement, *supra* note 504, at 56658. *See also infra* Section VI.C.2.b (discussing the benefits of geographic diversity).

[536] *See, e.g.,* 2003 BCP Policy Statement, *supra* note 504, at 56657 (stating that a critical ''lesson learned'' from the events of September 11, 2001 is the need for more rigorous business continuity planning in the financial sector to address problems of wider geographic scope and longer duration than those previously addressed).

[537] *See supra* notes 530 and 533 and accompanying text.

[538] *See infra* Section IV.B.6 (discussing SCI entity BC/DR testing requirements for members or participants).

[539] In addition, in response to commenters who argued that, because ATSs are subject to FINRA regulations with respect to BC/DR plans further regulation would be redundant and unnecessary (*see supra* note 533), the Commission notes that FINRA Rule 4370 generally requires that a member maintain a written continuity plan identifying procedures relating to an emergency or significant business disruption. Unlike Regulation SCI, however, the FINRA rule does not include the requirement that the business continuity and disaster recovery plans be reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, nor does it require the functional and performance testing and coordination of industry or sector-testing of such plans, which the Commission believes to be instrumental in achieving the goals of Regulation SCI with respect to SCI entities. *See also supra* note 115.

[540] *See supra* notes 107–109 and accompanying text.

[541] *See* Proposing Release, *supra* note 13, at 18108, n. 182 and accompanying text.

[542] *See id.*

[543] *See id.*

[544] An SCI entity with critical SCI systems subject to a two-hour recovery goal may, however, find it prudent to establish back-up facilities a significant distance away from their primary sites, or otherwise address the risk that a wide-scale disruption could impact either or both of the sites and their labor pool. *See* Interagency White Paper, *supra* note 504, at 17813.

geographic diversity requirement is therefore adopted as proposed.

In sum, the Commission believes that adopted Rule 1001(a)(2)(v), requiring an SCI entity to have business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, is consistent with, and builds upon, both the Interagency White Paper and the 2003 BCP Policy Statement by applying their principles to SCI entities in today's trading environment, one with a heavy reliance on technological infrastructure. The Commission believes that individual SCI entity resilience is fundamental to achieving the goal of improving U.S. securities market infrastructure resilience.

Robust Standards for Market Data

Proposed item (F), requiring an SCI entity to have standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data, received little comment. One commenter supported the proposed requirement, subject to further clarification about what constitutes market data.[545] Another commenter believed that this proposed requirement is redundant because SROs and other market participants are already subject to substantial requirements for market data.[546]

While consolidated market data is collected and distributed pursuant to a variety of Exchange Act rules and joint industry plans,[547] the Commission does not believe that existing requirements have the same focus on ensuring the operational capability of the systems for collecting, processing, and disseminating market data. Thus, the Commission believes that this provision, while consistent with existing rules, acts as a complement to such requirements and is not redundant. Further, as explained above, the term ''market data'' is not intended to include only consolidated market data, but proprietary market data as well and, as such, SCI systems directly supporting proprietary market data or consolidated market data are subject to the requirements of item (F). As stated in the SCI Proposal, the Commission believes that the accurate, timely, and efficient processing of data is important to the proper functioning of the securities markets. The Commission continues to believe that it is important that each SCI entity's market data systems are reasonably designed to maintain market integrity and that the proposed requirement would facilitate that goal.[548] This element, requiring that an SCI entity's policies and procedures include standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data, is adopted as proposed, as Rule 1001(a)(2)(vi).

Monitoring

The Commission is adopting an additional provision, designated as Rule 1001(a)(2)(vii), that requires an SCI entity's policies and procedures to provide for monitoring of SCI systems, and, for purposes of security standards, indirect SCI systems, to identify potential SCI events. Several commenters argued that Regulation SCI should allow entities to adopt and follow escalation procedures instead of providing that obligations under Regulation SCI are triggered by one employee's awareness of a systems issue.[549] The Commission is modifying Regulation SCI in three respects in response to these comments: revising the definition of responsible SCI personnel to focus on senior managers; requiring that an SCI entity have policies and procedures to identify, designate, and escalate potential SCI events to responsible SCI personnel; and explicitly requiring policies and procedures for monitoring.[550] The requirement that an SCI entity have policies and procedures to provide for monitoring of SCI systems and, for purposes of security standards, indirect SCI systems, is added to make explicit that escalation of a systems problem should occur not only if a systems problem is identified by chance, but rather that an SCI entity should have a monitoring process in place so that systems problems are able to be identified as a matter of standard operations and pursuant to parameters reasonably established by the SCI entity. In addition, the Commission believes that the reliability of escalation of potential SCI events to designated responsible SCI personnel for determination as to whether they are, in fact, SCI events is likely to be more effective when it occurs in connection with established procedures for monitoring of SCI systems and indirect SCI systems and pursuant to a process for the communication of systems problems by those who are not responsible SCI personnel to those who are. The Commission notes that several commenters discussed the role that technology staff play in monitoring and identifying potential systems problems and escalating issues up the chain of command to management as well as legal and/or compliance personnel. Although systems monitoring may already be routine in many SCI entities, there are expected benefits of monitoring and thus it is appropriate to require an SCI entity's policies and procedures to provide for monitoring of SCI systems, and, for purposes of security standards, indirect SCI systems, to identify potential SCI events. The Commission believes that monitoring in tandem with escalation to responsible SCI personnel is an appropriate approach to ensuring SCI compliance. As noted, the requirement that an SCI entity have policies and procedures for monitoring provides an SCI entity with flexibility to establish parameters that define the types of systems problems to which technology personnel should be alert, as well as the frequency and duration of monitoring. The Commission also believes this requirement is consistent with a risk-based approach, and that an SCI entity's policies and procedures for monitoring may be tailored to the relative criticality of SCI systems, with critical SCI systems likely to be subject to relatively more rigorous policies and procedures for monitoring than other SCI systems.

iii. Policies and Procedures Consistent With ''Current SCI Industry Standards''—Rule 1001(a)(4)

Proposed Rule 1000(b)(1)(ii) stated that an SCI entity's policies and procedures would be deemed to be reasonably designed if they are consistent with ''current SCI industry standards,'' such as those listed on proposed Table A. ''Current SCI industry standards'' were not limited to those listed on proposed Table A, but

[545] *See* MSRB Letter at 8.

[546] *See* Angel Letter at 19.

[547] *See, e.g.,* Rules 601–604 of Regulation NMS and Rule 301(b)(3) of Regulation ATS. *See also supra* Section IV.A.1.c (discussing definition of plan processor) and Concept Release on Equity Market Structure, *supra* note 4, at 3600 (discussing various rules and requirements relating to consolidated market data).

[548] *See* Proposing Release, *supra* note 13, at 18108.

[549] *See, e.g.,* OCC Letter at 12; FINRA Letter at 25–26; Omgeo Letter at 13; FIF Letter at 5; and NYSE Letter at 19–20. *See also* infra notes 758–761 and accompanying text (discussing comments on the proposed ''becomes aware'' standard).

[550] *See infra* Section IV.B.3.a (discussing the Commission's determination to further focus the definition of ''responsible SCI personnel'').

were proposed to be required to be: (A) Comprised of information technology practices that are widely available for free to information technology professionals in the financial sector; and (B) issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization. The rule further stated that ''compliance with such current SCI industry standards . . . shall not be the exclusive means to comply with the requirements of paragraph (b)(1).''

The goal of proposed Rule 1000(b)(1)(ii) was to provide guidance to SCI entities on policies and procedures that would meet the articulated standard of being ''reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.'' The proposal sought to provide this guidance by identifying example information technology publications describing processes, guidelines, frameworks, and/or standards that SCI entities could elect to look to in developing its policies and procedures. Proposed Table A set forth an example of one set of technology publications that the Commission preliminarily believed was an appropriate set of reference documents. The SCI Proposal acknowledged that ''current SCI industry standards'' would not be limited to the publications identified on proposed Table A. As such, an SCI entity's choice of a current SCI industry standard in a given domain or subcategory thereof could appropriately be different from those contained in the publications identified in proposed Table A.[551] Many commenters, however, objected to the proposed objective criteria for reference publications, and/or one or more of the specific publications listed on proposed Table A. The Commission has carefully considered commenters' views and is adopting Rule 1000(b)(1)(ii), renumbered as Rule 1001(a)(4), with certain modifications as described below.

Criteria for Identifying SCI Industry Standards: Comments Received and Commission Response

Some commenters disagreed with the Commission's proposal to require SCI industry standards to be ''comprised of information technology practices that are widely available for free to information technology professionals in the financial sector.'' Several commenters argued that there were significant disadvantages to requiring that standards be available free of charge.[552] One of these commenters stated that requiring standards to be available for free ''may encourage SCI entities to use standards that may be outdated when more suitable standards may be available and would be more appropriate.''[553] Another of these commenters stated that ''the cost or lack thereof of a technology standard or standard framework has no bearing on the quality or appropriateness of such standard or framework and bears no significance to the maintenance of fair and orderly markets.''[554]

Two standard setting organizations commented regarding the use of consensus standards, citing OMB Circular No. A–119, which directs agencies to use voluntary consensus standards (*i.e.,* standards developed by professional standards organizations), and urged the Commission to eliminate the requirement that SCI industry standards be ''available for free.''[555] Another commenter similarly urged that it was important for SCI entities to use publications generated by professional organizations that regularly update their standards and employ open processes for gathering industry input.[556]

The Commission agrees that the cost or lack thereof of a technology standard or standard framework has no bearing on the quality or appropriateness of such standard, and also that SCI entities should be encouraged to use appropriate standards developed by professional organizations that regularly update their standards and employ open processes for gathering industry input. While the Commission did not propose to require that particular standards be used, in response to comment, the Commission is adopting Rule 1001(a)(4) without the criterion in the SCI Proposal that a technology standard be available free of charge. The other criteria are adopted as proposed. Thus, to qualify as an ''SCI industry standard,'' a publication must be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization. The Commission believes that this criterion is sufficiently flexible to include technology practices issued by professional organizations, including the professional organizations referenced by commenters.[557]

Proposed Table A: Comments Received

The SCI Proposal stated that written policies and procedures that are consistent with the relevant examples of SCI industry standards contained in the publications identified in Table A would be deemed to be ''reasonably designed'' for purposes of proposed Rule 1000(b)(1).[558] Proposed Table A listed publications covering nine inspection areas, or ''domains,'' that Commission staff historically has evaluated under the ARP Inspection Program.[559]

Proposed Table A elicited significant and varied comment. Some commenters objected generally to the Table A framework.[560] Others objected more specifically to Table A's proposed content,[561] and some commenters objected to Table A as a premature attempt to establish consensus on SCI industry standards where consensus has not yet emerged.[562]

*Table A Framework and Process*

One group of commenters suggested that, in lieu of the publications identified in Table A, the Commission should characterize policies and procedures as reasonably designed if they comply with ''generally accepted standards.''[563] Another commenter similarly suggested that the Commission replace the proposed rule's reference to ''current SCI industry standards'' with

[551] *See* Proposing Release, *supra* note 13, at 18109.

[552] *See* ANSI Letter at 1; DTCC Letter at 15; OCC Letter at 9; Omgeo Letter at 33–34; and X9 Letter at 1.

[553] *See* OCC Letter at 9.

[554] *See* Omgeo Letter at 33 (noting also that the proposed criteria would eliminate appropriate standards such ITIL and ISO 27000).

[555] *See* ANSI Letter at 1; and X9 Letter at 1.

[556] *See* CISQ2 Letter at 6. *See also* Angel Letter at 8 (suggesting that the proposed criteria could potentially result in the creation of race-to-the-bottom standards organizations that establish lax standards).

[557] *See infra* notes 583–601 and accompanying text. The Commission expresses no view, however, on any particular publication that is not specifically identified in *infra* notes 584–601, or standards that remain in development (*e.g.,* a standard being drafted by AT 9000) (*see infra* note 601 and accompanying text).

[558] *See* Proposing Release, *supra* note 13, at 18109.

[559] *See id.*

[560] *See, e.g.,* Angel Letter at 8–9; BATS Letter at 6–7; BIDS Letter at 7; Direct Edge Letter at 2; Joint SROs Letter at 4; MSRB Letter at 11–12; and NYSE Letter at 20–21.

[561] *See, e.g.,* Angel Letter at 8–9; BATS Letter at 6–7; FIF Letter at 3–4; ISE Letter at 11–12; CAST Letter at 10; MSRB Letter at 11–12; DTCC Letter at 15; FINRA Letter at 31; Omgeo Letter at 33; CISQ Letter at 1–2; OCC Letter at 9; Lauer Letter at 5–7; BIDS Letter at 7; and Liquidnet Letter at 3–4.

[562] *See, e.g.,* FIF Letter at 3–4; Liquidnet Letter at 3–4; UBS Letter at 7; and ISE Letter at 11–12.

[563] *See* Joint SROs Letter at 4.

the phrase ''generally accepted technology principles,'' and delete Table A and the proposed Table A criteria.[564] These commenters viewed proposed Table A as flawed in concept.[565] Specifically, one of these commenters expressed concern that the standards set forth in Table A might not keep pace with a constantly evolving technological landscape and that, despite this evolution, Commission staff might take a checklist approach to its review of policies and procedures, which would result in unintended consequences.[566]

The other commenter stated that it was more common, and more appropriate in any industry that relies heavily on technology, for an entity to review a variety of different standards for frameworks or best practices, and then adopt a derivative of multiple standards, customizing them for the systems at issue.[567] According to this commenter, SCI entities would be unlikely to comply with all aspects of any particular standard in Table A at any particular time, thereby ''obviating its usefulness.'' [568]

Other commenters argued that the Table A concept was flawed because Table A would always be on the verge of being outdated. For example, one commenter characterized the proposed Table A publications as ''soon-to-be outdated'' and stated that it is crucial that SCI entity policies and procedures be ''forward-looking'' and able to respond to future threats.[569] Another commenter stated that the proposed process for updating Table A [570] would not be sufficiently nimble to assure that SCI entities adhere to the best possible then-current standards, and suggested that the Commission defer to the expertise of the organizations that have established the listed standards and rely on the updates provided by these organizations.[571] Another commenter stated that any ''hard coded'' solutions are likely to become obsolete very quickly.[572]

After careful consideration of these comments, the Commission acknowledges that the proposed framework for identifying and updating publications on Table A may not be sufficiently nimble to assure that its list of publications does not become obsolete as technology and standards change. The Commission agrees that, in an industry that relies heavily on technologies that are constantly evolving, the prescription of hard-coded solutions that may become quickly outdated is not the better approach. However, because several commenters stated that there is currently a lack of consensus on what constitutes generally accepted standards or principles in the securities industry,[573] the Commission continues to believe that there is value in identifying example publications for SCI entities to consider looking to in establishing policies and procedures that are consistent with ''current SCI industry standards.'' [574]

After considering the potential disadvantages of ''hard-coding'' Table A in a Commission release, and the potential benefits of providing further guidance to SCI entities on the meaning of ''current SCI industry standards,'' the Commission has determined that, rather than the Commission issuing Table A in this release, Commission staff should issue guidance to assist SCI entities in developing policies and procedures consistent with ''current SCI industry standards'' in a manner that is consistent with the Commission's response to comments received on proposed Table A, as discussed in this Section IV.B.1.b.iii, and periodically update such guidance as appropriate. The Commission believes that guidance issued by the Commission staff will have the advantage of easier updating and allow for emerging consensus on standards more focused on the securities industry. Thus, concurrent with the Commission's adoption of Regulation SCI, Commission staff is issuing guidance to SCI entities on developing policies and procedures consistent with ''current SCI industry standards.'' [575]

*Table A Publications*

Many commenters who did not urge elimination of Table A altogether addressed the content of proposed Table A. Those commenters did not express opposition to the identification of certain inspection areas or domains on proposed Table A, but some commenters identified issues with specific publications listed on Table A.[576] Specifically, two commenters stated that the NIST publication listed for the Systems Development Methodology domain was outdated.[577] One of these commenters objected to this publication as reflecting a burdensome staged process to software development that favors the ''waterfall methodology'' over ''agile'' software development, which generally uses more ''nimble processes'' and is more typical in the financial services industry today.[578] Another commenter noted that this publication had both strengths and weaknesses.[579] Two commenters objected to the FFIEC's Operations IT Examination Handbook in the capacity planning domain as too generic.[580] One commenter objected to the inclusion of FFIEC's Audit IT Examination Handbook.[581] Another commenter stated more broadly that the proposed Table A publications focus too heavily

[564] *See* NYSE Letter at 20–21.

[565] *See* Joint SROs Letter at 4; and NYSE Letter at 20.

[566] *See* Joint SROs Letter at 4. Other commenters similarly expressed concern that SCI entities would closely adhere to the publications listed in Table A (even though the SCI Proposal specified that such adherence would not be the exclusive means to comply with the requirements of proposed Rule 1000(b)(1)), rather than take advantage of the flexibility built into the proposed rule out of concern that if they did not, they would expose themselves to potential regulatory action for failure to comply with Regulation SCI. *See, e.g.,* MSRB Letter at 11; Angel Letter at 8; BATS Letter at 6; and NYSE Letter at 20–21.

[567] *See* NYSE Letter at 20.

[568] *See id.*

[569] *See id. See also* ISE Letter at 10 (stating that the standards listed in Table A are not the most current or appropriate standards). *See also infra* notes 577–578 and accompanying text.

[570] In the SCI Proposal, the Commission stated that it ''preliminarily believes that, following its initial identification of one set of SCI industry standards . . . it would be appropriate for Commission staff, from time to time, to issue notices to update the list of previously identified set of SCI industry standards after receiving appropriate input from interested persons. . . . However, until such time as Commission staff were to update the identified set of SCI industry standards, the then-current set of SCI industry standards would be the [relevant] standards. . . .'' Proposing Release, *supra* note 13, at 18111.

[571] *See* MSRB Letter at 11–12.

[572] *See* Direct Edge Letter at 2.

[573] *See supra* note 633 and accompanying text.

[574] *See* Rule 1001(a)(4), which states: ''For purposes of [complying with Rule 1001(a)], such policies and procedures shall be deemed to be reasonably designed if they are consistent with current SCI industry standards, which shall be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization. Compliance with such current SCI industry standards, however, shall not be the exclusive means to comply with [Rule 1001(a)].''

[575] Staff Guidance on Current SCI Industry Standards will be available on the Commission's Web site at: *www.sec.gov.*

[576] *See, e.g.,* Angel Letter at 9; BATS Letter at 6–7; FIF Letter at 3–4; and ISE Letter at 10.

[577] *See* BATS Letter at 6; and ISE Letter at 10 (objecting to the inclusion of NIST Security Considerations in the System Development Life Cycle (Special Publication 800–64 Rev. 2) as a suitable ''current SCI industry standard'' in the systems development methodology domain).

[578] *See* BATS Letter at 6–7.

[579] *See* CISQ2 Letter at 4–5 (stating that NIST Special Publication 800–64, Rev. 2 and any derivative standard should ''be reviewed and if necessary revised by a panel of industry practitioners and technical experts to balance the requirement for rigor with the amount of practices and documentation specified in the standard'').

[580] *See* ISE Letter at 10; and FIF Letter at 3–4 (both described this publication as setting forth a process for conducting capacity planning).

[581] *See* ISE Letter at 10.

on firm-level risks and do not take into account the technological and economic stability of the U.S. market as a whole.[582]

In addition, several commenters suggested specific additions to the proposed list of publications on Table A.[583] For example, more than one commenter suggested the following standards as appropriate for inclusion on Table A: COBIT/ISACA;[584] ISO–27000;[585] ISO 25000;[586] and NFPA–1600.[587] Other standards or publications mentioned by commenters as useful, particularly in the area of software quality or software security, include the CISQ Software Quality Specification,[588] the Capability Maturity Model Integration (CMMI) framework,[589] ''SANS 20 Critical Security Controls,''[590] ''CWE/SANS Top 25 Most Dangerous Software Errors,''[591] the Open Source Security Testing Methodology Manual (OSSTMM),[592] the BITS Financial Services Roundtable Software Assurance Framework (January 2012),[593] the ''Build Security In Maturity Model'' (BSTMM),[594] Microsoft's SDL,[595] and resources for defining secure software development practices from organizations such as OWASP, WASC and SAFECode,[596] and publications issued by Scrum Alliance,[597] the Association for Software Testing (AST),[598] the Institute of Electrical and Electronics Engineers (IEEE),[599] and the Association for Computing Machinery (ACM).[600] In addition, one commenter suggested a standard currently being drafted by AT 9000, a working group which focuses on trading safety, regulatory requirements, and achieving efficiency and effectiveness of systems involved in automated trading.[601]

A few commenters opposed referencing standards in Regulation SCI at the outset and instead supported establishing a process that they believed would, after a certain period of time, yield a coherent set of standards.[602] One of these commenters urged that best practices should evolve from the Commission's experience with the annual SCI review process and experience with the ARP program, because such best practices will be specific to the securities industry and reflect the actual practices of SCI entities.[603] Finally, several commenters suggested that the Commission establish a working group to develop SCI industry standards.[604]

The Commission has carefully considered these comments, and continues to believe that there is value in identifying publications for SCI entities to consider looking to in establishing reasonable policies and procedures, because doing so will provide guidance on how an SCI entity may comply with adopted Rule 1001(a). The Commission therefore believes that issuance of staff guidance that does this, as discussed above, will be useful for SCI entities. However, after careful consideration of commenters' views regarding the publications on proposed Table A, the Commission believes it is useful to characterize how such staff guidance should be used by SCI entities. In particular, the Commission understands that some commenters who objected to the proposed Table A concept and/or the proposed Table A content were more broadly taking issue with the characterization of certain of the documents on proposed Table A, such as the NIST 800–53 document, as a ''standard,'' rather than a ''framework'' or a ''process.''[605] The Commission believes that many commenters implicitly were questioning why certain identified technology frameworks (such as NIST 800–53) were being labeled as, and thereby elevated to, an example of ''current SCI industry standards'' when many SCI entities were already following ISO 27000, COBIT, or other technology standards that they viewed as more specific, relevant, and/or cost effective than the NIST frameworks identified on proposed Table A.[606] In response to these comments, the Commission believes it is appropriate that the staff's guidance be characterized as listing examples of publications describing processes, guidelines, frameworks, or standards for an SCI entity to consider looking to in developing reasonable policies and procedures, rather than strictly as listing industry standards. Thus, the Commission believes it is appropriate if Commission staff were to list publications that provide guidance to SCI entities on suitable processes for developing, documenting, and implementing policies and procedures for their SCI systems (and indirect SCI systems, as applicable), taking into account the criticality of each such system.

With respect to the publications commenters suggested for inclusion on proposed Table A, the Commission is not disputing the value of such standards, and believes that each, when considered with respect to a particular system at an SCI entity, may contain appropriate standards for the SCI entity to use as, or incorporate within, its

[582] *See* Angel Letter at 9.

[583] *See, e.g.,* CAST Letter; ISE Letter; MSRB Letter; DTCC Letter; FINRA Letter; Omgeo Letter; CISQ2 Letter; OCC Letter; BIDS Letter; Liquidnet Letter; and X9 Letter.

[584] *See* CAST Letter at 10; ISE Letter at 11; and MSRB Letter at 11. COBIT (formerly known as Control Objectives for Information and related Technology) is an enterprise information technology governance framework developed by ISACA (formerly known as the Information Systems Audit and Control Association).

[585] *See* DTCC Letter at 15; ISE Letter at 11; FINRA Letter at 31; and Omgeo Letter at 33. FINRA recommended ISO–27000 series because it provides ''greater specificity'' and may be ''less burdensome'' than the standards identified in proposed Table A. ISE and DTCC recommended ISO 27000 specifically for application controls, information security and networking, and physical security controls. Omgeo stated more broadly that it models aspects of its program on widely accepted international standards and frameworks such as ITIL and ISO 27000.

[586] *See* CAST Letter and CISQ2 Letter. CAST suggested supplementing the SCI industry standards with standards that address development, as well as standards that pertain to structural software quality, such as ISO 25010 and CISQ Software Quality Specification. *See* CAST Letter at 5. CISQ2 agreed that standards addressing structural software quality are needed and suggested including CISQ Specification for Automated Quality Characteristic Measures: CISQ–TR–2012–01 in Table A. CISQ also pointed to the Capability Maturity Model Integration (CMMI) as another potential option, noting that it was the most widely adopted process standard for rigorous software development practices. *See* CISQ2 Letter at 3–4.

[587] *See* OCC Letter at 9; and ISE Letter at 11. ISE also specifically recommended BS 25999 as an alternative contingency planning standard.

[588] *See* CAST Letter at 5; and CISQ Letter at 1.

[589] *See* CAST Letter at 10.

[590] *See* FIF Letter at 4.

[591] *See id.*

[592] *See* Lauer Letter at 5–7.

[593] *See* BIDS Letter at 7.

[594] *See id.*

[595] *See id.*

[596] *See id.*

[597] *See* Liquidnet Letter at 4.

[598] *See id.*

[599] *See id.*

[600] *See id.*

[601] *See* X9 Letter at 2.

[602] *See, e.g.,* FIF Letter at 4, 6; Liquidnet Letter at 3; UBS Letter at 7; and ISE Letter at 11.

[603] *See* FIF Letter at 4, 6.

[604] *See, e.g.,* Liquidnet Letter at 3 (urging that a working group consisting of regulators, industry participants (from exchanges, ATSs and broker-dealers) and security and controls experts be established to develop a security and controls framework for the industry). *See also* UBS Letter at 7 (urging the Commission to convene a ''cross-industry, multi-disciplinary Working Group'' to be responsible for developing recommendations for appropriate standards); and ISE Letter at 11 (recommending that the Commission authorize SCI entities to establish a standards committee to review and recommend specific sets of standards). *See also* CISQ Letter at 2, 6 (supporting the Table A approach but also seeing value in tailoring existing standards from professional organizations into an industry-specific set of standards for SCI entities).

[605] The Commission also notes that this point was made by a member of the third panel at the Cybersecurity Roundtable, *supra* note 39. *See also* FINRA Letter at 31.

[606] *See supra* notes 577–601 and accompanying text.

policies and procedures.[607] The Commission notes that the guidance is intended to be used as a baseline from which the staff may work with SCI entities and other interested market participants to build consensus on industry-specific standards, as discussed more fully below. Further, the Commission believes that the goal of providing general and flexible guidance to SCI entities does not necessitate providing a lengthy list of all the publications that meet the criteria set forth in Rule 1001(a)(4).[608]

The Commission continues to believe that it may be appropriate for an SCI entity to choose to adhere to a standard or guideline in a given domain or subcategory thereof that is different from those contained in the staff guidance, and emphasizes that nothing that the staff may include in its guidance precludes an SCI entity from adhering to standards such as ISO 27000, COBIT, or others referenced by commenters to the extent they result in policies and procedures that comply with the requirements of Rule 1001(a).[609] Moreover, adopted Rule 1001(a)(4) explicitly provides that compliance with current SCI industry standards (*i.e.,* including those publications identified by the Commission staff) is not the exclusive method of compliance with Rule 1001(a). Accordingly, an SCI entity's determination not to adhere to some or all of the publications included in the staff guidance in developing its policies and procedures does not necessarily mean that its policies and procedures will be deficient or unreasonable for purposes of Rule 1001(a)(1). Importantly, the publications listed by Commission staff should be understood to provide guidance to SCI entities on selecting appropriate controls for applicable systems, as well as suitable processes for developing, documenting, and implementing policies and procedures for their SCI systems (and indirect SCI systems, as applicable), taking into account the criticality of each such system. Thus, for example, the Commission believes it would be reasonable for the most robust controls to be selected and implemented for ''critical SCI systems,'' as compared to other types of SCI systems, and the Commission believes it would be appropriate that the staff's guidance include publications that require more rigorous controls for higher-risk systems. The staff guidance is not intended to be static, however. As the Commission staff works with SCI entities, as well as members of the securities industry, technology experts, and interested members of the public, and as technology standards continue to evolve, the Commission anticipates that the Commission staff will periodically update the staff guidance as appropriate.

Another way in which the publications identified by Commission staff should provide guidance to SCI entities is by providing transparency on how the staff will, at least initially, prepare for and conduct inspections relating to Regulation SCI. As discussed in the SCI Proposal and above,[610] for over two decades, ARP staff has conducted inspections of ARP entity systems, with a goal of evaluating whether an ARP entity's controls over its information technology resources in each domain are consistent with ARP and industry guidelines,[611] as identified by ARP staff from a variety of information technology publications that ARP staff believed were appropriate for securities market participants.[612] With the adoption of Regulation SCI, and the resultant transition away from the voluntary ARP Inspection Program to an inspection program under Regulation SCI, the Commission believes it is helpful to establish consistency in its approach to examining SCI entities for compliance with Regulation SCI. Importantly, establishing consistency does not mean that the Commission will take a one-size-fits-all or checklist approach. Because the publications identified by Commission staff should be general and flexible enough to be compatible with many widely-recognized technology standards that SCI entities currently use, the Commission believes the publications identified by Commission staff should provide guidance for an SCI entity to self-assess whether its policies and procedures comply with Rules 1001(a)(1)–(2). Moreover, because use of the publications identified by Commission staff is not mandatory, the staff guidance should not be regarded as establishing a checklist, the use of which could result in unintended consequences, but rather a basis for considering how an SCI entity's selected standards relate to the guidance provided by Commission staff and whether they are appropriate standards for use by that particular SCI entity for a given system.

The Commission believes that it would be appropriate that the publications initially identified by Commission staff at a minimum include the nine inspection areas, or ''domains,'' that the Commission identified on Table A in the SCI Proposal and that are relevant to SCI entities' systems capacity, integrity, resiliency, availability, and security, namely: Application controls; capacity planning; computer operations and production environment controls; contingency planning; information security and networking; audit; outsourcing; physical security; and systems development methodology.

The Commission believes it would be appropriate that each publication identified by Commission staff be identified with specificity and include the particular publication's date, volume number, and/or publication number, as the case may be. Thus, for SCI entities that establish or self-assess their policies and procedures in reliance on the guidance provided by the publications identified by Commission staff, the Commission believes that the publications should be the relevant publications until such time as the list is updated by Commission staff. Of course, SCI entities may elect to use publications describing processes, guidelines, frameworks, and/or standards other than those identified by Commission staff to develop policies and procedures that satisfy the requirements of Rules 1001(a)(1)–(2).

As stated in the SCI Proposal, however, the Commission continues to believe that the development of securities-industry specific standards is a worthy goal. Although some commenters urged the Commission not to adopt Table A at the outset, and instead establish a process to achieve that end,[613] the Commission believes that the better approach is for Commission staff to provide examples of publications through its guidance that form a baseline and remain open to emerging consensus on industry-specific standards. In response to the

[607] *See supra* notes 577–601 and accompanying text.

[608] *See supra* note 557 and accompanying text.

[609] Likewise, such guidance would not preclude an SCI entity from adopting a derivative of multiple standards, and/or customizing one or more standards for the particular system at issue, as one commenter suggested. *See supra* note 567 and accompanying text. In assessing whether an SCI entity's use of such an approach in designing its policies and policies and procedures would be ''deemed'' to be reasonably designed, the Commission's inquiry would be into whether its policies and procedures were consistent with standards meeting the criteria in adopted Rule 1001(a)(4).

[610] *See supra* Section II.A.

[611] As stated in the SCI Proposal, the domains covered during an ARP inspection depend in part upon whether the inspection is a regular inspection or a ''for-cause'' inspection. Typically, however, to make the most efficient use of resources, a single ARP inspection will cover fewer than nine domains. *See* Proposing Release, *supra* note 13, at 18086.

[612] *See id.* and *supra* Section II.A (discussing the ARP Inspection Program).

[613] *See supra* note 604 and accompanying text.

commenter that suggested that the Commission leverage the annual SCI review process and the SCI inspection process to yield a coherent set of industry-specific standards that could be referenced on Table A, the Commission believes that such an approach could serve as an appropriate input into the future development of such standards.[614] In response to the commenter who stated that the proposed Table A publications do not take into account the technological and economic stability of the U.S. market as a whole,[615] the Commission notes that the technological stability of individual SCI entities, in tandem with a heightened focus on critical SCI systems, are necessary prerequisites to achieving such market-wide goals. Accordingly, the Commission believes that the publications identified by Commission staff today should serve as an appropriate *initial* set of publications, processes, guidelines, frameworks, and standards for SCI entities to use as guidance to develop their policies and procedures under Rule 1001(a). With this guidance as a starting point, the Commission expects that the Commission staff will seek to work with members of the securities industry, technology experts, and interested members of the public towards developing standards relating to systems capacity, integrity, resiliency, availability, and security appropriately tailored for the securities industry and SCI entities, and periodically issue staff guidance that updates the guidance with such standards.

2. Policies and Procedures To Achieve Systems Compliance—Rule 1001(b)

Proposed Rule 1000(b)(2)(i) would have required each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in the manner intended, including in a manner that complies with the federal securities laws and rules and regulations thereunder and the SCI entity's rules and governing documents, as applicable.

Proposed Rule 1000(b)(2) also would have included safe harbors for an SCI entity and its employees. Specifically, proposed Rule 1000(b)(2)(ii) provided that an SCI entity would be deemed not to have violated proposed Rule 1000(b)(2)(i) if the SCI entity: (1) Established policies and procedures reasonably designed to provide for specified elements; (2) established and maintained a system for applying such policies and procedures which would reasonably be expected to prevent and detect, insofar as practicable, any violations of such policies and procedures by the SCI entity or any person employed by the SCI entity; and (3) reasonably discharged the duties and obligations incumbent upon it by such policies and procedures, and was without reasonable cause to believe that such policies and procedures were not being complied with in any material respect. The safe harbor for SCI entities in proposed Rule 1000(b)(2)(ii) specified that the SCI entity's policies and procedures must be reasonably designed to provide for: (1) Testing of all SCI systems and any changes to such systems prior to implementation; (2) periodic testing of all SCI systems and any changes to such systems after their implementation; (3) a system of internal controls over changes to SCI systems; (4) ongoing monitoring of the functionality of SCI systems to detect whether they are operating in the manner intended; (5) assessments of SCI systems compliance performed by personnel familiar with applicable federal securities laws and rules and regulations thereunder and the SCI entity's rules and governing documents, as applicable; and (6) review by regulatory personnel of SCI systems design, changes, testing, and controls to prevent, detect, and address actions that do not comply with applicable federal securities laws and rules and regulations thereunder and the SCI entity's rules and governing documents, as applicable.

In addition, proposed Rule 1000(b)(2)(iii) set forth a safe harbor for individuals. It provided that a person employed by an SCI entity would be deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by any other person of proposed Rule 1000(b)(2)(i) if the person employed by the SCI entity has reasonably discharged the duties and obligations incumbent upon such person by the policies and procedures, and was without reasonable cause to believe that such policies and procedures were not being complied with in any material respect.

After careful consideration of the comments, proposed Rule 1000(b)(2) is adopted as Rule 1001(b) with modifications, as discussed below.

a. Reasonable Policies and Procedures To Achieve Systems Compliance

The Commission received significant comment on its proposal to require that SCI entities establish, maintain, and enforce written policies and procedures reasonably designed to ensure systems compliance. Some commenters supported the broad goals of a policies and procedures requirement to help ensure that SCI systems operate as intended.[616] Other commenters questioned whether any set of policies and procedures could guarantee perfect operational compliance.[617] One commenter emphasized that no set of policies and procedures can guarantee 100% operational compliance and that, historically, the Commission has allowed entities to use a reasonableness standard so that policies and procedures are required to be reasonably designed to promote compliance, and the same should be used for the underlying predicate requirement in Regulation SCI.[618] A few commenters expressed concern that, in instances where an SCI entity's policies and procedures failed to prevent SCI events, the Commission might use such failures as the basis for an enforcement action, charging that the policies and procedures were not reasonable.[619] One commenter believed that compliance with Regulation SCI should be measured against a firm's adherence to its own set of policies and procedures that are in keeping with SCI system objectives, and such policies should be reviewed and updated as part of the annual SCI review process.[620] Another commenter requested that the Commission more clearly distinguish between liability under Regulation SCI and liability for SCI events, stating that compliance with Regulation SCI and compliance with other federal securities laws and rules must remain distinct.[621]

Whereas adopted Rule 1001(a)[622] concerns the robustness of the SCI entity's systems, adopted Rule 1001(b)[623] concerns the operational compliance of an SCI entity's SCI systems with the Exchange Act, the rules and regulations thereunder, and

[614] *See supra* note 602 and accompanying text.

[615] *See supra* note 582 and accompanying text.

[616] *See* MSRB Letter at 12–13; SIFMA Letter at 12; and MFA Letter at 3. Two of these commenters believed that SCI entities that perform critical market functions should be required to have more stringent policies and procedures than less critical SCI entities. *See* SIFMA Letter at 12; and MFA Letter at 3–4.

[617] *See* ITG Letter at 14. *See also* BATS Letter at 3–4, 6.

[618] *See* ITG Letter at 14.

[619] *See* BATS Letter at 3–4; Angel Letter at 4; and FSR Letter at 5. One of these commenters considered this possibility as, in effect, imposing a strict liability standard with respect to systems issues, and was concerned that the proposed approach would result in ''finger-pointing'' and constant enforcement actions for immaterial violations that desensitize people to actual material violations. *See* FSR Letter at 3–8.

[620] *See* FIF Letter at 4.

[621] *See* FSR Letter at 6.

[622] Adopted Rule 1001(a) was proposed as Rule 1000(b)(1).

[623] Adopted Rule 1001(b) was proposed as Rule 1000(b)(2).

the SCI entity's governing documents. The Commission continues to believe, as stated in the SCI Proposal, that a rule requiring SCI entities to establish, maintain, and enforce policies and procedures reasonably designed to ensure operational compliance will help to: ensure that SCI SROs comply with Section 19(b)(1) of the Exchange Act;[624] reinforce existing SRO rule filing processes to assist market participants and the public in understanding how the SCI systems of SCI SROs are intended to operate; and assist SCI SROs in meeting their obligations to file plan amendments to SCI Plans under Rule 608 of Regulation NMS.[625] It will similarly help other SCI entities (*i.e.,* SCI ATSs, plan processors, and exempt clearing agencies subject to ARP) to achieve operational compliance with the Exchange Act, the rules and regulations thereunder, and their governing documents.

The Commission notes that Rule 1001(b) is intended to help prevent the occurrence of systems compliance issues at SCI entities. The Commission discussed in Section IV.A.3.b the rationale for further focusing the definition of systems compliance issue (*i.e.,* replacing the reference to operating ''in the manner intended, including in a manner that complies with the federal securities laws'' with a reference to operating ''in a manner that complies with the Act''). To provide consistency between the definition of systems compliance issue and the requirement for policies and procedures to ensure systems compliance, the Commission is similarly revising Rule 1001(b)(1) to require each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate ''in a manner that complies with the Act'' and the rules and regulations thereunder and the entity's rules and governing documents, as applicable.

As noted above, some commenters expressed concern that an SCI entity would be found to be in violation of Rule 1001(b) if an SCI event occurs.[626] Consistent with the discussion above regarding Rule 1001(a), the Commission emphasizes that the occurrence of a systems compliance issue at an SCI entity does not necessarily mean that the SCI entity has violated Rule 1001(b) of Regulation SCI. As stated in the SCI Proposal, an SCI entity will not be deemed to be in violation of Rule 1001(b) solely because it experienced a systems compliance issue.[627] The Commission also notes that Rule 1001(b) requires systems compliance policies and procedures to be *reasonably designed.*[628] The Commission acknowledges that reasonable policies and procedures will not ensure the elimination of all systems issues, including systems compliance issues. While a systems compliance issue may be probative as to the reasonableness of an SCI entity's policies and procedures, it is not determinative. Further, the occurrence of a systems compliance issue also does not necessarily mean that the SCI entity will be subject to an enforcement action. Rather, the Commission will exercise its discretion to initiate an enforcement action if the Commission determines that action is warranted, based on the particular facts and circumstances of an individual situation.

In response to one commenter's request that the Commission more clearly distinguish between liability under Regulation SCI and liability for SCI events,[629] the Commission notes that liability under Regulation SCI is separate and distinct from liability for other violations that may arise from the underlying SCI event. In particular, whether an SCI entity violated Regulation SCI does not affect the determination of whether the underlying SCI event also caused the SCI entity to violate other laws or rules, and compliance with Regulation SCI is not a safe harbor or other shield from liability under other laws or rules. Thus, even if the occurrence of an SCI event does not cause an SCI entity to be found to be in violation of Regulation SCI, the SCI entity may still be liable under other Commission rules or regulations, the Exchange Act, or SRO rules for the underlying SCI event.[630]

b. Proposed Safe Harbor for SCI Entities

i. Comments Received

In the SCI Proposal, the Commission solicited comment on the proposed approach to include safe harbor provisions in proposed Rule 1000(b)(2) and specifically asked whether commenters agreed with the proposed inclusion of safe harbors.[631] Many commenters specifically addressed the safe harbors in proposed Rule 1000(b)(2). Two commenters urged elimination of the proposed safe harbors.[632] One of these commenters stated that the safe harbors were framed so generally that they would be easy to invoke.[633] This commenter also stated that inclusion of a safe harbor provision for compliance standards would unnecessarily and severely limit the Commission's ability to deter violations through meaningful enforcement actions.[634] The other commenter stated that, if a safe harbor is adopted, the Commission should be as specific as possible in establishing how to qualify for the safe harbor, and recommended that Commission guidance ensure that SCI entities are actively building and improving upon safety systems and not simply checking boxes and doing the minimal amount necessary to ensure compliance.[635]

In contrast, several commenters supported the inclusion of a safe harbor in proposed Rule 1000(b)(2) in theory, but objected to the proposed

[624] *See* 15 U.S.C. 78s(b)(1) (requiring each SRO to file with the Commission copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of the SRO).

[625] *See* Proposing Release, *supra* note 13, at 18115.

[626] *See supra* notes 617–620 and accompanying text. One of these commenters believed that compliance with Regulation SCI should be measured against a firm's adherence to its own set of policies and procedures that are in keeping with SCI systems objectives. *See supra* note 620 and accompanying text. The Commission understands this commenter to be expressing the same concern as other commenters that an SCI entity would be found to be in violation of Rule 1001(b) if an SCI event occurs. This commenter also noted that policies and procedures should be reviewed and updated as part of the annual SCI review process. *See supra* note 620 and accompanying text. The comment regarding reviews and updates of policies and procedures is addressed below. *See infra* note 673 and accompanying text.

[627] Also, as noted in the SCI Proposal, an employee of an SCI entity would not be deemed to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by any other person of Rule 1001(b) merely because the SCI entity at which the employee worked experienced a systems compliance issue. *See* Proposing Release, *supra* note 13, at 18116.

[628] As stated above, one commenter noted that no set of policies and procedures can guarantee 100% operational compliance and that historically, the Commission has allowed entities to use a reasonableness standard so that policies and procedures are required to be reasonably designed to promote compliance, and the same approach should be used for Regulation SCI. *See supra* note 618 and accompanying text. The Commission agrees with this commenter that reasonably designed policies and procedures might not completely eliminate the occurrence of systems compliance issues. Also, adopted Rule 1001(b) is consistent with this commenter's suggestion, because it requires policies and procedures that are ''reasonably designed'' to ensure systems compliance.

[629] *See supra* note 621 and accompanying text.

[630] For example, it is possible for an SCI SRO to have established, maintained, and enforced reasonably designed systems compliance policies and procedures consistent with the requirements of Rule 1001(b) of Regulation SCI, but still potentially violate Section 19(g) of the Exchange Act if the operation of its systems is inconsistent with its own rules. *See* 15 U.S.C. 78s(g) (requiring every SRO to comply with the Exchange Act, the rules and regulations thereunder, and its own rules).

[631] *See* Proposing Release, *supra* note 13, at 18117, question 104.

[632] *See* Better Markets Letter at 5–6; and Lauer Letter at 7–8.

[633] *See* Better Markets Letter at 5–6.

[634] *See id.* at 6.

[635] *See* Lauer Letter at 7–8.

approach.[636] Some commenters stated that the proposed safe harbor, with its prescriptive requirements, would evolve into the *de facto* rule itself as SCI entities decide to adhere to the requirements of the safe harbor rather than risk a potential enforcement action stemming from an SCI event.[637] One of these commenters noted that the safe harbor merely further defined the elements that the policies and procedures must have by providing a list of points that reasonably designed policies and procedures must cover.[638] This commenter believed that including a requirement for reasonably designed policies and procedures and providing a safe harbor when those policies and procedures are reasonably designed is inherently circular, and expressed concern about liability under Regulation SCI whenever there is a systems or technology malfunction or error.[639] This commenter also compared the proposed SCI entity safe harbor to other rules, stating that the other rules requiring policies and procedures recognize the need for those policies and procedures to be reasonably designed in light of the manner in which business is conducted.[640] This commenter further noted that, if the Commission intends that all SCI entities conform to the standards articulated in the safe harbor, the Commission should set them forth as express provisions of the rule, although this commenter believed that such an approach would be misguided because it would create strictures that impose protocols that may not be suitable for certain market participants.[641]

Several other commenters expressed concern that the proposed safe harbors were unclear.[642] One group of commenters noted that the provisions in the proposed safe harbors were vague, subjective, and merely duplicate elements that would result from a logical interpretation of Rule 1000(b)(1),[643] which these commenters believed offered no safe harbor protection at all.[644] Another commenter stated that the use of a reasonableness standard with respect to the design of systems and the discharge of duties under an SCI entity's policies and procedures would mean that an SCI entity and its employees would never know with certainty whether they met the terms of the safe harbor.[645] Another commenter similarly stated that SCI entities cannot know if they have complied with the safe harbor unless more guidance is provided on the concept of ''reasonable policies and procedures'' and the Commission explains what constitutes adequate testing, monitoring, assessments, and review for each system.[646] One commenter agreed with the need for a safe harbor but stated that the proposed safe harbor is not sufficiently robust because it contains ''vague and extensive requirements that are overly subjective'' and the Commission therefore would be ''likely to review an SCI entity's interpretation of the safe harbor in the event of a systems issue with the benefit of 20/20 hindsight.'' [647] This commenter expressed concern that the occurrence of a significant systems event would mean that an exchange did not have reasonable policies and procedures and would be outside the terms of the proposed safe harbor.[648]

A few commenters suggested specific alternatives to the proposed safe harbors.[649] One commenter recommended that the Commission adopt a safe harbor with objective criteria to protect SCI entities from enforcement actions under Regulation SCI except in cases of intentional or reckless non-compliance or patterns of non-compliance with Regulation SCI, or if an SCI entity fails to implement reasonable corrective action in response to a written communication from the Commission regarding Regulation SCI.[650] This commenter urged that, even if the Commission does not include the suggested safe harbor, the adopting release should clearly state that the Commission will not pursue enforcement actions against SCI entities that establish, maintain, and enforce compliance policies and procedures or act in good faith, notwithstanding a violation of Regulation SCI.[651]

One group of commenters similarly recommended that the Commission adopt an objective safe harbor.[652] These commenters noted that minor mistakes and unintentional errors occur in the daily operations of running a business, and a safe harbor should provide protection to SCI entities that follow the policies and procedures as intended, including in the resolution and containment of such mistakes and errors.[653] These commenters believed that it should be sufficient for an SCI entity to qualify for the safe harbor if it adopts policies and procedures reasonably designed to comply with Regulation SCI and does not knowingly violate such policies and procedures.[654] These commenters further requested that the Commission clarify its views on the protections of the safe harbor for inadvertent violations of other laws and rules despite compliance with Regulation SCI and expand the safe harbor to explicitly cover such instances.[655]

One commenter suggested simplifying the safe harbor to require only that an SCI entity adopt reasonable policies and procedures to comply with proposed Regulation SCI, which should include reasonable ongoing responsibilities related to testing and monitoring.[656] Another commenter believed that the safe harbor should grant immunity from enforcement penalties for all problems that are self-reported by SCI entities and individuals.[657] One commenter suggested that Regulation SCI should: (1) Encourage parties to discover and

[636] *See, e.g.*, Angel Letter; Direct Edge Letter; FSR Letter; ITG Letter; MSRB Letter; NYSE Letter; OCC Letter; OTC Markets Letter; and Joint SROs Letter.

[637] *See* ITG Letter at 14 (stating that ''[t]he safe harbor contains so many requirements that it operates as a rule by itself''); and FSR Letter at 8.

[638] *See* FSR Letter at 4–5.

[639] *See id.* at 5–6.

[640] *See* FSR Letter at 8–9 (expressing concern that the safe harbor will become the sole yardstick by which conduct is measured and, even if the safe harbor were non-exclusive, it could become the *de facto* standard to the exclusion of other, legitimate approaches).

[641] *See* FSR Letter at 9.

[642] *See, e.g.*, FSR Letter; OCC Letter; and OTC Markets Letter.

[643] *See* Joint SROs Letter at 13 (stating that the proposed safe harbor should provide a more objective and transparent approach, and provide SCI entities a clear, affirmative defense from allegations of having violated Regulation SCI).

[644] *See* Joint SROs Letter at 13.

[645] *See* OCC Letter at 11. This commenter also questioned the value of the safe harbors as proposed and requested that the Commission consider including bright-line tests and minimum standards in the safe harbor provisions to better guide SCI entities and their employees in avoiding liability under Regulation SCI. *See* OCC Letter at 11. *See also* NYSE Letter at 30 (noting that the Commission provided no guidance on the phrase ''policies and procedures reasonably designed'').

[646] *See* OTC Markets Letter at 15.

[647] *See* NYSE Letter at 30.

[648] *See id.*

[649] *See, e.g.*, FSR Letter; ITG Letter; OTC Markets Letter; Joint SROs Letter; and NYSE Letter.

[650] *See* NYSE Letter at 29, 31–32. This commenter also suggested that SCI entity employees be protected except in instances where employees intentionally or recklessly fail to discharge their duties and obligations under the SCI entity's policies and procedures. *See* NYSE Letter at 29, 31–32. This comment and the individual safe harbor are addressed in Section IV.B.2.d below. Another commenter, expressing support for NYSE's suggested approach for SCI entities and their employees, stated that an objective standard would provide the proper incentives for compliance and allow SCI entities to reasonably evaluate their potential exposure when an SCI event occurs and act quickly in the critical moments following an SCI event. *See* OTC Markets Letter at 16.

[651] *See* NYSE Letter at 32, n. 41.

[652] *See* Joint SROs Letter at 13–14.

[653] *See id.*

[654] *See id.* These commenters suggested a parallel safe harbor for employees of SCI entities. *See id.* at 14.

[655] *See id.*

[656] *See* ITG Letter at 14.

[657] *See* Angel Letter at 4.

remediate technology errors and malfunctions, and/or deficiencies in their policies and procedures; (2) avoid *ipso facto* liability under Regulation SCI for failures by technology or systems; and (3) require some form of causation in order for liability to attach.[658] This commenter also recommended that the Commission provide safe harbors from liability under both proposed Rules 1000(b)(1) and (2) where either: (1) The SCI entity or SCI personnel discovers and remediates a problem without regulatory intervention and assuming no underlying material violation; or (2) no technology error or problem has occurred, but the policies and procedures might benefit from improvements.[659] According to this commenter, the remediation safe harbor should also apply to underlying technology problems if the SCI entity had complied with Regulation SCI.[660] One commenter expressed concern that, without a safe harbor and a guarantee of immunity, the disclosures to the Commission required under Regulation SCI would provide a roadmap for litigation against non-SRO entities.[661]

ii. Elimination of Proposed Safe Harbor for SCI Entities and Specification of Minimum Elements

As discussed in greater detail below, after careful consideration of the comments, and in light of the more focused scope of Regulation SCI, the Commission has determined not to adopt the proposed safe harbor for SCI entities.[662] Rather, Rule 1001(b) sets forth non-exhaustive minimum elements that an SCI entity must include in its systems compliance policies and procedures. The Commission recognizes that the precise nature, size, technology, business model, and other aspects of each SCI entity's business vary. Therefore, the minimum elements are intended to be general in order to accommodate these differences, and each SCI entity will need to exercise judgment in developing and maintaining specific policies and procedures that are reasonably designed to achieve systems compliance. The Commission also believes that SCI entities should consider the evolving nature of the securities industry, as well as industry practices and standards, in developing and maintaining such policies and procedures. As such, the elements specified in Rule 1001(b) are non-exhaustive, and each SCI entity should consider on an ongoing basis what steps it needs to take in order to ensure that its policies and procedures are reasonably designed.

In the SCI Proposal, the Commission stated that, ''[b]ecause of the complexity of SCI systems and the breadth of the federal securities laws and rules and regulations thereunder and the SCI entities' rules and governing documents, the Commission preliminarily believes that it would be appropriate to provide an explicit safe harbor for SCI entities and their employees in order to provide greater clarity as to how they can ensure that their conduct will comply with [Rule 1000(b)(2)].'' [663]

One reason that the Commission is not adopting the proposed safe harbor for SCI entities is that the Commission has focused the scope of Regulation SCI as adopted. For example, adopted Rule 1001(b) requires policies and procedures that are reasonably designed to ensure compliance with ''the Act''—rather than operating ''in the manner intended, including in a manner that complies with the federal securities laws'' as was proposed—and the rules and regulations thereunder, and the SCI entity's rules and governing documents. Therefore, the requirement under adopted Rule 1001(b) is more targeted than the requirement under proposed Rule 1000(b)(2), and alleviates some of the concern regarding the ''breadth of the federal securities laws and rules and regulations thereunder'' that was expressed in the SCI Proposal. The Commission expects that SCI entities are familiar with their obligations under the Exchange Act, the rules and regulations thereunder, and their own rules and governing documents. In addition, as discussed in Section IV.A.2.b above, the Commission has further focused the scope of SCI systems, which also alleviates some of the concern regarding the ''complexity of SCI systems'' that was expressed in the SCI Proposal.[664]

Further, as noted above, in the SCI Proposal, the Commission stated its preliminary belief that it would be appropriate to provide an explicit safe harbor for SCI entities in order to provide greater clarity on how they could comply with proposed Rule 1000(b)(2).[665] Rather than achieving this goal, commenters argued that the proposed safe harbor merely further defined the elements that the policies and procedures must have, and did not include sufficient guidance or specificity to SCI entities seeking to rely on it.[666] For example, one commenter noted that the policies and procedures specified in the safe harbor would still need to be ''reasonably designed.'' [667] Further, the Commission acknowledges some commenters' concern that the proposed safe harbor, ''with its prescriptive requirements,'' could evolve into the *de facto* rule itself.[668]

As discussed above, the Commission is not adopting a safe harbor for SCI entities. Rather, adopted Rule 1001(b)(1) requires an SCI entity to have reasonably designed policies and procedures to achieve systems compliance and adopted Rule 1001(b)(2) specifies non-exhaustive, general minimum elements that an SCI entity must include in its systems compliance policies and procedures. These minimum elements are based on the elements contained in the proposed safe harbor for SCI entities, but modified in

[658] *See* FSR Letter at 9.

[659] *See id.* at 9–10.

[660] *See id.* at 3, 9–10.

[661] *See* OTC Markets Letter at 15–16 (stating that ''entities that do not have SRO immunity, such as ATSs, may be subject to liability based on information reported under Reg. SCI's Rule 1000(b)(4)(iv) . . . [w]ithout a safe harbor and a guarantee of immunity, this kind of disclosure provides a roadmap for litigation against non-SRO SCI entities'').

[662] The Commission's decision not to adopt an SCI entity safe harbor also addresses a commenter's concern that the inclusion of a safe harbor provision in Rule 1001(b) could unnecessarily and severely limit the Commission's ability to deter violations through meaningful enforcement actions. *See supra* notes 633–634 and accompanying text. As discussed in Section IV.B.2.d below, however, the Commission is adopting a safe harbor for personnel of SCI entities.

[663] *See* Proposing Release, *supra* note 13, at 18115.

[664] *See id.*

[665] *See id.*

[666] *See supra* notes 638–639, 643–648 and accompanying text. With respect to the group of commenters who suggested that the safe harbor should give SCI entities a clear, affirmative defense from allegations of having violated Regulation SCI, as discussed above, the Commission is eliminating the proposed safe harbor for SCI entities. *See supra* note 643. As discussed below, the Commission believes that, by specifying non-exhaustive minimum elements that an SCI entity must include in its systems compliance policies and procedures, the rule will encourage SCI entities to actively build and improve upon the compliance of their systems, rather than limit their compliance to some fixed elements of a safe harbor.

[667] *See supra* notes 638–639 and accompanying text. This commenter also compared the proposed SCI entity safe harbor to other rules, stating that the other rules requiring policies and procedures recognize the need for those policies and procedures to be reasonably designed in light of the manner in which business is conducted. *See supra* note 640 and accompanying text. Rule 1001(b), as adopted, requires policies and procedures to be ''reasonably designed'' to ensure the compliance of SCI systems. Therefore, Rule 1001(b) recognizes the need for policies and procedures to be reasonably designed in light of the manner in which an SCI entity's business is conducted.

[668] *See supra* note 637 and accompanying text and *supra* note 640. The Commission acknowledges that some commenters who believed that the proposed safe harbor was inadequate also advocated for alternative safe harbors, such as those that require knowledge or recklessness for liability. These comments are discussed below in Section IV.B.2.b.iii.

response to concerns raised by commenters. As adopted, Rules 1001(b)(1) and (b)(2) specify the minimum elements of reasonably designed policies and procedures to achieve systems compliance, and at the same time provide flexibility by permitting an SCI entity to establish policies and procedures that are reasonably designed based on the nature, size, technology, business model, and other aspects of its business. Moreover, the Commission believes that, by specifying non-exhaustive, general minimum elements of systems compliance policies and procedures, the rule will encourage SCI entities to actively build and improve upon the compliance of their systems rather than limit their compliance to bright-line tests or the fixed elements of a safe harbor, and encourage the evolution of sound practices over time. In addition, the Commission notes that there currently are no publicly available written industry standards regarding systems compliance that are applicable to all SCI entities that can serve as the basis for a clear, objective safe harbor, as there is with current SCI industry standards (*e.g.*, the publications listed in staff guidance) relating to operational capability. Even if such standards existed, the Commission believes that the specificity necessary to achieve the goal of a clear, objective safe harbor would disincentivize SCI entities from continuing to improve their systems over time. Finally, the Commission believes that, because the minimum elements specified in Rule 1001(b)(2) are non-exhaustive, Rule 1001(b) can accommodate the possibility that, as technology evolves, additional or updated elements could become appropriate for SCI entities to include in their systems compliance policies and procedures to ensure that such policies and procedures remain reasonably designed on an ongoing basis.

iii. Response to Other Comments on the SCI Entity Safe Harbor

With respect to commenters who requested clarification on the protection of the safe harbor for inadvertent violations of other laws and rules despite compliance with Regulation SCI,[669] as noted above, the Commission clarifies that liability under Regulation SCI is separate and distinct from liability for other violations that may arise from the underlying SCI events under other laws and rules. Specifically, Regulation SCI imposes new requirements on SCI entities and is not intended to alter the standards for determining liability under other laws or rules. Therefore, if an SCI entity is in compliance with Regulation SCI but inadvertently violates another law or rule, whether or not the SCI entity will be liable under the other law or rule depends on the standards for determining liability under such law or rule. Because the new requirements under Regulation SCI are separate and distinct from existing requirements under other laws or rules, Regulation SCI is not a shield from liability under such laws or rules.

The Commission also does not believe that it would be appropriate to provide a safe harbor for all problems that are self-reported by SCI entities and individuals or that are discovered and remediated without regulatory intervention, as suggested by commenters.[670] In particular, Rule 1001(b) is intended to help ensure that SCI entities operate their systems in compliance with the Exchange Act and relevant rules in the first place, and thus is not only focused on helping to ensure that SCI entities appropriately respond to a compliance issue (*e.g.*, by taking corrective action or reporting the issue to the Commission) after it has occurred and impacted the market or market participants. Therefore, the Commission does not believe that the suggested self-report or remediation safe harbors will effectively further this intent of Rule 1001(b). In particular, the Commission notes that reporting and remediation of SCI events are separately required under Rules 1002(b) and (a) of Regulation SCI, respectively. The purposes of Rule 1002(b) include keeping the Commission informed of SCI events after they have occurred. Moreover, Rule 1002(a) is intended to ensure that SCI entities remedy a systems issue and mitigate the resulting harm after the issue has already occurred. The Commission believes that, if an SCI entity is protected from liability under Rule 1001(b) simply because it self-reported systems compliance issues or discovered and remediated systems compliance issues without regulatory intervention, the SCI entity will not be effectively incentivized to have reasonably designed policies and procedures to ensure systems compliance in the first place. As discussed above, the occurrence of an SCI event will not necessarily cause a violation of Regulation SCI. Further, the occurrence of a systems compliance issue also does not necessarily mean that the SCI entity will be subject to an enforcement action. Rather, the Commission will exercise its discretion to initiate an enforcement action if the Commission determines that action is warranted, based on the particular facts and circumstances of an individual situation.

As discussed above, some commenters expressed concern that the occurrence of a significant systems issue would mean that an SCI entity did not have reasonable policies and procedures and therefore suggested ''objective'' safe harbors.[671] The Commission notes that all SCI entities are required to comply with the Exchange Act, the rules and regulations thereunder, and their own rules and governing documents, as applicable, and the purpose of Rule 1001(b) is to effectively help ensure compliance of the operation of SCI systems with these laws and rules. The Commission does not believe that Rule 1001(b) would further this goal to the same degree if the Commission were to adopt commenters' safe harbor suggestions (*i.e.*, an SCI entity is deemed to be in compliance with Rule 1001(b) so long as: The SCI entity is not knowingly out of compliance; such non-compliance is not intentional, reckless, or in bad faith; or there is no pattern of non-compliance) because, with these suggested ''objective'' safe harbors, SCI entities may not be effectively incentivized to establish, maintain, and enforce reasonably designed policies and procedures to ensure systems compliance. Moreover, the Commission notes that Rule 1001(b) requires ''reasonably designed'' policies and procedures, which already provides flexibility to SCI entities in complying with the rule. The Commission also emphasizes again that, while it is eliminating the safe harbor for SCI entities, the occurrence of a systems compliance issue may be probative, but is not determinative, of whether an SCI entity violated Regulation SCI. As noted above, an SCI entity would not be

[669] *See supra* notes 655 and 660 and accompanying text.

[670] *See supra* notes 657 and 659 and accompanying text.

[671] *See supra* notes 650–654 and accompanying text. As discussed above, some of these commenters suggested that the safe harbor should protect SCI entities from enforcement action except in cases of intentional or reckless non-compliance, or patterns of non-compliance with Regulation SCI. *See supra* note 650 and accompanying text. As an alternative to the intentional and recklessness standard, one of these commenters requested that the Commission specifically state that the Commission will not pursue enforcement actions against SCI entities that establish, maintain, and enforce systems compliance policies and procedures or act in good faith, notwithstanding a violation of Regulation SCI. *See supra* note 651 and accompanying text. One commenter noted that it should be sufficient for an SCI entity to qualify for the safe harbor if it adopts policies and procedures reasonably designed to comply with Regulation SCI and does not knowingly violate such policies and procedures. *See supra* note 654 and accompanying text.

deemed to be in violation of Rule 1001(b)(1) merely because it experienced a systems compliance issue. Further, the occurrence of a systems compliance issue also does not necessarily mean that the SCI entity will be subject to an enforcement action. Rather, the Commission will exercise its discretion to initiate an enforcement action if the Commission determines that action is warranted, based on the particular facts and circumstances of an individual situation.

Further, as noted above, one commenter recommended that the Commission provide a safe harbor where no technology error or problem has occurred, but the policies and procedures might benefit from improvements.[672] The Commission believes that there may be instances where an SCI entity's policies and procedures might benefit from improvement, even though they are reasonably designed. In such instances, the SCI entity is in compliance with Rule 1001(b) and therefore does not need a safe harbor. At the same time, the Commission notes that there may be instances where no technology error or problem has occurred, but an SCI entity's policies and procedures with regard to systems compliance might nonetheless be deficient and not satisfy the requirements of Rule 1001(b). The Commission does not believe that it would be appropriate to provide a safe harbor in these instances. As noted above, Rule 1001(b) is intended to help ensure that SCI entities operate their SCI systems in compliance with the Exchange Act and relevant rules. The Commission does not believe that a safe harbor that effectively insulates deficient policies and procedures will further the intent of this rule. Further, the Commission notes that one requirement of Rule 1001(b)(1) is that an SCI entity ''maintain'' its policies and procedures. To explicitly set forth an SCI entity's obligation to review and update its policies and procedures, similar to Rule 1001(a), the Commission is adopting a requirement for periodic review by an SCI entity of the effectiveness of its systems compliance policies and procedures, and prompt action by the SCI entity to remedy deficiencies in such policies and procedures.[673] The Commission notes that an SCI entity will not be found to be in violation of this maintenance requirement solely because it failed to identify a deficiency immediately after the deficiency occurred, if the SCI entity takes prompt action to remedy the deficiency once it is discovered, and the SCI entity had otherwise appropriately reviewed the effectiveness of its policies and procedures and took prompt action to remedy those deficiencies that were discovered.

Finally, as noted above, one commenter believed that, without a safe harbor and a guarantee of immunity (such as the regulatory immunity of SROs), information provided to the Commission pursuant to Rule 1000(b)(4)(iv) would provide a roadmap for litigation. As discussed below in Section IV.B.3.c, the Commission acknowledges that, if an SCI entity experiences an SCI event, it could become the subject of litigation (including private civil litigation). At the same time, the Commission notes that the information submitted to the Commission pursuant to Regulation SCI will be treated as confidential, subject to applicable law.[674] On the other hand, the Commission acknowledges that it could consider the information provided to the Commission pursuant to Rule 1002(b) in determining whether to initiate an enforcement action. The Commission notes that all SCI entities are required to comply with the Exchange Act, the rules and regulations thereunder, and their own rules and governing documents, as applicable, and the requirement for Commission notification of systems compliance issues is intended to assist the Commission in its oversight of such compliance. With respect to the regulatory immunity of SROs, the Commission notes that, although courts have found that SROs are entitled to absolute immunity from private claims under certain circumstances,[675] if an SRO fails to comply with the provisions of the Exchange Act, the rules or regulations thereunder, or its own rules, the Commission is still authorized to impose sanctions.[676] As such, like other SCI entities, SROs are not immune from Commission sanctions. Finally, as discussed in detail above, the Commission does not believe that it would be appropriate to provide a safe harbor for all problems that are self-reported to the Commission by SCI entities and individuals.

c. Minimum Elements of Reasonable Policies and Procedures

The safe harbor for SCI entities in proposed Rule 1000(b)(2)(ii) specified that, to qualify for the safe harbor, the SCI entity's policies and procedures must be reasonably designed to provide for: (1) Testing of all SCI systems and any changes to such systems prior to implementation; (2) periodic testing of all SCI systems and any changes to such systems after their implementation; (3) a system of internal controls over changes to SCI systems; (4) ongoing monitoring of the functionality of SCI systems to detect whether they are operating in the manner intended; (5) assessments of SCI systems compliance performed by personnel familiar with applicable federal securities laws and rules and regulations thereunder and the SCI entity's rules and governing documents, as applicable; and (6) review by regulatory personnel of SCI systems design, changes, testing, and controls to prevent, detect, and address actions that do not comply with applicable federal securities laws and rules and regulations thereunder and the SCI entity's rules and governing documents, as applicable. In the SCI Proposal, the Commission asked whether each element of the proposed safe harbor for SCI entities was appropriate.[677] Several commenters addressed one or more of the proposed safe harbor elements.

As discussed above, rather than adopting the proposed safe harbor for SCI entities, the Commission is specifying non-exhaustive, general

[672] *See supra* note 659 and accompanying text.

[673] *See* Rule 1001(b)(3). The adoption of this review and update requirement is consistent with the views of some commenters. *See supra* notes 620 and accompanying text (discussing a commenter's suggestion that policies and procedures should be reviewed and updated as part of the annual SCI review process) and 658 and accompanying text (discussing a commenter's suggestion that Regulation SCI should encourage parties to discover and remediate deficiencies in policies and procedures). The Commission notes that Rule 1001(b)(3) requires SCI entities to review and update their systems compliance policies and procedures rather than simply ''encourage'' the discovery and remediation of deficiencies because, in order to achieve the intended benefits of Rule 1001(b), an SCI entity's systems compliance policies and procedures must remain reasonably designed. If the Commission simply encourages SCI entities to review and update their systems compliance policies and procedures, the Commission believes that there would be a greater likelihood that such policies and procedures might become outdated and less effective in preventing systems compliance issues.

[674] The Commission notes that the General Instructions to Form SCI, Item G. Paperwork Reduction Act Disclosure, provides that the Commission ''will keep the information collected pursuant to Form SCI confidential to the extent permitted by law.'' *See infra* Section IV.C.2.

[675] The Commission notes that SRO immunity applies only under certain circumstances. In particular, ''when acting in its capacity as a SRO, [the SRO] is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder.'' *See DL Capital Group, LLC* v. *NASDAQ Stock Market, Inc.,* 409 F.3d 93, 97 (2d Cir. 2005) (quoting *D'Alessio* v. *New York Stock Exchange, Inc.,* 258 F.3d 93, 106 (2d Cir. 2001)).

[676] *See* 15 U.S.C. 78s(g).

[677] *See* Proposing Release, *supra* note 13, at 18116–17.

minimum elements that an SCI entity must include in its systems compliance policies and procedures. The minimum elements are based on the proposed safe harbor. These elements are: (i) Testing of all SCI systems and any changes to SCI systems prior to implementation; (ii) a system of internal controls over changes to SCI systems; (iii) a plan for assessments of the functionality of SCI systems designed to detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Act and the rules and regulations thereunder and the SCI entity's rules and governing documents; and (iv) a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues. Each of these elements is discussed below.

As noted above, some commenters requested more guidance or certainty regarding the safe harbor elements (*e.g.,* by including bright-line tests and minimum standards).[678] As discussed above in Section IV.B.2.b, the Commission is not adopting a safe harbor but is specifying the minimum elements that an SCI entity must include in its systems compliance policies and procedures. By generally requiring policies and procedures to be reasonably designed and specifying non-exhaustive, general minimum elements of systems compliance policies and procedures, the Commission intends to provide specificity on how to comply with Rule 1001(b), and at the same time provide a reasonable degree of flexibility to SCI entities in establishing and maintaining policies and procedures that are appropriately tailored to each SCI entity.

Regarding elements (1) and (2) of the proposed safe harbor, a few commenters opposed the inclusion of a requirement that an SCI entity conduct periodic testing of systems absent systems changes.[679] One commenter stated that it performs testing prior to implementation of trading systems changes in the production environment and conducts regression testing to ensure that the changes did not introduce any undesired side-effects.[680] This commenter explained that the proposed periodic testing requirement would impose additional cost and not provide any benefit.[681] One commenter believed that the pre- and post-implementation testing components of the safe harbor, which would apply to all systems changes, could potentially drive SCI entities to take a narrow view of what constitutes a systems change.[682] Another commenter sought further guidance from the Commission on the scope of periodic testing of all SCI systems and whether, for example, systems testing would be required following a systems change if the SCI entity has already provided notice of the systems change to the Commission.[683] One commenter requested clarification that the testing described in proposed Rules 1000(b)(2)(ii)(A)(1) and (2) refers to testing to ensure that SCI systems operate in the manner intended, and noted that testing should not be required to be periodic, but instead should be based on the relative risks of non-compliance arising from any changes being introduced into production or any changes to the applicable laws or rules.[684] One commenter stated that it believed that the frequency and type of testing under proposed Rules 1000(b)(2)(ii)(A)(1) and (2) are open to interpretation.[685]

After consideration of the views of commenters, the Commission believes that testing of SCI systems and changes to such systems prior to implementation is appropriate for inclusion as a required element of systems compliance policies and procedures. As noted in the SCI Proposal, elements (1) and (2) of the proposed safe harbor were intended to help SCI entities to identify potential problems before such problems have the ability to impact markets and investors.[686] The Commission believes that testing prior to implementation of SCI systems and prior to implementation of any SCI systems changes would likely be an important component for achieving this goal and it is included as a required element of systems compliance policies and procedures.[687] In contrast, the Commission believes that the value of the proposed element for additional testing in the absence of systems changes may be variable, depending on the SCI system or change to an SCI system at issue.[688] At the same time, each SCI entity should consider on an ongoing basis what steps it needs to take in order to ensure that its policies and procedures are reasonably designed, including whether its policies and procedures should provide for testing of certain systems changes after their implementation to ensure that they operate in compliance with the Exchange Act and relevant rules.

With regard to element (3) of the proposed safe harbor, one commenter stated that it is unclear what minimum standards are required for the internal controls under proposed Rule 1000(b)(2)(ii)(A)(3).[689] As discussed above, the Commission believes it is appropriate to set forth minimum elements of systems compliance policies and procedures that are broad enough to provide SCI entities with reasonable flexibility to design their policies and procedures based on the nature, size, technology, business model, and other aspects of their businesses. Therefore, while the Commission believes that a system of internal controls over changes to SCI systems is appropriate for inclusion as a required element of systems compliance policies and

[678] *See supra* notes 645–647 and accompanying text.

[679] *See* FINRA Letter at 33; BATS Letter at 7; and ISE Letter at 7.

[680] *See* ISE Letter at 7.

[681] *See id. See also* FINRA Letter at 33.

[682] *See* Direct Edge Letter at 6. This commenter expressed concern that, under the proposed approach, any opening of a customer port, the removal of access rights from a departing employee, and the previously unscheduled closing of the market for the death of a U.S. president all involve ''changes'' to SCI systems that need to be tracked, approved, and catalogued within the construct of an enterprise-wide change management system. *See id.* This commenter stated that these ''changes'' cannot all be tested, either prior to or after implementation, without an extraordinary amount of redundancy and bureaucracy, if at all. *See id.* This commenter therefore suggested requiring instead ''[a]ppropriate testing of [SCI] systems and changes to such systems prior to their implementation.'' *See id.*

[683] *See* OCC Letter at 11.

[684] *See* MSRB Letter at 13–14.

[685] *See* NYSE Letter at 30.

[686] *See* Proposing Release, *supra* note 13, at 18115.

[687] With respect to a commenter's concern that ''changes'' to SCI systems could include, for example, any opening of a customer port, the removal of access rights from a departing employee, and the previously unscheduled closing of the market for the death of a U.S. president, the Commission does not view these as changes to an SCI entity's systems, because the Commission believes that these actions are part of an SCI entity's standard operations. *See supra* note 682. In particular, the Commission believes that the opening of a customer port, the removal of access rights, and the closing of the market are existing functionalities at SCI entities, and are routinely performed by SCI entities without the need to change existing functionalities.

[688] *See supra* notes 681–682 and accompanying text. The Commission notes that a commenter asked about the scope of periodic testing under the proposed safe harbor, and whether systems testing under the proposed safe harbor would be required following a systems change if the SCI entity has already provided notice of the systems change to the Commission. Another commenter noted that testing under the proposed safe harbor should not be required to be periodic, but instead could be based on the relative risks of non-compliance arising from any changes being introduced into production or any changes to applicable laws or rules. The Commission is not requiring periodic testing or testing following systems changes in Rule 1001(b), and, as discussed above, the Commission is not adopting the proposed safe harbor.

[689] *See* NYSE Letter at 30.

procedures, the Commission is not specifying the minimum standard for internal controls. As stated in the SCI Proposal, a system of internal controls and ongoing monitoring of systems functionality are intended to help ensure that an SCI entity adopts a framework that will help it bring newer, faster, and more innovative SCI systems online without compromising due care, and to help prevent SCI systems from becoming noncompliant resulting from, for example, inattention or failure to review compliance with established written policies and procedures. The Commission believes that such internal controls would likely include, for example, protocols that provide for: Communication and cooperation between legal, business, technology, and compliance departments in an SCI entity; appropriate authorization of systems changes by relevant departments of the SCI entity prior to implementation; review of systems changes by legal or compliance departments prior to implementation; and monitoring of systems changes after implementation.

With regard to elements (4)–(6) of the proposed safe harbor, one commenter noted that the proposed requirement related to ongoing monitoring was too broad and should be eliminated or revised to be more flexible.[690] This commenter noted that the proposal for ''monitoring of the functionality of [SCI] systems to detect whether they are operating in the manner intended'' is potentially quite broad and seems to suggest some form of independent validation.[691] Another commenter asked the Commission to clarify how the testing requirements in proposed Rules 1000(b)(2)(ii)(1) and (2) (testing prior to and after implementation) differ from those in proposed Rule 1000(b)(2)(ii)(A)(5) (assessments of systems compliance by personnel familiar with applicable laws and rules).[692] One commenter noted that the monitoring, assessments, and reviews under proposed Rules 1000(b)(2)(ii)(A)(4), (5), and (6) are unclear.[693] Two commenters sought guidance on how an SCI entity could satisfy the requirements related to reviews and assessments by legal and compliance personnel (*i.e.,* proposed Rules 1000(b)(2)(ii)(A)(5) and (6)).[694] One of these commenters suggested that each SCI entity be given the discretion to determine the level of familiarity necessary to qualify as personnel able to undertake the assessments and which personnel are regulatory personnel, and asked whether these two categories of personnel are different.[695] Another commenter also sought clarification on the meaning of the term ''regulatory personnel'' and suggested that each SCI entity should have discretion in determining which of its employees constitute regulatory personnel.[696] One commenter expressed concern that review by regulatory personnel of SCI systems would unreasonably expose non-technology persons to potential liability if an SCI entity suffers a malfunction.[697]

After consideration of the views of commenters, the Commission believes that ''a plan for assessments of the functionality of SCI systems designed to detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Act and the rules and regulations thereunder and the SCI entity's rules and governing documents'' is appropriate for inclusion as a required element of systems compliance policies and procedures. In particular, rather than ''ongoing monitoring of the functionality of [SCI] systems to detect whether they are operating in the manner intended'' and also ''*assessments* of SCI systems compliance . . . ,'' the Commission believes that ''*a plan for assessments*'' of SCI systems compliance would be more appropriate.[698] The Commission notes that ''a plan for assessments'' could include, for example, not only a plan for monitoring, but also a plan for testing or assessments, as appropriate, and at a frequency (*e.g.,* periodic or continuous) that is based on the SCI entity's risk assessment of each of its SCI systems.[699] The Commission is not specifying the manner and frequency of assessments that must be set forth in such plan because the Commission believes that each SCI entity will likely be in the best position to assess and determine the assessment plan that is most appropriate for its SCI systems. The Commission emphasizes that the nature and frequency of the assessments contemplated by an SCI entity's plan will vary based on a range of factors, including the entity's governance structure, business lines, and legal and compliance framework. The plan for assessments does not require the SCI entity to conduct a specific kind of assessment, nor does it require that assessments be performed at a certain frequency. The plan, however, may address the specific reviews required by Rule 1003(b)(1).

In addition, in response to a commenter's concern that the proposed safe harbor element of ''monitoring of the functionality of [SCI] systems to detect whether they are operating in the manner intended'' is potentially quite broad and seems to suggest some form of independent validation, the Commission notes that it is not requiring SCI entities to include independent validation in their assessment plans.[700] However, if an SCI entity determines that its reasonably designed systems compliance policies and procedures should provide for independent validation in its assessment plan under certain circumstances, then the SCI entity should design its policies and procedures accordingly. In that case, pursuant to Rule 1001(b), which requires an SCI entity to establish, maintain, and enforce its written policies and procedures, the SCI entity would be required to enforce its own policies and procedures, including those related to independent validation.

In addition, the Commission believes that ''a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues'' is appropriate for inclusion as a required element of systems compliance policies and procedures. As noted in the SCI Proposal, assessments of SCI systems compliance by personnel familiar with applicable laws and rules

[690] *See* FINRA Letter at 33–34.

[691] *See id.*

[692] *See* MSRB Letter at 13.

[693] *See* NYSE Letter at 30.

[694] *See* FINRA Letter at 34–35; and MSRB Letter at 13.

[695] *See* MSRB Letter at 13–14.

[696] *See* OCC Letter at 11. *See also* FINRA Letter at 34–35 (requesting more guidance on which types of personnel are intended to fulfill the requirements of proposed Rules 1000(b)(2)(ii)(A)(5) and (6)).

[697] *See* ITG Letter at 14.

[698] The Commission notes that ''a plan for assessments'' is derived from a combination of the ''ongoing monitoring'' and ''assessments'' elements of the proposed SCI entity safe harbor. Because ''a plan for assessments'' could provide for ongoing (*i.e.,* periodic or continuous) monitoring, the Commission believes that it would be duplicative to include both monitoring and a plan for assessments as required elements of systems compliance policies and procedures.

[699] *See supra* note 690 and accompanying text (discussing the view of a commenter that the proposed element of the SCI entity safe harbor related to ongoing monitoring was too broad and should be eliminated or revised to be more flexible) and *supra* note 694 and accompanying text (discussing comments seeking guidance on how an SCI entity could satisfy the requirements related to reviews and assessments by legal and compliance personnel). Further, in response to a commenter, a plan for assessments is different from the testing of SCI systems prior to implementation of systems changes. *See supra* note 692 and accompanying text.

[700] *See supra* note 691 and accompanying text.

and regulatory personnel review of SCI systems design, changes, testing, and controls are intended to help foster coordination between the information technology and regulatory staff of an SCI entity so that SCI events and other issues related to SCI systems would be more likely to be addressed by a team of staff in possession of the requisite range of knowledge and skills.[701] They are also intended to help ensure that an SCI entity's business interests do not undermine regulatory, surveillance, and compliance functions and, more broadly, the requirements of the Exchange Act, during the development, testing, implementation, and operation processes for SCI systems.[702] The Commission believes that a plan of coordination and communication between regulatory and other personnel, including by responsible SCI personnel, would further these same goals.

The Commission expects that an SCI entity will determine for itself the responsible SCI personnel and other personnel who have sufficient knowledge of relevant laws and rules to be able to effectively implement systems assessments,[703] such that the SCI entity's policies and procedures are reasonably designed to ensure that SCI systems operate in compliance with the Exchange Act and relevant rules, as required by Rule 1001(b).[704] Similarly, the Commission expects that an SCI entity will determine for itself the regulatory and other personnel, including responsible SCI personnel, who have sufficient knowledge with respect to the legal and technical aspects of systems design, changes, testing, and controls to engage in coordination and communication regarding such operations, such that the SCI entity's policies and procedures are reasonably designed to ensure that its SCI systems operate in compliance with the Exchange Act and relevant rules, as required by Rule 1001(b).[705]

One commenter sought clarity on how an SCI entity would satisfy the requirement that it does ''not have reasonable cause to believe the policies and procedures were not being complied with.'' [706] Another commenter stated that there is no guidance for SCI entities on how to appropriately follow the procedures that they have developed and stated that as proposed, it would be reasonable to interpret the safe harbor as excluding any SCI entity that suffers a significant systems event.[707] One commenter believed that the Commission should resolve any potential ambiguity between the requirements of proposed Rule 1000(b)(2)(ii)(C)(1) (requiring SCI entities to reasonably discharge the duties and obligations set forth in the policies and procedures) and proposed Rule 1000(b)(2)(ii)(C)(2) (requiring that SCI entities not have reasonable cause to believe such policies and procedures were not being complied with).[708] As discussed throughout this section, the Commission is not adopting the proposed safe harbor for SCI entities. Therefore, as adopted, Rule 1001(b) does not include the provisions of proposed Rules 1000(b)(2)(ii)(B) and (C). Further, the Commission believes that proposed Rules 1000(b)(2)(ii)(B) and (C) reiterated the requirements for SCI entities to establish, maintain, and enforce their systems compliance policies and procedures, and provided an example of how SCI entities could satisfy these requirements. For example, the SCI Proposal noted that proposed Rules 1000(b)(2)(ii)(B) and (C) specified that an SCI entity's policies and procedures must be reasonably designed to achieve SCI systems compliance, and that, as part of such policies and procedures, the SCI entity must establish and maintain systems for applying those policies and procedures, and enforce its policies and procedures, in a manner that would reasonably allow it to prevent and detect violations of the policies and procedures.[709] The Commission believes that Rule 1001(b), as adopted, provides flexibility to SCI entities regarding their methods for establishing, maintaining, and enforcing their systems compliance policies and procedures.

d. Individual Safe Harbor

Proposed Rule 1000(b)(2)(iii) set forth a safe harbor for individuals. It provided that a person employed by an SCI entity would be deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by any other person of proposed Rule 1000(b)(2)(i) if the person employed by the SCI entity has reasonably discharged the duties and obligations incumbent upon such person by the policies and procedures, and was without reasonable cause to believe that such policies and procedures were not being complied with in any material respect.

In the SCI Proposal, the Commission asked whether commenters agreed with the requirements of the proposed safe harbor for employees of SCI entities, and whether a similar safe harbor should be available to individuals other than employees of SCI entities.[710] Some commenters specifically addressed the proposed safe harbor for individuals.[711] Several commenters urged that individuals not be subject to liability under Regulation SCI absent an intentional act of willful misconduct.[712] Two commenters questioned the need for a safe harbor for individuals generally,[713] and one commenter stated

[701] *See* Proposing Release, *supra* note 13, at 18116.

[702] For example, profit incentive could lead an SCI entity to introduce a new functionality before regulatory personnel are able to adequately check that the functionality will operate in compliance with relevant laws and rules.

[703] *See supra* notes 694–696 and accompanying text (describing comments on the proposed safe harbor related to who would be involved in systems assessments).

[704] Criteria for identification of such personnel could, for example, be set forth in the SCI entity's systems compliance policies and procedures.

[705] Some commenters expressed concern regarding the potential liability for regulatory personnel. *See supra* note 697 and accompanying text. The Commission discusses individual liability in Section IV.B.2.d below.

[706] *See* FINRA Letter at 35.

[707] *See* OTC Markets Letter at 15.

[708] *See* MSRB Letter at 13–15.

[709] *See* Proposing Release, *supra* note 13, at 18116.

[710] *See id.* at 18117, question 103.

[711] *See, e.g.,* Angel Letter; Direct Edge Letter; FINRA Letter; FSR Letter; and MSRB Letter.

[712] *See* Direct Edge Letter at 6; and MSRB Letter at 17. *See also supra* notes 650 and 654 and accompanying text (discussing comments suggesting individual safe harbors). One commenter suggested that the safe harbor should provide that a person employed by an SCI entity shall be deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by any other person unless such violation directly or indirectly relates to the duties and obligations of such person under the policies and procedures described in Rule 1000(b)(2)(i) and such person: (A) Has not reasonably discharged the applicable duty or obligation under such policies and procedures; (B) was not directed by his or her supervisor, SCI entity legal counsel, SCI senior management, or the governing body of the SCI entity to act in a manner that would constitute such a failure to discharge such duty or obligation; and (C) acted recklessly or intentionally with respect to such failure to discharge such duty or obligation. *See* MSRB Letter at 17. The Commission believes that elements (A) and (B) of this commenter's suggestion are consistent with the adopted individual safe harbor. In particular, the Commission notes that the safe harbor specifies that an individual must have reasonably discharged the duties and obligations incumbent upon such person by the SCI entity's policies and procedures. The Commission believes that there can be instances where a person has reasonably discharged his or her duties and obligations under the SCI entity's policies and procedures, even though such person was directed by his or her supervisor, SCI entity legal counsel, SCI entity senior management, or the governing body of the SCI entity to act in a manner that is inconsistent with his or her duties that are set forth the policies and procedures. For example, the SCI entity's reasonably designed policies and procedures could specifically set forth circumstances where certain personnel of the SCI entity may direct another person to act outside of his or her duties or obligations that are set forth in the policies and procedures.

[713] *See* FINRA Letter at 35; and FSR Letter at 3–8 (stating that the proposed rule lacks clarity over

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that inclusion of a safe harbor would unnecessarily and severely limit the Commission's ability to deter violations through meaningful enforcement actions.[714] Two commenters questioned why the proposed safe harbor for individuals was limited to SCI entity employees.[715] One commenter expressed concern that the proposed safe harbor for individuals could be counterproductive and create an environment of second-guessing and distrust, where employees act in a way to avoid potential liability (*i.e.,* each person would be effectively deputized to police others' actions).[716] A few commenters added that the proposed safe harbor for individuals, and the resulting implication of potential individual liability, may have the unintended consequence of limiting the ability of SCI entities to hire the best available talent in information technology, risk-management, and compliance disciplines.[717] One commenter questioned why the proposed safe harbor for individuals would apply only to actions of aiding any other person and not apply to any actions of the reporting individual.[718]

After careful consideration of these comments, the Commission is adopting the individual safe harbor with certain modifications. With respect to the commenter who expressed concern that a safe harbor would ''unnecessarily and severely'' limit the Commission's ability to deter violations through meaningful enforcement actions,[719] the Commission notes that Regulation SCI only imposes obligations directly on SCI entities and the Commission is not adopting a safe harbor for SCI entities. Further, personnel of SCI entities qualify for the individual safe harbor under Rule 1001(b) only if they satisfy certain requirements.[720] In particular, in connection with a Commission finding that an SCI entity violated Rule 1001(b), the individual safe harbor will not apply if an SCI entity personnel failed to reasonably discharge his or her duties and obligations under the policies and procedures. In addition, for an SCI entity personnel who is responsible for or has supervisory responsibility over an SCI system, the individual safe harbor also will not apply if he or she had reasonable cause to believe that the policies and procedures related to such an SCI system were not in compliance with Rule 1001(b) in any material respect. Therefore, the Commission does not believe that the individual safe harbor will ''unnecessarily and severely'' limit the Commission's ability to deter violations.

With respect to commenters who questioned the need for an individual safe harbor because Rule 1001(b) imposes an obligation on SCI entities,[721] the Commission agrees that Regulation SCI imposes direct obligations on SCI entities, and does not impose obligations directly on personnel of SCI entities. At the same time, as with all other violations of the Exchange Act and rules that impose obligations on an entity, there is a potential for secondary liability for an individual who aided and abetted or caused a violation. The Commission is therefore revising the individual safe harbor to clarify that personnel of an SCI entity shall be deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by ''an SCI entity'' (rather than ''any other person'') of Rule 1001(b) if the elements of the safe harbor are satisfied.

As noted above, one commenter questioned why the proposed safe harbor for individuals would only apply to actions of aiding another and not apply to any direct violative action of the reporting individual.[722] The Commission notes that the individual safe harbor only applies to actions of aiding, abetting, counseling, commanding, causing, inducing, or procuring the violation by an SCI entity because Regulation SCI does not impose any direct obligations on personnel of SCI entities. Therefore, individuals could not be found to be in violation of Regulation SCI, except through aiding, abetting, counseling, commanding, causing, inducing, or procuring the violation by an SCI entity of Regulation SCI.

With respect to commenters who suggested extending the individual safe harbor to contractors, consultants, and other non-employees used by SCI entities in connection with their SCI systems,[723] the Commission agrees with these comments and is extending the safe harbor to all ''personnel of an SCI entity,'' rather than only persons employed by an SCI entity, as was proposed. Specifically, the Commission believes that contractors, consultants, and other similar non-employees may act in a capacity similar to an SCI entity's employees, and thus should be able to avail themselves of the individual safe harbor if they satisfy its requirements.

To be covered by the individual safe harbor, for which the individual has the burden of proof, personnel of an SCI entity must: (i) Have reasonably discharged the duties and obligations incumbent upon such person by the SCI entity's policies and procedures; and (ii) be without reasonable cause to believe that the policies and procedures relating to an SCI system for which such person was responsible, or had supervisory responsibility, were not established, maintained, or enforced in accordance with Rule 1001(b) in any material respect. Element (i) of the adopted individual safe harbor is substantively unchanged from the proposal. For the reasons discussed below in this section, element (ii) of the adopted individual safe harbor specifies that it applies only to a person who is responsible for or has supervisory responsibility over an SCI system. In addition, rather than requiring an individual to be without reasonable cause to believe that systems compliance policies and procedures ''were not being complied with in any material respect'' as proposed, element (ii) of the adopted safe harbor requires the applicable personnel to be without reasonable cause to believe that the relevant systems compliance policies and procedures ''were not established, maintained, or enforced'' in accordance with Rule 1001(b) in any material respect. The Commission notes that element (ii) of the adopted safe harbor tracks the language of the general requirement under Rule 1001(b) that an SCI entity ''establish, maintain, and enforce'' written policies and procedures reasonably designed to ensure systems compliance, and appropriately reflects the responsibilities of a person who is responsible for or has supervisory responsibility over an SCI system.[724]

why individuals need a safe harbor when the policies and procedures requirement is placed exclusively on SCI entities, and lacks clarity regarding to whom SCI entities or SCI personnel would be liable for a breach and how liability would be apportioned between market participants for an SCI event). *See also* MSRB Letter at 15 (seeking further clarification from the Commission regarding the nature of the potential liabilities faced by individuals).

[714] *See* Better Markets Letter at 6.

[715] *See* FINRA Letter at 35; and MSRB Letter at 17. These commenters suggested extending the safe harbor to contractors, consultants, and other non-employees used by SCI entities in connection with their SCI systems. *See* FINRA Letter at 35; and MSRB Letter at 17.

[716] *See* MSRB Letter at 15–17.

[717] *See* Direct Edge Letter at 6; and MSRB Letter at 17.

[718] *See* Angel Letter at 4.

[719] *See supra* note 714 and accompanying text.

[720] As discussed below in this section, the Commission is extending the safe harbor to all personnel of an SCI entity, rather than only persons employed by an SCI entity, as proposed.

[721] *See supra* note 713 and accompanying text.

[722] *See supra* note 718 and accompanying text.

[723] *See supra* note 715 and accompanying text.

[724] As noted below, the Commission believes it is appropriate in the context of the safe harbor that,

The Commission believes that it is appropriate to not provide a safe harbor to a person with responsibility over an SCI system if such person had reasonable cause to believe that the policies and procedures for such system were not established, maintained, or enforced as required by Rule 1001(b) in a material respect. The limited application of this element to such personnel (rather than to any person employed by an SCI entity as proposed) is intended to mitigate commenters' concerns that the proposed safe harbor would create an environment of distrust and limit the ability of SCI entities to hire high quality personnel.[725] In particular, personnel who are not responsible for and do not have supervisory responsibility over SCI systems can qualify for the individual safe harbor, regardless of their belief regarding the reasonableness of the SCI entity's systems compliance policies and procedures. Therefore, such personnel would not be ''deputized to police'' the actions of other personnel, as a commenter believed they would.[726] Further, with respect to personnel who are responsible for or have supervisory responsibility over an SCI system, such personnel likely already have the responsibility to supervise others' activities related to that SCI system, which would provide such personnel with information to form a reasonable belief regarding the reasonableness of the policies and procedures. Because Rule 1001(b) is intended to help prevent the occurrence of systems compliance issues at SCI entities, the Commission believes that it is appropriate for supervisory personnel to be knowledgeable regarding the entity's policies and procedures regarding systems compliance, which may be accomplished through training provided by the SCI entity. Moreover, the Commission believes it is appropriate in the context of the safe harbor that, if a person with responsibility over an SCI system becomes aware of potential material non-compliance of the SCI entity's policies and procedures related to that system, such person should take action to review and address, or direct other personnel to review and address, such material non-compliance. Finally, to further mitigate commenters' concern that potential individual liability may limit the hiring ability of SCI entities,[727] as noted above, personnel of an SCI entity will not be deemed to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by an SCI entity of Regulation SCI merely because the SCI entity experienced a systems compliance issue, whether or not the person was able to take advantage of the individual safe harbor.

As noted above, with respect to a personnel of an SCI entity who is not responsible for and does not have supervisory responsibility over SCI systems, the safe harbor provides that such personnel shall be deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by an SCI entity of Rule 1001(b) if such person has reasonably discharged the duties and obligations incumbent upon him or her by the systems compliance policies and procedures. Therefore, unlike personnel who are responsible for or have supervisory responsibility over SCI systems, these persons would not be liable even if the SCI entity itself did not have reasonably designed systems compliance policies and procedures or did not enforce its policies and procedures, as long as they discharged their duties and obligations under the policies and procedures in a reasonable manner.[728] The Commission believes this safe harbor is appropriate because the persons who will seek to rely on this safe harbor are those who do not have responsibility for the establishment, maintenance, and enforcement of the policies and procedures, or the actions of other personnel of the SCI entity.

With respect to commenters who argued that individuals should not be subject to liability under Regulation SCI absent an intentional act of willful misconduct,[729] the Commission notes again that Regulation SCI imposes direct obligations only on SCI entities, and not on individuals. However, as with all other violations of provisions of the Exchange Act and rules that impose obligations on an entity, there is a potential for secondary liability for an individual who aided and abetted or caused a violation. As discussed above in the context of SCI entities, all SCI entities are required to comply with the Exchange Act, the rules and regulations thereunder, and their own rules and governing documents, as applicable, and the purpose of Rule 1001(b) is to effectively help ensure compliance of the operation of SCI systems with the Exchange Act, the rules and regulations thereunder, and their own rules and governing documents. The Commission does not believe that the rule would further this goal to the same degree if the Commission adopts commenters' suggestions for the individual safe harbor (*i.e.,* personnel of an SCI entity are permitted to cause an SCI entity to be out of compliance with Rule 1001(b) so long as the personnel did not act intentionally or willfully).

3. SCI Events: Corrective Action; Commission Notification; Dissemination of Information—Rule 1002

Adopted Rule 1002, which corresponds to proposed Rules 1000(b)(3)–(5), requires an SCI entity to take corrective action, notify the Commission, and disseminate information regarding certain SCI events.

a. Triggering Standard

As proposed, the obligation of an SCI entity to take corrective action (proposed Rule 1000(b)(3)), notify the Commission (proposed Rule 1000(b)(4)), and disseminate information (proposed Rule 1000(b)(5)) would have been triggered upon ''any responsible SCI personnel becoming aware of'' an SCI event.[730] Proposed Rule 1000(a) defined ''responsible SCI personnel'' to mean, for a particular SCI system or SCI security system impacted by an SCI event, any personnel, whether an employee or agent, of an SCI entity having responsibility for such system.[731] In the SCI Proposal, the Commission noted that this proposed definition was intended to include any personnel of the SCI entity having responsibility for the specific system(s) impacted by a given SCI event.[732] The Commission stated that such personnel would include any technology, business, or operations staff with responsibility for such systems, and with respect to systems compliance issues, any regulatory, legal, or compliance personnel with legal or compliance responsibility for such systems.[733] The Commission also

if a person with responsibility over an SCI system becomes aware of potential material non-compliance of the SCI entity's policies and procedures related to that system, such person should take action to review and address, or direct other personnel to review and address, such material non-compliance.

[725] *See supra* notes 716–717 and accompanying text.

[726] *See supra* note 716 and accompanying text.

[727] *See supra* note 717 and accompanying text.

[728] The Commission believes that, in order for a person to reasonably discharge his duties and obligations under the SCI entity's policies and procedures, that person must be able to understand his duties and obligations under such policies and procedures, which may be accomplished through training provided by the SCI entity.

[729] *See supra* note 712 and accompanying text.

[730] *See* proposed Rules 1000(b)(3), 1000(b)(4)(i)–(ii), and 1000(b)(5)(i)–(ii).

[731] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.C.3.a.

[732] *See* Proposing Release, *supra* note 13, at 18118.

[733] *See id.*

explained that ''responsible SCI personnel'' would not be limited to managerial or senior-level employees of the SCI entity and could include junior personnel with responsibility for a particular system.[734]

After considering the views of commenters, the Commission is modifying the proposed standard for triggering corrective action, Commission notification, and dissemination of information obligations in adopted Rule 1002, including by amending the definition of responsible SCI personnel, as discussed below.

Responsible SCI Personnel

Many commenters expressed concern that the proposed definition of responsible SCI personnel was too broad.[735] These commenters generally urged the Commission to revise the scope of the definition to cover only those employees in management or supervisory roles that have responsibility over an SCI system, rather than including relatively junior or inexperienced employees.[736] Some of these commenters stated that junior employees and/or technology personnel may not have the training or breadth of knowledge or experience necessary to identify, analyze, and determine whether a systems issue is an SCI event under the rule.[737] Similarly, one commenter advocated limiting responsible SCI personnel to employees with full knowledge and authority over a system.[738] Some commenters also suggested that SCI entities should have the discretion to decide which employees are responsible SCI personnel.[739]

Similarly, several commenters emphasized the importance of escalation policies and procedures, pursuant to which technology staff or junior employees could assess a systems problem and escalate the issue up the chain of command to management as well as legal and/or compliance personnel, who will help determine whether a systems issue was an SCI event and whether the obligations under Regulation SCI are triggered.[740] These commenters argued that the rule should allow entities to adopt and follow such escalation procedures rather than triggering the obligations under Regulation SCI upon one employee's awareness of a systems issue.[741] One commenter also asserted that limiting the definition of responsible SCI personnel would be appropriate if the Commission also required a robust escalation procedure.[742]

Some commenters also expressed concern about the potential liability that responsible SCI personnel could face if the rule were adopted as proposed, given the breadth of the definition of ''responsible SCI personnel.'' [743] Specifically, commenters asserted that, as a result of including junior and information technology personnel within the definition and the potential liability of such individuals, the proposed provision would make it more difficult for SCI entities to attract and retain high quality information technology employees.[744] Another commenter noted that responsible operations or technical personnel may not be in a position to make legal determinations about when a compliance issue has arisen.[745]

After consideration of the views of commenters, the Commission has revised the term ''responsible SCI personnel'' to mean, ''for a particular SCI system or indirect SCI system impacted by an SCI event, such senior manager(s) of the SCI entity having responsibility for such system, and their designee(s).'' [746] The Commission agrees that the proposed definition of responsible SCI personnel was broad and, consistent with the views of some commenters, believes that it is appropriate to instead focus the adopted definition on senior personnel of SCI entities that have responsibility for a particular system.[747] The Commission believes that adopting a more focused definition of responsible SCI personnel to include only senior managers having responsibility for a given system (and their designees) addresses commenters' concerns that the obligations of the rule could have been triggered upon the awareness of junior or inexperienced employees who lack the knowledge or experience to be able to make a determination regarding whether an SCI event had, in fact, occurred.[748] The Commission believes that the revised definition is a better approach than the proposed definition because, consistent with suggestions from some commenters, it will appropriately allow SCI entities to adopt procedures that would require personnel of an SCI entity to escalate a systems issue to senior individuals who are responsible for a particular system and who have the ability and authority to appropriately analyze and assess the issue affecting the SCI system or indirect SCI system, and their designees, as applicable.[749]

The Commission also notes that, consistent with some commenters' recommendations, under the adopted rule, SCI entities will be afforded flexibility to determine which personnel to designate as ''responsible SCI personnel.'' [750] Specifically, SCI entities will need to affirmatively identify one or more senior managers that have responsibility for each of its SCI systems or indirect SCI systems.[751] In addition, the Commission notes that the definition of responsible SCI personnel affords SCI entities with the flexibility to designate one or more other personnel as designees for a given system.[752] The Commission believes that it is important to include designees within the definition of responsible SCI personnel to provide an SCI entity with the flexibility that it may need, and

[734] *See id.*

[735] *See, e.g.,* Omgeo Letter at 13; MSRB Letter at 6; BATS Letter at 8; Liquidnet Letter at 3; CME Letter at 7; OCC Letter at 12; Joint SROs Letter at 12; FINRA Letter at 25–26; and OTC Markets Letter at 19. *See also* NYSE Letter at 19 (stating that the proposed definition was too vague and suggesting an alternative approach). *See also infra* note 761 and accompanying text.

[736] *See, e.g.,* Omgeo Letter at 13; MSRB Letter at 6, 18; NYSE Letter at 19; BATS Letter at 8; Liquidnet Letter at 3; CME Letter at 7; OCC Letter at 12; Joint SROs Letter at 12; FINRA Letter at 25–26; and OTC Markets Letter at 19. Similarly, with regard to the Commission notification requirement in proposed Rule 1000(b)(4), one commenter stated that the obligation to notify the Commission should only be triggered when the responsible SCI personnel notifies the officer or senior staff responsible for the SCI system or systems generally. *See* DTCC Letter at 9.

[737] *See, e.g.,* OCC Letter at 12; FINRA Letter at 25–26; and OTC Markets Letter at 19.

[738] *See* FIF Letter at 3, 5.

[739] *See, e.g.,* Liquidnet Letter at 3; NYSE Letter at 19; and Joint SROs Letter at 12.

[740] *See, e.g.,* OCC Letter at 12; FINRA Letter at 25–26; Omgeo Letter at 13; FIF Letter at 5; and NYSE Letter at 19–20.

[741] *See, e.g.,* OCC Letter at 12; FINRA Letter at 25–26; Omgeo Letter at 13; FIF Letter at 5; and NYSE Letter at 19–20.

[742] *See* FIF Letter at 5.

[743] *See, e.g.,* NYSE Letter at 19; BATS Letter at 8; Joint SROs Letter at 13; and OTC Markets Letter at 18. *See also supra* note 717.

[744] *See, e.g.,* NYSE Letter at 19; BATS Letter at 8; Joint SROs Letter at 13; and OTC Markets Letter at 18. These commenters therefore recommended that the definition include only senior personnel who would more appropriately be responsible for making a determination as to whether an SCI event had occurred given their knowledge and authority.

[745] *See* Omgeo Letter at 13.

[746] *See* adopted Rule 1000.

[747] *See generally supra* notes 735–738 and accompanying text.

[748] *See supra* notes 736–737. *See also* note 738 and accompanying text.

[749] *See supra* Section IV.B.1.b (discussing Rule 1001(a)(1)(2)(vii), which requires an SCI entity to have policies and procedures to provide for monitoring of SCI systems, and indirect SCI systems, as applicable, to identify potential SCI events, and escalate them to responsible SCI personnel); and *infra* notes 758–761 and accompanying text.

[750] *See supra* note 739 and accompanying text.

[751] *See* Rule 1001(c).

[752] The Commission notes that the rules do not, however, require SCI entities to have designees. Rather, each SCI entity has the discretion to have designees if they choose to do so.

which the Commission believes is necessary, given the varying sizes, natures, and complexities of each SCI entity. A senior manager may name a designee (or designees) who would also have responsibility for a given system with regard to Regulation SCI, for example, if the senior manager is absent, is occupied with other oversight responsibilities for a period of time, or because of other practical limitations, is otherwise unavailable to assess the SCI entity's obligations under Regulation SCI at a given point in time. The Commission believes it is likely that the designation of a designee and such designee's particular responsibilities with regard to an SCI system or indirect SCI system would be addressed by an SCI entity's policies and procedures, as discussed below. However, the Commission notes that while the definition of ''responsible SCI personnel'' does not permit the senior manager having responsibility for an applicable system to disclaim responsibility under the rule by delegating it fully to one or more designees (*i.e.,* the adopted rule reads ''*and* their designees'' rather than ''*or* their designees''), it may assist SCI entities in fulfilling their responsibilities under Regulation SCI by allowing them to delegate to personnel other than senior managers such that those designees can also serve in the role of responsible SCI personnel.

The Commission further believes that the modifications to the definition addresses some commenters' concerns regarding the potential liability of junior SCI personnel, as the obligations of the rule are now triggered only when senior managers, rather than junior employees, having responsibility for a particular system have a reasonable basis to conclude that an SCI event has occurred.[753] Further, the Commission reiterates that Regulation SCI imposes direct obligations on SCI entities and does not impose obligations directly on personnel of SCI entities. For these reasons, the Commission believes that an SCI entity's ability to attract and retain employees should not be negatively affected by the requirements of Regulation SCI, as adopted.[754] The Commission also reiterates that the occurrence of an SCI event may be probative, but is not determinative of whether an SCI entity violated Regulation SCI.[755]

In light of the more focused definition of responsible SCI personnel and consistent with commenters' suggestions,[756] the Commission believes it is appropriate to also adopt a policies and procedures requirement with respect to the designation of responsible SCI personnel and escalation procedures. As discussed above, many commenters highlighted the importance of escalation procedures and advocated for their use as an alternative to the adoption of a broader definition of responsible SCI personnel.[757] Specifically, the Commission is adopting Rule 1001(c), which requires each SCI entity to ''[e]stablish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events.'' The Commission believes that it is important for an SCI entity's policies and procedures to have a defined set of criteria for identifying responsible SCI personnel so that such personnel are identified in a consistent manner across all of an SCI entity's operations and with regard to all of its SCI systems and indirect SCI systems. The Commission believes that SCI entities are best suited to establish the appropriate criteria for such a designation but notes that such criteria could include, for example, consideration of the level of knowledge, skills, and authority necessary to take the required actions under the rules. The Commission also believes it is important for policies and procedures to include the designation and documentation of responsible SCI personnel, so that it is clear to all employees of the SCI entity who the designated responsible SCI personnel are for purposes of the escalation procedures and so that Commission staff can easily identify such responsible SCI personnel in the course of its inspections and examinations and other interactions with SCI entities. The Commission also believes that, given the more focused definition of responsible SCI personnel, escalation procedures to quickly inform responsible SCI personnel of potential SCI events are necessary to help ensure that the appropriate person(s) are provided notice of potential SCI events so that any appropriate actions can be taken in accordance with the requirements of Regulation SCI without unnecessary delay. Such escalation procedures would establish the means by which, and actions required for, escalating information regarding a systems issue that may be an SCI event up the chain of command to the responsible SCI personnel, who will be responsible for determining whether an SCI event has occurred and what resulting obligations may be triggered. The Commission notes that each SCI entity may establish escalation procedures that conform to its needs, organization structure, and size. By requiring that responsible SCI personnel are ''quickly inform[ed]'' of potential SCI events, the Commission intends to require that escalation procedures emphasize promptness and ensure that responsible SCI personnel are informed of potential SCI events without delay. At the same time, the rule does not prescribe a specific time requirement in order to give flexibility to SCI entities in recognition that immediate notification may not be possible or feasible. Further, similar to adopted Rules 1001(a) and 1001(b), Rule 1001(c) requires that an SCI entity periodically review the effectiveness of the policies and procedures related to responsible SCI personnel, and to take prompt action to remedy deficiencies in such policies and procedures.

Becomes Aware

Several commenters criticized the proposed requirement that certain obligations under Regulation SCI be triggered when a responsible SCI personnel ''becomes aware'' of an SCI event. Some commenters stated that the standard was vague and lacked clarity regarding when, exactly, responsible SCI personnel would be deemed to become aware of an SCI event.[758] Further, some commenters noted that the ''becomes aware'' standard emphasized immediate action over methodical escalation, diagnosis, and resolution procedures.[759] As noted above, several commenters emphasized the importance of escalation policies and procedures, and argued that the rule should allow entities to adopt and follow such escalation procedures rather

[753] *See supra* notes 743–744 and accompanying text.

[754] *See supra* notes 721 and 743–744 and accompanying text. The Commission notes that commenters' concerns regarding potential liability of employees were related to the scope of the proposed definition of responsible SCI personnel and the effect on the hiring and retention of junior and information technology personnel. Commenters believed that the definition should instead focus on senior managers who could appropriately be held responsible given their responsibilities and authority to take necessary actions under the rule.

[755] *See, e.g., supra* notes 470 and 627 and accompanying text.

[756] *See supra* notes 740–742 and accompanying text and *infra* notes 759–761 and accompanying text.

[757] *See supra* notes 740–742 and accompanying text.

[758] *See, e.g.,* BATS Letter at 8–9; NYSE Letter at 19; and Joint SROs Letter at 12.

[759] *See* Joint SROs Letter at 3, 9, and 12. *See also* OCC Letter at 12; FINRA Letter at 25–26; Omgeo Letter at 13; FIF Letter at 5; and NYSE Letter at 19–20.

than triggering the obligations under Regulation SCI upon one employee's awareness of a systems issue.[760] Another commenter suggested specific revisions to the triggering standard so that the phrase ''responsible SCI personnel becoming aware'' would be eliminated entirely and replaced with ''SCI entity having a reasonable basis to conclude,'' which it believed would allow for escalation through a normal chain of command.[761]

With regard to the Commission notification requirements specifically,[762] one commenter suggested that SCI entities should only be required to notify the Commission ''upon confirming the existence of an SCI event,'' [763] while another commenter stated that the rule should require notification to the Commission as soon as reasonably practicable after responsible personnel becomes aware of the SCI event.[764] Similarly, one commenter believed that the ''becomes aware'' standard was problematic because it would require notification before an SCI entity has accurate information upon which to act.[765]

After consideration of the views of commenters, the Commission has determined to revise the triggering standard so that SCI entities will be required to comply with the obligations of adopted Rule 1002 upon responsible SCI personnel having ''a reasonable basis to conclude'' that an SCI event has occurred, as suggested by a commenter.[766] This standard permits an SCI entity to gather relevant information and perform an initial analysis and assessment as to whether a systems issue may be an SCI event, rather than requiring an SCI entity to take corrective action, notify the Commission, and/or disseminate information about an SCI event immediately upon responsible SCI personnel becoming aware of an SCI event.[767] Thus, the Commission believes that the ''reasonable basis to conclude'' standard should provide some additional flexibility and time for judgment to determine whether there is a ''reasonable basis to conclude'' in contrast to the ''becomes aware'' standard which many commenters noted would be difficult to apply in practice due to the difficulty of determining when an individual, in fact, ''becomes aware'' of an SCI event.[768] Further, the Commission believes that, consistent with commenters' recommendations, the revised standard, in conjunction with the revised definition of ''responsible SCI personnel,'' will allow an SCI entity to adopt and follow its internal escalation policies and procedures to inform senior SCI entity personnel of systems issues, and allow meaningful assessment of the issues by such senior management prior to triggering obligations of the rule.[769] At the same time, the Commission believes that the obligations of the rule will continue to be triggered in a timely manner because the Commission is adopting a separate requirement in Rule 1001(c), as noted above, for escalation procedures to quickly inform responsible SCI personnel of potential SCI events.

b. Corrective Action—Rule 1002(a)

Proposed Rule 1000(b)(3) required an SCI entity, upon any responsible SCI personnel becoming aware of an SCI event, to begin to take appropriate corrective action including, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable.[770] The corrective action requirement is being adopted substantially as proposed, but with the triggering standard modified as discussed above.[771]

Two commenters supported the corrective action provision generally.[772] Several commenters stated that the proposed requirement put too great an emphasis on immediately taking corrective action at the expense of thoroughly analyzing the SCI event and its cause, considering potential remedies, and/or acting in accordance with internal policies and procedures before committing to a plan to take corrective action.[773] One group of commenters suggested that the rule should make clear that ''corrective action'' should also include a variety of other potential actions, such as communicating with responsible parties, diagnosing the root cause, disclosing to members and the public, and mitigating potential harm by following their policies and procedures.[774] Another commenter stated that, in certain circumstances, it is ''aggressive to presume that one individual's knowledge should prompt an immediate response by the SCI [e]ntity at large.'' [775] This commenter further stated that a standard requiring an SCI entity to mitigate potential harm to investors is extremely vague.[776]

As adopted, Rule 1002(a) requires an SCI entity, upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, to begin to take appropriate corrective action including, at a minimum, mitigating potential harm to investors and market integrity resulting

[760] *See supra* notes 740–742 and accompanying text.

[761] *See* NYSE Letter at 19.

[762] *See infra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events).

[763] *See* Direct Edge Letter at 8.

[764] *See* Omgeo Letter at 17.

[765] *See* FIF Letter at 5 (urging that notification be required when ''accurate and actionable'' information is provided to responsible SCI personnel). *See also* BATS Letter at 9.

[766] *See* adopted Rules 1002(a), (b), and (c). *See also supra* note 761.

[767] *See supra* notes 759 and 763–765 and accompanying text. Additionally, the Commission does not agree with the commenter who stated that notification should be required only as soon as reasonably practicable after responsible personnel become aware of an SCI event because that standard would unnecessarily delay the requirement for an SCI entity to take necessary actions under the rule and the Commission's knowledge of an SCI event. *See supra* note 764.

[768] *See supra* note 758 and accompanying text.

[769] *See supra* notes 758–760 and accompanying text. The Commission believes that the adopted standard similarly allows for escalation of a systems issue to senior officials because the Commission believes that having ''a reasonable basis to conclude'' is a good indication that an SCI event has likely occurred and does not require that the responsible SCI personnel come to a *definitive* conclusion, which would cause unnecessary delay in taking the actions required by Regulation SCI. Rather, once responsible SCI personnel have a *reasonable basis* to conclude that an SCI event has occurred, the Commission believes that an SCI entity should begin to take corrective action, provide notice to the Commission, and/or disclose such event, as applicable, because these requirements are designed to ensure that the SCI entity begins to take action in a timely fashion to mitigate potential harm arising from the incident and that the Commission and relevant market participants are kept apprised of an SCI event even where a definitive conclusion is not yet available. The Commission does not agree with the commenter that it should apply the triggering standard only to the SCI entity rather than responsible SCI personnel. The Commission notes, as discussed above, that the adopted definition of responsible SCI personnel imposes obligations only upon the senior personnel of an SCI entity that have responsibility for a particular system. Additionally, the Commission believes that it is important to apply the triggering standard to responsible SCI personnel rather than to the SCI entity because, when combined with an SCI entity's policies and procedures with respect to the designation of responsible SCI personnel and escalation and monitoring procedures, the triggering standard is designed to ensure that senior managers are provided notice of potential SCI events so that any appropriate actions can be taken in accordance with the requirements of Regulation SCI without unnecessary delay.

[770] *See* proposed Rule 1000(b)(3) and Proposing Release, *supra* note 13, at 18117.

[771] *See supra* Section IV.B.3.a (discussing the triggering standard).

[772] *See* MSRB Letter at 17 and DTCC Letter at 9–10.

[773] *See* SIFMA Letter at 3; OCC Letter at 14; Joint SROs Letter at 11; LiquidPoint Letter at 4; DTCC Letter at 10; and Direct Edge Letter at 7.

[774] *See* Joint SROs at 11.

[775] *See* Direct Edge Letter at 7.

[776] *Id.*

from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable. The Commission continues to believe that this provision of Regulation SCI is important to make clear that each SCI entity has the obligation to respond to SCI events with appropriate steps necessary to remedy the problem or problems causing such SCI event and mitigate the negative effects of the SCI event, if any, on market participants and the securities markets more broadly. As discussed below, the specific steps that an SCI entity will need to take to mitigate the harm will be dependent on the particular systems issue, its causes, and the estimated impact of the event, among other factors. To the extent that a systems issue affects not only the particular users of an SCI system, but also has a more widespread impact on the market generally, as may be likely with regard to systems issues affecting critical SCI systems, the SCI entity will need to consider how it might mitigate any potential harm to the overall market to help ensure market integrity. For example, an SCI entity would need to take steps to regain a system's ability to process transactions in an accurate, timely, and efficient manner, or to ensure the accurate, timely, and efficient collection, processing, and dissemination of market data.

As noted above, many of the comments on this requirement are related to the standard for triggering the obligation to take corrective action under this provision, namely ''upon any SCI responsible personnel becoming aware of'' an SCI event. As discussed above, the Commission has further focused the scope of the term ''responsible SCI personnel'' in response to commenters' concerns that the term was too broad and could inappropriately capture junior and/or inexperienced employees. Further, as discussed above, the Commission has revised the ''becomes aware'' standard to instead trigger obligations when responsible personnel have ''a reasonable basis to conclude'' an SCI event has occurred. As explained above, the Commission believes that these important modifications are responsive to commenters' concerns that the corrective action requirement could be triggered upon the knowledge of only one individual or a junior employee of a systems issue without sufficient time to analyze and assess the systems problem and follow internal escalation procedures. Under the adopted standard, only when (i) suspected systems problems are escalated to senior managers of the SCI entity who have responsibility for the SCI system or indirect SCI system experiencing an SCI event and their designees, and (ii) such personnel have ''a reasonable basis to conclude'' that an SCI event has occurred are the appropriate corrective actions required by Rule 1002(a) triggered.

Further, in response to commenters who stated that the proposed rule places too large an emphasis on immediate corrective action,[777] in addition to the modifications noted above which are intended to allow for appropriate time for an SCI entity to perform an initial analysis and preliminary investigation into a potential systems issue before the obligations under Rule 1002(a) are triggered, the Commission notes that it does not use the term ''immediate'' in either the proposed or adopted rules. Rather, the Commission emphasizes that the rule requires that corrective action be taken ''as soon as reasonably practicable'' once the triggering standard has been met. The Commission believes that, because the facts and circumstances of each specific SCI event will be different, this standard ensures that an SCI entity will take necessary corrective action soon after an SCI event, but not without sufficient time to first consider what is the appropriate action to remedy the SCI event in a particular situation and how such action should be implemented.

Moreover, the Commission has considered the comment that the rule prescribe in more specificity the particular types of corrective action that must be taken by an SCI entity and believes that it is appropriate to adopt, as proposed, a rule that requires more generally that ''appropriate'' corrective action be taken and requires that, at a minimum, the SCI entity take appropriate steps to mitigate potential harm to investors and market integrity resulting from the SCI event and devote adequate resources to remedy the SCI event. The Commission notes that the rule is designed to afford flexibility to SCI entities in determining how to best respond to a particular SCI event in order to remedy the problem causing the SCI event and mitigate its effects. As a general matter, though, the Commission agrees that such corrective action would likely include a variety of actions, such as those identified by one group of commenters, including determining the scope of the SCI event and its causes, making a determination regarding its known and anticipated impact, following adequate internal diagnosis and resolution policies and procedures, and taking additional action to respond as each SCI entity deems appropriate.[778] The Commission also notes that certain other specific types of corrective action identified by such commenters are already required by other provisions of Regulation SCI, such as communicating and escalating the issue to responsible personnel and making appropriate disclosures to members or participants regarding the SCI event.[779]

c. Commission Notification—Rule 1002(b)

i. Proposed Rule 1000(b)(4)

Proposed Rule 1000(b)(4) addressed the Commission notification obligations of an SCI entity upon any responsible SCI personnel becoming aware of an SCI event.[780] Specifically, proposed Rule 1000(b)(4)(i) required an SCI entity, upon any responsible SCI personnel becoming aware of a systems disruption that the SCI entity reasonably estimated would have a material impact on its operations or on market participants, any systems compliance issue, or any systems intrusion (''immediate notification SCI event''), to notify the Commission of such SCI event, which could be done orally or in writing (*e.g.,* by email). Proposed Rule 1000(b)(4)(ii) required an SCI entity to submit a written notification pertaining to any SCI event to the Commission within 24 hours of any responsible SCI personnel becoming aware of the SCI event. Proposed Rule 1000(b)(4)(iii) required an SCI entity to submit to the Commission continuing written updates on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, until such time as the SCI event was resolved.

Proposed Rule 1000(b)(4)(iv) detailed the types of information that was required for written notifications under proposed Rule 1000(b)(4).[781] In

[777] *See supra* notes 773–775 and accompanying text.

[778] *See supra* note 774 and accompanying text.

[779] *See* adopted Rule 1001(c) (requiring policies and procedures that include, among other things, escalation procedures to quickly inform responsible SCI personnel of potential SCI events) and Rule 1002(c) (requiring dissemination of information regarding SCI events).

[780] *See* proposed Rule 1000(b)(4) and Proposing Release, *supra* note 13, at Section III.C.3.b.

[781] Specifically, the SCI Proposal required written notifications and updates to be made electronically and required initial written notifications to include all pertinent information known about an SCI event, including: (1) A detailed description of the SCI event; (2) the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; (3) the potential impact of the SCI event on the market; and (4) the SCI entity's current assessment of the SCI event, including a discussion of the SCI entity's determination regarding whether the SCI event was a dissemination SCI event or not. In addition, as proposed, to the extent available as of the time of

Continued

addition, proposed Rule 1000(b)(4)(iv)(C) required an SCI entity to provide a copy of any information disseminated regarding the SCI event to its members or participants or on the SCI entity's publicly available Web site.

As described below, adopted Rule 1002(b) retains the general framework of proposed Rule 1000(b)(4) for Commission notification of SCI events, but makes several modifications in response to comments.

Comments Regarding Commission Notification of SCI Events

One commenter generally supported proposed Rule 1000(b)(4), stating that it would enhance transparency and might allow the Commission to see patterns in small, seemingly non-material SCI events that are worthy of attention.[782] However, many other commenters expressed concerns about proposed Rule 1000(b)(4).[783] Many of these commenters stated that the scope of proposed Rule 1000(b)(4) was too broad, and that the notification requirement would lead to over-reporting to the Commission.[784] Commenters also suggested various ways to revise the reporting requirement. For example, several commenters recommended requiring notification to the Commission only for ''material'' or ''significant'' events.[785] For example, one commenter recommended reporting most SCI events as part of the annual SCI review process, while focusing Commission notification on material SCI events.[786] Similarly, another commenter suggested that SCI entities should only be required to report information relating to ''impactful'' systems disruptions in an annual report to the Commission rather than in near real time reports.[787] Another commenter recommended requiring notification only for systems issues that warrant notification to an SCI entity's subscribers or participants.[788] Some commenters recommended a risk-based approach under which each SCI event would be subject to a risk-based assessment, in which the obligation to notify the Commission would be based on the attendant risk, with only material events requiring notification.[789]

Commenters also identified potential problems resulting from a notification requirement that they perceived as too broad. For example, one commenter stated that the notification requirements have the potential to create efficiency issues, delay system remediation, create substantial resource demands, and create instability, which would diminish an SCI entity's ability to be responsive to investors and damage market efficiency.[790] Similarly, several commenters stated that the proposed Commission notification provision would require SCI entities to divert resources to comply with the requirement which, in turn, would risk delaying resolution of the SCI event that is being reported on.[791] Other commenters suggested that the proposed rule would result in large volumes of data and reporting, which would present challenges to, and burdens on, SCI entities as well as Commission staff.[792] One commenter also questioned the extent to which the reported information provided by the notifications would be useful to the Commission.[793]

Some commenters focused their comments on the proposal's requirements for Commission reporting of systems intrusions and offered alternative approaches to reporting systems intrusions. One commenter stated that, in order to limit the number of notifications, SCI entities should be required to investigate and keep a record of all systems intrusions that did not cause a material disruption of service, or that were a malicious (but unsuccessful) attempt in gaining unauthorized access to confidential data, and make these records available to the Commission staff if requested.[794] Another commenter recommended that non-material systems intrusions be recorded within the SCI entity's records.[795] Another commenter suggested that systems intrusions in a development or testing environment should only be reportable if there is a likelihood that the same issue or vulnerabilities exist in the current production environment and cannot be verified within a certain period, such as, for example, 24 to 48 hours.[796] In addition, one commenter suggested that, for systems intrusions, rather than impose the Commission notification requirement on SCI entities, the Commission should instead require SCI entities to establish policies and procedures reasonably designed to prevent, detect, and respond to systems intrusions.[797]

One commenter stated that the Commission should support the enhancement of the Financial Services Information Sharing and Analysis Center (''FS–ISAC'')[798] and another commenter suggested that non-material cyber-relevant events be provided to and disseminated through FS–ISAC rather than the Commission.[799] Some commenters further suggested that certain systems intrusions should be reported to FS–ISAC.[800]

Other commenters stated that reporting a systems compliance issue is

the initial notification, Exhibit 1 to Form SCI would have required inclusion of the following information: (1) A description of the steps the SCI entity was taking, or planned to take, with respect to the SCI event; (2) the time the SCI event was resolved or timeframe within which the SCI event was expected to be resolved; (3) a description of the SCI entity's rule(s) and/or governing documents, as applicable, that related to the SCI event; and (4) an analysis of the parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. *See* proposed Rule 1000(b)(4)(iv)(A).

[782] *See* Lauer Letter at 6. The Commission also notes that, although many other commenters expressed reservations with proposed Rule 1000(b)(4), many of these commenters also expressed their general support for a notification rule that is more limited in scope. *See, e.g.,* ITG Letter at 12 (stating that a reduction in notifications would result in lower costs, reduce the over-reporting of events, and allow the Commission to focus on events that warrant review); and FINRA Letter at 18 (''FINRA fully supports the Commission's goal of ensuring that Commission staff is informed of events that could potentially impact the market'').

[783] *See, e.g.* NYSE Letter at 21; BATS Letter at 12–13; ITG Letter at 12; FINRA Letter at 16–17; Omgeo Letter at 16; SIFMA Letter at 13; ISE Letter at 6; OCC Letter at 11; and CME Letter at 9.

[784] *See, e.g.,* NYSE Letter at 22; Omgeo Letter at 16; SIFMA Letter at 14; ISE Letter at 6; and OCC Letter at 12.

[785] *See, e.g.,* ITG Letter at 12; CME Letter at 9; DTCC Letter at 8; and Omgeo Letter at 15.

[786] *See* FIF Letter at 4.

[787] *See* BATS Letter at 10.

[788] *See* OTC Markets Letter at 19 (stating that the notification requirement to the Commission should be aligned with the current industry practice of notifying SCI entities' subscribers of material events, explaining that competitive forces motivate entities to promptly notify subscribers about significant issues).

[789] *See, e.g.,* OCC Letter at 13; SIFMA Letter at 13; Omgeo Letter at 1; FINRA Letter at 14; and NYSE Letter at 25.

[790] *See* UBS Letter at 3.

[791] *See* Omgeo Letter at 16; MSRB Letter at 19; and OCC Letter at 14.

[792] *See* SunGard Letter at 5; and Joint SROs Letter at 7.

[793] *See* NYSE Letter at 22.

[794] *See* Omgeo Letter at 12.

[795] *See* DTCC Letter at 8.

[796] *See* FINRA Letter at 11–12.

[797] *See* BATS Letter at 12. This commenter believed that the cost of the proposed requirement would outweigh any benefits because the proposed rule would require SCI entities to ''rapidly investigate and report a multitude of minor incidents that regularly occur during the normal course of business.'' *Id.*

[798] FS–ISAC is a service that gathers information from a multitude of sources related to threat, vulnerability, and risk of cyber and physical security and communicates timely notifications and authoritative information specifically designed to help protect critical systems and assets from physical and cybersecurity threats. *See* FS–ISAC: Financial Services—Information Sharing and Analysis Center, available at: *www.fsisac.com.*

[799] *See* BIDS Letter at 10; and Omgeo Letter at 12.

[800] *See* SIFMA Letter at 14 (recommending that systems intrusions be reported to FS–ISAC in addition to the Commission); and Omgeo Letter at 12 and 21 (recommending that non-material systems intrusions be reported solely to FS–ISAC).

reporting a legal conclusion, and that requiring an SCI entity to do so would overburden them with extensive technical and legal analysis and potentially expose those entities to Commission sanctions or litigation.[801] Several commenters expressed concerns regarding the confidentiality of the information provided pursuant to proposed Rule 1000(b)(4), and stated that the such information should be confidential and protected from public disclosure.[802] One of these commenters requested that the Commission confirm in the final rule that the information will remain confidential.[803]

Commenters also raised other general concerns and made suggestions with regard to proposed Rule 1000(b)(4). One commenter argued that the proposed rules could cause SCI entities to release information before all relevant factors are known, which could be counterproductive and harmful.[804] Another commenter was concerned that SCI entities would be required to provide notification reports multiple times to different Commission staff for the same event.[805] Another commenter suggested that the proposed requirement is onerous and costly and thus, to realize benefits, the Commission, based on notifications received from SCI entities, should provide regular summary-level feedback that communicates the types, frequency, severity, and impact of market incidents across all reporting entities and other related data on the root cause of problems.[806] Another commenter suggested that the Commission provide examples, such as publications and reference blueprints, which could be useful to SCI entities as they attempt to understand the types of SCI events that warrant Commission notification.[807] Finally, some commenters broadly questioned the Commission's legal authority to adopt Regulation SCI as proposed, asserting, among other things that the Commission's proposed notification requirement was beyond its legal authority.[808]

ii. Rule 1002(b)

After careful consideration of the comments on proposed Rule 1000(b)(4), the Commission is adopting Rule 1002(b), with several modifications in response to comments.[809]

Overview

The Commission notes that, even without the modifications the Commission is making in adopted Rule 1002(b), the proposed Commission notification rule would require Commission notice of fewer SCI events than as proposed as a result of the adopted definitions of SCI systems, indirect SCI systems, systems disruption, and systems compliance issue, and the revised triggering standard discussed above. In addition, the Commission has determined to refine the scope of the adopted Commission notification requirement by incorporating a risk-based approach that requires SCI entities, for purposes of Commission notification, to divide SCI events into two main categories: SCI events that ''[have] had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants'' (''de minimis'' SCI events); and SCI events that are not de minimis SCI events. De minimis SCI events will not be subject to an immediate Commission notification requirement as proposed. Instead, all de minimis SCI events will be subject to recordkeeping requirements, and de minimis systems disruptions and de minimis systems intrusions will be subject to a quarterly reporting obligation, as set forth in adopted Rule 1002(b)(5). For SCI events that are not de minimis, Commission notification will be governed by adopted Rules 1002(a)(1)–(4), which is substantially similar to proposed Rules 1000(b)(4)(ii)–(iv), but relaxed in certain respects in response to comment, as discussed below.

Effect of Revised Definitions and Revised Triggering Standard on Commission Notification Requirement

The Commission believes that the revisions made to a number of definitions already focus the scope of the Commission notification requirement in adopted Rule 1002(b) from the SCI Proposal. For example, elimination of member regulation and member surveillance systems from the adopted definition of SCI systems will substantially reduce the potential number of SCI events that would be subject to Commission notification under the proposal.[810] Likewise, systems problems that would otherwise meet the definition of SCI event do not meet the definition of an SCI event if they occur in the development or testing environment.[811] In addition, the Commission believes that the revised definition of ''systems disruption'' and ''systems compliance issue'' also will result in fewer systems issues being identified as SCI events.[812] In tandem with the revised definitions, the Commission also believes that the revised triggering standard for notification of SCI events, which affords an SCI entity time to evaluate whether a potential SCI event is an actual SCI event, will also result in fewer SCI events being subject to the requirements of Rules 1002(b)(1)–(4).[813] The Commission believes that these changes respond to comments that proposed Rule 1000(b)(4) was overbroad and overly burdensome for SCI entities.[814]

Exclusion of De Minimis SCI Events From Immediate Notification Requirements: Adopted Rule 1002(b)(5)

Adopted Rule 1002(b)(5) states that the requirements of Rules 1002(b)(1)–(4) do not apply to any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. For such de minimis events, Rule 1002(b)(5) requires that an SCI entity: (i) Make, keep, and preserve records relating to all such SCI events; and (ii) submit to the Commission a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of such systems

[801] *See* OTC Markets Letter at 16. *See also* NYSE Letter at 16.

[802] *See* NYSE Letter at 24; Joint SROs Letter at 12; and DTCC Letter at 11.

[803] *See* DTCC Letter at 11.

[804] *See* ITG Letter at 13.

[805] *See* NYSE Letter at 22. Another commenter suggested that the notification requirement with respect to system disruptions should make clear that multiple notifications are not required if a disruption impacts multiple SCI entities. *See* FINRA Letter at 22.

[806] *See* BIDS Letter at 10.

[807] *See* SunGard Letter at 6.

[808] *See* NYSE Letter at 4–6; and OTC Markets at 6. *See infra* notes 833–837 and accompanying text (discussing ''Commission Legal Authority'').

[809] Specific comments on proposed Rules 1000(b)(4)(i)–(iii) that are not discussed above are discussed below in conjunction with the Commission's response to those comments.

[810] *See supra* Section IV.A.2.b (discussing the definition of ''SCI systems'').

[811] *See supra* note 796 and accompanying text. *See also supra* Section IV.A.2.b (discussing the definition of ''SCI systems''). According to one commenter who supported excluding non-market systems from the definition of SCI systems and the notification and dissemination requirements, applying the reporting requirements to non-market systems ''would significantly increase the volume of the reports the Commission receives.'' FINRA Letter at 10. (''If the definition of SCI systems is broadly construed to apply to non-market regulatory and surveillance systems, approximately 111 FINRA systems could be subject to Regulation SCI.'') FINRA Letter at 7.

[812] *See supra* Section IV.A.3 (discussing the definition of ''SCI event,'' ''systems disruption,'' and ''systems compliance issue'').

[813] *See supra* Section IV.B.3.a (discussing the definition of ''responsible SCI personnel'') and Section IV.B.3.a (discussing the triggering standard).

[814] *See supra* note 784 and accompanying text. *See also* Section VI (discussing comments regarding the burdens associated with proposed Rule 1000(b)(4)).

disruptions and systems intrusions, including the SCI systems and, for systems intrusions, indirect SCI systems, affected by such systems disruptions and systems intrusions during the applicable calendar quarter.

The Commission believes that this exception will result in a less burdensome reporting framework for de minimis SCI events than for other SCI events, and therefore responds to comment that the proposed reporting framework was too burdensome. The Commission believes that the quarterly reporting of de minimis systems disruptions and de minimis systems intrusions will reduce the frequency and volume of SCI event notices submitted to the Commission and also will allow both the SCI entity and its personnel, as well as the Commission and its staff, to focus their attention and resources on other, more significant SCI events. Consistent with taking a risk-based approach in other aspects of Regulation SCI, the Commission believes this modification from the SCI Proposal will result in more focused Commission monitoring of SCI events than if this aspect of the SCI Proposal was adopted without modification. Further, by reducing the number of SCI event notices provided to the Commission on an immediate basis as compared to the SCI Proposal, the adopted rule should also impose lower compliance costs and fewer burdens than if this aspect of the SCI Proposal was adopted without modification.

However, the Commission has determined not to incorporate a materiality threshold as requested by some commenters,[815] to limit the Commission reporting requirements to those events that are considered by SCI entities to be truly disruptive to the markets, as suggested by other commenters,[816] or to limit the Commission reporting requirement only to those events that warrant notification to an SCI entity's subscribers or participants, as suggested by still other commenters.[817] The Commission has made this determination because while there may be SCI events with little apparent impact on an SCI entity's operations or on market participants and the burden on an SCI entity to provide immediate notice to the Commission every time such an event occurs may not justify the benefit of providing such notice to the Commission on an immediate basis, the Commission does not believe that such de minimis events are irrelevant or that the Commission should never be made aware of them. To fulfill its oversight role, the Commission believes that the Commission and its staff should regularly be made aware of de minimis systems disruptions and de minimis systems intrusions and should have ready access to records regarding de minimis systems compliance issues that SCI entities are facing and addressing because, as the regulator of the U.S. securities markets, it is important that the Commission and its staff have access to information regarding all SCI events (including de minimis SCI events) and their impact on the technology systems and systems compliance of SCI entities, which may also provide useful insights into learning about indications of more impactful SCI events. The Commission has, however, determined to distinguish the timing of its receipt of information regarding SCI events based on their impact: those SCI events that an SCI entity reasonably estimates to have a greater impact are subject to ''immediate'' notification upon responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred; and those SCI events that an SCI entity reasonably estimates to have no or a de minimis impact are subject to recordkeeping obligations, and for de minimis systems disruptions and de minimis systems intrusions, a quarterly summary notification. Despite commenters' arguments to the contrary that de minimis SCI events do not warrant the Commission's and its staff's attention, the Commission believes that quarterly reporting of de minimis systems disruptions and de minimis systems intrusions and review of records regarding de minimis systems compliance issues is beneficial to the Commission and its staff in understanding SCI entity systems operations at the level of the individual SCI entity, as well as across the spectrum of SCI entities, and to monitor compliance with the Exchange Act and rules thereunder. The Commission notes that, while it is not requiring that de minimis systems compliance issues be submitted to the Commission in quarterly reports, Commission staff may request records relating to such de minimis systems compliance issues as necessary. The Commission encourages and does not intend to inhibit an evaluation by SCI entities of systems compliance issues, including de minimis systems compliance issues, which may inherently involve legal analysis.

As noted, some commenters focused specifically on systems intrusions, urging the Commission to modify or significantly reduce the instances in which notice of systems intrusions would be required,[818] or provide that non-material systems intrusions not be reported at all, and only be recorded by the SCI entity.[819] The Commission believes that the recordkeeping and quarterly reporting requirement for de minimis systems intrusions described in Rule 1002(b)(5) is partially responsive to these comments, but also believes that notice of intrusions in SCI systems and indirect SCI systems is important to allow the Commission and its staff to detect patterns or understand trends in the types of systems intrusions that may be occurring at multiple SCI entities. However, as compared to what would have been required if the SCI Proposal was adopted without modification, the Commission expects that the exception from the immediate reporting requirement provided for de minimis SCI events under Rule 1002(b)(5) will result in a much lower number of systems intrusions that SCI entities will be required to immediately report to the Commission than commenters believed,[820] and will achieve this result without compromising the Commission's interest in receiving more timely notification of impactful SCI events.

In addition, some commenters suggested that certain types of systems intrusions or non-material SCI events be reported exclusively to FS–ISAC or to both the Commission and FS–ISAC, and some advocated that the Commission support the enhancement of FS–ISAC.[821] The Commission believes that FS–ISAC, and other information sharing services play an important role in assisting SCI entities and other entities with respect to security issues. Consistent with views shared by several members of the third panel at the Cybersecurity Roundtable, to the extent SCI entities determine that such information sharing services are useful, the Commission encourages SCI entities to cooperate with and share information relating to information security threats and related issues with such entities to

[815] *See, e.g., supra* note 785 and accompanying text.

[816] *See, e.g., supra* notes 785–787.

[817] *See supra* note 788.

[818] *See supra* notes 794–797 and accompanying text.

[819] *See supra* notes 794–795 and accompanying text.

[820] *See, e.g., supra* note 794 and accompanying text (discussing a commenter's suggestion to limit the number of notifications by requiring recordkeeping of all systems intrusions that did not cause a material disruption of service or that were a malicious (but unsuccessful) attempt in gaining unauthorized access to confidential data).

[821] *See supra* notes 799–800 and accompanying text.

further enhance their utility.[822] At the same time, for the reasons discussed above,[823] the Commission believes that it is important that the Commission directly receive information regarding systems intrusions from SCI entities, through immediate notifications or quarterly reports, as applicable.

In response to comments that recordkeeping of non-material SCI events would be more appropriate than reporting, the Commission believes that quarterly reporting of de minimis systems disruptions and de minimis systems intrusions will better achieve the goal of keeping Commission staff informed regarding the nature and frequency of SCI events that arise but are reasonably estimated by the SCI entity to have a de minimis impact on the entity's operations or on market participants. Importantly, submission and review of regular reports will facilitate Commission staff comparisons among SCI entities and thereby permit the Commission and its staff to have a more holistic view of the types of systems operations challenges that were posed to SCI entities in the aggregate.

With regard to de minimis systems compliance issues, however, the Commission believes the goals of Regulation SCI can be achieved through the SCI entity's obligation to keep, and provide to representatives of the Commission upon request, records of such de minimis systems compliance issues. The Commission believes that systems compliance issues generally are more specific to a particular entity's systems and rules and less likely, as compared to systems disruptions and systems intrusions, to raise market-wide issues that could affect several SCI entities. Accordingly, information on such events are less likely to provide valuable insight into trends and risks across the industry and, therefore, the Commission believes that the benefits of receiving quarterly reports on such de minimis systems compliance issues would be less relative to de minimis systems disruptions and de minimis systems intrusions. Further, the Commission notes that, based on Commission staff's experience with notifications of compliance-related issues at SROs, the Commission believes that SCI entities will experience a relatively small number of systems compliance issues each year, and thus, its regular examinations of SCI entities will provide an adequate mechanism for reviewing and addressing de minimis systems compliance issues affecting SCI entities. As noted above, Commission staff may request records relating to such de minimis systems compliance issues as necessary.

In response to the concerns raised by one commenter that the notification requirements have the potential to create efficiency issues, delay system remediation, create substantial resource demands, and create instability, the Commission believes that these concerns have been mitigated by the numerous changes made from the proposal, such as the adoption of a quarterly reporting framework for de minimis systems disruptions and de minimis systems intrusions and revised definitions of the terms SCI systems, indirect SCI systems, systems disruption, and systems compliance issue, in addition to the reduction in the obligations SCI entities have with respect to reporting requirements.[824] In addition, ARP entities today are able to regularly notify the Commission of systems related issues, such as systems outages, and the Commission therefore believes that the notification requirements will not require a majority of SCI entities to develop policies and procedures that are incongruous with their current practice. Moreover, the Commission believes that providing SCI entities with 30 days after the end of each quarter is adequate time for an SCI entity to prepare its report without unduly diverting SCI entity resources away from focusing on SCI events occurring in real time.[825]

The Commission believes that requiring SCI entities to report de minimis systems disruptions and de minimis systems intrusions quarterly balances the interest of SCI entities in having a limited reporting burden for such types of events with the Commission's interest in oversight of the information technology programs and systems compliance of SCI entities.[826] Similarly, the Commission believes that requiring recordkeeping of de minimis systems compliance issues allows the Commission to adequately monitor compliance with the Exchange Act and rules thereunder, while reducing the burdens on SCI entities with regard to providing information to the Commission on such de minimis systems compliance issues. Accordingly, the Commission has determined to exclude certain SCI events from the immediate Commission reporting requirements, subject to certain recordkeeping and reporting requirement for such events, as applicable.[827]

As described above, the de minimis exception from the immediate Commission notification requirements applies to systems compliance issues as well as systems disruptions and systems intrusions. The Commission believes that this approach strikes a balance that will help focus the Commission's and SCI entities' resources on those systems compliance issues with more significant impacts. Even if an SCI entity determines that the impact of the systems compliance issue is none or negligible, however, the Commission believes that it should have ready access to records regarding such systems compliance issues, and notes that Rule 1002 requires that an SCI entity take corrective action with respect to all SCI events, including de minimis systems compliance issues.[828]

The Commission recognizes that in many cases, the discovery of a potential systems compliance issue may be of a different nature than the discovery of potential systems disruptions or systems intrusions, as the latter types of events often have an immediately apparent and negative impact on the operations of a given system of the SCI entity. In contrast, in many instances, a systems compliance issue may require the involvement of various personnel

[822] *See supra* notes 39–40 and accompanying text. During the Cybersecurity Roundtable, panelists referenced other services that they believed useful to SROs, including the Financial Services Sector Coordinating Council for Critical Infrastructure Protection and Homeland Security (FSSCC), the Clearing House and Exchange Forum (CHEF), and the Worldwide Federation of Exchange's recently established Global Exchanges Cyber Security Working Group (GLEX). *See supra* note 39.

[823] *See supra* notes 904–906 and accompanying text.

[824] *See supra* note 790.

[825] *See supra* notes 791–793 and accompanying text.

[826] The Commission notes an SCI entity should be prepared for the possibility that Commission staff may, whether upon request pursuant to Rule 1002(b)(3), Rule 1005(b)(3), or Rule 1007 or during an examination of its compliance with Regulation SCI, include a review of the entity's classification of SCI events as de minimis SCI events under Rule 1002(b).

[827] While the facts and circumstances surrounding a particular SCI event will ultimately determine the severity of a given event, including whether the event is reasonably estimated to be a de minimis event, a wide range of factors may be relevant to an SCI entity in making such a determination. For example, such factors could include, but are not limited to: whether critical SCI systems are impacted; the duration of the SCI event; whether there is a loss of redundancy (that negatively impacts, for example, a source of power, telecommunications, or other key service); whether an alternate trading system is available following a trading system disruption; the size of the affected market trading volume; whether the processes for trade completion or clearance and settlement are adversely impacted; whether settlement is completed on time; whether an event is resolved prior to the market's open; whether a post-trade event is resolved before the market closes; whether a failover, despite being successful, results in a given system operating without a backup; and the number of securities symbols that are adversely affected.

[828] *See infra* note 829 and accompanying text.

(potentially including compliance and/or legal personnel) and a period of time may be required to afford such personnel the chance to perform a preliminary legal analysis to analyze whether a systems compliance issue had, in fact, occurred. Because Rule 1002(b)(1) only requires notification to the Commission when responsible SCI personnel have a ''reasonable basis to conclude'' that a non-de minimis SCI event has occurred, the Commission believes it is appropriate for an SCI entity to notify the Commission of a non-de minimis systems compliance issue after it has conducted such a preliminary legal analysis, unless the nature of the issue makes it readily identifiable as a systems compliance issue.[829] Further, if an SCI entity determines that a systems compliance issue is de minimis, such event will not be required to be reported immediately to the Commission, but rather the SCI entity will be required to keep, and provide to representatives of the Commission upon request, records of such de minimis systems compliance issue. Thus, the Commission believes that, as adopted, the requirements with respect to systems compliance issues are reasonable because SCI entities are afforded flexibility to assess and understand potential SCI events and are not required to notify the Commission prior to forming a reasonable basis to conclude that an SCI event has occurred. The Commissions also believes that, as part of its oversight of the securities markets, it should have access to information regarding de minimis systems compliance issues when requested. And, although some commenters expressed concern that a systems compliance issue is a legal conclusion that requires time to analyze and could possibly expose the entity to liability if reported,[830] as discussed above, the Commission believes these concerns will be mitigated by the revised triggering standard for the obligations in Rule 1002.[831] However, while commenters are correct that the occurrence of a systems compliance issue may expose an SCI entity to liability,[832] the occurrence of an SCI event will not necessarily cause a violation of Regulation SCI. Further, the occurrence of a systems compliance issue also does not necessarily mean that the SCI entity will be subject to an enforcement action. Rather, the Commission will exercise its discretion to initiate an enforcement action if the Commission determines that action is warranted, based on the particular facts and circumstances of an individual situation.

Commission Legal Authority

As noted above, some commenters broadly questioned the Commission's legal authority to adopt certain provisions of Regulation SCI as proposed, including those relating to Commission notification of SCI events, as well as Commission notification of material systems changes.[833] Section 11A(a)(2) of the Exchange Act directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under the Exchange Act to facilitate the establishment of a national market system for securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act. Among the findings and objectives in Section 11A(a)(1) is that ''[n]ew data processing and communications techniques create the opportunity for more efficient and effective market operations'' and ''[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the economically efficient execution of securities transactions.'' In addition, Sections 6(b), 15A, and 17A(b)(3) of the Exchange Act impose obligations on national securities exchanges, national securities associations, and clearing agencies, respectively, to be ''so organized'' and ''[have] the capacity to . . . carry out the purposes of [the Exchange Act].''

Consistent with this statutory authority, the Commission is adopting Regulation SCI to require, among other things, that SCI entities: (1) Provide certain notices and reports to the Commission to improve Commission oversight of securities market infrastructure; and (2) have comprehensive policies and procedures in place to help ensure the robustness and resiliency of their technological systems, and also that their technological systems operate in compliance with the Exchange Act, rules thereunder, and with their own rules and governing documents. These requirements are important to furthering the directives in Section 11A(a)(2) of the Exchange Act that the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, facilitate the establishment of a national market system for securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act, including the economically efficient execution of securities transactions.

As discussed in Section I, the U.S. securities markets have been transformed in recent years by technological advancements that have enhanced the speed, capacity, efficiency, and sophistication of the trading functions that are available to market participants. Central to these technological advancements have been changes in the automated systems that route and execute orders, disseminate quotes, clear and settle trades, and transmit market data. At the same time, however, these technological advances have generated an increasing risk of operational problems with automated systems, including failures, disruptions, delays, and intrusions. Accordingly, in today's securities markets, properly functioning technology is central to the maintenance of fair and orderly markets, the national market system, and the efficient and effective market operations and the execution of securities transactions. While the Commission's ARP Inspection Program has been active in this area, the Commission has not adopted rules specific to these matters. The Commission believes that the adoption of Regulation SCI, with the modifications from the SCI Proposal as discussed above, and compliance with the regulation by SCI entities, will further the goals of the national market system. It will help to ensure the capacity, integrity, resiliency, availability, and security of the automated systems of entities important

[829] At the same time, the Commission cautions SCI entities against unnecessarily delaying Commission notifications of SCI events, including systems compliance issues. The Commission notes that the notification requirement is triggered when responsible SCI personnel have a *reasonable basis* to conclude that an SCI event has occurred and not, for example, when responsible SCI personnel have *definitively* concluded that an SCI event has occurred. As discussed above, the Commission does not believe it is appropriate for an SCI entity to delay notifying its regulator of a systems compliance issue once the SCI entity has a reasonable basis to conclude there is one. *See supra* note 828 and accompanying text.

[830] *See* OTC Markets Letter at 16; and NYSE Letter at 16.

[831] *See supra* Section IV.B.3.a (discussing the triggering standard).

[832] If an SRO fails to, among other things, comply with the provisions of the Exchange Act, the rules or regulations thereunder, or its own rules, the Commission is authorized to impose sanctions. *See* 15 U.S.C. 78s(g).

[833] *See supra* note 808 and accompanying text. *See infra* note 1268 (noting comments relating to the Commission's legal authority for the proposed access provision, which the Commission has determined not to adopt in its final rules because the Commission can adequately assess an SCI entity's compliance with Regulation SCI through existing recordkeeping requirements and examination authority, as well as through the new recordkeeping requirement in Rule 1005 of Regulation SCI).

to the functioning of the U.S. securities markets, as well as reinforce the requirement that such systems operate in compliance with the Exchange Act and rules and regulations thereunder, thus strengthening the infrastructure of the U.S. securities markets and improving its resilience when technological issues arise. In addition, Regulation SCI establishes an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of these systems whose proper functioning is central to the maintenance of fair and orderly markets and for the continued operation of the national market system. For these reasons, the Commission disagrees with the comments questioning the Commission's legal authority to adopt Regulation SCI.

More specifically, the Commission disagrees with comment regarding its legal authority under Rule 1002(b) related to Commission notification of SCI events. As discussed above, having immediate notice and continuing updates of non-de minimis SCI events, quarterly reports related to de minimis systems disruptions and de minimis systems intrusions, and recordkeeping requirements for de minimis SCI events, directly enables the Commission to have more effective oversight of the systems whose proper functioning is central to the maintenance of fair and orderly markets and for the continued operation of the national market system. In this respect, Rule 1002(b) is integral to furthering the statutory purposes of Section 11A of the Act under which the Commission is directed to act. Moreover, the Commission underscores that the adopted Commission notification provisions would require immediate Commission notice of fewer SCI events than as proposed because the adopted definitions of SCI systems, indirect SCI systems, systems disruption, and systems compliance issue have been refined from the proposal, and de minimis SCI events are not subject to immediate notice.

Some commenters also questioned the Commission's legal authority to require Commission notification of material systems changes.[834] As discussed in more detail below, the material systems change reports are intended to make the Commission and its staff aware of significant systems changes at SCI entities, and thereby improve Commission oversight of U.S. securities market infrastructure, which directly furthers the findings and objectives set forth in Section 11A(a)(1) of the Exchange Act.[835] The Commission believes that the adopted material systems change notification requirement will allow the Commission to more efficiently and effectively participate in discussions with SCI entities when systems issues occur and will allow Commission staff to effectively prepare for inspections and examinations of SCI entities. Moreover, Rule 1003(a), as adopted, differs significantly from the proposed requirements as it no longer requires 30-day advance notification, but rather requires quarterly reports of material systems changes. As such, the requirement is designed not to result in ''close, minute regulation of computer systems and computer security.'' [836] Additionally, the Commission notes that Regulation SCI does not provide for a new review or approval process for SCI entities' material systems changes.[837]

Immediate Commission Notification—Proposed Rule 1000(b)(4)(i)

Commenters also specifically discussed proposed Rule 1000(b)(4)(i) regarding reporting to the Commission on immediate notification SCI events. One commenter stated that it generally supported the immediate notification requirement of proposed Rule 1000(b)(4)(i) in the case of material SCI events,[838] but other commenters were critical.[839] For example, some commenters stated that the Commission should adopt a materiality threshold which would only require an SCI entity to immediately report material SCI events.[840] Similarly, one group of commenters suggested a tiered method that would reserve immediate notification to the Commission for truly critical events ''where the Commission's input would contribute to an expedient resolution,'' while requiring SCI entities to have written policies and procedures that focus the SCI entity's attention primarily on taking corrective measures during an SCI event and maintaining records to provide information to the Commission and members and participants as appropriate.[841] Two commenters suggested that different reporting standards should apply to different types of systems, suggesting, for example, that immediate notification should be required only for higher priority systems.[842]

One commenter questioned the adequacy of the Commission's asserted basis and purpose for requiring notification for the vast majority of SCI events.[843] In this commenter's view, the Commission's asserted rationale for the Commission notification requirement[844] would only support requiring immediate notification for a limited number of SCI events, where the Commission's involvement is necessary.[845] For other SCI events, in which the Commission would only be gathering and analyzing submitted information, the commenter stated that the Commission's rationale for requiring immediate notification is insufficient.[846]

Some commenters addressed the use of the term ''immediately'' in the proposed rule. One commenter characterized the proposed immediate reporting requirements as rigid, and questioned why reporting could not occur ''promptly'' with follow-up as reasonably requested by the Commission staff.[847] Another commenter stated that immediate notification is unrealistic and predicted

[834] *See infra* note 1046 and accompanying text.

[835] *See infra* Section IV.B.4 (discussing the requirement to notify the Commission of material systems changes).

[836] *See infra* note 1046.

[837] As noted below in Section IV.B.4, Commission staff will not use material systems change reports to require any approval of prospective systems changes in advance of their implementation pursuant to any provision of Regulation SCI, or to delay implementation of material systems changes pursuant to any provision of Regulation SCI.

[838] *See* MSRB Letter at 18.

[839] *See, e.g.,* NYSE Letter at 22.

[840] *See* SIFMA Letter at 13; FIF Letter at 4; ITG Letter at 12; NYSE Letter at 23; FINRA Letter at 10, 22; and OCC Letter at 13. One commenter stated that, in considering factors that would determine whether or not an SCI event is material, the Commission should consider the overall market disruption caused by the SCI event, the length of the event, the financial impact of the event, and the inability to meet core regulatory obligations regarding order handling and execution activities. *See* ITG Letter at 13. Similarly, two commenters stated that, with respect to systems compliance issues or systems intrusions, immediate notification SCI events should be limited to systems compliance issues or systems intrusions that the SCI entity reasonably estimates would have a material impact on its operations or on market participants. *See* MSRB Letter at 18; and Omgeo Letter at 15. Further, in the case of intrusions, one commenter stated that notifications could also include intrusions that would cause a malicious unauthorized access to confidential data, but recommended that other types of intrusions be subject to recordkeeping. *See* Omgeo Letter at 15. One group of commenters supported implementing a materiality threshold for systems compliance issues, which it stated should be based on factors such as the number of members affected, financial impact and operation impact, and these guidelines should be articulated in the SCI entities' policies and procedures. *See* Joint SROs Letter at 9.

[841] *See* Joint SROs Letter at 10.

[842] *See* FINRA Letter at 22 (suggesting, for example, that immediate Commission notification should not be required for SCI events that occur in systems that do not provide real-time data to the market); and SIFMA Letter at 13 (stating that that lower priority systems should only be reported on an aggregate and periodic basis).

[843] *See* NYSE Letter at 21–22.

[844] *See* Proposing Release, *supra* note 13, at 18119.

[845] *See* NYSE Letter at 22; *see also* Joint SROs Letter at 10.

[846] *See* NYSE Letter at 22.

[847] *See* BATS Letter at 12.

that it could trigger an innumerable amount of false alarms.[848]

Other commenters addressed SCI events that occur outside of normal business hours. Two commenters believed that an SCI entity should not be required to notify the Commission of an SCI event outside of normal business hours.[849] Other commenters stated that material events should require immediate notification to the Commission, but all other types of events should be reported by the next business day.[850]

One commenter stated that immediate notification of an SCI event may be difficult where an SCI entity uses a third party to operate its systems, and therefore believed that an SCI entity should not be responsible for reporting an SCI event caused by a third party unless there is a material impact to the market or the SCI entity's ability to meet its service level agreements.[851] This commenter stated that the rule should permit SCI entities flexibility on how to address third party issues and requested further guidance from the Commission in this area.[852]

Immediate Notification of SCI Events: Adopted Rule 1002(b)(1)

Adopted Rule 1002(b)(1) requires each SCI entity to notify the Commission of an SCI event immediately upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred (unless it is a de minimis SCI event). Such notification may be provided orally (*e.g.,* by telephone) or in writing (*e.g.,* by email or on Form SCI). Although many commenters were critical of the immediate notification provision, Rule 1002(b)(1) substantially retains the requirements of proposed Rule 1000(b)(4)(i), but is modified in certain respects in response to comments.

The Commission has considered the views of commenters who stated that the Commission should require immediate notification only for material SCI events, or when Commission involvement would contribute to an expedient resolution.[853] Given the Commission's oversight responsibilities over SCI entities and the U.S. securities market generally, the notification rule is not intended to be limited to instances in which SCI entities might believe that it would be useful for the Commission to provide input. SCI event notifications also serve the function of providing the Commission and its staff with information about the potential impact of an SCI event on the securities markets and market participants more broadly, which potential impacts may not be readily apparent or important to the SCI entity reporting such an event. Moreover, the Commission believes that there will be instances in which an SCI entity will not know the significance of an SCI event at the time of the occurrence of an event, or whether such event (or, potentially, the aggregated impact of several SCI events occurring, for example, across many SCI entities) will warrant the Commission's input or merit the Commission's awareness, nor does the Commission believe it should be solely within an SCI entity's discretion to make such a determination. And SCI entities retain the flexibility to revise their initial assessments should they subsequently determine that the event in question was incorrectly initially assessed to be a de minimis event (or incorrectly initially assessed to not be a de minimis event). Consequently, the Commission does not agree with commenters who stated that only material SCI events should be reported to the Commission immediately.[854]

The Commission has also considered comments that the term ''immediately'' as used in proposed Rule 1000(b)(4) is rigid and unrealistic.[855] The Commission, in adopting Rule 1002(b), has retained the requirement that SCI entities must notify the Commission immediately; however, as discussed in detail above,[856] the triggering standard has been modified so that the notification obligations of Rule 1002(b) are triggered only upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. The Commission believes this modification responds to commenters concerns that the ''immediate'' reporting requirement is too rigid or would pose practical difficulties, as it allows additional time for escalation to senior SCI entity personnel and for the performance of preliminary analysis and assessment regarding whether an SCI event has, in fact, occurred before requiring notification to the Commission. As such, the Commission believes that the immediate notification requirement of Rule 1002(b)(1) will not unduly cause ''false alarms,'' as one commenter stated.[857] At the same time, the Commission believes that the immediate notification requirement, as adopted, will help ensure that the Commission and its staff are kept apprised of SCI events after they occur, and as their impact unfolds and is mitigated and, ultimately, as the SCI entity engages in corrective action to resolve the SCI events. Additionally, the Commission notes that immediate notifications made pursuant to Rule 1002(b)(1) may be made orally (*e.g.,* by telephone) or in a written form (*e.g.,* by email or on Form SCI).[858] The Commission notes that, by not prescribing the precise method of communication for an immediate notification, SCI entities are afforded the flexibility to determine the most effective and efficient method to communicate with the Commission.

The Commission has also considered comments that immediate notification should not be required outside of normal business hours, or that it should only be required outside of normal business hours in the case of material SCI events.[859] The Commission notes that the adopted rule will afford SCI entities considerable flexibility in how to communicate an immediate notification to the Commission—that is, SCI entities may satisfy the immediate

[848] *See* Direct Edge Letter 8.

[849] *See* FINRA Letter at 21; and BATS Letter at 12. FINRA also stated that an SCI entity should have one full business day to report an SCI event.

[850] *See, e.g.,* DTCC Letter at 9 (stating that, outside of normal business hours, an SCI entity should only be required to notify the Commission of the most critical events; *i.e.,* those with the potential to impact the core functions and critical operations of the SCI entity); and OCC Letter at 14 (stating that when an event is material because it could have a market-wide impact or impact the core functions of an SCI entity, immediate notification should be required even outside of normal business hours, but all other SCI events should be reported no later than the next business day).

[851] *See* FINRA Letter at 22; *see also supra* Section IV.A.2.b (discussing the definition of ''SCI systems'' as it relates to third parties).

[852] *See* FINRA Letter at 22.

[853] *See supra* notes 838–846 and accompanying text.

[854] *See, e.g., supra* note 842 and accompanying text.

[855] *See supra* note 847 and accompanying text.

[856] *See supra* Section IV.B.3.a (discussing the triggering standard).

[857] *See supra* note 848 and accompanying text. The Commission notes that, if an SCI entity at some point after submitting an immediate notification concludes after further investigation and analysis that it was incorrect in its initial determination that an SCI event had occurred, the SCI entity should alert the Commission of its updated assessment pursuant to Rule 1002(b)(3). Relatedly, Rule 1002(b) is designed to provide SCI entities flexibility in notifying the Commission of the details regarding an SCI event (for example, through the ability to provide the Rule 1002(b)(2) written notification on a good faith, best efforts basis) and time to assess and analyze the SCI event (for example, by requiring that the Rule 1002(b)(2) written notification only provide a description of the SCI event, including the system(s) affected, and with additional information only required to the extent available at that time).

[858] The Commission notes that, prior to the compliance date of Regulation SCI, Commission staff intends to notify SCI entities of the email addresses, phone numbers, and contact persons that SCI entities should use when notifying the Commission of SCI events under Rule 1002(b).

[859] *See, e.g., supra* notes 849 and 794–797 and accompanying text.

notification requirement simply by communicating with the Commission via telephone or email. In addition, because an SCI entity's obligation to report to the Commission is not triggered until responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred,[860] the Commission does not believe that timely notification, even outside of normal business, is so onerous that it necessitates allowing a full business day to comply. Particularly because it has determined to exclude de minimis SCI events from the immediate notification requirement, the Commission believes that it is reasonable to require that an SCI event (except those specified in Rule 1002(b)(5)) be reported to the Commission orally (*e.g.,* by telephone) or in writing (*e.g.,* by email or on Form SCI) when responsible SCI personnel have a reasonable basis to conclude that an SCI event has occurred, even if such communication may be outside of normal business hours. Because the rule provides flexibility to more easily enable communication—by permitting oral notification—of the fact of an SCI event to the Commission, and because only non-de minimis SCI events are subject to this requirement, the Commission believes notice to the Commission is appropriate sooner rather than later. In addition, as discussed above, the Commission believes that there may be situations where the severity of an SCI event may not be immediately apparent to an SCI entity experiencing the event, but the Commission, from its unique position, may determine as a result of receiving multiple immediate notifications, each related to an SCI event of a similar nature, that the SCI event is part of a pattern of a larger, more significant occurrence. The Commission is therefore adopting Rule 1002(b) to require that an SCI entity notify the Commission of an SCI event immediately upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, without an exception for periods outside of normal business hours.

In addition, as noted above, the information submitted to the Commission pursuant to Regulation SCI will be treated as confidential, subject to applicable law[861] and, as noted in Sections IV.B.1.b.i and IV.B.2.a, the occurrence of an SCI event does not necessarily mean that an SCI entity has violated Regulation SCI.

The Commission disagrees with the commenter who stated that the Commission should not require SCI entities to be responsible for reporting an SCI event caused by a third party because immediate notification would be difficult.[862] An SCI event, whether or not caused by a third party system, by definition relates to an SCI system or indirect SCI system. As explained in Section IV.A.2 above (discussing the definitions of ''SCI systems'' and ''indirect SCI systems''), the Commission has adopted the definition of SCI systems to include, specifically, those systems of SCI entities that would be reasonably likely to impact the protection of investors and the maintenance of fair and orderly markets and an SCI entity's operational capability, and has not excluded third party systems from the definition. As stated above, if an SCI entity is uncertain of its ability to manage a third-party relationship to satisfy the requirements of Regulation SCI, then it would need to reassess its decision to outsource the applicable system to such third party.[863]

In response to comment that SCI entities would be required to provide notification reports multiple times to different Commission staff for the same event,[864] the Commission notes that rule does not include such a requirement. In addition, the Commission also disagrees with the commenter who stated that, for systems disruptions, notifications should not be required from each separate entity where a disruption impacts multiple SCI entities.[865] Excusing immediate notification where a given event seems to be affecting multiple SCI entities would not be appropriate because the Commission, as the centralized receiver of notifications, will be the entity that will be in a position to determine whether, in fact, SCI entities are concurrently experiencing the same SCI event. Moreover, even if a given event affects multiple SCI entities, it may be the case that the event impacts each SCI entity and the affected systems in a different manner, and thus the Commission believes it is important to receive individual notifications from each affected SCI entity.

Written Commission Notification: Proposed Rule 1000(b)(4)(ii)

Commenters also specifically discussed and suggested alternatives to proposed Rule 1000(b)(4)(ii), which would have required an SCI entity, within 24 hours of any responsible SCI personnel becoming aware of any SCI event, to submit a written notification pertaining to such SCI event to the Commission. Many commenters stated that the proposed 24-hour time frame was too short or burdensome.[866] Several commenters specifically suggested that the Commission extend the time frame to allow SCI entities to attend to the SCI event without also devoting resources to notifying the Commission, suggesting different time frames they believed to be appropriate.[867] One commenter suggested that SCI entities be given until 24 to 48 hours *after* final resolution of the SCI event to submit a written notification.[868] Another commenter similarly recommended that, where real-time notification is needed, written notification should not be required unless an SCI event remains unresolved after a reasonable period (such as 10 or 15 days).[869]

Some commenters also suggested that, if the Commission retains the 24-hour requirement, it should require provision of less information. For example, one commenter suggested that SCI entities should only be required to provide whatever information is sufficiently reliable at that time.[870] Two other commenters stated that SCI entities should not be required to include an estimate of the markets and participants

[860] *See supra* Section IV.B.3.a (discussing the triggering standard).

[861] *See supra* note 674.

[862] *See supra* notes 851–852 and accompanying text.

[863] *See supra* note 260 and accompanying text.

[864] *See, e.g., supra* note 805 and accompanying text.

[865] *See, e.g., id.*

[866] *See* NYSE Letter at 23; FINRA Letter at 19; BATS Letter at 12; DTCC Letter at 9; MSRB Letter at 18; SIFMA Letter at 13; FIF Letter at 5; BIDS Letter at 10; Omgeo Letter at 17; and CME Letter at 9.

[867] Commenters suggested time frames of 48 hours (CME Letter at 9); 72 hours (OCC Letter at 12; DTCC Letter at 9, 11 (noting, however, that details surrounding an SCI event should not be required to be provided in writing until after the investigation of the event is complete and the event has been resolved)); and five business days (BIDS Letter at 10).

[868] *See* FINRA Letter at 20. This commenter further suggested that, if an SCI event has not been fully resolved within a reasonable period, *e.g.,*10 or 15 days, an SCI entity could be required to submit written notification based on currently available information at the end of that period, with periodic status updates via telephone or email, and a final written submission within 24 to 48 hours after the event has been fully resolved.

[869] *See* SIFMA Letter at 14.

[870] *See* FINRA Letter at 20. This commenter also suggested that the rule require an SCI entity to assess the ''business impact'' of an SCI event, noting that this information may provide more context than requiring an SCI entity to estimate the number of market participants impacted by an SCI event (which in some cases could be zero, but still have a negative impact on the SCI entity). *See* FINRA Letter at 30.

impacted by an SCI event or to quantify such impact because this requirement may create a risk of civil liability for the SCI entity.[871] Another commenter recommended that the rule require only a brief written summary that is one or two paragraphs, which could be supplemented by oral communications and a longer summary within 15 days after an SCI event has been fully resolved.[872]

With respect to the information provided to the Commission via notification of an SCI event, one commenter suggested that the rule provide a safe harbor for entities and employees for either inadvertent omissions in a submitted report, or when a good faith, documented determination is made that no report is required.[873] One commenter stated that that the Commission should expressly provide that initial written submissions are to be made on a best efforts basis and SCI entities will incur no liability or penalty for any unintentional inaccuracies or omissions contained in these submissions.[874] Some commenters stated that entities should not be liable for information that is later found to be incomplete or inaccurate.[875]

Some commenters [876] questioned the purpose of requiring that information disseminated to members and participants (under proposed Rule 1000(b)(5)) be copied and attached to Form SCI as part of notifications to the Commission, and considered it ''an overly broad inclusion of communications'' that would have ''a chilling effect on communications between the SCI entities and their members and participants,'' [877] while another commenter argued that, when an exchange is having a technology issue, many members may be reaching out to the exchange's staff with requests for information and status. Therefore, that commenter questioned the feasibility, need, and potential impact of the proposed requirement that SCI entities provide a copy of any information disseminated to date regarding the SCI event to their members or participants.[878]

One commenter stated that, to reduce the cost of compliance, the Commission should accept the same notifications of service interruptions that an ATS already provides to its subscribers.[879]

Commenters also provided suggestions for limiting the circumstances for which 24-hour written notification would be required under proposed Rule 1000(b)(4)(ii). One commenter stated that only SCI events that materially impact an SCI entity's operations or market participants should be subject to the 24-hour written notification requirement, but questioned whether 24 hours was realistic even for those events.[880] One commenter suggested that proposed Rule 1000(b)(4)(ii) only apply to significant SCI events and that other events only be subject to a recordkeeping requirement.[881] In addition, some commenters suggested that if an SCI entity has provided oral notification to the Commission, it should not be required to file written notice within 24 hours after the initial report unless reasonably requested by the Commission.[882]

Written Notification Within 24 Hours: Adopted Rule 1002(b)(2)

Adopted Rule 1002(b)(2) requires an SCI entity, within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, to submit a written notification pertaining to such SCI event to the Commission. Rule 1002(b)(2) allows for such written notifications to be made on a good faith, best efforts basis and requires that it include: (i) A description of the SCI event, including the system(s) affected; and (ii) to the extent available as of the time of the notification: the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event.

The Commission has considered comments stating that 24 hours is too short and burdensome a duration for an SCI entity to submit a compliant written notification.[883] The Commission understands commenters' concerns that SCI entities may still be actively investigating and working to resolve an SCI event and that information it initially provides to the Commission about an SCI event may not ultimately prove correct.[884] Therefore, in line with commenters' concerns regarding a good faith and best efforts standard,[885] the Commission has modified the 24-hour written notification requirement in adopted Rule 1002(b) to make clear that the written notification should be provided on a ''good faith, best efforts basis.'' This modification acknowledges that a written notification provided within 24 hours may provide only a preliminary assessment of the SCI event, that additional information may come to light after the initial 24-hour period, and that the initial assessment may prove in retrospect to be incorrect or incomplete. Consequently, the adopted rule requires that the written notification provided within 24 hours be submitted on a good faith, best efforts basis, and does not require that the written notification be a comprehensive or complete assessment of the SCI event (unless, of course, an SCI entity has completed a full assessment by such time). The Commission believes that a ''good faith'' standard will help to ensure that SCI entities will not be accountable for unintentional inaccuracies or omissions contained in these submissions, and a ''best efforts'' standard will help to ensure that SCI entities will make a diligent and timely attempt to provide all the information required by the written notification requirement. The Commission also notes that an SCI entity will not need to submit a written notification where an SCI entity documents that an SCI event is determined to be a de minimis SCI event, other than including de minimis systems disruptions and de minimis systems intrusions in the quarterly report required by Rule 1002(b)(5). As discussed in further detail below, in the event that new information comes to light or previously reported information is found to be materially incorrect, adopted Rule 1002(b)(3) requires an SCI entity to update the information at that

[871] *See* DTCC Letter at 10; and Omgeo Letter at 30. Omgeo added that such a calculation would be difficult to compute, likely inaccurate, and of little use to the Commission.

[872] *See* Omgeo Letter at 17.

[873] *See id.* at 18.

[874] *See* FINRA Letter at 20.

[875] *See, e.g.,* SIFMA Letter at 14; and UBS Letter at 4 (stating that SCI entities acting in good faith should not be held accountable if details offered in reports to the Commission are substantially different from what is revealed by further analysis).

[876] Because the requirement to provide information disseminated to an SCI entity's members or participants is now included in the Final Report (Rule 1002(b)(4)) instead of with the 24-written notification requirement as proposed, the Commission's response to these comments is discussed below in the subsection ''Final Report: Adopted Rule 1002(b)(4).''

[877] *See* Joint SROs Letter at 11.

[878] *See* Direct Edge Letter at 7–8.

[879] *See* BIDS Letter at 11.

[880] *See* MSRB Letter at 18.

[881] *See* CME Letter at 9.

[882] *See* BATS Letter at 12; and Omgeo Letter at 17. *See also* DTCC Letter at 10; and OCC Letter at 14 (suggesting 72 hours to provide written information after providing verbal notification).

[883] *See, e.g., supra* note 866 and accompanying text.

[884] *See supra* notes 873–875 and accompanying text.

[885] *See id.*

time, and does not require that such updates be written.[886] The Commission believes these modifications will help ensure that SCI entities are able to provide the information required by Rule 1002(b)(2) within 24 hours, and therefore the Commission is not modifying the timeframe to extend beyond 24 hours, as requested by several commenters.[887] Moreover, because the information need only be provided on a good faith, best efforts basis and, pursuant to Rule 1002(b)(3), updates can be provided on a regular basis to correct any materially incorrect information previously provided or when new material information is discovered, the Commission disagrees with commenters that stated that the information required by Rule 1002(b) should be provided only after resolution of the SCI event. The Commission continues to believe that Rule 1002(b)(2)'s requirement to provide information to the Commission within 24 hours is appropriately tailored to help the Commission and its staff quickly assess the nature and the scope of an SCI event and will contribute to more timely and effective Commission oversight of systems whose proper functioning is central to the maintenance of fair and orderly markets, and that this would particularly be the case for SCI events that are not yet resolved.[888]

Adopted Rule 1002(b)(2) is also responsive to comments urging the Commission to require less information in a 24-hour written notification.[889] Specifically, whereas proposed Rule 1000(b)(4) required a detailed description of the SCI event, adopted Rule 1002(b)(2)(i) specifies that an SCI entity must only provide ''a description of the SCI event, including the system(s) affected.'' Additional information is only required to the extent available as of the time of the notification, which includes an ''SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event.'' [890] This information is the type of necessary information that SCI entities are able to provide in a short timeframe and that the Commission has come, over time, to rely upon to properly assess systems issues.

Additionally, the Commission notes that adopted Rule 1002(b) does not require that an SCI entity provide the Commission, at the time of the initial notice to the Commission, with its current assessment of the SCI event, including a discussion of the determination of whether it is subject to a dissemination requirement, as proposed in Rule 1000(b)(4).

The Commission has also determined to further refine the scope of information that needs to be reported in the 24-hour written notification by requiring that the following items instead be included in the final report under Rule 1002(b)(4), rather than in the 24-hour written notification required by Rule 1002(b)(2): A description of the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss.[891]

In response to commenters who suggested that the Commission limit the events for which 24-hour written notification would be required to material events,[892] the Commission notes that it has partially responded to such comments by providing an exception to the immediate notification requirement for de minimis events in Rule 1002(b)(5). The Commission believes that this exception should reduce the overall number of SCI events subject to immediate notification requirements as compared to what would have been required if the SCI Proposal was adopted without modification and, consequently, the requirement to submit a written notification within 24 hours of an SCI event, thereby alleviating some of the burdens about which commenters expressed concerns. Moreover, the Commission believes that a materiality threshold would likely exclude from the 24-hour written notification a large number of SCI events that are not de minimis SCI events but that the Commission, as part of its oversight role, should be updated on so that the Commission and its staff can quickly assess the nature and scope of those SCI events and potentially assist the SCI entity in identifying the appropriate response, including ways to mitigate the impact of SCI events on investors and promote the maintenance of fair and orderly markets. The Commission reemphasizes that the information to be provided under the 24-hour written notification would represent the SCI entity's preliminary assessment—performed on a good faith, best efforts basis—of the SCI event, and only certain key information is required under the 24-hour written notification, with ''other pertinent information'' required only where ''known by the SCI entity'' within the 24-hour timeframe. For these reasons, the Commission has determined not to adopt a materiality threshold for the requirement that an SCI entity update the Commission within 24 hours after it has a reasonable basis to conclude that an SCI event has occurred.

Additionally, the Commission disagrees with those commenters who stated that written notification should only be required when reasonably requested by the Commission.[893] The Commission believes that it should be notified of all SCI events and that all SCI events (other than those specified in Rule 1002(b)(5)) should be subject to the 24-hour written notification requirement because, by articulating in a single notification what is currently known about an SCI event and the steps expected to be taken to respond to the SCI event, the Commission will be better able to assess the nature and scope of, and respond to, SCI events and potentially assist SCI entities in identifying the appropriate response, including ways to mitigate the impact of SCI events on investors and promote the maintenance of fair and orderly markets.

In response to the comment that the Commission should accept the same notifications of service interruptions that an ATS provides to its

[886] *See infra* note 909 and accompanying text.

[887] *See supra* notes 867–869 and accompanying text; and Proposing Release, *supra* note 13, at 18119.

[888] *See supra* notes 868 and 872 and accompanying text.

[889] *See supra* notes 870–872 and accompanying text.

[890] Rule 1002(b)(2)(ii). The information required to be provided in Rule 1002(b)(2)(ii) is a subset of information proposed to be required under Rule 1000(b)(4)(iv)(A)(1)–(2) of the SCI Proposal.

[891] At the same time, if such information is known at the time of the notification, the SCI entity will be required to provide it pursuant to Rule 1002(b)(2)(ii)'s requirement that the SCI entity provide ''any other pertinent information known . . . about the SCI event.'' Additionally, such information would be provided under the requirement to provide the Commission with regular updates under Rule 1002(b)(3)'s requirement to provide any of the information listed in Rule 1002(b)(2)(ii) if it becomes available after the time of submission of the 24-hour notification. The Commission also notes that Rule 1002(b)(4)(ii) requires that an SCI entity include in the final report a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding an SCI event to any of its members or participants.

[892] *See supra* note 880 and accompanying text.

[893] *See supra* note 882 and accompanying text.

subscribers,[894] the Commission believes that SCI ATSs can use the types of information contained in ATS notices to subscribers when completing Form SCI, but nevertheless believes that it is more useful and efficient for the Commission and its staff to be able to have all SCI event notifications standardized in a single format (*i.e.,* Form SCI).

As discussed above, the information required under the adopted 24-hour written notification requirement has been refined as compared with the requirements in the proposal. Consequently, the Commission believes that SCI entities should be able to provide the Commission with this information in a written format, and does not agree that such information should be provided in an oral format, as requested by some commenters, regardless of the manner in which the immediate notification was provided to the Commission.[895] The Commission emphasizes that regular updates provided under Rule 1002(b)(3) may, however, be provided either orally or in written form.[896]

In response to commenters that stated SCI entities should not be required to include an estimate of the market participants impacted by an SCI event or to quantify such impact because this requirement may create a risk of civil liability for the SCI entity,[897] the Commission notes that the information submitted to the Commission pursuant to Regulation SCI will be treated as confidential, subject to applicable law, including amended Rule 24b–2.[898] Moreover, the requirement to provide a 24-hour written notification does not itself create a risk of civil liability, but the Commission acknowledges that the information provided to it may be subject to FOIA requests.

Regarding the comment that the requirement to include an estimate of the markets and participants impacted by an SCI event or to quantify such impact would be difficult to compute, likely inaccurate, and of little use to the Commission,[899] the Commission disagrees. The rule requires an SCI entity to provide its current assessment of the types and number of market participants potentially affected by the SCI event and the potential impact of the SCI event on the market, to the extent this information is available as of the time of the notification, rather than an exact computation. In addition, the rule does not require that the assessment be submitted only if the SCI entity ensures that it is free of inaccuracies. Further, contrary to the commenter's suggestion, the Commission believes that such estimates will be of significant use to the Commission and its staff in understanding the potential severity of the SCI event. In addition, because the SCI entity is likely to be in the best position to assess an SCI event, the Commission also believes that an assessment of the impact of an SCI event on markets and participants is useful because it afford the Commission the opportunity to learn the SCI entity's perspective on the potential or actual impact of an SCI event.[900]

Written Commission Updates: Proposed Rule 1000(b)(4)(iii)

Commenters also addressed proposed Rule 1000(b)(4)(iii), which required an SCI entity to provide the Commission written updates pertaining to an SCI event on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, until the SCI event was resolved. Some commenters urged the Commission to provide clarity on the definition of ''resolved.'' [901] For example, one commenter suggested that the Commission should define the resolution of an SCI event to be when the affected SCI systems have been normalized,[902] and another commenter stated that there should be a precise definition of when an SCI event is resolved and that definition should be linked directly to the definition of the SCI event itself.[903] Other commenters expressed concern that the continuing update requirement could divert resources from resolution of the SCI event and suggested that updates be required only to the extent they would not interfere with event resolution.[904] One commenter stated that continual updates should only be necessary if the SCI entity had not resolved the event within a reasonable period, such as 10 to 15 days.[905]

Other commenters addressed the method of providing updates. For example, one commenter stated that only oral communication should be required when an SCI event is ongoing, and that the rule should allow a written supplement to a final or post mortem report if additional information comes to light regarding the SCI event.[906] Another commenter suggested that updates should be permitted to be in writing or provided orally based on the judgment of the SCI entity.[907] Finally, one commenter stated that requests for updates regarding SCI events should only be permitted to come from senior staff at the Commission.[908]

Regular Updates: Adopted Rule 1002(b)(3)

Rule 1002(b)(3) requires that, until such time as an SCI event is resolved, and the SCI entity's investigation of the SCI event is closed, an SCI entity provide the Commission with updates pertaining to the SCI event on a regular basis, or at such frequency as reasonably requested by a representative of the Commission. Updates are required to correct any materially incorrect information previously provided, or when new material information is discovered, including not limited to, any of the information listed in Rule 1002(b)(2)(ii).

While the Commission recognizes that providing the Commission with such updates imposes an additional reporting requirement on SCI entities, the Commission also believes that updates are important to allow the Commission to fully monitor the SCI event. In addition, the Commission believes that the update requirement will encourage SCI entities to formalize their processes for gathering information on SCI events, which will help to ensure that responsible SCI personnel receive accurate and updated information on SCI events as they are being resolved, and further, that this process may be helpful to SCI entities when providing information about SCI events to their members or participants. Also, because the Commission has revised the requirements of the 24-hour notification to allow SCI entities to provide information on a good faith, best efforts basis and has limited the scope of information required in that report as discussed above, the Commission believes that updates to the Commission to correct materially incorrect information previously reported or when new material information is

[894] *See supra* note 879 and accompanying text.

[895] *See supra* notes 872 and 882 and accompanying text.

[896] *See infra* note 911 and accompanying text.

[897] *See supra* note 871.

[898] *See supra* notes 802–803 and accompanying text. For a discussion of the amendment to Rule 24b–2, *see infra* notes 1245–1248 and accompanying text.

[899] *See supra* note 871 and accompanying text.

[900] The Commission notes that SCI entities retain the flexibility to provide additional information to the Commission as part of their assessments, such as providing the ''business impact'' of an SCI event, as suggested by one commenter. *See supra* note 870.

[901] *See* DTCC Letter at 11; and Omgeo Letter at 18.

[902] *See* DTCC Letter at 11.

[903] *See* Omgeo Letter at 18.

[904] *See* MSRB Letter at 19; and OCC Letter at 14.

[905] *See* FINRA Letter at 20.

[906] *See* Omgeo Letter at 17.

[907] *See* MSRB Letter at 19.

[908] *See* NYSE Letter at 24.

discovered as required by the rule is important to keep the Commission up to date with accurate information, including the following: The SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event. Consequently, the Commission does not agree with the commenter who suggested that updates should be only required if an SCI event has not been resolved within a reasonable amount of time, such as 10 to 15 days.[909]

The Commission believes that updates regarding this information are important to enhance the Commission's oversight of the securities markets and its informed and continued understanding of an SCI event. Moreover, the Commission underscores that updates are only required to the extent that they correct any *materially* incorrect information previously provided or when new *material* information is discovered, including but not limited to, any of the information listed in Rule 1002(b)(2)(ii), thereby alleviating the burden to SCI entities of providing such updates absent such circumstances.[910] The Commission has also eased the requirements of the proposed update provision by eliminating the proposed requirements that an SCI entity attach a copy of any information disseminated to date regarding the SCI event to its members or participants or on the SCI entity's publicly available Web site; a description of the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. Instead, these information requirements must only be provided as part of the final report required by Rule 1002(b)(4), and the Commission therefore believes that burdens associated with the continuing update requirement will be streamlined because SCI entities will not need to devote resources to providing written updates while an SCI event is ongoing.

At the same time, the Commission is cognizant of the burdens associated with requiring written updates and therefore has revised the update requirement in adopted Rule 1002(b)(3) to remove the proposed requirement that such updates be provided in written form. Thus, submission of updates may be provided either orally or in written form, and will result in a lighter burden on SCI entities than the proposed requirement, and is responsive to commenters that suggested that SCI entity resources would be better directed to resolving an SCI event.[911]

In response to comment that the Commission provide guidance to clarify when an SCI event has been ''resolved'' [912] and in line with the particular comment that the concept of resolution should be linked directly to the definition of the SCI event itself,[913] the Commission believes that an SCI event is resolved when the event no longer meets the definitions of a systems disruption, systems intrusion, or systems compliance issue, as defined in Rule 1000, and that an SCI entity's Rule 1002(b) reporting obligations are completed when an SCI entity submits a final report as required by Rule 1002(b)(4). Further, the Commission does not believe that it is necessary to prescribe that requests to SCI entities regarding updates should come solely from senior Commission staff, as suggested by one commenter.[914] The Commission believes that requiring an SCI entity to update the Commission at such frequency as reasonably requested by a representative of the Commission provides appropriate flexibility to the Commission to request additional information as necessary, but does not anticipate that requests will be made by multiple members of the Commission staff because the Commission expects that such requests would be coordinated by a particular group of Commission staff that are assigned to handle specific reports from SCI entities.

Final Report: Adopted Rule 1002(b)(4)

Adopted Rule 1002(b)(4) requires that if an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 days of the occurrence of the SCI event, then within five business days after the resolution of the SCI event and closure of the SCI entity's investigation regarding the SCI event, the SCI entity is to submit a final written notification pertaining to such SCI event to the Commission (''final report''). The final report is required to include: (i) A detailed description of: The SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event; (ii) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants; and (iii) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. Rule 1002(b)(4) also specifies that, if an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 days of the occurrence of the SCI event, then, the SCI entity is required to submit a written notification pertaining to such SCI event to the Commission within 30 days after the occurrence of the SCI event containing the information required in Rules 1002(b)(4)(i)–(iii), to the extent known at the time. Within five business days after the resolution of such SCI event and closure of the investigation regarding such SCI event, the SCI entity is required to submit a final written notification pertaining to such SCI event to the Commission containing the information specified in the rule.

As an initial matter, the Commission notes that several of the items that are specifically required to be described in the final report (as specified in adopted Rule 1002(b)(4)) were proposed to be required to be provided to the Commission under proposed Rule 1000(b)(4)(ii), within a shorter time frame.[915] The Commission believes that

[909] *See supra* note 870 and accompanying text.

[910] The requirement that updates regarding new or corrected information be provided on a regular basis (unless an alternative, specific frequency is reasonably requested by a representative of the Commission) is designed to take into account the fact that new or updated information may develop at different frequencies for different SCI events.

[911] *See supra* note 791 and accompanying text. SCI entities may, but are not required to, utilize Form SCI to submit such updates. *See* Section IV.D (discussing Form SCI). The Commission also believes that, to the extent commenters suggested that the Commission permit oral updates, they did so because, at least in part, oral updates are less burdensome to SCI entities than written updates. *See supra* notes 906–907 and accompanying text.

[912] *See supra* notes 902–903 and accompanying text.

[913] *See supra* note 903 and accompanying text.

[914] *See supra* note 802 and accompanying text.

[915] The Commission notes that while proposed Rule 1000(b)(4)(iv)(C) specified that an SCI entity

Continued

the adopted rule, by requiring that this information be submitted to the Commission after resolution of an SCI event and closure of the SCI entity's investigation, will encourage SCI entities to devote resources first to resolving the SCI event, and providing status reports when required, and then to preparing a comprehensive final report. In particular, as some commenters suggested, certain information would be more accurate, and therefore more useful, if provided after an SCI event is resolved.[916] The Commission believes that the information required under Rule 1002(b)(4) will provide the Commission with a comprehensive analysis to more fully understand and assess the impact caused by the SCI event. In addition, the Commission ordinarily would expect an SCI entity to include the root cause of an SCI event as part of ''any other pertinent information'' known about the SCI event. The Commission also believes that certain of the information requested by Rule 1002(b)(4) is more suitable to be provided after, rather than prior to, resolution of an SCI event. Specifically, much of the information required by Rule 1002(b)(4) (an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss) can only be comprehensively known after the final resolution of an SCI event.[917]

Similarly, the Commission is revising the proposed requirement that SCI entities provide to the Commission a copy of any information disclosed by the SCI entity to date regarding the SCI event to any of its members or participants. First, rather than requiring that SCI entities provide a copy of ''any information disclosed by the SCI entity,'' the adopted rule requires that SCI entities provide a copy of any information ''disseminated pursuant to paragraph (c) of [Rule 1002]'' by the SCI entity to date regarding the SCI event to any of its members or participants. The Commission believes that this refined requirement will more appropriately capture only the information needed for the Commission to assess compliance with the dissemination requirements of Rule 1002(c). Further, to limit the burden on, and provide additional flexibility to, SCI entities as they resolve SCI events, the adopted rule does not require this information to be included as part of a Form SCI submission until the final report is to be submitted to the Commission. The Commission believes that it is sufficient to require that this information be included in the final report because it is an important part of the record of an SCI event and SCI entity's response to such event.[918] As noted above, one commenter questioned the purpose of this requirement and expressed concern that it may negatively impact open communication between an SCI entity and its members and participants,[919] while another commenter questioned the feasibility, need, and potential impact of this requirement in light of the numerous communications that SCI entities will engage in with their members or participants.[920] While the Commission recognizes that it is possible that the requirement could have some chilling effect on such communications, it believes that this information is important for SCI entities to share with the Commission because it is an efficient means for the Commission to assess whether SCI entities are complying with the dissemination requirements of Rule 1002(c). Further, the Commission believes that, by requiring that SCI entities provide a copy only of information disseminated pursuant to Rule 1002(c) (rather than all information disclosed to members or participants regarding the SCI event), it addresses one commenter's concern that it would be difficult, unnecessary, and could impede open communication, to provide the Commission with a copy of all information disclosed to members or participants, which could include hundreds of individual communications via email or telephone for each SCI event.

The Commission also believes that, if an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 days of the occurrence of the SCI event, it is reasonable to require that an SCI entity submit within thirty business days after the occurrence of the SCI event the information required in Rule 1002(b)(4)(ii), to the extent known at the time, because this timeframe provides SCI entities with flexibility to continue their investigation while also apprising the Commission of relevant information discovered during the course of the SCI entity's investigation. Moreover, the rule takes into account the Commission's recognition that an SCI entity's investigation regarding an SCI may not yet be complete despite the fact that the SCI event itself has resolved. In such cases, within five business days after the SCI event has resolved and the investigation regarding the SCI event has closed, the Commission believes that it is reasonable and necessary to provide it with a comprehensive and complete understanding of the SCI event. Consequently, SCI entities are required to submit a final written notification that contains all information required by Rule 1002(b).

Goals of Adopted Commission Notification Rule

As discussed in greater detail above, the Commission has carefully considered the views of commenters as well as what it believes is necessary for the Commission and its staff with respect to the timing and content of notifications regarding SCI events, and believes that the adopted rule will be less burdensome for SCI entities than if the proposed rule was adopted without modification, while still resulting in meaningful notice to the Commission and its staff with information about SCI events in a timely manner that permits the Commission to fulfill its oversight role.

With regard to comments on the resource and efficiency demands of the notification requirements,[921] the Commission believes that while SCI entities will need to devote resources to fulfilling the notification requirements, the Commission does not believe that these resources will diminish SCI entities' ability to respond to SCI events because it is the Commission's

was required to provide a copy of any information disseminated on the SCI entity's publicly available Web site, adopted Rule 1002(b)(4) specifies that an SCI entity provide a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants.

[916] *See supra* notes 870–878 and accompanying text.

[917] The Commission notes that a notification required pursuant to proposed Rule 1000(b)(4)(ii) required the SCI entity to provide information on the ''*potential* impact of the SCI event on the market,'' whereas adopted Rule 1002(b)(4)(ii)(A) requires a description of ''*the SCI entity's assessment of* the impact of the SCI event on the market.'' Because adopted Rule 1002(b)(4) requires a final report upon resolution of an SCI event and the closure of the SCI entity's investigation of the SCI event, the Commission believes it is appropriate that an SCI entity provide its assessment of the impact of the SCI event in the final report, rather than information on the SCI event's potential impact.

[918] Under Rule 1002(b)(4), SCI entities are required to provide a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants.

[919] *See supra* note 877.

[920] *See supra* note 878 and accompanying text. Specifically, this commenter noted that there could be hundreds of communications between the SCI entity and its members or participants during a systems incident and questioned the feasibility of, and need for, recreating and providing to the Commission a copy of all such communications. Further, the commenter noted that this requirement could have an unintended effect of discouraging open communication between the SCI entity and its members.

[921] *See supra* notes 790–793.

experience that the staff that engages in corrective action is generally distinct from the staff that has been charged with notifying the Commission of systems issues. Consequently, the Commission does not believe that, due to this requirement, staff that engages in corrective action will be unable to fulfill its responsibilities after implementation of Regulation SCI.

The Commission believes that adopted Rules 1002(b)(1)–(4) are responsive to concerns that the proposed Commission notification requirements would have required SCI entities to notify the Commission of information before all relevant facts are known.[922] As discussed, in tandem with the revised triggering standard, which affords an SCI entity time to assess whether an SCI event has occurred,[923] the adopted rule affords an SCI entity the flexibility to gather information for the 24-hour written notification on a good faith best, efforts basis,[924] and adopted Rule 1002(b)(3) makes clear that an SCI entity is required to update the Commission to correct any materially inaccurate information previously provided, or when pertinent new information is discovered, until such time as the SCI event is resolved, and the SCI entity's investigation of the SCI event is closed. Further, the final report for a given SCI event is only required once, when both the SCI event is resolved and the SCI entity's investigation of the SCI event is closed, with an interim report required only when an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 days of the occurrence of the SCI event. Taken together, the Commission believes that Rule 1002(b) does not require reporting before all relevant fact are known, which one commenter suggested would be counterproductive and harmful.[925] Instead, the Commission believes that the rule is designed to provide SCI entities with a process that gives them sufficient time to submit information to the Commission when known. In addition, and in response to comment questioning the usefulness of the notification requirement for the Commission,[926] the Commission believes that adopted Rule 1002(b) will foster a system for comprehensive reporting of SCI events, which should enhance the Commission's review and oversight of U.S. securities market infrastructure and foster cooperation between the Commission and SCI entities in responding to SCI events. The Commission also believes that the aggregated data that will result from the reporting of SCI events will enhance its ability to comprehensively analyze the nature and types of various SCI events and identify more effectively areas of persistent or recurring problems across the systems of all SCI entities. Some commenters suggested that the Commission provide to SCI entities regular summary-level feedback on SCI entities' notifications[927] or provide examples of the types of SCI events that warrant notification.[928] To the extent it believes that guidance or other information, including summary-level feedback, publications, or reference blueprints, would be appropriate to share, the Commission or its staff may do so in the future.

d. Dissemination of Information—Rule 1002(c)

i. Proposed Rule 1000(b)(5)

Proposed Rule 1000(b)(5) would have required an SCI entity to provide specified information relating to ''dissemination SCI events'' to SCI entity members or participants. The term ''dissemination SCI event'' was proposed to mean an SCI event that is a: (1) Systems compliance issue; (2) systems intrusion; or (3) systems disruption that results, or the SCI entity reasonably estimates would result, in significant harm or loss to market participants.

Proposed Rule 1000(b)(5)(i)(A) would have required an SCI entity, promptly after any responsible SCI personnel becomes aware of a dissemination SCI event other than a systems intrusion, to disseminate to its members or participants the following information about such SCI event: (1) The systems affected by the SCI event; and (2) a summary description of the SCI event. Proposed Rule 1000(b)(5)(i)(B) would have required an SCI entity to further disseminate to its members or participants, when known: (1) A detailed description of the SCI event; (2) the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; and (3) a description of the progress of its corrective action for the SCI event and when the SCI event has been or is expected to be resolved. Proposed Rule 1000(b)(5)(i)(C) would have further required an SCI entity to provide regular updates to members or participants on any of the information required to be disseminated under proposed Rules 1000(b)(5)(i)(A) and (i)(B). In the case of a systems intrusion, the proposed rule permitted a limited delay in dissemination if the dissemination would compromise the security of the SCI entity's systems.[929] Except for the delay in dissemination of information for systems intrusions in specified circumstances, the proposed rule did not distinguish dissemination obligations based on the severity or impact of a dissemination SCI event.

ii. Comments Regarding Information Dissemination

Two commenters generally supported proposed Rule 1000(b)(5).[930] One commenter characterized it as ''one of the major benefits of th[e] proposal.''[931] Another commenter suggested broadening the proposal to require an SCI entity to reveal dissemination SCI events to the public at large, and not just to its members or participants.[932] This commenter believed that public dissemination of the facts of an SCI event would help enhance investor confidence by preventing speculation and misinformation, and would provide important learning opportunities for the industry and other SCI entities.[933]

In contrast, many commenters urged the Commission to revise the proposed dissemination requirement.[934] For example, a few commenters expressed concern that the proposal would require dissemination of too much information too soon.[935] One of these commenters stated that the proposed rule would be counterproductive and harmful because

[922] *See supra* note 804 and accompanying text.

[923] *See supra* Section IV.B.3.a (discussing the triggering standard).

[924] *See supra* discussion of ''good faith, best efforts'' above.

[925] *See supra* note 804.

[926] *See supra* note 793.

[927] *See supra* note 806 and accompanying text.

[928] *See supra* note 807 and accompanying text.

[929] *See* proposed Rule 1000(b)(5)(ii) (permitting a delay in dissemination of information regarding a systems intrusion if ''the SCI entity determines that dissemination of such information would likely compromise the security of the SCI entity's SCI systems or SCI security systems, or an investigation of the systems intrusion, and documents the reasons for such determination'').

[930] *See* Angel Letter at 5; and MFA Letter at 7.

[931] *See* Angel Letter at 5. This commenter stated: ''Instead of keeping information about hardware failures, system intrusions, and software glitches private, sharing the information will alert others in the industry about such problems and help to reduce system wide costs of diagnosing problems, as well as result in improved responses to technology problems. These will serve as warnings to the other SCI entities to stay vigilant to prevent similar problems from occurring on their platforms.'' Angel Letter at 5.

[932] *See* MFA Letter at 7.

[933] *See id.*

[934] *See, e.g.,* NYSE Letter at 28–29; FINRA Letter at 24; BATS Letter at 13; DTCC Letter at 11–12; OCC Letter at 16; CME Letter at 9–10; ICI Letter at 4; Oppenheimer Letter at 2; Direct Edge Letter at 8; Omgeo Letter at 21; ITG Letter at 13; and FIA PTG Letter at 3.

[935] *See, e.g.,* DTCC Letter at 12, NYSE Letter at 29; and ITG Letter at 13.

it would cause the release of information before all relevant facts are known and suggested dissemination should only be required when the SCI entity has credible information that can be acted upon.[936] Another commenter suggested that dissemination should only be required when the information to be disseminated is certain and clear.[937] Another commenter urged that, if immediate dissemination is required, then the information required to be disseminated should be limited to communication of the basic fact that there is a systems issue and additional information will be provided when known.[938]

Several commenters opposed requiring information dissemination to all members and participants.[939] For example, some commenters urged that an SCI entity be required to provide information only to members or participants actually impacted by an SCI event, or that interact with the SCI system impacted, rather than to all members or participants of an SCI entity.[940] One commenter recommended that an SCI entity be required to disseminate information only to persons reasonably likely to be affected by a significant systems issue.[941] Two commenters stated that SCI entities should have reasonable discretion to determine who among their members and participants should receive notification of an SCI event, as well as the manner and timing for providing notice.[942] A few commenters more broadly expressed concern that the proposed rule would result in over-reporting of information about SCI events and would have limited usefulness.[943] Some of these commenters stated that the proposed approach would result in SCI entity members and participants becoming immunized to the notifications because they would receive too many notifications and therefore would not focus on the truly significant events.[944]

Several commenters suggested that the Commission apply the proposed dissemination requirement to fewer types of SCI events.[945] For example, several commenters stated that information dissemination should only be required for material or significant SCI events.[946] One commenter suggested that, for an SCI event that is ''de minimis,'' information dissemination to members or participants should not be required at all.[947] This commenter suggested that a de minimis SCI event would be one that is limited in impact, brief in duration, or involves little or no member or participant harm.[948] Another commenter noted that, as proposed, Commission notification would be required for a systems disruption if the systems disruption had a ''material impact'' on the SCI entity's operations or on market participants, whereas information dissemination to members or participants would be required if an SCI entity reasonably estimated that the systems disruption would result ''in significant harm or loss to market participants.'' [949] This commenter criticized the differing standards for Commission notification and member/participant notification and suggested that the Commission clarify the standards or adopt a uniform standard for both types of notifications.[950]

Several commenters specifically opposed the proposed dissemination requirement for systems compliance issues. Some commenters urged that an SCI entity be required to disseminate information only for material or significant systems compliance issues.[951] One of these commenters stated that prompt dissemination of information regarding systems compliance issues to members or participants might lead to widespread dissemination of extraneous and potentially inaccurate information.[952]

Regarding systems intrusions, a few commenters stated that dissemination of systems intrusions information could raise significant risks and security concerns.[953] One commenter recommended that a dissemination requirement apply only in the case of members, participants, or clients for whom confidential data was disclosed, processing was impacted, or where such member, participant, or client could take further action to mitigate the risk of such disclosure.[954] This commenter also expressed support for the limited exception for intrusions that would compromise an investigation or resolution of the systems intrusion, noting that once dissemination would no longer compromise an investigation or the resolution of the issue, the entity should notify materially affected members, participants, or clients.

One commenter stated that information should not be disseminated regarding disruptions in regulatory or surveillance systems, nor should information be disseminated about intrusions or compliance issues, arguing that the information could be misused, or if disseminated too soon, could be inaccurate and misleading.[955] Two other commenters also expressed concern that information dissemination should not be required when the information provided might be misused to the detriment of the markets or investors, such as with respect to systems intrusions or issues relating to surveillance systems.[956]

iii. Rule 1002(c)

In the SCI Proposal, the Commission stated that the intended purpose of the proposed rule was twofold: To aid members or participants of SCI entities

[936] *See* ITG Letter at 13. *See also supra* note 804 and accompanying text.

[937] *See* DTCC Letter at 12.

[938] *See* NYSE Letter at 29 (stating also that the scope of the information required to be provided is too extensive, particularly given the timing requirements of the proposed rule).

[939] *See, e.g.,* MSRB Letter at 20–21; DTCC Letter at 11; CME Letter at 10; NYSE Letter at 28; FINRA Letter at 24–25; ISE Letter at 6–7; SIFMA Letter at 15; and OCC Letter at 17.

[940] *See* MSRB Letter at 20–21; DTCC Letter at 11; CME Letter at 9; NYSE Letter at 28; FINRA Letter at 25; and ISE Letter at 6–7. In addition, one of these commenters sought clarification on whether the term ''participant'' refers to a formal participant or, more broadly speaking, any market participant that interacts with the SCI system in question. *See* MSRB Letter at 20. *See also* Omgeo Letter at 21, and *infra* note 954.

[941] *See* NYSE Letter at 28.

[942] *See* SIFMA Letter at 15 (urging that an SCI entity should have discretion to determine which participants or members are affected and how to notify them); and OCC Letter at 17 (urging that an SCI entity should be able to limit the communication to those members and participants that are actually affected and to provide the communication on a confidential and secure basis when the SCI entity has reasonable certainty of the information that is required to be provided).

[943] *See, e.g.,* CME Letter at 9; FIA PTG Letter at 3; and Omgeo Letter at 39. *See also* Fidelity Letter at 5 (requesting that the Commission provide greater specificity regarding the types of dissemination SCI events that must be disclosed and to whom disclosure must be made).

[944] *See, e.g.,* Omgeo Letter at 40; FIA PTG Letter at 3; and CME Letter at 9.

[945] *See, e.g.,* NYSE Letter at 28; FIA PTG Letter at 3; FINRA Letter at 24; BATS Letter at 13; OCC Letter at 16–17; CME Letter at 9–10; ICI Letter at 4; Oppenheimer Letter at 2; and Direct Edge Letter at 8.

[946] *See* NYSE Letter at 28; FIA PTG Letter at 3; FINRA Letter at 24; BATS Letter at 13; OCC Letter at 16–17; CME Letter at 9–10; ICI Letter at 4; Oppenheimer Letter at 2; and Direct Edge Letter at 8.

[947] *See* BATS Letter at 13.

[948] *See id.*

[949] *See* OCC Letter at 16.

[950] *See id.*

[951] *See, e.g.,* FINRA Letter at 24; Joint SROs Letter at 9; SIFMA Letter at 12; BATS Letter at 13; MSRB Letter at 6; and CME Letter at 10.

[952] *See* Joint SROs Letter at 8.

[953] *See* DTCC Letter at 11; and NYSE Letter at 29. *See also* Direct Edge Letter at 3 (suggesting that, to ensure that sensitive information does not fall into the wrong hands, the Commission should require reporting of systems intrusions to the Commission, and only require public disclosure in instances where there is a risk of significant harm to the SCI entity's customers).

[954] *See* Omgeo Letter at 21.

[955] *See* NYSE Letter at 29. *See also* supra note 935 and accompanying text.

[956] *See* ICI Letter at 4; and Oppenheimer Letter at 2.

in determining whether their trading activity has been or might be impacted by the occurrence of an SCI event at an SCI entity so that they could consider that information in making trading decisions, seeking corrective action or pursuing remedies, or taking other responsive action; and to provide an incentive for SCI entities to devote more resources and attention to improving the integrity and compliance of their systems and preventing the occurrence of SCI events.[957] Although commenters generally did not object to the Commission's stated rationale for proposed Rule 1000(b)(5), several commenters suggested that the proposed approach did not adequately consider circumstances in which the proposed information dissemination might not be helpful to the market or market participants, or could be detrimental to the markets or market participants. One commenter, however, urged that public dissemination of information regarding SCI events would help to prevent speculation and misinformation regarding such events.[958]

The Commission has carefully considered the views of commenters with respect to proposed Rule 1000(b)(5), and has determined to adopt it as Rule 1002(c), with several modifications in response to comment. In particular, the Commission has determined to eliminate the definition of ''dissemination SCI event'' from the final rule and adopt an information dissemination requirement that scales dissemination obligations in accordance with the nature and severity of an SCI event. In response to comment that the proposed rule would result in over-reporting of information about SCI events and have limited usefulness, the Commission has further focused the rule from the proposal by requiring dissemination of information about SCI events that are not major SCI events only to affected SCI entity members and participants, and excepting de minimis SCI events and SCI events regarding market regulation or market surveillance systems from the information dissemination requirement.[959] In the case of a ''major SCI event,'' the Commission agrees with the commenter who stated that requiring dissemination should help to prevent speculation and misinformation regarding such events.[960] Therefore, in the case of a ''major SCI event,'' the adopted rule requires an SCI entity to disseminate information to all of its members or participants. At the same time, as with other SCI events, any SCI event that meets the definition of major SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants is excepted from the information dissemination requirement.[961] The Commission believes the revised approach will better achieve the purpose of maximizing the utility of information disseminated to SCI entity members and participants while simultaneously reducing compliance burdens for SCI entities.

Rule 1002(c)(1): Information Dissemination for Systems Disruptions and Systems Compliance Issues

Adopted Rule 1002(c)(1) generally addresses dissemination requirements for systems disruptions and systems compliance issues. Rule 1002(c)(1)(i) requires an SCI entity, promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event that is a systems disruption or systems compliance issue has occurred, to disseminate information about such SCI event, unless an exception applies. When the dissemination obligation is triggered,[962] Rule 1002(c)(1)(i) requires an SCI entity to disseminate to the persons specified in Rule 1002(c)(3) information on the system(s) affected by the SCI event and a summary description of the SCI event. Thereafter, Rule 1002(c)(1)(ii) provides that, when known, an SCI entity shall promptly further disseminate: A detailed description of the SCI event; the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; and a description of the progress of its corrective action for the SCI event and when the SCI event has been or is expected to be resolved. Rule 1002(c)(1)(iii) provides that, until resolved, an SCI entity shall provide regular updates of any information required to be disseminated under Rules 1002(c)(1)(i) and (ii). The specified types of information and the update requirements are unchanged from the proposal. The Commission continues to believe that, for the dissemination of information to be meaningful, it is necessary for an SCI entity to describe the SCI event in sufficient detail to permit a member or participant to determine whether and how it was affected by the SCI event and make appropriate decisions based on that determination.[963] Adopted Rule 1002(c)(1)(i) requires that the information initially disseminated include the systems affected by the SCI event and a summary description of the SCI event, and only after responsible SCI personnel have a reasonable basis to conclude that a systems disruption or systems compliance issue has occurred. Implicit in this requirement is that the disseminated information be accurate. Without the dissemination of accurate information, the impact on the SCI entity's members or participants or the market may be more pronounced because market participants may not recognize that an SCI event is occurring, or may mistakenly attribute unusual market activity to some other cause.

Adopted Rule 1002(c)(1) also requires that required information be disseminated ''promptly.'' [964] Although the Commission agrees that SCI entities should not prematurely disseminate information regarding an SCI event, lest it be inaccurate, speculative, misleading, or otherwise unhelpful, as some commenters were concerned about,[965] the Commission does not agree with the commenter who suggested that information dissemination be provided at a time chosen by the SCI entity.[966] The Commission believes that accurate information that is timely is more likely to aid a market participant in determining whether its trading activity has been or might be impacted by the occurrence of an SCI event than accurate information that is delayed. However, as compared to Commission notification, which is required to be provided immediately after an SCI entity has a reasonable basis to conclude that an SCI event has occurred, and which notice may be provided orally, dissemination of information to SCI entity members or participants is required to be provided promptly. The requirement for prompt dissemination, as opposed to immediate dissemination, is designed to provide some limited flexibility to an SCI entity to determine an efficient way to disseminate information to multiple potentially affected members or participants, or all of its members or participants, as the case may be, in a timely manner. Likewise, as new information becomes

[957] *See* Proposing Release, *supra* note 13, at 18120.

[958] *See supra* note 933 and accompanying text.

[959] *See supra* notes 943–956 and accompanying text.

[960] *See supra* note 933 and accompanying text.

[961] *See* Rule 1002(c)(4)(ii).

[962] *See supra* Section IV.B.3.a (discussing the triggering standard).

[963] *See* Proposing Release, *supra* note 13, at 18120.

[964] The persons to whom the required information about systems disruptions and systems compliance issues is to be disseminated are specified in Rules 1002(c)(3) and (4).

[965] *See also supra* notes 935–938 and 933 and accompanying text.

[966] *See supra* note 942 and accompanying text.

known, immediate updates are not required, but an SCI entity is obligated to also disseminate updated information ''promptly'' after it is known. The Commission believes that adopted Rule 1002(c)(1) strikes an appropriate balance by requiring an SCI entity to disseminate specific information about SCI events, but also permits an SCI entity to have time to check relevant facts before disseminating that information. The Commission therefore believes that adopted Rule 1002(c)(1) is responsive to comment that the proposed rule would have required release of information too soon, before it is determined to be credible, or before relevant facts were known.[967]

Rule 1002(c)(2): Information Dissemination for Systems Intrusions

Adopted Rule 1002(c)(2) requires an SCI entity, promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event that is a systems intrusion has occurred, to disseminate a summary description of the systems intrusion, including a description of the corrective action taken by the SCI entity and when the systems intrusion has been or is expected to be resolved, unless the SCI entity determines that dissemination of such information would likely compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and documents the reasons for such determination. This rule applies to systems intrusions that are not de minimis events. In response to commenters stating that information about a systems intrusion in many cases will be sensitive and raise security concerns, and those urging that the dissemination requirement apply only in limited cases,[968] the Commission notes that, although it does not wholly exclude systems intrusions from the dissemination requirement, the rule permits a delay in dissemination of any information about a systems intrusion if dissemination would compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and the SCI entity documents the reason for such determination.[969] Adopted Rule 1002(c)(2) also provides that the content of the required disclosure for a systems intrusion is less detailed than required for other types of SCI events. These provisions are unchanged from the SCI Proposal.[970] As stated in the SCI Proposal, the Commission continues to believe that there may be circumstances in which the dissemination of information related to a systems intrusion should be delayed to avoid compromising the investigation or resolution of a systems intrusion.[971] Also, as stated in the SCI Proposal, the affirmative documentation required by Rule 1002(c)(2) is important to allow the Commission to ensure that SCI entities are not improperly invoking the limited exception provided by Rule 1002(c)(2).[972] This delayed dissemination provision permits an SCI entity to delay providing information about an intrusion to its members or participants to protect legitimate security concerns. However, under Rule 1002(c)(2), if an SCI entity cannot, or can no longer, determine that information dissemination as required by Rule 1002(c)(2) would likely compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion, no delay (or further delay, if applicable) in dissemination is permitted.[973] Pursuant to Rule 1002(c)(2), information about a systems intrusion is required to be disseminated eventually, as the Commission believes that circumstances permitting a delay (*i.e.,* dissemination of information would likely compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion), will not continue indefinitely.[974]

Rule 1002(c)(3): To Whom Information Is To Be Disseminated

Adopted Rule 1002(c)(3) provides that the information required to be provided under Rules 1002(c)(1) and (2) promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred, shall be promptly disseminated by the SCI entity to those members or participants of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event, and promptly disseminated to any additional members or participants that any responsible SCI personnel subsequently reasonably estimates may have been affected by the SCI event. The rule further requires that, for major SCI events, such information shall be disseminated by the SCI entity to all of its members or participants. As noted, several commenters urged that an SCI entity be required to disseminate information relating to an SCI event only to those members or participants affected by the SCI event.[975] Some suggested that an SCI entity have discretion to determine who should receive information regarding SCI events,[976] and one suggested that SCI events warrant public disclosure.[977] Others expressed more general concern that the breadth of the proposed dissemination requirement would result in over-reporting of information about SCI events because they believed that SCI entities would over-report out of an abundance of caution [978] or that SCI entity members and participants would become immunized to reports of SCI events and not focus on significant events.[979]

After careful consideration of the comments, the Commission believes that, to maximize the utility of information dissemination, a more tailored approach to who should receive information about an SCI event is warranted, based on an SCI event's impact. Because information about an SCI event is likely to be of greatest value to those market participants affected by it, who can use such information to evaluate the event's impact on their trading and other activities and develop an appropriate response, adopted Rule 1002(c)(3) requires prompt dissemination to those members or participants of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event. With respect to more serious SCI events, however, the Commission believes that dissemination to all members or participants of an SCI entity is warranted. Accordingly, under adopted Regulation SCI, certain SCI events will be defined as ''major SCI events.''

Adopted Rule 1000 defines ''major SCI event'' as ''an SCI event that has

[967] *See supra* notes 935–938 and accompanying text.

[968] *See, e.g., supra* notes 953–954 and accompanying text.

[969] *See* Rule 1002(c)(4) (excepting de minimis systems intrusions and intrusions into market regulation or market surveillance systems from the dissemination requirement) and Rule 1001(c)(2) (permitting a delay in dissemination).

[970] The persons to whom the required information about a systems intrusion is to be disseminated (provided the circumstances warranting a delay do not apply) is specified in Rules 1002(c)(3) and (4).

[971] *See* Proposing Release, *supra* note 13, at 18120.

[972] *See id.*

[973] *See id.*

[974] Some commenters urged modifications to the proposed rule that would further circumscribe the proposed dissemination requirement for systems intrusions. *See, e.g., supra* notes 953–954 and accompanying text (urging that dissemination for systems intrusions only be required for affected persons and only if material). These comments are addressed in the discussion of adopted Rules 1002(c)(3) and (4).

[975] *See supra* note 940 and accompanying text.

[976] *See supra* note 942 and accompanying text.

[977] *See supra* notes 932–933 and accompanying text.

[978] *See supra* note 943 and accompanying text.

[979] *See supra* notes 943–944 and accompanying text.

had, or the SCI entity reasonably estimates would have: (1) Any impact on a critical SCI system; or (2) a significant impact on the SCI entity's operations or on market participants.'' The Commission believes that dissemination of information regarding a major SCI event to all members or participants of an SCI entity is appropriate because major SCI events are likely to impact a large number of market participants (*e.g.*, with respect to critical SCI systems, a disruption of consolidated market data or the clearance and settlement system, or an event significantly impacting the operations of an exchange).[980] As noted, one commenter suggested broadening the proposed rule to generally require an SCI entity to reveal dissemination SCI events (other than intrusions) to the public at large. This commenter expressed the view that public dissemination of the facts of an SCI event would help ''enhance investor confidence by presenting the facts of the SCI event, preventing speculation and misinformation, and informing the public of corrective action being taken'' and would ''serve as an important collective learning opportunity'' that would allow for ''SCI [e]ntities and market participants [to] learn from [the event] . . . and build upon their policies and controls as appropriate.'' This commenter stated further that such an ''industry protocol would help strengthen and enhance the integrity and security of our markets.'' [981] The Commission agrees with this commenter that it is appropriate for an SCI entity to present the facts, prevent speculation and misinformation, and provide transparency about corrective action being taken when the impact of an SCI event is most likely to be felt by many market participants (*i.e.*, when it is a major SCI event). In the context of a major SCI event, the Commission believes these goals can be achieved by requiring an SCI entity to disseminate information to all of its members or participants (as opposed to the ''public at large''). Moreover, the Commission believes it is appropriate to require dissemination of information on major SCI events to all of the SCI entity's members or participants because these market participants are the most likely to act on this information. Based on the experience of the Commission and its staff, when an entity disseminates information about a systems issue to all of its members or participants (*e.g.*, on the entity's Web site), and that information has the potential to affect the market and investors more broadly (including market participants that may not be members or participants of the SCI entity reporting the event), such information is routinely picked up by financial or other media outlets, and also may be relayed to market participants for whom such information is relevant (*e.g.*, by members or participants of SCI entities to their own clients). Therefore, the Commission believes that when information about a systems issue with broad potential impact is disseminated to all of an SCI entity's member or participants, such dissemination is tantamount to public dissemination.[982] As such, the Commission believes that it can achieve the purposes of the rule without requiring public dissemination, and believes that any additional gain in benefits from public dissemination would be minimal. Rule 1002(c)(3) does not specify how an SCI entity is to disseminate information to all of its members or participants when required to do so, but the Commission believes that posting the information on a Web site accessible to, at a minimum, all of its member or participants (for example, on a ''systems status alerts'' page) would meet the rule's requirements.[983]

For an SCI event that is neither a major SCI event nor an event identified in Rule 1002(c)(4), however, the information specified in Rule 1002(c)(1) or (2), as applicable, is required to be disseminated by the SCI entity to those members or participants of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event.[984] The Commission believes that an SCI entity is generally in the best position to identify those of its members or participants that are or are reasonably likely to be affected by such events. Under this approach, as commenters urged, members or participants not reasonably estimated to be affected by such events will not be the recipients of information likely to be irrelevant to them. The Commission believes that SCI entities will be able to analyze which members or participants are or reasonably likely will be impacted, and the rule requires SCI entities to disseminate information to such members or participants. The requirement that information is to be disseminated only to those members or participants that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event (other than a major SCI event or a de minimis SCI event) addresses the concern raised by some commenters that members and participants will become immunized by receiving irrelevant notifications [985] because, under the adopted approach, members or participants should only receive notifications relevant to them.

Whereas the proposed rule would have required dissemination of information about certain SCI events to all SCI entity members and participants, the adopted rule requires dissemination only to those members and participants reasonably estimated to be affected by an SCI event (other than a major SCI event or a de minimis SCI event). Because it is possible that an SCI entity's reasonable estimate of members or participants affected may change as an SCI event unfolds, the adopted rule also requires prompt dissemination of information to newly identified members or participants reasonably estimated to be affected by an SCI event.[986] This provision reflects the view that newly identified affected members or participants should receive prompt dissemination of information about an SCI event, just as those originally identified as affected members or participants. Although compliance with this requirement may result in an SCI entity disseminating information at several different times to

[980] At the same time, the Commission recognizes that some SCI events that meet the definition of ''major SCI event'' could also qualify as de minimis SCI events. Like other de minimis SCI events, they are excepted from the information dissemination requirement. *See* Rule 1002(c)(4).

[981] *See supra* notes 932–933.

[982] The Commission notes that one commenter referred to the dissemination provision in the SCI Proposal as the ''public dissemination provision of Proposed Reg SCI.'' *See* NYSE Letter at 28. *See also* ICI Letter at 4 and Oppenheimer Letter at 4 (each supporting ''transparency of SCI events to members and participants of an SCI entity'' but recommending that the Commission only require ''public dissemination'' where such information enhances investor protection).

[983] The Commission notes that, irrespective of the medium chosen to disseminate information to the SCI entity members or participants, the SCI entity would also be required to submit the disseminated information to the Commission as part of the report submitted pursuant to Rule 1002(b)(4). *See supra* Section IV.B.3.c.

[984] In response to the commenter seeking clarification on whether the term ''participant'' refers to a formal participant or, more broadly speaking, any market participant that interacts with the SCI system in question (*see supra* note 940), for purposes of adopted Rule 1002, the term ''participant'' refers to a formal participant. The Commission also notes that, with respect to the MSRB, the term ''members'' as used in Regulation SCI includes entities that are registered with the MSRB, but does not include ''a member of the Board,'' which is the definition of ''member'' in MSRB Rule D–5.

[985] *See supra* notes 944 and 952 and accompanying text.

[986] Rule 1002(c)(1) requires that, among other things, the SCI entity must disseminate the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event, and until resolved, provide regular updates of this and any other information required to be disseminated under the rule.

different members and participants, consistent with commenters' suggestions, the Commission believes that this requirement is appropriately tailored to result in information dissemination being provided to the relevant members or participants of an SCI entity.[987]

If an SCI event is a de minimis event—*i.e.*, is an SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants—the adopted rule does not impose any dissemination requirement.[988]

Adopted Rule 1002(c)(4): Exceptions to the General Rules on Information Dissemination

Adopted Rule 1002(c)(4) provides that the requirements of Rules 1002(c)(1)–(3) shall not apply to: (i) SCI events to the extent they relate to market regulation or market surveillance systems; or (ii) any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. The Commission has added the exception in adopted Rule 1002(c)(4)(i) in response to comments that information should not be disseminated regarding disruptions in regulation and surveillance systems, because dissemination of such information to an SCI entity's members or participants or the public at large could encourage prohibited market activity.[989] The Commission notes that the exception for market regulation or market surveillance systems is limited to dissemination of information about SCI events related to market regulation or market surveillance systems. Information about an SCI event that impacts other SCI systems would still be required to be disseminated in accordance with Rule 1002(c) even if that same SCI event also impacts market regulation or market surveillance systems.

The exception in Rule 1002(c)(4)(ii) for de minimis SCI events is consistent with the Commission's approach to excluding de minimis SCI events from the immediate Commission notification requirements in Rule 1002(b), and is therefore responsive to comment that notification and dissemination of systems disruptions were subject to differing standards under the proposal,[990] as well as to the comment that a de minimis SCI event should not be subject to dissemination.[991] With respect to the comment that dissemination should only be required for material or significant SCI events,[992] while the Commission is not limiting the dissemination requirement as suggested by these commenters, the exception for de minimis SCI events is responsive to this comment, to an extent. Moreover, the Commission believes that a materiality threshold would likely exclude from the information dissemination requirement a large number of SCI events that are not de minimis SCI events, but that an SCI entity's members or participants should be made aware of so that they can quickly assess the nature and scope of those SCI events and identify the appropriate response, including ways to mitigate the impact of the SCI events. The Commission also believes that, even without adopting a materiality threshold, the adopted definitions of SCI systems and indirect SCI systems significantly focus the scope of the Commission dissemination requirements from the SCI Proposal.

Consistent with its statements in the SCI Proposal, the Commission notes that the requirements relating to dissemination of information in Regulation SCI relate solely to Regulation SCI.[993] Nothing in adopted Regulation SCI should be construed as superseding, altering, or affecting the reporting obligations of SCI entities or their affiliates under other federal securities laws or regulations. Accordingly, in the case of an SCI event, SCI entities or their affiliates subject to the public company reporting requirements of Section 13 or Section 15(d) of the Exchange Act would need to comply with their disclosure obligations pursuant to those provisions (including, for example, with respect to Regulation S–K and Forms 10–K, 10–Q, and 8–K) in addition to their disclosure and reporting obligations under Regulation SCI.[994] In addition, the Commission also wishes to highlight that the requirements of Rule 1002(c) address to whom and when SCI entities are obligated *under Regulation SCI* to disseminate information. Subject to any applicable laws or regulations, SCI entities still retain the flexibility to disseminate information—*e.g.*, to their members or participants, the public, or market participants that interact with the affected SCI systems—at any time they determine to be appropriate.

4. Notification of Systems Changes—Rule 1003(a)

a. Proposed Definition of Material Systems Change, Proposed Rules 1000(b)(6) and (b)(8)(ii)

Proposed Rule 1000(a) would have defined the term ''material systems change'' as a change to one or more: (1) SCI systems of an SCI entity that: (i) Materially affects the existing capacity, integrity, resiliency, availability, or security of such systems; (ii) relies upon materially new or different technology; (iii) provides a new material service or material function; or (iv) otherwise materially affects the operations of the SCI entity; or (2) SCI security systems of an SCI entity that materially affects the existing security of such systems. In the SCI Proposal, the Commission set forth examples that it preliminarily believed could be included within the proposed definition of material systems change.[995]

[987] The Commission notes that an SCI entity would be in compliance with the rule if it disseminated the required information to all members or participants, rather than disseminating only to those members and participants it reasonably initially estimated to be affected by the event (which might require subsequent dissemination(s) to additional members or participants if its estimate regarding those members or participants that were affected by a given SCI event changes over time).

[988] *See* discussion of adopted Rule 1002(c)(4) below (excepting, among other things, de minimis systems SCI events from the dissemination requirement). *See also supra* Section IV.B.3.c (discussing Rule 1002(b)(5), which requires that, for de minimis SCI events, an SCI entity is required to: (i) Make, keep, and preserve records relating to all such SCI events; and (ii) submit to the Commission a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of such systems disruptions and systems intrusions, including the SCI systems and, for systems intrusions, indirect SCI systems, affected by such systems disruptions and systems intrusions during the applicable calendar quarter).

[989] *See supra* notes 955–956 and accompanying text.

[990] *See supra* notes 949–950 and accompanying text.

[991] *See supra* notes 947–948 and accompanying text; Section IV.B.3.c (discussing Rule 1002(b)) and *supra* note 988 and accompanying text. The Commission notes that, because major SCI events are a subset of SCI events, the exception in Rule 1002(c)(4)(ii) also applies to major SCI events that meet the requirements of that rule.

[992] *See supra* note 946 and accompanying text; *see also supra* notes 941 and 944 and accompanying text.

[993] *See* Proposing Release, *supra* note 13, at 18119, n. 235.

[994] As an additional example, nothing in adopted Regulation SCI should be construed as superseding any obligations under Regulation FD. SCI entities may also wish to consider staff guidance on this topic. *See* CF Disclosure Guidance: Topic No. 2, Cybersecurity (October 13, 2011), available at: *http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.*

[995] These examples included: Major systems architecture changes; reconfiguration of systems that would cause a variation greater than five percent in throughput or storage; the introduction of new business functions or services; changes to external interfaces; changes that could increase susceptibility to major outages; changes that could increase risks to data security; changes that were, or would be, reported to or referred to the entity's board of directors, a body performing a function similar to the board of directors, or senior management; and changes that could require

Proposed Rule 1000(b)(6)(i) would have required an SCI entity, absent exigent circumstances, to notify the Commission in writing at least 30 calendar days before implementation of any planned material systems changes, including a description of the planned material systems changes as well as the expected dates of commencement and completion of implementation of such changes. If exigent circumstances existed, or if the information previously provided to the Commission regarding any planned material systems change had become materially inaccurate, proposed Rule 1000(b)(6)(ii) would have required the SCI entity to notify the Commission, either orally or in writing, with any oral notification to be memorialized within 24 hours after such oral notification by a written notification, as early as reasonably practicable. A written notification to the Commission made pursuant to proposed Rule 1000(b)(6) would have been required to be made electronically on Form SCI and include all information as prescribed in Form SCI and the instructions thereto.

Proposed Rule 1000(b)(8)(ii) would have required each SCI entity to submit to the Commission a report, within 30 calendar days after the end of June and December of each year, containing a summary description of the progress of any material systems change during the six month period ending on June 30 or December 31, as the case may be, and the date, or expected date, of completion of implementation of such changes. A written notification to the Commission made pursuant to proposed Rule 1000(b)(8)(ii) would have been required to be made electronically on Form SCI and include all information as prescribed in Form SCI and the instructions thereto.

b. Quarterly and Supplemental Material Systems Change Reports—Rule 1003(a)

i. Adopted Rule 1003(a)(1): Quarterly Material Systems Change Reports

Many commenters viewed the proposed 30-day advance notification requirement for material systems changes as burdensome.[996] For example, one commenter believed that the Commission significantly underestimated the number of material systems changes, and suggested that the proposal might require reporting of as many as 60 material systems changes per week, rather than that same amount per year, as the Commission estimated in the SCI Proposal.[997] Some commenters stated that many SCI entities implement frequent agile modifications rather than major episodic or ''waterfall'' changes, and therefore viewed the proposed 30-day advance notification requirement as favoring a model that employs waterfall changes over agile changes.[998] Several commenters stated more broadly that the proposed requirement would mandate constant reporting that would stifle innovation, interfere with an SCI entity's natural planning and development process, and potentially do more harm than good by curtailing an SCI entity's ability to respond to systems issues with appropriate fixes.[999] Several commenters also expressed concern that the burden of reporting would incentivize an SCI entity to change its systems less often instead of making smaller and more frequent iterative systems adjustments, which they believed would be inconsistent with current software best practices, curtail innovation, and expose their systems to increased risk.[1000] One commenter questioned the purpose of the proposed requirement, stating that the Commission has not presented any empirical evidence that major or material technology changes by SCI entities are in fact the leading cause of market disruption, and that non-material systems changes by SCI entities and non-SCI entities have a high likelihood of causing market disruptions, but they are not captured by the proposal.[1001] At the same time, this commenter stated that providing 30-day advance notification of these non-material systems changes would hamstring SCI entities.[1002]

Some commenters also noted that Regulation ATS already requires an ATS to report material changes to the operation of the ATS at least 20 calendar days prior to their implementation.[1003] One of these commenters noted that it is common for an ATS to finalize the systems specifications for a change close to when the ATS wants to go live with the change, but the ATS must wait 20 days before implementation, and occasionally the questions from Commission staff can further delay implementation.[1004] This commenter expressed concern that Regulation SCI would lengthen the notification requirement to 30 calendar days and broaden the requirement to include any significant systems change, not just a material change to the operation of the ATS.[1005]

The Commission continues to believe that it is important to receive notifications of planned and implemented material changes to SCI systems or the security of indirect SCI systems in connection with its oversight of U.S. securities market infrastructure.[1006] However, after considering the views of commenters regarding the 30-day advance notification requirement, the Commission is instead adopting a quarterly reporting requirement, which will permit the Commission and its staff to have up-to-date information regarding an SCI entity's systems development progress and plans, to aid in understanding the operations and functionality of the systems and any material changes thereto, without requiring SCI entities to submit a notification to the Commission for each

allocation or use of significant resources. *See* Proposing Release, *supra* note 13, at 18105–06. These examples were cited in the 2001 Staff ARP Interpretive Letter. The Commission also stated its preliminary belief that any systems change occurring as a result of the discovery of an actual or potential systems compliance issue would be material. *See id.*

[996] *See, e.g.*, NYSE Letter at 26; BATS Letter at 14; ISE Letter at 8; BIDS Letter at 14; UBS Letter at 3–4; SIFMA Letter at 15; ITG Letter at 8 and 13; FIF Letter at 5; MFA Letter at 5–6; CME Letter at 11; FINRA Letter at 27; Joint SROs Letter at 7; and OTC Markets Letter at 20.

[997] *See* BATS Letter at 14. *See also* NYSE Letter at 26; and ISE Letter at 8 (stating that the proposal would require reporting of too many routine changes), and *infra* discussion of the definition of material systems change.

[998] *See* KCG Letter at 19; FIF Letter at 5; UBS Letter at 4; and ITG Letter at 8. ''Agile'' software development, which involves smaller, more frequent changes in software code, is contrasted with the ''waterfall'' methodology, which involves larger, episodic software overhauls.

[999] *See* KCG Letter at 19; FIF Letter at 5; UBS Letter at 4; BATS Letter at 14; and ITG Letter at 8. *See also* SunGard Letter at 3.

[1000] *See* KCG Letter at 19; FIF Letter at 5; UBS Letter at 4; BATS Letter at 14; and ITG Letter at 8. *See also* SIFMA Letter at 16.

[1001] *See* SunGard Letter at 3.

[1002] *See id.*

[1003] *See* BIDS Letter at 14; and ITG Letter at 8.

[1004] *See* ITG Letter at 8.

[1005] *See id.*

[1006] *See* Proposing Release, *supra* note 13, at 18122, 18144. As noted above, one commenter argued that the Commission has not presented any empirical evidence that major or material technology changes by SCI entities are in fact the leading cause of market disruption, and that non-material systems changes have a high likelihood of causing market disruptions. *See supra* note 1001 and accompanying text. The Commission notes that the primary purpose of Rule 1003(a) is not to prevent market disruptions. Rather, it is to keep the Commission and its staff informed of the systems changes that SCI entities determine to be material, which will assist the Commission with its oversight of U.S. securities market infrastructure. While the Commission acknowledges that non-material systems changes could cause market disruptions, the Commission agrees with this commenter that requiring Commission notification of all systems changes would be burdensome. *See supra* note 1002 and accompanying text (noting this commenter's view that providing 30-day advance notification of non-material systems changes would hamstring SCI entities).

material systems change.[1007] Specifically, Rule 1003(a)(1) requires an SCI entity, within 30 calendar days after the end of each calendar quarter, to submit to the Commission a report describing completed, ongoing, and planned material systems changes to its SCI systems and security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion.[1008]

The Commission believes that elimination of the 30-day advance notification requirement for material systems changes is responsive to commenters who were concerned that the proposed approach was unsuited to the agile systems development methodology that some SCI entities use today. In particular, an SCI entity will have the ability to implement material systems changes without having to individually report each material systems change to the Commission 30 days in advance, which commenters noted could lead SCI entities to favor the waterfall methodology of systems changes over the agile methodology.[1009] The Commission also believes that the adopted quarterly reporting requirement provides more flexibility to SCI entities with respect to the timing of implementing material systems changes. In particular, SCI entities will not be required to wait 30 calendar days after notifying the Commission in order to implement a material systems change. Therefore, the adopted rule is responsive to commenters who stated that the proposed rule would stifle innovation, interfere with an entity's planning and development process, and expose SCI entities' systems to risk. Moreover, the Commission believes that elimination of the proposed 30-day advance notification requirement is responsive to commenters' concern that ATSs are already required to report material changes to the operation of the ATSs at least 20 calendar days prior to implementation, and that proposed Regulation SCI would extend the advance notification period to 30 calendar days.[1010]

The Commission also believes that adopting the quarterly reporting requirement instead of the 30-day advance notification requirement lessens SCI entities' burden of compliance as compared to the proposal.[1011] For example, rather than submitting a Form SCI for each material systems change, an SCI entity is now required to submit four reports each year pursuant to Rule 1003(a)(1) and, as applicable, supplemental reports pursuant to Rule 1003(a)(2). To the extent certain material systems changes are related or similar, an SCI entity will not be required to separately notify the Commission of each change. Instead, the SCI entity can describe such related changes within the single quarterly report. The Commission also believes that this quarterly report process will provide the Commission and its staff with a more efficient framework to review material systems changes that are described in the larger context afforded by such periodic reports, rather than parsing every submission that reports a material systems change.[1012]

One commenter expressed concern that the proposed exception for exigent circumstances was too narrow.[1013] Because adopted Rule 1003(a)(1) requires quarterly reports of material systems changes rather than 30-day advance notification of each material systems change, the Commission is not adopting the proposed ''exigent circumstances'' exception. Specifically, the Commission notes that the purpose of the exception was to accommodate situations where it would not be prudent or desirable for an SCI entity to delay a systems change simply to provide 30-day advance notification of the change. At the same time, the Commission notes that, because Rule 1003(a)(1) requires in part a description of completed, ongoing, and planned material systems changes during the prior and current calendar quarters, an SCI entity's quarterly report will be required to include a description of all material changes to its SCI systems or the security of its indirect SCI systems, including those that have been implemented in response to exigent circumstances during the prior and current calendar quarters.

Several commenters suggested possible alternatives to the proposed requirements related to material systems changes. Some commenters suggested eliminating the proposed advance notification requirement for material systems changes.[1014] One of these commenters explained that information regarding material systems changes would be available to the Commission during an inspection, but stated that, if an advance notification requirement is adopted, it should be folded into the proposed semi-annual reporting requirement.[1015] Another commenter similarly urged that the Commission require only semi-annual reporting of material systems changes, as proposed in Rule 1000(b)(8).[1016] One commenter supported the reporting of material systems changes in the annual SCI review report.[1017] One commenter believed that information related to systems changes should be reported periodically.[1018] Another commenter noted that if the Commission retains the 30-day advance notification requirement, it should be limited to material systems changes of only higher priority SCI systems and that

[1007] As discussed in more detail below, the Commission is also not adopting the proposed definition of material systems change or the proposed semi-annual reporting requirement.

[1008] Using the quarter ending December 31, 2014 as an example, an SCI entity would be required to submit a report by January 30, 2015 (*i.e.*, within 30 calendar days after December 31, 2014) that describes material systems changes that the SCI entity has made (including the dates when those changes commenced and were completed), are currently implementing (including the dates when those changes commenced and are expected to be completed), and plan to make (including the dates those changes are expected to commence and complete) for the period from October 1, 2014 (the beginning of the prior calendar quarter) through June 30, 2015 (the end of the subsequent calendar quarter). The next report that corresponds to the quarter ending March 31, 2015 would be required to be submitted by April 30, 2015. As discussed in more detail below, Rule 1003(a)(2) requires an SCI entity to promptly submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a)(1).

[1009] At the same time, because systems changes utilizing the waterfall methodology are often planned well in advance, these systems changes would generally be included in the quarterly report, as Rule 1003(a) requires the quarterly report to describe, among other things, planned material systems changes during the subsequent calendar quarter. However, this requirement of Rule 1003(a) is not limited to planned material systems changes utilizing the waterfall methodology, but also would apply to planned material systems changes utilizing other development methodologies, including the agile methodology.

[1010] The Commission notes that the adoption of Rule 1003(a) does not affect an SCI ATS's existing obligation under Rule 301(b)(2)(ii) of Regulation ATS to file amendments on Form ATS at least 20 calendar days prior to implementing material change to the operation of the ATS. Therefore, with respect to a material systems change, an SCI ATS may be required to describe such change in a quarterly report under Rule 1003(a) and submit an amendment to Form ATS.

[1011] *See supra* notes 996–997 and accompanying text.

[1012] The Commission acknowledges that some systems changes deployed by an SCI entity may not by themselves be considered material by the SCI entity, but that, in the aggregate, can be considered material by the SCI entity (*e.g.*, making a series of small systems changes over time in order to implement a broad systems change). The Commission believes that the adopted quarterly reporting requirement is better suited to capture such changes than the proposed 30-day advance notification requirement (*i.e.*, 30-day advance notification for each single systems change that is by itself considered material by the SCI entity).

[1013] *See* BATS Letter at 15.

[1014] *See* MFA Letter at 7 and ITG Letter at 13–14. *See also* Joint SROs Letter at 8 (stating that material systems changes should be reported in a periodic, post-hoc basis, as was required under ARP).

[1015] *See* MFA Letter at 7.

[1016] *See* Direct Edge Letter at 8.

[1017] *See* CME Letter at 11.

[1018] *See* NYSE Letter at 27.

notifications of changes to lower criticality systems could be provided at the time of the change or periodically.[1019]

Some commenters suggested that the Commission provide more flexibility and allow SCI entities more time to report material systems changes.[1020] One commenter supported giving SCI entities discretion to determine the appropriate timing and format for reporting changes to the Commission, and stated that the current practice under ARP to submit quarterly reports that cover changes for the previous and upcoming quarters has proven effective in keeping the Commission staff apprised of planned and completed systems changes.[1021]

One commenter suggested that SCI entities be required to keep records of all systems changes and technical issues, and make that information available to the Commission upon request.[1022] If the Commission decides to retain the notification requirement, this commenter recommended that it be satisfied through periodic (ideally, quarterly) reporting of material systems changes.[1023] One commenter believed the Commission should allow all 30-day advance notifications regarding pending material systems changes to be communicated orally, and only submitted in writing after development and testing is completed and the feature is finalized.[1024]

The Commission believes that the adopted quarterly reporting requirement is responsive to commenters who requested additional flexibility or time for material systems change notifications, as well as to commenters who suggested that such notices be submitted on a periodic or quarterly basis.[1025] The Commission does not agree with the commenters who suggested that the Commission completely eliminate the advance notification requirements. The Commission believes that advance notifications of planned material systems changes will help ensure that the Commission has up-to-date information regarding important future systems changes at an SCI entity, to aid in its understanding of the operations and functionality of the systems post-change.[1026] As adopted, Rule 1003(a)(1) requires an SCI entity to provide the Commission with advance notification of planned material systems changes in the current and subsequent quarters through the quarterly reports. As noted above, after considering the views of commenters, the Commission is not adopting the proposed 30-day advance notification requirement for each material systems change.

The Commission is also not adopting commenters' suggestion that material systems changes be reported semi-annually or annually.[1027] As noted in the SCI Proposal, proposed Rule 1000(b)(8)(ii) required semi-annual reports because the proposal would have separately required information relating to each planned material systems change to be submitted at least 30 calendar days before its implementation.[1028] Thus, in the SCI Proposal, the Commission stated its preliminary view that requiring ongoing summary reports more frequently would not be necessary.[1029] At the same time, the Commission expressed the concern that a longer period of time would permit significant updates and milestones relating to systems changes to occur without notice to the Commission.[1030] Because the Commission is not adopting the 30-day advance notification requirement, the Commission believes that it is appropriate to require more frequent reports of material systems changes than on a semi-annual basis. Further, as noted above, some commenters suggested quarterly reports, which is consistent with the practice of some entities under the ARP Inspection Program.[1031]

The Commission does not agree with the commenter who suggested that Regulation SCI should only require SCI entities to keep records of all systems changes and make that information available to the Commission upon request.[1032] Similarly, the Commission does not agree with commenters who suggested that SCI entities be given discretion to determine the timing of the reports.[1033] The Commission believes that quarterly reporting of material systems changes will help ensure that the Commission has, on an ongoing basis, a comprehensive view and up-to-date information regarding material systems changes at an SCI entity.

With respect to the commenter who suggested that all 30-day advance material systems change notifications should be provided orally, and submitted in writing only after the changes are fully tested and implemented,[1034] the Commission notes that it is not adopting the proposed 30-day advance notification requirement for material systems changes.

With respect to the commenter who suggested giving SCI entities discretion to determine the format for reporting changes to the Commission,[1035] the Commission notes that Rule 1003(a) does not prescribe a specific style that the quarterly reports should take. The Commission intends for the quarterly report to allow the Commission and its staff to gain a sufficient level of understanding of the material systems changes that have been implemented, are on-going, and are planned for the future, which would aid the Commission and its staff in understanding the operations and functionality of the systems of an SCI entity and any changes to such systems. In particular, the Commission notes that Rule 1003(a)(1) only specifically requires the quarterly reports to ''describe'' the material systems changes and the dates or expected dates of their commencement and completion. Therefore, Rule 1003(a)(1) gives each

[1019] *See* SIFMA Letter at 15.

[1020] *See* NYSE Letter at 27; FINRA Letter at 27; and MSRB Letter at 22. *See also* CME Letter at 11 (stating ''instead of setting firm time limits under which an entity is required to submit notifications of material systems changes under Rule 1000(b)(6), the Commission should instead simply require 'timely advance notice of all material planned changes to SCI systems that may impact the reliability, security, or adequate scalable capacity of such systems''').

[1021] *See* FINRA Letter at 27.

[1022] *See* OTC Markets Letter at 20.

[1023] *See id.* This commenter also noted that this would allow for the elimination of proposed Rule 1000(b)(6)(ii), which required notices for material inaccuracies in prior notifications. *See* OTC Markets Letter at 20–22. According to this commenter, quarterly updates would disclose material deviations from plans described in a previous report, whether stemming from inaccuracies in prior reports or new information that prompts beneficial deviations from a systems implementation plan. *See id.*

[1024] *See* Omgeo Letter at 22.

[1025] Because the Commission is only adopting a quarterly reporting requirement for material systems changes, the adopted approach is responsive to a commenter's suggestion that notifications of changes to lower criticality systems could be provided at the time of the change or periodically. *See supra* note 1019 and accompanying text.

[1026] The Commission acknowledges that there may occasionally be unexpected material systems changes that are not reported to the Commission in advance, but expects that material systems changes generally will be planned well in advance and reported in the quarterly report accordingly.

[1027] *See supra* notes 1015–1017 and accompanying text.

[1028] *See* Proposing Release, *supra* note 13, at 18124.

[1029] *See id.*

[1030] *See id.*

[1031] *See supra* notes 1021, 1023 and accompanying text.

[1032] *See supra* note 1022 and accompanying text. As discussed above, this commenter also stated that, if the Commission decides to retain the notification requirement for material systems changes, the Commission should require periodic (ideally, quarterly) reporting. *See supra* note 1023 and accompanying text. Adopted Rule 1003(a)(1) is consistent with this commenter's alternative suggestion.

[1033] *See supra* note 1021 and accompanying text. *See also supra* note 1020.

[1034] *See supra* note 1024 and accompanying text.

[1035] *See supra* note 1021 and accompanying text.

SCI entity reasonable flexibility in determining precisely how to describe its material systems changes in the report in a manner that best suits the needs of that SCI entity as well as the needs of the Commission and its staff.[1036] In addition, to the extent the Commission seeks additional information about a given change noted in a quarterly report, an SCI entity would be required to provide Commission staff with such information in accordance with Rule 1005 (Recordkeeping Requirements Related to Compliance with Regulation SCI).[1037]

The Commission also notes that the quarterly reports are required to include descriptions of material systems changes during the prior calendar quarter that were completed, ongoing, or planned. Therefore, if a report for the first quarter of a given year discusses the SCI entity's plan to implement a particular series of material changes to an SCI system, Rule 1003(a)(1) requires that, in the report for the second quarter of that year, the SCI entity describe the material systems changes that were completed, ongoing, and planned in the first quarter, including the planned changes discussed in the prior quarter's report, as applicable.

Several commenters expressed concern that the proposed 30-day advance notification requirement would potentially give the Commission new authority to ''reject'' a Form SCI filing describing material systems changes, similar to the way the Commission may reject an improperly filed proposed rule change pursuant to Rule 19b–4 under the Exchange Act.[1038] Three commenters requested that the Commission clarify how proposed Rule 1000(b)(6) would relate to Rule 19b–4, suggesting that there may be unnecessary redundancy between the two processes.[1039] Another commenter suggested limiting the types of changes that would require 30-day advance notification to those changes that are already required to be filed with the Commission as proposed rule changes for immediate effectiveness under Section 19(b)(3)(A) of the Exchange Act (excluding those filings that would not become operative for 30 days after the date of the filing because those filings would already provide the Commission with 30 days' advance notification of the material systems changes).[1040] This commenter also noted that where a material systems change would be filed for approval under Section 19(b)(2) of the Exchange Act, the Section 19(b)(2) approval process provides the Commission sufficient notification of the systems change.[1041] One commenter stated that proposed Rule 1000(b)(6) was improperly premised on the notion that the Commission should be responsible for a minutely-detailed understanding of the IT infrastructure of SCI entities and for assessing prospective changes in advance of their implementation.[1042]

The Commission disagrees with commenters who believed that material systems change reports are redundant given the rule filing requirements of Rule 19b–4 under the Exchange Act, or that material systems change reports should not be required if the SCI entity submitted certain types of rule filings regarding the same change.[1043] The Commission acknowledges that some systems changes require proposed rule changes under Rule 19b–4, and some Rule 19b–4 proposed rule changes result in systems changes. However, based on Commission staff's experience with the ARP Inspection Program and the rule filing process, the Commission believes that the type of information regarding systems changes included in rule filings is different from the type of information that will be included in reports on material systems changes. In particular, the technical details or specifications of SCI systems and indirect SCI systems are generally not specifically set forth in the rules of an SCI SRO. Therefore, technical information regarding systems changes is usually not set forth in rule filings. In addition, the Commission notes that the rule filing process and the material systems change reports serve different purposes. In particular, the material systems change reports are intended to inform the Commission and its staff of important technical changes to an SCI entity's systems. On the other hand, the rule filing process provides notice of changes to an SCI entity's rules, including, for example, the statutory basis for such changes, and in some cases seeks approval by the Commission of the rule changes. Therefore, if an SCI SRO submits a rule filing regarding a particular systems change and the change is also included in a material systems change report, the information included in the rule filing may not necessarily further the goal of the material systems change reporting requirement, and the information included in the material systems change report may not necessarily assist in the Commission's review of the rule filing. Moreover, commenters' concern regarding the redundancy between the rule filing process and the material systems change reports stemmed from concerns regarding the 30-day advance notification requirement. As discussed above, the Commission is not adopting a 30-day advance notification requirement.

The Commission also reiterates that the material systems change reports are intended to inform the Commission and its staff of such changes and help the Commission in its oversight of U.S. securities market infrastructure. Regulation SCI does not provide for a new approval process for SCI entities' material systems changes. As such, Commission staff will not use material systems change reports to require any approval of prospective systems changes in advance of their implementation pursuant to any provision of Regulation SCI,[1044] or to delay implementation of material systems changes pursuant to any provision of Regulation SCI.[1045]

Three commenters questioned the Commission's legal authority to adopt the proposed material systems change notification requirements, including, in particular, those set forth in proposed Rule 1000(b)(6).[1046] For the reasons

[1036] *See also* Omgeo Letter at 43 (requesting that the Commission specify in the final rule the required content for a planned material systems change notification).

[1037] *See infra* Section IV.C.

[1038] *See* Omgeo Letter at 23; and SIFMA Letter at 16. *See* Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b).

[1039] *See* KCG Letter at 19; Joint SROs Letter at 8; and FIF Letter at 5.

[1040] *See* MSRB Letter at 22.

[1041] *See* MSRB Letter at 22. This commenter also suggested that material systems changes (other than those filed pursuant to Rule 19b–4 under the Exchange Act) be reported semi-annually, or that de minimis changes be excepted from the notice requirement altogether if the Commission continues to require 30-day advance notification. *See* MSRB Letter at 22–23. As discussed above, the Commission is adopting a quarterly reporting requirement for systems changes that an SCI entity determines to be material.

[1042] *See* Direct Edge Letter at 1, 8. *See also* ITG Letter at 13–14 (stating that the Exchange Act does not enable the Commission to ''bootstrap its SRO rule review authority or its national market system authority to force regulated entities to submit upcoming material systems changes for agency approval'' and that ''the Commission need only receive notifications when they are a significant part of proposed rule changes by SROs or amendments to Form ATS of material changes to the operation of the ATS'').

[1043] *See supra* notes 1039–1041 and accompanying text. The Commission notes that the requirement under Regulation SCI to submit reports of material systems changes does not alter an SRO's obligation to file proposed rule changes, the obligation of participants of an SCI Plan to file a proposed amendment to such SCI Plan, or any other obligation any SCI entity may have under the Exchange Act or rules thereunder.

[1044] *See supra* note 1042 and accompanying text.

[1045] *See supra* note 1038 and accompanying text.

[1046] *See* NYSE Letter at 4 (stating the belief that ''[a]uthority to facilitate a national market or assure economically efficient execution of securities transaction is remote from close, minute regulation of computer systems and computer security''); ITG Letter at 13 (stating the belief that the proposed notification requirement for material systems

discussed above in Section IV.B.3.c, the Commission disagrees with these comments and believes that adopted Rule 1003(a) will assist the Commission in its oversight of U.S. securities market infrastructure consistent with its legal authority under the Exchange Act.

In light of the 30-day advance notification requirement in proposed Rule 1000(b)(6), some commenters suggested eliminating the semi-annual reporting requirement in proposed Rule 1000(b)(8)(ii) because they considered it duplicative and unnecessary.[1047] One commenter believed that the required semi-annual reporting requirement was excessive and should instead be incorporated into the annual reporting obligations in proposed Rule 1000(b)(8)(i).[1048] As discussed above, the Commission is adopting a quarterly reporting requirement under Rule 1003(a)(1) and is not adopting the proposed 30-day advance notification requirement. Therefore, the Commission is not adopting the requirement in proposed Rule 1000(b)(8)(ii) for semi-annual progress reports.

ii. Definition of Material Systems Change

Commenters generally opposed the proposed definition of material systems change. Many commenters stated their belief that the term was too broad and would therefore necessitate an excessive number of notifications of material systems changes.[1049] Some commenters believed that the definition should be revised and offered a variety of suggestions.[1050] Several commenters advocated for creating a risk-based definition whereby, for example, notifications are only required for those material systems changes that pose a risk to critical operations of an entity.[1051] One commenter suggested that the requirement focus on SCI systems only.[1052] One commenter stated that SCI entities should be afforded flexibility to establish reasonable standards for defining material systems changes for their systems.[1053]

Several commenters sought guidance from the Commission on the materiality threshold, which commenters believed was unclear, explaining, for example, that the term ''material'' appears both in the term ''material systems change'' and in the definition of that term.[1054] Similarly, several commenters requested that the Commission provide more guidance on the meaning of ''material'' in the context of systems changes because, although the wording of the proposed definition contained the concept of ''materiality,'' the commenters believed some of the examples provided in the SCI Proposal to be non-material.[1055] One commenter asked that the Commission clearly define what types of systems changes are not subject to the prior notification requirement in order to avoid receiving notices of all systems changes, material or otherwise.[1056] One commenter asked that the Commission clarify the meaning of ''material'' and confirm that prior notification would not be required for changes that do not pertain to the production environment.[1057]

Rather than adopting a detailed definition of material systems change as proposed, Rule 1003(a)(1) requires an SCI entity to establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and to report to the Commission those changes the SCI entity identified as material in accordance with such criteria. This change is responsive to a commenter's suggestion that SCI entities should be granted flexibility to establish reasonable standards for determining whether a systems change is material. In addition, the Commission does not believe that it is appropriate to adopt a precise definition for the term ''material systems change'' because SCI entities differ in nature, size, technology, business model, and other aspects of their businesses. The Commission notes that there currently is no industry definition of ''material systems change'' that is applicable to all SCI entities that can serve as the basis for a precise definition of the term ''material systems change'' in Regulation SCI, and believes that whether a systems change is material is dependent on the facts and circumstances, such as the reason for the change and how it may impact operations. Moreover, requiring SCI entities to establish their own reasonable criteria for identifying material systems changes reflects the Commission's view that an SCI entity is in the best position to determine, in the first instance, whether a change, or series of changes, is material in the context of its systems. Because adopted Rule 1003(a)(1) allows each SCI entity to identify material systems changes, it is responsive to commenters' concern that the proposed definition was too broad and would result in an excessive number of notifications, and to commenters' suggestion that the definition should be revised.

Further, the Commission's determination to not adopt the proposed definition of material systems change mitigates commenters' concern that the proposed definition was unclear. In particular, by eliminating the proposed definition of material systems change, the Commission seeks to eliminate the confusion caused by the proposed definition of this term, which contained the word ''material.'' Moreover, some commenters requested additional clarity on the definition of material systems change because they believed that some of the examples the Commission provided in the SCI Proposal were not material systems changes. Because adopted Rule 1003(a)(1) requires SCI entities to establish reasonable written criteria for identifying material systems changes, SCI entities will not be required to identify material systems changes in accordance with the detailed definition and examples from the SCI

changes ''would extend the SEC's reach far beyond that of a securities regulator and instead enable it to regulate the IT process of marketplace participants'' and that the Exchange Act does not enable the Commission to ''bootstrap its SRO rule review authority or its national market system authority to force regulated entities to submit upcoming material systems changes for agency approval''); and KCG Letter at 19 (stating the belief that ''[t]he Commission does not have authority to stop implementation of systems changes by ATSs or systems changes that exchanges are not required to submit under Section 19(b) of the Exchange Act'').

[1047] *See* Omgeo Letter at 24–25; and OCC Letter at 16.

[1048] *See* CME Letter at 11.

[1049] *See, e.g.,* BATS Letter at 14; MFA Letter at 6; ICI Letter at 4; BIDS Letter at 14; Liquidnet Letter at 3; FINRA Letter at 24–26; MSRB Letter at 22; NYSE Letter at 26–27; Joint SROs Letter at 7; CME Letter at 5; Oppenheimer Letter at 3; OTC Markets Letter at 20–21; and Direct Edge Letter at 3.

[1050] *See, e.g.,* BATS Letter at 14–15 (recommending that only those material systems changes that are reported to an SCI entity's board of directors or similar body should be required to be reported to the Commission, which BATS stated is the standard it uses currently for the ARP Inspection Program); OCC Letter at 15 (stating that the reporting of systems changes to the board of directors, or to a similar governing body, is a more appropriate standard for determining materiality than reporting to ''senior management''); BIDS Letter at 14–15 (stating its belief that the Commission should define a ''material systems change'' to be a large-scale architectural upgrade, the implementation of industry-wide rules or other market structure changes, or other technology changes that may be required because of changes in trading rules defined in the exchange's or the ATS's trading rule book); and FIF Letter at 5 (recommending that the term be defined to include significant functional enhancements, major technology infrastructure changes, or changes requiring member/participant notifications).

[1051] *See, e.g.,* OCC Letter at 15; DTCC Letter at 16; Liquidnet Letter at 3; MFA Letter at 6; ICI Letter at 4; CME Letter at 5; and Direct Edge at 4.

[1052] *See* NYSE Letter at 27.

[1053] *See* FINRA Letter at 27.

[1054] *See* Direct Edge Letter at 3–4; OCC Letter at 15; and NYSE Letter at 26.

[1055] *See, e.g.,* Joint SROs Letter at 7; DTCC Letter at 15–16; Omgeo Letter at 23; OCC Letter at 15; FINRA Letter at 27; OTC Markets Letter at 20–21; BIDS Letter at 14; Direct Edge Letter at 3–4; and ISE Letter at 8. *See also* supra note 1050.

[1056] *See* KCG Letter at 20.

[1057] *See* SIFMA Letter at 15–16.

Proposal. Rather, an SCI entity will have reasonable discretion in establishing the written criteria in order to capture the systems changes that it believes are material. Specifically, the Commission believes that adopted Rule 1003(a) is sufficiently flexible to allow each SCI entity to identify changes that it believes are material, which may include some of the suggestions identified by the commenters if an SCI entity determines such changes to be appropriate to include in its criteria for identifying material systems changes. For example, if an SCI entity reasonably believes that its systems changes are material if they involve significant functional enhancements, major technology infrastructure changes, or changes requiring member/participant notifications, and such criteria is set forth in the SCI entity's reasonable written criteria, the SCI entity may identify material systems changes in accordance with such written criteria. Likewise, if an SCI entity reasonably believes that some of the examples of material systems changes identified in the SCI Proposal can appropriately serve as criteria for identifying material systems changes, and such criteria is set forth in the SCI entity's reasonable written criteria, the SCI entity may identify material systems changes in accordance with such written criteria.

In response to a commenter's suggestion that the Commission clearly define what types of systems changes are not subject to the prior notification requirement in order to avoid notification of all systems changes, material or otherwise, the Commission notes that Rule 1003(a)(1) specifically requires SCI entities to identify material systems changes and report only material systems changes. With respect to a commenter's question regarding whether prior notification would be required for changes that do not pertain to the production environment, the Commission notes that SCI systems do not include development and testing systems, although indirect SCI systems could include development and testing systems if they are not walled-off from SCI systems. Therefore, Rule 1003(a) could apply to material changes to the security of development and testing systems that are not walled-off from SCI systems. Finally, with respect to a commenter's suggestion that Rule 1003(a) focus only on SCI systems, the Commission believes that notifications of material systems changes regarding the security of indirect SCI systems is important to the Commission's oversight of U.S. securities market infrastructure. At the same time, the Commission notes that Rule 1003(a)(1) provides that each SCI entity establish its own reasonable criteria for identifying a change to the security of its indirect SCI systems as material. Therefore, to the extent that an SCI entity determines that certain changes to the security of its indirect SCI systems are not material in accordance with its reasonable written criteria, such changes are not required to be reported to the Commission.

As with an SCI entity's other policies and procedures under Regulation SCI, Commission staff may review an SCI entity's established criteria relating to the materiality of a systems change (*e.g.,* in the course of an examination) to determine whether it agrees with the SCI entity's assessment that such criteria is reasonable and in compliance with the requirements of Rule 1003(a). The Commission believes that, by providing SCI entities flexibility in establishing the criteria and reviewing SCI entities' established criteria, it strikes the proper balance between granting discretion to SCI entities and ensuring that SCI entities carry out their obligations under Regulation SCI.

iii. Adopted Rule 1003(a)(2): Supplemental Material Systems Change Reports

A commenter who advocated for a quarterly reporting requirement noted that quarterly updates would disclose material deviations from plans described in a previous report, including those stemming from inaccuracies in prior reports.[1058] Another commenter similarly noted that periodic reporting of any inaccuracies is sufficient for oversight purposes.[1059] The Commission believes that there may be circumstances in which an SCI entity realizes that information previously provided to the Commission in a quarterly report was materially inaccurate or that the quarterly report omitted material information. The Commission believes that it should, on an ongoing basis, have complete and correct information regarding material systems changes at an SCI entity, rather than waiting until the next quarterly report to receive corrected information, as suggested by these commenters. The Commission is therefore adopting Rule 1003(a)(2), which requires an SCI entity to promptly submit a supplemental report to notify the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a)(1). The Commission notes that the supplemental report requirement applies only if the error or omission in a prior report is material.

5. SCI Review—Rule 1003(b)

Proposed Rule 1000(b)(7) required an SCI entity to conduct an SCI review of the SCI entity's compliance with Regulation SCI not less than once each calendar year, and submit a report of the SCI review to senior management of the SCI entity no more than 30 calendar days after completion of such SCI review.[1060] Further, proposed Rule 1000(b)(8)(i) required an SCI entity to submit to the Commission a report of the SCI review required by paragraph (b)(7), together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity.[1061]

Proposed Rule 1000(a) defined the term ''SCI review'' to mean a review, following established procedures and standards, that is performed by objective personnel having appropriate experience in conducting reviews of SCI systems and SCI security systems, and which review contains: (1) A risk assessment with respect to such systems of the SCI entity; and (2) an assessment of internal control design and effectiveness to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.[1062] In addition, the proposed definition provided that such review must include penetration test reviews of the SCI entity's network, firewalls, and production systems at a frequency of not less than once every three years.[1063]

The Commission is adopting the provisions relating to SCI reviews with modifications in response to comment. In addition, the Commission is adopting a definition of ''senior management'' in Rule 1000 for purposes of the SCI review requirement.

Some commenters expressed support for the proposed requirements for SCI reviews,[1064] with a few advocating that the SCI review be conducted by an independent third party, rather than ''objective personnel.''[1065] One commenter noted that it agreed that annual SCI reviews and reports can have a meaningful impact on improving

[1058] *See* OTC Markets Letter at 22.

[1059] *See* NYSE Letter at 28.

[1060] *See* proposed Rule 1000(b)(7) and Proposing Release, *supra* note 13, at Section III.C.5.

[1061] *See* proposed Rule 1000(b)(8)(i) and Proposing Release, *supra* note 13, at Section III.C.6.

[1062] *See* proposed Rule 1000(a) and Proposing Release, *supra* note 13, at Section III.C.5.

[1063] *See id.*

[1064] *See, e.g.,* MSRB Letter at 23; Lauer Letter at 5; Better Markets Letter at 5; and Direct Edge Letter at 9.

[1065] *See* Lauer Letter at 5; Better Markets Letter at 5; and BlackRock Letter at 4.

technology and business practices.[1066] Another commenter expressed support for proposed Rule 1000(b)(7), but asked for clarification that any review of a processor under an NMS plan be performed independently of reviews of the same entity in other capacities (*e.g.,* as an exchange or other SCI entity).[1067]

With regard to the suggestion that the Commission adopt a requirement that SCI reviews be conducted by an independent third party rather than ''objective personnel'' as proposed,[1068] the Commission continues to believe that it is appropriate to permit SCI reviews to be performed by personnel of the SCI entity or an external firm, provided that such personnel are, in fact, objective and, as required by rule, have the appropriate experience to conduct reviews of SCI systems and indirect SCI systems. Experienced personnel should have the knowledge and skills necessary to conduct such reviews. In the SCI Proposal, the Commission noted that to satisfy the criterion that an SCI review be conducted by ''objective personnel,'' it should be performed by persons who have not been involved in the development, testing, or implementation of such systems being reviewed.[1069] The Commission continues to believe that persons who were not involved in the process for development, testing, and implementation of the systems being reviewed would generally be in a better position to identify weaknesses and deficiencies that were not identified in the development, testing, and implementation stages. The Commission believes that, given the requirement that such personnel be ''objective,'' any personnel with conflicts of interest that have not been adequately mitigated to allow for objectivity should be excluded from serving in this role. In particular, the Commission believes that a person or persons conducting an SCI review should not have a conflict of interest that interferes with their ability to exercise judgment, express opinions, and present recommendations with impartiality. While the Commission recognizes that, as one commenter asserted, all personnel of an SCI entity could be viewed as having some level of conflict of interest,[1070] the Commission believes that SCI entities can have appropriate policies and procedures in place to mitigate such conflicts or to help ensure that certain departments and/or specified personnel (such as internal audit departments) are appropriately insulated from such conflicts so as to be able to objectively conduct SCI reviews.[1071]

Accordingly, the Commission believes that the goals of Regulation SCI can be achieved through reviews by either internal objective personnel or external objective personnel. Taking into consideration the advantages and disadvantages associated with each approach, each SCI entity should make its own determination regarding the levels of review or assurance that can be provided by different personnel, the best means to ensure their objectivity, and whether it is appropriate to incur the additional costs of an independent third party review. An SCI entity may, for example, determine that it is appropriate to utilize personnel not employed by the SCI entity (*i.e.,* third parties) to conduct such review each year or only on a less frequent, periodic basis (*e.g.,* every three years), or only with regard to certain of its systems. In addition, with regard to one commenter's suggestion that an SCI review should be performed independently for each capacity in which an SCI entity acts, the Commission notes that the definition of SCI review and provisions of Rule 1003(b) require that an SCI entity perform a review, following established procedures and standards, for compliance with Regulation SCI that includes a risk assessment of the SCI entity's SCI systems and indirect SCI systems and an assessment of internal control design and effectiveness of such systems and does not require an SCI entity that serves in two different capacities with respect to Regulation SCI to conduct two independent SCI reviews. The Commission believes that, as a practical matter, an SCI entity may determine that, to comply with these requirements, it is necessary to conduct separate assessments and analysis for each capacity of the SCI entity, because the standards used, risk assessments, applicable policies and procedures, and assessment of internal control design and effectiveness are different with regard to the distinct and differing functions of the SCI entity in each capacity. For example, an entity that meets both the definition of an SCI SRO and a plan processor may determine that it is necessary to conduct separate reviews for each function performed, because, for instance, the findings of a risk assessment determine that certain SCI systems fall into the category of ''critical SCI systems'' with regard to the functions of the plan processor, but not with regard to the functions of the SRO. At the same time, the Commission notes that, even where separate reviews are conducted, there may be certain overlap in conducting such reviews (for example, the entity may use the same objective reviewer for each function performed), such reviews may be conducted at the same time, and a single SCI review report may contain findings for each capacity.

While other commenters also supported some form of review, many of these commenters stated that the term SCI review is defined too broadly and/or that the SCI review requirements should allow more flexibility.[1072] Some commenters expressed concerns about the need to review all systems on an annual basis, which they argued could be costly, burdensome, and unnecessary.[1073] Several commenters suggested the adoption of a risk-based approach for determining the scope of the review, which would entail conducting a risk assessment to determine which systems should be reviewed and how often.[1074] Under such an approach, the highest risk systems would be reviewed more frequently than other, less critical systems, which could be reviewed less frequently than annually or on a rotational basis. Similarly, one

[1066] *See* FIF Letter at 6 (expressing support for the SCI review requirement while also providing suggestions for modifications to the rule).

[1067] *See* Direct Edge Letter at 9.

[1068] *See supra* note 1065 and accompanying text.

[1069] *See* Proposing Release, *supra* note 13, at 18123.

[1070] *See* Better Markets Letter at 5.

[1071] For example, the Commission believes that many entities implement a reporting structure pursuant to which internal audit employees or departments report directly to the board of directors or an audit committee of the board. The Commission notes that, while utilizing external personnel (*i.e.,* third parties) to conduct an SCI entity's SCI review generally would not raise the same concerns regarding objectivity, the SCI entity would likewise need to mitigate any conflicts of interest that would prevent such personnel from meeting the objectivity standard required for an SCI review. For example, among the factors an SCI entity may consider in evaluating the objectivity of a third party review could be who within the SCI entity is managing the third party review, is setting the scope of review, is authorizing payment for such review, and has the authority to review and comment on the third party report, among others. Further, an SCI entity may consider the third party's ability to remain objective in light of any other services provided by the third party to the SCI entity.

[1072] *See, e.g.,* FINRA Letter at 39–41; Omgeo Letter at 23–24; OCC Letter at 19; NYSE Letter at 35; SIFMA Letter at 17; DTCC Letter at 16–17.

[1073] *See, e.g.,* FINRA Letter at 39–41; Omgeo Letter at 23–24; OCC Letter at 19; NYSE Letter at 35; DTCC Letter at 16–17; and BIDS Letter at 11.

[1074] *See, e.g.,* FINRA Letter at 39–41; OCC Letter at 19; NYSE Letter at 35; SIFMA Letter at 17; DTCC Letter at 16–17; LiquidPoint Letter at 3; and Omgeo Letter at 24. One commenter noted that the proposed SCI review requirement essentially eliminated the ability to utilize its current risk assessment approach to determine the frequency of review for each system (ranging from annually to once every four years). *See* FINRA Letter at 40.

commenter recommended that SCI reviews should be focused only on those core systems capable of having a material impact on members or participants, and ''adjacent'' systems should not be subject to the review process.[1075]

After considering the views of commenters, the Commission has determined to adopt the provisions relating to SCI reviews with modifications in response to comment.[1076] Thus, adopted Rule 1003(b) requires an SCI entity to conduct an SCI review of the SCI entity's compliance with Regulation SCI not less than once each calendar year.[1077] However, the Commission notes that, because it has revised the scope of the definition of ''SCI systems'' as described above, fewer systems of each SCI entity will be subject to the SCI review, thereby focusing the overall scope of the SCI review requirement.[1078] Further, to address some commenters' concerns about the burdens and inflexibility of the proposed rule and the recommendation that the proposed rule utilize a more risk-based approach, the adopted rule is being revised to allow assessments of SCI systems directly supporting market regulation or market surveillance to be conducted, based upon a risk-assessment, at least once every three years, rather than annually.[1079] SCI entities would be required to determine the specific frequency with which to conduct assessments of these systems depending on the risk assessment that they conduct as part of the annual SCI review, provided that these systems are assessed at least once every three years. The Commission believes that market regulation and market surveillance systems have the potential to pose less risk to an entity or the market than other SCI systems. While the Commission believes that these systems are essential to investor protection and market integrity and that they can pose a significant risk to the markets in the event of a systems issue, the Commission also believes that certain market regulation and market surveillance systems may not have as immediate or widespread of an impact on the maintenance of fair and orderly markets or an entity's operational capability as the other categories of systems included within the definition of SCI systems. While a systems issue affecting a trading system could result in the immediate inability of a market, and thus market participants, to continue trading on such system and potentially impact trading on other markets as well, the Commission believes that the temporary disruption or failure of a SCI entity's market regulation and/or market surveillance systems in the wake of a wide-scale disruption would likely not have as direct an impact on market participants' ability to continue to trade. Thus, after considering commenters' views regarding the costs and burdens of the proposed SCI review requirements, as well as the suggestion that the Commission incorporate more of a risk-based approach in Regulation SCI, the Commission believes that a longer frequency of review of these systems may be appropriate in cases where the risk assessment conducted as part of the SCI review results in such a determination. The Commission also notes that, as originally proposed the rule would have required penetration test reviews of the SCI entity's network, firewalls and development, testing, and production systems at a frequency of not less than once every three years in recognition of the potentially significant costs that may be associated with the performance of such tests.[1080] However, consistent with modifications to the definition of SCI systems, references to development and test systems have been deleted in adopted Rule 1003(b)(1)(i).[1081] The Commission notes that SCI entities may, however, determine that based on its risk assessment, it is appropriate and/or necessary to conduct such penetration test reviews more frequently than once every three years.

The Commission is not, however, adopting a broader risk-based approach to determine the required frequency of an SCI review (*i.e.,* for SCI systems other than market regulation and market surveillance systems), as suggested by some commenters.[1082] The Commission believes that a critical element to ensuring the capacity, integrity, resiliency, and availability of SCI systems and indirect SCI systems is conducting an annual objective review to assess the risks of an SCI entity's systems and the effectiveness of its internal information technology controls and procedures. Such reviews will not only assist the Commission in improving its oversight of the technology infrastructure of SCI entities, but also each SCI entity in assessing the effectiveness of its information technology practices, helping to ensure compliance with the safeguards provided by the requirements of Regulation SCI, identifying potential areas of weakness that require additional or modified controls, and determining where to best devote resources. Further, the Commission believes that the competitive environment of today's securities markets drives SCI entities to continually update, modify, and introduce new technology and systems, often in an effort to meet specific business needs and achieve ''quick-to-market'' results, potentially without

[1075] *See* FIF Letter at 6.

[1076] *See* adopted Rule 1003(b). However, the Commission is moving the clause regarding penetration test reviews from the definition of SCI review into Rule 1003(b), which addresses the timing of reviews. Further, the adopted definition of SCI review will require that the objective reviewer have ''appropriate experience to conduct reviews'' rather than ''appropriate experience in conducting reviews'' as proposed. The Commission believes this revision is appropriate given that, prior to the adoption of Regulation SCI today, no individual or entity would have experience in conducting the specific SCI reviews required by Rule 1003(b). Rather, the Commission believes that there are individuals or entities that have experience in conducting reviews, audits, and/or testing similar to the functions that would be necessary to address certain aspects of the SCI review requirement, and thus, the objective reviewer should have this type of appropriate experience that would allow them to conduct SCI reviews in accordance with the requirements of Regulation SCI. Thus, as adopted, the term ''SCI review'' means ''a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains: (1) A risk assessment with respect to such systems of an SCI entity; and (2) An assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.'' *See* Rule 1000. Further, the Commission is moving the requirement relating to reports to the Commission on SCI reviews from proposed Rule 1000(b)(8) into Rule 1003(b) so that all provisions regarding SCI reviews are in the same rule.

[1077] *See* adopted Rule 1003(b)(1).

[1078] The Commission also notes that it has clarified that the definition of ''indirect SCI systems'' includes only those systems that have not been effectively logically or physically separated from SCI systems. Thus, the scope of the SCI review is also more focused than what some commenters may have believed. It is also further focused by the elimination of references to development and test systems from the penetration test requirement in adopted in Rule 1003(b)(1)(i).

[1079] *See* adopted Rule 1003(b)(1)(ii).

[1080] As noted by some commenters, penetration tests are highly technical and would require special expertise, and thus the Commission believes such testing could potentially require substantial costs. *See, e.g.,* DTCC Letter at 17; and Omgeo Letter at 44. *See also infra* Sections V.D.2.d and VI.C.2.b.vi (discussing estimated costs associated with the SCI review requirement, which takes into consideration the costs of penetration testing) and Proposing Release, *supra* note 13, at 18123 (stating that the Commission seeks to balance the frequency of such tests with the costs associated with performing the tests). As noted in the SCI Proposal, the Commission believes that the penetration test reviews should help an SCI entity evaluate the system's security and resiliency in the face of attempted and successful intrusions. *See id.*

[1081] *See supra* Section IV.A.2.b (discussing elimination of development and test systems from the definition of SCI systems).

[1082] *See supra* note 1074 and accompanying text.

adequate focus on ensuring the continuous integrity of its systems. In addition, given today's fast-paced nature of technological advancement, existing controls can quickly become obsolete or ineffective and the relative criticality or risk nature of a system can change over time as well.[1083] Further, as one commenter noted, it is not uncommon for entities to experience repeated unsuccessful attempts to gain access to their systems,[1084] which the Commission believes can expose certain vulnerabilities not identified previously and, if successful, also create new vulnerabilities and risk. For these reasons, the Commission believes that it is appropriate to require an SCI entity to conduct an SCI review of its applicable systems not less than once every 12 months.[1085]

Further, the Commission notes that, as described in detail above, Regulation SCI is consistent with a risk-based approach in several areas, and thus, a risk assessment is appropriate in order to determine the standards and requirements applicable to a given SCI system. As such, the Commission believes that it is appropriate to require SCI entities to conduct a risk-based assessment with regard to its SCI systems and indirect SCI systems as part of its SCI review at least annually to help ensure that SCI entities are meeting the requirements of Regulation SCI.[1086]

For the reasons noted above, the Commission believes it is appropriate to require that SCI reviews be conducted at least annually, rather than utilizing a risk-based approach to determine the *frequency* of the required SCI review.[1087] At the same time, the Commission notes that this provision is consistent with a risk-based approach in that SCI entities may design the scope and rigor of the SCI review for a particular system based on its risk assessment of such system, provided that the review meets the requirements of the rule, such as including an assessment of internal control design and effectiveness to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards[1088] and performing penetration test reviews at least once every three years.[1089]

Some commenters sought clarification on various aspects of the SCI review requirement. One commenter stated that the term SCI review, as proposed, expanded significantly on what is required under ARP and asked for greater specificity as to the objectives and intended scope of the SCI review.[1090] This commenter suggested, as an alternative, that the Commission establish an ''agreed upon procedures'' approach, which would involve outlining specific SCI review objectives and procedures that would be performed by an objective reviewer.[1091] One commenter also requested that the Commission clarify whether there is a distinction between the existing ARP report and the SCI review and whether the ARP practice of on-site inspections would be eliminated.[1092]

With regard to the comment seeking clarity on the scope of the review as compared to what is done under the current ARP Inspection Program,[1093] as noted in the SCI Proposal, the requirement for an annual SCI review was intended to formalize a practice in place under the current ARP Inspection Program in which SROs conduct annual systems reviews following established audit procedures and standards that result in the presentation of a report to senior SRO management on the recommendations and conclusions of the review.[1094] Specifically, the ARP Policy Statements called for each SRO to have its automated systems reviewed annually by an ''independent reviewer'' [1095] and stated that independent reviews and analysis should: ''(1) Cover significant elements of the operations of the automation process, including the capacity planning and testing process, contingency planning, systems development methodology and vulnerability assessment; (2) be performed on a cyclical basis by competent and independent audit personnel following established audit procedures and standards; and (3) result in the presentation of a report to senior SRO management on the recommendations and conclusions of the independent reviewer, which report should be made available to Commission staff for its review and comment.'' [1096] Similar to (1) above, the definition of SCI review requires the review to contain an assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards. Consistent with element (2), an SCI review must be performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems and must be performed following established procedures and standards. Finally, like item (3), Rule 1003(b)(2)–(3) requires SCI entities to submit a report of the SCI review to senior management after completion of the review, and following submission to senior management, to submit a report of the SCI review to the Commission, along with any response by senior management. Senior management, after reviewing the report, should note, in addition to any other response that may be made, any material inaccuracy or omission that, to their knowledge, is in the report. In this regard, the Commission recognizes that senior managers, by virtue of their positions and experience, may have differing levels of knowledge regarding their entity's SCI systems and indirect SCI systems and compliance with Regulation SCI.

While the SCI review requirement in Rule 1003 is based on the ARP review and report, a greater number of automated systems meeting the definition of SCI system or indirect SCI system would be subject to the SCI review requirements because the scope of Regulation SCI expands upon the current ARP Inspection Program. The Commission notes that the SCI review is not a substitute for inspections and

[1083] In addition, the Commission believes changes in personnel with access to SCI systems throughout the year can create additional risk that should be considered in evaluating the risks of any particular system.

[1084] *See* SIFMA Letter at 11.

[1085] The Commission notes that, while the rule requires that an SCI review be conducted ''not less than once each calendar year,'' an SCI entity may determine that it is appropriate to conduct an assessment of an SCI system more frequently, particularly for critical SCI systems. *See* adopted Rule 1003(b)(1).

[1086] *See* adopted Rule 1003(b) and Rule 1000 (definition of ''SCI review'').

[1087] However, as discussed above, an SCI entity may conduct an SCI review of its market regulation and market surveillance systems based upon its risk assessment of such systems, but not less than once every three years. *See* adopted Rule 1003(b)(1)(ii).

[1088] *See* adopted Rule 1000 (definition of ''SCI review'').

[1089] *See* adopted Rule 1003(b)(1)(i).

[1090] *See* FINRA Letter at 39–40.

[1091] *See id.* at 40.

[1092] *See* OCC Letter at 19.

[1093] *See supra* note 1092 and accompanying text. *See also supra* note 1090 and accompanying text.

[1094] *See* Proposing Release, *supra* note 13, at 18123.

[1095] *See* ARP I, *supra* note 1, at 48706–07. ARP I provided that an ''independent reviewer'' could be either an internal auditor group or an external audit firm so long as the independent reviewer had the competence, knowledge, consistency, and independence sufficient to perform the role.

[1096] *See* ARP II, *supra* note 1, at 22491. In ARP II, the Commission also explained that, in its view, ''a critical element to the success of the capacity planning and testing, security assessment and contingency planning processes for [automated] systems is obtaining an objective review of those planning processes by persons independent of the planning process to ensure that adequate controls and procedures have been developed and implemented.'' *Id.*

examinations conducted by Commission staff, and therefore SCI entities should expect that technology systems inspections and examinations will continue following the adoption of Regulation SCI. Along with notifications of material systems changes under adopted Rule 1003(a) and SCI event notifications pursuant to adopted Rule 1002(b), one purpose of SCI reviews will be to aid the Commission and its staff in understanding the operations and risks associated with the applicable systems of an SCI entity.

In addition, as noted above, one commenter, in seeking further clarity on the scope of the SCI review requirement, suggested that the Commission take an ''agreed upon approach'' which would outline more specific review objectives and procedures that would be performed by the objective reviewer. The Commission believes that an SCI entity should have the ability to design the specific parameters of an SCI review within the confines of the general framework of the rule, including identifying its own review objectives and procedures, given the SCI entity's in-depth knowledge of, and familiarity with, its own systems and their attendant risks. As such, the adopted rule is designed to provide a general framework for the scope of the SCI review by specifying that the review must include a risk assessment of SCI systems and indirect SCI systems and an assessment of the internal control design and effectiveness of its systems in certain areas.[1097] At the same time, the rule provides flexibility by permitting the review to be conducted ''following established procedures and standards,'' which would be identified and established by the SCI entity itself.[1098]

Some commenters expressed views on the provisions requiring SCI entities to submit reports of the SCI review to senior management of the SCI entity and to the Commission. Specifically, two commenters supported the proposed requirement that reports of the SCI review be submitted to senior management of the SCI entity no later than 30 days after completion of the SCI review.[1099] One commenter urged that senior management of an SCI entity certify the report before it is submitted to the Commission in order to promote accountability at the highest ranks of the SCI entity.[1100] Another commenter believed that 45 days for submission of such reports to senior management would be more appropriate as a target timeframe given the complexity of the issues addressed in an SCI review, and that should this target fail to be met, the Board of Directors Audit Committee (or similar governing body) should be informed of the reason therefor.[1101] Two commenters recommended that the distribution cycle within proposed Rule 1000(b)(8)(i) be modified so that individual, focused audit reports resulting from rotational reviews could be bundled and distributed to the Commission on a regular basis (semi-annually or quarterly).[1102]

The Commission does not believe that it is necessary to require senior management certification of the report of the SCI review, as suggested by one commenter.[1103] Adopted Rules 1003(b)(2)–(3) require that the SCI entity submit a report of the SCI review to senior management of the SCI entity no more than 30 calendar days after completion of such SCI review, and that the SCI entity submit a report of the SCI review, together with any response by senior management, to the Commission and the board of directors of the SCI entity or the equivalent of such board within 60 calendar days after its submission to senior management. Because reports of SCI reviews and any responses by senior management are required to be filed using Form SCI under the Exchange Act and Regulation SCI, it is unlawful for any person to willfully or knowingly make, or cause to be made, a false or misleading statement with respect to any material fact in such reports or responses.[1104]

The Commission recognizes that senior management certifications are used in other regulatory contexts, including in some Commission rules and regulations.[1105] However, at this time, the Commission believes that, in light of the other requirements for an SCI entity, the goals of Regulation SCI can be achieved without the imposition of an additional requirement on SCI entities for senior management certification. Specifically, the Commission believes that the adopted requirements promote the responsibility and accountability of senior management of an SCI entity by helping to ensure that senior management receives and reviews reports of SCI reviews, is made aware of issues relating to compliance with Regulation SCI, and is encouraged to promptly establish plans for resolving such issues.

The Commission is also adopting a definition of ''senior management'' in Rule 1000 to make clear which individuals at an SCI entity must receive and review the report of the SCI review. The Commission believes that, in the context of the SCI review requirement, senior management should not be limited to a single individual or officer of an SCI entity. Thus, ''senior management,'' for purposes of adopted Rule 1003(b) is defined as an SCI entity's Chief Executive Officer, Chief Technology Officer, Chief Information Officer, General Counsel, and Chief Compliance Officer, or the equivalent of such employees or officers of an SCI entity. The Commission believes that, in order to achieve the goals of the rule to promote increased awareness and oversight of the technology infrastructure at an SCI entity by its most senior employees and officers, it is important that the SCI entity's senior management team receive and carefully review reports of SCI reviews. The Commission believes that these employees and officers, or their functional equivalent, represent the executive, technology, legal, and compliance functions that are necessary to effectively review the reports of SCI reviews. The Commission also believes that awareness by an SCI entity's senior management of SCI reviews and issues with Regulation SCI compliance should help to promote a focus by senior management on such reviews and issues, enhance communication and coordination regarding such reviews and issues among business, technology, legal, and compliance personnel, and, in turn, strengthen the capacity, integrity, resiliency, and availability of the systems of SCI entities. To help ensure that persons at the highest levels of an SCI entity are made aware of any issues raised in the SCI review, the Commission is also adopting a requirement for each SCI entity to submit to its board of directors or the equivalent of such board a report of the SCI review and any response by senior management within 60 calendar days after the submission of the report to senior management of the SCI entity.

With regard to one commenter's suggestion that SCI entities should be given 45 days rather than 30 days to submit the report of the SCI review to senior management (and that it should be only a target timeframe rather than a

[1097] *See* adopted Rule 1000 (defining ''SCI review'').

[1098] *See id.*

[1099] *See* MSRB Letter at 23; and FIF Letter at 6.

[1100] *See* Better Markets Letter at 6.

[1101] *See* DTCC Letter at 17.

[1102] *See* OCC Letter at 19; and DTCC Letter at 17.

[1103] *See supra* note 1100 and accompanying text.

[1104] *See, e.g.,* Section 32(a) of the Exchange Act, 15 U.S.C. 78ff(a).

[1105] *See, e.g.,* 17 CFR 240.15c3–5(e)(2) (chief executive officer certification under the Market Access Rule); and 17 CFR 240.13a–14 (principal executive and principal financial officer certification of disclosure in annual and quarterly reports).

requirement),[1106] the Commission notes that the 30-day timeframe is based on the Commission's experience with the current ARP Inspection Program that an ARP entity is able to consider the review and prepare a report for senior management consideration prior to the submission to the Commission.[1107] The Commission acknowledges that a greater number of systems will be subject to the SCI review requirement than the current ARP Inspection Program given the definitions of SCI system and indirect SCI system,[1108] and that the issues addressed in an SCI review may be complex. However, the Commission notes that the adopted timeframe, while based on experience with the current ARP Inspection Program, also takes into account these factors.[1109] Further, the Commission believes that the complexity of the issues presented during an SCI review would more likely affect the timing of conducting and completing the SCI review, rather than the timing for submitting a report of the review to senior management. The Commission, therefore, continues to believe that this requirement is appropriate. The Commission also notes that the requirement to submit the annual report to the Commission within 60 calendar days after its submission to senior management is similarly based on the Commission's experience with the ARP Inspection Program that this time period is a sufficient period to enable senior management to consider such review or report before submitting it to the Commission.[1110] Because an SCI entity will already have prepared the report and any response by senior management for filing with the Commission, the Commission believes that an SCI entity will not need significant additional time to submit the same report and response to its board of directors or the equivalent of such board.

Contrary to the suggestion of some commenters, the Commission does not believe it is appropriate to allow an SCI entity to delay the submission of SCI review reports to the Commission in order to bundle several reports together and submit them on a quarterly or semi-annual basis. Rather, the Commission believes that it is important to receive such reports in a timely manner after completion of the SCI review, so that the Commission is made aware of potential areas of weakness in an SCI entity's systems that may pose risk to the entity or the market as a whole, as well as areas of non-compliance with the provisions of Regulation SCI, without undue delay.

With respect to clearing agencies, two commenters noted that the SCI review requirement potentially might overlap with staff guidance for clearing agencies that calls for an annual report on internal controls and recommended that the Commission consider further coordination on potential redundancies.[1111] The Commission notes that the section in the guidance provided in the Announcement for Standards for the Registration of Clearing Agencies referenced by commenters is distinct from the adopted SCI review requirement, as such section in the guidance relates to the review and evaluation of clearing agencies' *accounting* controls.[1112] In contrast, the SCI review requirement involves a risk assessment and assessment of internal control design and effectiveness of all of an SCI entity's SCI systems and indirect SCI systems.

Finally, it should be noted that the required review and timely reporting to the Commission will enable the Commission and Commission staff to monitor the quality of compliance with Regulation SCI, thoroughness and robustness of SCI reviews, and the responses of senior management to such reviews. Accordingly, the Commission will be in a position to consider enhancing these regulatory requirements in the future, if necessary.

6. SCI Entity Business Continuity and Disaster Recovery Plans Testing Requirements for Members or Participants—Rule 1004

Adopted Rule 1004 addresses testing of SCI entity business continuity and disaster recovery plans, including backup systems, by SCI entity members or participants. Rule 1004 corresponds to proposed Rule 1000(b)(9), and is adopted with certain modifications in response to comment, as discussed below.

a. Proposed Rule 1000(b)(9)

Proposed Rule 1000(b)(9)(i) required each SCI entity, with respect to its BC/DR plans, to require participation by designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, at least once every 12 months. Proposed Rule 1000(b)(9)(ii) further required each SCI entity to coordinate the testing of such plans on an industry- or sector-wide basis with other SCI entities. Proposed Rule 1000(b)(9)(iii) would have additionally required each SCI entity to designate those members or participants it deems necessary, for the maintenance of fair and orderly markets in the event of the activation of its BC/DR plans, to participate in the testing of such plans, and notify the Commission of such designations and its standards for such designation on Form SCI.

b. Comments and Commission Response

The Commission received significant comment on proposed Rule 1000(b)(9) and is adopting it with revisions, as Rule 1004. As more fully discussed below, the adopted rule requires designation of a more limited set of SCI entity members and participants for mandatory participation in BC/DR testing than the proposed rule. Further, the adopted rule does not require an SCI entity to file designation standards or member/participant designations with the Commission on Form SCI, as was proposed, but instead an SCI entity must keep records of its standards and designations. The scope, frequency, and coordination aspects of the proposed rule are adopted as proposed.

i. Mandatory BC/DR Testing Generally

Some commenters expressed general support for the goals of proposed Rule 1000(b)(9).[1113] One commenter in particular stated that ''[i]t is vital that as many firms as possible participate in [market-wide] testing with conditions as realistic as possible.'' [1114] According to this commenter, broader mandatory participation in testing would be ''one of the most valuable parts of Regulation SCI and will do the most to ensure improved market network reliability.''[1115] Another commenter

[1106] *See supra* note 1101 and accompanying text.

[1107] *See* Proposing Release, *supra* note 13, at 18123.

[1108] The Commission also notes, however, that as discussed above, the scope of systems subject to Regulation SCI has been refined from what was proposed.

[1109] The Commission notes that, while the ARP II Release recommended that an SRO's independent review should result in the presentation of a report to senior SRO management on the recommendations and conclusions of the independent review and such report should be made available to Commission staff, it did not provide recommended time periods for the submission of such reports. *See* ARP II Release, *supra* note 1. The adopted 30-day time period is based on experience with the ARP Inspection Program, as well as a consideration of the scope of the review required under Regulation SCI.

[1110] *See* Proposing Release, *supra* note 13, at 18124.

[1111] *See* OCC Letter at 19–20; and DTCC Letter at 18 (citing Securities Exchange Act Release No. 16900, 45 FR 41920, available at: *http://sec.gov/rules/other/34-16900.pdf*).

[1112] *See* Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 23, 1980).

[1113] *See, e.g.,* Angel Letter at 9; UBS Letter at 4–5; and FIF Letter at 6–7.

[1114] *See* Angel Letter at 9.

[1115] *See id.* at 10.

expressed support for broad participation in BC/DR testing, but also expressed concern that the testing requirement would put SCI entities at a competitive disadvantage versus non-SCI entities.[1116]

Several commenters objected to the proposed mandatory testing requirement for SCI ATSs.[1117] For example, two commenters suggested that few ATSs are critical enough to warrant inclusion in the proposed mandatory testing requirement.[1118] One commenter urged that only SCI entities that provide market functions on which other market participants depend be subject to the requirements for separate backup and recovery capabilities.[1119] Another commenter stated that the added benefit of requiring fully redundant backup systems is almost impossible to measure while the cost of implementation is significant, and added further that fully redundant systems and increased testing do not guarantee a flawless backup plan.[1120]

Two commenters stated that the current voluntary coordinated testing organized by SIFMA [1121] already attracts significant participation without any mandate in place.[1122] However, a different commenter noted the difficulties it has encountered in fostering participation in its voluntary disaster recovery exercises, and stated that, despite encouraging users to participate in its disaster recovery exercises, participation levels were only 20 percent of its targeted high volume client base.[1123] One commenter sought clarification on whether the requirements of proposed Rule 1000(b)(9) would apply only to trading and clearance systems, or would extend to other SCI systems as well.[1124] Two commenters asked whether third parties that perform critical market functions for an SCI entity, such as data vendors and service bureaus, would be subject to the proposed requirement.[1125] One commenter stated that testing by an SCI entity of its business continuity capabilities should not be required to be coordinated with members.[1126] According to this commenter, ''[t]he entire point of [business continuity plan testing] would be to not coordinate it with customers, and assess whether operations out of [backup] facilities was seamless to members and other market participants.'' [1127] One commenter stated that it would be more appropriate for SCI entities' members and participants to be responsible for their own business continuity plans and testing.[1128] The Commission has carefully considered commenters' views on the need for all SCI entities to be subject to the proposed mandatory testing requirement. The Commission continues to believe that adopted Rule 1004 should apply to all SCI entities.

Whereas adopted Rule 1001(a)(2)(v) requires that each SCI entity's policies and procedures include BC/DR plans and specifies recovery goals and geographic diversity requirements for such plans,[1129] adopted Rule 1004 sets forth certain minimum requirements for SCI entity testing of its BC/DR plans. Adopted Rule 1004, like proposed Rule 1000(b)(9), aims to reduce the risks associated with an SCI entity's decision to activate its BC/DR plans and help to ensure that such plans operate as intended, if activated, by requiring that an SCI entity include participation by certain members and participants in testing of the SCI entity's BC/DR plans. Although some commenters, including several ATSs, argued that ATSs should be excluded from requiring members or participants to test because, according to these commenters, ATSs are less critical to the orderly functioning of the markets than other SCI entities,[1130] the Commission believes that eliminating any category of SCI entity—including SCI ATSs—from the testing requirement would undermine the goal of maintaining fair and orderly markets in the wake of a wide-scale disruption, and assuring the smooth and effective implementation of an SCI entity's BC/DR plans.[1131] The Commission continues to believe that a testing participation requirement will help an SCI entity to ensure that its efforts to develop effective BC/DR plans are not undermined by a lack of participation by members or participants that the SCI entity believes are necessary to the successful activation of such plans.[1132] As stated in the SCI Proposal, the Commission believes that a factor in the shutdown of the equities and options markets in the wake of Superstorm Sandy was the exchanges' belief regarding the inability of some market participants to adequately operate from the backup facilities of all market centers.[1133] And, although testing protocols were in place and the chance to participate in such testing was available, the member participation rate was low.[1134] The Commission does not agree with comments that seamless operation of backup facilities should not require coordination of testing, or that the fact that members and participants have their own BC/DR plans and testing means that they should not be required, if designated, to participate in the testing of an SCI entity's BC/DR plans.[1135] The Commission continues to believe that testing of the effectiveness of back-up arrangements in recovering from a wide-scale disruption is a sound principle, and that, without the participation of significant members or participants of SCI entities, the effectiveness of such testing could be

[1116] *See* FIF Letter at 7.

[1117] *See* SIFMA Letter at 17; BIDS Letter at 8; and ITG Letter at 15.

[1118] *See* BIDS Letter at 5, 8; and ITG Letter at 15.

[1119] *See* KCG Letter at 8.

[1120] *See* Group One Letter at 3.

[1121] SIFMA organizes an annual industry-wide testing exercise for firms and exchanges to submit and process test orders using their backup facilities. Participation is voluntary. *See http://www.sifma.org/services/bcp/industry-testing/.*

[1122] *See* CME Letter at 13; and Tellefsen Letter at 7–8.

[1123] *See* Omgeo Letter at 26 (noting also that it lacks the ability to require participation by its clients).

[1124] *See* FINRA Letter at 37.

[1125] *See* FINRA Letter at 39; and MSRB Letter at 25.

[1126] *See* Direct Edge Letter at 9.

[1127] *See id.*

[1128] *See* SIFMA Letter at 17. In addition, some commenters believed that ATSs should be excluded from requiring members or participants to test, given that ATSs and their broker-dealer participants are already subject to FINRA Rule 4370, which relates to BC/DR plans. *See* FIA PTG Letter at 5; and BIDS Letter at 9.

[1129] *See supra* Section IV.B.1.b (discussing the requirement that an SCI entity have reasonable policies and procedures that include business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption).

[1130] *See supra* note 1118 and accompanying text.

[1131] *See supra* Section IV.A.1 (discussing the Commission's rationale for adopting the definition of SCI entity as proposed). *See supra* Section IV.B.1.b (discussing the BC/DR requirements in Rule 1001(a)(2)(v) for SCI entities). *See also infra* Sections VI.C.1.c and VI.C.2.b.vii (discussing competitive concerns raised by requiring SCI entities to require members or participants to participate in the SCI entities' BC/DR testing).

[1132] *See* Proposing Release, *supra* note 13, at 18125.

[1133] *See id.* at 18158. *See also id.* at 18091. The Commission notes that its basis for adopting a mandatory testing rule is independent of whether the market closures in the wake of Superstorm Sandy were appropriate to protect the health and safety of exchange personnel.

[1134] *See id.* at 18158 and text accompanying n. 83 at 18091. In addition, based on the discussions of Commission staff with market participants in the months following Superstorm Sandy, the Commission understands that many market participants had previously engaged in connectivity testing with backup facilities, and yet remained uncomfortable about switching over to the use of backup facilities in advance of the storm.

[1135] Nor does the Commission agree that Rule 1004 would be duplicative of FINRA Rule 4370, as Rule 1004 relates to participation by members or participants in the testing of an SCI entity's business continuity plans, whereas FINRA Rule 4370 relates to the testing of the member's or participant's own business continuity plan. *See supra* note 539 and accompanying text.

undermined. Based on its experience with the ARP Inspection Program, the Commission understands that many SCI entities have already made significant investments in their backup facilities.[1136] The Commission believes that the requirements of Rule 1004 will help to ensure that such facilities will be effective in the event they are needed.[1137]

In response to commenters who questioned the need for mandatory participation by SCI entity members and participants,[1138] the Commission believes that current voluntary industry-led testing has been useful because it annually brings together a wide variety of market participants, including many SCI entities, and involves a range of asset classes.[1139] The current industry-led testing program coordinated by SIFMA therefore could provide a foundation for the development of the testing required by Rule 1004. However, because participation rates by members and participants in voluntary testing generally has been low, the Commission believes that a mandatory participation requirement is the best means to achieve effective and coordinated BC/DR testing with assured participation by the more significant SCI entity members and participants.[1140] In addition, although the Commission generally agrees with the comment that ''[i]t is vital that as many firms as possible participate in [market-wide] testing with conditions as realistic as possible,'' [1141] because of the burden and costs of requiring participation by all SCI entity members and participants, regardless of their market significance, the Commission believes it is appropriate to adopt a more measured approach to mandatory participation in BC/DR testing.[1142] The Commission is therefore adopting a BC/DR testing designation requirement that applies to all SCI entities, but does not apply to all members and participants of SCI entities, as discussed below.[1143]

ii. SCI Entity Designation of Members or Participants for Participation in BC/DR Testing—Rules 1004(a)–(c)

Several commenters raised concerns about the proposed requirement that SCI entities exercise discretion to designate members or participants for participation in coordinated BC/DR testing under proposed Rule 1000(b)(9).[1144] After careful consideration of the views of commenters, the Commission is adopting the requirement that SCI entities designate certain members or participants to participate in testing BC/DR plans with certain modifications from the proposal. As proposed, the rule would have required each SCI entity to designate those members or participants it ''deems necessary, for the maintenance of fair and orderly markets in the event of the activation of its business continuity and disaster recovery plans . . .'' The Commission has determined instead to require that each SCI entity designate those members or participants ''that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans.'' This change is broadly consistent with the suggestion of one commenter to revise the criteria for designation to those firms ''critical to the operation of the SCI entity.'' [1145] However, the Commission believes that the adopted standard is more appropriate in that it focuses on the ability of the SCI entity to maintain fair and orderly markets under its BC/DR plan.[1146]

Several commenters suggested eliminating SCI entity discretion and setting forth in the rule clear, objective criteria (such as trading volume) for which members or participants would be required to participate in testing.[1147] One commenter suggested that the Commission require that all members or participants that represent a meaningful percentage of the volume in the marketplace participate in the testing in order to capture the more significant market participants, while recognizing the financial burden such testing may pose for smaller entities.[1148] This commenter believed that giving discretion to SCI entities in this area might lead to regulatory arbitrage and a race to the bottom regarding how many and which members or participants are designated to participate in testing.[1149] On the other hand, another commenter commented that the discretion contemplated by the proposal keeps the rule flexible enough to accommodate SCI entities conducting a diverse range of business activities.[1150] This commenter also suggested that SCI entities should not be required to report to the Commission who they have designated to test, and instead should only be required to keep a record of who they have designated.[1151]

In response to commenters who were concerned about the discretionary aspect of the designation requirement,[1152] the Commission believes the SCI entity is in the best position to determine which of its members or participants collectively represent sufficient liquidity for the SCI entity to maintain fair and orderly markets in a BC/DR scenario following a wide-scale disruption. The Commission believes such determinations require the exercise of reasonable judgment by each SCI entity, and are not well-suited for a ''one-size-fits-all'' objective measure determined by the Commission. For example, if the Commission were to establish an objective measure (*e.g.,* based on a specified percentage of trading volume),

[1136] *See infra* Section VI.B.2 (stating that nearly all national securities exchanges already have backup facilities that do not rely on the same infrastructure components as those used by their primary facility).

[1137] *See* 2003 BCP Policy Statement, *supra* note 512, at 56658 (stating: ''The effectiveness of back-up arrangements in recovering from a wide-scale disruption should be confirmed through testing.''). *See also* Interagency White Paper, *supra* note 512, at 17811 (identifying ''a high level of confidence, through ongoing use or robust testing, that critical internal and external continuity arrangements are effective and compatible'' as one of three important business continuity objectives). *See also supra* Section IV.B.1.b (discussing adopted Rule 1001(a)(2)(v)).

[1138] *See supra* notes 1117–1122 and accompanying text.

[1139] *See http://www.sifma.org/services/bcp/industry-testing/* (in which SIFMA describes its annual BC/DR test held annually in October, which includes assets classes such as commercial paper, equities, options, futures, fixed-income, settlement, payments, Treasury auctions and market data).

[1140] *See supra* note 1123 (noting Omgeo's comment that voluntary participation levels are low). *See also* Proposing Release, *supra* note 13, at 18091, n. 83 and accompanying text (noting that press reports indicated that a large number of NYSE members did not participate in NYSE's contingency plan testing that occurred seven months prior to Superstorm Sandy).

[1141] *See supra* note 1114 and accompanying text.

[1142] In addition, because the Commission recognizes that the coordination of such testing is complex and time-consuming, it has provided for a compliance date for the coordination requirement of Rule 1004(d) that is 12 months after the compliance date required for other provisions of Regulation SCI. *See* Section IV.F.

[1143] In response to commenters seeking clarification on the types of systems that would be subject to the mandatory testing requirement (*see supra* notes 1124–1125 and accompanying text), because the required testing is BC/DR testing, all systems necessary for an SCI entity to successfully activate it BC/DR plan would be included.

[1144] *See* NYSE Letter at 33; FIF Letter at 6–7; Omgeo Letter at 26; Fidelity Letter at 6; and Angel Letter at 10.

[1145] *See* ISE Letter at 9.

[1146] As discussed more fully in Section IV.B.6.b.iv *infra,* the Commission also believes that the adopted standard could, but would be unlikely to, cause members or participants to elect to withdraw from participation in an SCI entity (particularly a smaller SCI entity) to save on the cost of connectivity fees.

[1147] *See* NYSE Letter at 33; Omgeo Letter at 26; Angel Letter at 10; and FIF Letter at 6.

[1148] *See* NYSE Letter at 33.

[1149] *See* NYSE Letter at 33.

[1150] *See* CME Letter at 12.

[1151] *See id.* at 13.

[1152] *See supra* notes 1144, 1147–1149 and accompanying text.

it might represent a meaningful percentage for some SCI entities, but not for others. Thus, the rule requires that each SCI entity establish standards for the designation of those members or participants that the SCI entity ''reasonably'' determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of its BC/DR plans. This adopted provision is in lieu of the proposed requirement, which would have required an SCI entity to designate those members or participants it ''deems necessary'' for the maintenance of fair and orderly markets in the event of the activation of its BC/DR plans. Because the adopted rule requires an SCI entity's determination to be reasonable, it provides some degree of flexibility to SCI entities but also imposes a check on SCI entity discretion, which the Commission believes should help prevent an SCI entity's designations from being overly limited. In response to concerns that a discretionary designation requirement would lead to regulatory arbitrage and a race to the bottom regarding how many and which members or participants are designated to participate in testing, the Commission believes that this is unlikely to occur because each SCI entity will be subject to the same requirement and will be required to make a reasonable determination that the designated members or participants are those that are the minimum necessary for it to maintain fair and orderly markets in the event of activation of its BC/DR plans. Further, the Commission believes that broad participation in BC/DR testing will enhance the utility of the testing, and that allowing non-designated members or participants the opportunity to participate in such testing generally will further this goal. Therefore, the Commission encourages SCI entities to permit non-designated members or participants to participate in the testing of the SCI entity's BC/DR plans if they request to do so.

Consistent with the recommendation of one commenter, however, the Commission has determined not to require that each SCI entity notify the Commission of its designations and its standards for designation on Form SCI as proposed. Instead, an SCI entity's standards, designations, and updates, if applicable, would be part of its records and therefore available to the Commission and its staff upon request.[1153] Unlike de minimis systems disruptions and de minimis systems intrusions, which may occur with regularity (and for which a quarterly summary report would aid Commission oversight of systems whose proper functioning is central to the maintenance of fair and orderly markets), the establishment of standards for designation, the designations themselves, and updates to such standards or designations are likely to occur less frequently. Thus, the Commission believes it is sufficient for the Commission to review records relating to such designations when the Commission determines that it is necessary to do so to fulfill its oversight role, such as during its examination of an SCI entity.[1154] More broadly, the Commission believes this revision is generally consistent with modifications that the Commission has made in response to comment that proposed Regulation SCI would have required unnecessary and burdensome notice and reporting submissions.

Some commenters questioned whether many SCI entities, particularly non-SROs and ATSs, have the authority to require their members or participants to participate in such testing.[1155] Another commenter more generally stated that it was unclear how an SCI entity could enforce a requirement that its customers engage in BC/DR testing.[1156] In response to these comments, the Commission believes that SCI SRO rulemaking authority and non-SRO contractual arrangements would enable SCI entities to implement this requirement.[1157] Specifically, SROs have the authority, and legal responsibility, under Section 6 of the Exchange Act, to adopt and enforce rules (including rules to comply with Regulation SCI's requirements relating to BC/DR testing) applicable to their members or participants that are designed to, among other things, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[1158] Further, SCI entities that are not SROs have the ability to include provisions in their contractual agreements with their participants (such as their subscriber or participant agreements) requiring such parties to engage in BC/DR testing.

Other commenters focused on the potential impact of the rule on the members or participants designated to participate in testing. One commenter pointed out that, without clearly defined industry level coordination, some members or participants may be overburdened by being subject to multiple individual tests with various SCI entities.[1159] Another commenter asked the Commission to clarify what the obligation is for firms that are members or participants at multiple SCI entities.[1160] Several commenters expressed concern that the Commission underestimated the costs and burdens of the proposed testing.[1161] According to some of these commenters, under the proposal, certain firms, such as market makers and other firms performing important market functions, could be required to maintain connections to the backup sites of a number of SCI entities, at significant cost.[1162] A group of commenters requested that the scope be targeted to only cover those instances in which an SCI entity determines to enact its disaster recovery plans.[1163] One commenter agreed that the designation requirement could be relaxed and still achieve the provision's aim, because the bulk of the liquidity at a market center is provided by a small number of firms.[1164] Another commenter asked the Commission to give designated firms the

[1153] *See infra* Section IV.C.1 (discussing SCI entity recordkeeping requirements).

[1154] *See supra* Sections IV.A.3 and IV.B.3.c (discussing the rationale for quarterly reporting of de minimis systems disruptions and de minimis systems intrusions).

[1155] *See* Omgeo Letter at 26; MSRB Letter at 24; BIDS Letter at 8; LiquidNet Letter at 4; and SIFMA Letter at 17. *See also* ITG Letter at 15–16.

[1156] *See* SIFMA Letter at 17–18 (suggesting that the Commission instead adopt a ''BCP testing requirement more akin to the 'best practices' described in the Interagency White Paper'').

[1157] While some designated members or participants of SCI entities might choose to withdraw from membership or participation in an SCI entity if they assess the cost of participating in BC/DR testing to be too great, the Commission believes that other aspects of their involvement with the SCI entity, including an interest in maintaining a profitable business relationship, will factor significantly into any decision regarding their continued membership or participation in the SCI entity. *See also infra* Sections VI.C.1.c and VI.C.2.b.vii (discussing competition between SCI entities and non-SCI entities in relation to the requirements under Rule 1004).

[1158] *See* Section 6 of the Exchange Act, 15 U.S.C. 78f.

[1159] *See* OCC Letter at 18.

[1160] *See* DTCC Letter at 13.

[1161] *See* FINRA Letter at 37–39; OCC Letter at 18; Fidelity Letter at 6; Joint SROs Letter at 15–16; ISE Letter at 9; and Group One Letter at 3. *See also infra* Section VI (discussing the costs and burdens of the requirement, including the costs for members or participants to participate in BC/DR testing).

[1162] *See* FINRA Letter at 37–39; OCC Letter at 18; and Fidelity Letter at 6 (expressing concern an SCI entity might cast a wide net with its designation powers to include more firms than necessary).

[1163] *See* Joint SROs Letter at 16 (noting the complexity of testing a scenario in which a market participant may have enacted its business continuity plan but can still access an SCI entity through the primary facility).

[1164] *See* Tellefsen Letter at 9.

ability to opt-out if they have a good reason.[1165]

The Commission believes that adoption of a more focused designation requirement that requires SCI entities to exercise reasonable discretion to identify those members or participants that, taken as a whole, are the ''minimum necessary'' for the maintenance of fair and orderly markets in the event of the activation of such plans is likely to result in a smaller number of SCI entity members or participants being designated for participation in testing as compared to the SCI Proposal. Because the Commission believes that SCI entities have an incentive to limit the imposition of the cost and burden associated with testing to the minimum necessary to comply with the rule, it also believes that, given the option, most SCI entities would, in the exercise of reasonable discretion, prefer to designate fewer members or participants to participate in testing, than to designate more. On balance, the Commission believes that adopted rule will incentivize SCI entities to designate those members and participants that are in fact the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of their BC/DR plans, and that this should reduce the number of designations to which any particular member or participant would be subject, as compared to the SCI Proposal, and would potentially simplify efforts for SCI entities to coordinate BC/DR testing, as required by adopted Rule 1004(d). Despite the modifications from the proposal, it remains possible, as some commenters noted, that firms that are members of multiple SCI entities will be the subject of multiple designations, and that multiple designations could require certain firms to maintain connections to and participate in testing of the backup sites of multiple SCI entities. The Commission believes this possibility, though real, may be mitigated by the fact that multiple designations are likely to be made to firms that are already connected to one or more SCI entity backup facilities, since they represent significant members or participants of the applicable SCI entities; and that, because some SCI entity backup facilities are located in close proximity to each other, multiple connections to such backup facilities may be less costly than if SCI entity backup facilities were not so located. The Commission recognizes that there will be greater costs to a firm being designated by multiple SCI entities to participate in the testing of their BC/DR plans than to a firm designated by only one SCI entity. However, the Commission believes that these greater costs are warranted for such firms, as they represent significant participants in each of the SCI entities for which they are designated, and their participation in the testing of each such SCI entity's BC/DR plans is necessary to evaluate whether such plans are reliable and effective. The designation of a firm to participate in the BC/DR testing of an SCI entity means that such firm is significant, as the SCI entity has reasonably determined it to be included in the set of its members or participants that is, ''taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans.'' Nonetheless, the Commission acknowledges that there may be instances in which an SCI entity has reasonably designated a firm to participate in BC/DR testing, and the firm is unwilling to bear the cost of participation in BC/DR testing with a given SCI entity. In such instances, there may be firms that opt out of such testing by withdrawing as a member or subscriber of one or more SCI entities, but the Commission believes that is unlikely. In particular, the Commission believes that it is unlikely that a firm determined to be significant enough to be designated to participate in testing by an SCI entity would choose to withdraw its membership or participation in an SCI entity solely because of the costs and burdens of Regulation SCI's BC/DR testing provisions. The Commission also believes that such firm is likely to be a larger firm with greater resources and a significant level of participation in such SCI entity, and is likely to already be connected to the backup facility of the SCI SRO that is designating it to test.[1166] Moreover, the Commission does not agree with the suggestion made by one commenter that the Commission give designated firms the ability to ''opt-out'' if they have a good reason,[1167] because the ability to opt-out in this manner would render participation in BC/DR testing voluntary which, as discussed above, is unlikely to result in adequate BC/DR testing.[1168] The Commission continues to believe, as stated in the SCI Proposal, that ''unless there is effective participation by certain of its members or participants in the testing of [BC/DR] plans, the objective of ensuring resilient and available markets in general, and the maintenance of fair and orderly markets in particular, would not be achieved.'' [1169] Although the Commission recognizes that testing of a BC/DR plan does not guarantee flawless execution of that plan, the Commission believes that a tested plan is likely to be more reliable and effective than an inadequately tested plan.[1170]

iii. Scope, Timing, and Frequency of BC/DR Testing—Rule 1004(b)

The SCI Proposal specified that the type of testing for which designees would be required to participate was ''scheduled functional and performance testing of the operation of [BC/DR] plans, in the manner and frequency specified by the SCI entity, at least once every 12 months.'' [1171] After careful consideration of the views of commenters, the Commission is adopting the scope, frequency, and timing requirements in the rule as proposed. Specifically, adopted Rule 1004(b) requires that an SCI entity's designees participate in ''scheduled functional and performance testing of the operation of [BC/DR] plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months.''

In the SCI Proposal, the Commission noted that functional testing is commonly understood to examine whether a system operates in accordance with its specifications, whereas performance testing examines whether a system is able to perform under a particular workload.[1172] The Commission added that functional and performance testing should include not only testing of connectivity, but also testing of an SCI entity's systems, such as order entry, execution, clearance and settlement, order routing, and the transmission and/or receipt of market data, as applicable, to determine if they can operate as contemplated by its business continuity and disaster recovery plans.[1173] With regard to the proposed scope of testing, several commenters expressed specific concerns about the requirement for ''functional and performance'' testing of BC/DR

[1165] *See* Fidelity Letter at 6.

[1166] *See infra* Section IV.B.6.b.iv.

[1167] *See* Fidelity Letter at 6.

[1168] *See supra* note 1140 and accompanying text.

[1169] *See* Proposing Release, *supra* note 13, at 18091, 18125.

[1170] Further, because the Commission believes that increased participation in BC/DR testing is likely to enhance the utility of the testing, the Commission encourages SCI entities to permit members or participants that do not meet the SCI entity's reasonable designation standards to participate in such testing if they request to do so.

[1171] *See* proposed Rule 1000(b)(9)(i).

[1172] *See* Proposing Release, *supra* note 13, at 18125, n. 267.

[1173] *See id.* at 18126.

plans.[1174] Specifically, one commenter expressed concern about the logistical challenges of conducting functional and performance testing at the same time.[1175] Two commenters expressed concern that requiring firms to perform industry-wide, end-to-end testing by processing transactions in their disaster recovery systems would introduce risk to the markets because such testing would increase the chance that test transactions could inadvertently be introduced into production systems.[1176] Another commenter stated that a full functional test across all primary and recovery data centers for any significant number of members or participants would require substantial time to conduct and may require market downtime, as would a full performance test.[1177] One group of commenters suggested that the scope of the requirement should be revised to only cover ''functional and operational testing'' of disaster recovery plans, but requested additional guidance with regard to the scope of testing required to establish the effectiveness of disaster recovery plans.[1178] This group of commenters expressed concern about the ''complexity and cost associated with establishing an effective coordinated test script that captures the significant number of possibilities that may occur to each significant market participant or SCI entity'' and recommended that the scope of the coordinated functional and operational testing requirements be revised to cover those instances in which an SCI entity determines to enact its disaster recovery plan.[1179] Two commenters believed the tests should be ''scenario-based'' to recreate as closely as possible the actual conditions that would trigger widespread use of BC/DR plans.[1180]

Adopted Rule 1004(b) provides that the scope of required testing is ''functional and performance testing of the operation of BC/DR plans.'' As stated in the SCI Proposal, such functional and performance testing should include not only testing of connectivity, but also testing of an SCI entity's systems, such as order entry, execution, clearance and settlement, order routing, and the transmission and/or receipt of market data, as applicable, to determine if they can operate as contemplated by its business continuity and disaster recovery plans.[1181] In response to commenters expressing concern about the breadth of the requirement, the Commission notes that the rule requires functional and performance testing of the ''operation of [BC/DR] plans.'' While the type of testing required by adopted Rule 1004(b) is more rigorous than some types of testing urged by some commenters, the Commission does not believe that the requirement for ''functional and performance testing of the operation of such plans'' requires additional testing that is as burdensome as that feared by some of those commenters. Importantly, ''functional and performance testing of the operation of [BC/DR] plans'' entails testing that goes beyond communication and connectivity testing, and beyond validation testing, which are more limited types of testing urged by some commenters. But the requirement to conduct ''functional and performance testing of the operation of [BC/DR] plans'' does not mean that a full test of the functional and performance characteristics of each backup facility is required to be conducted all at once and in coordination with other SCI entities all at the same time, as some commenters characterized the proposed requirement.[1182] Specifically, the Commission notes that the testing of BC/DR plans, which is required by Rule 1004, is different from testing of the function and performance of backup facilities generally.[1183] What Rule 1004 requires is coordinated testing to evaluate annually whether such backup facilities of SCI entities can function and perform in accordance with the operation of BC/DR plans in the event of wide-scale disruption. In addition, the Commission notes that performance testing, which examines whether a system is able to perform under a particular workload, is not synonymous with ''stress testing,'' in which capacity limits are tested, and therefore should not require as much time to conduct as one commenter suggested.

In response to commenters concerned that the required testing would necessitate system reconfigurations,[1184] the Commission understands that the requirement to test backup facilities may require technology adjustments to permit testing activity to be processed by BC/DR systems, and believes that such adjustments to permit testing are warranted to achieve the goal, as discussed above, of achieving reliable and effective BC/DR plans at SCI entities. The Commission also believes that such system reconfigurations would be less burdensome than a Commission rule requiring the establishment of a dedicated environment for safe end-to-end testing that accurately simulates the trading environment, which some commenters suggested might be appropriate. One group of commenters noted the ''complexity and cost associated with establishing an effective coordinated test script,'' and urged that the scope of the coordinated testing be ''narrowed to cover those instances in which an SCI entity determines to enact its disaster recovery plan.'' The Commission acknowledges that establishment of an effective coordinated test script will involve

[1174] *See, e.g.*, FINRA Letter at 37; OCC Letter at 18; and DTCC Letter at 12.

[1175] *See* FINRA Letter at 37 (stating that combining performance testing with functional testing on weekends would be difficult and possibly not feasible because an end-to-end functional test combined with a stress test would require much more time to accommodate processing volumes than would be afforded in an abbreviated non-business day session).

[1176] *See* OCC Letter at 17–18 (stating that its systems and systems of many member firms are configured to prevent test activity from being processed by production or disaster recovery systems); and DTCC Letter at 12 (stating similarly that the testing proposed by Rule 1000(b)(9) (as opposed to communication and connectivity testing) would not be supported by most SCI entities' current systems configurations, and encouraging the Commission to consider this in adopting testing requirements).

[1177] *See* Omgeo Letter at 26–27. This commenter urged a more limited scope of testing. Specifically, this commenter urged the Commission to focus on ''smoke testing,'' which it characterized as a more limited form of testing to validate that system functionality is fully deployed and operational in the new recovered or resumed production environment, and with respect to the goals of performance testing, a more limited set of system operations to assure that the recovery system would perform those operations at roughly comparable speeds as those performed on the main production systems. This commenter further stated that, in both cases, the purpose of these tests would be to validate that the backup or recovery systems have the necessary functionality to perform the service required of the SCI systems, and have sufficient capacity to process the production workloads at roughly comparable levels of performance, rather than to test the actual functional or performance characteristics of the backup or alternate recovery systems in their own right. *See* Omgeo Letter at 27.

[1178] *See* Joint SROs Letter at 15–16.

[1179] *See id.* at 16.

[1180] *See* FIF Letter at 7; and UBS Letter at 4.

[1181] *See* Proposing Release, *supra* note 13, at 18126.

[1182] Conducting the required testing is not intended to require market downtime, but permits a range of possibilities, as SCI entities determine to be appropriate, including weekend testing, as well as testing in segments over the course of a year, if SCI entities determine that, to meet the requirements of the rule, a single annual test cannot be properly conducted within a single period of time (*e.g.*, over the course of a weekend).

[1183] Testing of the function and performance of backup facilities generally would occur before such facilities are launched into production (such as pursuant to Rule 1001(a)), and Regulation SCI does not impose a requirement for coordinating such testing with other SCI entities.

[1184] *See supra* note 1176 and accompanying text. *See also* Tradebook Letter at 2–3 (stating its view that ''the only way to test integration from order generation to allocation and then through to final settlement, is in the production environment'' and ''test tickers that operate in the production environment are the only way to reliably simulate exactly what will happen in the production environment with a live order'').

some costs and complexity, but believes that this is an important first step in establishing robust and effective testing under the rule. The Commission encourages SCI entities to develop one or more test scripts contemplating a wide-scale disruption and the enactment by SCI entities in the region of the wide-scale disruption of their BC/DR plans.

Further, the Commission notes that nothing in Rule 1001(a) nor Rule 1004 requires that an SCI entity's BC/DR plan specify that its backup site must fully replicate the capacity, speed, and other features of the primary site. Similarly, SCI entity members and participants are not required by Regulation SCI to maintain the same level of connectivity with the backup sites of an SCI entity as they do with the primary sites.[1185] In the event of a wide-scale disruption in the securities markets, the Commission acknowledges that an SCI entity and its members or participants may not be able to provide the same level of liquidity as on a normal trading day. In addition, the Commission recognizes that the concept of ''fair and orderly markets'' does not require that trading on a day when business continuity and disaster recovery plans are in effect will reflect the same levels of liquidity, depth, volatility, and other characteristics of trading on a normal trading day. Nevertheless, the Commission believes it is critical that SCI entities and their designated members or participants be able to operate with the SCI entities' backup systems in the event of a wide-scale disruption. Therefore, Rule 1004 requires that an SCI entity's BC/DR plan that meets the requirements of Rule 1001(a)(2)(v) be tested for both its functionality and performance as specified by the SCI entity's BC/DR plan.

In addition, several commenters addressed testing more generally.[1186] For example, some commenters urged that comprehensive, industry-wide, end-to-end testing could be enhanced if there were uniform test tickers supported by the testing infrastructure at all SCI entities.[1187] Two commenters urged the establishment of principles for end-to-end, integrated testing.[1188] Specifically, one of these commenters suggested that SCI entities, the Commission, and relevant third-parties think about how to establish a dedicated environment where end-to-end testing could be done safely, and where it could accurately simulate the trading environment.[1189] This commenter also suggested that testing plans concentrate on high volume periods, stress testing common order types, and focusing on securities that generally experience low liquidity.[1190] This commenter believed that industry-wide testing should include derivatives and cross-asset scenarios, and possibly include some involvement by foreign regulators and markets as well.[1191] While the suggestions of these commenters are not inconsistent with the rule's requirement for functional and performance testing of BC/DR plans, the Commission has determined not to require them because the Commission does not believe, at this time, that these suggestions are necessary in every instance to achieve reliable and effective BC/DR plans at SCI entities. However, to the extent an SCI entity believes them to be appropriate for its systems, these suggestions could be utilized in its BC/DR plans testing.

Importantly, the adopted rule does not prescribe how SCI entities are to develop plans for functional and performance testing of order entry, execution, clearance and settlement, order routing, and the transmission and/or receipt of market data, as applicable, to determine if these functions can operate as contemplated by SCI entity BC/DR plans. Thus, as with the proposed requirement, the adopted rule provides an SCI entity with discretion to determine the precise manner and content of the BC/DR testing required pursuant to Rule 1004, and SCI entities have discretion to determine, for example, the duration of the testing, the sample size of transactions tested, the scenarios tested, and the scope of the test. Therefore, while comments urging the creation of uniform test tickers, establishment of principles for end-to-end testing, mandatory types of test scripts, and cross-asset and cross-jurisdictional coordination are matters that SCI entities may wish to consider in implementing the testing required by the rule, the Commission does not believe it is appropriate to mandate such details in Regulation SCI. To do so would be more prescriptive than the Commission believes is appropriate, as this requirement is designed to provide SCI entities flexibility and discretion in determining how to meet it. The Commission believes that the adopted testing requirement will help to improve securities market infrastructure resilience by helping to ensure not only that an SCI entity can operate following an event that triggers its BC/DR plans, but also that it can do so with a greater level of confidence that its core members or participants are also ready based on experience during testing. The Commission is adopting Rule 1004(b) substantively as proposed because it gives SCI entities discretion to develop a test that meets the requirements of the rule.

One commenter recommended requiring that each entity be run entirely under its backup plan at least one day a year for a full trading day, and that the entire market run off of the backup sites at least once a year.[1192] While adopted Rule 1004 would not preclude this approach, the Commission notes that other commenters disagreed with the wisdom of it.[1193] Specifically, one group of commenters stated that the risks of testing in a ''live production environment on a periodic basis'' outweigh the benefits.[1194] Another commenter stated that requiring SCI entities to operate using their backup facilities would increase the risk of erroneous quotes and orders entering the marketplace.[1195]

After careful consideration of these comments, the Commission has determined not to prescribe the time of day or week during which testing shall occur. In addition, the adopted rule does not require an SCI entity to test its BC/DR plan in live production, but also does not prohibit an SCI entity from testing its BC/DR plans in live production, either, if an SCI entity determines such a method of testing to be appropriate. The Commission continues to believe that SCI entities are in the best position to structure the details of the test in a way that would maximize its utility.

With respect to testing frequency, one commenter agreed with the proposal that an SCI entity's BC/DR plans, including its backup systems, be tested ''at least once every 12 months.'' [1196] One commenter stated that the rule should explicitly set forth the required frequency of testing.[1197] One commenter believed that two coordinated industry tests per year would be more appropriate.[1198] One commenter

[1185] *See infra* Section VI.C.2.b.vii (discussing the estimated costs of adopted Rule 1004).

[1186] *See* Tradebook Letter at 1–3; CAST Letter at 9; FIA PTG Letter at 2; and CoreOne Letter at 3–7.

[1187] *See* Tradebook Letter at 2–3; CAST Letter at 9; and FIA PTG Letter at 2.

[1188] *See* CoreOne Letter at 3; and Tradebook Letter at 1–3.

[1189] *See* CoreOne Letter at 3.

[1190] *See id.* at 3–4.

[1191] *See id.* at 7.

[1192] *See* Angel Letter at 10.

[1193] *See* Joint SROs Letter at 15; and Group One Letter at 2.

[1194] *See* Joint SROs Letter at 15.

[1195] *See* Group One Letter at 2.

[1196] *See* DTCC Letter at 13

[1197] *See* NYSE Letter at 33.

[1198] *See* FIF Letter at 6.

believed that testing once per year is arbitrary, and suggested that a risk-based approach might justify testing certain systems with more or less frequency.[1199]

The Commission is adopting as proposed the requirement that testing occur not less than once every 12 months. Although commenters offered differing views on the appropriate frequency for the required testing,[1200] the Commission continues to believe that a testing frequency of once every 12 months is an appropriate minimum frequency that encourages regular and focused attention on the establishment of meaningful and effective testing. In the context of coordinated BC/DR testing, the Commission believes the key is for testing to occur regularly enough to offer practical utility in the event of a wide-scale disruption without imposing undue cost, and that a minimum frequency of one year achieves this balance. This requirement does not prevent SCI entities from testing more frequently, but rather is intended to give SCI entities the flexibility to test their BC/DR plans, including their backup systems, at more frequent intervals if they find it appropriate to do so.

iv. Industry- or Sector-Wide Coordination—Rule 1004(d)

Proposed Rule 1000(b)(9)(a)(ii) specified that an SCI entity would be required to coordinate the testing of BC/DR plans on an industry- or sector-wide basis with other SCI entities. The Commission received significant comment on this aspect of the proposal.

Two commenters supported the coordinated testing requirement.[1201] Specifically, one of these commenters stated that a coordination requirement targets an area where technology risks have left the markets more vulnerable, namely, the complex ways that firms interact.[1202] This commenter favored market-wide testing as a way to better manage that risk.[1203] This commenter also stated that coordination is vital because the more SCI entities and member firms that participate in testing, the more realistic that testing will be.[1204] Another commenter noted that one of the most important steps in validating and maintaining systems integrity is an effective BC/DR model and urged the Commission to promptly advance a program to introduce a new and more comprehensive BC/DR testing paradigm.[1205]

In contrast, some commenters opposed the proposed comprehensive, coordinated testing structure.[1206] Some commenters stated that coordinating testing presents significant technological and logistical challenges that need to be weighed carefully.[1207] One commenter stated that coordinated testing is a good aspirational goal, but expressed concern that too much is outside of the control of an individual SCI entity, and therefore the rule should, at most, require SCI entities to attempt to coordinate such testing.[1208] Another commenter stated that the fixed-income market is so fragmented that coordinated testing is difficult to conduct and much less imperative.[1209]

Some commenters offered suggestions on how to improve the proposed coordination requirement. One commenter urged that coordination only be required among providers of singular services in the market (*i.e.*, exchanges that list securities, exclusive processors under NMS plans, and clearing and settlement agencies).[1210] Some commenters believed that coordination would work best if it was organized by an entity with regulatory authority over SCI entities, or by an organization designated by the Commission to fulfill that role.[1211] One such commenter supported coordinating testing through a Commission-approved plan, provided SCI entities have the right to maintain the confidentiality of certain critical information.[1212] Another commenter recommended that the Commission work with the CFTC to adopt a coordinated approach to dealing with technology issues across financial markets, including through participation by derivatives exchanges in testing alongside their equity markets counterparts.[1213]

After careful consideration of the comments, the Commission has determined to adopt the coordination requirement as proposed. Specifically, Rule 1004(d) requires that an SCI entity ''coordinate the testing of [BC/DR] plans on an industry- or sector-wide basis with other SCI entities.'' The Commission recognizes that coordinating industry- or sector-wide testing among SCI entities and their designated members or participants may present logistical challenges. Because of these challenges, the Commission does not believe that a more prescriptive approach is warranted. Instead, the coordination requirement provides discretion to SCI entities to determine how to meet it.

The Commission does not agree with commenters suggesting that the Commission should assume leadership on the organization of coordinated testing, designate an organization to fulfill that role, or require a ''Commission-approved plan'' for testing, because it believes at this time that SCI entities can achieve coordination more quickly and efficiently without the imposition of a formal procedural framework that these suggestions would entail.[1214] In response to comment suggesting that coordination should be aspirational rather than required, the Commission believes that, because trading in the U.S. securities markets today is dispersed among a wide variety of exchanges, ATSs, and other trading venues, and is often conducted through sophisticated trading strategies that access many trading platforms simultaneously, requiring SCI entities to coordinate testing would result in testing under more realistic market conditions.[1215] The Commission also continues to believe that it would be more cost-effective for SCI entity members and participants to participate in testing of SCI entity BC/DR plans on an industry- or sector-wide basis than to test with each SCI entity on an individual basis because such coordination would likely reduce duplicative testing efforts.[1216] In

[1199] *See* MSRB Letter at 24.

[1200] *See supra* notes 1196–1199.

[1201] *See* Angel Letter at 9; and UBS Letter at 4.

[1202] *See* Angel Letter at 9.

[1203] *See id.*

[1204] *See id.*

[1205] *See* UBS Letter at 4–5. This commenter also stated that improved BC/DR testing should not be delayed until Regulation SCI is adopted. *See* UBS Letter at 5.

[1206] *See* DTCC Letter at 12–13; FINRA Letter at 37–39; OCC Letter at 17–18; and ISE Letter at 8.

[1207] *See* LiquidPoint Letter at 4; and SIFMA Letter at 17–18. *See also supra* notes 1175–1177 and accompanying text.

[1208] *See* CME Letter at 13.

[1209] *See* TMC Letter at 3.

[1210] *See* Direct Edge Letter at 9.

[1211] *See* DTCC Letter at 13; OCC Letter at 18; and NYSE Letter at 33.

[1212] *See* NYSE Letter at 33.

[1213] *See* Angel Letter at 12.

[1214] With respect to the suggestion that there be a Commission approved plan, the Commission notes that Rule 608 of Regulation NMS is designed to facilitate participation in NMS plans by self-regulatory organizations, which does not include SCI entities that are not SCI SROs, including SCI ATSs. The Commission notes that at least one commenter suggested that the Commission work with the CFTC to adopt a coordinated approach to testing. But, as discussed above, the Commission believes that Regulation SCI is an important step to reduce the risks associated with a decision to activate BC/DR plans. And, although the Commission may in the future consider additional initiatives to promote further coordination with the CFTC, in the Commission's view, this initial step of adopting Regulation SCI should not be delayed.

[1215] *See* Proposing Release, *supra* note 13, at 18126.

[1216] In response to comment that coordinated BC/DR testing is not needed in the current fixed-income market, the Commission notes that it has determined to exclude ATSs trading only municipal securities or corporate debt securities from the

addition, if SCI entities that are ''providers of singular services'' in the markets (*i.e.,* which the Commission believes would be synonymous with SCI entities that are providers of ''critical SCI systems'') lead coordination efforts on behalf of all SCI entities, such an approach would not be impermissible under Rule 1004(d), provided all SCI entities agreed to such an approach.

In response to commenters who more generally expressed concern about the rule subjecting SCI entity members and participants to multiple duplicative and costly testing requirements,[1217] the Commission notes that the flexibility provided in the adopted coordination requirement, in tandem with the more focused adopted mandatory designation requirement should mitigate these concerns. As discussed above, adoption of a more focused designation requirement that requires SCI entities to exercise reasonable discretion is likely to reduce the extent to which SCI entity member or participant designations overlap and possibly result in a smaller number of SCI entity members or participants being designated for participation in testing than as contemplated by the SCI Proposal, and a fewer number of members or participants designated to participate in testing should simplify efforts to coordinate testing. However, as some commenters noted, it remains possible that, despite coordination, some firms that are members of multiple SCI entities may be designated to participate in testing with multiple SCI entities at greater cost than if they had been designated by only one SCI entity, and may be required to test more than once annually, as this may be necessary for each SCI entity to meet its obligations under the rule. Though the Commission recognizes that the possibility of being designated by multiple SCI entities to participate in the testing of their BC/DR plans may be costly, the Commission ultimately believes that such a cost is appropriate to help ensure that the BC/DR plan of each SCI entity is useful and effective. If, for example, a firm is designated for mandatory testing by multiple SCI entities, it would be so designated because each such SCI entity determines that such firm is necessary to the successful activation of its BC/DR plan. The Commission recognizes that it is conceivable that a firm that is required to participate in testing with multiple SCI entities assesses the costs and burdens of participating in every such test to be too great, and makes its own business decision to withdraw its membership or participation in one or more such SCI entities so as to avoid the costs and burdens of such testing, but believes such scenario to be unlikely. Specifically, the Commission believes that it is unlikely that a firm determined to be significant enough to be designated to participate in testing by an SCI entity (even a smaller SCI entity) would choose to withdraw its membership or participation in an SCI entity solely because of the costs and burdens of Regulation SCI's BC/DR testing provisions. The Commission also believes that such firm is likely to be a larger firm with greater resources and a significant level of participation in such SCI entity, and is likely to already be connected to the backup facility of the SCI SRO that is designating it to test. The Commission continues to believe that SCI entities are best suited to find the most efficient and effective manner in which to test its BC/DR plans.[1218]

Furthermore, the Commission is also adopting a longer compliance period with regard to the industry- or sector-wide coordinated testing requirement in adopted Rule 1004(d).[1219] Specifically, SCI entities will have 21 months from the Effective Date to coordinate the testing of an SCI entity's business continuity and disaster recovery plans on an industry- or sector-wide basis with other SCI entities pursuant to adopted Rule 1004(d). In sum, the Commission believes that Rule 1004, as adopted, will enhance the resilience of the infrastructure of the U.S. securities markets.

### *C. Recordkeeping, Electronic Filing on Form SCI, and Access—Rules 1005–1007*

Adopted Rules 1005 through 1007 specify several additional requirements of Regulation SCI relating to recordkeeping and electronic filing and submission. As discussed below, the Commission has determined not to adopt the proposed provision regarding Commission access to the systems of an SCI entity because the Commission can adequately assess an SCI entity's compliance with Regulation SCI through existing recordkeeping requirements and examination authority, as well as through the new recordkeeping requirement in Rule 1005 of Regulation SCI.

#### 1. Recordkeeping—Rules 1005–1007

##### a. Recordkeeping Related to Compliance With Regulation SCI—Rule 1005

Proposed Rule 1000(c) required SCI SROs to make, keep, and preserve all documents relating to their compliance with Regulation SCI, as prescribed in Rule 17a–1 under the Exchange Act. Proposed Rule 1000(c) required SCI entities other than SCI SROs to: Make, keep, and preserve at least one copy of all documents relating to their compliance with Regulation SCI; keep these documents for not less than five years, the first two years in a place that is readily accessible to the Commission or its representatives for inspection and examination; and promptly furnish to Commission representatives [1220] copies of any of these documents upon request. Further, proposed Rule 1000(c) provided that, upon or immediately prior to ceasing to do business or ceasing to be registered under the Exchange Act, an SCI entity must ensure that the required records are accessible to the Commission and its representatives in a manner required by Rule 1000(c) for the remainder of the period required by Rule 1000(c).

The Commission received one comment letter supporting proposed Rule 1000(c).[1221] The Commission is adopting Rule 1000(c) as proposed, but re-designated as Rule 1005.[1222]

As noted in the SCI Proposal, SCI entities are already subject to recordkeeping requirements,[1223] but records relating to Regulation SCI may not be specifically addressed in certain

scope of Regulation SCI. *See supra* notes 189–192 and accompanying text (discussing the exclusion of ATSs trading only fixed-income securities from the definition of SCI ATS).

[1217] *See supra* notes 1159–1160 and accompanying text.

[1218] *See* Proposing Release, *supra* note 13, at 18126.

[1219] *See infra* Section IV.F (discussing the delayed implementation time for adopted Rule 1004(d)).

[1220] As discussed above, the Commission has renamed the ARP Inspection Program the Technology Controls Program. *See supra* note 6.

[1221] *See* MSRB Letter at 25. As discussed above, some commenters suggested recordkeeping in lieu of certain Commission reporting requirements. *See, e.g., supra* note 881 and accompanying text.

[1222] The Commission notes that adopted Rule 1005 replaces the term ''SCI security systems'' with ''indirect SCI systems'' as described in more detail in Section IV.A.2.d. Furthermore, internal cross references to Rules 1000(c)(2)(i) and (c)(2)(ii) in Rule 1000(c)(2)(iii) were updated to paragraphs (b)(1) and (b)(2) of Rule 1005 in accordance with the renumbering of the rule.

[1223] *See, e.g.,* 17 CFR 240.17a–1, applicable to SCI SROs; 17 CFR 240.17a–3 and 17a–4, applicable to broker-dealers; and 17 CFR 242.301–303, applicable to ATSs.

It has been the experience of the Commission that SCI entities presently subject to the ARP Inspection Program (nearly all of whom are SCI SROs that are also subject to the recordkeeping requirements of Rule 17a–1(a)) do generally keep and preserve the types of records that would be subject to the requirements of Rule 1005. Nevertheless, the Commission continues to believe that Regulation SCI's codification of these preservation practices will support an accurate, timely, and efficient inspection and examination process and help ensure that all types of SCI entities keep and preserve such records.

current recordkeeping rules.[1224] As adopted, Rule 1005 specifically addresses recordkeeping requirements for SCI entities with respect to records relating to Regulation SCI compliance.

With respect to SCI SROs, Rule 17a–1(a) under the Exchange Act requires every national securities exchange, national securities association, registered clearing agency, and the MSRB to keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made and received by it in the course of its business as such and in the conduct of its self-regulatory activity.[1225] In addition, Rule 17a–1(b) requires these entities to keep all such documents for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of Rule 17a–6.[1226] Rule 17a–1(c) requires these entities, upon request of any representative of the Commission, to promptly furnish to the possession of Commission representatives copies of any documents required to be kept and preserved by it pursuant to Rules 17a–1(a) and (b).[1227] Therefore, as noted in the SCI Proposal, the breadth of Rule 17a–1 under the Exchange Act is such that it would require SCI SROs to make, keep, and preserve records relating to their compliance with Regulation SCI.[1228] The Commission continues to believe that it is appropriate to cross-reference Rule 17a–1 in Rule 1005 to be clear that all SCI entities are subject to the same recordkeeping requirements regarding compliance with Regulation SCI. The Commission also continues to believe that it is appropriate to adopt recordkeeping requirements for SCI entities other than SCI SROs that are consistent with the recordkeeping requirements applicable to SROs under Rule 17a–1 under the Exchange Act. The Commission believes it is important to require such records be kept at both SCI SROs and SCI entities other than SCI SROs because such records are essential to understanding whether an SCI entity is meeting its obligations under Regulation SCI, to assess whether an SCI entity has appropriate policies and procedures with respect to its technology systems, to help identify the causes and consequences of an SCI event, and to understand the types of material systems changes occurring at an SCI entity.[1229]

Further, as noted above, the definitions of SCI system and indirect SCI system include systems operated ''on behalf of'' an SCI entity by third parties. An SCI entity retains legal responsibility for systems operated on its behalf and, as such, is responsible for producing to Commission representatives records required to be made, kept, and preserved under Regulation SCI, even if those records are maintained by third parties, and the SCI entity is responsible for ensuring that such third parties produce those requested documents, upon examination or other request. Accordingly, the Commission believes that an SCI entity should have processes and requirements in place, such as contractual provisions with a third party, to ensure that it is able to satisfy the requirements of Regulation SCI for systems operated on its behalf by a third party, including the recordkeeping requirements in Rule 1005.[1230] The Commission believes that if an SCI entity is unable to ensure compliance with Regulation SCI with regard to third party systems or recordkeeping, it should reassess its decision to outsource its systems or recordkeeping.

The Commission believes that Rule 1005 will facilitate its inspections and examinations of SCI entities and assist it in evaluating an SCI entity's compliance with Regulation SCI. In particular, Rule 1005 should facilitate Commission examination of SCI entities by helping to reduce delays in obtaining relevant records during an examination. Therefore, as noted in the SCI Proposal, the Commission's ability to examine for, and enforce compliance with, Regulation SCI could be hampered if an SCI entity were not required to adequately provide accessibility to its records for the full proposed retention period.

Further, while many SCI events may occur, be discovered, and be resolved in a short time frame, there may be other SCI events that may not be discovered until months or years after their occurrences, or may take significant periods of time to fully resolve. In such cases, having an SCI entity's records available even after it has ceased to do business or be registered under the Exchange Act would be beneficial. Because SCI events have the potential to negatively impact trade execution, price discovery, liquidity, and investor participation, the Commission believes that its ability to oversee the securities markets could be undermined if it is unable to review records to determine the causes and consequences of one or more SCI events experienced by an SCI entity that deregisters or ceases to do business. This information should provide an additional tool to help the Commission reconstruct important market events and better understand how such events impacted trade execution, price discovery, liquidity, and investor participation.

b. Service Bureau—Rule 1007

Proposed Rule 1000(e) required that, if the records required to be filed or kept by an SCI entity under Regulation SCI were prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity, the SCI entity ensure that the records are available for review by the Commission and its representatives by submitting a written undertaking, in a form acceptable to the Commission, by such service bureau or other recordkeeping service and signed by a duly authorized person at such service bureau or other recordkeeping service. Further, the written undertaking was required to include an agreement by the service bureau designed to permit the Commission and its representatives to examine such records at any time or from time to time during business hours, and to promptly furnish to the Commission and its representatives true, correct, and current electronic files in a form acceptable to the Commission or its representatives or hard copies of any, all, or any part of such records,

[1224] *See* Proposing Release, *supra* note 13, at 18128.

[1225] *See* 17 CFR 240.17a–1(a). Such records would, for example, include copies of incident reports and the results of systems testing.

[1226] *See* 17 CFR 240.17a–1(b). Rule 17a–6(a) under the Exchange Act states: ''Any document kept by or on file with a national securities exchange, national securities association, registered clearing agency or the Municipal Securities Rulemaking Board pursuant to the Act or any rule or regulation thereunder may be destroyed or otherwise disposed of by such exchange, association, clearing agency or the Municipal Securities Rulemaking Board at the end of five years or at such earlier date as is specified in a plan for the destruction or disposition of any such documents if such plan has been filed with the Commission by such exchange, association, clearing agency or the Municipal Securities Rulemaking Board and has been declared effective by the Commission.'' 17 CFR 240.17a–6(a).

[1227] *See* 17 CFR 240.17a–1(c).

[1228] *See* Proposing Release, *supra* note 13, at 18128.

[1229] To achieve the goals for which the recordkeeping requirements are designed, and to comply with the recordkeeping requirements of Rule 17a–1 and Rule 1005 of Regulation SCI, SCI entities must ensure that the records that they make, keep, and maintain are complete and accurate.

[1230] *See also* Rule 1007, which states that, if records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity, the SCI entity is required to ensure that the records are available for review by the Commission and its representatives by submitting a written undertaking, in a form acceptable to the Commission, by such service bureau or other recordkeeping service, signed by a duly authorized person at such service bureau or other recordkeeping service.

upon request, periodically, or continuously and, in any case, within the same time periods as would apply to the SCI entity for such records. Proposed Rule 1000(e) also provided that the preparation or maintenance of records by a service bureau or other recordkeeping service would not relieve an SCI entity from its obligation to prepare, maintain, and provide the Commission and its representatives with access to such records.

The Commission did not receive any comments on proposed Rule 1000(e) and is adopting Rule 1000(e) as proposed, but re-designated as Rule 1007. As noted in the SCI Proposal, Rule 1007 is substantively the same as the requirement applicable to broker-dealers under Rule 17a–4(i) of the Exchange Act.[1231] The Commission continues to believe that this requirement will help ensure the Commission's ability to obtain required records that are held by a third party who may not otherwise have an obligation to make such records available to the Commission. In addition, the Commission continues to believe that the requirement that SCI entities obtain from such third parties a written undertaking will also help ensure that such service bureau or other recordkeeping service is aware of its obligation with respect to records relating to Regulation SCI. The Commission believes that this requirement will help ensure that the Commission has prompt and efficient access to all required records, including those housed at a service bureau or any other recordkeeping service.[1232]

2. Electronic Filing and Submission of Reports, Notifications, and Other Communications—Rule 1006

Proposed Rule 1000(d) required that, except with respect to notifications to the Commission made pursuant to proposed Rule 1000(b)(4)(i) (Commission notification of certain SCI events) or oral notifications to the Commission made pursuant to proposed Rule 1000(b)(6)(ii) (Commission notification of certain material systems changes), any notification, review, description, analysis, or report to the Commission required under Regulation SCI be submitted electronically on Form SCI and include an electronic signature. Proposed Rule 1000(d) also required that the signatory to an electronically submitted Form SCI manually sign a signature page or document, in the manner prescribed by Form SCI, authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing. This document would be required to be executed before or at the time Form SCI is electronically submitted and would be required to be retained by the SCI entity in accordance with the recordkeeping requirements of Regulation SCI. The Commission is adopting Rule 1000(d) substantially as proposed, as discussed below, but re-designated as Rule 1006.

One commenter supported the electronic submission of Form SCI.[1233] One commenter suggested that the Commission should make clear that Regulation SCI filings do not need to be made in a tagged data format such as XBRL, which could be costly.[1234] Another commenter stated that the electronic signature requirement was appropriate only if the final rule included a safe harbor for good faith reporting of SCI events.[1235] According to this commenter, the requirement that there be an electronic signature and a manual signature could put SCI entity personnel at risk if it is later determined that there were factual errors, omissions, or other flaws in the initial filing.[1236]

After consideration of the comments, the Commission is adopting Rule 1000(d) substantially as proposed, and with updated internal cross references to reflect revisions to other aspects of Regulation SCI, as adopted. Specifically, Rule 1006 provides that notifications made pursuant to Rule 1002(b)(1) (immediate Commission notification of SCI events) and updates made pursuant to Rule 1002(b)(3) (updates regarding SCI events) are not required to be filed on Form SCI.[1237] As noted in the SCI Proposal, Rule 1006 is intended to provide a uniform manner in which the Commission would receive—and SCI entities would provide—written notifications, reviews, descriptions, analyses, or reports made pursuant to Regulation SCI.[1238] Rule 1006 should therefore allow SCI entities to efficiently draft and submit the required reports, and for the Commission to efficiently review, analyze, and respond to the information provided.[1239] In addition, the Commission believes that filing Form SCI in an electronic format would be less burdensome and more efficient for SCI entities and the Commission than mailing and filing paper forms.[1240] Further, after considering comments regarding the burden of submitting Form SCI in a tagged data format such as XBRL, the Commission is not requiring the use of XBRL formatting for Form SCI. Rather, certain fields in Sections I–III of Form SCI will require information to be provided by SCI entities in a format that will allow the Commission to gather information in a structured manner (*e.g.,* the submission type and SCI event type in Section I), whereas the exhibits to Form SCI will allow SCI entities to provide narrative responses, such as through a text format. Further, the Commission also is specifying that documents filed through the EFFS system must be in a text-searchable format without the use of optical character recognition. If, however, a portion of a Form SCI submission (*e.g.,* an image or diagram) cannot be made available in a text-searchable format, such portion may be submitted in a non-text-searchable format.[1241] The Commission believes that requiring documents to be submitted in a text-searchable format (with the limited exception noted) is necessary to allow Commission staff to efficiently review and analyze information provided by SCI entities. In particular, a text-searchable format allows Commission staff to better gather, analyze and use data submitted as exhibits, whereas a non-text-searchable format submission would require significantly more steps and labor to review and analyze data. The Commission notes that word processing and spreadsheet applications that are widely used by many businesses, including SCI entities, generate documents in this format.

As noted above, one commenter stated that the electronic signature requirement was appropriate only if the

[1231] 17 CFR 240.17a–4(i). *See* Proposing Release, *supra* note 13, at 18129.

[1232] *See* 17 CFR 240.17a–4(i) (records preserved or maintained by a service bureau).

[1233] *See* MSRB Letter at 25.

[1234] *See* OTC Markets Letter at 4. *See also* FINRA Letter at 28.

[1235] *See* Omgeo Letter at 20.

[1236] *See id.*

[1237] *See supra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events). Adopted Rule 1006 refers to an electronically ''filed'' Form SCI, rather than an electronically ''submitted'' Form SCI as proposed in Rule 1000(d)(1). This change clarifies that notices and reports required to be submitted under Regulation SCI are filings under the Exchange Act and Regulation SCI. *See* proposed and adopted 17 CFR 249.1900 (stating that Form SCI shall be used to ''file'' notices and reports as required by Regulation SCI). *See also* amended Rule 24b–2 (referring to material ''filed'' in electronic format on Form SCI).

[1238] *See* Proposing Release, *supra* note 13, at 18129–30.

[1239] *See id.* at 18130.

[1240] The Commission will implement Form SCI through the electronic form filing system (''EFFS'') currently used by SCI SROs to file Form 19b–4 filings. *See* Securities Exchange Act Release No. 50486 (October 4, 2004), 69 FR 60287 (October 8, 2004) (adopting the EFFS for use in filing Form 19b–4). *See also* Proposing Release, *supra* note 13, at 18130.

[1241] *See* General Instructions to Form SCI, Item A.

final rule included a safe harbor for good faith reporting of SCI events. The Commission is adopting the electronic signature requirement as proposed. The Commission notes that, as discussed above in Section IV.B.3.c, immediate Commission notification following an SCI event and updates regarding the SCI event may be given orally; the 24-hour Commission notification is required to be made on a good faith, best efforts basis; and the final Commission notification is not required until the resolution of the SCI event and the completion of the SCI entity's investigation of the SCI event. The Commission also notes that the purpose of the electronic signature requirement on Form SCI is to ensure that the person submitting the form to the Commission has been properly authorized by the SCI entity to submit the form on its behalf.[1242] Therefore, the electronic signature requirement would not put SCI entity personnel at risk if the SCI entity later determines that there were factual errors, omissions, or other flaws in the initial filing. As such, the Commission does not agree with the comment that the electronic signature requirement was appropriate only if the final rule included a safe harbor for good faith reporting of SCI events.[1243]

Amendment To Facilitate Electronic Filing Requirements

In addition, to permit implementation of Rule 1006,[1244] the Commission is adopting an amendment to Rule 24b–2 under the Exchange Act.[1245] Rule 24b–2 currently provides confidential treatment requests and the confidential portion of an electronic filing may be submitted in paper format only.[1246] The Commission is amending Rule 24b–2 by amending the rule's preliminary note, and paragraph (b) of the rule to clarify that under Rule 24b–2, confidential treatment requests and the confidential portion of an electronic filing may be submitted in paper format only, unless Rule 24b–2 provides otherwise. The Commission also is adding a new paragraph (g) to Rule 24b–2 to provide an electronic means by which an SCI entity may request confidential treatment of its filings on Form SCI. New paragraph (g) will provide that an SCI entity's electronic filings on Form SCI pursuant to Regulation SCI must include any information with respect to which confidential treatment is requested (''confidential portion''), and provide that, in lieu of the procedures described in Rule 24b–2b, an SCI entity may request confidential treatment of all information submitted on Form SCI by completing Section IV of Form SCI. The Commission's amendment provides an exception from Rule 24b–2's paper-only request for confidential treatment for all Form SCI filings, and specifically permits an SCI entity to electronically request confidential treatment of all information filed on Form SCI in accordance with Regulation SCI. The Commission believes that allowing for electronic submission of confidential treatment requests will reduce the burden on SCI entities by not requiring a separate paper submission, and provided the confidential treatment request is properly made, will expedite Commission review of the requests for confidential treatment, as all information submitted on Form SCI will be deemed to be the subject of the request for confidential treatment.

If such a confidential treatment request is properly made, the Commission will keep the information collected pursuant to Form SCI confidential to the extent permitted by law.[1247]

3. Access to the Systems of an SCI Entity

Proposed Rule 1000(f) would have required each SCI entity to provide Commission representatives reasonable access to its SCI systems and SCI security systems to assess the SCI entity's compliance with Regulation SCI.[1248] In the SCI Proposal, the Commission noted that the proposed rule would facilitate the access of representatives of the Commission to such systems of an SCI entity either remotely or on site, noting, for example, that with such access, Commission representatives could test an SCI entity's firewalls and vulnerability to intrusions.[1249] Further, the Commission noted that the proposed rule was intended to be consistent with the Commission's current authority with respect to access to records generally[1250] and could help ensure that Commission representatives have ready access to the SCI systems and SCI security systems of SCI entities in order to evaluate an SCI entity's practices with regard to the requirements of Regulation SCI.[1251] As discussed below, the Commission has determined not to adopt the proposed requirement because it believes it can achieve the goal of the proposed rule through its existing recordkeeping requirements and examination authority, as well as through the new recordkeeping requirement in Rule 1005 of Regulation SCI.

Many commenters criticized the SCI Proposal's discussion of the proposed access requirement as permitting unfettered access by third parties that could pose significant security risks to an SCI entity's systems.[1252] Potential issues identified by commenters included unauthorized access to confidential information,[1253] risk and damage to systems,[1254] and contractual issues with third party vendors.[1255] One commenter stated that the Commission should bear in mind that access to such highly sensitive environments of SCI entities carries a duty of care commensurate with the sensitivity of the access and information involved.[1256]

While several commenters advocated for the elimination of the proposed access provision,[1257] some commenters recommended ways to refine the proposed requirement while still achieving its goals.[1258] These

[1242] Additionally, similar to use of the EFFS in the context of electronic filing of Form 19b–4, by using a digital ID for each duly authorized signatory providing an electronic signature, both the Commission and an SCI entity may be assured of the authenticity and integrity of the electronic filing of Form SCI. *See infra* Section V.D.2.e (noting the necessity of completing a form to gain access to EFFS).

[1243] The same rationale also applies to the requirement for manual signature in Rule 1006.

[1244] *See* Rule 1006, 17 CFR 242.1006; *see also* General Instruction E to Form SCI (requiring Form SCI and exhibits to be filed electronically under Rule 1006).

[1245] 17 CFR 240.24b–2.

[1246] *See* 17 CFR 240.24b–2.

[1247] The Freedom of Information Act (''FOIA'') provides at least two pertinent exemptions under which the Commission has authority to withhold certain information. FOIA Exemption 4 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). FOIA Exemption 8 provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8).

[1248] *See* proposed Rule 1000(f) and Proposing Release, *supra* note 13, at Section III.D.3.

[1249] *See* Proposing Release, *supra* note 13, at 18130.

[1250] *See* Proposing Release, *supra* note 13, at 18130 (citing Section 17(b) of the Exchange Act, as well as Sections 11A, 6(b)(1), 15A(b)(2), and 17A(b)(3)(A) of the Exchange Act).

[1251] *See* Proposing Release, *supra* note 13, at 18130.

[1252] *See, e.g.,* NYSE Letter at 34; BATS Letter at 15; ISE Letter at 10; MSRB Letter at 25–26; Omgeo Letter at 28–29; SIFMA Letter at 18–19; FIF Letter at 7; Fidelity Letter at 5–6; LiquidPoint Letter at 4; ITG Letter at 16; KCG Letter at 20–21; Joint SROs Letter at 17–18; OCC Letter at 20; UBS Letter at 5; Tellefsen Letter at 10; and FINRA Letter at 41.

[1253] *See, e.g.,* FINRA Letter at 41; and Omgeo Letter at 29.

[1254] *See, e.g.,* Omgeo Letter at 29; and ITG Letter at 16.

[1255] *See, e.g.,* SIFMA Letter at 19.

[1256] *See* OCC Letter at 20.

[1257] *See, e.g.,* ITG Letter at 16; and CME Letter at 11.

[1258] *See, e.g.,* NYSE Letter at 34; OCC Letter at 20; ISE Letter at 10; DTCC Letter at 14; CME Letter at

suggestions included: Limiting the category of Commission staff to whom access could be provided;[1259] providing the Commission with access to ''configuration and information flows of the system, instead of direct access;''[1260] providing the Commission with reports and metrics on systems vulnerabilities rather than direct access;[1261] requiring only that SCI entities demonstrate for Commission staff their controls and safeguards and compliance with the rule;[1262] mandating training of Commission staff and supervision of Commission staff access by SCI entity personnel;[1263] and requiring that an SCI entity's staff conduct any tests while Commission staff observed, rather than providing Commission staff with direct access.[1264] One commenter also noted that the concept of reasonable access was vague.[1265] Other commenters asked that the Commission more clearly prescribe what would constitute ''reasonable access.''[1266] One commenter also recommended that SCI entities provide an individual contact for a designated Commission representative to communicate and meet with regarding an SCI entity's systems.[1267]

A few commenters also questioned whether the proposed access requirement is authorized by Section 17(b) or Section 11A of the Exchange Act, as stated in the SCI Proposal.[1268] Other commenters considered the proposed access requirement unnecessary and questioned the Commission's justification for needing this authority.[1269] Another commenter pointed out that this type of access is authorized by other sections of the Exchange Act and an additional provision in Regulation SCI is redundant.[1270]

After consideration of the views of commenters, the Commission has determined not to adopt the proposed reasonable access provision because it believes it can achieve its goals through existing recordkeeping requirements and its examination authority, as well as through the new recordkeeping requirement in Rule 1005 of Regulation SCI. As discussed in the SCI Proposal, the reasonable access provision was designed to help ensure that the Commission was able to evaluate an SCI entity's practices with regard to the requirements of proposed Regulation SCI.[1271] The Commission believes that it can adequately assess an SCI entity's compliance with Regulation SCI through its authority provided by existing provisions of the Exchange Act and rules thereunder, as well as through the additional recordkeeping provisions being adopted today in Rule 1005 of Regulation SCI, as described above. In this regard, as discussed above, Section 17(a) of the Exchange Act provides the Commission with the authority to adopt recordkeeping rules, and the breadth of Rule 17a–1 thereunder is such that it would require SCI SROs to make, keep, and preserve records relating to their compliance with Regulation SCI, including records produced by SCI systems and indirect SCI systems.[1272] Further, adopted Rule 1005 specifically imposes requirements on each SCI entity (other than SCI SROs) to, among other things: Make, keep, and preserve at least one copy of all documents relating to its compliance with Regulation SCI; keep all such documents for a period of not less than five years, the first two years in a place that is readily accessible to the Commission or its representatives for inspection and examination; and upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to Rules 1005(b)(1) and (2).[1273] The Commission also notes that Section 17(b) of the Exchange Act authorizes the Commission to conduct reasonable periodic, special, or other examinations of all records maintained by the entities described in Section 17(a).[1274] These examinations can be conducted ''at any time, or from time to time,'' as the Commission ''deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].''[1275]

Taken together, the Commission believes that these provisions afford the Commission the authority and ability to assess SCI entities' compliance with the requirements of Regulation SCI, rendering the adoption of a reasonable access provision unnecessary. Pursuant to this authority, in some circumstances, the Commission's assessment of an SCI entity's compliance may require appropriate access to certain SCI systems in coordination with the relevant SCI entity. In particular, the Commission's ability to assess the accuracy and completeness of an SCI entity's records with regard to Regulation SCI, including the written policies and procedures established and maintained pursuant to Rule 1001 and the report of the SCI review prepared in accordance with Rule 1003(b), and to evaluate whether SCI entities are otherwise complying with Regulation SCI, may necessitate the observation of SCI systems and indirect SCI systems by Commission representatives.[1276]

The Commission believes that such access would not require an SCI entity to agree to remote or direct access by Commission personnel to an SCI entity's systems, such as by permitting Commission staff to run tests or use system scanning tools on its SCI systems or indirect SCI systems. Rather, as suggested by some commenters, access would entail allowing Commission staff to observe the SCI entity's SCI systems and indirect SCI systems with appropriate safeguards, including through systems demonstrations for Commission staff performed by the SCI entity and running tests on an SCI system with Commission staff onsite to observe.[1277] The Commission believes that such access does not raise the potential security risks posed by unrestricted third party access to SCI systems.[1278]

### *D. Form SCI*

Pursuant to proposed Rule 1000(d), subject to certain exceptions, notices, reports, and other information required

11; Omgeo Letter at 29; Joint SROs Letter at 18; and MSRB Letter at 26.

[1259] *See, e.g.,* NYSE Letter at 34.

[1260] *See* NYSE Letter at 34.

[1261] *See, e.g.,* ISE Letter at 10; DTCC Letter at 14; OCC Letter at 20; and CME Letter at 11.

[1262] *See, e.g.,* Omgeo Letter at 28–29; and DTCC Letter at 14.

[1263] *See* MSRB Letter at 26.

[1264] *See* OCC Letter at 20.

[1265] *See, e.g.,* ITG Letter at 16.

[1266] *See, e.g.,* MSRB Letter at 26; Joint SROs Letter at 18; and FINRA Letter at 41.

[1267] *See* SIFMA Letter at 19.

[1268] *See* NYSE Letter at 34; BATS Letter at 15; and CME Letter at 11.

[1269] *See* FINRA Letter at 41; BATS Letter at 15; Omgeo Letter at 28–29; and Fidelity Letter at 5.

[1270] *See* Angel Letter at 18.

[1271] *See* Proposing Release, *supra* note 13, at *18130.*

[1272] *See supra* note 1251 and accompanying text.

[1273] *See supra* Section IV.C.1 (discussing recordkeeping requirements of adopted Rule 1005). As noted above, the recordkeeping requirements also extend to records of third parties. Specifically, an SCI entity is responsible for producing to Commission representatives records required to be made, kept, and preserved under Regulation SCI, even if those records are maintained by third parties, and the SCI entity is responsible for ensuring that such third parties produce those requested documents, upon examination or other request. *See id.*

[1274] *See* Section 17(b) of the Exchange Act, 15 U.S.C. 78q(b).

[1275] *Id.*

[1276] The Commission notes that, under the ARP Inspection Program, such access has been routinely requested by Commission staff and provided by ARP entities.

[1277] *See supra* notes 1262 and 1264 and accompanying text.

[1278] The Commission believes that the elimination of the proposed reasonable access provision addresses the other comments on this provision.

to be provided to the Commission under Regulation SCI would have been required to be submitted electronically through the EFFS on proposed Form SCI.[1279] Proposed Form SCI included detailed instructions regarding the specific information that SCI entities would have been required to submit to the Commission. After careful consideration of comments, the Commission is adopting Form SCI with certain modifications, as further discussed below. These modifications to proposed Form SCI correspond to the changes to the Commission notification and reporting requirements as adopted, each of which is discussed in greater detail above.[1280]

Adopted Rule 1006 provides that, except with respect to notifications to the Commission made pursuant to Rule 1002(b)(1) or updates to the Commission made pursuant to Rule 1002(b)(3), all notifications, reviews, descriptions, analyses, or reports to the Commission required to be submitted under Regulation SCI must be filed electronically on Form SCI. Form SCI solicits information through a series of questions designed to elicit short-form answers, but also requires SCI entities to provide information and/or reports in narrative form by attaching specified exhibits. All filings on Form SCI require that an SCI entity identify itself and indicate the basis for submitting the form. Specifically, an SCI entity would indicate on the form the specific type of submission it is making: A notification regarding an SCI event pursuant to Rule 1002(b)(2); a final report or interim status report regarding an SCI event pursuant to Rule 1002(b)(4); a quarterly report on de minimis systems disruptions and de minimis systems intrusions pursuant to Rule 1002(b)(5)(ii); a quarterly report of material systems changes pursuant to Rule 1003(a)(1); a supplemental report of material system changes pursuant to Rule 1003(a)(2); or a submission of the report of an SCI review, together with any response by senior management, pursuant to Rule 1003(b)(3). In addition, Form SCI permits, but does not require, SCI entities to utilize the form to submit initial notifications of SCI events pursuant to Rule 1002(b)(1), as well as updates regarding SCI events pursuant to Rule 1002(b)(3). Moreover, if an SCI entity decides to withdraw a previously submitted Form SCI, it would complete page 1 of Form SCI and select the appropriate check box to indicate the withdrawal. A filing on Form SCI also requires that an SCI entity provide additional information on attached exhibits, as discussed below. Because Form SCI is a report that is required to be filed under the Exchange Act and Regulation SCI, it is unlawful for any person to willfully or knowingly make, or cause to be made, a false or misleading statement with respect to any material fact in Form SCI.[1281]

Several commenters addressed the information required by Form SCI as well as the submission process for the form. One commenter asked a number of questions on how the submission process would work in practice, including: (i) Whether the form would be rejected by the Commission if information was missing; (ii) whether the Commission would deem it a failure to comply with Regulation SCI if a Form SCI is rejected for incompleteness and the SCI entity is unable to resubmit within the applicable reporting time frame; (iii) how SCI entities would update or correct information previously submitted on Form SCI; (iv) will the EFFS system be available for Form SCI submissions during non-business hours and whether there is an alternative means to submit notifications if the EFFS system is down or unavailable; (v) who at the Commission would be reviewing submissions and whether they would be familiar with technical jargon; and (vi) whether the SCI entities will be expected to attach documentation supporting the descriptions provided in the exhibits.[1282] The commenter also expressed several concerns, including: (i) The amount of time it would take SCI entities to master the new submission process for proposed Form SCI and suggested a delayed implementation or transition period; (ii) that the form could encourage SCI entities to guess where they are missing information if a form could be rejected for incomplete information; (iii) that a submission that needs to be updated or corrected would not be considered timely filed; (iv) that the updating procedure could become burdensome if the SCI entity needed to explain the reason for any changes to information previously provided; and (v) that submissions would be more burdensome if technical notifications and reports needed to be translated into plain English.[1283] Another commenter requested that the electronic filing system that the Commission puts in place to receive Form SCI submissions be made available on weekends and outside normal business hours.[1284] This commenter also suggested that the Commission remain open to changes to Form SCI as it and SCI entities gain experience with the use of Form SCI and that the Commission should work with SCI entities to test the electronic submission system to ensure its operational capability.[1285]

The Commission has considered these comments and has addressed many of the issues raised by commenters by revising the substantive requirements of adopted Rules 1002 and 1003, as well as making certain changes to the adopted form. With respect to a commenter's question regarding whether a Form SCI would be rejected if information was missing,[1286] as stated in the General Instructions for Form SCI, an SCI entity must provide all information required by the form, including the exhibits. The General Instructions for Form SCI also state that a filing that is incomplete or similarly deficient may be returned to the SCI entity, and any filing so returned will be deemed not to have been filed with the Commission.[1287] In response to the commenter who expressed concern that a submission that needed to be updated or corrected would not be considered timely filed, the Commission notes that an SCI entity is responsible for submitting a complete and correct Form SCI within the time period specified in the relevant provisions under Regulation SCI.[1288] At the same time, the Commission notes

[1279] Proposed Rule 1000(d) provided exceptions for notifications under proposed Rule 1000(b)(4)(i) and oral notifications pursuant to proposed Rule 1000(b)(6)(ii).

[1280] *See supra* Sections IV.B.3.c, IV.B.4, and IV.B.5 (discussing the reporting requirements of the adopted regulation). *See also supra* Section IV.B.6 (discussing the business continuity and disaster recovery plans testing requirement for SCI entity members or participants, and elimination of the proposed Commission notification requirement related to member or participation designations).

[1281] *See, e.g.,* Section 32(a) of the Exchange Act, 15 U.S.C. 78ff(a).

[1282] *See* FINRA Letter at 28–30.

[1283] *See id.*

[1284] *See* MSRB Letter at 19, 25. *See also* FINRA Letter at 29 (questioning whether the EFFS system would be available during non-business hours for Form SCI submissions).

[1285] *See* MSRB Letter at 25–26.

[1286] *See supra* note 1282 and accompanying text.

[1287] While the Commission has the ability to reject a Form SCI filing, the Commission notes that the Form SCI submission process is different from the Form 19b–4 filing process. Specifically, SCI entities file Form SCI to provide notification to the Commission regarding SCI events and material systems changes, and reports of SCI reviews. On the other hand, SROs file Form 19b–4 for immediately effective rule changes or to seek Commission approval of rule changes. Therefore, the process for rejecting a Form 19b–4 filing does not apply to Form SCI submissions.

[1288] With respect to a commenter's concern that SCI entities may have to guess where information is missing if a form could be rejected for incomplete information, the Commission intends there to be communication between Commission staff and SCI entity personnel in instances where a Form SCI is rejected to discuss the information missing in the submission and anything else necessary to comply with the form requirements. *See supra* note 1283 and accompanying text.

that, while the SCI event notification under Rule 1002(b)(2) is required to be provided within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event occurred, information for such notifications is only required to be provided on a good faith, best efforts basis. For other types of notifications and reports required to be submitted on Form SCI, SCI entities have more time to prepare such submission, and to ensure that the information provided is complete and correct.

With respect to a commenter's question regarding how SCI entities would update or correct information previously submitted on Form SCI, the Commission notes that the rules under Regulation SCI already provide for updates for many of the Form SCI submissions. Specifically, Rule 1002(b)(2) requires certain information to be submitted on a good faith, best efforts basis within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. Rule 1002(b)(3) requires SCI entities to provide updates regarding SCI events until the SCI event is resolved and the SCI entity's investigation of the SCI event is closed.[1289] As such, SCI entities may use the updates under Rule 1002(b)(3) to correct or update previously submitted information. Also, Rule 1003(a)(2) requires SCI entities to submit supplemental reports to notify the Commission of any material error in or material omission from a previously submitted material systems change report.

With respect to the Form SCI submissions where the rules do not specifically provide for updates (*i.e.,* SCI event notifications under Rule 1002(b)(4), quarterly SCI event notifications under Rule 1002(b)(5), report of SCI reviews under Rule 1003(b)(3)), if an SCI entity discovers that a previously submitted Form SCI must be corrected or updated, the SCI entity should contact Commission staff as it corrects or updates the prior submission. In addition, an SCI entity will be able to withdraw and re-submit a previously submitted Form SCI.[1290] However, as noted above, an SCI entity is responsible for submitting a complete and correct Form SCI within the time period specified in the relevant provisions under Regulation SCI.[1291]

In addition, in response to comments,[1292] the Commission notes that Form SCI does not require SCI entities to attach documentation supporting the descriptions in the exhibits, although SCI entities will be able to do so if they so choose by attaching the documentation as part of the relevant exhibit. Moreover, in response to the commenter who asked who at the Commission would be reviewing submissions and whether they would be familiar with technical jargon, the Commission notes that appropriate Commission staff from different offices or divisions with the necessary expertise to understand the Form SCI submission will review it depending on the nature of the submission (*i.e.,* legal or technical), and thus, it is not necessary for SCI entities to translate technical jargon into plain English.

In response to the commenter who expressed concern as to the amount of time it would take SCI entities to master the Form SCI submission process and suggested delayed implementation, the Commission believes that, by utilizing the EFFS system currently used by many SROs for Rule 19b–4 and Rule 19b–7 filings, it will allow for a quicker and smoother implementation of the Form SCI submission process for certain SCI entities, and allow the Commission to apply its experience with EFFS to facilitate the submissions of notifications and reports required by Regulation SCI. Nevertheless, the Commission notes that it is delaying the date for compliance with Regulation SCI, as discussed in Section IV.F below. The Commission does not expect that the Form SCI submission process will require substantial time for SCI entities to master and the delayed date for compliance with Regulation SCI provides SCI entities with more time to learn and adopt it.

With respect to commenters' question regarding whether the EFFS system will be available during non-business hours and whether there is an alternative means to submit notifications if the EFFS system is down or unavailable,[1293] the Commission notes that, as is the case with Rule 19b–4 and Rule 19b–7 filings, EFFS is available 24 hours a day. If EFFS becomes unavailable for a period of time, the Commission recognizes that SCI entities will not be able to submit any required notifications during that time period, and the Commission would expect the SCI entities to file any required notifications promptly once it becomes available. In response to the commenter who suggested that the Commission remain open to changes to Form SCI and that the Commission work with SCI entities to test the electronic submission system to ensure its operational capability, the Commission expects, as it has done with the SRO rule filing process, to periodically evaluate the effectiveness of the submission process for Form SCI, as well as the form itself, and may consider improvements in the future as appropriate.[1294] The Commission also notes that it expects, prior to the compliance date, that its staff will provide materials to SCI entities regarding the operation of the electronic filing system to submit Forms SCI. Furthermore, the Commission will perform internal testing to help ensure the operational capability of EFFS prior to the compliance date.

1. Notice of SCI Events Pursuant to Rule 1002(b)

Proposed Rule 1000(b)(4) would have required each SCI entity to submit certain information regarding SCI events to the Commission using proposed Form SCI.[1295] The Commission is adopting proposed Rule 1000(b)(4) as Rule 1002(b) with certain modifications, which are discussed above in Section IV.B.3.c.

With respect to Commission notifications under Rule 1002, adopted Form SCI requires an SCI entity to provide the following information in a short, standardized format: (i) Whether the Commission has previously been notified of the SCI event pursuant to Rule 1002(b)(1); (ii) the type of submission (*i.e.,* an initial notification pursuant to Rule 1002(b)(1), a notification pursuant to Rule 1002(b)(2), an update pursuant to Rule 1002(b)(3), a final report pursuant to Rule 1002(b)(4), or an interim status report

[1289] As discussed in detail in Section IV.B.3.c above, Rule 1002(b)(3) allows SCI entities to discuss the update with Commission staff orally, rather than by completing the form, although an SCI entity may use Form SCI if it chooses to do so. To the extent an SCI entity chooses to utilize the form for such updates, the written updates can facilitate the Commission's tracking and assessment of SCI events.

[1290] *See* General Instructions to Form SCI, Item F.

[1291] As noted above, one commenter expressed concern that an updating procedure could become burdensome if the SCI entity needs to explain the reason for any changes to information previously provided. *See supra* note 1283 and accompanying text. The Commission notes that, with respect to rules under Regulation SCI that require updates, those rules specify the information that is required to be contained in an update, and do not require an explanation of the reason for the update. With respect to the Form SCI submissions where the rules do not specifically provide for updates, as noted above, the SCI entity can contact Commission staff as the SCI entity corrects or updates the prior submission.

[1292] *See supra* notes 1282–1283 and accompanying text.

[1293] *See supra* notes 1282, 1284 and accompanying text.

[1294] *See supra* note 1285 and accompanying text.

[1295] Proposed Rule 1000(d) provided an exception for notifications under proposed Rule 1000(b)(4)(i).

pursuant to Rule 1002(b)(4)); (iii) the type(s) of SCI event (*i.e.,* systems compliance issue, systems disruption, or systems intrusion);[1296] (iv) the date/time the SCI event occurred; (v) the duration of the SCI event; (vi) when responsible SCI personnel had a reasonable basis to conclude that an SCI event occurred; (vii) whether the SCI event has been resolved and, if so, the date/time of resolution; (viii) whether the SCI entity's investigation of the SCI event is closed and, if so, the date of closure; (ix) the estimated number of market participants potentially impacted by the SCI event; (x) whether the SCI event is a major SCI event; (xi) the types of systems impacted (*i.e.,* trading, clearance and settlement, order routing, market data, market regulation, market surveillance, or indirect SCI systems) and the name of such system(s); and (xii) whether any critical SCI system(s) are impacted by the SCI event and, if so, the types of such critical SCI systems (*i.e.,* systems that directly support functionality relating to: Clearance and settlement systems of clearing agencies; openings, reopenings, and closings on the primary listing market; trading halts; initial public offerings; the provision of consolidated market data; exclusively listed securities; or systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets) and a description of such systems.

If an SCI entity chooses to utilize Form SCI to submit an initial notification required by Rule 1002(b)(1), an SCI entity will be able to submit a short description of the SCI event, and be allowed to attach documents regarding such SCI event as part of Exhibit 6 of Form SCI if the SCI entity chooses to do so.

For a notification required by Rule 1002(b)(2), in addition to providing the applicable standardized information on Form SCI as discussed above, an SCI entity is required to submit an Exhibit 1. An SCI entity is required to provide the following information on a good faith, best efforts basis in the Exhibit 1: (i) A description of the SCI event, including the system(s) affected; and (ii) to the extent available as of the time of notification, the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event.

If an SCI entity chooses to utilize Form SCI to submit an update required by Rule 1002(b)(3), an SCI entity will be able to submit a short description of the update, and be allowed to attach documents regarding such update as part of Exhibit 6 of Form SCI if the SCI entity chooses to do so.

For a submission required by Rule 1002(b)(4), in addition to providing the applicable standardized information on Form SCI as discussed above, adopted Form SCI also requires an SCI entity to indicate if it is a final report or an interim status report and submit an Exhibit 2. If an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 calendar days of the occurrence of the SCI event, an SCI entity must file a final report under Rule 1002(b)(4)(i)(A) within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event. However, if an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 calendar days of the occurrence of the SCI event, an SCI entity must file an interim status report under Rule 1002(b)(4)(i)(B)(*1*) within 30 calendar days after the occurrence of the SCI event. For SCI events in which an interim status report is required to be filed, an SCI entity must file a final report under Rule 1002(b)(4)(i)(B)(*2*) within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event. For any submission required by Rule 1002(b)(4), an SCI entity is required to provide the following information in the Exhibit 2: (i) A detailed description of: The SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event; (ii) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants; and (iii) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. As noted above, if an SCI entity submits an interim written notification under Rule 1000(b)(4)(i)(B), the SCI entity is required to provide the information specified in Exhibit 2, but only to the extent known at the time. The SCI entity is also required to subsequently submit a final report under Rule 1000(b)(4)(i)(B) and provide all the information specified in Exhibit 2.

Rule 1002(b)(5) states that the Commission notification requirements under Rules 1002(b)(1)–(4) do not apply to any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. Rule 1002(b)(5)(i) instead requires that an SCI entity make, keep, and preserve records relating to all such SCI events and Rule 1002(b)(5)(ii) requires an SCI entity to submit to the Commission quarterly reports containing a summary description of such de minimis systems disruptions and de minimis systems intrusions. For a quarterly report required by Rule 1002(b)(5), an SCI entity is required to indicate the end date of the applicable calendar quarter for which the report is being submitted. The SCI entity is also required to submit an Exhibit 3, containing a summary description of such de minimis systems disruptions and de minimis systems intrusions, including the SCI systems and, for systems intrusions, the indirect SCI systems, affected by such de minimis systems disruptions and de minimis systems intrusions during the applicable calendar quarter.

2. Notices of Material Systems Changes Pursuant to Rule 1003(a)

Proposed Rule 1000(b)(6) would have required an SCI entity to provide advance Commission notifications of material systems changes. Proposed Rule 1000(b)(8)(ii) would have required an SCI entity to submit to the Commission semi-annual reports on material systems changes. As discussed in detail in Section IV.B.4 above, many commenters were critical of the proposed reporting framework with respect to material systems changes, including the 30-day advance notification procedure. After considering the views of commenters, the Commission is not adopting the 30-day advance notification requirement or the semi-annual reporting requirement

[1296] Some SCI events may meet the definition of more than a single SCI event type, and the form permits SCI entities to check one, two, or all three SCI event types.

for material systems changes. Rather, an SCI entity is required to submit quarterly reports for material systems changes under Rule 1003(a)(1). An SCI entity is also required under Rule 1003(a)(2) to promptly submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a).

One commenter raised a concern that an advance notification could be rejected by the Commission for inadequate description and result in a delay to a planned systems change.[1297] As noted above in Section IV.B.4, the Commission is adopting a quarterly reporting system that does not require the advanced notification of individual planned material systems changes required by proposed Rule 1000(b)(6). The adopted framework is intended to keep the Commission and its staff apprised of systems changes at SCI entities while reducing the burdens related to notifying the Commission of such changes and allowing for the various types of development processes used by SCI entities (including agile development processes). Also, as noted above in Section IV.B.4, Regulation SCI does not provide for a new review or approval process for SCI entities' material systems changes. As such, Commission staff will not use material systems change reports to require any approval of prospective systems changes in advance of their implementation pursuant to any provision of Regulation SCI, or to delay implementation of material systems changes pursuant to any provision of Regulation SCI.[1298]

For a notification required by Rule 1003(a) (including supplemental reports under Rule 1003(a)(2)), an SCI entity is required to indicate the end date of the applicable calendar quarter for which the report is being submitted and submit an Exhibit 4. For a notification required by Rule 1003(a)(1), Exhibit 4, is required to contain a description of completed, ongoing, and planned material changes to its SCI systems and the security of its indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. For a notification required by Rule 1003(a)(2), Exhibit 4 is required to contain the supplemental report of a material error in or material omission from a report previously submitted under Rule 1003(a)(1).[1299]

3. Reports of SCI Reviews Pursuant to 1003(b)

Proposed Rule 1000(b)(8)(i) would have required an SCI entity to submit to the Commission a report of the SCI review required by proposed Rule 1000(b)(7), together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity. As discussed above in Section IV.B.5, the Commission is adopting this Commission reporting requirement as proposed. There were no comments on proposed Form SCI with respect to reports of SCI reviews.

For a notification required by Rule 1003(b), an SCI entity is required to indicate on Form SCI the date of completion of the SCI review and the date of submission of the SCI review to the SCI entity's senior management. An SCI entity is also required to submit an Exhibit 5, containing the report of the SCI review that was submitted to the SCI entity's senior management, along with any response to the report by senior management.[1300]

4. Notification of Member or Participant Designation Standards and List of Designees

Proposed Rule 1000(b)(9) would have required an SCI entity to notify the Commission of its members or participants that have been designated for business continuity and disaster recovery plans testing, as well as the standards for such designation. Proposed Rule 1000(b)(9) would have also required SCI entities to promptly update such notification after any changes to its list of designees or standards for designation. As discussed above in Section IV.B.6, the Commission is not adopting these Commission notification requirements.

5. Other Information and Electronic Signature

Proposed Form SCI would have required an SCI entity to provide the Commission with contact information for the systems personnel, regulatory personnel, and senior officer responsible for addressing an SCI event, including the name, title, telephone number, and email address of such persons. Proposed Form SCI would also have given the SCI entity an option to provide contact information for an additional systems personnel and regulatory personnel. Finally, proposed Form SCI would have required an electronic signature to help ensure the authenticity of the Form SCI submission.

Adopted Form SCI more generally requires an SCI entity to provide contact information for a person who is prepared to respond to questions for a particular submission. Form SCI continues to require an electronic signature to help ensure the authenticity of the Form SCI submission. The Commission believes that these requirements will expedite communications between Commission staff and SCI entities, because they will help identify the person or persons responsible for communicating with Commission staff about an SCI event even though one or more other persons may be responsible for addressing and resolving the SCI event, and also help ensure that only authorized personnel at each SCI entity submit filings required by adopted Regulation SCI.

*E. Other Comments Received*

1. Applying Regulation SCI to Security-Based Swap Data Repositories and Security-Based Swap Execution Facilities

As noted in the SCI Proposal, on July 21, 2010, the President signed the Dodd-Frank Act into law.[1301] The Dodd-Frank Act was enacted, among other things, to promote the financial stability of the United States by improving the accountability and transparency of the nation's financial system.[1302] Title VII of the Dodd-Frank Act provides the Commission and the CFTC with the authority to regulate over-the-counter derivatives.

In particular, as noted in the SCI Proposal, Section 763 of the Dodd-Frank Act amends the Exchange Act by adding new statutory provisions to govern the regulation of various entities, including security-based swap data repositories (''SB SDRs'') and security-based swap execution facilities (''SB SEFs'').[1303]

[1297] *See* SIFMA Letter at 16.

[1298] At the same time, the Commission notes that the General Instructions for Form SCI state that a filing that is incomplete or similarly deficient may be returned to the SCI entity, and any filing so returned will be deemed not to have been filed with the Commission.

[1299] *See* General Instructions to Form SCI, Item C.

[1300] As discussed in Section IV.B.5, the SCI review would contain: (1) A risk assessment with respect to SCI systems and indirect SCI systems of an SCI entity; and (2) an assessment of internal control design and effectiveness of SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.

[1301] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, H.R. 4173) (''Dodd-Frank Act'').

[1302] *See* Dodd-Frank Act Preamble.

[1303] *See* Dodd-Frank Act, Section 763 (adding Sections 13(n), 3C, and 3D of the Exchange Act). The Dodd-Frank Act also directs the Commission to harmonize to the extent possible Commission regulation of SB SDRs and SB SEFs with CFTC regulation of swap data repositories (''SDRs'') and swap execution facilities (''SEFs'') under the

Continued

Under the authorities of Section 13(n) of the Exchange Act, applicable to SB SDRs, and Section 3D(d) of the Exchange Act, applicable to SB SEFs, the Commission proposed rules for these entities with regard to their automated systems' capacity, resiliency, and security.[1304] In the SB SDR Proposing Release and the SB SEF Proposing Release, respectively, the Commission proposed Rule 13n–6 and Rule 822 under the Exchange Act, which would set forth the requirements for these entities with regard to their automated systems' capacity, resiliency, and security. In each release, the Commission stated that it was proposing standards comparable to the standards applicable to SROs, including exchanges and clearing agencies, and other registrants, pursuant to the Commission's ARP standards.[1305] The SCI Proposal described in detail the SB SDR and SB SEF proposals relating to systems' capacity, resiliency, and security; the comments received on those proposals; and the differences between proposed Regulation SCI and those proposals.[1306]

In the SCI Proposal, the Commission recognized that there could be differences between Regulation SCI, as adopted, and Rules 13n–6 and 822, if adopted. Therefore, the Commission sought comment on whether it should propose to apply the requirements of Regulation SCI, in whole or in part, to SB SDRs and/or SB SEFs.[1307] In addition, the Commission sought comment on what—if the Commission were to propose to apply some or all of the requirements of Regulation SCI to SB SDRs or SB SEFs—would be the most appropriate way to implement such requirements for SB SDRs and SB SEFs.[1308] However, the Commission also noted that, should the Commission decide to propose to apply the requirements of Regulation SCI to SB SDRs or SB SEFs, the Commission would issue a separate release discussing such a proposal.[1309]

One commenter supported the inclusion of SB SEFs and possibly SB SDRs under proposed Regulation SCI.[1310] Several commenters supported some form of harmonization, but were cognizant of the practical differences between options and equities, on the one hand, and derivatives, on the other.[1311]

In the context of considering whether Regulation SCI should apply to SB SDRs or SB SEFs, one commenter supported principles-based rules relating to systems compliance and integrity, and generally believed that principles applicable to one type of system should be applicable to all types of systems.[1312] This commenter noted that the Commission should not promulgate principles-based rules that would apply different principles to different systems, unless such difference is clearly warranted by the facts and circumstances relating to and the purpose of a particular system.[1313] This commenter also commented that, because technology continues to evolve at a rapid pace and because specific and technical rules may create conflicting standards, any attempt to provide specific and technical rules should be avoided, unless the context clearly warrants such specific and technical rules.[1314] This commenter concluded that the similarities between certain SCI entities and SB SDRs and SB SEFs do not provide a clear justification for a different set of rules.[1315]

One commenter noted that SB SDRs should have standards that are consistent with, but not identical to, those of SCI entities.[1316] According to this commenter, the functions that SB SDRs perform are significantly different from those performed by SCI entities.[1317] However, this commenter supported applying to SB SDRs: Proposed Rule 1000(b)(1)(i)(A)–(E);[1318] requirements relating to Commission notification of SCI events (by adopting the notification provisions described in proposed Rule 13n–6(3)); and requirements for business continuity planning and testing (but SB SDRs should not be required to test with other SB SDRs given the structure of the proposed SB SDR Regulations).[1319] Finally, rather than making Regulation SCI applicable to SB SDRs, this commenter recommended that these provisions be incorporated into Rule 13n–6.[1320]

The Commission appreciates the comments received on the potential application of Regulation SCI to SB SDRs and SB SEFs. As noted above, should the Commission decide to propose to apply the requirements of Regulation SCI to SB SDRs or SB SEFs, the Commission would issue a separate release discussing such a proposal and would take these comments into account.

2. Applying Regulation SCI to Broker-Dealers Other Than SCI ATSs and Other Types of Entities

Regulation SCI, as proposed and as adopted, would apply to national securities exchanges, registered securities associations, registered clearing agencies, the MSRB, SCI ATSs, plan processors, and exempt clearing agencies subject to ARP. It would not apply to other types of market participants, such as market makers or other broker-dealers. As noted in the SCI Proposal, recent events have highlighted the significance of systems integrity of a broader set of market participants than those included in the definition of SCI entity.[1321] Also, as

CFTC's jurisdiction, an endeavor that Commission staff is undertaking as it seeks to move the SB SDR and SB SEF proposals toward adoption. *See* Dodd-Frank Act, Section 712 (directing the Commission, before commencing any rulemaking with regard to SB SDRs or SB SEFs, to consult and coordinate with the CFTC for purposes of assuring regulatory consistency and comparability to the extent possible).

[1304] *See* Securities Exchange Act Release Nos. 63347 (November 19, 2010), 75 FR 77306 (December 10, 2010) (proposing new Rule 13n–6 under the Exchange Act applicable to SB SDRs) (''SB SDR Proposing Release''); 63825 (February 2, 2011), 76 FR 10948 (February 28, 2011) (proposing new Rule 822 under the Exchange Act applicable to SB SEFs) (''SB SEF Proposing Release''). *See also* Dodd-Frank Act, Section 761(a) (adding Section 3(a)(75) of the Exchange Act) (defining the term ''security-based swap data repository''), and Section 761(a) (adding Section 3(a)(77) of the Exchange Act) (defining the term ''security-based swap execution facility'').

[1305] *See* SB SDR Proposing Release, *supra* note 1304, at 77332 and SB SEF Proposing Release, *supra* note 1304, at 10987.

[1306] *See* Proposing Release, *supra* note 13, at 18133–34.

[1307] *See id.* at 18134–37.

[1308] *See id.* at 18137–38. As noted in the SCI Proposal, although the Commission has issued a policy statement regarding the anticipated sequencing of the compliance dates of final rules to be adopted by the Commission for certain provisions of Title VII of the Dodd-Frank Act, the precise timing for adoption of or compliance with any final rules relating to SB SDRs or SB SEFs is not known at this time. *See* Securities Exchange Act Release No. 67177 (June 11, 2012), 77 FR 35625 (June 14, 2012) (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).

[1309] *See* Proposing Release, *supra* note 13, at 18134.

[1310] *See* Tellefsen Letter at 5.

[1311] *See* DTCC Letter at 18–19; and NYC Bar Letter at 2–5. *See also* CoreOne Letter at 5–7.

[1312] *See* NYC Bar Letter at 3.

[1313] *See id.* at 3–4.

[1314] *See id.* at 4.

[1315] *See id.* This commenter also specifically noted that important market systems should not have differing recovery requirements without a clear justification, particularly in light of a Congressional mandate in the Dodd-Frank Act to ensure regulatory consistency and comparability, to the extent possible. *See* NYC Bar Letter at 5.

[1316] *See* DTCC Letter at 18.

[1317] *See id.*

[1318] However, this commenter noted that specific industry standards should be adopted for SB SDRs, rather than adopting existing standards that were largely developed before repositories were developed and were not intended to cover these types of entities. *See id.*

[1319] *See id.* at 18–19.

[1320] *See id.* at 19.

[1321] *See* Proposing Release, *supra* note 13, at 18138, n. 334.

noted in the SCI Proposal, some broker-dealers have grown in size and importance to the market in recent years.[1322] As such, the Commission recognized that systems disruptions, systems compliance issues, and systems intrusions at broker-dealers could pose a significant risk to the market.[1323] The Commission also noted that Rule 15c3–5 under the Exchange Act,[1324] which requires brokers or dealers with market access to implement risk management controls and supervisory procedures to limit risk, already seeks to address certain risks posed to the markets by broker-dealer systems.[1325]

The Commission did not propose to apply Regulation SCI to registered broker-dealers (other than SCI ATSs) or to other types of entities not covered by the definition of SCI entity. As noted in the SCI Proposal, if the Commission were to decide to propose to apply the requirements of Regulation SCI to such entities, the Commission would issue a separate release discussing such a proposal.[1326] Nevertheless, in the SCI Proposal, the Commission sought comment on whether such entities should be subject to Regulation SCI in whole or in part.[1327]

Some commenters stated that the Commission should expand the definition of SCI entity to include broker-dealers.[1328] One commenter stated that the goals of Regulation SCI could not be met without expanding the definition of SCI entity to include the following types of broker-dealers: Exchange market maker, OTC market maker, and any other broker or dealer that executes orders internally by trading as a principal or crossing orders as an agent.[1329] This commenter stated that these entities should be included because they play a critical role in the markets, handle market share that exceeds that of certain SCI ATSs, and, like exchanges and ATSs, rely heavily on sophisticated automated systems.[1330] Another commenter also believed that the objectives of Regulation SCI could more readily be achieved if the regulation also applied to market makers, high-frequency trading firms, and other broker-dealers because the activities of these types of entities could present systemic risks to the market.[1331]

In connection with questions in the SCI Proposal regarding the application of Regulation SCI to broker-dealers other than SCI ATSs, one commenter urged the Commission to broaden the definition of SCI entity to include any entity with direct electronic access to equity markets because the equity markets can be disrupted by a single server.[1332] Another commenter stated that all direct access proprietary trading market participants (including high frequency market participants) should be included as SCI entities because of their significant footprint in the markets, past incidents like Knight Capital Group's massive trading losses from a systems malfunction in August 2012,[1333] and flaws in the existing compliance controls and practices of such firms.[1334] One commenter stated that Regulation SCI should be extended to any trading platforms that transact significant volume, including systems that are not required to register as an ATS, because all executions are against the bids and offers of a single dealer.[1335]

A few commenters further argued that Rule 15c3–5 under the Exchange Act is not sufficient by itself and therefore some broker-dealers should be treated as SCI entities.[1336] One of these commenters stated that non-ATS broker-dealers should be treated as SCI entities because Rule 15c3–5, concerning the implementation of risk management and supervisory controls to limit risk associated with routing orders to exchanges or ATSs, does not address reliability or integrity of the systems that implement such controls.[1337]

Many other commenters stated more generally that broker-dealers should not be captured by the definition of SCI entity.[1338] Several commenters stated that they do not support the expansion of Regulation SCI to all broker-dealers because broker-dealers generally perform functions that do not have any systemic impact on the operation of the national market system and are presently subject to numerous regulations that require the establishment of controls (such as the Market Access Rule, Rule 17a–3, and Rule 17a–4), making Regulation SCI duplicative and unduly burdensome.[1339]

One commenter stated that broker-dealers are currently subject to high standards of systems compliance and integrity by FINRA and state laws, and disciplinary actions for failure to maintain sufficient protection of customer data and supervisory policies.[1340] Moreover, this commenter noted that, if potential systems issues could be addressed by Regulation SCI as applied to SCI entities, there would be no need to apply Regulation SCI to broker-dealers conducting activities on behalf of retail clients.[1341] This commenter stated that additional regulation would only be warranted after a meticulous cost-benefit analysis and implementation of the additional regulation at the lowest cost to firms and investors.[1342] This commenter concluded that the inclusion of broker-dealers would raise investors' costs and is unnecessary.[1343]

Another commenter believed that non-SCI ATS broker-dealers should not be included in the definition of SCI entity because, despite the longstanding practice of retail brokers routing their customers' orders to market markers for execution, those market makers are not critical.[1344] Moreover, this commenter believed that FINRA's rules with respect to broker-dealers are more appropriate than the SCI Proposal, and FINRA rules hold broker-dealers accountable and do not shield them from liability.[1345] This commenter stated that the combination of Commission and FINRA rules on

[1322] *See id.* at 18138, n. 335.

[1323] *See id.* at 18138.

[1324] 17 CFR 240.15c3–5.

[1325] *See supra* note 114 and Proposing Release, *supra* note 13, at 18138–39.

[1326] *See id.* at 18139.

[1327] *See id.* at 18139–41.

[1328] *See* NYSE Letter at 8–10; and Liquidnet Letter at 2–3. Another commenter expressed its view that inclusion of order routing systems within the definition of ''SCI systems'' puts SCI entities at a competitive disadvantage against broker-dealers that are not covered by Regulation SCI. *See* BATS Letter at 4. *See also supra* notes 48–50, 94–96, and 152 and accompanying text (discussing comments regarding broadening the coverage of ''SCI entity'' and ''SCI ATS'' and the effect of the adopted ATS thresholds on barriers to entry), and *infra* Section VI.C.1.c (discussing the effect of Regulation SCI on competition between SCI entities and non-SCI entities).

[1329] *See* NYSE Letter at 9.

[1330] *See id.*

[1331] *See* Liquidnet Letter at 2.

[1332] *See* Lauer Letter at 3. *See also supra* notes 212–213 (explaining that the Commission believes that many systems with direct market access are captured by the adopted definition but the Commission is not expanding the scope of Regulation SCI to include other broker-dealer entities and their systems at this time).

[1333] *See* Proposing Release, *supra* note 13, at 18090, n. 70 (discussing Knight's systems malfunction in August 2012).

[1334] *See* Leuchtkafer Letter at 1–7. *See supra* notes 124–126 and accompanying text (discussing the Commission's determination to not apply Regulation SCI to non-ATS broker-dealers at this time).

[1335] *See* BlackRock Letter at 4.

[1336] *See* Lauer Letter at 3 and NYSE Letter at 9.

[1337] *See* NYSE Letter at 9.

[1338] *See* SIFMA Letter at 3; MFA Letter at 4–5; FIA PTG Letter at 5; FSI Letter at 3; WF Letter at 2; Fidelity Letter at 4; KCG Letter at 14–17; LiquidPoint Letter at 4; and FSR Letter at 2–3, n. 5.

[1339] *See* SIFMA Letter at 3; MFA Letter at 4–5; FIA PTG Letter at 5; WF Letter at 2; KCG Letter at 15–17; LiquidPoint Letter at 4; and FSR Letter at 2–3, n. 5.

[1340] *See* FSI Letter at 3.

[1341] *See id.*

[1342] *See id.*

[1343] *See id.*

[1344] *See* KCG Letter at 14.

[1345] *See id.* at 14–15.

broker-dealers ensures that broker-dealers are sufficiently regulated, although this commenter stated that FINRA could provide additional guidance on its rules in light of the weaknesses revealed by Superstorm Sandy.[1346] Similarly, another commenter stated that broker-dealers should not be regulated under Regulation SCI because broker-dealer operational regulation has been overseen almost entirely by FINRA.[1347] Specifically, FINRA member broker-dealers are required to create and implement written supervisory procedures covering the operation of their business.[1348] According to this commenter, this process allows broker-dealers to devise procedures that keep them in-line with FINRA and Commission regulations, and allows FINRA to focus on bigger picture issues impacting the broker-dealer industry.[1349]

In addition, one commenter stated that the Commission should not propose a requirement that SCI SROs require their members to institute policies and procedures similar to those required under Regulation SCI.[1350] According to this commenter, SCI SROs already impose regulatory requirements addressing similar concerns as those that Regulation SCI is designed to address.[1351]

One commenter stated that the term SCI entity should not encompass clearing broker-dealers or transfer agents because they are not involved in ''real-time'' trading activities and therefore there would not be any material impact on critical market functions should their systems fail.[1352] Additionally, this commenter stated that because Regulation SCI ''is designed to formalize the Commission's existing ARP Program,'' and clearing broker-dealers and transfer agents do not participate in ARP, those entities should not be included within the scope of Regulation SCI.[1353] Another commenter echoed these positions with respect to transfer agents, and also stated that transfer agents should not be included within the definition of SCI entity because the majority of transfer agents do not have electronic connectivity to SCI entities.[1354] Additionally, this commenter stated that larger transfer agents are already required to have business continuity plans and written policies and procedures to ensure that their systems are robust and will function as intended.[1355] In determining whether to expand the scope of SCI entities, one commenter commented that the Commission should consider the role of an entity in the securities markets and the risks presented by that entity, and stated that transfer agents should not be covered because they raise fewer risks to the markets than the proposed SCI entities, as their systems do not directly support the functions intended to be targeted by the SCI Proposal.[1356] Another commenter similarly stated that transfer agents should not be covered because there is little chance that a problem with a transfer agent's operations would impact market activity.[1357]

The Commission appreciates the comments received on the potential application of Regulation SCI to broker-dealers other than SCI ATSs and other types of entities. As noted above, should the Commission decide to propose to apply the requirements of Regulation SCI to these entities, the Commission would issue a separate release discussing such a proposal and would take these comments into account.

*F. Effective Date and Compliance Dates*

Several commenters provided recommendations for when the requirements of Regulation SCI should go into effect and/or when SCI entities should be required to comply with the various requirements of the regulation.[1358] Each commenter recommended allowing what they believed to be sufficient time for SCI entities to prepare for what they perceived as complex or substantial regulatory responsibilities.[1359]

Several commenters suggested that the implementation period should vary between those entities and/or systems currently subject to the ARP Inspection Program and those that are not.[1360] For example, one commenter suggested an implementation period of no less than two years for SCI systems that are subject to the ARP Inspection Program and three years for all other systems.[1361] Similarly, another commenter recommended that certain systems of non-ARP participants should be provided at least an additional one year transition period, after a six-month delayed effectiveness after final approval of Regulation SCI for SCI systems of current ARP participants that are trading, clearance and settlement, and order routing systems.[1362] Another commenter stated that systems currently covered by the ARP Inspection Program should be granted two years to phase-in the rule and that non-ARP systems would need a phase-in period of at least four years.[1363] One commenter also noted more generally that the time needed to meet the new requirements of Regulation SCI will vary by the type of SCI entity and the level of its current participation in the ARP Inspection Program.[1364]

Some commenters requested a special phase-in period for ATSs. Specifically, two commenters suggested that ATSs should be given six months after meeting the given threshold in the definition of SCI ATS to come into compliance with Regulation SCI.[1365]

Other commenters provided detailed suggestions for a phase-in compliance timeline for the requirements of Regulation SCI.[1366] For example, one commenter suggested implementing the rule in three phases so that it would apply: (1) After initial six-month delayed effectiveness, to SCI systems of current ARP participants that are trading, clearance and settlement, and order routing systems, and after one additional year, to such systems of non-ARP participants (for at least one annual cycle); (2) to indirect SCI systems relating to the systems in phase one (for at least one annual cycle); and (3) to SCI systems that are market data, regulation and surveillance systems and related indirect SCI systems.[1367] Another commenter believed the rule should be phased-in over four stages, where each SCI entity would: (1) Review its SCI systems risk-based assessment with Commission staff; (2) review and update its policies and procedures to reasonably ensure compliance with Regulation SCI; (3) implement such policies and procedures; and (4) conduct an annual review.[1368]

[1346] *See id.* at 14–17.

[1347] *See* OTC Markets Letter at 11.

[1348] *See id.*

[1349] *See id.*

[1350] *See* WF Letter at 2.

[1351] *See id.* at 2–3.

[1352] *See* Fidelity Letter at 4.

[1353] *See id.*

[1354] *See* STA Letter at 2.

[1355] *See id.*

[1356] *See* ICI Letter at 3.

[1357] *See* Oppenheimer Letter at 2.

[1358] *See e.g.,* FINRA Letter at 41–42; DTCC Letter at 3; OCC Letter at 2; MSRB Letter at 39–40; KCG Letter at 19; SIFMA Letter at 7; and OTC Markets Letter at 4, 22–23.

[1359] *See e.g.,* FINRA Letter at 41–42; DTCC Letter at 3; OCC Letter at 2; MSRB Letter at 39–40; KCG Letter at 19; SIFMA Letter at 7; and OTC Markets Letter at 4, 22–23.

[1360] *See, e.g.,* FINRA Letter at 41–42; DTCC Letter at 3; and OTC Markets Letter at 4, 22–23.

[1361] *See* FINRA Letter at 41–42.

[1362] *See* MSRB Letter at 39–40.

[1363] *See* OTC Markets Letter at 4, 22–23.

[1364] *See* DTCC Letter at 3.

[1365] *See* KCG Letter at 19; and SIFMA Letter at 7. *See also* adopted Rule 1000 (definition of ''SCI ATS'') and *supra* Section IV.A.1.b (discussing definition of ''SCI ATS'').

[1366] *See* MSRB Letter at 39–40; and OCC Letter at 2–3.

[1367] *See* MSRB Letter at 40.

[1368] *See* OCC Letter at 3.

Other commenters recommended individual compliance deadlines for certain requirements of Regulation SCI.[1369] Specifically, two commenters suggested that phased-in compliance should be permitted for proposed Rule 1000(b)(9) addressing testing of SCI entity business continuity and disaster recovery plans by SCI entity members or participants.[1370] Specifically, one commenter believed that, if end-to-end business continuity and disaster recovery plans testing were to be required, it should be phased-in to allow SCI entities to conduct testing of specific SCI systems over time, rather than be required to conduct a full end-to-end test, which it stated cannot be done within a reasonable timeframe.[1371] The other commenter recommended a phased-in approach to implementation of broader BC/DR testing over a period of years.[1372] One commenter recommended that the Commission institute an implementation period for the Commission notification requirement under proposed Rule 1000(b)(4) to allow SCI entities to prepare for what the commenter believed to be an increase in the number of notifications that would be required.[1373] This commenter also noted generally that business continuity and end-to-end testing requirements,[1374] the two-hour recovery time objective,[1375] and adopting the required policies and procedures may take longer to comply with than other provisions of Regulation SCI.[1376]

Regulation SCI will become effective 60 days after publication of the rules in the **Federal Register** (''Effective Date''). As proposed, SCI entities would have been required to meet the requirements of Regulation SCI on the Effective Date. However, after consideration of the views of commenters, the Commission has determined to adopt a compliance date for Regulation SCI of nine months after the Effective Date, except as described below with regard to: (1) ATSs newly meeting the thresholds in the definition of ''SCI ATS;'' and (2) the industry- or sector-wide coordinated testing requirement, which will have different compliance periods. The Commission believes that the importance of strengthening the technology infrastructure of key market participants, the potential significant risks posed by systems issues to the U.S. securities markets, and the significant number of recent systems issues at various trading venues, necessitates as prompt an implementation of the requirements of Regulation SCI by SCI entities as possible. At the same time, the Commission understands that SCI entities will need time to prepare for the obligations imposed by Regulation SCI and, accordingly, believes that this nine-month time frame provides SCI entities adequate time to meet the requirements of Regulation SCI. While certain commenters suggested longer compliance periods or phased-in compliance periods, the Commission understands that entities currently subject to the ARP Inspection Program may already comply with certain requirements of Regulation SCI. In addition, the Commission also believes that SCI entities that have not previously participated in the ARP Inspection Program may also currently operate in accordance with certain of the adopted requirements. For example, the Commission believes that most SCI entities generally have in place policies and procedures designed to ensure its systems' capacity, integrity, resiliency, availability, and security and that most SCI entities already take corrective actions in response to systems issues.

Further, the Commission notes that, as described above, it has further focused the scope of the requirements of Regulation SCI from the SCI Proposal and, thus, has lessened the potential burdens on SCI entities.[1377] Therefore, the Commission believes that many of the concerns expressed by commenters regarding the time that would be needed to prepare for the responsibilities imposed by Regulation SCI have been significantly mitigated or addressed by this overall refinement of the rules and obligations of SCI entities. For example, as discussed above, the Commission has further focused the definition of ''SCI systems'' and clarified the scope of ''indirect SCI systems,'' which will result in fewer systems being subject to the requirements of Regulation SCI.[1378] In addition, the Commission notification provision will require immediate Commission notice of fewer SCI events than as proposed as a result of the refining of several definitions and the adoption of an exception from the immediate reporting requirements for de minimis SCI events, which will instead be subject to recordkeeping requirements and/or a quarterly reporting obligation, as applicable.[1379] Further, the Commission has clarified that an SCI entity's policies and procedures relating to the capacity, integrity, resiliency, availability, and security of its SCI systems and indirect SCI systems can to be tailored to a particular SCI system's criticality and risk, contrary to the belief of some commenters that the rule required all systems to be held to the same standards.[1380] The Commission also notes that it expects, prior to the compliance date, that its staff will provide information to SCI entities regarding the operation of the electronic filing system to submit Forms SCI.

With regard to some commenters' suggestions that there should be different compliance periods for SCI entities currently subject to the ARP Inspection Program and those that do not currently participate in the ARP Inspection Program (or phased-in compliance based, in part, on this

[1369] *See* OCC Letter at 2–3, 11, and 18; and SIFMA Letter at 18.

[1370] *See* adopted Rule 1004 and *supra* Section IV.B.6 (discussing business continuity and disaster recovery plans testing requirements).

[1371] *See* OCC Letter at 18.

[1372] *See* SIFMA Letter at 18.

[1373] *See* OCC Letter at 11; *see also* adopted Rule 1002(b) and *supra* Section IV.B.3.c (discussing the Commission notification requirement for SCI events). One commenter also expressed concern about SCI entities being able to effectively make submissions on Form SCI upon Regulation SCI becoming effective, and urged Commission staff to work with the SCI entities in the development, testing, and implementation of the Form SCI electronic submission system, including provision of any systems requirements (*e.g.,* supported browsers, required certificates, or authentication protocols). *See* MSRB Letter at 25. Another commenter requested that the Commission provide SCI entities sufficient time to learn the new Form SCI submission process, and recommended that the Commission delay implementation of Form SCI until SCI entities and Commission staff have gained experience with the Regulation SCI reporting requirements. *See* FINRA Letter at 28. In the alternative, this commenter recommended that the Commission provide a transition period for SCI entities to establish their processes for submission of Form SCI. *See* FINRA Letter at 28.

[1374] *See* adopted Rule 1004 and *supra* Section IV.B.6 (discussing business continuity and disaster recovery plans testing requirements).

[1375] *See* adopted Rule 1001(a)(2)(v) and *supra* Section IV.B.1.b (discussing the policies and procedures requirement and the two-hour recovery time objective).

[1376] *See* OCC Letter at 2–3; *see also* adopted Rule 1001 and *supra* Sections IV.B.1–2 (discussing the policies and procedures requirement for operational capability and systems compliance).

[1377] *See supra* Section III (providing a summary of the key modifications from the SCI Proposal) and Section IV (providing a detailed discussion of changes from the SCI Proposal).

[1378] *See supra* Sections IV.A.2.b and IV.A.2.d (discussing the definitions of ''SCI systems'' and ''indirect SCI systems''). The Commission notes that the refining of these definitions also reduces the need to phase-in compliance based on type of system as suggested by one commenter, because fewer systems overall will be subject to the regulation than proposed and many systems for which the commenter urged a delay in compliance will not be covered by the regulation, as adopted.

[1379] *See supra* Section IV.B.3.c (discussing the Commission notification requirement). As discussed above, SCI entities will be required to make, keep, and preserve records relating to all de minimis SCI events and to report de minimis systems disruptions and de minimis systems intrusions quarterly.

[1380] *See supra* Section IV.B.1 (discussing the requirement for policies and procedures to achieve capacity, integrity, resiliency, availability, and security).

distinction), as noted above, the Commission believes that both categories of entities already have some level of processes or procedures in place that are in compliance with the requirements of Regulation SCI. Further, given the voluntary nature of the current ARP Inspection Program, the Commission believes that the extent of current compliance with the requirements of adopted Regulation SCI by entities subject to the ARP Inspection Program varies for different entities. In addition, as noted above, Regulation SCI has a broader scope than the current ARP Inspection Program and imposes mandatory requirements on entities subject to the rules, and accordingly will require all SCI entities (both ARP entities and non-ARP entities) to take steps, including implementing necessary systems changes, to meet the requirements of Regulation SCI. For these reasons, the Commission believes that it is appropriate to provide all SCI entities nine months to become compliant with the requirements of Regulation SCI.

With regard to two commenters' suggestions that the Commission should adopt specific phased-in compliance periods based on type of entity (*i.e.,* ARP or non-ARP), type of system, or other factors, the Commission believes that such an approach is not necessary for the reasons stated above. Further, the Commission believes that having multiple phases of compliance would create unnecessary complexity and raise practical difficulties for implementation.

At the same time, the Commission believes that it is appropriate to provide additional compliance periods for limited aspects of Regulation SCI, as requested by some commenters. Specifically, the Commission believes that ATSs meeting the volume thresholds in the definition of ''SCI ATS'' for the first time should be provided an additional six months from the time that the ATS first meets the applicable thresholds to comply with the requirements of Regulation SCI.[1381] The Commission believes that this additional six-month period is appropriate and necessary to allow an SCI ATS the time needed to take steps to meet the requirements of the rules, rather than requiring compliance immediately upon meeting the volume thresholds. The Commission also believes that this additional compliance period should give a new ATS entrant the opportunity to initiate and develop its business by allowing additional time before a new ATS must incur the costs associated with compliance with Regulation SCI.[1382]

The Commission is also adopting a longer compliance period with regard to the industry- or sector-wide coordinated testing requirement in adopted Rule 1004(d).[1383] Specifically, SCI entities will have 21 months from the Effective Date to coordinate the testing of an SCI entity's business continuity and disaster recovery plans on an industry- or sector-wide basis with other SCI entities pursuant to adopted Rule 1004(d). Given that the compliance date for the other requirements of Regulation SCI is nine months from the Effective Date, this will provide SCI entities an additional year (12 months) beyond the compliance date for the other requirements of Regulation SCI (for a total of 21 months) to comply with Rule 1004(d). The Commission believes that this additional time period is appropriate in light of commenters' concerns regarding the complexity and logistical challenges posed by the requirement.[1384] The Commission expects SCI entities to work cooperatively to address these logistical hurdles and to carefully plan such testing, and believes that the additional time for compliance should help to ensure that such testing is implemented effectively.

If any provision of Regulation SCI, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

## V. Paperwork Reduction Act

Certain rules under Regulation SCI impose new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1385] 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 accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted these collections of information to the Office of Management and Budget (''OMB'') for review. The title for the collection of information requirement is ''Regulation Systems Compliance and Integrity.'' The collection of information was assigned OMB Control No. 3235–0703.

In the SCI Proposal, the Commission solicited comments on the collection of information burdens associated with Regulation SCI. In particular, the Commission asked whether commenters agree with the Commission's estimate of the number of respondents and the burden associated with compliance with Regulation SCI.[1386] In addition, the Commission asked whether SCI entities would outsource the work associated with compliance with Regulation SCI.[1387] Some commenters noted that the Commission underestimated the burdens that would be imposed by proposed Regulation SCI.[1388] As discussed above, the Commission received 60 comment letters on the proposal. Some of these comments relate directly or indirectly to the PRA. These comments are addressed below.

### *A. Summary of Collection of Information*

Regulation SCI includes four categories of obligations that require a collection of information within the meaning of the PRA. Specifically, an SCI entity is required to: (1) Establish specified written policies and procedures, and mandate participation by designated members or participants in certain testing of the SCI entity's business continuity and disaster recovery plans; (2) provide certain notifications, disseminate certain information, and create reports; (3) take corrective actions, and identify critical SCI systems, major SCI events, de minimis SCI events, and material systems changes; and (4) comply with recordkeeping requirements.

#### 1. Requirements To Establish Written Policies and Procedures and Mandate Participation in Certain Testing

Rule 1001 requires SCI entities to establish policies and procedures with respect to various matters. Rule 1001(a) requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity,

[1381] *See supra* note 1365 and accompanying text. *See also supra* Section IV.A.1.b (discussing the definition of ''SCI ATS,'' including the applicable volume thresholds and the inclusion of a six-month compliance period within the definition). For example, if a new ATS begins operations in January 2016 and subsequently meets the volume thresholds in the definition of ''SCI ATS'' for four out of the six months ending December 31, 2016, it would have until June 30, 2017 to become compliant with the requirements of Regulation SCI.

[1382] *See supra* note 152 and accompanying text.

[1383] *See supra* Section IV.B.6.b.iv (discussing the coordinated testing requirement of adopted Rule 1004(d)).

[1384] *See id.*

[1385] 44 U.S.C. 3501 *et seq.*

[1386] *See* Proposing Release, *supra* note 13, at 18155.

[1387] *See id.* at 18154–55.

[1388] *See, e.g.,* Joint SRO Letter at 18–19; CME Letter at 4–5; OCC Letter at 11–12.

integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. Rule 1001(a)(2) specifies that such policies and procedures are required to include, at a minimum: (i) The establishment of reasonable current and future technology infrastructure capacity planning estimates; (ii) periodic capacity stress tests of such systems to determine their ability to process transactions in an accurate, timely, and efficient manner; (iii) a program to review and keep current systems development and testing methodology for such systems; (iv) regular reviews and testing, as applicable, of such systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters; (v) business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption; (vi) standards that result in such systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data; and (vii) monitoring of such systems to identify potential SCI events. Rule 1001(a)(3) requires each SCI entity to periodically review the effectiveness of the policies and procedures required by Rule 1001(a), and take prompt action to remedy deficiencies in such policies and procedures. Rule 1001(a)(4) states that an SCI entity's policies and procedures shall be deemed to be reasonably designed if they are consistent with current SCI industry standards, which are required to be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization, though compliance with current SCI industry standards is not the exclusive means to comply with the requirements of Rule 1001(a).

Rule 1001(b)(1) requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Act and rules and regulations thereunder and the entity's rules and governing documents, as applicable. Rule 1001(b)(2) specifies that such policies and procedures are required to include, at a minimum: (i) Testing of all SCI systems and any changes to SCI systems prior to implementation; (ii) a system of internal controls over changes to SCI systems; (iii) a plan for assessments of the functionality of SCI systems designed to detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Act and the rules and regulations thereunder and the SCI entity's rules and governing documents; and (iv) a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues. Rule 1001(b)(3) requires each SCI entity to periodically review the effectiveness of the policies and procedures required by Rule 1001(b), and take prompt action to remedy deficiencies in such policies and procedures. Further, pursuant to Rule 1001(b)(4), personnel of an SCI entity is deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by an SCI entity of Rule 1001(b) if the person: (i) Has reasonably discharged the duties and obligations incumbent upon such person by the SCI entity's policies and procedures; and (ii) was without reasonable cause to believe that the policies and procedures relating to an SCI system for which such person was responsible, or had supervisory responsibility, were not established, maintained, or enforced in accordance with Rule 1001(b) in any material respect.

Rule 1001(c)(1) requires each SCI entity to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events. Rule 1001(c)(2) requires each SCI entity to periodically review the effectiveness of the policies and procedures required by Rule 1001(c)(1), and take prompt action to remedy deficiencies in such policies and procedures.

Rule 1004 requires an SCI entity, with respect to its business continuity and disaster recovery plans, including its backup systems, to: (a) Establish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans; and (b) designate members or participants pursuant to such standards and require participation by such members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency as specified by the SCI entity, at least once every 12 months (*e.g.,* for SCI SROs, by submitting proposed rule changes under Section 19(b) of the Exchange Act; for SCI ATSs, by revising membership or subscriber agreements and internal procedures; for plan processors, through an amendment to an SCI Plan under Rule 608 of Regulation NMS; and, for exempt clearing agencies subject to ARP, by revising participant agreements and internal procedures). Rule 1004(c) requires an SCI entity to coordinate such required testing on an industry- or sector-wide basis with other SCI entities.

2. Notification, Dissemination, and Reporting Requirements for SCI Entities

Certain rules under Regulation SCI require SCI entities to notify or report information to the Commission, or disseminate information to their members or participants. Rules 1002 and 1003 each contain notification, dissemination, or reporting requirements.[1389]

Rule 1002(b) requires Commission notification of SCI events. Rule 1002(b)(1) requires an SCI entity to immediately notify the Commission upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. These notifications may be made orally or in writing.

Rule 1002(b)(2) requires an SCI entity, within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, to submit a written notification to the Commission on Form SCI pertaining to such SCI event.[1390]

[1389] To access EFFS, the secure Commission Web site for filing of Form SCI, an SCI entity will submit to the Commission an External Application User Authentication Form (''EAUF'') to register each individual at the SCI entity who will access the EFFS system on behalf of the SCI entity. Upon receipt and verification of the information in the EAUF process, the Commission will issue each such person a User ID and Password to permit access to the Commission's secure Web site.

[1390] This notification is required to be submitted on a good faith, best efforts basis.

Rule 1002(b)(2) requires that this notification include: (i) A description of the SCI event, including the system(s) affected; and (ii) to the extent available as of the time of the notification, the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event, the potential impact of the SCI event on the market, a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event, the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved, and any other pertinent information known by the SCI entity about the SCI event.

Rule 1002(b)(3) requires an SCI entity, until an SCI event is resolved and the SCI entity's investigation of the SCI event is closed, to provide updates pertaining to such SCI event to the Commission on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, to correct any materially incorrect information previously provided, or when new information is discovered (including but not limited to any of the information listed in Rule 1002(b)(2)(ii)). The updates under Rule 1002(b)(3) may be made orally or in writing.

Rule 1002(b)(4) states that, if an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 calendar days of the occurrence of the event, then within 5 business days after the resolution of the SCI event and closure of the investigation regarding the SCI event, the SCI entity is required to submit a final written notification to the Commission pertaining to the SCI event. This notification is required to include: (i) A detailed description of the SCI entity's assessment of the types and number of market participants affected by the SCI event, the SCI entity's assessment of the impact of the SCI event on the market, the steps that the SCI entity has taken, is taking, or plans to take with respect to the SCI event, the time the SCI event was resolved, the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event, and any other pertinent information known by the SCI entity about the SCI event; (ii) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants; and (iii) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. Rule 1002(b)(4)(iv) further states that, if an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 days of the occurrence of the SCI event, then the SCI entity is required to submit an interim written notification pertaining to such event within 30 calendar days after the occurrence of the event, containing the information required by Rule 1002(b)(4)(ii) to the extent known at that time. Within 5 business days after the resolution of such event and closure of the investigation, the SCI entity is required to submit a final written notification to the Commission, containing the information required by Rule 1002(b)(4)(ii).

Rule 1002(b)(5) states that the requirements of Rules 1002(b)(1)–(4) do not apply to de minimis SCI events. Instead, for these types of SCI events, an SCI entity is required to make, keep, and preserve records relating to these events, and submit to the Commission quarterly reports containing a summary description of de minimis systems disruptions and de minimis systems intrusions, including the SCI systems and, for systems intrusions, indirect SCI systems, affected by such systems disruptions and systems intrusions during the applicable calendar quarter.

Rule 1002(c) requires the dissemination of information regarding certain SCI events and specifies the nature and timing of such dissemination. Rule 1002(c)(1)(i) requires an SCI entity, promptly after any responsible SCI personnel has a reasonable basis to conclude that a systems disruption or systems compliance issue has occurred, to disseminate the following information about such SCI event: (A) The system(s) affected by the SCI event; and (B) a summary description of the SCI event. In addition, Rule 1002(c)(1)(ii) requires an SCI entity, when known, to further disseminate the following information: (A) A detailed description of the SCI event; (B) the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; and (C) a description of the progress of its corrective action for the SCI event and when the SCI event has been or is expected to be resolved. Rule 1002(c)(1)(iii) requires that an SCI entity provide regular updates of the information required to be disseminated under Rule 1002(c)(1)(i) and (ii).

With respect to systems intrusions, Rule 1002(c)(2) states that, promptly after any responsible SCI personnel has a reasonable basis to conclude that a systems intrusion has occurred, an SCI entity is required to disseminate a summary description of the systems intrusion, including a description of the corrective action taken by the SCI entity and when the systems intrusion has been or is expected to be resolved, unless the SCI entity determines that dissemination of such information would likely compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and documents the reasons for such determination.[1391]

Rule 1002(c)(4) provides that the information dissemination requirement does not apply to SCI events to the extent they relate to market regulation or market surveillance systems, or to any de minimis SCI events.

Rule 1003(a)(1) requires an SCI entity, within 30 calendar days after the end of each calendar quarter, to submit to the Commission a report describing completed, ongoing, and planned material changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. Rule 1003(a)(2) further requires an SCI entity to promptly submit a supplemental report to notify the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a).

Rules 1003(b)(1) and (2) require an SCI entity to conduct periodic SCI reviews of its compliance with Regulation SCI,[1392] and to submit a report of the SCI review to senior management of the SCI entity for review no more than 30 calendar days after completion of such SCI review. Rule 1003(b)(3) also requires an SCI entity to submit to the Commission, and to the board of directors of the SCI entity or the equivalent of such board, a report of the SCI review, together with any response by senior management, within

[1391] Rule 1002(c)(3) provides that the information specified in Rules 1002(c)(1) and (2) is required to be disseminated to members or participants of the SCI entity that a responsible SCI personnel has reasonably estimated may have been affected by the SCI event, and promptly disseminated to any additional members or participants that any responsible SCI personnel subsequently reasonably estimates may have been affected by the SCI event. However, information regarding major SCI events must be disseminated to all members or participants of an SCI entity.

[1392] SCI entities are required to conduct an SCI review not less than once each calendar year. However, under Rule 1003(b)(1)(i), penetration test reviews of the network, firewalls, and production systems are required to be conducted not less than once every three years. Under Rule 1003(b)(1)(ii), assessments of SCI systems directly supporting market regulation or market surveillance are required to be conducted at a frequency based on risk assessment, but not less than once every three years.

60 calendar days after its submission to senior management of the SCI entity.

Rule 1006 requires any notifications to the Commission required to be submitted under Regulation SCI, except notifications pursuant to Rule 1002(b)(1) or 1002(b)(3), to be filed electronically on Form SCI, include all information as prescribed in Form SCI and the instructions thereto, and contain an electronic signature. In addition, pursuant to Rule 1006(b), the signatory to an electronically filed Form SCI is required to manually sign a signature page or document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document is required to be retained by the SCI entity in accordance with Rule 1005.

3. Requirements To Take Corrective Action and Identify Critical SCI Systems, Major SCI Events, De Minimis SCI Events, and Material Systems Changes

Rule 1002(a) requires an SCI entity, upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, to begin to take appropriate corrective action, which is required to include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable. The Commission believes that SCI entities are likely to work to develop a written process for ensuring that they are prepared to comply with the corrective action requirement and are likely to also periodically review this process.

In connection with the reporting of material systems changes, Rule 1003(a)(1) requires an SCI entity to establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material. In addition, because the Commission notification and information dissemination requirements under Rules 1002(b) and (c), respectively, apply differently to SCI events depending on whether an event is a ''major SCI event'' or whether the event has no or a de minimis impact on the SCI entity's operations or on market participants, when an SCI event occurs, an SCI entity must determine whether an SCI event is a major SCI event or a de minimis SCI event. Moreover, because the business continuity and disaster recovery policies and procedures requirement under Rule 1001(a)(2)(v) imposes different resumption goals for critical SCI systems as compared to other SCI systems, an SCI entity must determine whether an SCI system is a critical SCI system.[1393] As such, SCI entities would likely work to develop a written process for ensuring that they are able to make timely and accurate determinations regarding the nature of an SCI system or SCI event, and periodically review this process.

4. Recordkeeping Requirements

Rule 1005 sets forth recordkeeping requirements for SCI entities. Under Rule 1005(a), SCI SROs are required to make, keep, and preserve all documents relating to their compliance with Regulation SCI as prescribed in Rule 17a–1 under the Exchange Act. Under Rule 1005(b), each SCI entity that is not an SCI SRO is required to make, keep, and preserve at least one copy of all documents, including correspondence, memoranda, papers, books, notices, accounts, and other such records, relating to its compliance with Regulation SCI, including, but not limited to, records relating to any changes to its SCI systems and indirect SCI systems. Each SCI entity that is not an SCI SRO is required to keep all such documents for a period of not less than five years, the first two years in a place that is readily accessible to the Commission or its representatives for inspection and examination. Upon request of any representative of the Commission, such SCI entities would be required to promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it under Rules 1005(b)(1) and (2). Under Rule 1005(c), upon or immediately prior to ceasing to do business or ceasing to be registered under the Exchange Act, an SCI entity is required to take all necessary action to ensure that the records required to be made, kept, and preserved by Rule 1005 will be accessible to the Commission and its representatives in the manner required by Rule 1005 and for the remainder of the period required by Rule 1005.

In addition, Rule 1007 provides that, if the records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity, the SCI entity is required to ensure that the records are available for review by the Commission and its representatives by submitting a written undertaking, in a form acceptable to the Commission, by such service bureau or other recordkeeping service and signed by a duly authorized person at such service bureau or other recordkeeping service.

*B. Use of Information*

1. Requirements To Establish Written Policies and Procedures and Mandate Participation in Certain Testing

The requirement that SCI entities establish policies and procedures under adopted Rule 1001(a) should advance the goal of improving Commission review and oversight of U.S. securities market infrastructure by requiring an SCI entity's policies and procedures to be reasonably designed to ensure its own operational capability, including the ability to maintain effective operations, minimize or eliminate the effect of performance degradations, and have sufficient backup and recovery capabilities. Because an SCI entity's own operational capability can have the potential to impact investors, the overall market, or the trading of individual securities, the Commission believes that these policies and procedures will help promote the maintenance of fair and orderly markets.

The Commission believes that Rule 1001(b), which requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents, as applicable, will help to prevent the occurrence of systems compliance issues. In addition, the Commission believes Rule 1001(b) will help to: Ensure that SCI SROs comply with Section 19(b)(1) of the Exchange Act; reinforce existing SRO rule filing processes to assist market participants and the public in understanding how the SCI systems of SCI SROs are intended to operate; and assist SCI SROs in meeting their obligations to file plan amendments to SCI Plans under Rule 608 of Regulation NMS. It should similarly help other SCI entities to achieve operational compliance with the Exchange Act, the rules and regulations thereunder, and their governing documents.

The requirement to establish policies and procedures pursuant to Rule 1001(c) that include the designation and documentation of responsible SCI personnel should help make it clear to all employees of the SCI entity who the designated responsible SCI personnel are for purposes of the escalation procedures and so that Commission staff

[1393] Also, pursuant to the definition of ''major SCI event,'' in determining whether an SCI event is a major SCI event, an SCI entity is required to consider whether an SCI event can have any impact on a critical SCI system. *See* Rule 1000.

can easily identify such responsible SCI personnel in the course of its inspections and examinations and other interactions with SCI entities. The Commission also believes that escalation procedures to quickly inform responsible SCI personnel of potential SCI events will help ensure that the appropriate person(s) are provided notice of potential SCI events so that any appropriate actions can be taken in accordance with the requirements of Regulation SCI without unnecessary delay.

The Commission believes that the requirement that SCI entities establish standards that require designated members or participants to participate in the testing of their business continuity and disaster recovery plans will help reduce the risks associated with an SCI entity's decision to activate its BC/DR plans and help to ensure that such plans operate as intended, if activated. The testing participation requirement should help an SCI entity to ensure that its efforts to develop effective BC/DR plans are not undermined by a lack of participation by members or participants that the SCI entity believes are necessary to the successful activation of such plans. This requirement should also assist the Commission in maintaining fair and orderly markets in a BC/DR scenario following a wide-scale disruption.

2. Notification, Dissemination, and Reporting Requirements for SCI Entities

Adopted Rule 1002(b), including adopted Rules 1002(b)(1)–(3), will foster a system for comprehensive reporting of SCI events, which should enhance the Commission's review and oversight of U.S. securities market infrastructure and foster cooperation between the Commission and SCI entities in responding to SCI events. The Commission also believes that the aggregated data that will result from the reporting of SCI events will enhance its ability to comprehensively analyze the nature and types of various SCI events and identify more effectively areas of persistent or recurring problems across the systems of all SCI entities. The information in the final report required under Rule 1002(b)(4) should provide the Commission with a comprehensive analysis to more fully understand and assess the impact caused by the SCI event. The Commission expects that the quarterly reporting required by Rule 1002(b)(5) will better achieve the goal of keeping Commission staff informed regarding the nature and frequency of systems disruptions and systems intrusions that arise but are reasonably estimated by the SCI entity to have a de minimis impact on the entity's operations or on market participants. Further, submission and review of regular reports should facilitate Commission staff comparisons among SCI entities and thereby permit the Commission and its staff to have a more holistic view of the types of systems operations challenges that were posed to SCI entities in the aggregate.

Adopted Rule 1002(c) advances the Commission's goal of promoting fair and orderly markets by disseminating information about an SCI event to some or all of the SCI entity's members or participants, who can use such information to evaluate the event's impact on their trading and other activities and develop an appropriate response.

The quarterly material systems change reports required by Rule 1003(a) should permit the Commission and its staff to have up-to-date information regarding an SCI entity's systems development progress and plans, and help the Commission with its oversight of U.S. securities market infrastructure.

The SCI reviews under Rule 1003(b) should not only assist the Commission in improving its oversight of the technology infrastructure of SCI entities, but also each SCI entity in assessing the effectiveness of its information technology practices, helping to ensure compliance with the safeguards provided by the requirements of Regulation SCI, identifying potential areas of weakness that require additional or modified controls, and determining where to best devote resources.

Rule 1006 provides a uniform manner in which the Commission would receive—and SCI entities would provide—written notifications, reviews, descriptions, analyses, or reports made pursuant to Regulation SCI. The Commission believes that Rule 1006 therefore allows SCI entities to efficiently draft and submit the required reports, and for the Commission to efficiently review, analyze, and respond to the information provided.

As noted above, in order to access EFFS, an SCI entity will submit to the Commission an EAUF to register each individual at the SCI entity who access the EFFS system on behalf of the SCI entity. The information provided via EAUF will be used by the Commission to verify the identity of the individual submitting Form SCI on behalf of the SCI entity and provide such individual access to the EFFS.

3. Requirements To Take Corrective Action and Identify Critical SCI Systems, Major SCI Events, De Minimis SCI Events, and Material Systems Changes

The requirement that SCI entities begin to take appropriate corrective action upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, and the policies and procedures SCI entities would likely use to implement this requirement, should help facilitate SCI entities' responses to SCI events, including taking appropriate steps necessary to remedy the problem or problems causing such SCI event and mitigate the negative effects of the SCI event, if any, on market participants and the securities markets more broadly. The requirement that each SCI entity establish written criteria for identifying material systems changes should help the Commission ensure that it is kept apprised of the systems changes that SCI entities believe to be material and aid the Commission and its staff in understanding the operations and functionality of the systems of an SCI entity and any changes to such systems. The Commission expects that the application of different requirements (*e.g.,* Commission notification requirements and information dissemination requirements) to critical SCI systems, major SCI events, and de minimis SCI events, and the policies and procedures required by SCI entities to make these determinations, will help to ensure that the Commission is kept apprised of SCI events, and that relevant market participants have basic information about SCI events so that those notified can better develop an appropriate response. These policies and procedures should also assist SCI entities in complying with the notification, dissemination and reporting requirements of Regulation SCI.

4. Recordkeeping Requirements

Rule 1005 requires each SCI entity to make, keep, and preserve records relating to its compliance with Regulation SCI because such records should assist the Commission in understanding whether an SCI entity is meeting its obligations under Regulation SCI, assessing whether an SCI entity has appropriate policies and procedures with respect to its technology systems, helping to identify the causes and consequences of an SCI event, and understanding the types of material systems changes occurring at an SCI entity. The Commission expects that Rule 1005 will also facilitate the

Commission's inspections and examinations of SCI entities and assist it in evaluating an SCI entity's compliance with Regulation SCI. Moreover, having an SCI entity's records available even after it has ceased to do business or to be registered under the Exchange Act should provide an additional tool to help the Commission to reconstruct important market events and better understand the impact of such events.

Rule 1007 should help ensure the Commission's ability to obtain required records that are held by a third party who may not otherwise have an obligation to make such records available to the Commission.

*C. Respondents*

The ''collection of information'' requirements contained in Regulation SCI apply to SCI entities, as described below. Currently, there are 27 entities that would satisfy the definition of SCI SRO,[1394] 14 entities that would satisfy the definition of SCI ATS,[1395] 2 entities that would satisfy the definition of plan processor,[1396] and 1 entity that would meet the definition of exempt clearing agency subject to ARP.[1397] Accordingly, the Commission estimates that there are currently 44 entities that meet the definition of SCI entity and are subject to the collection of information requirements of Regulation SCI.

*D. Total Initial and Annual Reporting and Recordkeeping Burdens*

The Commission notes that national securities exchanges, national securities associations, registered clearing agencies, plan processors, one ATS, and one exempt clearing agency currently participate in the ARP Inspection Program. Under the ARP Inspection Program, Commission staff conducts inspections of these entities, attends periodic technology briefings by staff of these entities, monitors planned significant systems changes, and responds to reports of systems failures, disruptions, and other systems problems of these entities.[1398]

Under Regulation SCI, many of the principles of the ARP policy statements with which some SCI entities are familiar are codified. As such, current practices of these SCI entities already comply with certain requirements of Regulation SCI.[1399] However, because Regulation SCI has a broader scope than the current ARP Inspection Program and imposes mandatory recordkeeping obligations on SCI entities,[1400] the Commission believes Regulation SCI will impose paperwork burdens on all SCI entities.

The Commission's total burden estimates in this Paperwork Reduction Act section reflect the total burdens on all SCI entities, taking into account the extent to which some SCI entities already comply with some of the requirements of Regulation SCI. The Commission also notes that the burden estimates per SCI entity are intended to reflect the average paperwork burden for each SCI entity to comply with Regulation SCI. Therefore, some SCI entities may experience more burden than the Commission's estimates, while others may experience less. The Commission notes that the burden figures set forth in this section are the Commission's estimate of the paperwork burden for compliance with Regulation SCI based on a variety of sources, including Commission staff's experience with the current ARP Inspection Program, other similar estimated burdens for analogous rulemakings, and comments received on the burden estimates in the SCI Proposal.[1401]

1. Requirements To Establish Written Policies and Procedures and Mandate Participation in Certain Testing

The rules under Regulation SCI that would require an SCI entity to establish policies and procedures and to mandate member or participant participation in business continuity and disaster recovery plan testing are discussed more fully in Sections IV.B.1, IV.B.2, and IV.B.6 above.

a. Policies and Procedures

In the SCI Proposal, the Commission estimated that an SCI entity that has not previously participated in the ARP Inspection Program would require an average of 210 burden hours initially to develop and draft the policies and procedures required by proposed Rule 1000(b)(1) (except for the policies and procedures for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data) [1402] and 60 hours annually to review and update such policies and procedures.[1403] The Commission estimated that an SCI entity that currently participates in the ARP Inspection Program would require an average of 105 burden hours initially to develop and draft such policies and procedures [1404] and 30 hours annually

[1394] *See supra* notes 74–77 and accompanying text (listing 18 registered national securities exchanges, 7 registered clearing agencies, FINRA, and the MSRB). *See also supra* note 80 and accompanying text.

[1395] *See supra* notes 150 and 175 and accompanying text.

[1396] *See supra* note 202 and accompanying text.

[1397] *See supra* note 203 and accompanying text.

[1398] *See supra* Section II.A.

[1399] In addition, some SCI entities already comply with certain requirements of Regulation SCI to some extent as a matter of prudent business practice or pursuant to other rules. For example, as noted above, FINRA Rule 4370 includes requirements for FINRA members related to business continuity plans. *See* supra note 115. In addition, NASD Rule 3010 and FINRA Rule 3130 include requirements for FINRA members related to procedures to achieve compliance with applicable securities laws and regulations and certain SRO rules. *See* supra note 115. Further, FINRA Rule 4530 includes reporting requirements related to certain compliance issues. *See* supra note 115. Compliance with existing requirements under FINRA rules could help SCI ATSs to comply with Regulation SCI. Therefore, the Commission acknowledges that SCI ATSs may experience a lower paperwork burden in complying with certain provisions of Regulation SCI than some other SCI entities. However, unlike SCI entities that participate in the ARP Inspection Program (where in many instances the Commission has estimated a 50% reduction in SCI entity staff compliance burden as compared to other SCI entities when estimating paperwork costs with regard to Regulation SCI requirements due to participation in the ARP inspection program), the Commission believes that any reduction in burden resulting from compliance with these FINRA and NASD rules is unlikely to be significant.

[1400] As discussed more fully in *supra* Section IV.C.1, SCI SROs are already subject to existing recordkeeping and retention requirements under Rule 17a–1.

[1401] The Commission also notes that the allocation of burden hours between staff and managers of an SCI entity that are identified in this section is intended to reflect the Commission's estimate of the broad categories of SCI entity personnel who will be involved in compliance with Regulation SCI. The Commission recognizes that some SCI entities may have additional subcategories of staff or managers who will be involved in compliance with Regulation SCI (*e.g.,* information security staff may be a subcategory of systems analysts), whereas other SCI entities may not have the specific categories of staff or managers that are identified in this section.

[1402] *See* Proposing Release, *supra* note 13, at 18145. The 210 burden hours included 80 hours by a Compliance Manager (including senior management review), 80 hours by an Attorney, 25 hours by a Senior Systems Analyst, and 25 hours by an Operations Specialist. *See id.* at 18146. This estimate was based on Commission staff's experience with the ARP Inspection Program and the Commission's preliminary estimate in the SB SDR Proposing Release for a similar requirement. *See id.* at 18145, n. 365.

[1403] *See* Proposing Release, *supra* note 13, at 18146. The 60 burden hours included 30 hours by a Compliance Manager and 30 hours by an Attorney. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program and the Commission's preliminary estimate in the SB SDR Proposing Release for a similar requirement. *See id.* at 18146, n. 377.

[1404] *See* Proposing Release, *supra* note 13, at 18145. The 105 burden hours included 40 hours by a Compliance Manager (including senior management review), 40 hours by an Attorney, 12.5 hours by a Senior Systems Analyst, and 12.5 hours by an Operations Specialist. *See id.* at 18146. The Commission stated its belief that a fifty percent baseline for SCI entities that participate in the ARP Inspection Program is appropriate because, although these entities already have substantial

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to review and update such policies and procedures.[1405] With respect to the requirement in proposed Rule 1000(b)(1) for policies and procedures that provide for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data, the Commission estimated that each SCI entity would spend 130 hours annually.[1406] In the SCI Proposal, the Commission also estimated that all SCI entities would conduct most of the work associated with proposed Rule 1000(b)(1) internally.[1407] However, the Commission estimated that SCI entities would seek outside legal and/or consulting services in the initial preparation of the policies and procedures at an average cost of $20,000 per SCI entity.[1408]

With respect to proposed Rule 1000(b)(2), the Commission estimated that each SCI entity would elect to comply with the proposed safe harbor provisions.[1409] The Commission estimated that each SCI entity would spend 180 hours initially to design the policies and procedures accordingly.[1410] The Commission estimated that each SCI SRO would spend approximately 120 hours annually to review and update such policies and procedures,[1411] and that each SCI entity that is not an SRO would spend approximately 60 hours to review and update such policies and procedures.[1412] In the SCI Proposal, the Commission also estimated that all SCI entities would conduct most of the work associated with proposed Rule 1000(b)(2) internally.[1413] However, the Commission estimated that SCI entities would seek outside legal and/or consulting services in the initial preparation of the policies and procedures at an average cost of $20,000 per SCI entity.[1414]

Several commenters noted that the Commission underestimated the paperwork burden of proposed Rules 1000(b)(1) and (b)(2). One commenter noted that the systems covered by proposed Rules 1000(b)(1) and (b)(2) are very complex and a first draft of the required policies and procedures would take far more than the estimated number of hours to complete and keep up-to-date.[1415] With respect to proposed Rule 1000(b)(2), this commenter stated that the breadth of the rule is extremely comprehensive because it requires policies and procedures that are designed to ensure that SCI systems ''comply with the federal securities laws and rules and regulations thereunder'' and operate ''in the manner intended.'' [1416]

Another commenter noted that the hour burdens did not take into account the appropriate level of management review in connection with the development of the policies and procedures.[1417] This commenter also noted that policies and procedures developed to achieve compliance with Regulation SCI can potentially impact other areas of the SCI entity and other SCI entities, and therefore an SCI entity would broadly review the policies and procedures to ensure that they do not conflict with other policies, procedures, practices, and processes and revise the policies and procedures accordingly.[1418] Therefore, this commenter argued that the Commission did not include adequate estimates for the substantial amount of time required by senior management and others in the organization, as well as the persons identified in the SCI Proposal, in: Understanding the breadth and depth of the requirements established by proposed Regulation SCI; determining which systems of the SCI entity fall into the various categories of systems described in proposed Regulation SCI; assessing, growing and potentially reorganizing large portions of the SCI entity's workforce to align with the requirements of proposed Regulation SCI; and establishing and conducting extensive training curriculum to ensure appropriate personnel fully understand their new or changed duties; and any number of other collateral effects of the new requirements.[1419] This commenter suggested that a more accurate estimate of the paperwork burden from proposed Rule 1000(b)(1) would be three to four times the estimate in the SCI Proposal, and the allocation of the burden hours should be weighted more heavily toward more senior staff of the organization.[1420]

One commenter stated that the 50% baseline for SCI entities that are currently under the ARP Inspection Program does not account for the significant expansion of the requirements if the definition of SCI system is construed broadly, and as a result, the burden estimates may be too low.[1421]

One commenter agreed with the Commission that ongoing paperwork burdens for compliance with proposed Rules 1000(b)(1) and (b)(2) should be lower than the initial burden.[1422] However, this commenter stated that the estimated ongoing burden is understated, but likely to a lesser extent than with respect to the initial burden.[1423] Another commenter also noted that, given the complexity of the

policies and procedures in place, the rule would require these entities to devote substantial time to review and revise their existing policies and procedures to ensure that they are sufficiently robust. *See id.* at 18145.

[1405] *See* Proposing Release, *supra* note 13, at 18146. The 30 burden hours included 15 hours by a Compliance Manager and 15 hours by an Attorney. *See id.*

[1406] *See* Proposing Release, *supra* note 13, at 18145. The 130 burden hours included 30 hours by a Compliance Attorney and 100 hours by a Senior Systems Analyst. *See id.* at 18146. This estimate was based on Commission staff's experience with the ARP Inspection Program. *See id.* at 18145, n. 371. The Commission noted in the SCI Proposal that this proposed requirement was not addressed by the ARP Inspection Program. *See id.* at 18145.

[1407] *See* Proposing Release, *supra* note 13, at 18145.

[1408] *See id.*

[1409] *See id.* at 18146, and proposed Rules 1000(b)(2)(ii) and (iii).

[1410] *See id.* at 18146. The 180 burden hours included 30 hours by a Compliance Attorney and 150 hours by a Senior Systems Analyst. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program and OCIE examinations, which review policies and procedures of registered entities in conjunction with examinations of such entities for compliance with the federal securities laws. *See id.* at 18146, n. 383.

[1411] *See id.* at 18146. The 120 burden hours included 20 hours by a Compliance Attorney and 100 hours by a Senior Systems Analyst. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. *See id.* at 18146, n. 384.

[1412] *See id.* at 18146. The 60 burden hours included 10 hours by a Compliance Attorney and 50 hours by a Senior Systems Analyst. *See id.*

[1413] *See id.* at 18145.

[1414] *See id.*

[1415] *See* Omgeo Letter at 31–32, 34. According to this commenter, the implementation of its current information security policy framework and related standards took approximately 18 months and over 1600 work hours to put in place. *See id.* This commenter noted that proposed Rule 1000(b)(1) would be far more labor and resource intensive because security is just one of the proposed seven areas of policy and standards development this new rule would require. *See id.*

[1416] *See id.* at 34.

[1417] *See* MSRB Letter at 28–29. This commenter stated that the Commission placed too much reliance on its experience with the ARP Inspection Program, which was ''a voluntary program that did not create potential legal liabilities for non-compliance, and may not take into account the heightened need for high-level supervision that a rule-based requirement would entail.'' *See id.* at 29. *See also infra* Sections IV.B.3.c and VI.C.2.b (discussing the Commission's view on the potential for liability resulting from requirements under Regulation SCI). *See also* Omgeo Letter at 32 (noting that the estimate of 210 hours for proposed Rule 1000(b)(1) is unrealistic because the estimate should include not only the drafting of the required policies and procedures, but also their review and approval by senior management) and 35 (noting that the burden estimate of proposed Rule 1000(b)(2) does not reflect the review and direction of senior managers); and CME Letter at 3, n. 5.

[1418] *See* MSRB Letter at 29.

[1419] *See id.* at 30.

[1420] *See id.*

[1421] *See* FINRA Letter at 7.

[1422] *See* MSRB Letter at 31.

[1423] *See id.*

underlying systems and the requirements of proposed Rule 1000(b)(1), significantly more effort and time will be required on an ongoing basis to comply with that rule.[1424]

One commenter noted that the establishment of the policies and procedures under proposed Rules 1000(b)(1) and (b)(2) would not be conducive to outsourcing, although an SCI entity might incur some cost for outside counsel for consultation purposes.[1425] On the other hand, another commenter argued that the Commission's burden estimate for proposed Rule 1000(b)(1) ''is inaccurate because of its mistaken assumption that SCI entities would not seek guidance from outside consultants and attorneys.'' [1426] This commenter noted that, given the rates charged by large law firms and consulting firms, an estimate of approximately $100,000 for each exempt clearing agency subject to ARP is more realistic than the $20,000 estimated in the SCI Proposal.[1427] This commenter similarly noted that the burden estimate for proposed Rule 1000(b)(2) failed to account for the costs associated with using outside counsel or an outside consulting firm to help draft the policies and procedure.[1428]

As discussed in detail above in Sections IV.B.1 and IV.B.2, the Commission is adopting proposed Rules 1000(b)(1) and (b)(2) as Rules 1001(a) and (b), respectively, with certain modifications. As adopted, Rule 1001(a)(1), consistent with the proposal, requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. Adopted Rule 1001(a)(2), consistent with the proposal, provides the minimum required elements of such policies and procedures. Some of these elements were modified from the proposal,[1429] and one adopted element was not included in the proposal.[1430]

As compared to proposed Rule 1000(b)(2), which required written policies and procedures reasonably designed to ensure that SCI systems operate ''in the manner intended, including in a manner that complies with the federal securities laws,'' adopted Rule 1001(b)(1) requires an SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the *Exchange Act* and the rules and regulations thereunder, and the entity's rules and governing documents, as applicable.[1431] Further, rather than adopting the proposed safe harbor for SCI entities, Rule 1001(b)(2) provides the minimum required elements of such policies and procedures. Some of these elements were modified from the proposed safe harbor elements,[1432] and one element of the proposed safe harbor is not included in Rule 1001(b)(2).[1433]

With respect to the view of a commenter that the systems covered by proposed Rules 1000(b)(1) and (2) are very complex and that the Commission underestimated the burdens associated with completing and updating the required policies and procedures,[1434] the Commission believes that most, if not all, SCI entities already have some policies and procedures related to systems capacity, integrity, resiliency, availability, security, and compliance, although such policies and procedures differ in a variety of respects from the requirements under Regulation SCI. Also, in adopting Regulation SCI, the Commission has reduced the burdens for proposed Rules 1000(b)(1) and (2) from the SCI Proposal in a variety of ways, including by, for example: Refining the definition of SCI systems; more explicitly recognizing that some systems pose greater risk than others to the maintenance of fair and orderly markets and imposing obligations that allow for risk-based considerations; and providing that staff guidance on current SCI industry standards be characterized as providing examples of publications describing processes, guidelines, frameworks, or standards for an SCI entity to consider looking to in developing reasonable policies and procedures, rather than strictly as listing industry standards. At the same time, the Commission acknowledges commenters' feedback with respect to the burden of the rules and thus is doubling the burden estimates for the policies and procedures under Rules 1000(b)(1) and (2).[1435] The Commission notes that, as part of this approach, it doubled the ongoing burden estimates in part in response to comment stating that significantly more effort and time will be required on an ongoing basis to comply with proposed Rule 1000(b)(1).[1436]

As noted above, some commenters noted that the policies and procedures could potentially impact other areas of the SCI entity and other SCI entities, and therefore would result in more burden hours to ensure that the policies and procedures do not conflict with other policies, procedures, practices, and processes, and would require greater involvement of senior management and others in an SCI

[1424] *See* Omgeo Letter at 32, n. 63.

[1425] *See* MSRB Letter at 31.

[1426] *See* Omgeo Letter at 32.

[1427] *See id.* at 32, n. 64.

[1428] *See id.* at 35.

[1429] *See, e.g.,* Rules 1001(a)(2)(i) (requiring policies and procedures with respect to the establishment of reasonable current and future ''technological infrastructure capacity planning estimates'' rather than simply ''capacity planning estimates''); 1001(a)(2)(iv) (requiring policies and procedures with respect to ''regular reviews and testing, as applicable,'' of systems to identify vulnerabilities rather than ''regular reviews and testing'' of systems); and 1001(a)(2)(v) (requiring policies and procedures with respect to business continuity and disaster recovery plans that are ''reasonably designed to achieve'' next business day resumption of trading and two-hour resumption of ''critical SCI systems'' rather than ''to ensure'' next business day resumption of trading and two-hour resumption of ''clearance and settlement services''). *See also supra* Section IV.B.1.b.ii (discussing modifications from the SCI Proposal in adopted Rule 1001(a)(2)).

[1430] *See* Rule 1001(a)(2)(vii) (requiring policies and procedures with respect to monitoring of systems to identify potential SCI events).

[1431] *See supra* Section IV.B.2.a.

[1432] *See* Rules 1001(b)(2)(iii) (requiring policies and procedures with respect to ''a plan for assessments'' of systems compliance rather than both ''ongoing monitoring'' and ''assessments'' of systems compliance) and 1001(b)(2)(iv) (requiring policies and procedures with respect to ''a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel'' regarding SCI systems rather than ''review by regulatory personnel of SCI systems''). *See also supra* Section IV.B.2.c (discussing modifications from the SCI Proposal in adopted Rule 1001(b)(2)).

[1433] *See* proposed Rule 1000(b)(2)(ii)(A)(*2*) (periodic testing of all SCI systems and any changes to such systems after their implementation).

[1434] *See supra* note 1415 and accompanying text. As noted above, one commenter stated that its current information security policy framework and related standards took over 1,600 hours to put in place, and that security is just one of the seven areas of policies and standards proposed to be required. *See supra* note 1415. The Commission notes that, to the extent an SCI entity already has adequate policies and procedures in place with respect to systems capacity, integrity, resiliency, availability, security, and compliance, Rules 1001(a) and (b) will not impose significant additional paperwork burden on the entity.

[1435] In response to the commenter that suggested the initial burden for proposed Rule 1000(b)(1) would be three to four times that estimated in the SCI Proposal, the Commission believes that because it further focused the requirements associated with proposed Rules 1000(b)(1) and (2) in a variety of ways described above, resulting in reduced burden estimates as compared to the SCI Proposal, the commenter's estimate based on the proposal is too high. *See supra* note 1420. Based on Commission staff experience, the Commission believes it is more appropriate to double the estimated initial SCI entity staff burden and also add senior management time.

[1436] *See supra* note 1424.

entity.[1437] Similarly, some commenters noted that the establishment, maintenance, and enforcement of the policies and procedures would involve senior management review.[1438] The Commission agrees with these comments and is adjusting the estimated paperwork burden. Specifically, in the SCI Proposal, the Commission included senior management review as part of its estimated burden hours for Compliance Managers in connection with the policies and procedures requirements under Rules 1001(a) and (b).[1439] However, in response to comments and based on Commission staff experience, the Commission is additionally including burden estimates for a Director of Compliance (10 hours initially, 5 hours annually) and Chief Compliance Officer [1440] (20 hours initially, 10 hours annually) with respect to both Rules 1001(a) and (b).[1441] The Commission reiterates that these estimates are averages across all SCI entities—some SCI entities may spend more hours in connection with the establishment, maintenance, and enforcement of the policies and procedures than the Commission's estimates, while others may spend less.[1442] Each SCI entity is required to determine for itself what is required for its staff and senior managers to do in order for the SCI entity to comply with Rules 1001(a) and (b).

After considering the views of commenters, and because Rule 1001(a) requires an additional element to be included in the policies and procedures (*i.e.,* monitoring of systems to identify SCI events), the Commission estimates that an SCI entity that has not previously participated in the ARP Inspection Program would require an average of 534 burden hours initially to develop and draft the policies and procedures required by that rule (except for the policies and procedures for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data, which is discussed below),[1443] or 7,476 hours for all such SCI entities.[1444] The Commission estimates that an SCI entity that has not previously participated in the ARP Inspection Program would require an average of 159 hours annually to review and update such policies and procedures,[1445] or 2,226 hours for all such SCI entities.[1446]

With respect to SCI entities that currently participate in the ARP Inspection Program, the Commission continues to believe that a 50% percent baseline for these SCI entities in terms of staff burden hours is appropriate because although these entities already have substantial policies and procedures in place, the rule would require these entities to devote substantial time to review and revise their existing policies and procedures to ensure that they meet all of the rule requirements.[1447] However, the Commission does not believe that a 50% baseline would be appropriate for these SCI entities in terms of senior management review of the policies and procedures. Specifically, as noted above, Commission believes that, although these entities already have substantial policies and procedures in place, senior management of all SCI entities, regardless of whether an SCI entity currently participates in the ARP Inspection Program, would require a similar number of hours to review the SCI entity's policies and procedures to ensure compliance with the new requirements under Regulation SCI.[1448]

[1437] *See supra* notes 1418–1419 and accompanying text.

[1438] *See supra* notes 1417, 1419, and 1420 and accompanying text. According to one commenter, the Commission's burden estimates for the policies and procedures did not account for the time required to determine which systems would fall into the various categories of systems. *See supra* note 1419 and accompanying text. The Commission disagrees with this view and notes that the burden of identifying various types of systems and events are discussed below in Section V.D.3. In addition, this commenter expressed concern that the Commission's estimates did not account for assessing, growing, and reorganizing an SCI entity's workforce; establishing and conducting training; and other collateral effects of the new requirements. *See supra* note 1419 and accompanying text. As discussed throughout this section, the Commission has increased the burden estimates for Rules 1001(a) and (b) in response to comments.

[1439] *See supra* note 1402.

[1440] The Chief Compliance Officer burden estimates include the time spent by other senior officers, including Chief Information Officers and Chief Information Security Officers, as appropriate for a particular requirement under Regulation SCI.

[1441] In estimating the number of burden hours to be spent by senior management, the Commission is not making a distinction between SCI entities that currently participate in the ARP Inspection Program and SCI entities that do not. In contrast to the Commission's estimate with regard to non-senior staff of SCI entities that currently participate in the ARP Inspection Program, who the Commission believes could be subject to less burden in drafting the policies and procedures because these SCI entities already have certain policies and procedures in place, the Commission believes that all senior management, regardless of whether an SCI entity participates in the ARP Inspection Program, would require a similar number of hours to review such policies and procedures to ensure compliance with Regulation SCI.

[1442] For example, some SCI entities have more complex systems than others, and current practices of some SCI entities already comply with certain requirements of Regulation SCI to some extent.

[1443] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 210 hours × 2 = 420 hours. 420 hours ÷ 5 × 6 = 504 hours to establish policies and procedures that contain six elements, as opposed to the five in the SCI Proposal. The 504 burden hours include 192 hours by a Compliance Manager, 192 hours by an Attorney, 60 hours by a Senior Systems Analyst, and 60 hours by an Operations Specialist. This burden hour allocation is based on the allocation in the SCI Proposal. *See* Proposing Release, *supra* note 13, at 18146. As noted above, as compared to the proposal, the Commission is estimating an additional 20 hours by a Chief Compliance Officer and 10 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 504 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 534 hours.

[1444] As noted above, all of the national securities exchanges (18), national securities associations (1), registered clearing agencies (7), and plan processors (2) currently participate on a voluntary basis in the ARP Inspection Program. In addition, 1 ATS and 1 exempt clearing agency subject to ARP participate in the ARP Inspection Program, for a total of 30 SCI entities that currently participate in the ARP Inspection Program. Therefore, 14 SCI entities do not participate in the ARP Inspection Program. 534 hours × 14 SCI entities that do not participate in the ARP Inspection Program = 7,476 hours.

[1445] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 60 hours × 2 = 120 hours. 120 hours ÷ 5 × 6 = 144 hours annually to review and update policies and procedures that contain six elements, as opposed to the five in the SCI Proposal. The 144 burden hours include 57 hours by a Compliance Manager, 57 hours by an Attorney, 15 hours by a Senior Systems Analyst, and 15 hours by an Operations Specialist. As compared to the proposal, the Commission is additionally allocating burden hours to Senior Systems Analysts and Operations Specialists. Also, as noted above, as compared to the proposal, the Commission is estimating an additional 10 hours by a Chief Compliance Officer and 5 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 144 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 159 hours.

[1446] 159 hours × 14 SCI entities that do not participate in the ARP Inspection Program = 2,226 hours. The Commission believes that the increases in the ongoing burden estimates for Rules 1001(a) and (b) are consistent with the comment that the Commission underestimated the ongoing burdens associated with proposed Rules 1000(b)(1) and (2), but to a lesser extent than with respect to the initial burden. *See supra* notes 1423–1424 and accompanying text.

[1447] With respect to a commenter's view that the 50% baseline does not account for the significant expansion of the requirements, the Commission notes that the 50% baseline merely indicates the difference between the level of burden imposed on SCI entities that participate in the ARP Inspection Program and SCI entities that do not. *See supra* note 1421 and accompanying text. As discussed above, the Commission has increased its burden estimates in response to comments.

[1448] *See supra* note 1441.

The Commission estimates that an SCI entity that currently participates in the ARP Inspection Program would require an average of 282 burden hours initially to develop and draft the policies and procedures required by Rule 1001(a) (except for the policies and procedures for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data),[1449] or 8,460 hours for all such SCI entities.[1450] The Commission estimates that an SCI entity that currently participates in the ARP Inspection Program would require an average of 87 hours annually to review and update such policies and procedures,[1451] or 2,610 hours for all such SCI entities.[1452]

With respect to the requirement in Rule 1001(a)(2)(vi) for policies and procedures that provide for standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data, the Commission estimates that each SCI entity would spend 160 hours initially,[1453] or 7,040 hours for all SCI entities.[1454] The Commission estimates that each SCI entity would spend 145 hours annually,[1455] or 6,380 hours annually for all SCI entities.[1456]

As noted above, one commenter argued that, given the rates charged by large law firms and consulting firms, an estimate of $100,000 is more appropriate for the cost of outsourcing under proposed Rule 1000(b)(1).[1457] After considering the view of this commenter and because the Commission is increasing its estimated burden hours for compliance with Rule 1001(a), the Commission is similarly increasing its estimate of the outsourcing cost for complying with Rule 1001(a). In particular, because the Commission doubled the non-senior staff burden estimate for Rule 1001(a) in response to comments that the Commission underestimated the burden in the proposal, the Commission believes it is appropriate to similarly double its estimate of the outsourcing cost for complying with Rule 1001(a). As noted above in the context of the burden estimate for Rule 1001(a), the Commission believes that, by doubling its outsourcing cost estimate, the Commission has incorporated the views of commenters that the Commission underestimated the burden, and at the same time accounted for changes to the proposal that reduce the burden from the SCI Proposal. Further, the Commission acknowledges that some SCI entities may have more complex systems and policies and procedures, may outsource more of the work associated with the policies and procedures,[1458] or may outsource the work to more expensive law firms and consulting firms than others. Therefore, the Commission believes that while some SCI entities may incur more outsourcing cost than the Commission's estimate, other SCI entities may incur less than the Commission's estimate. The Commission does not believe that a commenter's $100,000 estimate is more appropriate given that there will be differences among SCI entities in the extent of outsourcing and in the rates of outside firms.

Because Rule 1001(a) requires an additional element to be included in the policies and procedures as compared to proposed Rule 1000(b)(1) (*i.e.,* monitoring of systems to identify SCI events), the Commission now estimates that on average, each SCI entity would seek outside legal and/or consulting services in the initial preparation of the policies and procedures at a cost of approximately $47,000,[1459] or $2,068,000 for all SCI entities.[1460]

With respect to the view of a commenter that the Commission underestimated the paperwork burden under proposed Rule 1000(b)(2) because that rule is extremely extensive,[1461] the Commission notes that, as adopted, Rule 1001(b) requires policies and procedures to be reasonably designed to ensure, in part, that SCI systems ''operate in a manner that complies with

[1449] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 105 hours × 2 = 210 hours. 210 hours ÷ 5 × 6 = 252 hours to establish policies and procedures that contain six elements, as opposed to the five in the SCI Proposal. The 252 burden hours include 96 hours by a Compliance Manager, 96 hours by an Attorney, 30 hours by a Senior Systems Analyst, and 30 hours by an Operations Specialist. This burden hour allocation is based on the allocation in the SCI Proposal. *See* Proposing Release, *supra* note 13, at 18146. As noted above, as compared to the proposal, the Commission is estimating an additional 20 hours by a Chief Compliance Officer and 10 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 252 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 282 hours.

[1450] 282 hours × 30 SCI entities that participate in the ARP Inspection Program = 8,460 hours.

[1451] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 30 hours × 2 = 60 hours. 60 hours ÷ 5 × 6 = 72 hours to review and update policies and procedures that contain six elements, as opposed to the five in the SCI Proposal. The 72 burden hours include 28 hours by a Compliance Manager, 28 hours by an Attorney, 8 hours by a Senior Systems Analyst, and 8 hours by an Operations Specialist. As compared to the proposal, the Commission is additionally allocating burden hours to Senior Systems Analysts and Operations Specialists. Also, as noted above, as compared to the proposal, the Commission is estimating an additional 10 hours by a Chief Compliance Officer and 5 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 72 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 87 hours.

[1452] 87 hours × 30 SCI entities that participate in the ARP Inspection Program = 2,610 hours.

[1453] This estimate includes 130 hours by staff of an SCI entity, as estimated in the SCI Proposal, and 30 hours by senior management. The 130 burden hours include 30 hours by a Compliance Attorney and 100 hours by a Senior Systems Analyst. *See* Proposing Release, *supra* note 13, at 18146. This burden hour allocation is based on the allocation in the SCI Proposal. *See* Proposing Release, *supra* note 13, at 18146. As noted above, as compared to the proposal, the Commission is estimating an additional 20 hours by a Chief Compliance Officer and 10 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 130 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 160 hours. Unlike the burden estimates for complying with the rest of Rule 1001(a), the Commission does not believe it would be appropriate to double its proposed 130 hour staff burden estimate for Rule 1001(a)(2)(vi). Based on Commission staff experience, the Commission believes that these policies and procedures would not be so complex as to result in doubling the proposed burden estimate. The Commission also notes that the burden estimate for Rule 1001(a)(2)(vi) is already significantly higher than the estimated burden for the other individual policies and procedures required under Rule 1001(a)(2). In particular, the Commission estimates 160 hours for this one provision and 534 hours in total for the six other provisions of Rule 1001(a)(2) for non-ARP participants (which results in approximately 89 hours for each of those six other provisions).

[1454] 160 hours × 44 SCI entities = 7,040 hours.

[1455] This estimate includes 130 hours by staff of an SCI entity, as estimated in the SCI Proposal, and 15 hours by senior management. The 130 burden hours include 30 hours by a Compliance Attorney and 100 hours by a Senior Systems Analyst. *See* Proposing Release, *supra* note 13, at 18146. 130 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 145 hours.

[1456] 145 hours × 44 SCI entities = 6,380 hours.

[1457] *See supra* note 1427 and accompanying text. This commenter also argued that the Commission mistakenly assumed that SCI entities would not seek guidance from outside consultants or attorneys. *See supra* note 1426 and accompanying text. However, the Commission did account for outsourcing cost in the SCI Proposal and does so here, as well.

[1458] For example, smaller SCI entities may not have the same level of in-house expertise as larger SCI entities.

[1459] As noted above, the Commission is doubling its estimate of the outsourcing cost for SCI entities. $20,000 × 2 = $40,000. The Commission is also revising this cost estimate to reflect that Rule 1001(a) requires seven specific elements to be included in the policies and procedures, as opposed to the six in the proposed rule. $40,000 ÷ 6 × 7 = $46,667.

[1460] $47,000 × 44 SCI entities = $2,068,000.

[1461] *See supra* note 1416.

the Act and the rules and regulations thereunder.'' As adopted, this rule no longer refers to compliance with ''the federal securities laws and rules and regulations thereunder'' and operation ''in the manner intended.'' Nevertheless, as noted above, after considering the views of commenters that the Commission underestimated the paperwork burden under proposed Rule 1000(b)(2), the Commission is doubling its estimates from the proposal (which were focused on the burden for SCI entity staff), and is increasing its estimates to account for senior management review of the policies and procedures.

The Commission now estimates that each SCI entity would spend 270 hours initially to design the systems compliance policies and procedures,[1462] or 11,880 hours for all SCI entities.[1463] The Commission estimates that each SCI SRO would spend approximately 175 hours annually to review and update such policies and procedures,[1464] or 4,725 hours for all SCI SROs.[1465] The Commission estimates that each SCI entity that is not an SRO would spend approximately 95 hours to review and update such policies and procedures,[1466] or 1,615 hours for all such SCI entities.[1467]

As noted above, similar to the burden estimates for proposed Rule 1000(b)(1), one commenter argued that the Commission underestimated the outsourcing cost under proposed Rule 1000(b)(2).[1468] Similar to the discussion above related to Rule 1001(a),[1469] after considering the view of this commenter and because the Commission is increasing its estimated burden hours for compliance with Rule 1001(b), the Commission is doubling its estimate of the outsourcing cost for complying with Rule 1001(b). The Commission now estimates that on average, each SCI entity would seek outside legal and/or consulting services in the initial preparation of the policies and procedures at a cost of approximately $27,000,[1470] or $1,188,000 for all SCI entities.[1471]

Adopted Rules 1001(a)(3) and (b)(3) explicitly require each SCI entity to periodically review the effectiveness of the policies and procedures required by Rules 1001(a) and (b), respectively, and to take prompt action to remedy deficiencies in such policies and procedures. The Commission notes that the paperwork burden related to the review of the policies and procedures, and remedying deficiencies in policies and procedures, is included in the estimated annual ongoing burden of Rules 1001(a) and (b).

Rule 1001(c)(1), which was not included in the proposal, requires each SCI entity to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel,[1472] and escalation procedures to quickly inform responsible SCI personnel of potential SCI events. Like adopted Rules 1001(a)(3) and (b)(3), Rule 1001(c) requires each SCI entity periodically to review the effectiveness of these policies and procedures and to take prompt action to remedy deficiencies in policies and procedures. The Commission estimates that each SCI entity would require 114 hours initially to establish the criteria for identifying responsible SCI personnel and the escalation procedures,[1473] or 5,016 hours for all SCI entities.[1474] The Commission also estimates that each SCI entities would require 39 hours annually to review and update the criteria and the escalation procedures,[1475] or 1,716 hours for all

[1462] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 180 hours × 2 = 360 hours. 360 hours ÷ 6 × 4 = 240 hours to establish policies and procedures that contain four elements at a minimum, as opposed to the six in the SCI Proposal. The 240 burden hours include 40 hours by a Compliance Attorney and 200 hours by a Senior Systems Analyst. This burden hour allocation is based on the allocation in the SCI Proposal. *See* Proposing Release, *supra* note 13, at 18146. As noted above, as compared to the proposal, the Commission is estimating an additional 20 hours by a Chief Compliance Officer and 10 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 240 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 270 hours.

[1463] 270 hours × 44 SCI entities = 11,880 hours.

[1464] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 120 hours × 2 = 240 hours. 240 hours ÷ 6 × 4 = 160 hours to review and update policies and procedures that contain four elements at a minimum, as opposed to the six in the SCI Proposal. The 160 burden hours include 26 hours by a Compliance Attorney and 134 hours by a Senior Systems Analyst. This burden hour allocation is based on the allocation in the SCI Proposal. *See* Proposing Release, *supra* note 13, at 18146. As noted above, as compared to the proposal, the Commission is estimating an additional 10 hours by a Chief Compliance Officer and 5 hours by a Director of Compliance to reflect the views of commenters that compliance with the proposed policies and procedures requirements would require greater senior management involvement. *See supra* notes 1440–1441 and accompanying text. 160 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 175 hours.

[1465] 175 hours × 27 SCI SROs = 4,725 hours.

[1466] As noted above, the Commission is doubling its estimate of the burden for staff of SCI entities. 60 hours × 2 = 120 hours. 120 hours ÷ 6 × 4 = 80 hours to review and update policies and procedures that contain four elements at a minimum, as opposed to the six in the SCI Proposal. The 80 burden hours include 14 hours by a Compliance Attorney and 66 hours by a Senior Systems Analyst. This burden hour allocation is based on the allocation in the SCI Proposal. *See* Proposing Release, *supra* note 13, at 18146. 80 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 95 hours.

[1467] 95 hours × 17 non-SRO SCI entities = 1,615 hours.

[1468] *See supra* note 1428 and accompanying text.

[1469] *See supra* notes 1457–1458 and accompanying text.

[1470] As noted above, the Commission is doubling its estimate of the outsourcing cost for SCI entities. $20,000 × 2 = $40,000. The Commission is also revising this cost estimate to reflect that Rule 1001(b) will result in the inclusion of at least four elements in the policies and procedures, as opposed to the six in the proposed rule. $40,000 ÷ 6 × 4 = $26,667.

[1471] $27,000 × 44 SCI entities = $1,188,000.

[1472] The paperwork burden associated with the documentation of responsible SCI personnel is included in the Commission's estimate of the recordkeeping burden, as discussed in Section V.D.4 below.

[1473] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and Rule 1001(c) both require policies and procedures or processes. Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the establishment of six policies and procedures at a minimum and Rule 1001(c) requires the establishment of two policies and procedures, the Commission estimates that the initial burden to draft the policies and procedures required by Rule 1001(c) is one-third of the initial burden to draft the policies and procedures required by Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). Further, the Commission believes that, even though Rule 1001(c) will impose paperwork burdens on SCI entities, most, if not all, SCI entities, regardless of whether they participate in the ARP Inspection Program, already have some processes in place for the designation of persons responsible for particular systems and escalation procedures. Therefore, the Commission believes it is appropriate to assume a 50% baseline for all SCI entities (as compared to the burden estimate for Rule 1001(a) for SCI entities that do not participate in the ARP Inspection Program) in terms of the staff burden for compliance with Rule 1001(c). 252 hours ÷ 3 = 84 hours. The 84 burden hours include 32 hours by a Compliance Manager, 32 hours by an Attorney, 10 hours by a Senior Systems Analyst, and 10 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1443. The Commission also estimates that a Chief Compliance Officer will spend 20 hours and a Director of Compliance will spend 10 hours reviewing the policies and procedures required by Rule 1001(c). 84 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 114 hours.

The Commission notes that, in the SCI Proposal, it also estimated the burden hours for other policies and procedures based on its burden estimate under proposed Rule 1000(b)(1). *See, e.g.,* Proposing Release, *supra* note 13, at 18152, n. 442. One commenter stated that it was appropriate to base the burden estimate for proposed Rule 1000(b)(3), which would likely result in SCI entities revising their policies, on the burden estimate under proposed Rule 1000(b)(1). *See infra* note 1700 and accompanying text.

[1474] 114 hours × 44 SCI entities = 5,016 hours.

[1475] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule

SCI entities.[1476] The Commission believes that SCI entities will internally establish and maintain the policies and procedures required by Rule 1001(c) because these policies and procedures relate to internal personnel designations and internal processes.

b. Mandate Participation in Certain Testing

In the SCI Proposal, the Commission estimated that each SCI entity (other than plan processors) would spend approximately 130 hours initially to meet the requirements of proposed Rules 1000(b)(9)(i) and (ii) (*i.e.,* the requirement to mandate participation by designated members or participants in testing and the requirement that an SCI entity coordinate required testing with other SCI entities).[1477] The 130-hour estimate included 35 hours to write a proposed rule, or revise a membership/subscriber agreement or participant agreement to establish the participation requirement for designated members or participants.[1478] It also included 95 hours of follow-up work (*e.g.,* notice and schedule coordination) to ensure implementation.[1479] The Commission estimated that each SCI entity (other than plan processors) would spend approximately 95 hours annually to comply with proposed Rules 1000(b)(9)(i) and (ii).[1480]

In the SCI Proposal, the Commission estimated that each SCI entity (other than plan processors) would spend approximately 35 hours initially to meet the requirements of proposed Rule 1000(b)(9)(iii) (*i.e.,* establishing standards for designating members or participants and filing such standards with the Commission, and determining, compiling, and submitting the list of designated members or participants).[1481] The Commission estimated that each SCI entity (other than plan processors) would spend approximately 3 hours annually to comply with proposed Rule 1000(b)(9)(iii) (*i.e.,* to review the designation standards to ensure that they remain up-to-date and to prepare any necessary amendments, to review the list of designated members or participants, and to update prior Commission notifications with respect to standards for designation and the list of designees).[1482] The Commission also estimated that all SCI entities, other than plan processors, would conduct the work associated with proposed Rule 1000(b)(9) internally.[1483]

For plan processors, the Commission estimated that proposed Rules 1000(b)(9)(i) and (ii) would carry an initial cost of $52,000 per plan processor[1484] and an annual cost of $38,000 per plan processor.[1485] The Commission also estimated that proposed Rule 1000(b)(9)(iii) would carry an initial cost of $14,000 per plan processor[1486] and an annual cost of $1,200 per plan processor.[1487]

With respect to the Commission's estimate of the burdens under proposed Rule 1000(b)(9), one commenter noted that the estimate was effectively limited to ministerial tasks of producing a rule filing and of undertaking follow-up work in connection with implementation and does not take into account significant activities relating to the SRO rule change process (*e.g.,* board or directors briefing and deliberation, potential notice for comment, responses to comment letters received on such notice, responses to comment letters received by the Commission on a rule filing, etc.) and understates the activities necessary to implement testing with industry participants.[1488] Another commenter argued that it has contractual relationships with thousands of clients, and contract negotiations always require a great deal of time and commitment from its legal personnel.[1489] This commenter also noted that while a certain significant percentage of its clients may sign the contracts without any negotiation, many do not.[1490] According to this commenter, the requirements under proposed Rule 1000(b)(9) would create for it many thousands of burden hours because it would require the commenter to re-negotiate contracts with ''the many thousands of clients it has already signed up.'' [1491]

One commenter noted that the requirements under proposed Rule 1000(b)(9) would not be conducive to outsourcing.[1492]

As discussed in detail above in Section IV.B.6, the Commission is adopting proposed Rule 1000(b)(9) as Rule 1004, with certain modifications. Rule 1004 requires each SCI entity to establish standards for the designation of certain members or participants for business continuity and disaster recovery plan testing, to designate members or participants in accordance with these standards, to require participation by designated members or participants in such testing at least annually, and to coordinate such testing on an industry- or sector-wide basis with other SCI entities. However,

1001(a) and Rule 1001(c) both require policies and procedures or processes. Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the maintenance of six policies and procedures at a minimum and Rule 1001(c) requires the maintenance of two policies and procedures, the Commission estimates that the ongoing staff burden under Rule 1001(c) is one-third of the ongoing staff burden under Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). As noted above, the Commission believes it is appropriate to assume a 50% baseline for all SCI entities in terms of the staff burden for compliance with Rule 1001(c). 72 hours ÷ 3 = 24 hours. The 24 burden hours include 9.5 hours by a Compliance Manager, 9.5 hours by an Attorney, 2.5 hours by a Senior Systems Analyst, and 2.5 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1445. The Commission also estimates that a Chief Compliance Officer will spend 10 hours and a Director of Compliance will spend 5 hours reviewing the policies and procedures required by Rule 1001(c). 24 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 39 hours.

[1476] 39 hours × 44 SCI entities = 1,716 hours.

[1477] *See* Proposing Release, *supra* note 13, at 18147.

[1478] *See id.* The 35 burden hours included 10 hours by a Compliance Manager, 15 hours by an Attorney, and 10 hours by a Compliance Clerk. *See id.* In establishing this estimate, the Commission considered its estimate of the burden for an SRO to file an average proposed rule change under Rule 19b–4. *See id.* at 18147, n. 389.

[1479] *See* Proposing Release, *supra* note 13, at 18147. The 95 burden hours included 10 hours by a Compliance Manager, 15 hours by an Attorney, and 70 hours by an Operations Specialist. *See id.*

[1480] *See id.* The 95 burden hours included 10 hours by a Compliance Manager, 15 hours by an Attorney, and 70 hours by an Operations Specialist. *See id.* The Commission noted that, although the initial burden included 35 hours to write a proposed rule, revise an agreement, or amend an SCI Plan, the Commission did not believe the 35-hour burden would be applicable on an ongoing basis. *See id.* at 18147, n. 393.

[1481] *See* Proposing Release, *supra* note 13, at 18148. The 35 burden hours included 10 hours by a Compliance Manager, 15 hours by an Attorney, and 10 hours by a Compliance Clerk. *See id.* In establishing this estimate, the Commission considered its estimate of the burden for an SRO to file an average proposed rule filing under Rule 19b–4. *See id.* at 18148, n. 397.

[1482] *See* Proposing Release, *supra* note 13, at 18148. The 3 burden hours included 1.5 hours by a Compliance Manager and 1.5 hours by an Attorney. *See id.* In establishing this estimate, the Commission has considered its estimate of the burden for an SRO to amend a Form 19b–4 rule filing. *See id.* at 18148, n. 401.

[1483] *See id.* at 18145.

[1484] 130 hours × $400 per hour for outside legal service = $52,000. *See* Proposing Release, *supra* note 13, at 18147.

[1485] 95 hours × $400 per hour for outside legal service = $38,000. *See id.*

[1486] 35 hours × $400 per hour for outside legal service = $14,000. *See id.* at 18148.

[1487] 3 hours × $400 per hour for outside legal service = $1,200. *See id.*

[1488] *See* MSRB Letter at 38.

[1489] *See* Omgeo Letter at 46. This commenter noted that its relationships with clients are often based on negotiated agreements and that clients do not automatically agree to all terms stated in the standard contract. *See id.* at 45.

[1490] *See id.* at 46.

[1491] *See id.*

[1492] *See* MSRB Letter at 38.

adopted Rule 1004 does not require an SCI entity to notify and update the Commission of its designated members or participants and its standards for designation on Form SCI, as proposed.

Considering commenters' view that the Commission had underestimated the burden hours associated with proposed Rule 1000(b)(9), the Commission now estimates that the requirements under Rules 1004(a) (*i.e.,* establishment of standards for the designation of members and participants) and (c) (*i.e.,* coordination of testing on an industry- or sector-wide basis) will initially require 360 hours for each SCI entity that is not a plan processor (*e.g.,* establishing designation criteria by writing a proposed rule; revising a membership/subscriber agreement or participant agreement; providing notice to members or participants; scheduling the coordinated testing),[1493] or 15,120 hours for all such SCI entities.[1494] Further, the Commission estimates that the requirements under Rules 1004(a) and (c) will require 135 hours annually for each SCI entity that is not a plan processor,[1495] or 5,670 hours for all such SCI entities.[1496] The Commission continues to believe that SCI entities (other than plan processors) would handle internally the work associated with the requirements of Rule 1004.[1497]

With respect to a commenter's statement that it has contractual relationships with thousands of clients and that proposed Rule 1000(b)(9) would create many thousands of burden hours,[1498] the Commission notes that adoption of a more focused designation requirement is likely to result in a smaller number of SCI entity members or participants being designated for participation in testing as compared to the SCI Proposal. Specifically, as adopted, Rule 1004(a) requires an SCI entity to designate ''members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets'' in the event of the activation of the business continuity and disaster recovery plans. On the other hand, proposed Rule 1000(b)(9) required participation by members or participants the SCI entity deemed necessary ''for the maintenance of fair and orderly markets in the event of the activation of its business continuity and disaster recovery plans.'' [1499] The Commission believes that SCI entities have an incentive to limit the imposition of the cost and burden associated with testing to the minimum necessary to comply with the rule, and it also believes that, given the option, most SCI entities would, in the exercise of reasonable discretion, prefer to designate few members or participants to participate in testing, than to designate more. Thus, even if an SCI entity individually negotiates contract modifications with certain designated members or participants, the Commission believes that the burden would be substantially less than suggested by the commenter.[1500] Moreover, as noted above, taking into account commenters' view that the Commission underestimated the burden for proposed Rule 1000(b)(9), the Commission increased its estimate for initial burden hours from 130 hours for the proposed rule to 360 hours for adopted Rule 1004. The average burden estimate associated with Rule 1004 applies to SCI entities that would need to negotiate contract modifications with members or participants.

Based on its experience with plan processors, the Commission continues to believe that plan processors will outsource the work related to compliance with Rule 1004. The Commission estimates that Rule 1004 will carry an initial cost of $144,000 per plan processor,[1501] or $288,000 for all plan processors.[1502] The Commission estimates that Rule 1004 will carry an annual cost of $54,000 per plan processor,[1503] or $108,000 for all plan processors.[1504]

2. Notification, Dissemination, and Reporting Requirements for SCI Entities

The rules under Regulation SCI that would require an SCI entity to notify the

[1493] This estimate includes 90 hours to comply with Rule 1004(a) and 270 hours to comply with Rule 1004(c). The 90 hours include 30 hours by an Attorney, 20 hours by a Compliance Manager, 10 hours by an Assistant General Counsel, 6 hours by a Chief Compliance Officer, 4 hours by a Director of Compliance, and 20 hours by a Senior Operations Manager. The Commission is substantially increasing the estimated burden over that estimated for proposed Rule 1000(b)(9)(i), and is estimating an additional 10 hours by an Assistant General Counsel, 6 hours by a Chief Compliance Officer, 4 hours by a Director of Compliance, and 20 hours by a Senior Operations Manager to reflect senior management review of the standards for designation. With respect to the comment that the estimates in the proposal did not take into account significant activities relating to the SRO rule change process, the Commission notes that the paperwork burden associated with SRO rule filings are included as part of the burden associated with Rule 19b–4. *See supra* note 1488 and accompanying text. The 270 hours include 30 hours by an Attorney, 20 hours by a Compliance Manager, 10 hours by an Assistant General Counsel, 20 hours by a Chief Compliance Officer, 10 hours by a Director of Compliance, 140 hours by an Operations Specialist, and 40 hours by a Senior Operations Manager. The Commission is substantially increasing the estimated burden over that estimated for proposed Rule 1000(b)(9)(ii), and is estimating an additional 10 hours by an Assistant General Counsel, 20 hours by a Chief Compliance Officer, 10 hours by a Director of Compliance, and 40 hours by a Senior Operations Manager, in response to the view of a commenter that the estimates in the SCI Proposal underestimated the activities necessary to implement testing with industry participants. *See supra* note 1488 and accompanying text. The estimate of 360 hours includes the burden for designating members or participants for testing, as required by Rule 1004(b).

[1494] 360 hours × 42 SCI entities other than plan processors = 15,120 hours.

[1495] As noted in the SCI Proposal, the Commission does not believe that there would be significant annual burden under Rule 1004(a), as the Commission believes that the designation standards will likely not change substantially on an annual basis. *See* Proposing Release, *supra* note 13, at 18147, n. 393. The 135 hours include 15 hours by an Attorney, 10 hours by a Compliance Manager, 5 hours by an Assistant General Counsel, 10 hours by a Chief Compliance Officer, 5 hours by a Director of Compliance, 70 hours by an Operations Specialist, and 20 hours by a Senior Operations Manager. As compared to the estimated ongoing burden for proposed Rule 1000(b)(9)(ii), the Commission is estimating an additional 5 hours by an Assistant General Counsel, 10 hours by a Chief Compliance Officer, 5 hours by a Director of Compliance, and 20 hours by a Senior Operations Manager, consistent with the Commission's estimate for the initial burden for Rule 1004.

[1496] 135 hours × 42 SCI entities other than plan processors = 5,670 hours.

[1497] *See supra* note 1492 (discussing a commenter's view that the requirements under proposed Rule 1000(b)(9) would not be conducive to outsourcing).

[1498] *See supra* notes 1489–1491 and accompanying text.

[1499] The Commission notes that, because Rule 1004 would not require all members or participants of an SCI entity to participate in business continuity and disaster recovery plan testing, Rule 1004 will not affect all of an SCI entity's contractual relationships with clients or members or participants. Further, the Commission notes that its estimated burden for compliance with Rule 1004 is intended to reflect the average burden for all SCI entities (other than plan processors).

[1500] As discussed in the Economic Analysis, the Commission estimates that each SCI entity would designate an average of 40 members or participants to participate in the necessary testing. *See infra* note 2065. Therefore, an SCI entity will not be required to re-negotiate contracts with ''the many thousands of clients it has already signed up.'' *See supra* note 1491 and accompanying text. Moreover, this commenter recognized that a significant percentage of its clients may sign the contracts without any negotiation. *See supra* note 1491 and accompanying text. As a result, the Commission does not expect that an SCI entity will need to negotiate with all of the estimated 40 members or participants.

[1501] 360 hours × $400 per hour for outside legal service = $144,000. This is based on an estimated $400 per hour cost for outside legal services. This is the same estimate used by the Commission for these services in the ''Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million Under Management, and Foreign Private Advisers'' final rule: SEC Release No. IA–3222 (June 22, 2011); 76 FR 39646 (July 6, 2011).

[1502] $144,000 × 2 plan processors = $288,000.

[1503] 135 hours × $400 per hour for outside legal service = $54,000. The Commission increased from its estimate in the proposal the estimated hours for the outsourced work for plan processors to be equivalent to the number of burden hours it estimated for an SCI entity that is not a plan processor (*i.e.,* increasing the initial burden estimate from 130 hours to 360 hours and the annual burden estimate from 95 to 135 hours).

[1504] $54,000 × 2 plan processors = $108,000.

Commission of SCI events, disseminate information regarding certain SCI events, and notify the Commission of certain systems changes are discussed more fully in Sections IV.B.3.c, IV.B.3.d, and IV.B.4 above.

a. Commission Notification of SCI Events

In the SCI Proposal, the Commission estimated that each SCI entity would experience an average of 40 immediate notification SCI events [1505] per year (*i.e.,* 40 notifications under proposed Rule 1000(b)(4)(i)), and that one-fourth of the notifications under proposed Rule 1000(b)(4)(i) would be in writing (*i.e.,* 10 written notifications and 30 oral notifications).[1506] The Commission estimated that each written notification would require 0.5 hours to prepare and submit to the Commission.[1507] The Commission also estimated that each SCI entity would experience an average of 65 SCI events each year and therefore would submit 65 Commission notifications each year under proposed Rule 1000(b)(4)(ii).[1508] The Commission estimated that each such notification would require an average of 20 burden hours.[1509] In addition, the Commission estimated that on average, each SCI entity would submit 5 updates per year under proposed Rule 1000(b)(4)(iii), and that each update would require an average of 3 burden hours.[1510] Finally, the Commission estimated that SCI entities would handle internally the work associated with the notification requirement under proposed Rule 1000(b)(4).[1511]

Several commenters stated that the Commission underestimated the number of SCI events.[1512] One commenter stated that, because the proposed definition of SCI event was broad and would include minor or immaterial events, it is likely that each SCI entity could have hundreds if not thousands of SCI events on an annual basis.[1513] Similarly, another commenter stated that each SCI entity could be required to report hundreds of systems disruption events each year, although the vast majority of such events would be virtually unnoticed by market participants.[1514] Another commenter stated that, based on its best reading of the more expansive definitions of disruptions and intrusions, a more accurate estimate could be between 200 to 500 events per year per exchange.[1515] Several commenters noted that the Commission significantly underestimated the number of updates that would be required under Rule 1000(b)(4)(iii).[1516]

With respect to the Commission's estimate of the burden for Commission notification generally, one commenter noted that preparation of Form SCI will take a fair amount of time, not just to compile information about the SCI event, but also to review and edit the submission.[1517] According to this commenter, further impediments to timely reporting may arise where an issue requires cross-department coordination or coordination with a joint facility or RSA client.[1518] This commenter stated that the Commission notification process will take even more time where a third party's technical and data personnel are relied on to provide initial drafts or where an RSA client requests that it have the opportunity to review all written notices before they are submitted.[1519] Another commenter noted that senior management of SCI entities would want an SCI event to be investigated before it is reported to the Commission.[1520] This commenter also noted that any responsible Chief Administrative Officer, Chief Financial Officer, Chief Operations Officer, Chief Compliance Officer, Chief Information Security Officer, General Counsel, and compliance attorneys and officers would want to review any report on an SCI event prior to submission to the Commission.[1521] In addition, this commenter noted that the SCI entity would need to engage outside counsel and possibly other parties to review such reports.[1522]

With respect to the Commission's estimate of the burden for written Commission notification under proposed Rule 1000(b)(4)(i), one commenter noted that considerable amounts of activities may be necessary to gather the information needed, to have appropriate confirmations from persons with knowledge and authority with respect to the applicable SCI system, to provide for senior management review where appropriate, and to otherwise be in a position to draft the notification.[1523] Another commenter noted that Commission notification required by proposed Rule 1000(b)(4)(i) would require substantive input from personnel outside of the legal and compliance departments, including IT analysts and managers as well as impacted business analysts and managers.[1524] This commenter estimated that each notification under proposed Rule 1000(b)(4)(i) would require 12 hours.[1525] This commenter also noted that the Commission erroneously assumed that verbal notifications under proposed Rule

[1505] Immediate notification SCI events included systems disruptions that an SCI entity reasonably estimated would have a material impact on its operations or on market participants, all systems compliance issues, and all systems intrusions.

[1506] *See* Proposing Release, *supra* note 13, at 18148.

[1507] *See id.* The 0.5 burden hour would be spent by an Attorney. *See id.* at 18149.

[1508] *See id.* at 18148–49.

[1509] *See id.* at 18149. The 20 burden hours included 10 hours by an Attorney and 10 hours by a Compliance Manager. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. In determining this estimate, the Commission also considered its estimate of the burden to complete a Form 19b–4 filing, although the Commission noted that, unlike a Form 19b–4 filing, the information contained in Form SCI would only be factual. *See id.* at 18149, n. 410.

[1510] *See id.* at 18149. The 3 burden hours included 1.5 hours by an Attorney and 1.5 hours by a Compliance Manager. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. In determining this estimate, the Commission also considered its estimate of the burden for an SRO to amend a Form 19b–4. *See id.* at 18149, n. 410.

[1511] *See id.* at 18148–49, n. 408, n. 411, and n. 413.

[1512] *See* Omgeo Letter at 35; BATS Letter at 11; Joint SRO Letter at 18; OTC Markets Letter at 6; and NYSE Letter at 18. However, commenters did not specify estimates for the number of systems compliance issues an SCI entity would experience each year.

[1513] *See* Omgeo Letter at 35. According to this commenter, many of these SCI events would require written notification even though the vast majority of them would be minor and immaterial. *See id.*

[1514] *See* BATS Letter at 11. This commenter also noted that the Commission did not break down the anticipated reportable events into systems disruptions, systems intrusions, and systems compliance issues. *See id.*

[1515] *See* NYSE Letter at 18. *See also* FINRA Letter at 18, n. 32 (stating that depending on the interpretation of what constitutes a systems intrusion, it would be required to notify the Commission either: Several times a day under the broadest interpretation; three or four times per month under a narrower interpretation; or one or two times per year if limited to intrusions where there is a material impact).

[1516] *See* Joint SRO Letter at 19; NYSE Letter at 24 (noting that it is not realistic, with respect to over 90% of SCI events, that all required activity is complete and reportable on Form SCI within 24 hours). *See also* FINRA Letter at 19 (noting that some complex outages can take up to several days to triage, isolate, and begin to resolve, and that based on its experience with ARP outage reporting, it can take several days to confirm the root cause of an outage and even longer to determine the appropriate resolution and how long it will take to complete).

[1517] *See* FINRA Letter at 19. Similarly, another commenter noted that notifications to the Commission for SCI events and material systems changes would be considered a serious matter, and a diligent and properly considered notification would require the time and effort of numerous staff in different departments. *See* UBS Letter at 6.

[1518] *See* FINRA Letter at 19.

[1519] *See id.*

[1520] *See* Omgeo Letter at 35.

[1521] *See id.*

[1522] *See id.* at 35–36. This commenter also noted that the Commission's estimated cost for consulting outside experts is too low. *See id.* at 35, n. 69.

[1523] *See* MSRB Letter at 33.

[1524] *See* UBS Letter at 6. This commenter expressed the same concern with respect to proposed Rule 1000(b)(4)(ii). *See id.*

[1525] *See id.*

1000(b)(4)(i) would not consume the time of any employee.[1526]

With respect to the estimated burden under proposed Rule 1000(b)(4)(ii), one commenter noted that the estimate did not take into account the considerable amounts of activities to be undertaken by other personnel, including persons with knowledge and authority with respect to the applicable SCI system and the SCI event as well as senior management where appropriate, in order to collect and assess the appropriate information and to properly inform the attorney and compliance manager of such information in order to allow them to produce an accurate notification in compliance with proposed Rule 1000(b)(4)(ii).[1527] This commenter had similar concerns with the burden estimates for proposed Rule 1000(b)(4)(iii).[1528] Another commenter noted that, with respect to proposed Rule 1000(b)(4)(ii), no provision was made for the time burden that would be placed on technology personnel in the notification process.[1529] Similarly, one commenter noted that the 20-hour burden estimate failed to take into account technology staff and business operations personnel who spend considerable time gathering facts and circumstances of a systems issue.[1530] Another commenter estimated that each report under proposed Rule 1000(b)(4)(ii) will require approximately 5 hours of senior management time (including review and discussions between the Chief Administrative Officer, the Chief Compliance Officer, the Chief Information Officer, the Chief Operating Officer, and the General Counsel).[1531] In addition, this commenter estimated that middle managers from its Compliance, Legal, Technology, Product, and Information Security functions would spend on average approximately 31 hours per report.[1532] Further, this commenter estimated that associates from Compliance, Legal, Technology, Product, and Information Security functions would spend approximately 53.5 hours per report.[1533] With respect to the burden estimates for proposed Rule 1000(b)(4)(iii), this commenter believed that proposed Rule 1000(b)(4)(iii) could conceivably require it to update the Commission approximately half of the time it files Form SCI.[1534] According to this commenter, each update would result in 1 hour of senior management time, 17 hours of middle management time, and 9 hours of associate time.[1535]

One commenter stated its belief that none of the activities arising under proposed Rule 1000(b)(4) would be conducive to outsourcing.[1536]

As discussed above in Section IV.B.3.c, the Commission is adopting the Commission notification requirements in Rule 1002(b), with certain modifications from the proposal. As adopted, the Commission notification requirements under Rules 1002(b)(1)–(4) do not apply to SCI events that had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants.[1537] Rather, each SCI entity is required to make, keep, and preserve records relating to all such SCI events, and submit quarterly reports to the Commission regarding such de minimis systems disruptions and de minimis systems intrusions.[1538]

Rule 1002(b)(1), similar to the proposal, requires immediate Commission notification upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. Rule 1002(b)(2), similar to the proposal, requires a written Commission notification within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred. Rule 1002(b)(2) also specifically states that the 24-hour report is required to be made on a good faith, best efforts basis. In addition, the information required to be disclosed to the Commission under Rule 1002(b)(2) is less comprehensive than as proposed.[1539] Rule 1002(b)(3), similar to the proposal, requires SCI entities to provide updates pertaining to an SCI event on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, until the event is resolved and the SCI entity's investigation of the event is closed. However, Rule 1002(b)(3), unlike the proposal, does not require these updates to be in writing. Finally, Rule 1002(b)(4) includes requirements for SCI entities to submit interim written notifications, as necessary, and final written notifications regarding SCI events.[1540] Specifically, if an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 calendar days of the occurrence of the SCI event, then within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event, the SCI entity is required to submit a final written notification. If an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 calendar days of the occurrence of the SCI event, then the SCI entity is required to submit an interim written notification within 30 calendar days after the occurrence of the SCI event. Within five business days after the resolution of such SCI event and closure of the investigation regarding such SCI event, the SCI entity is required to submit a final written notification.

As noted above, some commenters expressed their view that the Commission underestimated the number of SCI events because they considered the definition of SCI event to be broad and would include minor or immaterial events.[1541] These commenters estimated hundreds and even thousands of SCI events annually for each SCI entity, but noted that the majority of such events would have no

[1526] *See id.*

[1527] *See* MSRB Letter at 33.

[1528] *See id.* at 33–34.

[1529] *See* Joint SRO Letter at 18. This commenter also opined that, in other sections, the Commission either incorrectly assumes that no legal or outside counsel would be used, or significantly underestimates the amount of legal or outside counsel expenses. *See id.* at 18–19.

[1530] *See* OCC Letter at 12. *See also* NYSE Letter at 18 and 34 (stating that a significant number of full time staff, including legal, compliance, technical, and operations staff, would be required to comply with the Commission notification process under proposed Rule 1000(b)(4), and that no estimate is provided for a technology staff member under Rule 1000(b)(4)(ii)).

[1531] *See* Omgeo Letter at 36.

[1532] *See id.*

[1533] *See id.*

[1534] *See id.*

[1535] *See id.*

[1536] *See* MSRB Letter at 34–35.

[1537] *See* Rule 1002(b)(5).

[1538] *See id.*

[1539] For example, an SCI entity is not required to provide the Commission a detailed description of the SCI event; a discussion of whether the SCI event is a dissemination SCI event; a description of the SCI entity's rules and/or governing documents, as applicable, which relate to the SCI event; or an analysis of parties that may have experienced a loss due to the SCI event.

[1540] The written notification is required to include (i) a detailed description of: The SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event; (ii) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants; and (iii) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. The information required to be included in the Rule 1002(b)(4) notifications is similar to the information required under proposed Rule 1000(b)(4)(iv)(A), which was related to the proposed 24-hour Commission notification.

[1541] *See supra* notes 1513–1515 and accompanying text.

effect on market participants.[1542] As discussed above in Section IV.B.3.c, the Commission notification requirements under adopted Rule 1002(b)(1)–(4) do not apply to any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants.[1543] Rather, each SCI entity would be required to keep records related to such events and submit quarterly reports that only contain a summary description of such de minimis systems disruptions and de minimis systems intrusions.[1544] Further, as noted above in Section IV.A, the Commission has refined the definition of SCI systems and SCI events in various respects.[1545] Therefore, the Commission does not believe that the number of SCI events subject to Rules 1002(b)(1)–(4) would be substantially higher than the Commission's estimate in the SCI Proposal.

After considering the views of commenters and in light of the more focused scope of the immediate Commission notification requirement, the Commission now estimates that each SCI entity will experience an average of 45 SCI events each year that are not de minimis SCI events, resulting in 45 written notifications under Rule 1002(b)(2) and 45 written notifications under Rule 1002(b)(4). The estimated 45 SCI events comprise 24 systems disruptions, 20 systems compliance issues, and one systems intrusion. These estimates are derived in part from the number of systems incidents reported to the Commission under the ARP Inspection Program and the number of compliance-related issues reported to the Commission by SROs.[1546]

In particular, the Commission notes that approximately 360 ARP incidents were reported to the Commission in 2013 by 29 entities that participated in the ARP Inspection Program.[1547] Thus, on average, each entity reported approximately 12 incidents in 2013, although some entities reported fewer than 12 incidents, and some entities reported significantly more than 12 incidents (*i.e.,* over 100). By defining ''systems disruption'' for purposes of Regulation SCI and requiring Commission notification of systems disruptions, the Commission expects that more incidents will be reported pursuant to Regulation SCI than pursuant to the voluntary ARP Inspection Program. Therefore, the Commission estimates that each SCI entity will report an average of 24 systems disruptions each year that are not de minimis systems disruptions, which is double the average number of systems incidents reported by each participant under the ARP Inspection Program in 2013.

Further, based on notifications received by Commission staff regarding certain SROs, each of these SROs experienced an average of 17 systems compliance-related issues in 2013. The notifications received by Commission staff indicate that some SROs experienced fewer than 17 systems compliance-related issues, and others experienced more than 17. The Commission believes that very few, if any, of the notifications received in 2013 would qualify as de minimis systems compliance issues under Regulation SCI. By defining ''systems compliance issue'' for purposes of Regulation SCI and requiring Commission notification of systems compliance issues, the Commission expects that more issues will be reported pursuant to Regulation SCI than pursuant to self-reporting. Therefore, the Commission estimates that each SCI entity will experience an average of 20 systems compliance issues each year that are not de minimis systems compliance issues.[1548]

Based on the Commission's experience with the ARP Inspection Program, the Commission believes each SCI entity will experience on average less than one non-de minimis systems intrusion per year. However, for purposes of the PRA, the Commission estimates one non-de minimis systems intrusion per SCI entity per year.[1549]

With respect to the notification requirement under Rule 1002(b)(1), the Commission notes that the notification can be made orally or in writing. As with the SCI Proposal, the Commission estimates that one-fourth of the notifications under Rule 1002(b)(1) will be submitted in writing (*i.e.,* approximately 11 events per year for each SCI entity),[1550] and three-fourths will be provided orally (*i.e.,* approximately 34 events per year for each SCI entity).[1551] The Commission also estimates that each written notification under Rule 1002(b)(1) will require 2 hours [1552] for each SCI entity.[1553] The Commission is not

[1542] *See id.*

[1543] *See* Rule 1002(b)(5).

[1544] *See id.*

[1545] *See* Rule 1000 (defining ''SCI systems'' and ''SCI event'').

[1546] The Commission notes that only one ATS currently participates in the ARP Inspection Program and other ATSs generally do not self-report system incidents to the Commission. At the same time, the Commission acknowledges that, to the extent that some ATSs have less complex systems or perform fewer functions than other SCI entities, it is possible that these ATSs will experience fewer SCI events per year than other SCI entities. Also, as discussed more fully below, many ATSs do not have rulebooks and thus may experience fewer systems compliance issues than other SCI entities. Nevertheless, the Commission believes that an average of 45 SCI events per year (excluding de minimis SCI events) is an appropriate average across all SCI entities, including ATSs.

[1547] In the SCI Proposal, the Commission noted that each entity reported an average of approximately 6 incidents under the ARP Inspection Program in 2011, and estimated that there would be an average of 65 SCI event notices per year for each SCI entity. *See* Proposing Release, *supra* note 13, at 18148.

[1548] The Commission acknowledges that SCI entities other than SCI SROs may experience fewer systems compliance issues than SCI SROs because they may not have rulebooks, and thus, one aspect of the definition of systems compliance issue would not apply to such SCI entities (*i.e.,* operating in a manner that does not comply with the entity's rules).

[1549] This estimate is lower than those provided by commenters (*see supra* note 1515 and accompanying text) because the adopted definitions of SCI systems and indirect SCI systems have been refined from the proposal, and because de minimis systems intrusions are required to be reported in summary format on a quarterly basis.

[1550] 45 SCI events ÷ 4 = 11.25 SCI events reported in writing. One commenter noted that most SCI entities would submit a writing to document that they had satisfied the notice requirement of proposed Rule 1000(b)(4)(i). *See* Omgeo Letter at 16. However, the Commission continues to estimate that one-fourth of the notifications under Rule 1002(b)(1) will be submitted in writing and that the rest will be provided orally. The Commission believes that it is less burdensome for an SCI entity to provide oral notification than to provide written notification and, given the requirement of Rule 1002(b)(2) to provide a written notification to the Commission within 24 hours, the Commission believes it is likely that most initial notifications submitted under Rule 1002(b)(1) would be done orally. Moreover, based on Commission staff experience, ARP participants generally provide initial notifications of systems issues orally.

[1551] 45 SCI events − 11 SCI events reported in writing = 34 SCI events reported orally.

[1552] The burden estimates for each rule under Regulation SCI that involves the filing of Form SCI include the burden associated with completing and electronically submitting Form SCI, and for manually signing a signature page or document, pursuant to the requirements of Rule 1006.

[1553] The 2 hours include 0.5 hours by an Attorney, 0.5 hours by a Compliance Manager, 0.5 hours by a Senior Systems Analyst, and 0.5 hours by a Senior Business Analyst. As compared to the estimated burden for proposed Rule 1000(b)(4)(i), the Commission is estimating an additional 0.5 hours by Compliance Managers, 0.5 hours by Senior Systems Analysts, and 0.5 hours by Senior Business Analysts to reflect that legal personnel may need to confer with technology and business personnel before contacting the Commission regarding an SCI event, in response to the views of commenters. *See supra* notes 1523–1525 and accompanying text. The Commission notes that the General Counsel, Director of Compliance, Chief Compliance Officer, or other senior employees or officers of certain SCI entities may review Commission notifications under Rule 1002(b)(1) before they are submitted (orally or in writing) to the Commission. However, the Commission estimates that on average, the General Counsel, Director of Compliance, Chief Compliance Officer, or other senior employees or officers may spend a small amount of time reviewing each Rule 1002(b)(1) notification. Rather, they will spend more time reviewing the other notifications required by Rule 1002(b).

significantly increasing its burden estimate for proposed Rule 1000(b)(4)(i) because Rule 1002(b)(1) requires the immediate notification of SCI events and does not specify the minimum information that must be submitted to the Commission. The Commission believes that, for many SCI events, an SCI entity will simply notify the Commission that an SCI event has occurred, often in a single phone call, and may not provide the Commission with additional information because it is not yet available to the SCI entity. For these reasons, contrary to the view of some commenters,[1554] the Commission does not expect that the SCI entity will need to gather a considerable amount of information or significantly confer with interested parties across the entity. In particular, while the Commission estimates some burden for legal and technology personnel of SCI entities in complying with Rule 1002(b)(1), it does not believe that Rule 1002(b)(1) will result in significant burden for such personnel.[1555]

The Commission agrees with the view of a commenter that oral notifications would also result in burdens on an SCI entity,[1556] although it expects the burden for legal and compliance personnel to be lower than in the case of written notifications because they would not need to draft and review a written document for submission to the Commission. The Commission estimates that the burden for systems and business analysts would remain the same as for written notifications because the SCI entity will still need to gather the same type of information in order to prepare an oral notification. The Commission therefore estimates that each oral notification under Rule 1002(b)(1) will require 1.5 hours for each SCI entity.[1557] The Commission estimates that each SCI entity would require an average of 73 hours annually to comply with Rule 1002(b)(1),[1558] or 3,212 hours for all SCI entities.[1559]

The Commission estimates that each written notification under Rule 1002(b)(2) will require 24 hours for each SCI entity.[1560] Contrary to the views of a commenter that each notification under proposed Rule 1000(b)(4)(ii) would require approximately 90 burden hours between senior management, middle managers, and associates from various functions (*e.g.,* legal, compliance, technology),[1561] the Commission is not significantly increasing its estimate of the burden hours from its estimate for proposed Rule 1000(b)(4)(ii) because Rule 1002(b)(2) requires less information than proposed Rule 1000(b)(4)(ii), although the Commission has revised its estimated burden hours to account for the various functions and multiple levels of review suggested by the commenter.[1562] Also, because Rule 1002(b)(2) explicitly permits information to be submitted on a good faith, best efforts basis, the Commission believes that SCI entities will be able to expend less resources in reviewing each notification. Therefore, the Commission estimates that each SCI entity would require an average of 1,080 hours annually to comply with Rule 1002(b)(2),[1563] or 47,520 hours for all SCI entities.[1564]

With respect to the number of updates required under Rule 1002(b)(3), the Commission estimates that each SCI entity will submit 6 written updates and 18 oral updates each year under that rule. These estimates are based on Commission staff's experience with the ARP Inspection Program, systems compliance-related issues at SROs, and views of commenters. Specifically, most of the systems incidents reported to the Commission in 2013 were reported as resolved within 24 hours. Further, as discussed above, de minimis SCI events are not subject to the update requirement under Rule 1002(b)(3). Moreover, the Commission believes that, for some SCI events, an SCI entity will not need to provide an update under Rule 1002(b)(3), because the SCI entity will be able to quickly submit a final report under Rule 1002(b)(4). However, after considering the views of a commenter that some complex outages can take up to several days to triage, isolate, and begin to resolve,[1565] and the views of another commenter that proposed Rule 1000(b)(4)(iii) could conceivably require it to update the Commission approximately half the time it files Form SCI,[1566] the Commission is increasing its estimate of the number of updates from 5 to 24.[1567] Because Rule 1002(b)(3) does not require SCI entities to submit updates in writing or on Form SCI, the Commission estimates that one-fourth of the updates will be submitted in writing, and three-fourths will be provided orally.[1568] Because the SCI entity will still need to gather the same type of information in order to prepare an oral or a written update, the Commission expects that the burden for systems and business analysts will be the same for either type of update. The Commission, however, expects that the burden for legal and compliance personnel would be less in the case of oral updates because in that case, an SCI entity would not need to draft and review a written document for submission to the Commission.

The Commission estimates that each written update under Rule 1002(b)(3) will require 6 hours [1569] and each oral

[1554] *See supra* notes 1523–1526 and accompanying text.

[1555] Given that there is not a minimum amount of information that must be submitted to the Commission, the Commission believes its estimated burden hours is more appropriate than the 12 hours suggested by a commenter. *See supra* note 1525 and accompanying text.

[1556] *See supra* note 1526 and accompanying text.

[1557] The 1.5 hours include 0.25 hours by an Attorney, 0.25 hours by a Compliance Manager, 0.5 hours by a Senior Systems Analyst, and 0.5 hours by a Senior Business Analyst.

[1558] 11 written notifications each year × 2 hours per notification + 34 oral notifications each year × 1.5 hours per notification = 73 hours.

[1559] 73 hours × 44 SCI entities = 3,212 hours.

[1560] The 24 hours include 5 hours by an Attorney, 5 hours by a Compliance Manager, 6 hours by a Senior Systems Analyst, 1 hour by an Assistant General Counsel, 1 hour by a Chief Compliance Officer, and 6 hours by a Senior Business Analyst. Given the modifications from proposed Rule 1000(b)(4)(ii) identified below, the Commission estimates that legal and compliance personnel will have less work in drafting the written notifications under Rule 1002(b)(2), and accordingly reduced the burden hours for Attorneys and Compliance Managers from 10 to 5. Further, as compared to the estimated burden for proposed Rule 1000(b)(4)(ii), the Commission is estimating an additional 6 hours by a Senior Systems Analyst, 1 hour by an Assistant General Counsel, 1 hour by a Chief Compliance Officer, and 6 hours by a Senior Business Analyst to reflect that legal personnel may need to confer with technology and business personnel and senior management, as well as the multiple levels of review (*e.g.,* attorney, compliance manager, chief compliance officer), before submitting a report regarding an SCI event, in response to the views of commenters. *See supra* notes 1520–1521, 1527, and 1529–1533 and accompanying text.

[1561] *See supra* notes 1531–1533 and accompanying text.

[1562] *See supra* notes 1539 and 1560.

[1563] 45 written notifications each year × 24 hours per notification = 1,080 hours.

[1564] 1,080 hours × 44 SCI entities = 47,520 hours.

[1565] *See supra* note 1516.

[1566] *See also supra* note 1534 and accompanying text.

[1567] The Commission's estimate of 24 updates is slightly above half of the 45 written notifications estimated for Rule 1002(b)(2). *See supra* note 1534 (stating that the rule could conceivably require the commenter to update the Commission approximately half of the time it files Form SCI).

[1568] The Commission similarly estimated one-fourth written notifications and three-fourths oral notifications in the SCI Proposal for proposed Rule 1000(b)(4)(i). *See* Proposing Release, *supra* note 13, at 18148; *see also supra* note 1550 and accompanying text.

[1569] The 6 hours include 1.5 hours by an Attorney, 1.5 hours by a Compliance Manager, 1.5 hours by a Senior Systems Analyst, and 1.5 hours by a Senior Business Analyst. As compared to the estimated burden for proposed Rule 1000(b)(4)(iii), the Commission is estimating an additional 1.5 hours by a Senior Systems Analyst and 1.5 hours by a Senior Business Analyst to reflect that legal personnel may need to confer with technology and business personnel before contacting the Commission regarding an SCI event, in response to the view of a commenter. *See supra* note 1528 and accompanying text. The Commission notes that the General Counsel, Director of Compliance, Chief

update will require 4.5 hours.[1570] The Commission is not significantly increasing its burden estimate from proposed Rule 1000(b)(4)(iii). The Commission believes that each update will likely only reflect some of the information listed under Rules 1002(b)(1) and (2) because certain information about SCI events may not yet be available at the time the SCI entity submits such update or may not need to be updated. Therefore, contrary to one commenter's view that each update would require 27 hours,[1571] the Commission does not believe that a Rule 1002(b)(3) update will require significantly more time than as estimated in the SCI Proposal. The Commission estimates that each SCI entity would require an average of 117 hours annually to comply with Rule 1002(b)(3),[1572] or 5,148 hours for all SCI entities.[1573]

The Commission estimates that compliance with Rule 1002(b)(4) for a particular SCI event (which includes a final report under Rule 1002(b)(4)(i)(A) and, as applicable, an interim report under Rule 1002(b)(4)(i)(B)) will require 35 hours.[1574] The Commission notes that the information required to be provided under Rule 1002(b)(4) is similar to the information required to be provided in a notification submitted under proposed Rule 1000(b)(4)(ii). As noted above, in the SCI Proposal, the Commission estimated that each notification under proposed Rule 1000(b)(4)(ii) would require an average of 20 burden hours,[1575] and some commenters argued that the Commission underestimated this burden.[1576] The Commission is estimating a higher burden for Rule 1002(b)(4) as compared to proposed Rule 1000(b)(4)(ii) (*i.e.,* 35 hours as compared to 20 hours) because the reports under Rule 1002(b)(4) constitute final reports regarding SCI events, and SCI entities will likely confer with technology and business personnel and senior management to ensure that the information provided is accurate. For the same reason, and because Rule 1002(b)(4) (final report) requires more information than Rule 1002(b)(2), the Commission's burden estimate for Rule 1002(b)(4) is higher than the burden estimate for Rule 1002(b)(2) (*i.e.,* 35 hours as compared to 24 hours).[1577] Nevertheless, the Commission is not substantially increasing the burden estimate as compared to proposed Rule 1000(b)(4)(ii) or adopted Rule 1002(b)(2) because it recognizes that some of the information required by Rule 1002(b)(4) may already have been provided in a prior notification to the Commission and, thus, its burden has been included in the burden estimate for Rule 1002(b)(2). Therefore, the Commission estimates that each SCI entity would require an average of 1,575 hours annually to comply with Rule 1002(b)(4),[1578] or 69,300 hours for all SCI entities.[1579]

Finally, the quarterly notification under Rule 1002(b)(5) is required only to include ''a summary description'' of the SCI events. The Commission's estimated burden reflects the Commission's belief that most, if not all, SCI entities already have some internal documentation of de minimis SCI events. Rule 1002(b)(5) would impose more burden on SCI entities if they do not already have such internal documentation. The Commission estimates that the initial and ongoing burden to comply with the quarterly report requirement would be 40 hours per report per SCI entity,[1580] or 160 hours annually per SCI entity,[1581] and 7,040 hours annually for all SCI entities.[1582]

The Commission estimates that while SCI entities would handle internally most of the work associated with Rule 1002(b), SCI entities would seek outside legal advice in the preparation of certain Commission notifications, at an average annual cost of $45,000 per SCI entity,[1583] or $1,980,000 for all SCI entities.[1584]

b. Dissemination of Information Regarding SCI Events

In the SCI Proposal, the Commission estimated that each SCI entity would experience an average of 14

Compliance Officer, or other senior employees or officers of certain SCI entities may review the updates under Rule 1002(b)(3) before they are submitted (orally or in writing) to the Commission. However, the Commission estimates that on average, the General Counsel, Director of Compliance, Chief Compliance Officer, or other senior employees or officers may spend a small amount of time reviewing each Rule 1002(b)(3) notification because it is not the final report to the Commission on an SCI event, and the SCI entity can subsequently submit additional updates. *See supra* note 1535 and accompanying text (noting a commenter's burden estimate for proposed Rule 1000(b)(4)(iii), which includes estimates for senior management review).

[1570] The 4.5 hours include 0.75 hours by an Attorney, 0.75 hours by a Compliance Manager, 1.5 hours by a Senior Systems Analyst, and 1.5 hours by a Senior Business Analyst.

[1571] *See supra* note 1535 and accompanying text.

[1572] 6 written updates each year × 6 hours per notification + 18 oral updates each year × 4.5 hours per notification = 117 hours.

[1573] 117 hours × 44 SCI entities = 5,148 hours.

[1574] The 35 hours include 8 hours by an Attorney, 8 hours by a Compliance Manager, 7 hours by a Senior Systems Analyst, 2 hours by an Assistant General Counsel, 1 hour by a General Counsel, 2 hours by a Chief Compliance Officer, and 7 hours by a Senior Business Analyst. As compared to proposed Rule 1000(b)(4)(ii), the Commission expects the legal and compliance personnel to have less work in drafting the written notifications under Rule 1002(b)(4) because some of the information required by Rule 1002(b)(4) may already have been provided in a prior notification to the Commission, and accordingly reduced the burden hours for Attorneys and Compliance Managers from 10 to 8. Further, as compared to the estimated burden for proposed Rule 1000(b)(4)(ii), the Commission is estimating an additional 7 hours by a Senior Systems Analyst, 2 hours by an Assistant General Counsel, 1 hour by a General Counsel, 2 hours by a Chief Compliance Officer, and 7 hours by a Senior Business Analyst to reflect that legal personnel may need to confer with technology and business personnel and senior management before submitting a final report regarding an SCI event.

[1575] *See supra* note 1509 and accompanying text.

[1576] *See supra* notes 1527, 1529–1533 and accompanying text.

[1577] As compared to the Commission's burden estimate for Rule 1002(b)(2), the Commission is estimating an additional 3 hours by an Attorney, 3 hours by a Compliance Manager, 1 hour by a Senior Systems Analyst, 1 hour by an Assistant General Counsel, 1 hour by a General Counsel, 1 hour by a Chief Compliance Officer, and 1 hour by a Senior Business Analyst. The type of personnel involved in compliance with Rule 1002(b)(4) is the same as those involved in compliance with Rule 1002(b)(2), except for the addition of the General Counsel.

[1578] 45 written notifications each year × 35 hours per notification = 1,575 hours.

[1579] 1,575 hours × 44 SCI entities = 69,300 hours. The Commission notes that this burden estimate includes the burden for submitting the one interim Commission notification required under Rule 1002(b)(4)(i)(B) (if necessary). In particular, the Commission notes that the interim notification requires SCI entities to include the same information as required to be included in a final notification under Rule 1002(b)(4)(i)(A), except that SCI entities are only required to provide the information to the extent known at the time of the interim notification. If an SCI entity submits an interim notification, it would also be required to submit a final notification, which is required to include all of the remaining information that was not provided in the interim notification. Because all SCI entities are required to provide the same amount of information in total for a particular SCI event under Rule 1002(b)(4), regardless of whether they submit an interim notification, the estimated burden for Rule 1002(b)(4) includes the burden for both the interim notification and the final notification related to a particular SCI event.

[1580] The 40 burdens hours include 7.5 hours by an Attorney, 7.5 hours by a Compliance Manager, 2 hours by a Chief Compliance Officer, 2 hours by an Assistant General Counsel, 1 hour by a General Counsel, 10 hours by a Senior Business Analyst, and 10 hours by a Senior Systems Analyst.

[1581] 40 hours × 4 reports each year = 160 hours.

[1582] 160 hours × 44 SCI entities = 7,040 hours.

[1583] *See supra* note 1522 and accompanying text (discussing the view of a commenter that SCI entities would need to engage outside parties to review the Commission notifications). *But see supra* note 1536 and accompanying text (discussing the view of a commenter that none of the activities arising under proposed Rule 1000(b)(4) would be conducive to outsourcing). The Commission's estimate represents an average of $1,000 of outsourced cost for each SCI event that is not a de minimis SCI event. The $1,000 estimate is consistent with the Commission's estimated outsourcing cost for each SCI event that is subject to the dissemination requirements under Rule 1002(c). 45 SCI events × $1,000 = $45,000.

[1584] $45,000 × 44 SCI entities = $1,980,000.

dissemination SCI events [1585] each year that are not systems intrusions, resulting in an average of 14 information disseminations per year for each SCI entity under proposed Rule 1000(b)(5)(i).[1586] The Commission estimated that each information dissemination under proposed Rule 1000(b)(5)(i)(A) would require an average of 3 hours to prepare and make available to members or participants.[1587] The Commission estimated that each information update under proposed Rule 1000(b)(5)(i)(B) would require an average of 5 hours to prepare and make available to members or participants.[1588] The Commission also estimated that, on average, each SCI entity would provide one regular update per year per dissemination SCI event under proposed Rule 1000(b)(5)(i)(C).[1589] The Commission estimated that each regular update would require an average of 1 hour to prepare and make available to members or participants.[1590]

In the SCI Proposal, the Commission estimated that each SCI entity would experience an average of 1 dissemination SCI event that is a systems intrusion each year, resulting in 1 information dissemination per year under proposed Rule 1000(b)(5)(ii). The Commission estimated that each information dissemination would require an average of 3 hours to prepare and make available to members or participants.[1591] This burden estimate included any burden for an SCI entity to document its reason for determining that dissemination of information regarding a systems intrusion would likely compromise the security of the SCI entity's SCI systems or SCI security systems, or an investigation of the systems intrusion.[1592]

In the SCI Proposal, the Commission estimated that while SCI entities would internally handle most of work associated with compliance with proposed Rule 1000(b)(5), SCI entities would seek outside legal advice in the preparation of the disseminations at an average annual cost of $15,000 per SCI entity.[1593]

With respect to the estimated burden under proposed Rule 1000(b)(5), one commenter noted that since most of the work entailed in producing a notification relating to a dissemination SCI event would occur in connection with the Commission notification requirements under proposed Rule 1000(b)(4), the Commission's estimate of the burden of proposed Rule 1000(b)(5) is fairly accurate.[1594]

Another commenter stated that the Commission underestimated the burden associated with information dissemination.[1595] In connection with expressing its concern that almost any minor or immaterial systems issue would fall under the proposed definition of SCI event, this commenter estimated that there would be at a minimum a ten-fold increase in reportable events from the 175 incidents in 2011 under the ARP Inspection Program.[1596]

With respect to the estimated burden associated with information dissemination, this commenter argued that the Commission incorrectly assumed that such communications would be drafted only by a single attorney and a webmaster.[1597] This commenter believed that properly drafting such communications will require a concerted effort by a number of individuals, including subject matter experts and mid-level and senior managers.[1598] This commenter also noted that SCI entities would draft different dissemination notices designed to address the particular concerns of the different client segments it services (*e.g.,* broker-dealers, custodian banks, investment managers, hedge funds).[1599] As such, this commenter estimated that proposed Rule 1000(b)(5)(i)(A) would result in a burden of approximately 30 hours to create the dissemination [1600] and 100 hours to review.[1601] Further, this commenter disagreed that SCI entities are likely to handle internally most of the work associated with information dissemination.[1602] This commenter believed that, to the extent a dissemination SCI event raises the possibility of litigation or reputational damage for an SCI entity, the SCI entity will likely engage outside counsel to review the facts and prepare the required materials.[1603] This commenter also argued that the Commission's estimate did not take into account the burden associated with addressing responses from an SCI entity's participants, members, or clients, which, according to this commenter, would be hundreds of hours of SCI entity associate and management time.[1604] This commenter expressed similar concerns respect to the burden estimates for proposed Rules 1000(b)(5)(i)(B) and (C) and noted that each follow-up notice would impose a burden far greater than 5 hours.[1605] This commenter also noted that the Commission underestimated that each SCI entity would only have to provide one update each year under proposed Rule 1000(b)(5)(i)(C), and that each dissemination would only be prepared by an attorney and a webmaster.[1606]

[1585] Dissemination SCI events included systems compliance issues, systems intrusions, and systems disruptions that resulted, or the SCI entity reasonably estimates would result, in significant harm or loss to market participants.

[1586] *See* Proposing Release, *supra* note 13, at 18149.

[1587] *See id.* The 3 burden hours included 2.67 hours by an Attorney and 0.33 hours by a Webmaster. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. *See id.* at 18149, n. 416.

[1588] *See id.* at 18150. The 5 burden hours included 4.67 hours by an Attorney and 0.33 hours by a Webmaster. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. *See id.* at 18150, n. 420.

[1589] *See id.* at 18150.

[1590] *See id.* The 1 burden hour included 0.67 hours by an Attorney and 0.33 hours by a Webmaster. *See id.* This estimate was based on the estimated burden to complete and submit a written update for an SCI event on Form SCI and on Commission staff's experience with the ARP Inspection Program. *See id.* at 18150, n. 422 and n. 423.

[1591] *See id.* at 18150. The 3 burden hours included 2.67 hours by an Attorney and 0.33 hours by a Webmaster. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program, and the Commission's burden estimate for proposed Rule 1000(b)(5)(i)(A). *See id.* at 18150, n. 426.

[1592] *See id.*

[1593] *See id.* at 18150–51.

[1594] *See* MSRB Letter at 35.

[1595] *See* Omgeo Letter at 37. This commenter argued that the Commission mistakenly relied upon experience with the ARP Inspection Program as a basis for the estimates. *See id.*

[1596] *See id.* at 37–38.

[1597] *See id.* at 38.

[1598] *See id.* According to this commenter, subject matter experts would include associates from functions such as Technology, Client Support, Information Security, Legal, Compliance, Product Management, and Sales and Relationship Management. *See id.* at 38, n. 75.

[1599] *See* Omgeo Letter at 38.

[1600] This commenter noted that major incidents would require far more resources. *See id.*

[1601] *See id.* This commenter noted that the 100-hour estimate does not include any follow up communications. *See id.* at 38, n. 76.

[1602] *See id.* at 39. However, another commenter stated its belief that none of the activities arising under proposed Rule 1000(b)(5) would be conducive to outsourcing. *See* MSRB Letter at 34–35.

[1603] *See* Omgeo Letter at 39. This commenter also expressed concern that SCI entities would be forced to send their clients and participants a constant stream of communications detailing minor, inconsequential events that have no impact on them, which would cause reputational damage to SCI entities. *See id.*

[1604] *See id.*

[1605] *See id.* at 40–41.

[1606] *See id.* at 41.

With respect to the burden estimates for proposed Rule 1000(b)(5)(ii), this commenter expressed similar concern, and noted that each dissemination under proposed Rule 1000(b)(5)(ii) would require hundreds of burden hours.[1607]

As discussed above in Section IV.B.3.d, the Commission is adopting the information dissemination requirements in Rule 1002(c), with certain modifications from the proposal. As adopted, an SCI entity is required to disseminate certain information to its members or participants that may have been affected by an SCI event.[1608] However, for major SCI events, an SCI entity must disseminate the required information to all of its member or participants.[1609] Rule 1002(c)(4) further provides that the information dissemination requirement does not apply to SCI events to the extent they relate to market regulation or market surveillance systems, or any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants.

Similar to proposed Rule 1000(b)(5), adopted Rule 1002(c)(1) requires SCI entities to promptly disseminate certain information regarding systems disruptions and systems compliance issues, to further disseminate certain information when such information becomes known,[1610] and to provide regular updates of such information until the SCI event is resolved. In addition, similar to proposed Rule 1000(b)(5), adopted Rule 1002(c)(2) requires SCI entities to promptly disseminate certain information regarding systems intrusions,[1611] and provides an exception when the SCI entity determines that dissemination of such information would likely compromise the security of its SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and documents the reasons for such determination.

With respect to a commenter's concern that because almost any minor or immaterial systems issue would fall under the proposed definition of SCI event, there would be at a minimum a ten-fold increase in reportable events as compared to the reported incidents under the ARP Inspection Program,[1612] as noted above, Rule 1002(c)(4) provides exceptions to certain SCI events from the information dissemination requirement. Specifically, SCI events that relate to market regulation or market surveillance systems and de minimis SCI events would not be subject to the information dissemination requirement.[1613] Further, as noted above in Section IV.A, the Commission has refined the definition of SCI systems and SCI event in various respects.[1614] Given these changes, the Commission believes that the commenter's suggestion that there would be at a minimum a ten-fold increase in reportable events as compared to the reported incidents under the ARP Inspection Program is not an appropriate estimate. The Commission now estimates that each SCI entity would disseminate information regarding 36 SCI events each year under Rule 1002(c),[1615] including 1 non-de minimis systems intrusion each year.[1616] Therefore, the Commission now estimates that each SCI entity would disseminate information regarding 35 SCI events each year under Rule 1002(c)(1)(i). The Commission estimates that each SCI entity would disseminate 3 updates for each such SCI event under Rules 1002(c)(1)(ii) and (iii),[1617] or 105 updates each year.[1618] Further, the Commission estimates that each SCI entity would disseminate information regarding 1 systems intrusion each year under Rule 1002(c)(2).

The Commission estimates that each information dissemination under Rule 1002(c)(1)(i) will require 7 hours.[1619] The Commission is not significantly increasing its burden estimate from the proposal because the Commission believes that the information required to be disseminated under Rule 1002(c)(1)(i) would likely already be collected for Commission notification under Rule 1002(b)(1) or (2).[1620] Therefore, contrary to the view of a commenter,[1621] the Commission does not believe that Rule 1002(c)(1)(i) will result in significantly higher burden for

[1607] *See id.* at 41–42.

[1608] *See* Rule 1002(c)(3).

[1609] *See id.*

[1610] The information required to be disseminated under Rule 1002(c)(1) remains unchanged from the proposal.

[1611] The information required to be disseminated under Rule 1002(c)(2) remains unchanged from the proposal.

[1612] *See supra* note 1596 and accompanying text.

[1613] These exceptions should address a commenter's concern that proposed Rule 1000(b)(5) would result in SCI entities being forced to send their clients and participants a constant stream of communications detailing minor, inconsequential events that have no impact on them. *See id.*

[1614] *See* Rule 1000 (defining ''SCI systems'' and ''SCI event'').

[1615] As discussed above, the Commission estimates that each SCI entity will experience an average of 45 SCI events each year that are not de minimis SCI events. The Commission estimates that approximately one-fifth of these SCI events relate to market regulation and market surveillance systems. Therefore, the Commission estimates that the number of SCI events subject to the requirements of Rule 1002(c) would be 36 per year for each SCI entity (45 SCI events ÷ 5 × 4 = 36 SCI events).

[1616] Based on Commission's experience with the ARP Inspection Program, the Commission believes each SCI entity will experience on average less than one non-de minimis systems intrusion per year. However, for purposes of the PRA, the Commission estimates one non-de minimis systems intrusion per SCI entity per year.

[1617] The Commission notes that Rule 1002(c)(1)(ii) requires each SCI entity, when known, to promptly further disseminate for each SCI event three types of information: (A) A detailed description of the SCI event; (B) the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; and (C) a description of the progress of its corrective action for the SCI event and when the SCI event has been or is expected to be resolved. The Commission believes that one or more of these types of information may become known to an SCI entity at different times, and therefore the Commission estimates that each SCI entity will submit two updates per SCI event under Rule 1002(c)(1)(ii). Rule 1002(c)(1)(iii) requires each SCI entity to provide regular updates of any information required to be disseminated under Rules 1002(c)(1)(i) and (ii). The Commission estimates that each SCI entity will submit one regular update under Rule 1002(c)(1)(iii) before the SCI event is resolved. The Commission believes that the number of updates under Rules 1002(c)(1)(ii) and (iii) will vary depending on how quickly information is discovered and how quickly the SCI event is resolved, but believes that a total of three updates for the two provisions is an appropriate estimate.

[1618] 35 SCI events × 3 updates per SCI event = 105 updates.

[1619] The 7 hours include 2.67 hours by an Attorney, 1 hour by a Compliance Manager, 0.5 hours by a Chief Compliance Officer, 0.5 hours by a General Counsel, 0.5 hours by a Director of Compliance, 1 hour by a Senior Systems Analyst, 0.5 hours by a Corporate Communications Manager, and 0.33 hours by a Webmaster. As compared to the estimated burden for proposed Rule 1000(b)(5)(i)(A), the Commission is estimating an additional 1 hour by a Compliance Manager, 0.5 hours by a General Counsel, 0.5 hours by a Chief Compliance Officer, 0.5 hours by a Director of Compliance, 1 hour by a Senior Systems Analyst, and 0.5 hours by a Corporate Communications Manager to reflect the view of commenters that the preparation for information dissemination would require the involvement of subject matter experts and mid-level and senior managers. *See supra* notes 1597–1598 and accompanying text.

[1620] *See also supra* note 1594 and accompanying text (discussing the view of a commenter that since most of the work entailed in producing a notification relating to a dissemination SCI event would occur in connection with the Commission notification requirements under proposed Rule 1000(b)(4), the Commission's estimate of the burden of proposed Rule 1000(b)(5) is fairly accurate).

[1621] *See supra* notes 1600–1601 and 1607 and accompanying text.

SCI entities than as estimated in the proposal. With respect to the view of a commenter that SCI entities would create different dissemination notices designed to address the concerns of different client segments,[1622] the Commission notes that Rule 1002(c) only specifies the general information that must be disseminated and does not require that SCI entities provide different information to different clients, even though SCI entities can decide to tailor the information dissemination for their clients.[1623] Based on the foregoing, the Commission estimates that each SCI entity would require an average of 245 hours annually to comply with Rule 1002(c)(1)(i),[1624] or 10,780 hours for all SCI entities.[1625]

The Commission estimates that each update under Rules 1002(c)(1)(ii) and (iii) will require 13 hours.[1626] The Commission is not significantly increasing its burden estimate for proposed Rules 1000(b)(5)(i)(B) and (C) because the Commission believes that the information required to be disseminated under Rules 1002(c)(1)(ii) and (iii) would likely already be collected for Commission notification under Rules 1002(b)(2)–(4).[1627] Therefore, contrary to the view of a commenter,[1628] the Commission does not believe that Rules 1002(c)(1)(ii) and (iii) will result in significantly higher burden for SCI entities than as estimated in the SCI Proposal. Based on the foregoing, the Commission estimates that each SCI entity would require an average of 1,365 hours annually to comply with Rules 1002(c)(1)(ii) and (iii),[1629] or 60,060 hours for all SCI entities.[1630]

The information required to be disseminated under Rule 1002(c)(2) for systems intrusions is similar to the information required to be disseminated under Rule 1002(c)(1)(i) in that both provisions require the dissemination of a summary description of an SCI event. Therefore, the Commission is using the burden estimate for Rule 1002(c)(1)(i) as the basis for its estimate for Rule 1002(c)(2). However, the Commission believes that Rule 1002(c)(2) will impose more burden than Rule 1002(c)(1)(i) because it also requires that the SCI entity determine whether dissemination of information regarding a particular systems intrusion would compromise the security of its SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and if the SCI entity determines that it would, to document the reason for such determination.[1631] Therefore, the Commission estimates that each SCI entity will spend an average of 10 hours to comply with Rule 1002(c)(2),[1632] or 440 hours for all SCI entities.[1633]

The Commission estimates that while SCI entities would handle internally some or most the work associated with compliance with Rule 1002(c),[1634] SCI entities would seek outside legal advice in the preparation of the information dissemination, at an average annual cost of $36,000 per SCI entity,[1635] or $1,584,000 for all SCI entities.[1636]

c. Commission Notification of Material Systems Changes

In the SCI Proposal, the Commission estimated that each SCI entity would have an average of 60 planned material systems changes each year, resulting in 60 advance notifications per year.[1637] The Commission estimated that each notification would require 2 hours to prepare and submit.[1638] For SCI entities that currently participate in the ARP Inspection Program, the Commission estimated that these entities would start from a baseline of fifty percent.[1639] The Commission also estimated that the initial and ongoing burden to submit semi-annual reports to the Commission pursuant to proposed Rule 1000(b)(8)(ii) would be 60 hours per report for each SCI entity.[1640]

With respect to the estimated burden under proposed Rule 1000(b)(6), some commenters noted that the Commission underestimated the number of material systems changes.[1641] For example, one

[1622] *See supra* notes 1599–1601 and accompanying text.

[1623] This commenter also noted that the Commission did not take into account the burden associated with addressing responses from an SCI entity's participants, members, or clients. *See supra* note 1604 and accompanying text. The Commission believes that currently, SCI entities already notify affected members or participants of certain systems issues. The Commission also believes that information regarding many systems issues that fall under the definition of major SCI event is already made available to members or participants of an SCI entity, and often to the public through the press or otherwise. Therefore, the Commission does not believe that the burden to respond to members or participants will be significantly higher than SCI entities' current practices in the absence of Regulation SCI. The Commission also notes that Rule 1002(c) does not impose any requirements related to responding to inquiries about the information dissemination.

[1624] 35 information dissemination each year × 7 hours per dissemination = 245 hours.

[1625] 245 hours × 44 SCI entities = 10,780 hours.

[1626] The 13 hours include 4.67 hours by an Attorney, 2 hours by a Compliance Manager, 1 hour by a Chief Compliance Officer, 1 hour by a General Counsel, 1 hour by a Director of Compliance, 2 hours by a Senior Systems Analyst, 1 hour by a Corporate Communications Manager, and 0.33 hours by a Webmaster. As compared to the estimated burden for proposed Rule 1000(b)(5)(i)(B), the Commission is estimating an additional 2 hours by a Compliance Manager, 1 hour by a General Counsel, 1 hour by a Chief Compliance Officer, 1 hour by a Director of Compliance, 2 hours by a Senior Systems Analyst, and 1 hour by a Corporate Communications Manager to reflect the view of commenters that the preparation for information dissemination would require the involvement of subject matter experts and mid-level and senior managers. *See supra* notes 1597–1598 and accompanying text.

[1627] *See supra* notes 1594 and 1620 accompanying text.

[1628] *See supra* notes 1605–1606 and accompanying text.

[1629] 105 updates each year × 13 hours per update = 1,365 hours.

[1630] 1,365 hours × 44 SCI entities = 60,060 hours.

[1631] *See* Rule 1002(c)(2).

[1632] The 10 hours include 3.67 hours by an Attorney, 1.5 hours by a Compliance Manager, 0.75 hours by a Chief Compliance Officer, 0.75 hours by a General Counsel, 0.75 hours by a Director of Compliance, 1.5 hour by a Senior Systems Analyst, 0.75 hours by a Corporate Communications Manager, and 0.33 hours by a Webmaster. *See supra* note 1619. The burden estimate for Rule 1002(c)(2) is approximately one and a half times the Commission's burden estimate for Rule 1002(c)(1)(i). (7 hours × 1.5 = 10.5 hours.)

[1633] 10 hours × 44 SCI entities = 440 hours.

[1634] The Commission recognizes that some SCI entities, such as certain SCI SROs, may have the in-house expertise to complete the work associated with compliance with Rule 1002(c), while other SCI entities may not and would therefore need to outsource some of the work associated with compliance with Rule 1002(c).

[1635] The Commission is increasing its estimate of the outsourcing cost for compliance with Rule 1002(c) from its estimate in the proposal because its estimate of the number of information dissemination is higher than the estimated number in the proposal (*i.e.,* from 15 to 36). In the SCI Proposal, the Commission estimated an outsourcing cost of $15,000 for 15 SCI events, which results in an average cost of $1,000 per SCI event. The Commission is continuing to estimate an average cost of $1,000 per SCI event subject to information dissemination, but is increasing the total outsourcing cost to $36,000 based on the increase in the number of estimated SCI events to 36. *See also supra* notes 1602–1603 and accompanying text (discussing the view of a commenter that SCI entities will likely engage outside counsel to review the facts and prepare the required documents to the extent an SCI event raises the possibility of litigation or reputational damage). *But see supra* note 1602 and accompanying text (discussing the view of a commenter that none of the activities arising under proposed Rule 1000(b)(5) would be conducive to outsourcing).

[1636] $36,000 × 44 SCI entities = $1,584,000.

[1637] *See* Proposing Release, *supra* note 13, at 18151. This estimate included instances where the information previously provided to the Commission regarding any planned material systems change becomes inaccurate. *See id.* at 18151, n. 431.

[1638] *See id.* at 18151. The 2 burden hours included 0.33 hours by an Attorney and 1.67 hours by a Senior Systems Analyst. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. In determining this estimate, the Commission also considered its burden estimate for the same reporting requirement that was proposed for SB SEFs. *See id.* at 18151, n. 432.

[1639] *See id.* at 18151.

[1640] *See id.* at 18152. The 60 burden hours included 10 hours by an Attorney and 50 hours by a Senior Systems Analyst. *See id.* This estimate was based on Commission staff's experience with the ARP Inspection Program. *See id.* at 18152, n. 440.

[1641] *See* BATS Letter at 14. *See also* NYSE Letter at 26 (stating that if ''material'' were interpreted broadly to cover any functional change to an SCI system, the number of material systems changes

commenter stated that, based on the proposed definition of material systems changes, each SCI entity could be reporting 60 material systems changes each week.[1642] One commenter noted that the burden estimate was effectively limited to ministerial tasks of producing material systems change notifications and did not take into account activities necessary to gather the information needed, to have appropriate confirmations from persons with knowledge of the material systems change, to provide for senior management review where appropriate, and to otherwise be in a position to draft the notification.[1643] One commenter stated that the Commission's estimate of 2 hours for each material systems change notice is too low because describing systems changes ''involves the work of a tech-writer, who needs to collaborate with multiple groups on a project team, including the project manager, application development team and the testing and implementation teams.'' [1644] Similarly, one commenter noted that material systems change notifications would require substantial review by IT management, relevant business supervisors, as well as compliance staff, which would increase the burden estimate at least three-fold.[1645] One commenter noted that, based on its experience under the ARP Inspection Program, each notice under proposed Rule 1000(b)(6) would require at least 62 hours.[1646] This commenter also opined that the Commission mistakenly assumed that only a senior systems analyst and an attorney would be involved in the drafting of the notice.[1647] According to this commenter, a number of subject matter experts would need to be involved in drafting and reviewing these notices (*i.e.,* Project Management, Developments, Quality Assurance, Performance Testing, Systems Engineering, Systems Architecture, Capacity Planning, Information Security, Business Continuity, Disaster Recovery, Legal, and Compliance).[1648]

On the other hand, one commenter stated that the Commission's estimate of the burden of proposed rule 1000(b)(8)(ii) is fairly accurate.[1649]

One commenter stated its belief that none of the activities arising under proposed Rules 1000(b)(6) and (b)(8) would be conducive to outsourcing.[1650]

As discussed in detail above in Section IV.B.4, the Commission is not adopting the requirement for SCI entities to provide 30-day advance notifications or semi-annual reports of material systems changes. Also as discussed in detail above in Section IV.B.4, the Commission is not adopting the proposed definition of material systems change. Adopted Rule 1003(a) requires each SCI entity to submit quarterly reports describing completed, ongoing, and planned material changes to its SCI systems and security of indirect SCI systems during the prior, current, and subsequent calendar quarters. Adopted Rule 1003(b) additionally requires each SCI entity to promptly submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a).

With respect to the comment that, based on the proposed definition of material systems change, each SCI entity could be reporting 60 material systems changes each week (rather than each year), the Commission notes that it has not adopted the proposed definition of material systems change.[1651] Rather, as discussed above in Section IV.B.4, Rule 1003(a)(1) requires each SCI entity to establish reasonable criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material. Because Rule 1003(a)(1) allows each SCI entity to identify material systems changes, it is responsive to commenters' concern that the proposed definition was too broad and would result in an excessive number of notifications, and to commenters' suggestion that the definition should be revised. In particular, an SCI entity will have reasonable discretion in establishing the written criteria in order to capture the systems changes that it believes are material. Relatedly, with respect to commenters who specifically discussed the 30-day advance Commission notification requirement for material systems changes,[1652] the Commission notes that it is not adopting a 30-day advance notification requirement for each material systems change and is instead adopting a quarterly reporting requirement. Therefore, the Commission does not believe that it is necessary to estimate the number of material systems changes that each SCI entity will experience each year in order to estimate the burden associated with Rule 1003(a).

As discussed above in Section IV.B.4, Rule 1003(a) requires quarterly reports on material systems changes and supplemental reports under certain circumstances. Specifically, the quarterly reports are required to include a description of the completed, ongoing, and planned material changes to SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion.[1653] The Commission notes that the quarterly reports under Rule 1003(a) are required to include similar information as the information required under proposed Rule 1000(b)(8)(ii).[1654]

could measure in the thousands); and OTC Markets Letter at 21 (stating that it estimated it had a minimum of 430 reportable changes to its production systems over a ten-month time frame based on the proposed notification standards for material systems changes).

[1642] *See* BATS Letter at 14.

[1643] *See* MSRB Letter at 35.

[1644] *See* OCC Letter at 15. This commenter stated that a large amount of information needs to be assembled from different groups and consolidated into a single report, which would include, for example: (i) A high-level description of the functionality and configuration of the affected systems; (ii) a description of the systems development process; (iii) the relationship to other systems; (iv) changes to production schedules due to the planned system change; (v) any effects on capacity; (vi) a description of test results; (vii) a summary of test results; (viii) contingency protocols (*i.e.,* fallback options and disaster recovery measures); (ix) vulnerability assessments and security measures; and (x) whether an SEC rule filing under Rule 19b–4 has been made in connection with the system change notification. *See id.* at 15–16. According to this commenter, unless the Commission intends for the scope of information provided with these notices to be limited to high level descriptions and generally less detailed, the preparation of material systems change notices generally requires considerably more time than estimated. *See id.* at 16.

[1645] *See* UBS Letter at 6.

[1646] *See* Omgeo Letter at 42.

[1647] *See id.*

[1648] *See id.* at 42–43.

[1649] *See* MSRB Letter at 37.

[1650] *See id.* at 36–37.

[1651] *See supra* notes 1641–1642 and accompanying text.

[1652] *See supra* notes 1643–1648 and accompanying text.

[1653] Contrary to the views of a commenter, these quarterly reports are limited in scope and do not require a detailed description of each systems change that the SCI entity determines to be material. *See supra* note 1644 (discussing the concerns of a commenter that a large amount of information would need to be assembled and consolidated into a single report, and that unless the Commission intends for the scope of the information provided to be limited to high level descriptions and generally less detailed, the preparation of material systems change notices will require considerably more time than estimated). The Commission notes that it intends for the quarterly report to only require the information necessary to allow the Commission and its staff to gain a sufficient understanding of the relevant material systems changes, which would aid the Commission and its staff in understanding the operations and functionality of the systems of an SCI entity and changes to such systems. Specifically, Rule 1003(a)(1) requires the quarterly report to ''describe'' the material systems changes and gives each SCI entity reasonable flexibility in how to describe it.

[1654] Proposed Rule 1000(b)(8)(ii) required semi-annual reports that include a summary description of the progress of any material systems changes during the six-month period ending on June 30 or

Continued

However, because the Commission is not requiring 30-day advance notification of each material systems change, SCI entities may need to spend more time to gather the information required to be included in the quarterly reports and to prepare the quarterly reports than the burden estimated for proposed Rule 1000(b)(8)(ii).[1655] Therefore, the Commission estimates that the initial and ongoing burden to comply with the quarterly reporting requirement would be 125 hours per report per SCI entity,[1656] or 500 hours annually per SCI entity [1657] and 22,000 hours annually for all SCI entities.[1658]

With respect to the requirement under Rule 1003(a)(2) for supplemental material systems change reports, for purposes of this PRA analysis, the Commission estimates that most quarterly reports will not contain material errors or material omissions. Therefore, the Commission estimates that each SCI entity will submit 2 supplemental reports each year under Rule 1003(a)(2), in order to account for the few instances where a quarterly report must be corrected. The Commission estimates that the initial and ongoing burden to comply with the supplemental reporting requirement would be 15 hours per report per SCI entity,[1659] or 30 hours annually per SCI entity [1660] and 1,320 hours annually for all SCI entities.[1661] The Commission believes that SCI entities would handle internally the work associated with reports required under Rule 1003(a).[1662]

d. SCI Review

In the SCI Proposal, the Commission estimated that the initial and ongoing burden of conducting an SCI review and submitting the SCI review to senior management for review would be approximately 625 hours for each SCI entity.[1663] The Commission also estimated that each SCI entity would spend 1 hour to submit the SCI review to the Commission pursuant to proposed Rule 1000(b)(8)(i).[1664]

With respect to the burden associated with SCI reviews, one commenter stated that the Commission's estimate of the burden of proposed Rule 1000(b)(7) is fairly accurate.[1665] According to this commenter, although the burden estimate of proposed Rule 1000(b)(7) did not require the inclusion of senior management's response, the Commission's estimate is sufficient to cover the burden on senior management to produce such response.[1666]

Another commenter noted that the Commission's estimate of the burden associated with SCI review is too low and that the SCI review will require over 1,200 burden hours.[1667] In connection with advocating for a risk-based approach for SCI reviews, one commenter noted that if it were to attempt to conduct all of the market-related technology application reviews that it currently conducts over four years during one year (excluding regulatory technology applications such as those related to member regulation), it would require approximately 6,400 to 8,320 hours.[1668] According to this commenter, significantly more resources would be required to conduct SCI reviews if the definition of SCI systems includes non-market regulatory and surveillance systems, and development and testing systems.[1669] One commenter noted that significant portions of the SCI review could be outsourced and that the Commission's estimate for the overall cost of outsourcing is reasonable, although some of the assumed hourly rates used in the SCI Proposal appear to be too low in the context of the current market environment.[1670]

One commenter noted that the Commission's estimate did not take into account the additional work that would be required by many different SCI entity associates, including managers and subject matter experts, in order to satisfy the requirements of proposed Rule 1000(b)(7).[1671] This commenter stated that the Commission incorrectly assumed that only an attorney, manager internal audit, and systems analyst would be required to work on the SCI review.[1672] According to this commenter, subject matter expertise that would be needed to perform such a review includes Product Managers, Project Managers, Developers, Quality Assurance staff, Systems Engineers, Systems Architects, Capacity Planners, Information Security experts, Business Continuity and Disaster Recovery staff, Compliance staff, and management.[1673] This commenter estimated that the

December 31, and the date, or expected date, of completion of implementation of such changes.

[1655] At the same time, the Commission believes that most, if not all, SCI entities already have some internal procedures for documenting all systems changes.

[1656] In the SCI Proposal, the Commission preliminarily estimated 60 hours per semi-annual report. *See* Proposing Release, *supra* note 13, at 18152. The Commission believes that, although Rule 1003(a)(1) requires quarterly reports rather than semi-annual reports, the reporting burden should not be reduced because the quarterly reports would cover material systems changes during the prior, current, and subsequent calendar quarters. On the other hand, the proposed semi-annual reports would have only covered material systems changes during the previous 6 months. In addition, because the Commission is not requiring 30-day advance notification of each material systems change, SCI entities may need more time to gather the information required to be included in the quarterly reports and to prepare the quarterly reports. Therefore, the Commission believes that it is appropriate to increase by fifty percent its estimate for the proposed semi-annual reporting requirement and to add additional personnel in response to comment. *But see supra* note 1649 and accompanying text (discussing a commenter's view that the Commission's estimate of the burden under proposed Rule 1000(b)(8)(ii) is fairly accurate). The 125 burdens hours include 7.5 hours by an Attorney, 7.5 hours by a Compliance Manager, 5 hours by a Chief Compliance Officer, 30 hours by a Senior Business Analyst, and 75 hours by a Senior Systems Analyst. In addition to adding fifty percent to the estimated burden for proposed Rule 1000(b)(8)(ii), the Commission is estimating an additional 7.5 hours by a Compliance Manager (and decreasing the proposed burden estimate for Attorney from 10 hours to 7.5 hours), 5 hours by a Chief Compliance Officer, and 30 hours by a Senior Business Analyst to address commenters' view that the estimates in the SCI Proposal did not take into account the activities to gather the information needed, to have appropriate confirmations from persons with knowledge of the material systems change, and to provide for senior management review where appropriate (even though some of these commenters commented on the burden estimate for proposed Rule 1000(b)(6) only). *See supra* notes 1643, 1645, 1647, and 1648 and accompanying text. The Commission notes that the inclusion of Senior Business Analyst and Senior Systems Analyst is intended to cover subject matter experts for material systems changes, as suggested by a commenter. *See supra* note 1648 and accompanying text.

[1657] 125 hours × 4 reports each year = 500 hours. The Commission recognizes that, to the extent an SCI entity develops a template for quarterly material systems change reports, the burden associated with creating future quarterly reports may be reduced.

[1658] 500 hours × 44 SCI entities = 22,000 hours.

[1659] The 15 burdens hours include 2 hours by an Attorney, 2 hours by a Compliance Manager, 1 hour by a Chief Compliance Officer, 3 hours by a Senior Business Analyst, and 7 hours by a Senior Systems Analyst. The Commission believes that the burden associated with supplemental material systems change reports will be substantially lower than the burden associated with quarterly material systems change reports, but the same type of personnel will be involved the supplemental report as the quarterly report.

[1660] 15 hours × 2 reports each year = 30 hours.

[1661] 30 hours × 44 SCI entities = 1,320 hours.

[1662] See supra note 1650 and accompanying text,

[1663] *See* Proposing Release, *supra* note 13, at 18151. The 625 burden hours included 80 hours by an Attorney, 170 hours by a Manager Internal Auditor, and 375 hours by a Senior Systems Analyst. *See id.* This estimate was the Commission's preliminary best estimate and was based on Commission staff's experience with the ARP Inspection Program. This estimate was also the same as the Commission's burden estimate for internal audits of SB SEFs. *See id.* at 18151, n. 437.

[1664] *See id.* at 18151. The 1 burden hour would be spent by an Attorney. *See id.*

[1665] *See* MSRB Letter at 36.

[1666] *See id.* at 37.

[1667] *See* ISE Letter at 12.

[1668] *See* FINRA Letter at 40. According to this commenter, it currently spends approximately 160 hours for each review of a technology application in connection with its regulatory audits, and currently it reviews between 10 and 13 market-related technology applications annually. *See id.*

[1669] *See id.*

[1670] *See* MSRB Letter at 36.

[1671] *See* Omgeo Letter at 44.

[1672] *See id.*

[1673] *See id.*

annual burden under proposed Rule 1000(b)(7) would be 4,670 hours.[1674] According to this commenter, if the Commission intended SCI entities to conduct a broader scope review beyond those now required by the ARP Inspection Program, then the annual burden would be 11,199 hours.[1675] With respect to the burden estimate for proposed Rule 1000(b)(8)(i), one commenter stated that the estimate did not address the burden on senior management for reading, analyzing, and perhaps responding to the SCI review.[1676]

As discussed above in Section IV.B.5, the Commission is adopting SCI review-related requirements in Rule 1003(b), with some modifications from the proposal. Specifically, Rule 1003(b)(1) requires each SCI entity to conduct an SCI review of its compliance with Regulation SCI not less than once each calendar year, with an exception for penetration test reviews, which are required to be conducted not less than once every three years.[1677] As adopted, Rule 1003(b)(1)(ii) provides an exception for assessments of SCI systems directly supporting market regulation or market surveillance, which are required to be reviewed at a frequency based on the risk assessment conducted as part of the SCI review, but in no case less than once every three years.[1678] Rules 1003(b)(2) and (3) require each SCI entity to submit a report of the SCI review to senior management no more than 30 calendar days after completion of the review, and to submit the report to the Commission and to the board of directors of the SCI entity or the equivalent of such board, together with any response by senior management, within 60 calendar days after its submission to senior management.

After considering the views of commenters, the Commission is not significantly increasing the burden estimate for compliance with Rules 1003(b)(1) and (2) from its estimates in the SCI Proposal. In particular, one commenter noted that the Commission's burden estimate for proposed Rule 1000(b)(7) was fairly accurate.[1679] Further, while other commenters advocated higher burden estimates for the SCI review requirement,[1680] the Commission notes that it has refined the definition of SCI systems (*e.g.,* by eliminating development and testing systems, and focusing on *market* regulation and *market* surveillance systems) and has incorporated a risk-based approach to the frequency of testing for market regulation and market surveillance systems. The Commission estimates that the initial and ongoing burden of conducting an SCI review and submitting the SCI review to senior management of the SCI entity for review would be approximately 690 hours for each SCI entity,[1681] and 30,360 hours annually for all SCI entities.[1682] The Commission estimates that while SCI entities would handle internally some or most of the work associated with compliance with Rule 1003(b),[1683] SCI entities would outsource some of the work associated with an SCI review, at an average annual cost of $50,000 per SCI entity,[1684] or $2,200,000 for all SCI entities.[1685]

With respect to the comment that the burden estimate for proposed Rule 1000(b)(8)(i) failed to account for the burden on senior management for reviewing and responding to the report of the SCI review,[1686] the Commission notes that proposed Rule 1000(b)(8)(i) and adopted Rule 1003(b)(3) do not require senior management to respond to the report of the SCI review. Rather, Rule 1003(b)(3) only requires an SCI entity to submit the already prepared report of the SCI review, and response by senior management if there was any, to the Commission and to the board of directors of the SCI entity or the equivalent of such board. Moreover, the Commission is including in its burden estimate for Rules 1003(b)(1) and (2) the burden for senior management review of the report for the SCI review. Therefore, with respect to Rule 1003(b)(3), the Commission estimates that each SCI entity would require 1 hour per year to submit the report of the SCI review and any response by senior management to the Commission and to the board of directors of the SCI entity or the equivalent of such board,[1687] for a

[1674] *See id.*

[1675] *See id.*

[1676] *See id.*

[1677] As proposed, the rule would have required penetration test reviews of the SCI entity's network, firewalls and development, testing, and production systems. However, consistent with modifications to the definition of SCI systems, references to development and test systems have been deleted in adopted Rule 1003(b)(1)(i).

[1678] These exceptions, along with the exclusion of development and testing systems from the definition of SCI systems, would address, at least in part, some commenters' concern regarding the scope of the definition of SCI systems and consequently the burden of the SCI review requirement. *See supra* notes 1669 and 1675 and accompanying text.

[1679] *See supra* note 1665 and accompanying text.

[1680] *See supra* notes 1667–1668 and 1675 and accompanying text. These commenters estimated a range of 1,200 to 8,320 burden hours. In response to the commenter that stated that it currently spends approximately 160 hours for each review of a technology application and it reviews between 10 and 13 market-related technology applications annually, the Commission notes that the burden estimates in this section only include the incremental burden associated with the rule above what the Commission estimates that SCI entities are already performing. To the extent an SCI entity already reviews certain of its systems, the additional burden imposed by Rule 1003(b) will be lower than for other SCI entities.

[1681] The 690 hours include 80 hours by an Attorney, 35 hours by a Compliance Manager, 5 hours by a General Counsel, 20 hours by a Chief Compliance Officer, 5 hours by a Director of Compliance, 170 hours by a Manager Internal Audit, and 375 hours by a Senior Systems Analyst. As compared to the estimated burden for proposed Rule 1000(b)(7), the Commission is estimating an additional 35 hours by a Compliance Manager, 5 hours by a General Counsel, 20 hours by a Chief Compliance Officer, and 5 hours by a Director of Compliance, to reflect the view of commenters that managers would be involved in satisfying the requirements related to SCI review. *See supra* notes 1671–1675 and accompanying text. The Commission notes that the 20-hour burden estimate for the Chief Compliance Officer includes the time spent by other members of the senior management team (other than the General Counsel, who has a separate burden estimate). *See supra* Section IV.B.5 (discussing senior management involvement in compliance with Rule 1003(b)). The Commission notes that the inclusion of Manager Internal Audit and Senior Systems Analyst is intended to cover subject matter experts related to systems review (*e.g.,* information security experts, systems engineers, quality assurance staff). *See supra* notes 1671–1675 and accompanying text. The Commission also believes that some SCI entities already conduct annual reviews of its systems, and therefore may incur less burden than other SCI entities in complying with Rule 1003(b).

[1682] 690 hours × 44 SCI entities = 30,360 hours.

[1683] As noted above, one commenter suggested that significant portions of the SCI review may be outsourced. This commenter also noted that the Commission's estimate of the overall cost of outsourcing is reasonable, although it believed some of the assumed hourly rates appear to be too low in the context of current market environment. *See supra* note 1670 and accompanying text. The Commission acknowledges that some SCI entities may outsource work related to SCI review to more expensive outside firms than others. On average, the Commission believes its hourly rate of $400 for outsourcing continues to be appropriate.

[1684] 125 hours × $400 = $50,000. The Commission believes that SCI entities may outsource some of the legal and audit work associated with an SCI review. In particular, the Commission estimates that, on average, an SCI entity will outsource 40 hours of legal work and 85 hours of audit work (or half of the hour burden estimates for Attorney and Manager Internal Audit). *See supra* note 1681.

[1685] $50,000 × 44 SCI entities = $2,200,000.

[1686] *See supra* notes 1666 and 1676 and accompanying text. One of these commenters, however, noted that the Commission's estimated burden for proposed Rule 1000(b)(7) is fairly accurate, even though it did not include senior management's response. *See supra* notes 1665–1666 and accompanying text.

[1687] The 1 hour would be spent by an Attorney. This estimate is unchanged from the burden estimate for proposed Rule 1000(b)(8)(i), which only required submission of the report and any response by senior management to the Commission. The Commission believes that the additional burden for submitting the same report and response to the SCI entity's board of directors or the equivalent of such board would be modest, and thus the estimate of one hour remains unchanged from the burden estimate for proposed Rule 1000(b)(8)(i), which required submission of the report and response by senior management only to the Commission.

burden of 44 hours for all SCI entities.[1688]

e. Access to EFFS

As noted above, to access EFFS, an SCI entity will submit to the Commission an EAUF to register each individual at the SCI entity who will access the EFFS system on behalf of the SCI entity. The Commission is including in its burden estimates the burden for completing the EAUF for each individual at an SCI entity that will request access to EFFS. The Commission estimates that initially, on average, two individuals at each SCI entity will request access to EFFS through the EAUF, and each EAUF would require 0.15 hours to complete and submit. Therefore, each SCI entity would initially require 0.3 hours to complete the requisite EAUFs,[1689] or approximately 13 hours for all SCI entities.[1690] The Commission also estimates that annually, on average, one individual at each SCI entity will request access to EFFS through EAUF.[1691] Therefore, the ongoing burden to complete the EAUF would be 0.15 hours annually for each SCI entity,[1692] or approximately 7 hours annually for all SCI entities.[1693]

In addition, the Commission estimates that each SCI entity will designate two individuals to sign Form SCI each year. An individual signing a Form SCI must obtain a digital ID, at the cost of approximately $25 each year. Therefore, each SCI entity would require approximately $50 annually to obtain digital IDs for the individuals with access to EFFS for purposes of signing Form SCI,[1694] or approximately $2,200 for all SCI entities.[1695]

3. Requirements To Take Corrective Actions and Identify Critical SCI Systems, Major SCI Events, De Minimis SCI Events, and Material Systems Changes

The rules under Regulation SCI that would result in SCI entities establishing additional processes for compliance are discussed more fully in Sections IV.A, IV.B.3.b, and IV.B.4 above.

a. Corrective Actions

In the SCI Proposal, the Commission noted that, although SCI entities already take corrective action in response to systems issues, proposed Rule 1000(b)(3) would likely result in SCI entities revising their policies regarding taking corrective actions.[1696] The Commission estimated that the initial burden would be 42 hours per SCI entity,[1697] and the ongoing burden would be 12 hours annually per SCI entity.[1698] The Commission estimated that SCI entities would establish the process for compliance with proposed Rule 1000(b)(3) internally.[1699]

One commenter stated its belief that basing the estimate for proposed Rule 1000(b)(3) on the percentage of the burden estimate under proposed Rule 1000(b)(1) is appropriate.[1700] This commenter also noted that while the taking of corrective action might be wholly or partially outsourced with regard to systems development activities, the establishment of policies and procedures with respect to corrective action would not be conducive to outsourcing.[1701]

As discussed in detail above in Section IV.B.3.b, the Commission continues to require each SCI entity to begin to take appropriate corrective action in Rule 1002(a), but the corrective action requirement is triggered when any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred.[1702] The Commission continues to believe that all SCI entities, regardless of whether they participate in the ARP Inspection Program, already take corrective action in response to systems issues and have some internal processes with respect to corrective action.[1703] The Commission also continues to believe that Rule 1002(a) will likely result in SCI entities revising their policies, which will help to ensure that their information technology staff has the ability to access systems in order to take appropriate corrective actions.[1704] The Commission therefore believes that Rule 1002(a) may impose a one-time implementation burden on SCI entities associated with developing such a process, and periodic burdens in reviewing that process. The Commission estimates that the initial burden to implement such a process would be 114 hours per SCI entity,[1705] or 5,016 hours for all SCI entities.[1706] The Commission also estimates that the ongoing burden to review such a process would be 39 hours annually per SCI entity,[1707] or

[1688] 1 hour × 44 SCI entities = 44 hours.

[1689] 0.15 hours per EAUF × 2 individuals = 0.3 hours per SCI entity. These estimates are based on Commission staff's experience with EFFS and EAUFs pursuant to Rule 19b–4 under the Exchange Act. The 0.15 hours would be spent by an Attorney. The Commission acknowledges that an SCI SRO may initially submit fewer than two EAUFs because certain individuals at SCI SROs currently already have access to EFFS, whereas an SCI entity other than an SCI SRO may submit more than two EAUFs initially because it has not previously submitted filings through EFFS. Therefore, the Commission believes it is appropriate to estimate that, on average, each SCI entity will submit two EAUFs initially.

[1690] 0.30 hours × 44 SCI entities = 13.2 hours.

[1691] The Commission estimates that annually, on average, one individual at each SCI entity will request access to EFFS through EAUF to account for the possibility that an individual who previously had access to EFFS may no longer be designated as needing such access.

[1692] 0.15 hours per EAUF × 1 individual = 0.15 hours.

[1693] 0.15 hours × 44 entities = 6.6 hours.

[1694] $25 per digital ID × 2 individuals = $50 per SCI entity.

[1695] $50 × 44 SCI entities = $2,200.

[1696] *See* Proposing Release, *supra* note 13, at 18152.

[1697] *See id.* The 42 burden hours included 16 hours by a Compliance Manager, 16 hours by an Attorney, 5 hours by a Senior Systems Analyst, and 5 hours by an Operations Specialist. *See id.* This estimate was based on the Commission's burden estimate for proposed Rule 1000(b)(1). *See id.* at 18152, n. 442.

[1698] *See id.* at 18152. The 12 burden hours included 6 hours by a Compliance Manager and 6 hours by an Attorney. *See id.* This estimate was based on the Commission's burden estimate for proposed Rule 1000(b)(1). *See id.* at 18152, n. 443.

[1699] *See id.* at 18152, n. 442.

[1700] *See* MSRB Letter at 31–32.

[1701] *See id.* at 32.

[1702] *See* Rule 1002(a).

[1703] *See* Proposing Release, *supra* note 13, at 18152.

[1704] *See id.*

[1705] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and Rule 1002(a) both would result in policies and procedures or processes. As noted above, one commenter stated that basing the burden estimate for proposed Rule 1000(b)(3) on the burden estimate under proposed Rule 1000(b)(1) is appropriate. *See supra* note 1700 and accompanying text. Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the establishment of six policies and procedures at a minimum and Rule 1002(a) would result in the establishment of one set of policies and procedures, the Commission estimates that the initial staff burden to draft the policies and procedures for Rule 1002(a) is one-sixth of the initial staff burden to draft the policies and procedures required by Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 504 hours ÷ 6 = 84 hours. The 84 burden hours include 32 hours by a Compliance Manager, 32 hours by an Attorney, 10 hours by a Senior Systems Analyst, and 10 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1443. The Commission also estimates that a Chief Compliance Officer will spend 20 hours and a Director of Compliance will spend 10 hours reviewing the policies and procedures required by Rule 1002(a). 84 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 114 hours.

[1706] 114 hours × 44 SCI entities = 5,016 hours.

[1707] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and 1002(a) both would result in policies and procedures or processes. *See supra* note 1700 and accompanying text (stating that basing the burden estimate for proposed Rule 1000(b)(3) on the burden estimate under proposed 1000(b)(1) is appropriate). Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the maintenance of six policies and procedures at a minimum and 1002(a) would result in the maintenance of one set of policies and procedures, the Commission estimates that the ongoing staff burden under 1002(a) is one-sixth of the ongoing staff burden under Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 144 hours ÷ 6 = 24 hours. The 24 burden hours include 9 hours by a Compliance Manager, 9 hours by an Attorney, 3 hours by a Senior Systems Analyst, and 3 hours by an Operations Specialist. This burden hour

1,716 hours annually for all SCI entities.[1708]

The Commission continues to believe that SCI entities will conduct internally most of the work related to their corrective action procedures. As noted by a commenter, the establishment of policies and procedures with respect to corrective action would not be conducive to outsourcing.[1709]

b. Identification of Critical SCI Systems, Major SCI Events, De Minimis SCI Events, and Material Systems Changes

In the SCI Proposal, the Commission estimated that requirements under the proposal with respect to immediate notification SCI events and dissemination SCI events may impose burdens on SCI entities in developing and reviewing a process to ensure that they are able to quickly and correctly make a determination regarding the nature of an SCI event.[1710] For SCI entities that do not participate in the ARP Inspection Program, the Commission estimated that the initial burden would be 42 hours per SCI entity [1711] and the ongoing burden would be 12 hours annually per SCI entity.[1712] For SCI entities that currently participate in the ARP Inspection Program, the Commission estimated that the initial burden would be 21 hours per SCI entity [1713] and the ongoing burden would be 6 hours annually per SCI entity.[1714] The Commission believed that SCI entities would internally establish the process for determining whether an SCI event is an immediate notification SCI event or dissemination SCI event.[1715]

One commenter stated its belief that the Commission's burden estimate for policies and procedures to identify an SCI event as an immediate notification SCI event or dissemination SCI event was effectively limited to ministerial tasks of producing such policies and procedures in isolation from other organizational activities and needs, and took into account only minimal supervisory or decision-making activities, therefore significantly underestimated the total burden of compliance with this provision.[1716] This commenter urged the Commission to adjust the estimate in a manner similar to this commenter's suggestion with regard to proposed Rules 1000(b)(1) and (2).[1717]

As discussed above in Section IV.B.4, Rule 1003(a)(1) requires each SCI entity to establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material. As noted in the SCI Proposal, because the ARP Inspection Program already provides for the reporting ''significant systems changes'' to Commission staff, the Commission believes that, as compared to entities that do not participate in the ARP Inspection Program, entities that currently participate in the ARP Inspection Program would already have some internal processes for determining the significance of a systems issue or systems change. Therefore, the Commission continues to estimate a 50% baseline for the staff burden estimates for SCI entities that currently participate in the ARP Inspection Program.[1718] However, the Commission does not believe that a 50% baseline would be appropriate for these SCI entities in terms of senior management review. The Commission believes that, although these entities already have some internal processes for determining the significance of a systems change, their senior management would require the same number of hours as other SCI entities to review and ensure that the process is reasonable, as required by Rule 1003(a)(1). The Commission continues to believe that SCI entities will internally establish and maintain the policies and procedures required by Rule 1003(a)(1).

The Commission estimates that each SCI entity that does not participate in the ARP Inspection Program would require 114 hours initially to establish the criteria for identifying material systems changes,[1719] or 1,596 hours for all such SCI entities.[1720] The Commission also estimates that each SCI entity that does not participate in the ARP Inspection Program would require 39 hours annually to review and update the criteria for identifying material systems changes,[1721] or 546 hours for all such SCI entities.[1722] The Commission estimates that each SCI entity that currently participates in the

allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1445. The Commission also estimates that a Chief Compliance Officer will spend 10 hours and a Director of Compliance will spend 5 hours reviewing the policies and procedures required by Rule 1002(a). 24 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 39 hours.

[1708] 39 hours × 44 SCI entities = 1,716 hours.

[1709] *See supra* note 1701 and accompanying text.

[1710] *See* Proposing Release, *supra* note 13, at 18152.

[1711] *See id.* at 18153. The 42 burden hours included 16 hours by a Compliance Manager, 16 hours by an Attorney, 5 hours by a Senior Systems Analyst, and 5 hours by an Operations Specialist. *See id.* This estimate was based on the Commission's burden estimate for proposed Rule 1000(b)(1). *See id.* at 18153, n. 448.

[1712] *See id.* at 18153. The 12 burden hours included 6 hours by a Compliance Manager and 6 hours by an Attorney. *See id.* This estimate was based on the Commission's burden estimate for proposed Rule 1000(b)(1). *See id.* at 18153, n. 452.

[1713] *See id.* at 18153. The 21 burden hours included 8 hours by a Compliance Manager, 8 hours by an Attorney, 2.5 hours by a Senior Systems Analyst, and 2.5 hours by an Operations Specialist. *See id.*

[1714] *See id.* The 6 burden hours included 3 hours by a Compliance Manager and 3 hours by an Attorney. *See id.*

[1715] *See id.* at 18153, n. 448, n. 450, n. 452, and n. 454.

[1716] *See* MSRB Letter at 32.

[1717] *See id.*

[1718] The 50% baseline for ARP participants is consistent with the baseline for the Rule 1001(a) burden estimates.

[1719] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and Rule 1003(a)(1) both require policies and procedures or processes. *See supra* note 1700 and accompanying text (stating, in the context of proposed Rule 1000(b)(3), that basing the burden estimate for a set of policies and procedures or processes on the burden estimate under proposed 1000(b)(1) is appropriate). Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the establishment of six policies and procedures at a minimum and Rule 1003(a)(1) requires the establishment of one set of criteria, the Commission estimates that the initial staff burden to draft the criteria required by Rule 1003(a)(1) is one-sixth of the initial staff burden to draft the policies and procedures required by Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 504 hours ÷ 6 = 84 hours. The 84 burden hours include 32 hours by a Compliance Manager, 32 hours by an Attorney, 10 hours by a Senior Systems Analyst, and 10 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1443. The Commission also estimates that a Chief Compliance Officer will spend 20 hours and a Director of Compliance will spend 10 hours reviewing the policies and procedures required by Rule 1003(a)(1). 84 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 114 hours.

[1720] 114 hours × 14 SCI entities that do not participate in the ARP Inspection Program = 1,596 hours.

[1721] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and Rule 1003(a)(1) both require policies and procedures or processes. *See supra* note 1700 and accompanying text (stating, in the context of proposed Rule 1000(b)(3), that basing the burden estimate for a set of policies and procedures or processes on the burden estimate under proposed 1000(b)(1) is appropriate). Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the maintenance of six policies and procedures at a minimum and Rule 1003(a)(1) requires the maintenance of one set of criteria, the Commission estimates that the ongoing staff burden under 1003(a)(1) is one-sixth of the ongoing staff burden under Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 144 hours ÷ 6 = 24 hours. The 24 burden hours include 9 hours by a Compliance Manager, 9 hours by an Attorney, 3 hours by a Senior Systems Analyst, and 3 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1445. The Commission also estimates that a Chief Compliance Officer will spend 10 hours and a Director of Compliance will spend 5 hours reviewing the policies and procedures required by Rule 1003(a)(1). 24 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 39 hours.

[1722] 39 hours × 14 SCI entities that do not participate in the ARP Inspection Program = 546 hours.

ARP Inspection Program would require 72 hours initially to establish the criteria for identifying material systems changes,[1723] or 2,160 hours for all such SCI entities.[1724] The Commission also estimates that each SCI entity that currently participates in the ARP Inspection Program would require 27 hours annually to review and update the criteria,[1725] or 810 hours for all such SCI entities.[1726]

As adopted, Regulation SCI requires SCI entities to identify certain types of events, systems, and changes. Specifically, Rule 1000 defines ''critical SCI systems'' as any SCI systems of, or operated by or on behalf of, an SCI entity that: (1) Directly support functionality relating to (i) clearance and settlement systems of clearing agencies; (ii) openings, reopenings, and closings on the primary listing market; (iii) trading halts; (iv) initial public offerings; (v) the provision of consolidated market data; or (vi) exclusively-listed securities; or (2) provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets. Rule 1000 defines ''major SCI event'' as an SCI event that has had, or the SCI entity reasonably estimates would have any impact on a critical SCI system or a significant impact on the SCI entity's operations or on market participants. Because Rule 1001(a)(2)(v) requires business continuity and disaster recovery plans that are reasonably designed to achieve two-hour resumption of critical SCI systems following a wide-scale disruption, each SCI entity needs to identify its critical SCI systems. In addition, each SCI entity needs to identify its critical SCI systems because the definition of major SCI event includes an SCI event that has had, or the SCI entity reasonably estimates would have, any impact on a critical SCI system. Further, when an SCI event occurs, an SCI entity needs to determine whether the event is a major SCI event, because Rule 1002(c)(3) requires an SCI entity to disseminate information regarding major SCI events to all of its member or participants. In addition, Rules 1002(b) and (c) provide certain exceptions from the Commission notification and information dissemination requirements for any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. Therefore, when SCI events occur, an SCI entity needs to determine whether they are de minimis SCI events.

The Commission believes that the identification of critical SCI systems, major SCI events, and de minimis SCI events will impose an initial one-time implementation burden on SCI entities in developing processes to quickly and correctly identify the nature of a system or event.[1727] The identification of these systems and events may also impose periodic burdens on SCI entities in reviewing and updating the processes. As noted in the SCI Proposal, because the ARP Inspection Program already provides for the reporting ''significant systems changes'' and ''significant systems outages'' to Commission staff, the Commission believes that, as compared to entities that do not participate in the ARP Inspection Program, entities that currently participate in the ARP Inspection Program would already have some internal processes for determining the significance of a systems issue or systems change. Therefore, the Commission estimates a 50% baseline for the staff burden for SCI entities that currently participate in the ARP Inspection Program.[1728] However, the Commission does not believe that a 50% baseline would be appropriate for these SCI entities in terms of senior management review. The Commission believes that SCI entities will internally establish and maintain the policies and procedures regarding the identification of critical SCI systems, major SCI events, and de minimis SCI events.

The Commission estimates that each SCI entity that does not participate in the ARP Inspection Program would require 198 hours initially to establish the criteria for identifying certain systems and events,[1729] or 2,772 hours for all such SCI entities.[1730] The Commission also estimates that each SCI entity that does not participate in the ARP Inspection Program would require 63 hours annually to review and update such criteria,[1731] or 882 hours

[1723] 84 hours ÷ 2 = 42 hours. The 42 burden hours include 16 hours by a Compliance Manager, 16 hours by an Attorney, 5 hours by a Senior Systems Analyst, and 5 hours by an Operations Specialist. The Commission also estimates that a Chief Compliance Officer will spend 20 hours and a Director of Compliance will spend 10 hours reviewing the policies and procedures required by Rule 1003(a)(1). 42 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 72 hours.

[1724] 72 hours × 30 SCI entities that participate in the ARP Inspection Program = 2,160 hours.

[1725] 24 hours ÷ 2 = 12 hours. The 12 burden hours include 4.5 hours by a Compliance Manager, 4.5 hours by an Attorney, 1.5 hours by a Senior Systems Analyst, and 1.5 hours by an Operations Specialist. The Commission also estimates that a Chief Compliance Officer will spend 10 hours and a Director of Compliance will spend 5 hours reviewing the policies and procedures required by Rule 1003(a)(1). 12 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 27 hours.

[1726] 27 hours × 30 SCI entities that participate in the ARP Inspection Program = 810 hours.

[1727] The Commission's approach with respect to SCI events and SCI systems is responsive to some commenters' suggestion for a risk-based regime. *See, e.g., supra* notes 784–789 and accompanying text (discussing commenters' suggestions for revising the Commission reporting requirement).

[1728] The 50% baseline for ARP participants is consistent with the baseline for the Rule 1001(a) burden estimates.

[1729] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and the identification of certain systems and events both would result in policies and procedures or processes. *See supra* note 1700 and accompanying text (stating, in the context of proposed Rule 1000(b)(3), that basing the burden estimate for a set of policies and procedures or processes on the burden estimate under proposed 1000(b)(1) is appropriate). Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the establishment of six policies and procedures at a minimum and the identification of certain systems and events could result in the establishment of two policies and procedures (*i.e.,* one for systems and one for events), the Commission estimates that the initial staff burden to draft the policies and procedures to identify certain systems and events is one-third of the initial staff burden to draft the policies and procedures required by Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 504 hours ÷ 3 = 168 hours. The 168 burden hours include 64 hours by a Compliance Manager, 64 hours by an Attorney, 20 hours by a Senior Systems Analyst, and 20 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1443. The Commission also estimates that a Chief Compliance Officer will spend 20 hours and a Director of Compliance will spend 10 hours reviewing the policies and procedures to identify certain systems and events. 168 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 198 hours.

[1730] 198 hours × 14 SCI entities that do not participate in the ARP Inspection Program = 2,772 hours.

[1731] This estimate is based on the Commission's burden estimate for Rule 1001(a), because Rule 1001(a) and the identification of certain systems and events both would result in policies and procedures or processes. *See supra* note 1700 and accompanying text (stating, in the context of proposed Rule 1000(b)(3), that basing the burden estimate for a set of policies and procedures or processes on the burden estimate under proposed 1000(b)(1) is appropriate). Because Rule 1001(a) (excluding Rule 1001(a)(2)(vi)) requires the maintenance of six policies and procedures at a minimum and the identification of certain systems and events could result in the maintenance of two policies and procedures, the Commission estimates that the ongoing staff burden to draft the policies and procedures to identify certain systems and events is one-third of the ongoing staff burden under Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). 144 hours ÷ 3 = 48 hours. The 48 burden hours include 18 hours by a Compliance Manager, 18 hours by an Attorney, 6 hours by a Senior Systems Analyst, and 6 hours by an Operations Specialist. This burden hour allocation is based on the allocation for Rule 1001(a) (excluding Rule 1001(a)(2)(vi)). *See supra* note 1445. The Commission also estimates that a Chief Compliance Officer will spend 10 hours and a Director of Compliance will spend 5 hours reviewing the policies and procedures for identifying certain

for all such SCI entities.[1732] The Commission estimates that each SCI entity that currently participates in the ARP Inspection Program would require 114 hours initially to establish the criteria for identifying certain systems and events,[1733] or 3,420 hours for all such SCI entities.[1734] The Commission also estimates that each SCI entity that currently participates in the ARP Inspection Program would require 39 hours annually to review and update such criteria,[1735] or 1,170 hours for all such SCI entities.[1736] The Commission believes that the revised burden estimates for establishing policies and procedures to identify certain systems and events are responsive to a commenter's concern that the estimate in the SCI Proposal only included ministerial tasks and minimal supervisory activities.[1737] Specifically, the Commission increased from the proposal the estimated burden hours for the personnel involved in establishing such policies and procedures, and included senior level review by adding burden estimates for the Chief Compliance Officer and Director of Compliance. Moreover, because these revised burden estimates are based on the revised burden estimates for Rule 1001(a), these estimates are responsive to a commenter's suggestion that they be revised in a manner similar to its suggestions with respect to proposed Rules 1000(b)(1) and (2).[1738]

4. Recordkeeping Requirements

In the SCI Proposal, the Commission noted that it is not proposing a new recordkeeping requirement for SCI SROs because the documents relating to compliance with proposed Regulation SCI are subject to their existing recordkeeping and retention requirements under Rule 17a–1 under the Act.[1739] The Commission therefore noted its belief that the proposed recordkeeping requirements would not result in any burden that is not already accounted for in the Commission's burden estimates for Rule 17a–1.[1740] With respect to SCI entities other than SCI SROs, the Commission estimated that the initial and ongoing burdens to make, keep, and preserve records relating to compliance with proposed Regulation SCI would be approximately 25 hours annually per SCI entity.[1741] The Commission also estimated that each SCI entity other than an SCI SRO would incur a one-time burden to set up or modify an existing recordkeeping system to comply with the proposed recordkeeping requirements.[1742] Specifically, the Commission estimated that for each SCI entity other than an SCI SRO, setting up or modifying a recordkeeping system would create an initial burden of 170 hours and $900 in information technology costs for purchasing recordkeeping software.[1743] Further, the Commission noted its belief that proposed Rule 1000(c)(3), which would require an SCI entity, upon or immediately prior to ceasing to do business or ceasing to be registered under the Exchange Act, to take all necessary action to ensure that the records required to be made, kept, and preserved by Rules 1000(c)(1) and (2) remain accessible to the Commission and its representatives in the manner and for the remainder of the period required by Rule 1000(c), would not result in any additional paperwork burden that is not already accounted for in the Commission's burden estimates for proposed Rules 1000(c)(1) and (2).[1744]

One commenter noted that while proposed Rule 1000(c) does not create new recordkeeping requirements for SCI SROs, the number of records to be retained by an SRO would increase due to proposed Regulation SCI.[1745] This commenter stated that such additional recordkeeping is not costless and should be considered by the Commission.[1746]

As discussed in detail above in Section IV.C.1.a, the Commission is adopting the recordkeeping requirements substantially as proposed. The Commission notes that the burden associated with creating such records, as required of all SCI entities, including SCI SROs, by Regulation SCI, are discussed and accounted for throughout this Section V.

With respect to SCI SROs, the breadth of Rule 17a–1 under the Exchange Act[1747] is such that it requires SCI SROs to make, keep, and preserve records relating to their compliance with Regulation SCI.[1748] SCI entities that participate in the ARP Inspection Program (nearly all of whom are SCI SROs) do generally keep and preserve the types of records that are subject to the requirements of Rule 1005. However, because Regulation SCI imposes new requirements on SROs, as noted by a commenter, the number of records to be retained by an SRO may increase.[1749] The Commission believes that existing recordkeeping systems and processes of SCI SROs will be used to retain the records required to be created pursuant to Regulation SCI. As a result, the Commission believes that the burden associated with retaining these additional records is an incrementally small increase in the burden currently incurred by SROs to retain records as required by Rule 17a–1 and that the burden associated with retaining records related to Regulation SCI is already accounted for in the

systems and events. 48 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 63 hours.

[1732] 63 hours × 14 SCI entities that do not participate in the ARP Inspection Program = 882 hours.

[1733] 168 hours ÷ 2 = 84 hours. The 84 burden hours include 32 hours by a Compliance Manager, 32 hours by an Attorney, 10 hours by a Senior Systems Analyst, and 10 hours by an Operations Specialist. The Commission also estimates that a Chief Compliance Officer will spend 20 hours and a Director of Compliance will spend 10 hours reviewing the policies and procedures for identifying certain systems and events. 84 hours + Chief Compliance Officer at 20 hours + Director of Compliance at 10 hours = 114 hours.

[1734] 114 hours × 30 SCI entities that participate in the ARP Inspection Program = 3,420 hours.

[1735] 48 hours ÷ 2 = 24 hours. The 24 burden hours include 9 hours by a Compliance Manager, 9 hours by an Attorney, 3 hours by a Senior Systems Analyst, and 3 hours by an Operations Specialist. The Commission also estimates that a Chief Compliance Officer will spend 10 hours and a Director of Compliance will spend 5 hours reviewing the policies and procedures for identifying certain systems and events. 24 hours + Chief Compliance Officer at 10 hours + Director of Compliance at 5 hours = 39 hours.

[1736] 39 hours × 30 SCI entities that participate in the ARP Inspection Program = 1,170 hours.

[1737] *See supra* note 1716 and accompanying text.

[1738] *See supra* note 1717 and accompanying text.

[1739] *See* Proposing Release, *supra* note 13, at 18153.

[1740] *See id.*

[1741] *See id.* at 18154. The 25 burden hours would be spent by a Compliance Clerk. *See id.* This estimate was based on Commission staff's experience with examinations of registered entities, the Commission's estimated burden for an SRO to comply with Rule 17a–1, and the Commission's estimated burden for a SB SEF to keep and preserve documents made or received in the conduct of its business. *See id.* at 18154, n. 458.

[1742] *See id.* at 18154.

[1743] *See id.* These estimates were based on the Commission's experience with examinations of registered entities and the Commission's estimated burden for an SB SEF to keep and preserve documents made or received in the conduct of its business. *See id.* at 18154, n. 460.

[1744] *See id.* at 18154.

[1745] *See* MSRB Letter at 39.

[1746] *See id.*

[1747] ''Every national securities exchange, national securities association, registered clearing agency and the Municipal Securities Rulemaking Board shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity.'' Exchange Act Rule 17a–1(a), 17 CFR 240.17a–1(a).

[1748] *See also* Rule 1005(a).

[1749] *See supra* notes 1745–1746 and accompanying text.

Commission's burden estimates for Rule 17a–1.[1750]

The Commission continues to believe that for SCI entities other than SCI SROs, the initial and ongoing burden to make, keep, and preserve records relating to compliance with Regulation SCI, as required by Rule 1005(b), would be approximately 25 hours annually per SCI entity that is not an SCI SRO.[1751] Therefore, the Commission estimates a total annual burden of 425 hours for all such SCI entities.[1752] The Commission also continues to estimate that each SCI entity other than an SCI SRO would incur a one-time burden to set up or modify an existing recordkeeping system to comply with Rule 1005. Specifically, the Commission estimates that, for each SCI entity other than an SCI SRO, setting up or modifying a recordkeeping system would create an initial burden of 170 hours and $900 in information technology costs for purchasing software.[1753] Therefore, the Commission estimates a total initial burden of 3,315 hours [1754] and a total initial cost of $15,300 for all such SCI entities.[1755]

Finally, the Commission continues to believe that Rule 1005(c), which requires an SCI entity, upon or immediate prior to ceasing to do business or ceasing to be registered under the Exchange Act, to take all necessary action to ensure that the records required to be made, kept, and preserved by Rule 1005 remain accessible to the Commission and its representatives in the manner and for the remainder of the period required by Rule 1005, would not result in any additional paperwork burden that is not already accounted for in the Commission's burden estimates for Rule 1005(b).[1756]

5. Total Paperwork Burden Under Regulation SCI

Based on the foregoing, the Commission estimates that the total one-time initial burden for all SCI entities to comply with Regulation SCI would be 330,508 hours [1757] and the total one-time initial cost would be approximately $9.3 million.[1758] The Commission estimates that the total annual ongoing burden for all SCI entities to comply with Regulation SCI would be 287,722 hours [1759] and the total annual ongoing cost would be approximately $5.9 million.[1760]

*E. Collection of Information Is Mandatory*

All collections of information pursuant to Regulation SCI is a mandatory collection of information.

*F. Confidentiality*

The Commission expects that the written policies and procedures, processes, criteria, standards, or other written documents developed or revised by SCI entities pursuant to Regulation SCI will be retained by SCI entities in accordance with, and for the periods specified in Exchange Act Rule 17a–1 and Rule 1005, as applicable. Should such documents be made available for examination or inspection by the Commission and its representatives, they would be kept confidential subject to the provisions of applicable law.[1761] In addition, the information submitted to the Commission pursuant to Regulation SCI that is filed on Form SCI, as required by Rule 1006, will be treated as confidential, subject to applicable law, including amended Rule 24b–2.[1762] The information disseminated by SCI entities pursuant to Rule 1002(c) under Regulation SCI to their members or participants will not be confidential.

*G. Reduced Burden From Amendment of Rule 301(b)(6) (OMB Control Number 3235–0509)*

Adopted Regulation SCI amends Rule 301(b)(6) of Regulation ATS.[1763] Amendment of Rule 301(b)(6) would eliminate certain collection of information requirements within the meaning of the PRA, which the Commission had submitted to OMB in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11 and OMB had approved. The approved collection of information is titled ''Rule 301: Requirements for Alternative Trading Systems and Form ATS; ATS–R,'' and the OMB control number for this collection of information is 3235–0509.[1764]

Some of the information collection burdens imposed by Regulation ATS would be reduced by the amendment of Rule 301(b)(6). Specifically, the paperwork burdens that would be eliminated by the amendment of Rule

[1750] *See* Supporting Statement for the Paperwork Reduction Act Information Collection Submissions for Rule 17a–1, available at: *http://www.reginfo.gov.*

[1751] *See* Proposing Release, *supra* note 13, at 18154, n. 458.

[1752] 25 hours × 17 non-SRO SCI entities = 425 hours.

[1753] *See* Proposing Release, *supra* note 13, at 18154, n. 460. The Commission believes that this burden estimate includes the burden imposed by Rule 1007. Specifically, Rule 1007 provides that, if the records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity, the SCI entity would be required to ensure that the records are available for review by the Commission and its representatives by submitting a written undertaking, in a form acceptable to the Commission, by such service bureau or other recordkeeping service, which is signed by a duly authorized person at such service bureau or other recordkeeping service.

[1754] (170 hours + 25 hours) × 17 non-SRO SCI entities = 3,315 hours.

[1755] $900 × 17 non-SRO SCI entities = $15,300.

[1756] The Commission believes that SCI entities will comply with Rule 1005(c) by, for example, a contractual arrangement with a recordkeeping service.

[1757] 330,508 hours = 54,992 hours (policies and procedures, mandate participation in certain testing) + 257,237 (notification, dissemination, reporting) + 14,964 hours (corrective action, identification of certain systems and events, identification of material systems changes) + 3,315 hours (recordkeeping).

[1758] $9,325,500 = $3,544,000 (policies and procedures, mandate participation in certain testing) + $5,766,200 (notification, dissemination, reporting) + $15,300 (recordkeeping).

[1759] 287,722 hours = 24,942 hours (policies and procedures, mandate participation in certain testing) + 257,231 (notification, dissemination, reporting) + 5,124 hours (corrective action, identification of certain systems and events, identification of material systems changes) + 425 hours (recordkeeping).

[1760] $5,874,200 = $108,000 (mandate participation in certain testing) + $5,766,200 (notification, dissemination, reporting). One commenter noted that majority of the estimated paperwork burden in the SCI Proposal relate to notifications of SCI events, rather than the writing and maintenance of the policies and procedures. *See* NYSE Letter at 18. This commenter noted that creating and maintaining reasonable policies and procedure to seek to ensure that important market systems have adequate levels of capacity, integrity, resiliency, availability, and security should be the main focus of the regulation, not the reporting provisions. *See* NYSE Letter at 18. The Commission notes that the burden estimates in this section relate solely to the paperwork burden of compliance with Regulation SCI. The Commission discusses other costs associated with compliance with Regulation SCI in the Economic Analysis section below.

[1761] *See, e.g.,* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission); 5 U.S.C. 552 *et seq.*

[1762] *See, e.g.,* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission); 5 U.S.C. 552 *et seq. See also supra* Section IV.C.2 (discussing confidentiality treatment for Form SCI filings).

[1763] *See* 17 CFR 242.301(b)(6). *See also* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (''ATS Release''). In the SCI Proposal, the Commission proposed that Regulation SCI would replace and supersede Rule 301(b)(6) in its entirety. As discussed above, the Commission is now amending Rule 301(b)(6) to remove paragraphs (i)(A) and (i)(B) so that Rule 301(b)(6) will no longer apply to ATSs that trade NMS stocks and non-NMS stocks. However, as described above, the Commission has determined to exclude ATSs that trade only municipal securities or corporate debt securities from the scope of Regulation SCI, and such ATSs will remain subject to the requirements of Rule 301(b)(6) if they meet the volume thresholds therein. The Commission estimates that no ATS that trade only municipal securities or corporate debt securities currently meet the thresholds of Rule 301(b)(6).

[1764] *See* Rule 301: Requirements for Alternative Trading Systems and Form ATS; ATS–R, OMB Control No: 3235–0509 (Rule 301 supporting statement), available at: *http://www.reginfo.gov.* This approval has an expiration date of April 30, 2017.

301(b)(6) would be: (i) Burdens on ATSs that trade NMS stocks and non-NMS stocks associated with the requirement to make records relating to any steps taken to comply with systems capacity, integrity and security requirements under Rule 301(b)(6) (estimated to be 20 hours);[1765] and (ii) burdens on ATSs that trade NMS stocks and non-NMS stocks associated with the requirement to provide notices to the Commission to report systems outages (estimated to be 2.5 hours).[1766] The Commission received no comments regarding the reduced paperwork burdens from the proposal to repeal Rule 301(b)(6) of Regulation ATS.

## VI. Economic Analysis

### *A. Overview*

The Commission is sensitive to the economic effects, including the costs and benefits, of its rules. When engaging in rulemaking pursuant to the Exchange Act that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, Section 3(f) of the Exchange Act requires the Commission to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[1767] In addition, Section 23(a)(2) of the Exchange Act requires the Commission in making rules pursuant to the Exchange Act to consider the impact any such rule would have on competition. The Exchange Act 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.[1768]

In the SCI Proposal, the Commission solicited comment on the economic effects of the proposed rules, including any effects that the proposed rules may have on efficiency, competition, and capital formation. The Commission also solicited comment on its representation of current practices and its characterization of the relevant markets in which SCI entities participate. In addition, the Commission solicited comment on reasonable alternatives to the proposed rules and their economic effects. The Commission encouraged commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any economic effects.

The Commission received many comment letters that addressed the Commission's economic analysis of the proposed rules.[1769] As described further below, some commenters stated that the Commission underestimated the costs (including, for example, the proposed rules' potential to impact innovation and create barriers to entry) of compliance with Regulation SCI.[1770] Other commenters believed that the costs are justified by the benefits of the rules.[1771]

As discussed above in Section I, a confluence of factors has contributed to the Commission's determination that it is necessary and appropriate at this time to address the technological vulnerabilities, and improve Commission oversight, of the core technology of key U.S. securities markets entities, including national securities exchanges and associations, significant ATSs, clearing agencies, and plan processors. These considerations include: The evolution of the markets to become significantly more dependent on sophisticated, complex, and interconnected technology; the current successes and limitations of the ARP Inspection Program; the significant number of, and lessons learned from, recent systems issues at exchanges and other trading venues,[1772] including increased concerns over ''single points of failure'' in the securities markets; and the views of a wide variety of commenters received in response to the SCI Proposal.

Regulation SCI codifies, updates, and expands the existing ARP Inspection Program in an effort to further the goals of the national market system. Regulation SCI is intended to help to ensure the capacity, integrity, resiliency, availability, and security of the automated systems of entities important to the functioning of the U.S. securities markets. Regulation SCI is also intended to strengthen the U.S. securities market infrastructure and improve the resilience of the U.S. securities markets when technological issues arise. Moreover, Regulation SCI is intended to reinforce the requirement that SCI entities operate their systems in compliance with the Exchange Act and the rules and regulations thereunder.

As adopted, Regulation SCI will apply to SCI SROs (including national securities exchanges,[1773] national securities associations,[1774] registered clearing agencies, and the MSRB), SCI ATSs, plan processors, and certain exempt clearing agencies.[1775] As such, Regulation SCI covers the trading of NMS stocks, OTC equities, and listed options. As discussed below, Regulation SCI also will impact multiple markets for services, including the markets for trading services, listing services, regulation and surveillance services, clearance and settlement services, and market data.

### *B. Economic Baseline*

The Commission recognizes that any economic effects, including costs and benefits and effects on efficiency, competition, and capital formation,

[1765] The Commission estimated that two alternative trading systems that register as broker-dealers and comply with Regulation ATS would trigger this requirement, and that the average compliance burden for each response would be 10 hours of in-house professional work at $379 per hour. Thus, the total compliance burden per year was estimated to be 20 hours (2 respondents × 10 hours = 20 hours). *See* Rule 301: Requirements for Alternative Trading Systems OMB Control No: 3235–0509 (Rule 301 supporting statement), available at: *http://www.reginfo.gov.* As discussed above, the Commission is amending Rule 301(b)(6) so that it will no longer apply to ATSs that trade NMS stocks and non-NMS stocks. ATSs that trade only municipal securities or corporate debt securities will remain subject to the requirements of Rule 301(b)(6), but the Commission estimates that no such ATS currently meets the thresholds of Rule 301(b)(6).

[1766] The Commission estimated that two alternative trading systems that register as broker-dealers and comply with Regulation ATS would meet the volume thresholds that trigger systems outage notice obligations approximately 5 times a year, and that the average compliance burden for each response would be .25 hours of in-house professional work at $379 per hour. Thus, the total compliance burden per year was estimated to be 2.5 hours (2 respondents × 5 responses each × .25 hours = 2.5 hours). *See id.* As discussed above, the Commission is amending Rule 301(b)(6) so that it will no longer apply to ATSs that trade NMS stocks and non-NMS stocks. ATSs that trade only municipal securities or corporate debt securities will remain subject to the requirements of Rule 301(b)(6), but the Commission estimates that no such ATS currently meets the thresholds of Rule 301(b)(6).

[1767] 15 U.S.C. 78c(f).

[1768] 15 U.S.C. 78w(a)(2).

[1769] *See, e.g.,* Tellefsen Letter; Angel Letter; MSRB Letter; OCC Letter; BIDS Letter; ISE Letter; Leuchtkafer Letter; Better Markets Letter; CAST Letter; FINRA Letter; CISQ Letter; Fidelity Letter; CME Letter; Omgeo Letter; Lauer Letter; SIFMA Letter; SunGard Letter; NYSE Letter; BATS Letter; FIA PTG Letter; ITG Letter; KCG Letter; UBS Letter; Joint SROs Letter; and TMC Letter.

[1770] *See, e.g.,* BIDS Letter at 2–3; NYSE Letter at 2; UBS Letter at 5; and Omgeo Letter at 2.

[1771] *See, e.g.,* Lauer Letter at 7 (commenting that cost burden should not be an appropriate reason to omit an SCI entity and that, if the burden to ensure secure, stable systems is too high for an entity, that entity should not be allowed to be in a position to impact the market); and Better Markets Letter at 9–12 (commenting that the Commission's preeminent duty when promulgating rules is to protect investors and the public interest, and these goals should not be subordinate to industry concerns over the cost of regulation).

[1772] *See supra* note 15 and accompanying text.

[1773] Regulation SCI will not apply to an exchange that lists or trades security futures products that is notice-registered with the Commission as a national securities exchange pursuant to Section 6(g) of the Exchange Act, including security futures exchanges. *See supra* note 78 and accompanying text.

[1774] Regulation SCI will not apply to limited purpose national securities associations registered with the Commission pursuant to Section 15A(k) of the Exchange Act. *See supra* note 78 and accompanying text.

[1775] *See supra* Section IV.A.1 (discussing the definition of SCI entities).

should be compared to a baseline that accounts for current practices. The description of current practices below is based, among other things, on the Commission's understanding of the current practices under the ARP Inspection Program (including current practices influenced by staff guidance related to the ARP Inspection Program), the requirements under Regulation ATS, rules of SROs, information provided by commenters, and current practices and staff guidance related to systems compliance-related issues.

As noted above, all active registered clearing agencies, all registered national securities exchanges, FINRA, two plan processors, one ATS, and one exempt clearing agency currently participate in the ARP Inspection Program. Under the ARP Policy Statements and through the ARP Inspection Program, these entities, among other things, are expected to establish current and future capacity estimates; conduct capacity stress tests; and conduct annual reviews that cover significant elements of the operations of the automation process, including the capacity planning and testing process, contingency planning, systems development methodology, and vulnerability assessments. When conducting an ARP inspection, Commission staff also evaluates whether an ARP entity's controls over its information technology resources in nine general areas, or information technology ''domains,'' is consistent with ARP and industry guidelines.[1776] The ARP Policy Statements and staff letters also address, among other things, the reporting of certain systems changes, intrusions, and outages, and the need to comply with relevant laws and rules.[1777] Many participants in the ARP Inspection Program have developed current practices that to some extent overlap with the requirements of Regulation SCI. These practices are discussed in more detail throughout this economic analysis.

The ARP Policy Statements and the ARP Inspection Program address systems that directly support trading, clearance and settlement, order routing, and market data, which are a subset of the systems covered by Regulation SCI.[1778] Additionally, Commission staff currently inspects all the categories of systems that are included in the adopted definition of ''SCI systems'' to varying degrees.[1779] In general, the Commission believes that, to varying degrees, entities participating in the ARP Inspection Program establish current and future capacity estimates, conduct periodic capacity stress tests, and conduct an annual independent assessment of whether their automated systems can perform adequately at their estimated capacity levels and whether these systems have adequate protection against threats.[1780] Additionally, entities participating in the ARP Inspection Program provide to the Commission and its staff reports relating to system changes and reviews, as well as information regarding systems outages.

In addition, as discussed above, pursuant to Rule 301(b)(6) of Regulation ATS, certain aspects of the ARP Policy Statements apply to ATSs that meet the thresholds set forth in that rule.[1781] Currently, the Commission believes that only one ATS meets such thresholds and, thus, is required by Commission rule to implement systems safeguard measures. There is also one ATS that voluntarily participates in the ARP Inspection Program. Rule 301(b)(6) of Regulation ATS includes requirements that are similar to the requirements underlying the policies and procedures required by Rule 1001(a)(2) of Regulation SCI. Specifically, Rule 301(b)(6) under Regulation ATS requires relevant ATSs to establish certain capacity estimates, conduct periodic capacity stress tests of critical systems, develop and implement reasonable procedures to review and keep current systems development and testing methodology, review the vulnerability of their systems and data center computer operations to specified threats, establish adequate contingency and disaster recovery plans, conduct an independent review of its systems controls annually for ensuring that Rules 301(b)(6)(ii)(A)–(E) are met and conduct a review by senior management of a report of the independent review, and promptly notify the Commission of certain systems outages and systems changes. Rule 301(b)(6) of Regulation ATS, however, applies only to systems that support order entry, order routing, order execution, transaction reporting, and trade comparison,[1782] which is more targeted than the adopted definition of ''SCI system.''

The Commission recognizes that market participants that do not participate in the ARP Inspection Program and are not subject to Regulation ATS also take measures consistent with certain aspects of Regulation SCI to avoid systems disruptions, compliance issues, and intrusions. For example, the Commission believes that many market participants document systems events as prudent and standard business practice, even when the entity is not an ARP participant or does not report the incident as an ARP participant. Additionally, commenters provided information about their practices for maintaining suitable levels of systems capacity, integrity, resiliency, availability, and security. As discussed in Section IV.B.1, the Commission understands that some SCI entities are already following technology standards such as ISO 27000 and COBIT.[1783] One commenter also stated that NFPA–1600 or BS 25999 was useful for contingency planning.[1784] Commenters also provided less specific information on current practices that allow the Commission to gauge current practices. For example, one commenter stated that SCI entities commonly review a variety of different standards for frameworks or best practices, and then adopt a derivative of multiple standards, customizing them for the systems at issue.[1785] In addition, another commenter stated that the financial services industry currently uses processes for software development that are more ''nimble'' than the frameworks listed in Table A, such as the NIST publication under the Systems Development Methodology domain.[1786]

FINRA members, including ATSs, are also subject to FINRA rules that are generally related to certain aspects of Regulation SCI.[1787] For example, NASD

[1776] *See supra* Section II.A (discussing the ARP Policy Statements and Commission staff letters).

[1777] *See id.*

[1778] *See infra* note 1900 and accompanying text.

[1779] Commission staff inspects systems that are not directly related to trading, clearance and settlement, order routing, or market data if staff detects red flags. *See* Proposing Release, *supra* note 13, at 18158.

[1780] *See* ARP I Release and ARP II Release, *supra* note 1.

[1781] Specifically, Rule 301(b)(6) of Regulation ATS applies to ATSs that, during at least four of the preceding six months, had: (A) With respect to any NMS stock, 20 percent or more of the average daily volume reported by an effective transaction reporting plan; (B) with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume as calculated by the self-regulatory organization to which such transactions are reported; (C) with respect to municipal securities, 20 percent or more of the average daily volume traded in the United States; or (D) with respect to corporate debt securities, 20 percent or more of the average daily volume traded in the United States. *See* 17 CFR 242.301(b)(6)(i).

[1782] *See* 17 CFR 242.301(b)(6)(ii).

[1783] *See* text accompanying *supra* note 606.

[1784] *See* ISE Letter at 11.

[1785] *See* NYSE Letter at 20.

[1786] *See* BATS Letter at 6–7 (commenting that the NIST publication reflects a burdensome staged process to software development that favors the ''waterfall methodology'' over ''agile'' software development).

[1787] *See supra* note 115. As noted above, although these rules have some broad relation to certain

Rule 3010(b)(1) requires a member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations. However, this NASD rule does not specifically address compliance of the *systems* of FINRA members and does not cover more broadly policies and procedures relating to operational capability. Additionally, FINRA Rule 3130 requires a member's chief compliance officer to certify that the member has in place written policies and procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules, and federal securities laws and regulations. Again, this FINRA rule does not specifically address compliance of the *systems* of FINRA members and does not cover more broadly policies and procedures relating to operational capability. Further, FINRA Rule 4530 imposes a reporting regime for, among other things, compliance issues and other events where a member has concluded or should have reasonably concluded that a violation of securities or other enumerated law, rule, or regulation of any domestic or foreign regulatory body or SRO has occurred. However, the reporting requirements of FINRA Rule 4530 are different in several respects from the Commission notification requirements under Regulation SCI relating to systems compliance issues (*e.g.,* scope, timing, content, the recipient of the reports) and would not cover reporting of systems disruptions or systems intrusions that did not also involve a violation of a securities law, rule, or regulation. In addition, FINRA Rule 4370 generally requires that a member maintain a written continuity plan identifying procedures relating to an emergency or significant business disruption. However, as compared to adopted Rules 1001(a)(2)(v) and 1004, this FINRA rule does not include a requirement that the business continuity and disaster recovery plans be reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, nor does it require the functional and performance testing and coordination of industry or sector-testing of such plans.

Commenters addressed the Commission's consideration of current practices under the ARP Inspection Program as part of the baseline. According to a commenter, the ARP Inspection Program was implemented many years ago in a series of policy statements setting out guidance for voluntary compliance, and was supplemented with informal Commission staff guidance over the years, in many cases before the relevant systems existed.[1788] This commenter also noted that Regulation SCI is a mandatory regulation with a more expansive nature, differentiating the proposed regulation from the voluntary, targeted scope of the ARP Inspection Program.[1789] Some commenters believed that the Commission performed the economic analysis from a faulty premise by assuming that SCI entities that participate in the ARP Inspection Program have been in compliance with the voluntary standards and that the cost of compliance with Regulation SCI would merely be incremental as compared with the current baseline cost of voluntary compliance with the ARP regime.[1790] One commenter noted that there is no publicly available information on voluntary compliance under the ARP Inspection Program, and the Commission should calculate the actual cost based on its knowledge of the extent to which SCI entities currently participating in the ARP Inspection Program are actually in compliance with ARP, rather than simply assuming full compliance.[1791]

In response to these comments, the Commission believes that current practices under the ARP Inspection Program continue to be relevant in an economic assessment of Regulation SCI and the current baseline. In particular, as described in more detail throughout the economic analysis, based on comments and staff experience, the Commission believes that ARP entities have developed practices that to some extent overlap with the requirements of Regulation SCI. Accordingly, the Commission believes that, for some entities, the economic effects associated with compliance with Regulation SCI will be less significant as these entities will need to make incremental adjustments to their current practices to comply with many of the requirements.

The Commission recognizes that there is no publicly available information on voluntary compliance under the ARP Inspection Program. At the same time, the Commission and its staff have overseen the ARP Inspection Program for over two decades and notes that participants in the ARP Inspection Program generally follow the ARP Policy Statements. The Commission also notes that, in the ARP II Release, it stated that Commission staff and the SROs have discussed the independent review process, ''taking into account that the SROs already engage in testing and quality assurance reviews of new or modified systems, and that there are other significant controls in place to prevent, detect or correct problems in such areas as capacity planning, testing, systems development, vulnerability and contingency planning.'' [1792] The Commission is not assuming in the economic analysis that each SCI entity is fully in compliance with the ARP Inspection Program. Rather, the Commission's and its staff's experience informs the Commission's view regarding the range of existing practices of SCI entities. The Commission recognizes that some participants in the ARP Inspection Program may also have adopted practices that are not precisely in line with the standards articulated in the ARP Policy Statements and other Commission policy statements. As discussed throughout this economic analysis, the Commission has considered what the economic effects, including the costs and benefits of complying with Regulation SCI, will be for those entities that may not have practices consistent with the standards articulated in the ARP Policy Statements. For example, some SRO backup facilities may be less geographically dispersed from the primary facilities than articulated in the 2003 BCP Policy Statement.[1793] Further, some SROs may report systems issues or changes to the Commission in a manner different from what is articulated in the ARP Policy Statements and Commission staff letters. Instead of assuming full compliance with the ARP Inspection Program, throughout the economic analysis the Commission notes that some SCI entities that participate in the ARP Inspection Program have current

aspects of Regulation SCI, the Commission is not persuaded that the rules, even when taken together, are an appropriate substitute for the comprehensive approach in Regulation SCI with respect to technology systems and system issues. *See id.*

[1788] *See* NYSE Letter at 2, 6–7. This commenter noted that the ARP Inspection Program was never subject to Commission rulemaking, including notice and public comment, and a cost-benefit analysis. *See id.* at 6. This commenter further stated that if the Commission were to move forward with Regulation SCI, it should first engage in a detailed public analysis of the costs and benefits of the existing ARP Inspection Program. *See id.* at 2.

[1789] *See id.* at 6.

[1790] *See* ISE Letter at 11; and Joint SROs Letter at 18.

[1791] *See* ISE Letter at 11.

[1792] *See* ARP II, *supra* note 1, at 22491.

[1793] *See* 2003 BCP Policy Statement, *supra* note 504, at 56658.

practices that already satisfy some of the requirements of Regulation SCI and considers the details of those current practices when assessing the economic effects of the rules.

Finally, in using the ARP Inspection Program as a component of the baseline, the Commission also recognizes that Regulation SCI is more expansive than the ARP Inspection Program and has taken this fact into consideration throughout the economic analysis. For example, among other things, Regulation SCI includes more expansive requirements compared to the ARP Inspection Program for the establishment of policies and procedures regarding systems capacity, integrity, resiliency, availability, security, and compliance; and annual business continuity and disaster recovery plans testing. In addition, the Commission is aware that more entities will be subject to Regulation SCI than are currently participating in the ARP Inspection Program, including a higher number of ATSs. The Commission has considered these differences in the economic analysis.

The sections below describe in more detail the Commission's understanding of current practices related to areas covered by Regulation SCI, as informed by its experience with the ARP Inspection Program, the OCIE examination program, as well as by commenters. In particular, the sections below provide an overview of the frequency and the types of systems issues addressed by Regulation SCI (*i.e.,* systems disruptions, systems intrusions, and systems compliance issues) and current practices related to these events, as well as current practices related to business continuity and disaster recovery, and material systems changes notifications. Additionally, the sections below include a summary of the current competitive landscape in various markets for services related to Regulation SCI and why the markets for these services do not provide an adequate competitive incentive to prevent the occurrence of these market events and reduce the duration and severity when they occur.[1794] Details regarding the baseline for certain specific current practices relevant to specific provisions of Regulation SCI are discussed throughout the consideration of costs and benefits and the effect on efficiency, competition, and capital formation below.

1. SCI Events

a. Systems Disruptions and Intrusions

Currently, market participants use an array of preventive and corrective measures to avoid systems disruptions and to restore systems when disruptions occur, including escalation procedures to notify management of disruptions. The range of preventive and corrective measures varies among market participants and SCI entities, and also differs among the systems employed by SCI entities. For instance, clearing systems and order matching engines generally are given higher priority by SCI entities than other SCI entity systems.

Also, as noted by a commenter, exchanges, member firms, and ATSs conduct regular and ad hoc testing of mission critical systems for the introduction of new software releases, new features and functions, and systems upgrades, among other things.[1795] This commenter also noted that the internal IT staff of exchanges, ATSs, trading platform providers, and clearing houses conduct regular systems testing, regression testing, stress testing, and failover testing to ensure the availability, capacity, resilience, and readiness of newly introduced systems, applications, products, and system functions.[1796] However, industry practices are not codified as requirements for SCI entities and systems, except as may be the case in an entity's rulebook or subscriber agreement.

Market participants also employ a wide variety of measures to prevent and respond to systems intrusions, including escalation procedures to notify management of intrusions. Generally, market participants use measures such as firewalls to prevent systems intrusions, and use detection software to identify systems intrusions. Once an intrusion has been identified, the affected systems typically would be isolated and quarantined, and forensics would be performed.

While there have been instances in which SCI entities revealed systems issues (including disruptions and intrusions) to their members or participants and to the public in the past,[1797] there currently is no requirement applicable to SCI entities that includes the level of specificity in Regulation SCI for dissemination of information regarding systems disruptions and systems intrusions, as those terms are defined in Regulation SCI, to affected members or participants or to all members or participants of an SCI entity.

In 2013, entities that participated in the ARP Inspection Program, including at least one of each type of such participants (*i.e.,* national securities exchange, national securities association, registered clearing agency, plan processor, ATS, and exempt clearing agency), reported a total of approximately 357 systems disruptions to the Commission.[1798] These incidents had durations ranging from under one hour to well over several hours, with most incidents having a duration of less than three hours.[1799] The Commission has also tracked the percentage of market outages at SROs and electronic communications networks, which were self-reported to the Commission or identified by Commission staff, that were corrected within targeted timeframes. Specifically, in fiscal year 2013, 80% of outages were resolved within 2 hours, 86% were resolved within 4 hours, and 98% were resolved within 24 hours.[1800]

b. Systems Compliance Issues

Currently, systems compliance issues are not covered by the ARP Inspection Program. However, the Commission notes that all SROs are required to comply with the Exchange Act, the rules

[1794] Throughout this Economic Analysis, the general concept of a reduction of SCI events may refer to fewer events, shorter duration of events, and/or less severe events.

[1795] *See* Tellefsen Letter at 11.

[1796] *See id.*

[1797] One instance of a publicly reported systems intrusion at an SCI entity occurred in February 2011, when NASDAQ OMX Group, Inc. revealed that hackers had penetrated certain of its computer networks, though Nasdaq reported that at no point did this intrusion compromise Nasdaq's trading systems. *See* Proposing Release, *supra* note 13, at 18089. One commenter also stated that when systems issues arise that impact subscriber access, functionality, or security, each potential SCI entity informs its subscribers of the problem and the expected solution, and generally follows with a post mortem. According to this commenter, some entities provide this notice pursuant to a contract or general agreement with subscribers, while others do so in order to maintain and grow their subscriber base. *See* OTC Markets Letter at 19. *See also supra* Section II.B (describing recent events involving systems-related issues, which have been made public).

[1798] One commenter believes that ATSs have not contributed to the recent major systems issues that have impacted the market. *See* ITG letter at 4. However, as the Commission has noted, FINRA halted trading for over 3½ hours in all OTC equity securities due to a lack of availability of quotation information resulting from a connectivity issue experienced by OTC Markets Group Inc.'s OTC Link ATS. *See supra* note 33 and accompanying text.

[1799] The Commission acknowledges that the number of systems incidents reported to the Commission by entities that participated in the ARP Inspection Program represents the lower end of expected SCI events under Regulation SCI because the definition of ''SCI event'' is broader than the types of events covered by the current ARP Inspection Program. *See supra* Section V.D.2.a.

[1800] *See* U.S. Securities and Exchange Commission FY 2015 Annual Performance Plan, at 26 (March 7, 2014), available at: *http://www.sec.gov/about/reports/secfy15congbudgjust.pdf.*

and regulations thereunder, and their own rules and governing documents, as applicable,[1801] and securities information processors and ATSs are subject to similar requirements.[1802]

Further, SROs currently take steps to ensure that their systems' operations are consistent with the federal securities laws and rules and their own rules, and some SROs notify Commission staff of certain systems compliance issues.[1803] In particular, the Commission understands that SCI SROs generally have procedures to escalate a compliance issue upon discovery, to include legal and compliance personnel in the review of systems changes, and to periodically review rulebooks. However, although some SCI entities currently notify the Commission of certain systems compliance issues, the Commission does not receive comprehensive data regarding such issues.

Similar to systems disruptions and systems intrusions, while there have been instances in which SCI entities revealed systems compliance-related issues to their members or participants and to the public in the past,[1804] there currently is no requirement applicable to SCI entities that includes the level of specificity in Regulation SCI for dissemination of information regarding systems compliance issues, as that term is defined in Regulation SCI, to affected members or participants, or to all members or participants of an SCI entity.

In the SCI Proposal, based on Commission staff's experience with SROs and the rule filing process, the Commission estimated that there are likely approximately seven systems compliance issues per SCI entity per year. No commenter provided additional information regarding the frequency of systems compliance issues. However, Commission staff received notifications indicating that certain SROs experienced an average of 17 systems compliance-related issues in 2013. The Commission believes that its staff received notification of a larger number of systems compliance issues in 2013 for a variety of reasons, including the proposal of Regulation SCI, recent Commission enforcement actions relating to systems compliance issues, as well as related press reports, all of which the Commission believes increased attention on systems compliance issues.[1805]

2. Business Continuity and Disaster Recovery

The Commission recognizes that SCI entities already have business continuity and disaster recovery plans. For example, nearly all national securities exchanges already have backup facilities that do not rely on the same infrastructure components as those used by their primary facility.[1806] Additionally, most participants in the ARP Inspection Program have strived to adhere to the recovery timeframes in the Interagency White Paper and the 2003 BCP Policy Statement.[1807] Some SCI entities also already require some of their members or participants to connect to their backup systems.[1808] Further, some SCI entities already provide their members or participants with the opportunity to test the SCI entity's business continuity and disaster recovery plans, including its backup systems.[1809] However, because participation in BC/DR testing, including backup systems, is not always required by SCI entities, the Commission understands that not all market participants participate in testing.[1810] In addition, based on the discussions between Commission staff and market participants in the months following Superstorm Sandy, the Commission understands that many market participants had previously engaged in connectivity testing with backup facilities, and yet remained uncomfortable about switching to the use of backup facilities in advance of the storm.

Commenters also provided information regarding current practices surrounding business continuity and disaster recovery. One commenter noted that the major equity and options exchanges and numerous ATSs already regularly augment IT testing with other business continuity management exercises (*e.g.,* they conduct annual business continuity and disaster recovery plan updates, building evacuation drills, and business disruption scenario planning workshops).[1811] This commenter also noted that all of the U.S. exchanges and clearinghouses have participated in the planning and execution of the annual disaster recovery test initiative conducted and coordinated by the FIA and SIFMA.[1812] This commenter noted that, in 2012, for example, the annual FIA industry test involved 18 exchanges and clearinghouses, 68 futures commission merchants, and 46 trading participant firms.[1813] This commenter also noted that the exchanges reported that the firms engaged in testing represented approximately 80% of their clearing members and that these firms reflected approximately 85% of the exchanges' 2012 volumes.[1814]

3. Material Systems Changes Notifications

Many entities that participate in the ARP Inspection Program already voluntarily provide material systems change notifications to the Commission on an annual and ad hoc basis. In particular, the ARP II Release stated that SROs should notify Commission staff of significant additions, deletions, or other changes to their automated systems.[1815] Moreover, in the 2001 Staff ARP Interpretive Letter, Commission staff provided guidance to ARP entities on how they should report planned systems changes to the Commission.[1816] In addition, Rule 301(b)(6) under Regulation ATS requires that ATSs that meet the thresholds in that rule notify Commission staff of significant systems changes,[1817] and Rule 301(b)(2) under Regulation ATS requires each ATS that is subject to Rule 301, regardless of activity level, to file an amendment on Form ATS at least 20 days prior to implementing a material change to the operation of the ATS.[1818]

[1801] *See, e.g.,* 15 U.S.C. 78s(g) (requiring each SRO to comply with the Exchange Act, the rules and regulations thereunder, and its own rules).

[1802] *See, e.g.,* 15 U.S.C. 78k–1(b)(6); 15 U.S.C. 78k–1(c)(1); and FINRA Rule 3130. Moreover, ATSs are registered broker-dealers and may be subject to Commission sanctions if they fail to comply with relevant federal securities laws and rules and regulations thereunder.

[1803] *See* Proposing Release, *supra* note 13, at 18087, n. 36. As part of the Commission's oversight of SROs, OCIE reviews systems compliance issues reported to Commission staff.

[1804] *See supra* Section II.B (describing recent events involving systems-related issues, which have been made public).

[1805] *See id.*

[1806] *See, e.g.,* CBOE Regulatory Circular RG14–001 (Back-Up Data Center Test on January 25, 2014).

[1807] *See supra* note 504 and accompanying text.

[1808] *See, e.g.,* CBOE Regulatory Circular RG13–110 (Connectivity to the CBOE Back-Up Data Center). *See also* Proposing Release, *supra* note 13, at n. 641.

[1809] For example, SIFMA organizes industry-wide business continuity tests. *See* Industry Testing, *http://www.sifma.org/services/bcp/industry-testing/*.

[1810] *See, e.g.,* Angel Letter at 9–10.

[1811] *See* Tellefsen Letter at 7.

[1812] *See id.*

[1813] *See id.* at 8.

[1814] *See id. See also* CME Letter at 12.

[1815] *See* ARP II Release, *supra* note 1, at 22491.

[1816] *See supra* note 21 and accompanying text. The 2001 Staff ARP Interpretive Letter provided guidance on what Commission staff considers significant systems changes to include.

[1817] 17 CFR 242.301(b)(6)(ii)(G).

[1818] 17 CFR 242.301(b)(2)(ii) (requiring an amendment to Form ATS not solely for material systems changes, but also for any material change to the operation of an ATS).

4. Potential for Market Solutions

The current competitive landscape in various markets for services related to Regulation SCI affect current incentives to prevent the occurrence of SCI events in these markets.[1819] The Commission outlined and examined this competitive landscape and potential for market solutions to reduce SCI events and their shortcomings in the SCI Proposal.[1820] In particular, the Commission evaluated current limitations to competition and potential market solutions in the markets for trading services, listing services, regulatory services, clearance and settlement services, and market data.

The discussion below responds to comments received regarding the Commission's discussion of the potential for market solutions in the markets for trading services and market data. The Commission did not receive specific comments regarding its analysis of the markets for listing services, regulatory services, and clearance and settlement services. Therefore, the Commission believes that its analysis of these markets in the SCI Proposal continues to apply. Specifically, the Commission believes that, while the market for listing services provides some discipline, it has limitations related to a disconnect between trading location and listing market (*i.e.,* while a company can be listed on a certain exchange, trading does not necessarily occur on that exchange), to switching costs if an issuer wishes to change its listing exchange, and to market power deriving from the ''prestige'' of a listing exchange.[1821] Further, the Commission believes that the market for regulatory and surveillance services is concentrated in a few competitors and that the market for clearance and settlement services is currently characterized by specialization and limited competition.[1822]

The Commission has considered the views of commenters and the Commission's analysis of markets not addressed by commenters, and continues to believe that market forces alone are insufficient to significantly reduce SCI events in the markets that it evaluated and that a regulatory solution is needed. In particular, the Commission continues to believe that SCI entities do not fully internalize the costs associated with systems issues, SCI events pose significant negative externalities on the market—*i.e.,* systems issues have ramifications on the securities markets beyond the impact on the entity responsible for the systems issues—and, as discussed above, significant technology issues continue to occur in the absence of regulation.

Some commenters broadly addressed the potential for market solutions evaluated in the SCI Proposal. According to one commenter, SCI entities (*e.g.,* ATSs) are highly motivated to provide uninterrupted order matching services for economic reasons.[1823] On the other hand, another commenter noted that, as indicated by the 2008 financial crisis and the technology incidents over the past few years, market participants do not have the right economic incentives to protect themselves.[1824] Another commenter stated that, in the past, ''disruptive or deviant behavior in the markets was disciplined not just by regulators but also by trading crowds,'' but anonymity and fully automated price/time matching made it impossible for the trading crowd to attribute and sanction disruptive behavior.[1825] This commenter also noted that market incentives can drive the industry in the opposite direction (*i.e.,* short-term market incentives can drive the industry to minimize risk controls).[1826] According to this commenter, the only practical source of discipline left is government regulation.[1827]

The Commission believes that all SCI entities have some incentives to maintain robust systems in order to maximize long-term revenue. However, as evidenced by the various systems issues that have occurred prior to and since publication of the SCI Proposal, economic motivations alone have not been sufficient to significantly reduce systems issues.[1828] In addition, although SCI entities may suffer an economic and reputational burden if a systems issue becomes apparent to the trading community or the public, the Commission believes that SCI entities are not sufficiently incentivized to improve the robustness of these systems to prevent systems issues, as described in more detail below.[1829] Further, SCI entities may fail to internalize the risk of catastrophic failure associated with systems issues.

As noted above, systems issues have ramifications on the securities markets beyond the impact on the entity responsible for or experiencing the systems issues (an ''economic externality''). That is, a systems issue not only affects the entity responsible for the issue, but also directly affects other entities that use that entity. Often, when an SCI entity experiences a systems issue, all market participants that use that entity incur costs. For example, if market data systems fail, it affects anyone requiring such market data to make informed decisions. Also, when a matching engine fails, securities cannot be traded via that functionality. As discussed in greater detail below, the failure of a trading system not only forces the venue to forgo revenue, but also can diminish trading in financial instruments during the disruption. Additionally, the failure of a trading system can impose costs on market participants that have optimized their strategy so that trading costs are minimized. If the strategy of these market participants assumes that all trading venues are fully operational, then the failure of a trading system could impose additional transaction costs. The Commission believes that, in part because the costs of such externalities are not fully borne by SCI entities in the form of lost business, market forces alone are insufficient to significantly reduce SCI events.

Market for Trading Services

In the proposing release, the Commission identified many competitors in the market for trading services, including equities exchanges, options exchanges, ATSs, OTC market makers, and broker-dealers.[1830] Competitors for listed-equity (NMS)

[1819] This section evaluates competition as it currently exists. The Commission analyzes the economic effects of Regulation SCI, including potential effects on competition, in Section VI.C.

[1820] *See* Proposing Release, *supra* note 13, at 18159–61.

[1821] *See id.* at 18160.

[1822] *See id.* at 18160–61.

[1823] *See* ITG Letter at 4 (stating also that sponsors of ATSs have a ''compelling business incentive to avoid systems issues''). *See also* Angel Letter at 5–6 (commenting that firms have sufficient motivation to take every precaution against catastrophic failures, although the interaction between firms may result in a catastrophic event).

[1824] *See* Lauer Letter at 3–4.

[1825] *See* Leuchtkafer Letter at 1–2.

[1826] *See id.* at 6. This commenter stated that it is far cheaper for firms to implement new trading strategies ''in a matter of minutes'' than it is for them to rigorously test a new strategy before deployment, and that it is more profitable for firms to skimp on risk controls because controls take time. *See id.* Further, this commenter noted that the exchanges know, or should know, who ''misbehaves,'' but they are tangled in mixed incentives of their own, dependent on firms for the next quarter's profits and, at the same time, expected to moderate the firms' behavior. *See id.*

[1827] *See id.* at 6–7.

[1828] *See supra* Section II.B (discussing recent events involving systems-related issues).

[1829] As noted above, the Commission acknowledges that the nature of technology and the level of sophistication and automation of current market systems prevent any measure, regulatory or otherwise, from completely eliminating all systems disruptions, intrusions, or other systems issues. *See supra* Section III.

[1830] *See* Proposing Release, *supra* note 13, at 18159.

trading services include 11 national securities exchanges, none having an overall market share of 20 percent,[1831] 44 ATSs, which account for 18% of dollar volume, and several hundred OTC market makers and broker-dealers, which account for 15.8% of dollar volume.[1832] In the SCI Proposal, the Commission recognized that all providers of trading services compete and have incentives to avoid systems disruptions, systems compliance issues, and systems intrusions because, for example, brokers and other entities will be inclined to route orders away from trading venues that have frequent systems problems. However, the Commission noted several limitations on competition, including market participants misjudging the quality of trading services because of incomplete information regarding SCI events and the limited number of competitors (in some cases only one competitor) that may offer trading services in a particular product.[1833]

With respect to the market for trading services, one commenter stated that the current competitive market for trading services provides sufficient redundancies that make a disruption at any particular service provider minor.[1834] Another commenter noted that exchanges compete vigorously with one another and against broker-dealer execution platforms and cannot afford to develop a reputation for technology problems.[1835] This commenter also noted that the incidence of self-help declarations [1836] has been reduced, which reflects technology enhancements by exchanges that are a direct result of the competitive environment in which exchanges operate.[1837] Similarly, another commenter stated that, apart from any regulatory standards, no organization has a greater stake in assuring the effective operation of its systems than the owners and operators of the entities that participate in the market structure.[1838] Moreover, one commenter stated that ATSs already have incentives to avoid any systems disruptions for competitive reasons and also perform numerous tests and employ best practices.[1839]

Again, the Commission acknowledges that all providers of trading services compete and have some incentives to avoid systems issues. However, the Commission continues to believe that there are limits to the extent to which competition mitigates systems problems associated with trading services because providers of trading services compete on a variety of measures—for example, providing the best prices, deep quotes, and fast executions—not just the quality of their systems. As a result, an issue with trading systems might not significantly harm the SCI entity that experienced the issue. Additionally, competition in the market for trading services may also not sufficiently mitigate the occurrence and effects of SCI events because market participants may lack information about SCI events. The Commission believes that it is important for affected SCI entity members or participants and, in some cases, all members or participants of an SCI entity, to know about SCI events at a particular service provider.[1840] Moreover, even in markets where significant competition exists—such as the market for trading NMS securities, which has many competitors including exchanges and ATSs—entities that experience significant outages may temporarily lose market share, but may quickly regain the lost market share.[1841] The Commission believes that this further suggests that competition alone will not significantly reduce systems issues.

In addition, some entities that face little competition in one security may impose significant externalities on the market with little competitive recourse. For example, even though there may be multiple trading venues for the majority of securities, trading service providers may have limited means to transact in particular securities (*e.g.,* certain index options exclusively traded on one options exchange) and thus, if systems issues persist at certain venues, brokers, investors, and other entities will not be able to trade the security until the venue that lists the security recovers. In this particular case, not only does the venue lose revenue from forgone volume, but market participants also incur costs because they are not able to trade the security. As a result, the Commission believes that competition alone in the market for trading services is not sufficient to reduce SCI events at entities providing these services.

As mentioned by one commenter,[1842] competitive forces among trading venues may also lead to ''underinvestment and cutting corners.'' For example, the incentive to migrate software from testing to the production environment to improve trading services (and thereby the entity's profitability) may promote an environment where software that has not been adequately tested is launched into production, thus increasing the potential for systems issues to develop.

Market for Market Data

One commenter stated that Regulation SCI, as applied to market data, is unnecessary and will have ''zero benefits'' because the revenue from the sale of market data is an important revenue source for an SRO.[1843] Therefore, according to this commenter, SROs already have the right incentives to successfully collect, process, and disseminate market data.[1844]

As noted above, the Commission has, on numerous occasions, emphasized the importance of market data, including the consolidated data feed.[1845] The Commission believes that consolidated market data is an important part of the investment and trading process as it helps market participants to make well-informed investment and trading decisions, and also helps investors to monitor the quality of execution of orders by their brokers. In addition,

[1831] *See supra* note 106 and accompanying text.

[1832] Calculated by Commission staff using market volume statistics reported by BATS and data from Form ATS–R for the second quarter of 2014. *See supra* notes 106 and 150. In 2012, 255 OTC market makers and broker-dealers accounted for 17% of volume. *See* DERA staff white papers, ''Alternative Trading Systems: Description of ATS Trading in National Market System Stocks'' by Laura Tuttle (*http://www.sec.gov/marketstructure/research/alternative-trading-systems-march-2014.pdf*) and ''OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks'' by Laura Tuttle (*http://www.sec.gov/marketstructure/research/otc_trading_march_2014.pdf*).

[1833] For example, a number of listed options and NMS stocks trade on only one venue.

[1834] *See* KCG Letter at 6–8.

[1835] *See* BATS Letter at 2.

[1836] Rule 611(b) under Regulation NMS provides a number of exceptions from the general requirement to prevent trade-throughs of protected quotations. In particular, Rule 611(b)(1) provides the ''self-help'' exception, which applies when the ''transaction that constituted the trade-through was effected when the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment.'' *See* 17 CFR 242.611(b)(1).

[1837] *See* BATS Letter at 2–3.

[1838] *See* BIDS Letter at 2.

[1839] *See* ITG Letter at 4.

[1840] *See supra* Section VI.B.1 (discussing current practices of SCI entities regarding dissemination of information on systems-related issues).

[1841] For example, on November 12, 2012, the NYSE experienced a failure in a matching engine that forced it to stop trading 216 stocks. *See* NYSE Market Status Alert, *http://markets.nyx.com/nyse/market-status/view/11558.* The NYSE lost market share on the day of the outage but regained its market share the next day. *See generally http://www.batstrading.com/market_summary/* (compiling data on market share).

[1842] *See* Lauer Letter at 4 (stating that ''[e]very firm in every industry is constantly balancing the cost of safety with scarcity of resources . . . [and t]he Commission's job in this regard is to compel these firms to act in their own long-term interests, and the interests of the public at-large, rather than any short-term interests that may be better served by underinvestment and cutting corners'').

[1843] *See* Angel Letter at 18–19.

[1844] *See id.*

[1845] *See supra* note 249 and accompanying text.

exchanges rely on accurate consolidated market data for many of their real-time functions. Even though demand is great, a total of only two SIPs collect, process, and distribute consolidated market data in NMS securities, and only a single SIP collects, processes, and distributes consolidated market data for any given security. Further, other providers of market data in markets other than NMS securities (*e.g.,* municipal securities) may also be the sole providers of their data. Therefore, the Commission believes that the market data consolidators are not subject to significant competitive market forces. Further, because the demand for market data from the SIPs is inelastic,[1846] there is little incentive to improve reliability as few alternatives exist. Thus, the Commission believes that competition alone is not sufficient to reduce SCI events for market data consolidators. Because an SCI event in connection with market data can significantly disrupt markets, the Commission believes that regulation is needed and, as discussed below, will provide significant benefits.[1847]

*C. Consideration of Costs and Benefits and the Effect on Efficiency, Competition, and Capital Formation*

1. Broad Economic Considerations

The Commission has considered the economic effects of Regulation SCI as a whole as well as the specific effect of each rule. This section provides an overview of the broad economic considerations relevant to Regulation SCI and the economic effects, including the costs, benefits, and effects on efficiency, competition, and capital formation that are attributable to Regulation SCI as a whole. Additional economic effects, including benefits and costs, related to specific requirements in Regulation SCI and reasonable alternatives are discussed in Section VI.C.2 below.

The Commission has attempted, where possible, to quantify the benefits and costs anticipated to flow from Regulation SCI. The Commission notes, however, that many of the costs and benefits of Regulation SCI are difficult to quantify with any degree of certainty, especially as the current practices of market participants vary and are expected to evolve and adapt to changes in technology and market developments. For example, in some cases, quantification depends heavily on factors outside of the control of the Commission, particularly because Regulation SCI provides flexibility to an SCI entity to tailor its policies and procedures to the nature of its business, technology, and the relative criticality of each of its SCI systems. Additionally, in some cases, the Commission is unable to quantify the benefits and costs associated with Regulation SCI because the Commission lacks the information necessary to provide a reasonable estimate. For example, the Commission does not have sufficient information upon which to base an estimate of all costs associated with the various specific systems changes that may be required as the result of Regulation SCI. Accordingly, much of the discussion of economic effects is qualitative in nature but, again, where possible, the Commission has provided quantified information.

a. Benefits

The Commission believes that the adoption of, and compliance by SCI entities with Regulation SCI, will further the goals of the national market system as a result of each SCI entity establishing, maintaining, and enforcing written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. In this respect, Regulation SCI will promote the capacity, integrity, resiliency, availability, and security of the automated systems of entities important to the functioning of the U.S. securities markets, as well as reinforce the requirement that such systems operate in compliance with the Exchange Act and rules and regulations thereunder, thus strengthening the infrastructure of the U.S. securities markets and improving their resilience when technological issues arise. Regulation SCI also establishes an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems. Although the Commission acknowledges that Regulation SCI likely will not eliminate all systems issues, the Commission believes that Regulation SCI will change and strengthen the practices of SCI entities, and should result in a number of benefits, including those summarized below.[1848]

The Commission believes that adopting Regulation SCI will result in fewer market disruptions due to systems issues, which could lead to fewer interruptions in the price discovery process [1849] and liquidity flows and, thus, may result in fewer periods with pricing inefficiencies. Specifically, the Commission believes that Regulation SCI would improve systems up-time for SCI entities and also would promote more robust systems that directly support execution facilities, order matching, and the dissemination of market data. Systems issues that directly inhibit execution facilities, order matching, and dissemination of market data could cause slow executions and result in delaying the incorporation of information into prices, and thus could harm price efficiency and price discovery. System issues could also result in unfilled orders, depriving traders of an execution. The Commission believes that Regulation SCI would reduce the frequency, severity, and duration of such effects resulting from systems issues. Moreover, decreasing the number of trading interruptions could improve price discovery and liquidity because interruptions in trading interfere with the process in which relevant information gets incorporated into security prices and, thus, temporarily disrupt liquidity flows and lower the quality of the price discovery process. Further, because interruptions in liquidity flows and the price discovery process in one security can affect securities trading in other markets, reducing trading interruptions could have broad effects. For example, an interruption in the market for securities that underlie derivative securities (*e.g.,* index options and futures) would harm the price discovery process for those products and potentially restrict liquidity flows between the stock market and the derivative markets.

The Commission also believes that Regulation SCI has the potential to reduce widespread SCI events. Given

[1846] Demand is inelastic when demand does not diminish as price increases.

[1847] For example, as discussed above, on August 22, 2013, Nasdaq halted trading in all Nasdaq-listed securities for more than three hours after the Nasdaq SIP, the single source of consolidated market data for Nasdaq-listed securities, became unable to process quotes from exchanges for dissemination to the public. *See supra* note 32 and accompanying text.

[1848] As noted above, in the SCI Proposal, the Commission encouraged commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding benefits. The Commission notes that it is unable to quantify the benefits associated with Regulation SCI as a whole because quantitative data regarding each of the benefits is not readily available to the Commission, and commenters did not provide sufficient quantitative data to allow the Commission to do so.

[1849] The price discovery process involves trading—buyers and sellers arriving at a transaction price for a specific asset at a given time. Thus, generally, any trading interruptions would interfere with the price discovery process.

the speed and interconnected nature of the U.S. securities markets, a seemingly minor systems problem at a single entity can quickly create losses and liability for market participants, and spread rapidly across the national market system, potentially creating widespread damage and harm to market participants, including investors. By reducing systems issues, Regulation SCI also has the potential to decrease the risk of these catastrophic events.

In addition, other benefits may derive from the additional information provided to the Commission and to members or participants of an SCI entity resulting from Regulation SCI. In particular, the information provided to the Commission should enhance the Commission's review and oversight of U.S. securities market infrastructure and foster cooperation between the Commission and SCI entities in responding to SCI events. Also, as noted in Section IV.B.3.c, the Commission believes that the aggregated data that will result from the reporting of SCI events will enhance its ability to comprehensively analyze the nature and types of various SCI events and identify more effectively areas of persistent or recurring problems across the systems of all SCI entities. Moreover, as discussed in Section IV.A.3, the Commission notification requirements for SCI events will help to focus the Commission's and SCI entities' resources on the more significant SCI events, as the Commission has determined to distinguish the timing of its receipt of information regarding SCI events based on their impact, with SCI events estimated to have a greater impact being subject to ''immediate'' Commission notification, and SCI events having no or a de minimis impact being subject to recordkeeping obligations, and for de minimis systems disruptions and de minimis systems intrusions, a quarterly summary notification. Moreover, the increased dissemination of information about SCI events to SCI entity members or participants could reduce search costs for market participants when they are gathering information to make a decision with respect to the use of an entity's services. As discussed more thoroughly below, by lowering search costs, the information dissemination requirement could provide SCI entities additional competitive incentives to ensure and maintain robust policies and procedures to promote systems capacity, integrity, resiliency, availability, security and compliance.

Some commenters addressed how the availability of Commission resources may affect the benefits and costs of Regulation SCI. One commenter argued that Regulation SCI would result in misallocation of Commission resources.[1850] This commenter stated that it is likely that Regulation SCI would not reduce in a material manner the occurrence of systems issues at SCI entities, and Commission staff resources would be better devoted to working with the industry to develop best practices (not legal requirements) for all regulated entities in the areas of systems capacity, security, and integrity.[1851] Similarly, one commenter noted that unless the Commission and Congress devote sufficient resources to hiring enough skilled technical staff, Regulation SCI will devolve into a paperwork exercise with little added benefit to the markets.[1852] Another commenter stated that there is insufficient evidence regarding the resources and capacity of Commission staff to assess and analyze the data required to be provided under Regulation SCI.[1853] This commenter urged the Commission to consider its resources as the Commission accommodates new initiatives.[1854]

As described throughout this release, the Commission believes that Regulation SCI will have significant benefits and that a regulatory solution is necessary because market forces alone are insufficient to significantly reduce SCI events in the relevant markets. The Commission has significant experience with the ARP Inspection Program, and thus has developed expertise in this area that it will apply to implementing and monitoring compliance with Regulation SCI. In light of this experience, the Commission believes that it can devote sufficient resources to carry out its obligations associated with Regulation SCI so that the benefits of Regulation SCI can be realized.

b. Costs

Some of the costs associated with Regulation SCI are compliance costs. Compliance costs include, for example, documentation and mandatory reporting and dissemination of SCI events, and reports that include material systems changes. SCI entities will also incur costs in complying with the SCI review requirement, as well as in implementing the policies and procedures related to systems capacity, integrity, resiliency, availability, security, and compliance. Moreover, SCI entities will incur costs related to recordkeeping. Additional costs will also result from member/participant participation in the testing of SCI entity business continuity and disaster recovery plans. Also, market participants (including institutional and retail investors) in the securities markets may face increased transaction costs from SCI entities, to the extent that increased compliance costs are passed on to market participants.

Many, but not all, of the quantifiable costs of Regulation SCI involve a collection of information, and these costs and burdens are discussed in the Paperwork Reduction Act section of this release.[1855] When the PRA burdens are monetized, the estimated paperwork related compliance burdens for SCI entities as a result of Regulation SCI total approximately $117 million initially and approximately $100 million annually.[1856] The Commission notes that the monetized PRA burdens have increased from those contained in the SCI Proposal. Although many of the adopted rules are more targeted and impose fewer requirements on SCI entities than the proposed rules, the monetized PRA burdens have changed in part due to modifications made to the PRA estimates as a result of recommendations from commenters, revisions to the rule text, and the revised estimate of the number of SCI events, which resulted from incorporating the Commission's review of the number of systems compliance-related issues and ARP incidents reported to Commission staff in 2013.

In addition, the Commission has quantified non-paperwork related costs for SCI entities that total between approximately $14 million [1857] and $106 million [1858] in initial costs and between

[1850] *See* ITG Letter at 6–7. This commenter noted that Commission staff resources used to oversee Regulation SCI compliance would dwarf those used for the ARP Inspection Program and that Commission staff would have to analyze and act upon notifications from SCI entities, including systems change notifications. *See id.* This commenter also noted that substantial examination resources from the Commission and FINRA would be assigned to Regulation SCI oversight. *See id.* Similarly, another commenter noted that proposed Regulation SCI would result in a dramatic increase in the number of Commission notifications and would require substantial resources for Commission staff to process them in a responsible fashion. *See* Omgeo Letter at 8, n. 14.

[1851] *See* ITG Letter at 7.

[1852] *See* Angel Letter at 2.

[1853] *See* SunGard Letter at 2.

[1854] *See id.* at 5.

[1855] *See supra* Section V. The Commission provides below quantified estimates of other costs imposed by Regulation SCI beyond the PRA burdens, to the extent the Commission can quantify such costs.

[1856] The monetized PRA cost reflects the paperwork cost estimated for all of Regulation SCI, as discussed in Section V.

[1857] *See infra* note 1943 (estimating cost for complying with the policies and procedures required by Rules 1001(a) and (b)).

[1858] *See infra* note 1944 (estimating cost for complying with the policies and procedures required by Rules 1001(a) and (b)).

$9 million [1859] and $70 million [1860] in annual ongoing costs. In addition to the costs to SCI entities, the Commission also estimates the total connectivity costs to members or participants of SCI entities associated with the testing of business continuity and disaster recovery plans to be $18 million annually.[1861] Thus, the Commission estimates total quantified costs for SCI entities and members or participants of SCI entities to be between approximately $149 million [1862] and $241 million [1863] in initial costs and between $127 million [1864] and $188 million [1865] in annual ongoing costs.

Several commenters provided broad comments regarding the costs of proposed Regulation SCI.[1866] According to one commenter, Regulation SCI as proposed is ''too universal in its application, too ambitious in its scope and too costly in its implementation to achieve the hoped for reduction in risk to the markets without simultaneously diminishing other important SEC accomplishments, such as increased competition, improved innovation, increased consumer choice, lower barriers to entry into the industry and reduced transaction costs to the customer.'' [1867] Another commenter noted that proposed Regulation SCI would impose an unreasonably burdensome technology and controls standard on automated systems of SCI entities, which could lead to allocative inefficiencies in the marketplace and therefore have a stifling effect on innovation in the U.S. equity markets.[1868] Another commenter stated that the ultimate result of proposed Regulation SCI will be to limit or suppress the execution choice of buy-side investors, meaning investors will have less ability to effectively manage their trading strategies and diminished opportunities to seek better execution, lower transaction costs, and achieve price improvement and investment performance.[1869]

As discussed throughout this release, the Commission believes that Regulation SCI will change and strengthen the practices of SCI entities, and should result in a number of benefits. Further, the Commission believes that these benefits should result without diminishing the Commission's accomplishments in other areas, stifling innovation, or suppressing the execution choice of investors. In particular, although costs associated with Regulation SCI could adversely impact competition and increase barriers to entry, the Commission believes that the adverse effect on competition and heightened barriers for SCI entities that provide venues for trading, including ATSs and exchanges, would be mitigated and therefore the Commission does not expect that investor choice on trading venues would be significantly limited.[1870] The Commission also believes that any such effects would be warranted in light of the expected benefits of Regulation SCI. Additionally, as discussed below, the dissemination of information regarding certain major SCI events to all members or participants of an SCI entity can promote competitive incentives to prevent systems issues. The Commission also believes that the reduction in systems issues resulting from Regulation SCI could result in fewer interruptions in the price discovery process and liquidity flows and thus result in fewer periods with pricing inefficiencies. Furthermore, Regulation SCI could improve system uptime for SCI entities, and therefore reduce latency as market participants will not be forced to reroute orders or change execution strategies associated with situations in which an SCI entity is not operational.

Moreover, the Commission notes that it has revised the proposed rules after considering the comments received. The Commission believes that many of the revisions to the proposed rules would reduce burdens on SCI entities and significantly address commenters' concerns regarding potential negative effects on allocative inefficiency and innovation. For example, because the Commission is adopting a quarterly reporting requirement for material systems changes instead of the proposed 30-day advance notification requirement, adopted Regulation SCI would impose lower burdens on SCI entities compared to the proposal and allow SCI entities more flexibility when they implement material systems changes.[1871]

c. Effects on Efficiency, Competition, and Capital Formation

Along with the effects on efficiency, competition, and capital formation discussed below with regard to specific provisions of Regulation SCI, the Commission believes that Regulation SCI as a whole could affect efficiency, competition, and capital formation in several ways.

By increasing the robustness of SCI systems and indirect SCI systems of SCI entities, Regulation SCI may improve efficiency—in particular, price efficiency—and the improvement in pricing efficiency could promote capital formation. In particular, as discussed in VI.C.1, disruptions to SCI systems and the resulting trading interruptions can degrade pricing efficiency, price discovery, and liquidity. Regulation SCI may reduce the frequency, severity, and duration of market disruptions (*e.g.,* trading interruptions) that may otherwise prevent market participants from impounding information into security prices through market activity (*e.g.,* order submission) and, thus,

[1859] *See infra* note 1945 (estimating cost for complying with the policies and procedures required by Rule 1001(a) and (b)).

[1860] *See infra* note 1946 (estimating cost for complying with the policies and procedures required by Rule 1001(a) and (b)).

[1861] *See infra* note 2065.

[1862] $149 million = $117 million (PRA cost) + $14 million (other costs for SCI entities) + $18 million (connectivity costs for members or participants of SCI entities).

[1863] $241 million = $117 million (PRA cost) + $106 million (other costs for SCI entities) + $18 million (connectivity costs for members or participants of SCI entities).

[1864] $127 million = $100 million (PRA cost) + $9 million (other costs for SCI entities) + $18 million (connectivity costs for members or participants of SCI entities).

[1865] $188 million = $100 million (PRA cost) + $70 million (other costs for SCI entities) + $18 million (connectivity costs for members or participants of SCI entities).

[1866] One commenter provided ''conservative and preliminary'' estimates for the cost of compliance with Regulation SCI. *See* FINRA Letter at 42–43. This commenter estimated that its one-time cost to comply with Regulation SCI would be between approximately $1.1 million and $1.3 million, and its ongoing annual costs would be between approximately $4.5 million and $5.5 million, if Regulation SCI is adopted as proposed (*e.g.,* if SCI systems is defined to apply to non-market regulatory and surveillance systems, and development and testing environments). *See id.* at 42. As discussed above, the definition of SCI systems does not include non-market regulation and non-market surveillance systems, or development and testing systems. Therefore, the Commission believes these estimates are too high. This commenter estimated that, under a narrower Regulation SCI (*e.g.,* if non-market systems and development and testing environments are excluded from the definition of SCI systems), its one-time compliance costs would be between approximately $675,000 and $825,000 and its annual costs would be between approximately $2.2 million and $2.6 million. *See id.* This commenter also stated that, monetizing its hour estimates for annual SCI reviews, its compliance costs would increase by between approximately $600,000 and $900,000, and higher if more systems than currently in scope under ARP would be subject to annual SCI reviews. *See id.* at 42. The Commission notes that, other than the costs for SCI reviews, these estimates do not distinguish paperwork costs from non-paperwork costs. If the commenter's estimates are intended to include all costs for compliance with Regulation SCI, these estimates are close to or within the Commission's estimated total quantified cost ranges for SCI entities. *See supra* notes 1862–1865 and accompanying text.

[1867] *See* BIDS Letter at 2–3.

[1868] *See* ITG Letter at 2.

[1869] *See* UBS Letter at 7–8.

[1870] *See infra* Section VI.C.1.c (addressing potential effects on efficiency, competition, and capital formation, including effects on other SCI entities).

[1871] *See supra* Section IV.B.4.b.i.

improve price efficiency in the markets. Such disruptions also impose liquidity costs and harm the price discovery process. The quality of the price discovery process has important implications for efficiency and capital formation, as prices that accurately convey information about fundamental value improve the efficiency with which capital is allocated across projects and firms.

The Commission also believes that Regulation SCI could affect competition in several ways. The Commission believes that the existing competition among the markets has not sufficiently mitigated the occurrence of SCI events.[1872] Regulation SCI requires SCI entities to disseminate information regarding certain SCI events to affected members or participants or to all members or participants of an SCI entity. As discussed more thoroughly in Section VI.C.2.b.iv below, the Commission believes that requiring the dissemination of information regarding certain SCI events could further incentivize SCI entities to maintain more robust SCI systems and indirect SCI systems and would enhance competition among SCI entities with respect to the maintenance of robust SCI systems and indirect SCI systems.

Additionally, the Commission believes that Regulation SCI may have an impact on competition among SCI entities, in part because the compliance costs of Regulation SCI will be different among SCI entities. Specifically, some SCI entities already satisfy some of the requirements of Regulation SCI because those provisions codify certain aspects of the ARP Policy Statements. The Commission believes that these current ARP participants will incur direct compliance costs that are incremental relative to the current cost of participating in the ARP Inspection Program and current practices outside of the scope of ARP. But Regulation SCI also applies to some entities that currently do not participate in the ARP Inspection Program such as the MSRB and most SCI ATSs. These SCI entities may incur higher initial compliance costs, compared to current ARP participants, in modifying their current practices to comply with Regulation SCI.[1873] To the extent that SCI entities with different initial compliance costs compete, Regulation SCI could alter the competitive relationship and give SCI entities that are currently in compliance with certain provisions of Regulation SCI a competitive advantage.[1874]

In addition to competition among SCI entities, the compliance costs imposed by Regulation SCI could have an effect on competition between SCI entities and non-SCI entities in the markets for trading services. Specifically, in part because non-SCI entities do not have to incur the compliance costs associated with Regulation SCI, these entities may have a competitive advantage in the markets for trading services over SCI entities that they compete with. The adverse competitive effects, however, are likely to be minor when considering only ATSs because an SCI ATS is likely to be larger and have more of an established customer base than other ATSs. The Commission recognizes that broker-dealers also compete with SCI entities in the market for trading services and that some broker-dealers are larger than some ATSs and exchanges. However, broker-dealers cannot offer the same services as ATSs or exchanges without becoming ATSs or exchanges.

The costs imposed by Regulation SCI could also affect barriers to entry for new ATSs and exchanges and, thus, could adversely affect competition.[1875] Specifically, the Commission acknowledges that Regulation SCI will increase the costs for those that meet the definition of SCI entity. This will increase the expected costs of market entrants who expect to eventually be SCI entities. If an increase in these costs reduces the number of potential new entrants, the potential competition from new entrants will be lower.

As noted above, however, the Commission believes that the heightened barriers to entry for ATSs would be mitigated to some degree because the compliance period would provide a new ATS entrant the opportunity to initiate and develop its business before the ATS would need to comply with Regulation SCI.[1876] In particular, the Commission believes that few new ATSs would likely initially meet the threshold to be covered under Regulation SCI and a new ATS could trade for at least three months (*i.e.,* less than four of the preceding six months) and conduct such trading at any level without being subject to Regulation SCI. The Commission also notes that ATSs meeting the volume thresholds in the definition of ''SCI ATS'' for the first time will also be provided six months from the time that the ATS first meets the applicable thresholds to comply with the requirements of Regulation SCI.[1877] This compliance period should also provide such ATSs with time to plan on how they would meet the requirements of Regulation SCI, and could also potentially allow SCI ATSs to become more equipped to bear the cost of Regulation SCI once compliance is required, and thus not significantly discourage new ATSs from entering the market and growing. For newly registered exchanges, the Commission believes the costs associated with Regulation SCI would not represent a significant increased barrier to entry, as the costs would represent a small portion of total costs associated with creating and registering an exchange.

The compliance costs associated with participating in business continuity and disaster recovery plan testing may affect competition among members or participants of SCI entities and also could raise barriers to entry for new members or participants. In particular, Regulation SCI imposes compliance costs on certain members or participants of SCI entities that are designated to participate in business continuity and disaster recovery plans testing. Because some members or participants may incur compliance costs associated with Rule 1004 and others may not, it could negatively impact the ability for some to compete and could raise barriers to entry. As discussed more thoroughly in Section VI.C.2.b.vii below, the Commission expects the compliance costs associated with the business continuity and disaster recovery plans testing requirements in Rule 1004 to be limited for larger members or participants who already maintain connections to backup facilities, including for testing purposes, than for smaller members or participants. Furthermore, the Commission believes that new members or participants are less likely to be designated immediately to participate in business continuity and disaster recovery plan testing than existing significant members or participants because new members may not initially satisfy the SCI entity's designation standards as they establish their businesses. Thus, the Commission

[1872] *See supra* Section VI.B.4.

[1873] The Commission notes that the SCI entities incurring the lower initial compliance costs previously incurred such costs to participate in the ARP Inspection Program.

[1874] However, given the voluntary nature of the current ARP Inspection Program, the extent of current compliance with the requirements of adopted Regulation SCI by entities subject to the ARP Inspection Program varies.

[1875] While Regulation SCI could also increase start-up costs for SIPs and registered clearing agencies, SIPs provide exclusive services and registered clearing agencies are currently characterized by specialization and limited competition. Clearing and settlement services exhibit high barriers to entry and economies of scale. *See* Clearing Agency Standards Release, *supra* note 76, at 66263 and 66265.

[1876] *See supra* note 152.

[1877] *See supra* Section IV.F (discussing effective date and compliance dates for Regulation SCI).

believes the adverse effect on competition may be mitigated to some extent as the most likely members or participants to be designated for testing are those comprising the largest market share as ranked by volume by the SCI entity, and that these firms will have more limited compliance costs.[1878]

2. Analysis of Final Rules

a. Definitions—Rule 1000

In general, the definitions in Rule 1000 either clarify a provision or circumscribe the scope of a provision in Regulation SCI. Therefore, many of the costs and benefits associated with the impacts of the definitions are incorporated in the discussion of the substantive requirements of Regulation SCI. This section contains a discussion of the economic effects of the scope of Regulation SCI resulting from the definitions adopted by the Commission.

i. SCI Entities

The Commission estimates that the definition of SCI entity in Rule 1000 currently covers 44 entities. This includes 30 current participants in the ARP Inspection Program (*i.e.,* 18 registered national securities exchanges, seven registered clearing agencies, FINRA, two plan processors, one ATS trading NMS stocks, and one exempt clearing agency). The definition of SCI entity also includes one ATS that currently exceeds the relevant threshold in Rule 301(b)(6)(i) of Regulation ATS and is subject to the systems safeguard requirements of Regulation ATS. In addition to these entities, the definition of SCI entity includes the MSRB and an estimated 12 additional SCI ATSs.

Generally, by including certain entities that do not currently participate in the ARP Inspection Program or meet the current threshold for the systems safeguard requirements of Regulation ATS in the definition of SCI entity, the Commission believes that Regulation SCI will not only enhance systems resiliency at such entities, but also reduce the potential for incidents at these entities to have broader, disruptive effects across the securities markets more generally on other SCI entities, and attendant costs to investors. Although the Commission believes that the requirements of Regulation SCI will reduce the impact of SCI events, the Commission is unable to quantify the economic effects of the reduction because the degree to which adherence to the requirements of Regulation SCI will reduce the impact of SCI events is unknown.

As discussed throughout the economic analysis, the Commission also expects that SCI entities will incur costs for complying with the requirements of Regulation SCI and that these costs could affect the competitiveness of entities incurring such costs. For example, the section summarizing the effects of Regulation SCI on efficiency, competition, and capital formation, Section VI.C.1.c, discusses several ways that Regulation SCI might affect the competitiveness of SCI entities, including the competitiveness of SCI entities versus non-SCI entities, the relative initial competitiveness of SCI entities needing to make more changes to comply with Regulation SCI, and barriers to entry for SCI entities.

As discussed in detail in Section IV.A.1, many commenters addressed the scope of the definition of SCI entity. Many of these comments related to the inclusion of certain ATSs in the definition.[1879] Commenters presented mixed views on the inclusion of ATSs, with some commenters believing that all ATSs should be covered by Regulation SCI,[1880] and other commenters arguing that no ATSs should be covered by Regulation SCI.[1881] The commenters who supported including all ATSs in the scope of the definition of SCI entity argued that any ATS can impact the market and one of these commenters also stated that any participant on any ATS can have disproportionate impact on the market.[1882] One of the main points of commenters that suggested no ATSs should be covered was that ATSs are redundant of exchanges and other ATSs and that, in case an ATS fails, other ATSs or exchanges can service investors and absorb trading volume.[1883] Additionally, some commenters suggested applying higher thresholds in the definition of SCI ATS such that fewer ATSs would be covered under Regulation SCI.[1884] Many of these commenters who advocated for applying higher thresholds in the definition of SCI ATS stated that the inclusion of smaller ATSs in the definition of SCI ATS does not justify what they believed to be the significant compliance costs imposed by Regulation SCI.[1885]

The Commission believes that certain ATSs should be required to comply with rules regarding systems capacity, integrity, resiliency, availability, security, and compliance. ATSs now collectively represent a significant source of liquidity for NMS stocks.[1886] Given this level of activity on ATSs, coupled with the increasingly inter-connected and complex nature of the markets and heavy reliance on automated systems, the Commission recognizes that a systems issue even at one ATS could result in a market-wide impact. Further, some ATSs execute a larger portion of consolidated volume than smaller exchanges. In this respect, an outage at one or more of these ATSs, which serve as markets to bring buyers and sellers together in the national market system, could disrupt the entire market and could pose even greater risks to the market as a whole than certain smaller exchanges. Accordingly, the Commission believes that the exclusion of all ATSs from the definition of SCI entity would significantly reduce the benefits of Regulation SCI discussed in Section VI.C.1. On the other hand, the Commission believes that including all ATSs in the definition of SCI entity would heighten barriers to entry and restrict competition in the markets for trading services and, thus, could stifle innovations. As discussed in Section IV.A.1.b, the Commission believes that the adopted thresholds for SCI ATSs result in the inclusion of ATSs that can play a significant role in the securities markets and, given their heavy reliance on automated systems, have the potential to impact investors, the overall market, and the trading of individual securities should an SCI event occur. With respect to comments calling for higher or lower volume thresholds, the Commission believes that higher thresholds would increase the risk of significant market disruptions due to SCI events relative to the adopted thresholds and lower thresholds would serve to increase barriers to entry. In setting the levels in the thresholds for SCI ATS, the Commission has considered the trade-offs between barriers to entry and the risk of significant market disruptions.

In adopting the thresholds in the definition of SCI ATS, the Commission also considered alternative thresholds,

[1878] The Commission also notes that SCI entities have an incentive to limit the imposition of the cost and burden associated with testing to the minimum necessary to comply with Rule 1004, and that, given the option, most SCI entities would, in the exercise of reasonable discretion, prefer to designate fewer members or participants to participate in testing, than to designate more. *See supra* Section IV.B.6.b.

[1879] *See supra* Section IV.A.1.b.

[1880] *See, e.g.,* NYSE Letter at 8–10; and Lauer Letter at 4.

[1881] *See, e.g.,* BIDS Letter at 3; ITG Letter at 2–4; and OTC Markets Letter at 9.

[1882] *See, e.g.,* NYSE Letter at 8–10; and Lauer Letter at 4.

[1883] *See, e.g.,* BIDS Letter at 7–8; and ITG Letter at 3.

[1884] *See, e.g.,* Direct Edge Letter at 2; ITG Letter at 10.

[1885] *See, e.g.,* ITG Letter at 9–10.

[1886] *See supra* note 148 and accompanying text. *See also* text accompanying *supra* note 1832.

including the threshold used in Regulation ATS. The adopted thresholds in the definition of SCI ATS differ from the thresholds that subject an ATS to the systems safeguard requirements under Rule 301(b)(6) of Regulation ATS in several ways.[1887] First, for ATSs that trade NMS stocks or non-NMS stocks, the adopted thresholds are based on dollar trading volume instead of share trading volume. The Commission believes that the application of dollar trading volume thresholds better reflects the potential economic impact of a systems issue at a significant ATS as it more accurately measures the value of trading activity compared to a threshold based on share trading volume.[1888] Second, the adopted volume thresholds for NMS stocks and non-NMS stocks are lower than the volume thresholds in Rule 301(b)(6) of Regulation ATS. As discussed in IV.A.1.b, securities trading has evolved significantly since the adoption of Regulation ATS; today, trading activity in stocks is more dispersed among a larger number of trading venues. Because trading activity in stocks is now dispersed among a larger number of trading venues and markets today are so inter-connected and complex, the Commission believes that the application of lower volume thresholds would more effectively capture multiple sources of potential systems issues that could significantly disrupt the market for a single security or for the market as a whole. Third, with respect to ATSs that trade NMS stocks, the Commission is adopting the two-fold dollar volume thresholds in the first prong—a single NMS stock threshold and an all NMS stocks threshold. The Commission believes that such thresholds would appropriately account for the significance of an ATS in both overall trading of NMS stocks and for a single NMS stock.

With regard to commenters that stated no ATSs should be covered because ATSs are redundant of exchanges and other ATS, the Commission acknowledges that, to some extent, certain services provided by any trading venue, including exchanges and ATSs, are redundant in the sense that these facilities execute and process trades. However, the Commission notes that each ATS provides different services in terms of, among other things, order types, matching rules, and the speed of execution to meet investors' specific needs. If an ATS outage interferes with the supply of certain services that investors demand, it would impose costs on investors. For example, market participants may program their routing algorithms assuming that all market centers are operational. If one of those venues is not available, rerouting order flow may increase costs to the market participant seeking execution as time required for executing orders may increase, order fill rates may decrease, and slippage [1889] may also increase, which would further increase transaction costs.[1890]

The Commission also received comments regarding the inclusion of fixed-income ATSs. One commenter suggested the use of par value traded rather than volume.[1891] Further, in noting that fixed-income ATSs should not be subject to Regulation SCI, this commenter noted that retail fixed-income ATSs operate on a vastly different scale than institutional equity markets.[1892] According to this commenter, the costs of compliance for a retail fixed-income ATS would be several orders of magnitude higher than for an exchange in the equity market, and would overwhelm revenues for retail fixed-income ATSs.[1893]

The Commission, after considering the views of commenters, has determined to exclude ATSs that trade only municipal securities or corporate debt securities from the definition of SCI ATS at this time.[1894] Accordingly, such fixed-income ATSs will not be subject to the requirements of Regulation SCI. Rather, fixed-income ATSs will continue to be subject to the existing requirements in Rule 301(b)(6) of Regulation ATS regarding systems capacity, integrity and security if they meet the twenty percent threshold for municipal securities or corporate debt securities provided by that rule.[1895] Because no such ATS is subject to Regulation SCI at this time, it is possible that the municipal security and corporate debt markets may be affected by SCI events that otherwise may have been prevented with more robust systems that would result from Regulation SCI. However, the Commission believes that this loss in potential benefit relative to the proposed approach would be minimal as fixed-income securities trading is generally significantly less automated than trading in equities.[1896] Further, as commenters pointed out, the cost of the requirements of Regulation SCI could be significant for fixed-income ATSs relative to their size, scope of operations, and more limited potential for systems risk. Therefore, lowering the current threshold applicable to fixed-income ATSs in Regulation ATS and subjecting such ATSs to the requirements of Regulation SCI could have potentially discouraged the growth of automation that could benefit investors in these markets. However, as the Commission monitors the evolution of automation in this market, the Commission may reconsider the benefits and costs of extending the requirements of Regulation SCI to fixed-income ATSs in the future.

The adopted definition of SCI SRO includes all national securities exchanges regardless of their volume share. The Commission received one comment letter stating that the rule should also include volume thresholds for exchanges.[1897] The Commission is not persuaded that applying a volume threshold is appropriate for SCI SROs that are exchanges, but instead believes that Regulation SCI should cover all exchanges. In particular, the Commission recognizes that all exchanges play an important role in the securities markets. As discussed above in Section IV.A.1.a, all stock exchanges are subject to a variety of specific public obligations under the Exchange Act, including the requirements of Regulation NMS which, among other things, designates the best bid or offer of such exchanges to be protected quotations. Accordingly, every exchange may have a protected quotation that can obligate market participants to send orders to that exchange if such exchange is displaying the best bid or offer. Among other reasons, given that market participants may be required to send orders to any one of the exchanges at any given time if such exchange is displaying the best bid or offer, the Commission believes that it is important that the safeguards of Regulation SCI apply equally to all exchanges irrespective of trading volume. As

[1887] *See also supra* Section IV.A.1.b.

[1888] *See* text accompanying *supra* note 161; *see also* Proposing Release, *supra* note 13, at 18094 (stating that the use of dollar thresholds may better reflect the economic impact of trading activity).

[1889] Slippage refers to the difference between the expected price of a trade and the actual trade price due to the passage of time.

[1890] *See supra* Section VI.B.4 for a discussion of why market incentives do not seem to reduce these costs.

[1891] *See* TMC Letter at 1–3.

[1892] *See id.* at 2.

[1893] *See id.*

[1894] *See supra* Section IV.A.1.b.

[1895] *See* 17 CFR 242.301(b)(6).

[1896] The Commission notes that the corporate debt and municipal securities markets are primarily voice markets with little automation. *See also supra* note 185 (discussing the view of commenters that the inclusion of fixed-income ATSs and/or the adoption of the proposed thresholds would impose unduly high costs on these entities given their size, scope of operations, lack of automation, low speed, and resulting low potential to pose risk to systems).

[1897] *See supra* note 81 and accompanying text.

market participants may be required to send orders to the exchange displaying the best prices, systems issues at such exchange could force market participants to re-route their orders and, thus, could increase execution time and slippage, imposing additional transaction costs to investors.

With respect to options exchanges, the Commission additionally believes that it would be inappropriate to exclude them from the definition of SCI SRO because technology risks are equally applicable to such exchanges, as evidenced by recent technology incidents affecting the options markets.[1898] While there are many options that trade on multiple venues, systems issues resulting in trading disruptions at an options exchange could lower the quality of pricing efficiency and disrupt the price discovery process for singly-listed options (*e.g.,* certain index options only trade on one options exchange). As such, systems issues at options exchanges can pose significant risks to the markets, and the Commission believes that the inclusion of options exchanges within the scope of Regulation SCI is necessary to achieve the goals of Regulation SCI.

The definition of SCI entity also includes the MSRB. The Commission believes that the inclusion of the MSRB as an SCI entity will provide several significant benefits. In particular, the MSRB collects and consolidates municipal securities data and makes it available to market participants. The Commission believes that any event that could affect the market data collected and consolidated by the MSRB could significantly disrupt the municipal bond market. Also, the municipal securities data collected by the MSRB is provided to FINRA and made available to the Commission and the bank regulators, and serves as a key resource for monitoring the municipal bond market. Therefore, the inclusion of the MSRB will help ensure the robustness of the MSRB's systems and reduce the likelihood of systems issues that could harm investors in the municipal bond market.

As discussed above in Section IV.A.1, several commenters advocated the adoption of a ''risk-based'' approach in the definition of SCI entity based on the criticality of the functions performed.[1899] In effect, these commenters suggested that the Commission apply provisions of Regulation SCI based on the entity's risk to the operations of the U.S. securities markets based on the entity's functional role in the market (*e.g.,* a primary listing market, the sole venue of the security, a monopoly or utility type role with no redundancy). The Commission has considered these factors in developing the definition of SCI entity and believes that the adopted definition, in part, captures the intent of the commenters' suggestions in that it includes entities in the definition that play a significant role in the securities markets. In particular, as discussed in Section IV.A.1.a in detail, the Commission included all exchanges in the definition of SCI SRO because exchanges play a significant role in the functioning of securities markets. With respect to the comments that suggested including only those entities that are essential to continuous market-wide operation, the Commission believes that the specific criteria suggested by commenters, in effect, could lead to the exclusion of significant ATSs. As discussed above, the Commission continues to believe that significant ATSs that trade NMS and non-NMS stocks should be included in Regulation SCI. ATSs collectively represent a significant source of liquidity for stocks. Furthermore, as today's markets are increasingly inter-connected and complex with heavy reliance on automated systems, the Commission recognizes that a systems issue at an ATS could result in a market-wide impact. Consequently, the Commission believes that re-defining SCI entities according to commenters' ''risk-based'' approach could exclude certain entities that the Commission believes have the potential to pose significant risks to the securities markets should an SCI event occur, and thus limit the potential benefits from Regulation SCI, which are discussed throughout this economic analysis.

ii. SCI Systems

Regulation SCI expands on current practice, and applies to a broader range of systems than the current ARP Inspection Program. In particular, the ARP Policy Statements are focused on specific types of automated systems.[1900] The ARP Policy Statements and the ARP Inspection Program address systems that directly support trading, clearance and settlement, order routing, and market data. The definition of ''SCI systems'' would include these systems, as well as those that directly support market regulation and market surveillance, systems that serve an essential function for investor protection and market integrity.

The inclusion of market regulation and market surveillance systems under Regulation SCI could reduce systems compliance issues that result from disruptions in systems that support market regulation and market surveillance. The Commission believes that including market regulation and market surveillance systems under the definition of SCI systems should help ensure the robustness of the systems used by SCI entities to monitor compliance with relevant laws, rules, and their own rules, and detect any violations of such laws or rules by members or participants. The reduction in market regulation and market surveillance systems issues could help ensure investor protection and preserve market integrity.

The Commission also believes that the inclusion of market data systems in the definition of SCI systems will benefit the market. Currently, SIAC, Nasdaq, and the MSRB [1901] process, collect, and disseminate market data on equities, options, and municipal securities to investors. While SIAC and Nasdaq are part of the ARP Inspection Program, the MSRB is not. The Commission believes that consolidated market data is an important part of the investing and trading process as it helps market participants to make well-informed investment and trading decisions, and also helps investors to monitor the quality of execution of orders by their brokers. Thus, any SCI events that affect market data processed, collected, and disseminated by the MSRB could reduce

[1898] *See supra* note 84.

[1899] *See supra* notes 53–57 and accompanying text.

[1900] *See supra* Section II.A and Proposing Release, *supra* note 13, at Section I.A (discussing in more detail the ARP Policy Statements and the ARP Inspection Program). According to the ARP I Release, the term ''automated systems'' or ''automated trading systems'' means computer systems for listed and OTC equities, as well as options, that electronically route orders to applicable market makers and systems that electronically route and execute orders, including the data networks that feed the systems. These terms also encompass systems that disseminate transaction and quotation information and conduct trade comparisons prior to settlement, including the associated communication networks. *See* ARP I Release, *supra* note 1, at 48706, n. 21.

[1901] As discussed above, in 2008, the Commission amended Rule 15c2–12 to designate the MSRB as the single centralized disclosure repository for continuing municipal securities disclosure. In 2009, the MSRB established EMMA, which serves as the official repository of municipal securities disclosure and provides the public with free access to relevant municipal securities data, and is the central database for information about municipal securities offerings, issuers, and obligors. Additionally, the MSRB's RTRS, with limited exceptions, requires municipal bond dealers to submit transaction data to the MSRB within 15 minutes of trade execution, and such near real-time post-trade transaction data can be accessed through the MSRB's EMMA Web site. *See supra* note 77. The MSRB is an SCI entity by virtue of being an SRO, rather than a plan processor.

pricing efficiency and, consequently, could significantly disrupt the municipal bond market. Further, with respect to NMS securities, the Commission understands that many trading algorithms make trading decisions based primarily on market data and rely on that data being current and accurate.

In addition, as noted in Section IV.A.2.b, market data as used in the definition of ''SCI systems'' does not refer exclusively to consolidated market data, but also includes proprietary market data generated by SCI entities as well. The Commission notes that proprietary market data is widely used and relied upon by a broad array of market participants, including institutional investors, to make trading decisions. Therefore, if a proprietary market data feed became unavailable or otherwise unreliable, it could interfere with market participants making trading decisions and impose additional transaction costs on market participants.

The Commission has limited information on the extent to which the ARP Policy Statements guide ARP participants' practices with respect to their proprietary market data systems because this information is not reported to the Commission. To the extent that the ARP Policy Statements guide ARP participants with respect to certain of their proprietary market data systems, the potential benefits from including proprietary market data systems in Regulation SCI could be incremental given current practice. The Commission also notes that entities have competitive incentives to limit the number of systems issues with their proprietary market data systems, as those SCI entities with minimum latency and the most robust proprietary market data systems may attract more trading volume. While proprietary market data systems have experienced systems issues, because these issues are not reported to the Commission, the Commission has limited information on the frequency and severity of such systems issues and, in addition, does not have information about how proprietary market data systems issues affect the demand to subscribe to a particular proprietary market data feed. Although the Commission is unable to estimate the benefits and costs of subjecting proprietary market data systems to Regulation SCI, the Commission believes that if a proprietary market data feed became unavailable or otherwise unreliable, it could have a significant impact on the trading of the securities to which it pertains, and could interfere with the maintenance of fair and orderly markets.[1902]

To the extent that proprietary market data systems and consolidated market data systems share common infrastructure, the compliance costs associated with proprietary market data systems could be incremental to those costs associated with consolidated market data systems. In addition, to the extent the ARP Policy Statements guide ARP participants with respect to their proprietary market data systems, the initial compliance costs associated with proprietary market data systems will be lower for these participants with respect to the relevant proprietary market data systems.

As adopted, a subset of SCI systems are defined as critical SCI systems. Critical SCI systems are defined as SCI systems of, or operated by or on behalf of, an SCI entity that directly support functionality relating to clearance and settlement systems of clearing agencies; openings, reopenings, and closings on the primary listing exchange; trading halts; initial public offerings; the provision of consolidated market data; and exclusively listed securities.[1903] In addition, critical SCI systems include systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent, and without which there would be a material impact on fair and orderly markets.[1904] Critical SCI systems include systems that represent potential ''single points of failure'' in the securities markets—if they were to experience systems issues, the Commission believes they would be the most likely to have a widespread and significant impact on the U.S. securities markets. Critical SCI systems are subject to certain heightened resilience and information dissemination requirements under Regulation SCI. In addition, because an SCI entity may tailor its policies and procedures based on the relative criticality of a given system to the SCI entity and to the securities markets generally, an SCI entity may subject its critical SCI systems to higher standards than other SCI systems.

By adopting a defined term ''critical SCI systems'' (which is not defined for purposes of the ARP Inspection Program or Regulation ATS), along with the heightened requirements associated with critical SCI systems, the Commission expects fewer disruptions in critical SCI systems, and therefore fewer SCI events involving potential ''single points of failure'' that could cause wide-scale disruptions across the securities markets. As explained in Section VI.C.1, this could reduce the likelihood and duration of systems issues, thereby helping to avoid pricing inefficiencies and reduce interruptions in liquidity flow, which may occur during times when systems disruptions can make systems unavailable or unreliable.

The Commission also notes that, by distinguishing critical SCI systems from other SCI systems, and because an SCI entity may tailor its policies and procedures based on the relative criticality of a given system to the SCI entity and to the securities markets generally, an SCI entity may subject its critical SCI systems to higher standards than other SCI systems. In addition, critical SCI systems are subject to a goal of two-hour recovery following a wide-scale disruption, and a requirement for information dissemination to all members or participants of an SCI entity in the case of an SCI event impacting critical SCI systems (unless the SCI event qualifies as a de minimis SCI event). As result, the designation of critical SCI systems may result in additional costs as compared to the proposal. However, by distinguishing critical systems, Regulation SCI is consistent with a risk-based approach that targets areas that would generate the most benefits.

Regulation SCI defines ''indirect SCI systems'' [1905] to mean any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.[1906] As discussed above in Section IV.A.2.d, the adopted definition excludes systems that are effectively physically or logically separated from SCI systems because the Commission believes that the benefit of including systems that can effectively be ''walled off'' may be limited, as ''walled off'' systems are less likely to serve as potential vulnerable entry points to SCI systems in the event of a security

[1902] *See supra* Section IV.A.2.b.

[1903] *See* Rule 1000.

[1904] *See id.*

[1905] As discussed in Section IV.A.2.d, ''SCI security systems'' have been renamed ''indirect SCI systems'' and its definition has been revised in response to commenters who expressed concern about the breadth of the proposed definition. Because the definition of indirect SCI systems has been refined from the proposal, the compliance costs associated with indirect SCI systems (discussed below) would be lower relative to the compliance costs associated with the proposed rules.

[1906] As proposed, ''SCI security systems'' means any systems that share network resources with SCI systems that, if breached, would be reasonably likely to pose a security threat to SCI systems.

breach.[1907] Regulation SCI will expressly impose new requirements on systems that fall within the definition of ''indirect SCI systems'' (which is not defined for purposes of the ARP Inspection Program or Regulation ATS). These new requirements for indirect SCI systems should help ensure the robustness and resiliency of SCI systems by reducing the occurrence of security-related issues at SCI systems. Moreover, the application of Regulation SCI to indirect SCI systems could encourage SCI entities to isolate certain non-SCI systems from SCI systems (thereby removing these non-SCI systems from the scope of indirect SCI systems), which would decrease the risk that non-SCI systems provide vulnerable points of entry into SCI systems and cause security-related issues at SCI systems. The reduction in security-related SCI systems issues could lead to fewer interruptions in the price discovery process and liquidity flows and thus result in fewer periods with pricing inefficiencies as discussed in Section VI.C.1.

Regulation SCI specifies the obligations SCI entities would have with respect to SCI systems and indirect SCI systems. As mentioned above, the definition of SCI systems includes more systems than the ARP Inspection Program traditionally covered, and ''indirect SCI systems'' is not defined for purposes of the ARP Inspection Program or Regulation ATS. Because Regulation SCI applies to SCI systems and indirect SCI systems, SCI entities will incur compliance costs, discussed in detail further below in Section VI.C.2, which include, among other things, costs associated with policies and procedures related to such systems. Furthermore, as mentioned above, the definition of SCI systems includes systems that directly support trading, clearance and settlement, order routing, and market data, which are covered by the ARP Inspection Program. Accordingly, the Commission believes that initial compliance costs associated with SCI systems will be higher for SCI entities that are not currently participating in the ARP Inspection Program (*e.g.,* some SCI ATSs) as compared to ARP Inspection Program participants that have established practices consistent with the ARP Policy Statements. Although the Commission believes that some SCI ATSs will generally incur higher initial compliance costs associated with the requirements of Rule 1001 compared to other SCI entities that are current participants in the ARP Inspection Program, the difference in initial compliance costs could be limited because, as currently constituted, relative to the systems of SCI SROs, the systems of SCI ATSs generally would not fall within the category of critical SCI systems, and thus such SCI ATSs would not be subject to the more stringent requirements that would be applicable to the critical SCI systems of other SCI entities. Further, as discussed in Section VI.C.1, the Commission believes that Regulation SCI could have an impact on competition among SCI entities in part because the initial compliance costs associated with SCI systems and indirect SCI systems will vary across SCI entities.

In the SCI Proposal, the Commission defined SCI systems more broadly than it has in the adopted rule. Specifically, the proposed definition of SCI systems would have included all regulation and surveillance systems, as well as development and testing systems. As discussed above in Section IV.A.2.b, after considering, among other things, the views of commenters that the definition of SCI systems was overbroad and, thus, could cover nearly all systems of an SCI entity, the Commission refined the definition of SCI systems.[1908] Specifically, the scope of adopted Regulation SCI does not cover member regulation or member surveillance systems such as those, for example, relating to member registration, capital requirements, or dispute resolution, because issues relating to such systems are unlikely to have the same level of impact on the maintenance of fair and orderly markets or an SCI entity's operational capability as those systems identified in the definition of SCI systems. Consequently, the Commission does not believe that the exclusion of member regulation and member surveillance systems will significantly reduce the benefits of Regulations SCI discussed in Section VI.C.1. Furthermore, the Commission believes that the exclusion of member regulation and member surveillance systems from the adopted definition of SCI systems will substantially reduce the costs of compliance with Regulation SCI relative to the proposal because it reduces the potential number of SCI events that would be subject to the Commission notification requirements compared to the proposal.

As discussed above in Section IV.A.2.b, many commenters also opposed the inclusion of development and testing systems in the definition of SCI system, stating that issues in development and testing systems would have little or no impact on the operations of SCI entities.[1909] The Commission agrees that issues with development and testing systems generally have less of an impact on the SCI entity's operations than production systems that directly support trading, clearance and settlements, order routing, market data, market regulation, and market surveillance. In response to comment letters, the adopted definition of SCI systems is limited to systems that directly support trading, clearance and settlement, order routing, market data, market regulation, and market surveillance, and does not include development and testing systems. Consequently, the requirements of Regulation SCI that are triggered by the definition of SCI systems do not apply to development and testing systems. However, the Commission recognizes that there would be benefits from maintaining robust development and testing systems because these systems are important in ensuring the reliability and resiliency of systems of SCI entities. As discussed in Section IV.A.2.b, in order to have policies and procedures reasonably designed to ensure capacity, integrity, resiliency, availability, and security for SCI systems (and indirect SCI systems, as applicable) in accordance with adopted Rule 1001(a), an SCI entity will be required to have policies and procedures that include a program to review and keep current systems development and testing methodology for such systems.[1910]

A few commenters advocated that SCI entities should be permitted to conduct their own risk-based assessment in determining the scope of SCI systems.[1911] As discussed in Section IV.A.2.b, rather than limiting the definition of SCI systems to systems that pose a greater risk to the markets in the event of a systems issue or that are of paramount importance to the functioning of the U.S. securities market, the Commission is subjecting those systems that meet the definition of ''critical SCI systems'' to certain heightened requirements under

[1907] Some SCI entities currently employ a wide variety of means to separate their systems, including logical and physical separation.

[1908] *See supra* Section IV.A.2.b (discussing the definition of SCI systems).

[1909] *See supra* note 234 and accompanying text.

[1910] Further, as discussed above, the definition of SCI review and the corresponding requirement for an annual SCI review require an assessment of internal control design and effectiveness, which includes development processes. In addition, if development and testing systems are not appropriately walled off from production systems, such systems could be captured under the definition of indirect SCI systems and be subject to the requirements of Regulation SCI.

[1911] *See* DTCC Letter at 3–5; Omgeo Letter at 5–6; and OCC Letter at 3–4.

Regulation SCI. The Commission continues to believe that any systems issues involving systems that directly support one of the six functions (trading, clearance and settlement, order routing, market data, market regulation, or market surveillance) listed in the definition of SCI systems could also cause significant market disruptions and, thus, including such systems and imposing heightened requirements on a subset of such systems—critical SCI systems—should help realize the benefits of Regulation SCI discussed in Section VI.C.1.a.

As discussed above in Section IV.A.2.b, the definition of SCI systems includes any system that is operated by a third-party on behalf of an SCI entity and directly supports one of the six key functions (trading, clearance and settlement, order routing, market data, market regulation, or market surveillance) listed in the definition of SCI systems. The Commission understands that many SCI entities and many SROs, in particular, rely heavily on outsourcing to help test, operate, and run various systems in their daily operations and that they outsource networks, data center operations, and many of the products and systems that support their trading and/or clearing systems. The Commission also notes that its staff already discusses with ARP entities their use of certain third-party systems as necessary under the ARP Inspection Program. Because of this reliance on outsourcing to third party systems, the Commission believes that including any system that directly supports one of the six functions listed in the definition of SCI system, regardless of whether it is operated by the SCI entity directly or by a third party, is important in reducing systems issues and, thus, promoting pricing efficiency and price discovery process.

Several commenters stated that the definition of SCI systems should not include systems operated on behalf of an SCI entity by a third-party.[1912] These commenters expressed concerns about potential difficulties with meeting the requirements of Regulation SCI with regard to third-party systems.[1913] Another commenter questioned whether the Commission considered the costs and benefits of including third-party systems within the definition.[1914] This commenter also noted that the inclusion of third-party systems may force SCI entities to insource functions that are more efficiently performed by vendors, and the cost of insourcing will be passed along to members and market participants and may degrade competition.[1915]

As discussed above, the Commission believes that, among other reasons, allowing systems operated on behalf of an SCI entity by a third-party to be excluded from the requirements of Regulation SCI would reduce the effectiveness of the regulation in promoting the national market system by ensuring the capacity, integrity, resiliency, availability, and security of those systems important to the functioning of the U.S. securities markets.[1916] The Commission acknowledges that ensuring compliance of systems operated by a third-party with Regulation SCI may be more costly than ensuring compliance of internal systems with Regulation SCI because of search costs associated with employing adequate third-party systems or services and the additional communication needed with the third-party service provider. The Commission acknowledges that higher compliance costs associated with managing third-party systems could be passed on to market participants.

Moreover, the Commission recognizes that the inclusion of systems operated by a third-party on behalf of an SCI entity in the scope of SCI systems may in certain cases make it more difficult for an SCI entity to utilize third parties because the SCI entity is required to ensure that SCI systems and indirect SCI systems operated on its behalf by a third party are operated in compliance with Regulation SCI. In particular, the SCI entity might not be able to ensure that systems operated by certain third parties are in compliance with Regulation SCI and therefore might not be able to utilize such third-party service providers. Limitations on the choice of third-party systems could lower the quality of employable third-party systems because the employable third-party systems may not be best suited for the SCI entity or be the best available of its type. At this time, however, it is difficult to estimate the extent to which inclusion of systems operated by third parties on behalf of an SCI entity in the definition of SCI systems will alter outsourcing arrangements in a manner that would result in reducing an SCI entity's ability to maintain its operational capability and promote the maintenance of fair and orderly markets. While the Commission understands that SROs outsource some systems, the Commission lacks sufficient information regarding the specific contractual relationships between SCI entities and third-party service providers.

Furthermore, if—due to limited options on employable third-parties—an SCI entity decides to insource systems that could be more cost-effectively provided by third parties with relevant expertise, the quality of such systems may be adversely affected, while the cost to the SCI entity may be increased. As such, Regulation SCI could impose higher costs on SCI entities that are currently more dependent on third-party systems for their operations than SCI entities that primarily employ their own systems and therefore could potentially have adverse effects on competition among SCI entities. In addition, the requirements of Regulation SCI could force some third-party vendors out of the market for SCI systems or indirect SCI systems. In this respect, Regulation SCI could negatively impact such vendors and reduce the ability for some third-party vendors to compete in the market for SCI systems and indirect SCI systems, with attendant costs to SCI entities. However, Regulation SCI, over time, could result in quality improvements for systems or services provided by such third-party vendors as vendors that primarily provide services to SCI entities may compete in part on the quality of their systems in light of the requirements of Regulation SCI.

iii. SCI Events

Rule 1000 defines SCI events to include systems disruptions, systems compliance issues, and systems intrusions. Further, for purposes of the information dissemination requirement under Rule 1002(c), the Commission defines the new term, major SCI event, to mean an SCI event that has had, or the SCI entity reasonably estimates would have, any impact on a critical SCI system, or a significant impact on the SCI entity's operations or on market participants. As discussed further below, Regulation SCI requires SCI entities to take appropriate corrective actions in response to SCI events (Rule 1002(a)), notify the Commission of SCI events (Rule 1002(b)), and disseminate information regarding certain major SCI events to all members or participants of an SCI entity and certain other SCI events to affected members or participants (Rule 1002(c)).

Prior to the adoption of Regulation SCI, ''systems disruption'' was not defined by Commission rule. Rather, in the 2001 Staff ARP Interpretive Letter, Commission staff provided guidance on

[1912] *See, e.g.,* Omgeo Letter at 5–6; and BATS Letter at 4.

[1913] *See, e.g.,* Omgeo Letter at 5–6; and BATS Letter at 4.

[1914] *See* BATS Letter at 4–5.

[1915] *See id.* at 5.

[1916] *See supra* Section IV.A.2.b (discussing the definition of ''SCI systems'').

examples of significant systems outages that should be reported to Commission staff.[1917] The Commission understands that ARP participants currently exercise a level of discretion in determining what systems issues constitute significant systems outages.

As adopted, ''systems disruption'' is defined to mean an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system. The Commission believes the revised definition sets forth a standard that SCI entities can apply in a wide variety of circumstances to determine in their discretion whether a systems issue should be appropriately categorized as a systems disruption. The adopted definition of systems disruption potentially covers types of events that were not articulated as part of Commission staff guidance regarding significant systems outages, and at the same time potentially excludes types of systems events that were articulated as part of such guidance. The Commission, however, believes that the adopted definition of systems disruptions would more appropriately capture material or significant systems issues than the 2001 Staff ARP Interpretive Letter. Accordingly, the inclusion of systems disruptions in the definition of SCI event, along with the requirements of taking timely corrective actions, Commission notification, information dissemination, and recordkeeping on these systems issues, should help effectively reduce the severity and duration of events that harm pricing efficiency, price discovery, and liquidity and help Commission oversight of the securities markets. The Commission also acknowledges that SCI entities will incur some costs to determine whether a systems disruption has occurred. The Commission notes that these costs should be lower compared to the proposed definition, in part, because the adopted definition of systems disruption sets forth a standard that permits SCI entities to more effectively identify such systems issues.

As discussed in Section IV.A.3.a, after considering the views of commenters that the proposed definition of systems disruption was too prescriptive, insufficiently flexible, and should be limited to material systems disruptions, the Commission has taken a different approach. Instead of the proposed seven-prong prescriptive definition representing the effects caused by a disruption of an SCI entity's systems, the adopted definition focuses on whether a system is halted or degraded in a manner that is outside of its normal operation. The proposed definition had the potential to incorporate certain types of minor events that should more appropriately fall outside the purview of the regulation. Similarly, the prescriptive approach of the proposed definition also had the potential to exclude certain types of events that were significant enough to warrant inclusion, but may otherwise have gone unreported because they were not one of the seven enumerated types of systems malfunctions.

Currently, ''systems intrusion'' is not defined by Commission rule or Commission staff guidance. The Commission believes that regulated entities exercise a level of discretion in determining what systems intrusions to report to Commission staff. By adopting a definition of systems intrusion, the Commission is specifying the criteria for SCI entities to use to identify systems intrusions that would be subject to Regulation SCI. The definition of systems intrusion covers successful unauthorized entry to SCI systems and indirect SCI systems. Unauthorized access, destruction, and manipulation of SCI systems and indirect SCI systems could adversely affect the markets and market participants because intruders could force systems to operate in unintended ways that could create significant disruptions in securities markets. Therefore, the inclusion of systems intrusions in the definition of SCI events can help reduce the risk of such adverse effects. The Commission believes that the inclusion of systems intrusion in the definition of SCI event should help ensure consistent compliance with the requirements of taking timely corrective actions, Commission notification, information dissemination, and recordkeeping and, thus, should help realize the benefits of those requirements discussed in sections below. The Commission also acknowledges that SCI entities will incur some costs to determine whether a systems intrusion has occurred.

Currently, ''systems compliance issue'' is also not defined by Commission rule or Commission staff guidance and the Commission believes that regulated entities exercise a level of discretion in determining what systems compliance-related issues to report to Commission staff. While the ARP Policy Statements do not address systems compliance issues, some SCI entities notify the Commission of certain systems compliance-related issues.[1918] As noted above, however, the Commission does not receive comprehensive data regarding such issues. By adopting a definition of systems compliance issue, the Commission is specifying the criteria for SCI entities to use to identify systems compliance issues that would be subject to Regulation SCI.

By defining SCI events to include systems compliance issues, the Commission believes Regulation SCI should further assist the Commission in its oversight of SCI entities and in the protection of investors. Specifically, the Commission believes that inclusion of systems compliance issues in the definition of SCI event and the resulting applicability of the Commission reporting, information dissemination, and recordkeeping requirements are important to help ensure that SCI systems are operated by SCI entities in compliance with the Exchange Act, rules thereunder, and their own rules and governing documents.[1919] In addition, the Commission believes that, as part of its oversight of the securities markets, it should learn of a non-de minimis systems compliance issue immediately upon an SCI entity having a reasonable basis to conclude that such a systems compliance issue has occurred so that the Commission may consider whether there has been any resulting harm to investors or market participants. The Commission also acknowledges that SCI entities could incur some costs to determine whether a systems compliance issue has occurred.

The Commission notes that it has refined the definition of systems compliance issue as compared to the proposal by replacing the phrase ''federal securities laws'' with ''the Act.''[1920] Accordingly, the number of systems compliance issues subject to Regulation SCI could be no greater and possibly lower than if the Commission adopted the definition of systems compliance issue as proposed and there could be a corresponding reduction in benefits, compared to the proposal, as a result of adopting a targeted definition.[1921]

Regulation SCI also defines ''major SCI event.'' The addition of the definition of major SCI event allows the requirement for dissemination of

[1917] *See* 2001 Staff ARP Interpretive Letter, *supra* note 21.

[1918] *See supra* note 1803 and accompanying text. As part of the Commission's oversight of SROs, OCIE reviews systems compliance issues reported to Commission staff.

[1919] *See supra* Section IV.A.3.b.

[1920] *See id.*

[1921] For example, the adopted definition of systems compliance issue makes explicit that the requirements of Regulation SCI do not apply to any obligations that an SCI entity has under the Securities Act of 1933.

information to all members or participants of an SCI entity to be consistent with a tiered, risk-based approach. As discussed in Section VI.C.2.b.iv below and in Section VI.C.1 above, dissemination of information regarding SCI events to all members or participants of an SCI entity can result in benefits and affect competitive incentives to prevent systems issues. The Commission acknowledges, however, that the benefits of information dissemination to all members or participants of an SCI entity would not be realized if SCI entities were required to disseminate too many events, creating confusion about which events are meaningful, or if SCI entities were required to disseminate too few events. The definition of major SCI events provides a targeted approach to determining which events are appropriately disseminated to all members or participants of an SCI entity. The Commission also acknowledges that, as discussed in Section VI.C.2.b.iv below, SCI entities would incur compliance costs associated with developing a process for determining major SCI events and de minimis SCI events.

SCI entities will incur compliance costs with regard to the requirements of Regulation SCI. As noted above, the definition of SCI event includes systems disruptions and systems intrusions, terms that are not defined under the ARP Inspection Program, but which are contemplated by the ARP Inspection Program's attention to systems failures, disruptions, and other systems problems, including systems vulnerability.[1922] To this extent, the initial compliance costs associated with SCI events may be higher for SCI entities that are not currently participating in the ARP Inspection Program than for those currently participating in the ARP Inspection Program. Similarly, the initial compliance costs associated with SCI events will be higher for SCI entities that do not currently self-report systems compliance-related issues to the Commission than those that do. As discussed in Section VI.C.1, the Commission believes that Regulation SCI will have an impact on competition among SCI entities because the initial compliance costs stemming from the definition of SCI events will be different among SCI entities. However, all SCI entities, regardless of current participation in the ARP Inspection Program or self-reporting of systems compliance-related issues, could incur costs associated with the inclusion of major SCI events as a definition.

As an alternative to the adopted definitions of SCI event, several commenters suggested that the definition of SCI event include a materiality threshold such that certain Regulation SCI requirements would apply only to events that exceed the threshold, as determined by the SCI entity.[1923] The Commission is not persuaded that incorporating a materiality threshold into the definition of SCI event would appropriately capture SCI events. Some systems issues, which may initially seem insignificant to an SCI entity, may later prove to be the source of significant systems issues at the SCI entity. Furthermore, there could be incidences in which systems issues cause minor disruptions for one particular SCI entity but result in significant disruptions for another SCI entity or market participant. Under the use of the suggested materiality threshold, such systems issues could be overlooked and timely corrective action may not be taken.

b. Requirements for SCI Entities—Rules 1001–1004

i. Policies and Procedures—Rules 1001(a), (b), and (c)

Rules 1001(a), (b), and (c) set forth requirements relating to the written policies and procedures that SCI entities are required to establish, maintain, and enforce. Rule 1001(a) requires an SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. Rule 1001(b) requires an SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules regulations thereunder and the entity's rules and governing documents, as applicable. Rule 1001(c) requires an SCI entity to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events. This section discusses the economic effects of requiring these policies and procedures, both individually and as a whole.

The Commission believes the policies and procedures requirements as a whole should reduce the risk and incidences of SCI events because they are requirements under Commission rules rather than voluntary guidelines, and require SCI entities to establish, maintain, and enforce written policies and procedures related to capacity, integrity, resiliency, availability, security, compliance, responsible SCI personnel, and escalation. Also, policies and procedures requirements as a whole should reduce the risk and incidences of SCI events by imposing requirements on entities that are not currently participating in the ARP Inspection Program, and by covering areas not currently within the scope of the ARP Inspection Program, such as policies and procedures regarding systems compliance.[1924] The policies and procedures requirements in Regulation SCI should help ensure faster recoveries from systems disruptions, systems compliance issues, and systems intrusions. As discussed in Section VI.C.1, reducing the risk, incidence, and duration of SCI events could reduce interruptions in the price discovery process and liquidity flows and thus result in reduced periods with pricing inefficiencies.

The Commission also recognizes that the policies and procedures requirements of Regulation SCI will impose certain costs. In general, the Commission believes that some SCI entities that participate in the ARP Inspection Program already comply with some of the requirements of Rule 1001 and thus would incur lower initial costs to comply with the requirements of Rule 1001 than SCI entities that do not participate in the ARP Inspection Program. Additionally, some SCI entities that currently participate in the ARP Inspection Program are large and have complex systems and, therefore, will incur more costs to comply with Rule 1001 than others. Furthermore, SCI entities that do not currently participate in the ARP Inspection Program will also face costs to comply with Rule 1001 if they do not already have policies and procedures similar to those required by

[1922] *See supra* Section II.A (discussing the ARP Inspection Program).

[1923] *See supra* note 334 and accompanying text.

[1924] With respect to NASD and FINRA rules identified by commenters, although they have some broad relation to certain aspects of the policies and procedures provisions under Regulation SCI, the Commission is not persuaded that these rules, even when taken together, are an appropriate substitute for the comprehensive approach in Regulation SCI with respect to technology systems and system issues. *See* NASD Rule 3010(b)(1) and FINRA Rule 3130. *See also supra* note 115.

Rule 1001. These costs are discussed further below.

Quantifiable Costs

In the SCI Proposal, based on discussion with industry participants, the Commission estimated that, to comply with all requirements underlying the policies and procedures required by proposed Rules 1000(b)(1) and (2) other than paperwork burdens, on average, each SCI entity would incur an initial cost of between approximately $400,000 and $3 million.[1925] Based on this estimated range in costs, the Commission estimated that in the aggregate SCI entities would incur a total initial cost of between approximately $17.6 million [1926] and $132 million [1927] to comply with proposed Rules 1000(b)(1) and (2). In addition, the Commission estimated that, to comply with the policies and procedures required by proposed Rules 1000(b)(1) and (2), on average, each SCI entity would incur an ongoing annual cost of between approximately $267,000 [1928] and $2 million.[1929] Based on this estimated range, the Commission estimated that in the aggregate SCI entities would incur a total annual ongoing cost of between approximately $11.7 million [1930] and $88 million.[1931]

One commenter noted that the Commission did not provide sufficient discussion of the basis for the cost estimates for complying with the policies and procedures required by proposed Rules 1000(b)(1) and (2).[1932] However, this commenter was cautiously confident that its initial cost for full implementation of proposed Rules 1000(b)(1) and (2) would not exceed $3 million plus four times the estimated burden under the Paperwork Reduction Act analysis, although the commenter believed that such cost would not be less than half of such $3 million plus at least three times the Paperwork Reduction Act estimate.[1933] This commenter further noted that the approach taken by the Commission in the proposal with regard to federal securities law liabilities and the safe harbors likely will result in increased insurance costs for SCI entities and higher salaries for employees.[1934]

Another commenter noted that, without further clarification, the broad scope of the policies and procedures requirement under Regulation SCI could be burdensome, in terms of the cost of developing and implementing new (or enhancing existing) policies and procedures, and in terms of complying and documenting compliance under such policies and procedures.[1935] According to this commenter, these requirements could significantly increase technology project costs (*e.g.,* for testing, monitoring, and compliance staff) and would significantly prolong the systems development lifecycle and time to market.[1936] With respect to the Commission's cost estimate for proposed Rules 1000(b)(1) and (2), another commenter noted that the Commission's estimates do not adequately account for the opportunity costs of delays in systems innovation.[1937] This commenter stated that the Commission did not address the significant costs of complying with the requirements concerning the capacity, integrity, resiliency, availability, and security of systems.[1938]

After considering the views of these commenters and in light of the changes to the proposed rules, the Commission now estimates that, to comply with all requirements underlying the policies and procedures required by Rules 1001(a) and (b),[1939] other than paperwork burdens, on average, each SCI entity will incur an initial cost of between approximately $320,000 and $2.4 million and an ongoing annual cost of between approximately $213,600 and $1.6 million.[1940] The Commission notes that it has reduced the cost for complying with the policies and procedures required by Rules 1001(a) and (b) in a variety of ways, including by, for example: Refining the definition of SCI systems; more explicitly allowing SCI entities to tailor policies and procedures consistent with a risk-based approach; having separate staff guidance on current SCI industry standards rather than Commission guidance through proposed Table A, with staff guidance characterized as listing examples of publications describing processes, guidelines, frameworks, and/or standards for an SCI entity to consider looking to in developing reasonable policies and procedures, rather than strictly as listing examples of

[1925] *See* Proposing Release, *supra* note 13, at 18171. As explained in the SCI proposal, the Commission preliminarily estimated a range of cost for complying with the policies and procedures required by proposed Rules 1000(b)(1) and (2) because some SCI entities are already in compliance with some of these requirements and thus would likely need to incur less costs to comply with the rules. For example, the Commission believed that many SCI SROs (*e.g.,* certain national securities exchanges and registered clearing agencies) already have or have begun implementation of business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse to ensure next business day resumption of trading and two-hour resumption of clearance and settlement services following a wide-scale disruption. *See id.* at 18171, n. 633.

[1926] *See id.* at 18171, n. 634.

[1927] *See id.* at 18171, n. 635.

[1928] *See id.* at 18172, n. 637.

[1929] *See id.* at 18172, n. 638.

[1930] *See id.*

[1931] *See id.* at 18172, n. 640.

[1932] *See* MSRB Letter at 30.

[1933] *See id.* at 31. According to this commenter, if as a result of the restrictive listing of industry standards in Table A, it determines that it should adhere to one of the listed standards rather than the standards to which it currently adheres, its cost of compliance with proposed Rule 1000(b)(1) would be considerably increased and its total cost for compliance with proposed Rules 1000(b)(1) and (2) would likely be at or near $3 million plus four times the estimated burden under the Paperwork Reduction Act analysis. *See id.* As noted above in Section IV.B.1.b.iii, the Commission believes that staff guidance should be characterized as listing examples of publications describing processes, guidelines, frameworks, and/or standards for an SCI entity to consider looking to in developing reasonable policies and procedures, rather than strictly as listing examples of ''standards.'' As such, nothing that the staff may include in its guidance precludes an SCI entity from adhering to standards such as ISO 27000, COBIT, or others referenced by commenters to the extent they result in policies and procedures that comply with the requirements of Rule 1001(a).

[1934] *See id.* The commenter did not provide an estimate of the anticipated increased insurance costs for SCI entities and higher salaries for employees. The Commission acknowledges that SCI entities may incur increased insurance and personnel costs because of the potential additional liability associated with Regulation SCI, although the Commission is unable to estimate these costs given it lacks specific information regarding current personnel and insurance costs and the amount of any potential increases associated with changes in liability. The Commission also notes that many entities that fall within the definition of SCI entity could already be subject to liability for systems issues and thus may already largely be incurring these insurance and personnel costs.

[1935] *See* FINRA Letter at 32. The estimated burden associated with the development and maintenance of policies and procedures is discussed in the Paperwork Reduction Act section above. *See supra* Section V.D.1.a.

[1936] *See* FINRA Letter at 32.

[1937] *See* ITG Letter at 7. This commenter also noted that the estimates do not adequately account for the monitoring and notification costs that would be engendered by the proposal. *See id.*

[1938] *See id.*

[1939] These include, for example, establishing current and future capacity planning estimates, capacity stress testing, reviewing and keeping current systems development and testing methodology, regular reviews and testing to detect vulnerabilities, testing of all SCI systems and changes to SCI systems prior to implementation, implementing a system of internal controls, implementing a plan for assessments of the functionality of SCI systems, implementing a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, designed to detect and prevent systems compliance issues, and hiring additional staff.

[1940] The Commission estimates an average range of cost for complying with the policies and procedures required by Rules 1001(a) and (b) because some SCI entities are already in compliance with some of these requirements. The Commission recognizes that, for SCI entities that do not currently comply with the policies and procedures required by Rules 1001(a) and (b), their cost of compliance may, depending on their nature, size, technology, business model, and other aspects of their business, be at the upper end of the estimated average cost range.

''standards;'' and focusing compliance on the Exchange Act rather than federal securities laws generally.

At the same time, the Commission acknowledges that other aspects of the compliance costs could potentially be higher for the adopted rules than the proposed rules. For example, the requirement for a goal of two-hour resumption for all critical SCI systems (rather than only clearance and settlement systems) could increase compliance costs for SCI entities with critical SCI systems as compared to the proposal. However, as discussed above, the Commission has specified that the stated recovery timeframes in Regulation SCI are goals, rather than inflexible requirements.[1941] In addition, for some SCI entities that would have chosen to not use the proposed SCI entity safe harbor, the Commission's adoption of non-exhaustive, general minimum elements for systems compliance policies and procedures in Rule 1001(b)(2) could increase compliance costs as compared to the proposal. Based on the foregoing, the Commission believes that it is reasonable to revise the estimate to reflect the more targeted scope and increased flexibility of the adopted regulation, as compared to the proposal, in combination with potential increased costs associated with compliance with Rules 1001(a)(2)(v) and 1001(b)(2), and new costs associated with compliance with Rule 1001(a)(2)(vii).[1942] Therefore, the Commission believes that on balance overall, the costs will be reduced, and in its best judgment, each SCI entity is likely to incur an initial cost of between approximately $320,000 and $2.4 million and an ongoing annual cost of between approximately $213,600 and $1.6 million for complying with the policies and procedures required by Rules 1001(a) and (b). However, the Commission acknowledges that its cost estimates reflect a high degree of uncertainty. As noted above, the compliance costs of Rule 1001 may depend on the complexity of SCI entities' systems (*e.g.,* the compliance costs will be higher for SCI entities with more complex systems). The initial compliance costs associated with Rule 1001 may also vary across SCI entities depending on the degree of current practices' compliance with the requirements of Rule 1001. Because it is difficult to gauge the precise degree of current compliance for each SCI entity in estimating potential costs with respect to Rule 1001 at this time, the Commission is estimating a range of compliance costs above.

The Commission estimates that, in the aggregate, SCI entities will incur a total initial cost of between approximately $14 million [1943] and $106 million [1944] to comply with the policies and procedures required by Rules 1001(a) and (b). In addition, the Commission estimates that, in the aggregate, SCI entities will incur total annual ongoing cost of between approximately $9 million [1945] and $70 million.[1946] These cost estimates are intended to cover the cost of complying with all substantive requirements under Rules 1001(a) and (b) other than paperwork related burdens.

The Commission acknowledges that, for SCI entities, the requirements of Rules 1001(a) and (b) could increase technology project costs, prolong the systems development lifecycle and time to market, and result in opportunity costs because of potential delays in systems innovation.[1947] On the other hand, as discussed throughout this release, the Commission believes that entities that are important to the functioning of the U.S. securities markets should be required to have policies and procedures reasonably designed to ensure systems capacity, integrity, resiliency, availability, security, and compliance. Further, as discussed above in Sections IV.B.1 and IV.B.2, the Commission has focused the scope of Rules 1001(a) and (b) as compared to the SCI Proposal. Moreover, in tandem with the adoption of a definition of critical SCI systems, the Commission is making more clear that Rule 1001(a) permits SCI entities to tailor policies and procedures consistent with a risk-based approach. With respect to Rule 1001(b), the Commission is adopting non-exhaustive, general minimum elements that an SCI entity must include in its systems compliance policies and procedures.[1948]

Benefits and Qualitative Costs

Capacity, Integrity, Resiliency, Availability, and Security

Rule 1001(a)(1) requires that each SCI entity establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets. Rule 1001(a)(2)(i)–(iv) provides that an SCI entity's policies and procedures under Rule 1001(a) must include, at a minimum: (i) The establishment of reasonable current and future technological infrastructure capacity planning estimates; (ii) periodic capacity stress tests of systems to determine their ability to process transactions in an accurate, timely, and efficient manner; (iii) a program to review and keep current systems development and testing methodology of such systems; and (iv) regular reviews and testing, as applicable, of systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters.[1949]

Rules 1001(a)(1) and (2)(i)–(iv) codify and expand certain provisions of the ARP Policy Statements. They also expand on the requirements under Rule 301(b)(6) of Regulation ATS for ATSs that trade NMS stocks and non-NMS stocks. In particular, under the ARP Policy Statements and through the ARP Inspection Program, ARP participants, among other things, are expected to establish current and future capacity estimates; conduct capacity stress tests; and conduct annual reviews that cover significant elements of the operations of the automation process, including the capacity planning and testing process, contingency planning, systems development methodology, and vulnerability assessments. Further, Rule 301(b)(6) requires certain ATSs, with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, to establish certain capacity estimates, conduct periodic capacity stress tests of critical systems, develop and implement reasonable procedures to review and keep current systems development and testing methodology, review the vulnerability of their systems and data center computer operations to specified threats, establish adequate contingency and disaster recovery plans, conduct an independent review of their systems controls annually for ensuring that Rule 301(b)(6)(ii)(A)–(E) are met and conduct a review by senior management of a report of the independent review, and

[1941] *See supra* note 504 and accompanying text.

[1942] Rule 1001s(a)(2)(v), 1001(a)(2)(vii), and 1001(b)(2) are discussed further below.

[1943] $320,000 × 44 SCI entities = $14.1 million.

[1944] $2.4 million × 44 SCI entities = $105.6 million.

[1945] $213,600 × 44 SCI entities = $9.4 million.

[1946] $1.6 million × 44 SCI entities = $70.4 million.

[1947] *See supra* note 1936 and accompanying text (discussing a commenter's view regarding the potential economic effects of the policies and procedures requirements).

[1948] *See supra* note 1935 and accompanying text (discussing a commenter's views that, without clarification, the policies and procedures requirement under Regulation SCI could be burdensome).

[1949] *See* Rule 1001(a)(2) and *supra* Section IV.B.1.

promptly notify the Commission of certain systems outages and systems changes.[1950]

As mentioned above, Rules 1001(a)(1) and (2)(i)–(iv) codify certain aspects of the ARP Policy Statements. For SCI entities that are current participants in the ARP Inspection Program, codifying these aspects into requirements to establish policies and procedures should help ensure more robust systems that help realize the benefits of Regulation SCI discussed in Section VI.C.1.[1951]

In addition to the effects of the codification of aspects of the ARP Inspection Program, the Commission believes that the rules would further reduce the risk and incidences of systems issues affecting the markets by imposing requirements on entities that are not currently participating in the ARP Inspection Program, and by covering systems and events not currently within the scope of the ARP Inspection Program. For example, Rules 1001(a)(2)(i)–(iv) will help maintain robust systems at SCI entities that currently do not have the policies and procedures in place required by the rule. In particular, the Commission believes that, taken together, Rules 1001(a)(2)(i)–(iv) will benefit the securities markets by leading to the establishment, maintenance, and enforcement of policies and procedures that will reduce the risks and incidences of systems disruptions and systems intrusions. As noted above in Section VI.C.1, a reduction in the risk and incidences of systems issues could reduce interruptions in the price discovery process and liquidity flows.

Because current ARP participants will change their current practices to comply with Rules 1001(a)(2)(i)–(iv), the Commission recognizes that these entities will incur compliance costs that are incremental relative to the current compliance costs of the ARP Inspection Program.[1952] Furthermore, SCI entities that are not currently participating in the ARP Inspection Program may incur higher initial compliance costs to meet the requirements of Rules 1001(a)(2)(i)–(iv), compared to SCI entities that are current participants of the ARP Inspection Program. The paperwork burdens are discussed in Section V, and other costs are included as part of the quantified costs estimated above related to all requirements associated with Rules 1001(a) and (b) other than paperwork burdens.[1953]

A few commenters discussed in detail how setting forth policies and procedures with regard to systems development could yield benefits, such as efficient pricing of securities, to markets. One commenter noted that preventing defects from entering in software construction is the most cost effective approach to quality assurance.[1954] This commenter stated that it is ten times cheaper to find a defect in development than it is during systems testing, and it is one hundred times cheaper to fix a defect in development than in production (and this is not accounting for the impact on business).[1955] In addition, this commenter noted that software of higher quality is cheaper to maintain and easier to enhance, and that testing schedules for low quality, large software projects are two to three times longer and more than twice as costly as testing for high quality projects.[1956] According to information submitted by this commenter of large, mission critical systems across several industries, improving overall structural quality by 10 percent reduces ''ticket volume'' by over 30 percent.[1957] This commenter believed that this would be an inadvertent benefit of controlling integrity at the structural level that may even compensate for the cost of other aspects of Regulation SCI.[1958] Another commenter noted that the cost of a serious operational problem can rise to eight digits, and in extreme cases nine digits.[1959] This commenter noted that these costs are often shared with market participants beyond the owners of the disrupted systems.[1960] This commenter believed that the proposed Rule 1000(b)(1) requirements are reasonable and their cost can be balanced against the losses associated with the operational risks they address.[1961]

The Commission generally agrees with commenters that setting forth policies and procedures with regard to systems development could yield benefits to market participants and SCI entities, including a potential reduction in losses due to SCI events. Rule 1001(a)(2)(iii) requires SCI entities to establish a program to review and keep current systems development and testing methodology for SCI systems and, for purposes of security standards, indirect SCI systems. The Commission believes that development and testing systems are important in ensuring the reliability and resiliency of SCI systems. More reliable and resilient systems should help reduce the occurrences of SCI events and improve systems uptime for SCI entities, and thus possibly result in a reduction in losses due to SCI events. Furthermore, the Commission recognizes that the use of inadequately tested software in production could result in substantial losses to market participants if it does not function as intended. For instance, if software malfunctions, it may not route orders as intended and also could result in mispricing of securities. Additionally, if a system's capacity thresholds are improperly estimated, it may become congested, resulting in higher indirect transaction costs due to lower execution quality (*e.g.,* decrease in order fill rates). The Commission believes that costs associated with Rule 1001(a)(2)(iii) are appropriate in light of the reduction in losses due to SCI events and other benefits discussed throughout this Economic Analysis.

Business Continuity and Disaster Recovery Plans

Rule 1001(a)(2)(v) requires SCI entities' policies and procedures to set forth business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption.[1962] Therefore, as

[1950] *See* 17 CFR 242.301(b)(6)(ii).

[1951] Likewise, the relocation and modification of certain requirements in Rule 301(b)(6) of Regulation ATS applicable to significant-volume ATSs that trade NMS stocks and non-NMS stocks will help ensure that SCI ATSs create and maintain policies and procedures to support robust systems. *See supra* note 2 and accompanying text (noting that Regulation SCI, in addition to codifying the ARP Policy Statements, also supersedes and replaces aspects of those policy statements codified in Rule 301(b)(6) under the Exchange Act for significant-volume ATSs that trade NMS stocks and non-NMS stocks).

[1952] *See supra* Section VI.B (discussing current practices of SCI entities).

[1953] *See supra* note 1940 and accompanying text.

[1954] *See* CAST Letter at 10.

[1955] *See id.*

[1956] *See id.* (quoting Capers Jones and Olivier Bonsignour, *The Economics of Software Quality* (2012)).

[1957] *See id.* at 10–11.

[1958] *See id.* at 11.

[1959] *See* CISQ Letter at 2.

[1960] *See id.* at 2.

[1961] *See id.* at 2. *See also* CISQ2 Letter at 6 (stating, ''[t]he cost of recent outages in SCI systems easily justifies the additional effort in quality assurance. However, empirical evidence from software industry improvement programs demonstrates that the additional time added into quality assurance is more than compensated for by a reduction in rework to produce [return on investments] of 5:1 or greater'').

[1962] FINRA Rule 4370 generally requires that a FINRA member maintain a written continuity plan identifying procedures relating to an emergency or significant business disruption, which is akin to adopted Rule 1001(a)(2)(v) requiring policies and procedures for business continuity and disaster recovery plans. However, the FINRA rule does not include the requirement that the business continuity and disaster recovery plans be reasonably designed to achieve next business day

adopted, Rule 1001(a)(2)(v) puts an emphasis on trading and critical SCI systems with respect to resumption following a wide-scale disruption. As discussed above, the definition of critical SCI systems is intended to capture those systems that are critical to the operation of the securities markets, including systems that are potential single points of failure in the securities markets. The Commission understands that some SCI entities already have, to an extent, policies and procedures that are required by Rule 1001(a)(2)(v), while others would need to make more significant changes to their current practices.[1963]

Rule 1001(a), among other things, is expected to help ensure prompt resumption of all critical SCI systems, which in turn is expected to help minimize interruptions in trading and liquidity after a wide-scale disruption. In addition, in the case of a wide-scale disruption, multiple SCI entities may be affected by the same incident at the same time. Given that U.S. securities market infrastructure is concentrated in relatively few areas, such as New York City, New Jersey, and Chicago, maintaining backup and recovery capabilities that are geographically diverse could facilitate resumption in trading and critical SCI systems following wide-scale market disruptions. As discussed in detail in Section VI.C.1, the Commission expects the reduction in the occurrence of trading interruptions and the duration of trading interruptions would promote pricing efficiency, price discovery, and liquidity flows in markets.

One commenter noted that the Commission's cost-benefit analysis in the SCI Proposal did not take into consideration the already existing industry excess capacity as backup.[1964] With respect to this commenter, the Commission understands, based on staff expertise, that systems are sized to adequately handle message traffic with excess capacity under normal conditions and in those situations that moderately exceed the norm. The Commission also understands, however, that exchanges periodically receive escalated levels of message traffic due to unanticipated events and must make real-time adjustments to manage the capacity of their systems, such as queuing and/or throttling. Therefore, the Commission is not persuaded that excess capacity is a reasonable alternative to backup systems because systems may reach their capacity periodically. Also, as noted above, in the case of a wide-scale disruption, multiple SCI entities may be affected by the same incident at the same time. Given that U.S. securities market infrastructure is concentrated in relatively few areas, maintaining backup and recovery capabilities that are geographically diverse could facilitate resumption in trading and critical SCI systems following wide-scale market disruptions.

The Commission also received comments regarding the costs of maintaining geographically diverse backup facilities under proposed Rule 1000(b)(1). One commenter stated that the Commission did not appropriately consider the costs and benefits of maintaining geographically diverse data centers to meet the next-day readiness requirement.[1965] This commenter believed that the cost of establishing and maintaining geographically diverse data centers alone will dwarf the estimated overall compliance cost of $400,000 to $3 million.[1966] This commenter estimated that the incremental all-in, five-year cost to it to relocate its backup site would be $17 million.[1967] This commenter noted that the geographically diverse backup center requirement could also result in costs on members and users of the SCI entity.[1968] Another commenter noted that it maintains robust redundant and backup systems that exceed regulatory requirements and provide adequate capacity, security, and resiliency for its trading operations; however, the manpower and financial capital required to maintain and staff a geographically diverse backup site would easily push its annual and recurring compliance cost beyond the higher estimates provided by the Commission.[1969]

The Commission notes that the potential cost for maintaining geographically diverse backup and recovery capabilities is likely less than those estimated by commenters given the scope of the adopted rule. Specifically, because Rule 1001(a)(2)(v) does not require an SCI entity to require its members or participants to use an SCI entity's backup facility in the same way they use the primary facility (*i.e.,* does not require members or participants to co-locate their systems at backup sites to replicate the speed and efficiency of the primary site), the requirement for geographically diverse backup systems does not mean that the backup systems are required to be identical (*e.g.,* same speed and efficiency) to the primary facility. Nevertheless, the Commission believes it is critical that SCI entities and their designated members or participants be able to operate with the SCI entities' backup systems in the event of a wide-scale disruption. In addition, the Commission notes that Rule 1001(a) does not specify any particular minimum distance or geographic location that would be necessary to achieve geographic diversity, although the Commission believes that backup sites should not rely on the same infrastructure components, such as for transportation, telecommunications, water supply, and electric power. Further, Regulation SCI does not require an SCI entity to have a geographically diverse backup facility so distant from the primary facility that the SCI entity may not rely primarily on the same labor pool to staff both facilities if it believed it to be appropriate.

With respect to commenters who expressed concern regarding the potential cost for maintaining geographically diverse backup and recovery capabilities, the Commission cannot estimate with confidence the precise costs for the creation of a new, geographically diverse backup facility, given the wide range of message traffic that various exchanges, ATSs, and other entities receive and the reasonable flexibility in the design of the backup facility. Given that Rule 1001(a)(2)(v) does not require an SCI entity to require its members or participants to use an SCI entity's backup facility in the same way they use the primary facility, however, the Commission believes that the upper bound of building a new backup facility is equal to the cost of building a new primary facility. Given the Commission's response to commenters' concerns regarding the requirement to maintain geographically diverse backup and recovery capabilities, and the degree of flexibility within Regulation SCI to determine the precise nature and location of its backup site,[1970] the Commission believes that the commenter's estimate of $17 million over five years (or $3.4 million per

resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption, nor does it require the functional and performance testing and coordination of industry or sector-testing of such plans. *See supra* note 115.

[1963] *See infra* note 1973 and accompanying text (discussing the estimated range of cost per SCI entity to comply with the policies and procedures required by Rules 1001(a) and (b)).

[1964] *See* Angel Letter at 14.

[1965] *See* ISE Letter at 12. *See also* FIF Letter at 3.

[1966] *See* ISE Letter at 12.

[1967] *See id.*

[1968] *See id.* The cost to members or participants of SCI entities in connection with business continuity and disaster recovery plan testing is discussed in Section VI.C.2.b.vii below.

[1969] *See* ITG Letter at 7–8.

[1970] *See supra* notes 541–544 and accompanying text.

year),[1971] is high. Based on the Commission's best judgment, including taking into account Commission staff experience with SCI entities that have invested in geographically diverse backup facilities in recent years, the Commission believes that the average cost is more likely to be approximately $1.5 million annually for an SCI entity (that does not already have geographically diverse backup facilities). Nevertheless, even were the costs to be at the upper amount suggested by the commenter, the Commission believes the costs are appropriate given that individual SCI entity resilience is fundamental to achieving the goal of improving U.S. securities market infrastructure resilience.[1972]

The Commission recognizes that SCI entities may encounter significantly different costs in complying with the geographic diversity requirement underlying Rule 1001(a)(2)(v). As noted in Section VI.B.2, nearly all national securities exchanges already have backup facilities that do not rely on the same infrastructure components as those used by their primary facility. For those national securities exchanges that do not have such backup facilities, the cost to build such backup facilities will result in higher initial compliance costs than for national securities exchanges that do. For other SCI entities (*e.g.,* some SCI ATSs), the compliance costs to meet the geographic diversity requirement would depend on the nature, size, technology, business model, and other aspects of their business.[1973] Because SCI entities may encounter significantly different costs in complying with the geographic diversity requirement, the Commission believes that the initial compliance costs could have impact on competition among SCI entities.

The requirement to have policies and procedure to meet a goal of next day resumption in trading and two-hour resumption in critical SCI systems will impose compliance costs for SCI entities. The Interagency White Paper sets forth sound practices for core clearing and settlement organizations and firms that play significant roles in critical financial markets,[1974] and the 2003 BCP Policy Statement discusses the resumption of certain trading markets following a wide-scale disruption.[1975] As noted in Section VI.B.1, the Commission believes that SCI entities currently use an array of measures to restore systems when disruptions occur. However, the two-hour resumption goal for all critical SCI systems differs from the goals set forth in the Interagency White Paper insofar as the goal for Regulation SCI applies to critical SCI systems generally.[1976] To this extent, Rule 1001(a)(2)(v) would impose additional costs for SCI entities that currently have practices that are consistent with the Interagency White Paper for clearance and settlement systems but not all critical SCI systems. The next business day resumption goal for certain trading markets set forth in the 2003 BCP Policy Statement is consistent with the resumption goal for trading in Rule 1001(a)(2)(v). For some SCI entities that do not have policies and procedures with respect to critical SCI systems consistent with the Interagency White Paper and the 2003 BCP Policy Statement, the Commission believes that the initial compliance costs associated with establishing policies and procedures with respect to next day resumption in trading and two-hour resumption in all critical SCI systems would be larger than those that do. The costs associated with designing and modifying policies and procedures with respect to systems resumption requirements are included in the costs related to paperwork burdens in Section V. Furthermore, as discussed in Section VI.C.1, the Commission believes that the systems resumption requirements of Rule 1001(a)(2)(v) will have an impact on competition among SCI entities in part because the associated initial compliance costs will be different among SCI entities.

Market Data

Rule 1001(a)(2)(vi) provides that an SCI entity's policies and procedures must include standards that result in systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data.[1977] Unlike the other provisions of Rule 1001(a)(2) discussed above, Rule 1001(a)(2)(vi) is not addressed in Regulation ATS or the ARP Policy Statements.

The Commission believes that Rule 1001(a)(2)(vi) should help ensure that timely and accurate market data is available to all market participants. Given that market participants rely on consolidated market data in a variety of ways, including making markets, formulating trading algorithms, and placing orders, the Commission believes that this is an important benefit of Regulation SCI, although the Commission recognizes that SCI entities currently already take measures to facilitate the successful collection, processing, and dissemination of market data. As discussed in Section VI.C.1, the Commission believes that the further improvements in timeliness and accuracy of market data would help further ensure pricing efficiencies and uninterrupted liquidity flows in markets. As Rule 1001(a)(2)(vi) will be a new requirement for SCI entities, it will impose incremental compliance costs on SCI entities in setting aside additional resources to satisfy the requirements of the rule. These costs are included as part of the quantified costs estimated above related to all requirements underlying Rules 1001(a) and (b) other than paperwork burdens.[1978]

Monitoring

Rule 1001(a)(2)(vii) provides that an SCI entity's policies and procedures must include monitoring of systems to identify potential SCI events. Rule 1001(a)(2)(vii) imposes a new requirement that is not addressed in Regulation ATS or the ARP Policy Statements.

The Commission believes that SCI entities, particularly those that participate in the ARP Inspection Program, already monitor their systems in order to identify potential systems issues. Nevertheless, by defining ''SCI event'' and requiring policies and procedures for monitoring systems to identify potential SCI events, the Commission believes that Rule

[1971] *See supra* note 1967 and accompanying text.

[1972] *See supra* notes 499–544 and accompanying text.

[1973] The Commission notes that its average estimated range of initial cost of approximately $320,000 to $2.4 million per SCI entity to comply with Rules 1001(a) and (b), other than paperwork burdens, includes the cost to build and maintain a geographically diverse backup facility. The Commission estimates that the costs for SCI entities that do not currently have a geographically diverse backup facility would be at the higher end of this range.

[1974] According to the Interagency White Paper, core clearing and settlement organizations should develop the capacity to recover and resume clearing and settlement activities within the business day on which the disruption occurs with the overall goal of achieving recovery and resumption within two hours after an event. *See* Interagency White Paper, *supra* note 504, at 17812.

[1975] The 2003 BCP Policy Statement states that each SRO market and ECN should have a business continuity plan that anticipates the resumption of trading, in the securities traded by that market, no later than the next business day following a wide-scale disruption. *See* 2003 BCP Policy Statement, *supra* note 504, at 56658.

[1976] *See supra* Section IV.A.2.c (discussing the definition of critical SCI systems) and *supra* Section IV.B.1 (discussing the Commission's rationale for applying the two hour recovery goal to critical SCI systems generally instead of clearance and settlement services specifically).

[1977] *See* Rule 1001(a)(2) and *supra* Section IV.B.1.

[1978] *See supra* note 1940 and accompanying text.

1001(a)(2)(vii) should further help ensure that SCI entities identify potential SCI events, which could allow them to prevent some SCI events from occurring or to take timely appropriate corrective action after the occurrence of SCI events. As discussed above, the Commission believes the reduction in the occurrence of SCI events or the reduction in the duration of SCI events that disrupt markets would reduce pricing inefficiencies and promote price discovery and liquidity. Although the Commission believes that SCI entities already monitor their systems in order to identify potential systems issues, the Commission believes that SCI entities will have to allocate additional resources to comply with the requirements of Rule 1001(a)(2)(vii), including potentially hiring additional staff, and thus will incur costs. These costs are included as part of the quantified costs estimated above related to all requirements underlying Rules 1001(a) and (b) other than paperwork burdens.

Current SCI Industry Standards

Rule 1001(a)(4) deems an SCI entity's policies and procedures under Rule 1001(a) to be reasonably designed if they are consistent with current SCI industry standards.[1979] However, Rule 1001(a)(4) specifically states that compliance with current SCI industry standards is not the exclusive means to comply with the requirements of Rule 1001(a). Therefore, as adopted, Rule 1001(a)(4) provides flexibility to allow each SCI entity to determine how to best meet the requirements in Rule 1001(a), taking into account, for example, its nature, size, technology, business model, and other aspects of its business. Thus, Rule 1001(a)(4) allows SCI entities to choose the technology standards that best fit with their business, promoting efficiency. Furthermore, as discussed in Section IV.B.1, staff guidance lists examples of publications describing processes, guidelines, frameworks, or standards for an SCI entity to consider looking to in developing reasonable policies and procedures under Rule 1001(a). The reference to the publications which the staff may include, and which the Commission believes should be general and flexible enough to be compatible with many widely-recognized technology standards, will help SCI entities to implement and comply with Regulation SCI.[1980]

Some commenters expressed concern that SCI entities would closely adhere to the publications listed in Table A rather than take advantage of the flexibility built into the proposed rule out of concern that, if they did not, they would expose themselves to potential regulatory action for failure to comply with Regulation SCI.[1981] As discussed above in Section IV.B.1, Rule 1001(a) allows for flexibility in choosing standards or guidelines when an SCI entity is designing policies and procedures required by that rule. Moreover, the staff guidance lists examples of publications describing processes, guidelines, frameworks, or standards for an SCI entity to consider looking to in developing reasonable policies and procedures under Rule 1001(a). As noted in Section IV.B.1, the Commission understands that many SCI entities are already following other technology standards, such as ISO 27000 and COBIT. The staff guidance would not preclude SCI entities from adhering to standards such as ISO 27000, COBIT, or others, to the extent they result in policies and procedures that comply with the requirements of Rule 1001(a).[1982] Because there is no requirement for SCI entities to follow the publications listed as staff guidance, there is no separate compliance cost associated with the staff guidance in addition to the cost of complying with Rule 1001(a). As discussed throughout this section, the Commission recognizes that, in general, there will be costs associated with designing policies and procedures required by Rule 1001(a). Such costs to SCI entities that already set forth their policies and procedures based on industry standards, or that follow the publications listed in the staff guidance or comparable publications as a guide, would be minimal. On the other hand, other SCI entities that decide to modify their policies and procedures and those that do not have such policies and procedures in place may incur greater costs in designing policies and procedures required by Rule 1001(a). The costs associated with modifying and designing policies and procedures are included in the costs related to paperwork burdens in Section V.

Systems Compliance

Rule 1001(b)(1) requires each SCI entity to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules and regulations thereunder, and the entity's rules and governing documents, as applicable. Rule 1001(b)(2)(i)–(iv) provides that an SCI entity's policies and procedures under Rule 1001(b)(1) must include, at a minimum: (i) Testing of all SCI systems and any changes to SCI systems prior to implementation; (ii) a system of internal controls over changes to SCI systems; (iii) a plan for assessments of the functionality of SCI systems designed to detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Act and the rules and regulations thereunder and the SCI entity's rules and governing documents; and (iv) a plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues. The Commission recognizes that SCI entities currently take varying measures to ensure that their systems operate in a manner that complies with relevant laws and rules. These practices at SCI entities may include escalating a compliance issue upon discovery, including legal and compliance personnel in the review of systems changes, and periodically reviewing rulebooks.

The Commission believes that Rule 1001(b) should help to ensure that SCI entities operate their SCI systems in compliance with the Exchange Act and relevant rules and should help to reduce the occurrence of systems compliance issues. For example, the tests under Rule 1001(b)(2)(i) should help SCI entities to identify potential compliance issues before new systems or systems changes are implemented; the internal controls under Rule 1001(b)(2)(ii) should help to ensure that SCI entities remain vigilant against compliance issues when changing their systems and resolve potential compliance issues before the changes are implemented; and the systems assessment plans under Rule 1001(b)(2)(iii) and the coordination

[1979] Current SCI industry standards are required to be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization. *See* Rule 1001(a)(4).

[1980] *See supra* Section IV.B.1.b (discussing the role of staff guidance on current SCI industry standards).

[1981] *See, e.g.,* MSRB Letter at 11; Angel Letter at 8; BATS Letter at 6; and NYSE Letter at 20–21.

[1982] Likewise, the staff guidance would not preclude an SCI entity from adopting a derivative of multiple standards, and/or customizing one or more standards for the particular system at issue. In assessing whether an SCI entity's use of such an approach in designing its policies and policies and procedures would be ''deemed'' to be reasonably designed, the Commission's inquiry would be into whether its policies and procedures were consistent with standards meeting the criteria in adopted Rule 1001(a)(4).

and communication plans under Rule 1001(b)(2)(iv) should help technology, regulatory, and other relevant personnel (including responsible SCI personnel) of SCI entities to work together to prevent compliance issues, and to promptly identify and address compliance issues if they occur. To the extent that compliance with Rule 1001(b) reduces the occurrence of systems compliance issues, Rule 1001(b) should help ensure investor protection. Because SCI entities will need to allocate their resources towards establishing, maintaining, and enforcing policies and procedures with regard to systems compliance, Rule 1001(b) will impose compliance costs on SCI entities. These costs are included as part of the quantified costs estimated above related to all requirements underlying Rules 1001(a) and (b) other than paperwork burdens.[1983]

One commenter suggested that the Commission follow the Federal Aviation Administration's and NASA's approach, where, according to this commenter, individuals are encouraged to report safety issues and penalties are waived where there is self-reporting.[1984] As discussed above in Section IV.B.2.b, the Commission is not persuaded that it would be appropriate to provide a safe harbor for all problems that are self-reported by SCI entities and individuals because the Commission is not persuaded that the suggested self-report safe harbor will effectively further the intent of Regulation SCI.[1985] The extent to which regulators' reporting rules offer safe harbor protection is determined by particular circumstances and regulatory objectives. For purposes of Regulation SCI, a blanket safe harbor provision of the type proposed by the commenter would reduce incentives for SCI entities to take the proactive actions required to ensure the compliance of their SCI systems and, thus, could undermine the benefits of Regulation SCI discussed in Section IV.C.1.

Responsible SCI Personnel

Rule 1001(c) requires an SCI entity to establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events. Rule 1001(c) imposes a requirement that is not addressed in Regulation ATS or the ARP Policy Statements.

The Commission believes that requiring policies and procedures to identify and designate responsible SCI personnel and to establish escalation procedures to quickly inform responsible SCI personnel of potential SCI events should help to effectively alert responsible SCI personnel of potential SCI events, in order for such personnel to determine whether an SCI event has occurred so that any appropriate actions can be taken in accordance with the requirements of Regulation SCI without unnecessary delay. As such, Rule 1001(c) should help reduce the duration of SCI events as SCI entities should become aware of potential SCI events and take appropriate corrective actions more quickly. The reduction in the duration of SCI events would benefit markets as it would promote pricing efficiency and price discovery as discussed in Section VI.C.1.

The Commission believes that the costs associated with Rule 1001(c) are attributed to paperwork burdens, which are discussed in Section V.D.1.a above.[1986] The Commission does not believe that Rule 1001(c) will impose significant other costs on SCI entities because these entities already identify and designate responsible SCI personnel and have escalation procedures.[1987]

Periodic Review

Rules 1001(a)(3), (b)(3), and (c)(2) require each SCI entity to periodically review the effectiveness of the policies and procedures required under Rules 1001(a), (b), and (c), respectively, and to take prompt action to remedy deficiencies in such policies and procedures. Regulation ATS and the ARP Policy Statements do not explicitly address the periodic review of policies and procedures and remediation of deficient policies and procedures.

The Commission believes that requiring periodic review of the policies and procedures and remedial actions to address any deficiencies in the policies and procedures will help to ensure that SCI entities maintain robust policies and procedures and update them when necessary so that the benefits of Rules 1001(a), (b), and (c) should continue to be realized. As such, the Commission believes that Rules 1001(a)(3), (b)(3), and (c)(2) will help realize the benefits of Regulation SCI, and would facilitate price discovery and liquidity flow, as discussed in Section VI.C.1. These requirements, however, will impose costs on SCI entities because they will have to use resources to review the policies and procedures required by Rules 1001(a), (b), and (c) beyond the resources currently expended for this purpose or will have to take more prompt remedial action to remedy any identified deficiencies. The Commission expects that these costs generally will arise following an SCI entity's periodic review of the effectiveness of its policies and procedures and as a result of SCI events. The Commission believes that the costs associated with the review and update requirements are attributed to paperwork burdens, which are discussed in Section V.D.1.a above.[1988] However, the Commission recognizes that, if an SCI entity takes prompt or unplanned remedial action following the discovery of deficiencies in its policies and procedures, this may result in indirect costs (*i.e.,* opportunity costs) to SCI entities because they may need to delay or shift their resources away from profitable projects and reallocate their resources towards taking prompt or unplanned remedial actions required by the rules. However, it is difficult to assess such indirect costs imposed on SCI entities because the Commission lacks information necessary to provide a reasonable estimate. For example, the Commission does not have

[1983] *See supra* note 1940 and accompanying text. However, the costs associated with establishing and maintaining policies and procedures are included in the costs related to paperwork burdens in Section V.

[1984] *See* Angel Letter at 3–4. This commenter also stated that, in the SCI Proposal, the Commission did not analyze how other government regulatory agencies in the U.S. and elsewhere address technology risks (*e.g.,* in the aviation, nuclear power, electricity, telecommunications, medical, and banking sectors). *See* Angel Letter at 3 and 15. The Commission notes that, in considering the adoption of Regulation SCI, it has considered some of the current practices in other industries, such as those discussed by panelists at the Technology Roundtable (*e.g.,* aviation, nuclear power). *See supra* note 15 and Transcript of the Technology Roundtable, at 42–45.

[1985] The Commission notes that, in addition to dealing with a different problem in different industries, the ''waiving of penalties'' cited by the commenter has limitations (*e.g.,* the ASRS system cited by the comment suspends safe harbor protection for repeat violators and does not offer safe harbor for certain types of violations). Safe harbor protection for self-reporters may be appropriate in some circumstances. However, the Commission believes that in the specific context of Regulation SCI, such safe harbor protections would not further the intent of the regulation.

[1986] When monetized, the paperwork burden would result in approximately $1.7 million initially and $611,000 annually for all SCI entities in the aggregate.

[1987] As noted above, several commenters emphasized the importance of escalation procedures at SCI entities, pursuant to which technology staff or junior employees could assess a systems problem and escalate the issue up the chain of command to management as well as legal and/or compliance personnel. *See supra* note 740 and accompanying text.

[1988] As noted in Section V.D.1.a above, the paperwork burden related to the review of the policies and procedures is included in the estimated annual ongoing burden of Rules 1001(a), (b), and (c).

comprehensive and detailed information on the value of the potential forgone projects of SCI entities.

ii. Corrective Action—Rule 1002(a)

Rule 1002(a) requires an SCI entity to begin to take appropriate corrective action upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred. Rule 1002(a) also requires corrective action to include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable. Thus, it would not be appropriate for an SCI entity to unnecessarily delay the start of corrective action once its responsible SCI personnel have a reasonable basis to conclude that an SCI event has occurred, and the SCI entity would be required to focus on mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable. The Commission believes that SCI entities already have a variety of procedures in place to take corrective actions when system issues occur. However, Rule 1002(a) will likely require modifications to those existing practices in part because the rule specifies the timing and enumerates certain goals for corrective action.[1989]

The Commission believes that the corrective action requirement will reduce the length of systems disruptions, systems compliance issues, and systems intrusions, and thus, as noted in Section VI.C.1, reduce the negative effects of those interruptions on the SCI entity and market participants. Additionally, to the extent that corrective action could involve wide-scale systems upgrades, some SCI entities may potentially seek to accelerate capital expenditures, for example, by updating their systems with newer technology earlier than they might have otherwise to comply with Regulation SCI. As such, Rule 1002(a) could further help ensure that SCI entities invest sufficient resources as soon as reasonably practicable to address systems issues.

The Commission recognizes that Rule 1002(a) may require SCI entities to undertake corrective action sooner and/or to increase investments in newer and more updated systems earlier than they might have otherwise. The Commission thus believes that Rule 1002(a) could impose modestly higher costs for SCI entities in responding to SCI events relative to their current practice.[1990] But, given the wide variety of current practices, the Commission is unable to estimate the incremental costs associated with the required changes. Furthermore, if Regulation SCI reduces the frequency and severity of SCI events in the future, the cost of corrective action could similarly decline over time. However, the Commission cannot estimate these costs because the degree to which Regulation SCI will reduce the frequency and severity of SCI events is unknown. The Commission also believes that, if an SCI entity takes corrective action sooner than they might have without the requirements of Regulation SCI, this may impose indirect costs (*i.e.,* opportunity costs) to SCI entities because they may have to delay or reallocate their resources away from profitable projects and direct their resources toward taking corrective action required by the rule. However, the Commission acknowledges that it is difficult to assess such indirect costs imposed on SCI entities. For instance, the Commission does not have comprehensive and detailed information on the value of the potential foregone projects of SCI entities. Consequently, the Commission is, at this time, unable to estimate the costs of Rule 1002(a) of Regulation SCI because the Commission lacks information necessary to provide a reasonable cost estimate.

Several commenters stated that the requirements of proposed Rule 1000(b)(3) put too great an emphasis on immediate corrective action at the expense of thoroughly analyzing the SCI event and its cause, considering potential remedies, and/or acting in accordance with internal policies and procedures before committing to a plan to take corrective action.[1991] Partly in response to this concern, the Commission has modified the rule as adopted from the proposal. The Commission agrees that an SCI entity should be given appropriate time to perform an initial analysis and preliminary investigation into a potential systems issue before the corrective obligations are triggered. If a corrective action were to be applied without such analysis or investigation, then the impact of an SCI event could persist, exacerbating or prolonging its negative effects on markets and market participants. The Commission notes that Rule 1002(a) does not use the term ''immediate.'' Rather, Rule 1002(a) requires that corrective action be taken ''as soon as reasonably practicable'' once the triggering standard has been met. The Commission believes that, because the facts and circumstances of each specific SCI event will be different, this standard would help ensure that an SCI entity takes necessary corrective action soon after an SCI event, but not without sufficient time to first consider what is the appropriate action to remedy the SCI event in a particular situation and how such corrective action should be implemented.[1992]

iii. Commission Notification—Rule 1002(b)

As discussed above in Section IV.B.3.c, Rule 1002(b) requires SCI entities to provide notifications to the Commission regarding SCI events. Specifically, upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, an SCI entity is required to notify the Commission of the SCI event immediately. Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, an SCI entity is required to submit a more detailed written notification, on a good faith, best efforts basis, pertaining to the SCI event. Until such time as the SCI event is resolved and the SCI entity's investigation of the SCI event is closed, the SCI entity is required to provide updates regularly, or at such frequency as requested by a representative of the Commission. The SCI entity is also required to submit a detailed final written notification after the SCI event is resolved and the SCI entity's investigation of the event is closed (and an additional interim written notification, if the SCI event is not resolved or the investigation is not closed within a specified period of time). Finally, SCI entities are required to notify the Commission of information regarding de minimis systems disruptions and de minimis systems intrusions on a quarterly basis.

The Commission believes that most, if not all, major systems incidents are

[1989] For example, although the Commission believes that market participants already take corrective actions when system issues occur, currently, when taking corrective action, market participants may not always focus on mitigating potential harm to investors and market integrity or devoting adequate resources to remedy the issues as soon as reasonably practicable, as SCI entities are required to do under Rule 1002(a).

[1990] *See also* MSRB Letter at 32 (commenting that under most circumstances, any increased cost due to proposed Rule 1000(b)(3) would be modest since corrective action normally would already be taken).

[1991] *See* SIFMA Letter at 3; OCC Letter at 14; Joint SROs Letter at 11; LiquidPoint Letter at 4; DTCC Letter at 10; and Direct Edge Letter at 7.

[1992] *See also supra* Section IV.B.3.a (discussing in more detail the triggering standard for corrective action, Commission notification, and information dissemination) and Section IV.B.3.b (discussing the corrective action requirement).

reported by ARP entities to the Commission and that many ''de minimis'' systems issues are documented internally by SCI entities as part of their incident management systems. For those entities that do not participate in the ARP Inspection Program, the Commission also believes that some internal documentation of systems incidents exists. In addition, the Commission notes that some SCI entities currently notify the Commission of certain systems compliance issues.

Rule 1002(b) will apply to more entities (*e.g.,* some SCI ATSs), more systems (*e.g.,* market regulation and market surveillance systems, additional market data systems), and more types of systems issues (*e.g.,* systems compliance issues) than the ARP Policy Statements, and also require more detailed reporting to the Commission.[1993] The Commission believes that Rule 1002(b) will enhance the effectiveness of Commission oversight of the operation of SCI entities. For example, one commenter suggested that SCI events notification results in greater transparency for the Commission, with multiple benefits, including ensuring that the Commission has a view into problems at particular SCI entities for regulatory purposes as well as perspective on the effect of a single problem to the market at-large.[1994] Further, the Commission believes that providing written notifications to the Commission could help prevent systems failures from being dismissed as momentary issues, because notification would help focus the SCI entity's attention on the issue and encourage allocation of SCI entity resources to resolve the issue as soon as reasonably practicable.

As noted in Section IV.B.3.c, the Commission received comment letters that discuss the resource and efficiency demands of the Commission notification requirement.[1995] Some commenters expressed concern that SCI entities may feel compelled to characterize and report a greater number of systems anomalies as disruptions to comply with Regulation SCI,[1996] and that the proposal would result in SCI entities having ''shadow staff'' on hand solely for reporting SCI events so as to not divert staff away from working to resolve SCI events.[1997] While the Commission is adopting the definitions of systems disruptions, systems compliance issues, and systems intrusions, and providing discussions of these definitions in this release, the Commission acknowledges that some SCI entities could be overly cautious in seeking to be in compliance with Regulation SCI and therefore over-report systems issues to the Commission. Furthermore, the Commission notes that some SCI entities currently notify the Commission of systems related issues under the ARP Inspection Program or as part of their current business practice, but the Commission believes that SCI entities will have to allocate additional resources to meet the Commission notification requirement. Although the estimated cost to comply with the adopted notification provisions is greater than the estimate in the SCI Proposal, the Commission is not persuaded that the adopted rule, with its more targeted scope, will require SCI entities to have a ''shadow staff'' on hand solely for reporting SCI events. As discussed in Section IV.B.3.c, the Commission believes that concerns with respect to resource demands regarding the Commission notification requirements have been substantially mitigated by the numerous changes from the proposal, such as the adoption of a quarterly reporting framework for de minimis systems disruptions and de minimis systems intrusions; the adoption of an exception from the Commission notification requirements for de minimis systems compliance issues; the revised definitions of SCI systems, indirect SCI systems, systems disruption, and systems compliance issue; and the reduction in the obligations SCI entities have with respect to reporting requirements. In addition, the Commission is not persuaded that the burden of the Commission notification requirement will significantly reduce SCI entities' ability to adequately respond to SCI events. It is the Commission's experience that the staff engaging in corrective action to resolve an SCI event is generally distinct from the staff that has been charged with notifying the Commission of systems issues.

The compliance costs associated with Rule 1002(b) are attributed to the paperwork burden of Commission notifications of SCI events, including recordkeeping and submission of quarterly reports with respect to de minimis SCI events, as applicable.[1998] As discussed in the PRA, with respect to SCI events that are not de minimis, the Commission has estimated the total annual hourly burden to comply with Rules 1002(b)(1)–(4) to be 125,180 hours for all SCI entities (monetized to be approximately $40 million), or 2,845 hours per SCI entity.[1999] This estimate is greater than that estimated in the SCI Proposal (which estimate was 58,080 hours for all SCI entities, or 1,320 hour per SCI entity to comply with proposed Rules 1000(b)(4)(i)–(iii)). As more fully explained in the PRA, the Commission has increased its estimate to comply with the Commission notification provisions in Rules 1002(b)(1)–(4), notwithstanding the more targeted scope of the adopted rule, as compared to the proposed rule. These increased estimates are in response to comment that the estimates in the SCI Proposal were too low, particularly with respect to the time necessary for an SCI entity to prepare, review, and submit the required notifications.[2000] In addition, for Rule 1002(b)(5), which requires recordkeeping of all de minimis SCI events and quarterly reporting of de minimis systems disruptions and de minimis systems intrusions, the Commission has estimated a total of 7,040 hours for all SCI entities (monetized to be approximately $2 million), or 160 hours per SCI entity, for Commission notification. The number of SCI events (de minimis and otherwise), and the burdens to comply with notification requirements will likely vary among individual SCI entities, based on the nature of their business, technology, and the relative criticality of each of their SCI systems.

In addition, the Commission believes that most, if not all, SCI entities already have some internal procedures for determining the severity of a systems issue. Nevertheless, to the extent that an SCI entity must determine whether an SCI event is a de minimis SCI event, Rule 1002(b) may impose one-time implementation costs on SCI entities associated with developing a process for ensuring that they are able to quickly and correctly make such determinations, as well as ongoing costs in reviewing the adopted process. The initial and ongoing burden associated with identifying certain systems and SCI events is discussed in Section V.D.3.b.[2001]

[1993] *See supra* Section IV.B.3.c (discussing in detail the requirements of Rule 1002(b)).

[1994] *See* Lauer Letter at 8.

[1995] *See, e.g.,* UBS Letter at 3; Omgeo Letter at 16; MSRB Letter at 19; OCC Letter at 14; SunGard Letter at 5; Joint SROs Letter at 7; and NYSE Letter at 22.

[1996] *See* Joint SROs Letter at 9–10.

[1997] *See* FINRA Letter at 19.

[1998] When monetized, the paperwork burden would result in approximately $42 million, in addition to approximately $2 million in outsourcing cost, annually for all SCI entities in the aggregate.

[1999] *See supra* Section V.D.2.a (discussing the Commission's estimate of the hours required to comply with Rule 1002(b)).

[2000] *See id.*

[2001] When monetized, the paperwork burden would result in approximately $1.1 million initially and $413,000 annually for all ARP entities in the aggregate, and approximately $885,000 initially and $292,000 annually for all non-ARP entities in the aggregate. These estimates include the

Proposed Rule 1000(b)(4) did not distinguish de minimis SCI events from other SCI events in terms of the timing or type of Commission notifications. The Commission believes that the adopted quarterly Commission reporting requirement for de minimis systems disruptions and de minimis systems intrusions, and the exception from the Commission reporting requirement for de minimis systems compliance issues, will reduce costs related to Commission reporting (as compared to the costs of complying with the proposed Commission notification requirements) for SCI entities, and could facilitate more efficient allocation of SCI entities' resources toward more significant systems issues because de minimis SCI events would be subject to a recordkeeping requirement and de minimis systems disruptions and de minimis systems intrusions would be subject to a quarterly reporting requirement, rather than a requirement to report such events to the Commission more immediately. As de minimis SCI events are defined to have no or a de minimis impact on the SCI entity's operations or on market participants, the Commission believes that the recordkeeping requirement and quarterly reporting requirement, as applicable, will allow both the SCI entity and its personnel, as well as the Commission and its staff, to focus more of their attention and resources on other, more significant SCI events. Moreover, the quarterly Commission notification requirement for de minimis systems disruptions and de minimis systems intrusions will help SCI entities and the Commission to gather information on the nature, types, and frequency of de minimis SCI events and, thus, help identify potential weaknesses in systems across SCI entities and Commission's ability to monitor market events. The Commission believes that the quarterly reporting requirement for de minimis systems disruptions and de minimis systems intrusions balances the interest of SCI entities in having a limited reporting burden for de minimis systems disruptions and de minimis systems intrusions with the Commission's interest in oversight of the information technology programs of SCI entities.

Furthermore, proposed Rule 1000(b)(4)(iii) would have required an SCI entity to submit written updates pertaining to an SCI event until the SCI event is resolved. The Commission has revised the update requirement from the proposal in adopted Rule 1002(b)(3) so that the submission of updates may be provided either orally or in written form.[2002] This revision should reduce costs as compared to proposed Rule 1000(b)(4) by providing flexibility to SCI entities and because oral notifications will likely result in a lower burden than written notifications.

The Commission has also modified the 24-hour written notification requirement in adopted Rule 1002(b) to make clear that the written notification provided within 24 hours be submitted on a good faith, best effort basis. Compared to the proposed rule, the Commission believes the adopted rules will help provide certainty to SCI entities that they will not be accountable for unintentional inaccuracies or omissions contained in these submissions. The ''best efforts'' standard will also help to ensure that SCI entities will make a diligent and timely attempt to provide all the information required by the written notification requirement, thus permitting the Commission to effectively monitor SCI events.

As discussed in Section IV.B.3.c, with respect to submitting final written notifications, proposed Rule 1000(b)(4)(ii) would have required the submission of the information required to be included in the final written notification within a shorter time frame. By requiring that the final written notification be submitted after resolution of an SCI event, the Commission believes that the adopted rule will encourage SCI entities to allocate their resources efficiently in resolving the SCI event.

One commenter expressed concern that, without a safe harbor and a guarantee of immunity, the disclosures to the Commission required under Regulation SCI would provide a roadmap for litigation against non-SRO entities.[2003] As discussed in Section IV.B.2.b, the occurrence of a systems compliance issue does not necessarily mean that the SCI entity will be subject to an enforcement action. Rather, the Commission will exercise its discretion to initiate an enforcement action if the Commission determines that action is warranted, based on the particular facts and circumstances of an individual situation. Moreover, the Commission recognizes that compliance with Regulation SCI will increase the amount of information about SCI events available to the Commission and SCI entities' members and participants, and that the greater availability of this information has some potential to increase litigation risks for SCI entities, including the risk of private civil litigation. Commenters did not provide estimates of potential litigation costs and Commission staff were unable to find readily-available public information from which to estimate specific costs of possible litigation associated with the increased information available about SCI events, but based on staff experience, depending on the complexity, scope, and length of the litigation, the costs to defend an individual case could be quite significant. The Commission notes, however, that it is not clear that the incremental increase in costs due to Regulation SCI will be significant in the aggregate. Regulation SCI does not alter the elements of any available private cause of action, and the elements of such actions are likely to limit the potential for recovery. Moreover, to the extent members and participants suffer damages when SCI events occur, SCI entities are already subject to litigation risk.

As an alternative to the adopted rule, some commenters suggested that non-material systems intrusions not be reported to the Commission at all, and only be recorded by the SCI entity to reduce the instances in which notice of systems intrusions would be required.[2004] The Commission continues to believe that reporting intrusions in SCI systems and indirect SCI systems will help the Commission and its staff to detect patterns or understand trends over time and the nature of systems intrusions that may be occurring at multiple SCI entities and, thus, help ensure effective Commission oversight. As discussed in Section IV.B.3.c in detail, to reduce the burden associated with the Commission notification requirement, the Commission established separate reporting requirements (*e.g.,* quarterly reporting) for de minimis systems disruptions and de minimis systems intrusions and provided an exception from the Commission reporting requirement for de minimis systems compliance issues.

iv. Information Dissemination—Rule 1002(c)

Rule 1002(c) requires an SCI entity to disseminate information regarding

identification of critical SCI systems, major SCI events, and de minimis SCI events.

[2002] *See supra* Section IV.B.3.c.

[2003] *See* OTC Markets Letter at 15–16 (stating that ''entities that do not have SRO immunity, such as ATSs, may be subject to liability based on information reported under Reg. SCI's Rule 1000(b)(4)(iv) . . . [w]ithout a safe harbor and a guarantee of immunity, this kind of disclosure provides a roadmap for litigation against non-SRO SCI entities''). *See also* FIF Letter at 5.

[2004] *See* Omgeo Letter at 12; and DTCC Letter at 8.

certain major SCI events to all of its members or participants and certain other SCI events to affected members or participants. Specifically, promptly after any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, an SCI entity is required to disseminate certain information regarding the SCI event. When certain additional information becomes known, the SCI entity is required to promptly disseminate such information. Until the SCI event is resolved, the SCI entity is required to provide regular updates on the required information.[2005] As adopted, the information dissemination requirement does not apply to SCI events to the extent they relate to market regulation or market surveillance systems and de minimis SCI events. Rule 1002(c) imposes new requirements that are not currently part of the ARP Inspection Program. However, some entities currently provide their members or participants and, in some cases, market participants or the public more generally, with notices of systems issues.

As discussed in Section IV.B.3.d, a major SCI event is defined to mean an SCI event that has any impact on a critical SCI system or a significant impact on the SCI entity's operations or on market participants. The Commission believes that, in the context of a major SCI event, where the impact of the SCI event is most likely to be felt by many market participants, the goal of aiding market participants in evaluating the impact of the event would be efficiently served by dissemination of information to all members or participants of the SCI entity.[2006]

The Commission believes that Rule 1002(c) will help market participants—specifically the members or participants of SCI entities estimated to be affected by an SCI event and any additional members or participants subsequently estimated to be affected by an SCI event and, in some cases, all members or participants of an SCI entity—to better evaluate the operations of SCI entities by requiring certain information to be disclosed. Furthermore, increased awareness of SCI events through information disseminated to members or participants should provide SCI entities additional incentives to maintain robust systems and minimize the occurrence of SCI events. More robust SCI systems and the reduction in the occurrence of SCI events could reduce interruptions in price discovery process and liquidity flows as discussed above in Section VI.C.1.

One commenter provided information about the benefits of the proposed information dissemination requirements. Specifically, according to this commenter, one of the major benefits of Regulation SCI could be better sharing of information about technology problems.[2007] According to this commenter, sharing information about hardware failures, systems intrusions, and software glitches will alert others in the industry about such problems and help reduce system-wide costs of diagnosing problems, as well as result in improved responses to technology problems.[2008] This commenter also believed that the information will serve as warnings to other SCI entities to stay vigilant to prevent similar problems.[2009] The Commission believes that benefits identified by the commenter could be benefits of Rule 1002(c).

As discussed above, while some entities currently provide their members or participants and, in some cases, market participants or the public more generally, with notices of certain systems issues (*e.g.,* system outages), Rule 1002(c) imposes new requirements that are not currently part of the ARP Inspection Program. As such, the requirements of Rule 1002(c) will impose costs—which are attributed to paperwork burdens—on SCI entities with respect to preparing, drafting, reviewing, and making the information available to members or participants. These costs are discussed in more detail in Section V.D.2.b.[2010]

In the SCI Proposal, the Commission recognized that SCI entities incur costs to determine whether an event needs to be disseminated. While the SCI events subject to the adopted information dissemination requirements are different from those that would have been subject to the proposed requirements, the Commission continues to recognize that the determination imposes costs. Specifically, identifying major SCI events may impose one-time implementation costs on SCI entities associated with developing a process for ensuring that they are able to quickly and correctly make such determinations, as well as periodic costs in reviewing the adopted process. These costs are discussed in more detail in Section V.D.3.b.[2011]

One commenter expressed concern that SCI entities may over-report issues out of an abundance of caution if SCI entities are not given clear guidelines as to what and to whom they are required to provide information.[2012] This commenter believed that a flood of notifications, taken out of context, may create investor impression based on the quantity, not the quality, of the notifications disseminated, that certain counterparties pose serious risks to the market, when that is not the case.[2013] For the reasons discussed in Section IV.B.3.d, the Commission believes that information about SCI events (other than major SCI events and de minimis SCI events) should be disseminated to affected members or participants, and information about major SCI events (other than those that qualify as de minimis SCI events) should be disseminated to all members or participants of an SCI entity. At the same time, as compared to proposed Rule 1000(b)(5), the Commission is limiting the requirement for information dissemination to all members or participants of an SCI entity to major SCI events; limiting other information dissemination to members or participants affected by the SCI event; and excluding de minimis SCI events and SCI events related to market regulation or market surveillance systems from the information dissemination requirement. These changes would limit the compliance cost for Rule 1002(c), and are responsive to the commenter's concern that SCI entities may over-disclose systems issues.

As an alternative to the adopted rule, one commenter suggested broadening the proposed rule to require an SCI entity to disseminate information on SCI events to the public, and not just to its

[2005] Rule 1002(c)(2) provides an exception to the information dissemination requirement for systems intrusions when an SCI entity determines that dissemination of information would likely compromise the security of the SCI entity's systems, or an investigation of the systems intrusion, and documents the reasons for such determination.

[2006] At the same time, the Commission recognizes that some SCI events that meet the definition of ''major SCI event'' could also qualify as de minimis SCI events. Like other de minimis SCI events, they are excepted from the information dissemination requirement. In particular, because major SCI events are a subset of SCI events, the exception under Rule 1002(c)(4)(ii) applies to major SCI events that meet the requirements of that rule.

[2007] *See* Angel Letter at 5.

[2008] *See id.*

[2009] *See id.* However, this commenter also disagreed with the Commission that SCI entities may be reluctant to admit publicly to their glitches. *See id.* at 14. According to this commenter, market participants interact repeatedly with each other on a real-time basis and are acutely aware of glitches when they occur. *See id.*

[2010] When monetized, the paperwork burden would result in approximately $26 million, in addition to approximately $1.6 million in outsourcing cost, annually for all SCI entities in the aggregate.

[2011] *See also supra* note 2001.

[2012] *See* Fidelity Letter at 5.

[2013] *See id.*

members or participants.[2014] This commenter believed that public dissemination of the facts of an SCI event would help enhance investor confidence by preventing speculation and misinformation, and would provide important learning opportunities for the industry and other SCI entities.[2015] The Commission acknowledges that there can be additional benefits from disseminating major SCI events to the public as noted by the commenter. Under the adopted rule, an SCI entity is required to disseminate information on major SCI events (other than those that qualify as de minimis SCI events) to all of its members and participants. The Commission believes that these market participants are the most likely to act on this information and, thus, induce additional competitive incentives for SCI entities to avoid systems issues. As such, the Commission believes that it can achieve the purposes of the rule without requiring public dissemination, and also believes any additional gain in benefits from public dissemination would be minimal.

v. Material Systems Changes—Rule 1003(a)

Rule 1003(a)(1) requires an SCI entity to provide quarterly reports to the Commission, describing completed, ongoing, and planned material systems changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters. Rule 1003(a)(1) also requires an SCI entity to establish reasonable written criteria for identifying a change to its SCI systems and the security of its indirect SCI systems as material. Rule 1003(a)(2) requires an SCI entity to promptly submit a supplemental report to notify the Commission of a material error in or material omission from a previously submitted report.

Entities that participate in the ARP Inspection Program currently provide some material systems change notifications to the Commission and the Commission believes that all SCI entities have some internal processes for documenting systems changes as a matter of prudent business practice. For example, consistent with the ARP Policy Statements, certain entities provide annual reports on significant systems changes and notify the Commission on an as-needed basis regarding certain significant systems changes. In addition, ATSs are required notify the Commission of certain systems changes pursuant to Rule 301(b)(2)(ii) and Rule 301(b)(6)(ii)(G) of Regulation ATS, as applicable. Rule 1003(a) changes some of the current practices and sets forth more detailed requirements for these notifications. For example, Rule 1003(a) covers material changes on a broader set of systems than the ARP Inspection Program or Regulation ATS. Rule 1003(a) also requires an SCI entity to submit quarterly reports on Form SCI regarding material systems changes, but does not require separate notification for each material systems change. Further, Rule 1003(a) requires an SCI entity to promptly notify the Commission (by submitting Form SCI) of a material error in or material omission from a previously submitted report. To the extent that Rule 1003(a) requires SCI entities to notify the Commission of material systems changes for more types of systems and to the extent that it requires notification at a higher frequency than current practice (quarterly reports vs. annual reports), the Commission believes that Rule 1003(a) should enhance the Commission's oversight of the operation of SCI entities.

The compliance costs of Rule 1003(a) primarily entail costs associated with preparing and submitting Form SCI in accordance with the instructions thereto. The initial and ongoing cost estimates associated with preparing and submitting Form SCI with regard to material systems changes under Rules 1003(a)(1) and (2) are discussed in detail in Section V.D.2.c.[2016] The Commission does not expect Rule 1003(a) will impose significant costs on SCI entities other than those discussed in Section V.D.2.c.

According to one commenter, ''[t]he larger market participants [that will be subject to Regulation SCI] are generally experienced and circumspect with regards to significant infrastructure changes, such as data center migrations and major platform upgrades.'' [2017] This commenter expected that, for these larger entities, integrating Regulation SCI compliance into their existing programs can occur without crippling disruption or exorbitant cost, and expected that insight from the implementation of Regulation SCI would contribute to overall stability and resiliency of the markets over time.[2018] However, this commenter expressed concern that compliance with the Commission notification requirement will result in incremental costs that may in some cases delay or discourage innovation.[2019] Another commenter similarly expressed concern about the compliance burden and the resulting impact on competition and innovation associated with the 30-day advance Commission notification requirement for material systems changes.[2020] In addition, one commenter noted that the Commission underestimated the cost of lost business opportunities and the inability to swiftly deploy corrective solutions that would result from the 30-day advance systems change notification requirements.[2021] This commenter noted that most ATS operators with advanced systems purposefully implement frequent agile modifications instead of major episodic changes in order to continuously improve their systems and minimize the impact of the changes.[2022] This commenter expressed concern that a built-in 30-day delay in implementing changes would encourage the deployment of larger, riskier changes more infrequently, thereby creating longer periods of time during which a systems issue and/or erroneous configuration would continue without correction.[2023] This commenter also stated that the 30-day advance notification process has the potential to delay the deployment of corrective solutions that are necessary to ensure the provision of uninterrupted and efficient order matching services at the best available prices.[2024]

As noted above, as adopted, Regulation SCI does not include the proposed 30-day advance Commission notification requirement for material systems changes. Rather, Rule 1003(a)(1) requires quarterly reports of material systems changes. Elimination of the proposed 30-day advance Commission notification requirement addresses the concern of some commenters that the rule would impede agile development methodology and favor the waterfall development methodology, or delay the implementation of systems changes or innovations, particularly for smaller SCI entities. The quarterly reports will also provide the Commission and its staff with a more efficient framework to review material systems changes,

[2014] *See* MFA Letter at 7.

[2015] *See id.*

[2016] When monetized, the paperwork burden would result in approximately $6.8 million annually for all SCI entities in the aggregate.

[2017] *See* SunGard Letter at 3.

[2018] *See id.*

[2019] *See id.*.

[2020] *See* BATS Letter at 15. *See also, e.g., supra* notes 999–1000 (discussing the views of commenters that the proposed 30-day advance notification requirement would stifle innovation and interfere with an SCI entity's natural planning and development process).

[2021] *See* ITG Letter at 8.

[2022] *See id.*

[2023] *See id.*

[2024] *See id.*

because including all relevant material systems changes in a single report will allow the Commission to more easily and clearly understand an SCI entity's framework for systems changes, including how certain material systems changes are related.[2025]

vi. SCI Review—Rule 1003(b)

Rule 1003(b) requires an SCI entity to conduct an SCI review of its compliance with Regulation SCI not less than once each year,[2026] and submit a report of the SCI review to senior management of the SCI entity for review no more than 30 calendar days after completion of such SCI review. Rule 1003(b) also requires an SCI entity to submit a report of the SCI review to the Commission and to the board of directors of the SCI entity or the equivalent of such board, together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity.

Systems reviews have been part of the ARP Inspection Program, and through this program, the Commission understands that many SCI entities currently undertake annual systems reviews and that senior management and/or the board of directors or a committee thereof reviews reports of such reviews. However, the Commission believes that the scope of the systems reviews, and the level of senior management and/or board involvement in such reviews, varies among ARP entities. The Commission expects that the SCI review requirement would produce greater consistency in the approach that SCI entities take in systems reviews, which would help improve the efficiency of the Commission's oversight (*e.g.,* inspection) of SCI entities' systems. In addition, the Commission believes that the SCI review requirement would result in SCI entities having an improved awareness of the relative strengths and weaknesses of their systems independent of the assessment of Commission staff, which should, in turn, improve systems and reduce the number of SCI events. As discussed in Section VI.C.1, the reduction in occurrence of SCI events could reduce interruptions in the price discovery process and liquidity flows.

The initial and ongoing paperwork burden associated with conducting an SCI review, submitting a report of the SCI review to senior management of the SCI entity for review, and submitting a report of the SCI review and any response by senior management to the Commission and to the board of directors of the SCI entity or the equivalent of such board is discussed in Section V.D.2.d.[2027] SCI entities will also incur costs in addition to the paperwork burden to comply with the SCI review requirement. Although the Commission understands that most SCI entities currently undertake annual systems reviews, Rule 1003(b) sets forth specific requirements related to the SCI review. In particular, an SCI review is required to include a risk assessment with respect to SCI systems and indirect SCI systems of an SCI entity, an assessment of internal control design and effectiveness of SCI systems and indirect SCI systems, and penetration testing reviews. Moreover, Rule 1003(b) specifies that the SCI review is to determine the SCI entity's compliance with Regulation SCI. Rule 1003(b) also requires a report of the SCI review and any senior management response to be submitted to the board of directors of the SCI entity or the equivalent of such board and thus SCI entities may incur an additional cost as a result of additional time the board allocates to evaluate the review. The Commission cannot estimate costs other than paperwork burdens because the Commission does not have the information necessary to provide a reasonable estimate. In particular, the Commission lacks information on how SCI entities will structure their reviews.

As discussed above in Section IV.B.5, the Commission is not adopting a requirement that SCI reviews be conducted by an independent third party because the Commission believes that the goals of Regulation SCI can be achieved through reviews by either internal objective personnel or external objective personnel. The Commission acknowledges that, in some cases, there could be potential benefits from requiring third party reviews. However, as noted in Section IV.B.5, third parties can also have conflicts of interest that prevent a particular entity or personnel from meeting the objectivity standard required for an SCI review. In addition, during the Technology Roundtable in which participants discussed third party review, some panelists suggested that the use of an external third party is unnecessary because, for example, the training for a third party as well as the costs involved with third party evaluations would be large with little additional benefit.[2028] The Commission agrees that SCI entities would likely need to provide significant guidance to third-party reviewers on the specific features of the entity's systems. The Commission recognizes that a third-party review requirement could impose additional costs on SCI entities, and believes that it is appropriate at this time to allow SCI entities to decide whether to incur such costs instead of mandating third-party review.

vii. Business Continuity and Disaster Recovery Plan Testing—Rule 1004

Rule 1004(b) requires the testing of an SCI entity's business continuity and disaster recovery plans at least once every 12 months. Rules 1004(a) and (b) require participation in such testing by those members or participants that an SCI entity reasonably determines are, taken as a whole, the minimum number necessary for the maintenance of fair and orderly markets in the event of the activation of its business continuity and disaster recovery plans. Rule 1004(c) requires an SCI entity to coordinate such testing on an industry- or sector-wide basis with other SCI entities.

The requirements under Rule 1004 are not a part of the ARP Inspection Program. As discussed above in Section VI.B.2, the securities industry generally has a voluntary system for testing business continuity and disaster recovery plans and market participants, including exchanges, members of exchanges, clearing agencies, clearing members, and ATSs, already coordinate certain business continuity and disaster recovery plan testing to some extent. For example, some SCI entities already require some of their members or participants to connect to their backup systems. Further, although participation is not always mandatory, some SCI entities already provide their members or participants with the opportunity to test the SCI entity's business continuity and disaster recovery plans. However, because not all SCI entities require member or participant participation in business continuity and disaster recovery plans testing, the Commission

[2025] As discussed above, Commission staff will not use material systems change reports to require any approval of planned systems changes in advance of their implementation pursuant to any provision of Regulation SCI, or to delay implementation of material systems changes pursuant to any provision of Regulation SCI. *See supra* Section IV.B.4.b.

[2026] However, penetration test reviews of the network, firewalls, and production systems are required to be conducted not less than once every three years. *See* Rule 1003(b)(i). Assessments of SCI systems directly supporting market regulation or market surveillance are required to be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but also not less than once every three years. *See* Rule 1003(b)(1)(ii).

[2027] When monetized, the paperwork burden would result in approximately $9.7 million, in addition to approximately $2.2 million in outsourcing cost, annually for all SCI entities in the aggregate.

[2028] *See* Transcript of the Technology Roundtable, at 86–91.

understands that not all market participants participate in such testing. Moreover, the Commission understands that, to the extent such participation occurs, it may in many cases be limited in nature (*e.g.,* testing for connectivity to backup systems).[2029]

The Commission believes that, for SCI entities, voluntary testing is insufficient, and that business continuity and disaster recovery planning for market centers and certain members or participants must be an integral component of business continuity and disaster recovery preparedness. The Commission further believes that the requirements under Rule 1004 should help ensure that the securities markets will have improved backup infrastructure and fewer market-wide shutdowns. As discussed in detail in Section VI.C.1, fewer market-wide shutdowns should help facilitate continuous liquidity flows in markets, reduce pricing errors, and thus improve the quality of the price discovery process.

With respect to these benefits, one commenter suggested measuring benefits of reducing outages and technical issues by looking at, for example, loss of trading commissions due to outages.[2030] This commenter estimated that the potential loss of equity commissions by broker-dealers over the two-day market closure from Superstorm Sandy may have been approximately $374 million.[2031] The Commission believes that measuring potential benefits in terms of transaction costs (commission revenue) does not fully account for other benefits, such as uninterrupted liquidity flows and price discovery.[2032] Furthermore, the Commission believes that the estimated commission loss noted by the commenter likely overstates the actual losses in commissions because some of the ''lost'' trading may have only been delayed until the markets re-opened after Superstorm Sandy. Accordingly, the Commission is not persuaded that the estimate provided by the commenter represents the quantified benefit associated with this component of Regulation SCI. The Commission is unable to estimate the benefit of this component of Regulation SCI because the Commission does not have quantified information on the extent that a reduction in SCI events will help facilitate liquidity flows in markets, reduce pricing errors, and thus improve the quality of the price discovery process. Furthermore, the Commission is unable to quantify the impact of ''delayed'' trading because it lacks the information necessary to provide a reasonable estimate. In particular, data on the trading activity lost as opposed to ''delayed'' due to the two-day market closure would be extremely difficult to piece together in a meaningful way.

Costs to SCI Entities

The mandatory testing of SCI entity business continuity and disaster recovery plans, including backup systems, as required under Rule 1004, will result in additional costs to SCI entities. The Commission notes that some SCI entities already offer availability for their members or participants to test business continuity and disaster recovery plans. Furthermore, as mentioned above, market participants, including SCI entities, already coordinate certain business continuity plan testing to an extent. However, Rule 1004 mandates participation in testing for some entities that do not currently participate, requires more rigorous testing than currently required, and requires greater coordination than SCI entities and market participants currently engage in. In particular, Rule 1004 requires SCI entities to designate their members or participants to participate in business continuity and disaster recovery plan testing and to coordinate such testing with other SCI entities on an industry- or sector-wide basis. The requirement of member or participant designation in business continuity and disaster recovery plan testing under Rule 1004 imposes additional costs as an SCI would have to allocate resources towards initially establishing and later updating standards for the designation of its members and participants for testing. Furthermore, the requirement to coordinate industry- or sector-wide testing will impose additional administrative costs because an SCI entity would be required to notify its members or participants and also organize, schedule, and manage the coordinated testing.[2033]

Some commenters stated that the scope of the proposed testing requirement would impose costs on SCI entities that the Commission did not account for, including the cost to reconfigure their systems to engage in functional and performance testing, the cost of establishing effective coordinated test scripts for the testing, and time necessary to conduct the required testing.[2034] Another commenter stated that testing will be costly to ATSs and their subscribers, and that the aggregate cost for all would be higher than the $66 million estimated in the SCI Proposal.[2035] This commenter noted that the cost includes the time, resources, and professional staff that would be devoted to the testing process, and the resulting lost business opportunities associated with the ability to focus on revenue generating projects.[2036] In addition, this commenter stated that, while connectivity between an ATS and its subscribers may already be established, additional configurations and build out of systems may be required to create a testing environment that simulates live market conditions.[2037]

Another commenter stated that there are dozens of man-days of pre-test planning, preparation, pre-testing testing, testing, and post-mortem reviews for SCI entities associated with the industry test initiatives.[2038] According to this commenter, there are anywhere from tens to hundreds of business and technology staff engaged

[2029] *See* Proposing Release, *supra* note 13, at 18164.

[2030] *See* Angel Letter at 15–16. The Commission also notes that this commenter and others expressed the view that enhanced BC/DR testing would have substantial benefits. *See, e.g., id.* at 9–10 (stating that the ''ability of SROs to require their members to participate in testing is an important step forward in making sure that testing is as realistic as possible . . . [and] is one of the most valuable parts of Regulation SCI and will do the most to ensure improved market network reliability''); and UBS Letter at 5 (stating that the ''critical task of BCP testing should not be undertaken in isolated silos by individual firms. Individual BCP testing that does not involve realistic scenarios with connected participants may mask gaps and/or be insufficient from a systems integrity standpoint'' and that the benefits of a ''new and more comprehensive BCP testing paradigm'' would be ''broad and considerable'').

[2031] This commenter based this estimate on FINRA member equity commissions in 2010 obtained from SIFMA. *See* Angel Letter at 16. In addition, this commenter referred to the losses and legal and administrative costs associated with the Facebook IPO, as well as the losses associated with the May 6, 2010 incident. *See id.* at 15–16. This commenter also more generally stated that the benefits of reducing outages and major technical issues are pretty straightforward—catastrophic failures in exchange systems are extremely costly, both in terms of direct losses to participants and in reduced investor confidence in the markets. *See id.* at 15. According to this commenter, even a modest reduction in the overall risk of a meltdown is quite cost effective to the economy as a whole. *See id.*

[2032] As noted by this commenter, the $374 million loss does not include lost trading profits to investors, or loss of utility from being able to hedge risk, monetize holdings, or otherwise trade. *See id.* at 16.

[2033] Administrative costs associated with coordinating testing are included as part of the PRA burden of Rule 1004. *See supra* Section V.D.1.b. As discussed in Section V.D.1.b, the Commission continues to believe that plan processors will outsource the work related to compliance with Rule 1004.

[2034] *See supra* Section IV.B.6.b (discussing comments on proposed Rule 1000(b)(9)).

[2035] *See* ITG Letter at 15–16.

[2036] *See id.*

[2037] *See id.*

[2038] *See* Tellefsen Letter at 11.

in this initiative.[2039] This commenter estimated the following staff levels required to support testing: Exchanges—175–200+ man-days; member firms—80–85 man-days; and ATSs—12–25 man-days.[2040] Based on the commenter's upper estimates measured in man-days, the Commission estimated monetary values by allocating hours among the traders, technologists, programmers/system administrators, exchange personnel, and analysts necessary for implementation of disaster recovery testing. This estimation yields implied annual average total cost estimates of $500,000 and $60,000 for exchanges and ATSs, respectively.[2041] For the reasons discussed below, the Commission believes that this commenter's cost estimate does not accurately reflect the costs to SCI entities.

The Commission recognizes that the factors described by commenters will contribute to costs for SCI entities associated with business continuity and disaster recovery plans testing. For example, as discussed in Section IV.B.6.b, the Commission acknowledges that systems reconfiguration for functional and performance testing and establishing an effective coordinated test script could be a complex process and result in costs. At the same time, the Commission believes that systems reconfiguration and the establishment of an effective coordinated test script is an important first step in establishing robust and effective business continuity and disaster continuity plans testing. The Commission also notes that costs of Rule 1004 are likely to be lower than those estimated by commenters because of changes made to the proposed rule. For example, although Rule 1004 would require testing of BC/DR plans that is more rigorous than some types of testing urged by some commenters, the adopted rule includes a more targeted member and participant designation provision than the proposed rule. As discussed above in Section IV.B.6.b, compared to proposed Rule 1000(b)(9), the Commission believes that the adoption of a more targeted designation requirement is likely to result in a smaller number of SCI entity members or participants being designated to participate in business continuity and disaster recovery plans testing and thus should result in lower costs for SCI entities to coordinate testing.[2042]

The Commission is unable to provide a quantified estimate of the specific costs for SCI entities associated with the mandatory testing of SCI entity business continuity and disaster recovery plans, including backup systems. Although several commenters provided general estimates as to the costs of compliance with Rule 1004, these commenters did not provide their assumptions or a description of the quantified costs associated with each potential source of costs. Given the lack of information provided by commenters and that these costs could vary significantly based on the specific systems of each SCI entity, the Commission is unable to determine whether the costs provided by commenters are representative. Additionally, the Commission notes that commenters appeared to focus on costs as if assuming there is no testing today. Because SCI entities currently engage in some coordinated BC/DR testing, the Commission believes that the average *incremental* cost to SCI entities, in addition to the burden estimated in the PRA, would be lower than these commenters' cost estimates. The Commission also believes that costs would be significantly lower in the year following the initial year of testing. Because the Commission does not have detailed information regarding the current level of BC/DR testing and coordination of such testing by each SCI entity, and the cost associated with such testing and coordination, however, the Commission cannot at this time provide a quantified estimate of the cost for SCI entities to comply with Rule 1004.

Costs to SCI Entity Members and Participants

The Commission believes that Rule 1004 will also impose costs on SCI entity designated members and participants. In the SCI Proposal, based on discussions with market participants, the Commission estimated that the cost of business continuity and disaster recovery plan testing would range from immaterial administrative costs (for SCI entity members and participants that currently maintain connections to SCI entity backup systems) to a range of $24,000 to $60,000 per year per member or participant in connection with each SCI entity.[2043] As noted in the SCI Proposal and also above, the Commission understood that most of the larger members or participants of SCI entities already maintain connectivity with the backup systems of SCI entities and, thus, the additional connectivity costs imposed by proposed Rule 1000(b)(9) to these larger members or participants may be minimal.[2044] However, among smaller members or participants of SCI entities, the number of members or participants who maintain such connectivity is lower.[2045] Therefore, costs at the higher end of the estimated range would accrue for members or participants who would need to invest in additional infrastructure and to maintain connectivity with an SCI entity's backup systems in order to participate in testing.

Furthermore, in the SCI Proposal, the Commission acknowledged that it is difficult to provide an estimate for the total aggregate cost to SCI entity members or participants under proposed Rule 1000(b)(9).[2046] Because each SCI entity had discretion in determining its standards for designating members or participants for the testing required by proposed Rule 1000(b)(9)(i), the Commission did not have enough information to estimate the number of members or participants at each SCI entity that would be designated as required to participate in testing and to determine whether such designated members or participants are those that already maintain connections to SCI entity backup systems. With limited information, the Commission provided a total aggregate annual cost estimate in the SCI Proposal of approximately $66 million for designated members and participants to participate in business continuity and disaster recovery plans testing.[2047]

Several commenters stated that the Commission underestimated the cost of

[2039] *See id.*

[2040] *See id.*

[2041] The allocations are based on Commission staff experience that exchanges would divide their personnel as 85% technologists, 5% exchange rule enforcement personnel, and 10% business analysts, and ATSs are assumed to divide their personnel as 90% technologists and 10% business analysts based on staff experience. The hourly rates are from SIFMA's *Management & Professional Earnings in the Securities Industry 2012,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The calculation for ATSs was as follows: 25 days × (10% time required by analysts × $245/hour + 90% time required by technologists × $282/hour) = $55,660 per ATS. For each exchange: 200 days × (85% time required by technologists × $282/hour + 10% time required by analysts × $245/hour + 5% time required by supervisors × $446/hour) = $458,400 per exchange. The Commission has rounded up because the breakdown between analysts, supervisors, and technologists may vary between ATSs and Exchanges.

In the absence of a specific estimate provided by the commenter for plan processors or clearing agencies, the estimate for exchanges is assumed to apply to these types of SCI entities. Estimates for members and participants are discussed separately below.

[2042] *See supra* Section IV.B.6.b (discussing the designation requirement in adopted Rule 1004).

[2043] *See* Proposing Release, *supra* note 13, at 18172.

[2044] *See id.* at 18172 and n. 642.

[2045] *See id.* at 18172.

[2046] *See id.*

[2047] *See id.* at 18172 and n.643.

business continuity and disaster recovery plan testing under proposed Rule 1000(b)(9). One commenter noted that the Commission failed to take into account those SCI entities that engage in systems-specific testing upon implementation or initial connection by a market participant, but do not engage in business continuity and disaster recovery testing with the participation of market participants.[2048] One commenter noted that the average cost for a broker-dealer to maintain fully redundant systems at all relevant exchange backup facilities would be approximately $3 million annually, according to one of its informal surveys.[2049] Further, this cost would not include the initial capital costs related to the infrastructure or the labor/employment necessary for the maintenance and monitoring of backup connection and facilities.[2050]

Other commenters stated that the Commission underestimated other aspects of the cost of business continuity and disaster recovery plan testing under proposed Rule 1000(b)(9). One commenter believed that the requirement for members to connect to an SCI entity's backup site could pose significant economic burden and provide little benefit to the market.[2051] This commenter believed that the cost of such connections would be well over the $10,000 per connection that the Commission estimated.[2052] According to this commenter, establishing and maintaining a connection with comparable trading capability and latency could cost a broker-dealer that co-locates at an SCI entity's data center between $15,000 and $20,000 monthly simply for the necessary communication lines.[2053] In addition, this commenter noted that such members would need additional hardware (estimated to be up to $500,000) to establish an appropriate presence at the backup site to ensure that they could trade in an efficient manner with low latency.[2054] This commenter believed that compliance with the Rule 1000(b)(9) requirements could cause broker-dealers to reduce the number of SCI entities through which they trade.[2055] This commenter suggested that the standard for designating members should be those members ''critical to the operation of the SCI entity.'' [2056]

Another commenter estimated that the costs to a market making firm to support fully redundant exchange and ATS backup facilities would be approximately $7 million to $10 million in initial capital, with annual costs of between $5 million and $9 million.[2057] According to this commenter, this cost is not justified by the benefits because backup facilities would not be used in the event of an outage at the primary site,[2058] and would lead firms to reconsider their ability to make markets on as many trading platforms and potentially reduce price competition.[2059]

The same commenter who provided an estimate of burdens for SCI entities expressed the view that there are also dozens of man-days of pre-test planning, preparation, pre-testing testing, testing, and post-mortem reviews for members and participants that would be associated with industry test initiatives.[2060] Based on the commenter's upper estimates for member firms, measured in man-days, the Commission assigned monetary values using appropriate hours allocation among the traders, technologists, programmers/system administrators, exchange personnel, and analysts necessary for implementation of disaster recovery testing. This procedure yields an annual average total cost estimate of about $200,000 for each member firm.[2061] For the reasons discussed below, the Commission believes that this commenter's cost estimate does not accurately reflect the costs to members or participants.

The Commission acknowledges that members or participants will incur costs as a result of Rule 1004. However, the Commission believes that the members or participants likely to be designated to participate in such testing are those that conduct a high level of activity with the SCI entity, or that play an important role for the SCI entity (such as market makers), and who are more likely to have already established connections to the SCI entity's backup site. The Commission believes that many of these members or participants already have established connectivity with the SCI entity's backup site and already monitor and maintain such connectivity, and thus the additional connectivity costs imposed by Rule 1004 would be modest to these members or participants.

For members or participants that currently do not have connectivity, the Commission recognizes the requirements of Rule 1004 will impose costs on members or participants in establishing, maintaining, and monitoring backup connection and facilities. The Commission believes that a few commenters who stated that the Commission underestimated these costs may have based their cost estimates for proposed Rule 1000(b)(9) on the assumption that member connections to SCI entities' backup systems need to be the same as those at the primary site.[2062] However, as discussed above in Section IV.B.6, Rule 1004 does not require SCI entity members or participants to maintain the same level of connectivity with the backup sites of an SCI entity as they do with the primary sites. In the event of a wide-scale disruption in the securities markets, the Commission acknowledges that an SCI entity and its members or participants may not be able to provide the same level of liquidity as on a normal trading day. In addition, the Commission recognizes that the concept of ''fair and orderly markets'' does not require that trading on a day when business continuity and disaster recovery plans are in effect reflect the same level of liquidity, depth, volatility, and other characteristics of trading on a normal trading day.

The Commission, however, is unable to provide a quantified estimate of the

[2048] *See* MSRB Letter at 38.

[2049] *See* FIA PTG Letter at 3. *See also* BIDS Letter at 8 (commenting that testing and backup connections are expensive, and the expense of the connections could outweigh the value or the utilization of the value that certain venues provide).

[2050] *See* FIA PTG Letter at 3. This commenter noted that the costs vary widely among members and exchanges but are not insubstantial. *See id.*

[2051] *See* ISE Letter at 9.

[2052] *See id.*

[2053] *See id.*

[2054] *See id.*

[2055] *See id.*

[2056] *See id.* According to this commenter, under the suggested standard, its focus would be on its seven Primary Market Makers who provide continuous liquidity, and these members would provide a baseline of liquidity for trading. *See id.* However, this commenter believed that, in order to satisfy the standard to provide ''fair and orderly trading,'' it may need to require some or all of its 145 Electronic Access Members who access liquidity. *See id.*

[2057] *See* KCG Letter at 4, 12. This commenter stated that the cost of supporting a backup facility of an SCI entity would be reduced, if the backup facility of an SCI entity were at the primary site of another SCI entity where the market maker traded. *See id.* at 12.

[2058] *See id.* at 4.

[2059] *See id.* at 12.

[2060] *See also supra* note 2038 and accompanying text (discussing this commenter's cost estimate for SCI entities).

[2061] The allocations are based on the staff experience that member firms divide their personnel as 45% traders, 45% technologists, and 10% business analysts. The hourly rates are from SIFMA's *Management & Professional Earnings in the Securities Industry 2012,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The calculation for member firms was as follows: 85 days × (10% time required by analysts × $245/hour + 45% time required by technologists × $282/hour + 45% time required by traders × $312/hour) = $198,424 per member firm.

[2062] *See supra* notes 2049, 2050, 2052–2054, and 2057 and accompanying text (discussing commenters' estimates of the cost to maintain fully redundant systems at relevant SCI entity backup facilities).

specific costs for SCI entity members or participants associated with the mandatory testing required by Rule 1004. Although several commenters provided general estimates as to the costs of compliance with Rule 1004, these commenters did not provide their assumptions or a description of the quantified costs associated with each potential source of costs. Given the lack of information provided by commenters and that these costs could vary significantly based on the specific systems of each SCI entity and member or participant, the Commission is unable to determine whether the costs provided by commenters are representative. Additionally, the Commission notes that some commenters appeared to focus on costs as if assuming there is no testing today. Because some members and participants of SCI entities currently participate in SCI entities' BC/DR testing, these members and participants would not incur the full costs estimated by the commenters. Thus the Commission believes that the average *incremental* cost to members or participants would be lower than these commenter's estimates because the estimates do not account for current practices. The Commission also believes that costs will be highly variable among member firms, and will be significantly lower in the year following the initial year of testing. Because the Commission does not have detailed information regarding the current level of engagement by members or participants in BC/DR testing and the associated costs, or the details of the BC/DR testing that SCI entities will implement pursuant to Rule 1004, the Commission cannot at this time provide a precise quantified estimate of the cost for SCI entities' designated members or participants to comply with Rule 1004.[2063] The Commission also notes that it is critical that SCI entities and their designated members or participants be able to operate with the SCI entities' backup systems in the event of a wide-scale disruption, and believes that the costs that would be incurred by essential market participants are appropriate in light of the benefits discussed above.[2064]

Although the Commission generally believes that the aggregate cost to SCI entity members or participants under Rule 1004 will be lower than the cost estimated for proposed Rule 1000(b)(9), the Commission continues to believe it is difficult to provide an estimate for the aggregate cost to SCI entity members or participants because under Rule 1004, each SCI entity has reasonable discretion in designating its members or participants for the required testing, and, as noted above, the Commission does not possess necessary information to estimate the number of designated members or participants and to determine whether such designated members or participants are those that already have established and maintained connectivity to the SCI entity's backup systems. Accordingly, the Commission cannot at this time provide a quantified estimate of the total aggregate cost to SCI entity members or participants under Rule 1004.[2065]

Moreover, as noted above in Section IV.B.6.b, the Commission believes that adoption of a designation requirement that requires SCI entities to exercise reasonable discretion to identify those members or participants that, taken as a whole, are the ''minimum necessary'' for the maintenance of fair and orderly markets in the event of the activation of such plans is likely to result in a smaller number of SCI entity members or participants being designated for participation in testing as compared to the SCI Proposal, thus reducing total costs to all members or participants combined. Because the Commission believes that SCI entities have an incentive to limit the imposition of the cost and burden associated with testing to the minimum necessary to comply with the rule, it also believes that, given the option, most SCI entities would, in the exercise of reasonable discretion, prefer to designate fewer members or participants to participate in testing, than to designate more. On balance, the Commission believes that the adopted rule will incentivize SCI entities to designate those members and participants that are in fact the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of their BC/DR plans, and that this should reduce the number of designations to which any particular member or participant would be subject, compared to the SCI Proposal.

It remains possible, as some commenters noted, that firms that are members of multiple SCI entities will be the subject of multiple designations, and that multiple designations could require certain firms to maintain connections to backup sites and participate in testing of the BC/DR plans of multiple SCI entities. As discussed in Section IV.B.6.b, the Commission believes this possibility, though real, may be mitigated by the fact that designations are likely to be made to firms that are already connected to one or more SCI entity backup facilities, because they are more likely to be significant members or participants of the applicable SCI entities; and that, because some SCI entity backup facilities are located in close proximity to each other, multiple connections to such backup facilities may be less costly than if SCI entity backup facilities were not so located. The Commission recognizes that there would be greater costs to a firm being designated by multiple SCI entities to participate in the testing of their business continuity and disaster recovery plans, but believes that these greater costs are warranted for such firms, as they represent significant participants in each of the SCI entities for which they are designated, and their participation in the testing of each such

[2063] Although the Commission cannot at this time precisely estimate the total cost of compliance with Rule 1004, the Commission believes that $10,000 on average per SCI entity is a reasonable estimate solely for the incremental cost of connectivity associated with the requirements of Rule 1004. As noted above, the Commission continues to believe that it is reasonable to estimate that the members or participants of SCI entities that are most likely to be designated as required to participate in testing are those that conduct a high level of activity with the SCI entity, or that play an important role for the SCI entity (such as market makers), and that such members or participants are likely to already maintain connectivity with an SCI entity's backup systems. Therefore, the Commission is not persuaded that its estimate of the average connectivity cost for each member or participant of an SCI entity should be modified from $10,000.

[2064] Further, in response to comment that the added benefit of requiring fully redundant backup systems is almost impossible to measure while the cost of implementation is significant, the Commission acknowledges that testing of a BC/DR plan does not guarantee flawless execution of that plan, but still believes testing is warranted because a tested plan is likely to be more reliable and effective than an inadequately tested plan.

[2065] The Commission believes that it can reasonably estimate connectivity costs but not all costs associated with BC/DR testing. With respect to connectivity, the Commission now estimates that Rule 1004 will impose a total aggregate annual cost of approximately $18 million for designated members and participants. This estimate assumes that each of the 44 SCI entities will designate between 10 and 20 percent of its members or participants to participate in the necessary testing. This 10–20 percent estimate is based on staff experience and takes into consideration comment that typically 20 percent of an SCI entity's members might provide 80 percent of the order flow or liquidity (*see* Tellefsen Letter at 9), and balances it against another commenter's view that if the standard for designation was to identify those firms ''critical to the operation of the SCI entity'' (which is more targeted than the adopted standard), this commenter would designate approximately five percent of its members to participate in testing (*see* ISE Letter at 9). The Commission understands that many SCI entities have between 200 and 400 members or participants, although some have more and some have fewer. Therefore, the Commission estimates that on average, each SCI entity will designate approximately 40 members or participants in such testing. Based on these assumptions, the Commission estimates the total aggregate cost for connectivity to all designated members or participants of all SCI entities to be approximately $17.6 million (44 SCI entities × 40 members or participants × $10,000 = $17.6 million).

SCI entity's business continuity and disaster recovery plans is necessary to evaluate whether such plans are reliable and effective. The Commission recognizes that a firm that is designated to participate in testing with multiple SCI entities may assess the costs and burdens of participating in every test to be too great, and make business decisions to withdraw its membership or participation from one or more such SCI entities so as to avoid the costs and burdens of such testing. The Commission believes such a scenario is unlikely because such firm is likely to be a larger firm with a significant level of participation in such SCI entity and is likely to already have connections to backup facilities of the SCI entity.

The Commission believes that the cost associated with Rule 1004 is unlikely to induce the designated members or participants to reduce the number of SCI entities through which they trade and adversely affect price competitiveness in markets.[2066] As noted above, the Commission also recognizes that costs to some SCI entity members or participants associated with Rule 1004 could be significant, and also highly variable depending on the business continuity and disaster recovery plans being tested. Based on industry sources, the Commission understands that most of the larger members or participants of SCI entities already maintain connectivity with the backup systems of SCI entities. However, the Commission understands that there is a lower incidence of smaller members or participants maintaining connectivity with the backup sites of SCI entities.[2067] As such, the Commission believes that the compliance costs associated with Rule 1004 would be higher for those members or participants that are designated for testing by SCI entities who would need to invest in additional infrastructure to maintain connectivity with an SCI entity's backup systems to participate in testing, which the Commission believes is more likely to be the case for smaller members or participants designated for testing.

The Commission acknowledges that the compliance costs associated with Rule 1004 could raise barriers to entry and affect competition among members or participants of SCI entities. Specifically, to the extent that members or participants could be subject to designation in business continuity and disaster recovery plan testing and could incur additional compliance costs, the member or participant designation requirement of Rule 1004 could raise barriers to entry. Also, as discussed above, the compliance costs of the rule will likely be higher for smaller members or participants of SCI entities compared to larger members or participants of SCI entities. However, the Commission believes the adverse effect on competition may be mitigated to some extent as the most likely members or participants to be designated for testing are larger members or participants who already maintain connectivity with an SCI entity's backup systems. Further, the adverse effect on competition could be partially mitigated to the extent that larger firms, which are members of multiple SCI entities, could incur additional compliance costs as these larger member firms could be subject to multiple designations for business continuity and disaster recovery plan testing.

One commenter noted that mere network connectivity to an exchange or ATS would be insufficient for a market maker to provide meaningful liquidity on an SCI entity.[2068] This commenter noted that, if the Commission does not intend for SCI entities to be able to trade in the same way from a backup facility as it trades from the primary site, then market makers could maintain a more limited remote connectivity to the backup site and incur less cost, although this commenter believed that such an approach would not facilitate the posting of competitive quotes.[2069] This commenter believed that this alternative approach would result in unusually wide markets, and would not result in any benefits.[2070]

As discussed in Section IV.B.6, Rule 1001(a) does not require that backup facilities of SCI entities fully duplicate the features of primary facilities. Further as discussed in Section IV.B.6, SCI entity members or participants are not required by Regulation SCI to maintain the same level of connectivity with the backup sites of an SCI entity as they do with the primary sites. In the event of a wide-scale disruption in the securities markets, the Commission acknowledges that SCI entities and their members or participants may not be able to provide the same level of liquidity as on a normal trading day. However, the Commission expects that, on a day when business continuity and disaster recovery plans are in effect due to a wide-scale disruption in the securities markets, the requirements of Rule 1004 will help ensure adequate levels of liquidity and pricing efficiency to facilitate trading and maintain fair and orderly markets without imposing excessive costs on SCI entities and market participants by requiring them to maintain the same connectivity with the backup systems as with the primary sites.

Alternatives

Several commenters suggested alternatives to the proposed BC/DR testing requirements.[2071] Two commenters suggested that few ATSs are critical enough to warrant inclusion in the BC/DR testing requirement.[2072] One commenter suggested that only SCI entities that provide market functions on which other market participants depend be subject to the requirements for separate backup and recovery capabilities.[2073] Furthermore, one commenter urged that BC/DR testing coordination only be required among providers of singular services in the market (*i.e.,* exchange that lists securities, exclusive processors under NMS plans, and clearing and settlement agencies).[2074]

The Commission is not persuaded that SCI ATSs should be excluded from the requirements of BC/DR testing plans. In today's market, as discussed in Section IV.A.1.b, ATSs collectively represent a significant source of liquidity for stock trading. Although the concept of ''fair and orderly markets'' when BC/DR plans are in effect does not require the same level of liquidity, depth, volatility, and other characteristics of trading on a normal trading day, the Commission believes that excluding significant ATSs from BC/DR testing could harm liquidity, depth, and volatility when BC/DR plans are in effect and, thus, could significantly reduce the benefits of Rule 1004. Furthermore, with respect to the commenter that urged the Commission only to include providers of singular services in BC/DR testing coordination, as mentioned in Section IV.A.1.b, because trading in the U.S. securities markets today is dispersed among exchanges, ATSs, and other trading venues, and often involves trading strategies that require access to multiple trading venues, including ATSs, simultaneously, including all SCI entities, the Commission believes that requiring SCI entities to coordinate testing would result in testing under

[2066] *See supra* notes 2055 and 2059 and accompanying text.

[2067] *See* Proposing Release, *supra* note 13, at 18172, n. 642.

[2068] *See* KCG Letter at 12.

[2069] *See id.* at 13.

[2070] *See id.* at 13.

[2071] *See* SIFMA Letter at 17; BIDS Letter at 8; and ITG Letter at 15.

[2072] *See* BIDS Letter at 8; and ITG Letter at 15.

[2073] *See* KCG Letter at 8.

[2074] *See* Direct Edge Letter at 9.

more realistic market conditions and help ensure that securities markets have improved backup infrastructure, fewer market shutdowns, and fair and orderly markets in the event of the activation of BC/DR plans.

Furthermore, one commenter stated that coordinated BC/DR testing is a good aspirational goal, but expressed concern that too much is outside of the control of an individual SCI entity, and therefore the rule should, at most, require SCI entities to attempt to coordinate such testing.[2075] With respect to the comment suggesting that BC/DR testing coordination should be an aspirational goal rather than a requirement, the Commission believes that voluntary BC/DR testing is insufficient and will not further the goal of Regulation SCI as evidenced by Superstorm Sandy discussed in Section IV.B.6. As discussed above, the Commission acknowledges that there could be potential difficulties, including communicating with other SCI entities, in coordinating BC/DR testing on an industry- or sector-wide basis.

c. Recordkeeping and Electronic Filing—Rules 1005–1007

Entities that participate in the ARP Inspection Program currently keep records related to the ARP Inspection Program. However, the recordkeeping requirements of Rules 1005–1007 would apply to more entities, systems, and types of systems issues than the ARP Inspection Program. In addition, SCI entities are already subject to certain Commission recordkeeping requirements.[2076] However, records relating to Regulation SCI may not be specifically addressed in the recordkeeping requirements of certain rules.[2077] The Commission believes that the recordkeeping requirements specifically related to Regulation SCI would enhance the ability of the Commission to evaluate SCI entities' compliance with Regulation SCI.

With respect to SCI SROs in particular, the Commission notes that they are subject to the recordkeeping requirements of Rule 17a–1 under the Exchange Act, and the breadth of Rule 17a–1 is such that it would require SCI SROs to make, keep, and preserve records relating to their compliance with Regulation SCI. Therefore, Rule 1005(a) requires each SCI SRO to make, keep, and preserve all documents relating to its compliance with Regulation SCI as prescribed in Rule 17a–1 under the Exchange Act.[2078]

Rule 1005(b) requires each SCI entity that is not an SCI SRO to make, keep, and preserve at least one copy of all documents relating to its compliance with Regulation SCI. Each such SCI entity is required to keep all such documents for a period of not less than five years, the first two years in a place that is readily accessible to the Commission or its representatives for inspection and examination. Each such SCI entity is also required to promptly furnish copies of such documents to Commission representatives upon request. Rule 1005(c) requires each such SCI entity, upon or immediately prior to ceasing to do business or ceasing to be registered under the Exchange Act, to take all necessary action to ensure that the records required to be made, kept, and preserved by Rule 1005 shall be accessible to the Commission and its representatives in the manner required by Rule 1005 and for the remainder of the period required by Rule 1005.

According to Rule 1007, if the records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity, the SCI entity is required to ensure that such records are available for review by the Commission and its representatives by submitting a written undertaking, in a form acceptable to the Commission, by such service bureau or other recordkeeping service to that effect.

For SCI entities other than SCI SROs, Rule 1005 specifically addresses recordkeeping requirements with respect to records relating to Regulation SCI compliance. The Commission believes that Rules 1005 and 1007 would allow Commission staff to perform efficient inspections and examinations of SCI entities for their compliance with Regulation SCI, and would increase the likelihood that Commission staff can identify conduct inconsistent with Regulation SCI at earlier stages in the inspection and examination process. Furthermore, as discussed in Section IV.C.1.a, although many SCI events may be resolved in a short time frame, there may be other SCI events that may not be discovered for an extended period of time after their occurrences, or may take significant periods of time to fully resolve. In such cases, having an SCI entity's records available for a longer period of time or even after it has ceased to do business or be registered under the Exchange Act would be beneficial. Preserved information should provide the Commission with an additional source to help determine the causes and consequences of one or more SCI events and better understand how such events may have impacted trade execution, price discovery, liquidity, and investor participation. Consequently, the Commission believes that the requirements of Rules 1005 and 1007 would help ensure compliance with Regulation SCI and help realize the potential benefits (*e.g.,* better pricing efficiency, price discovery, and liquidity flows) of the regulation.

As noted above, the breadth of Rule 17a–1 under the Exchange Act is such that it would require SCI SROs to make, keep, and preserve records relating to their compliance with Regulation SCI. Therefore, for SCI SROs, the incremental compliance costs associated with Rules 1005 and 1007 will be modest.[2079] On the other hand, for SCI entities that are not SCI SROs, the recordkeeping requirements of Rules 1005 and 1007 will impose additional costs, including one-time cost to set up or modify an existing recordkeeping system to comply with Rules 1005 and 1007. The initial and ongoing compliance costs associated with the recordkeeping requirements are attributed to paperwork burdens, which are discussed in Section V.D.4 above.[2080]

Rule 1006 requires SCI entities to electronically file all written information to the Commission on Form SCI (except for notifications submitted pursuant to Rules 1002(b)(1) and (b)(3)).

[2075] *See* CME Letter at 13.

[2076] *See, e.g.,* 17 CFR 240.17a–1, applicable to SCI SROs; 17 CFR 240.17a–3 and 17a–4, applicable to broker-dealers; and 17 CFR 242.301–303, applicable to ATSs.

It has been the experience of the Commission that SCI entities presently subject to the ARP Inspection Program (nearly all of whom are SCI SROs that are also subject to the recordkeeping requirements of Rule 17a–1(a)) do generally keep and preserve the types of records that would be subject to the requirements of Rule 1005. Nevertheless, the Commission continues to believe that Regulation SCI's codification of these preservation practices will support an accurate, timely, and efficient inspection and examination process and help ensure that all types of SCI entities keep and preserve such records.

[2077] *See* Proposing Release, *supra* note 13, at 18128.

[2078] *See supra* Section IV.C.1.a (discussing recordkeeping requirements for SROs under Rule 17a–1).

[2079] As noted above, it has been the experience of the Commission that SCI entities presently subject to the ARP Inspection Program generally keep and preserve the types of records that would be subject to the requirements of Rule 1005. Nearly all of these ARP participants are SCI SROs that are also subject to the recordkeeping requirements of Rule 17a–1.

[2080] When monetized, the paperwork burden associated with all recordkeeping requirements would result in approximately $857,000 initially for all non-SRO SCI entities in the aggregate, and $27,000 annually for all non-SRO SCI entities in the aggregate.

Rule 1006 should provide a uniform manner in which the Commission would receive—and SCI entities would provide—written notifications, reviews, descriptions, analyses, or reports required by Regulation SCI.[2081] Rule 1006 should add efficiency for SCI entities in drafting and submitting the required reports, and for the Commission in reviewing, analyzing, and responding to the information provided.[2082] All costs associated with Form SCI are attributed to paperwork burdens discussed in Section V.

Every SCI entity will be required to have the ability to electronically submit Form SCI through the EFFS system, and every person designated to sign Form SCI will be required to have an electronic signature and a digital ID. Each SCI entity will also be required to submit documents attached as exhibits through the EFFS system in a text-searchable format, subject to a limited exception.[2083] The Commission believes that requiring documents to be submitted in a text-searchable format, subject to a limited exception, is necessary to allow Commission staff to efficiently review and analyze information provided by SCI entities. Additionally, the Commission believes that this requirement will not impose an additional burden on SCI entities, as SCI entities likely already prepare documents in an electronic format that is text searchable or can readily be converted into a format that is text searchable. The Commission also believes that many SCI entities currently have the ability to access the EFFS system and electronically submit Form SCI such that the requirement to submit Form SCI electronically will not impose significant new implementation or ongoing costs.[2084] The Commission also believes that some of the persons who will be designated to sign Form SCI already have digital IDs and the ability to provide an electronic signature. To the extent that some persons do not have digital IDs, the additional cost to obtain and maintain digital IDs is accounted for in the paperwork burden.[2085]

As an alternative to the adopted electronic submission requirement, the Commission considered requiring data to be submitted in a tagged data format such as XBRL. Requiring reports to be filed in a tagged data format such as XBRL would likely permit faster and more efficient analysis of information disclosed in reports but would also likely impose additional compliance costs associated with tagging information in the narrative responses.

Rather than requiring the use of XBRL formatting for Form SCI, the Commission notes that certain fields in Sections I–III of Form SCI will require information provided by SCI entities to be in a format that will allow the Commission to gather information in a structured manner (*e.g.,* the submission type and SCI event type in Section I). By collecting information on Form SCI in a way that allows the Commission to gather key information in a structured manner, the Commission believes it will be able to more efficiently review and process filings made on Form SCI. Moreover, gathering certain information in Sections I–III of Form SCI in a structured format should not result in an additional cost to SCI entities.

## VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[2086] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the SCI Proposal, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (''RFA''),[2087] that proposed Regulation SCI would not, if adopted, have a significant impact on a substantial number of small entities. The Commission received no comments on this certification.

### *A. SCI Entities*

Paragraph (a) of Rule 0–10 provides that for purposes of the RFA, a small entity when used with reference to a ''person'' other than an investment company means a person that, on the last day of its most recent fiscal year, had total assets of $5 million or less.[2088] With regard to broker-dealers, small entity means a broker or dealer that had total capital 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, or, if not required to file such statements, had total capital of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter), and that is not affiliated with any person (other than a natural person) that is not a small business or small organization.[2089] With regard to clearing agencies, small entity means a clearing agency that compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter), had less than $200 million of funds and securities in its custody or control at all times during 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.[2090] With regard to exchanges, small entity means an exchange that has been exempt from the reporting requirements of Rule 601 under Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[2091] With regard to securities information processors, small entity means a securities information processor that had gross revenue of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter), provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time it has been in business, if shorter), and is not affiliated with any person (that is not a natural person) that is not a small business or small organization.[2092] Under the standards adopted by the Small Business Administration (''SBA''), entities engaged in financial investments and related activities are considered small entities if they have $35.5 million or less in average annual receipts.[2093]

Based on the Commission's existing information about the entities that will be subject to Regulation SCI, the Commission believes that SCI entities that are self-regulatory organizations

[2081] *See* Proposing Release, *supra* note 13, at 18129–30.

[2082] *See id.* at 18130.

[2083] As noted in Section IV.C.2, the General Instructions to Form SCI, Item A. specify that documents filed through the EFFS system must be in a text-searchable format without the use of optical character recognition, with a limited exception to allow for a portion of a Form SCI submission (*e.g.,* an image or diagram) that cannot be made available in a text-searchable format to be submitted in a non-text-searchable format.

[2084] The initial and ongoing costs associated with various electronic submissions of Form SCI are discussed in the Paperwork Reduction Act section above. *See supra* Section V.

[2085] *See supra* Section V.D.2.e.

[2086] 5 U.S.C. 601 *et seq.*

[2087] 5 U.S.C. 605(b).

[2088] *See* 17 CFR 240.0–10(a).

[2089] *See* 17 CFR 240.0–10(c).

[2090] *See* 17 CFR 240.0–10(d).

[2091] *See* 17 CFR 240.0–10(e).

[2092] *See* 17 CFR 240.0–10(g).

[2093] *See* SBA's Table of Small Business Size Standards, Subsector 523 and 13 CFR 121.201. Such entities include firms engaged in investment banking and securities dealing, securities brokerage, commodity contracts dealing, commodity contracts brokerage, securities and commodity exchanges, miscellaneous intermediation, portfolio management, investment advice, trust, fiduciary and custody activities, and miscellaneous financial investment activities.

(national securities exchanges, national securities associations, registered clearing agencies, and the MSRB) or exempt clearing agencies subject to ARP would not fall within the Commission's definition of small entity as described above. With regard to plan processors, which are defined under Rule 600(b)(55) of Regulation NMS to mean a self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective NMS plan,[2094] the Commission's definition of small entity as it relates to self-regulatory organizations and securities information processors would apply. The Commission does not believe that any plan processor would be a small entity as defined above. With regard to SCI ATSs, because they are registered as broker-dealers, the Commission's definition of small entity as it relates to broker-dealers would apply. The Commission does not believe that any of the SCI ATSs would be a small entity as defined above.

*B. Certification*

For the foregoing reasons, the Commission again certifies that Regulation SCI will not have a significant economic impact on a substantial number of small entities.

## VIII. Statutory Authority and Text of Amendments

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, Sections 2, 3, 5, 6, 11A, 15, 15A, 17, 17A, 23(a), and 24 thereof, 15 U.S.C. 78b, 78c, 78e, 78f, 78k–1, 78*o,* 78*o*–3, 78q, 78q–1, 78x, and 78w(a), the Commission adopts Regulation SCI under the Exchange Act and Form SCI under the Exchange Act, and amends Regulation ATS and Rule 24b–2 under the Exchange Act.

## List of Subjects in 17 CFR Parts 240, 242, and 249

Brokers; Confidential business information; Reporting and recordkeeping requirements; and Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

[2094] *See* 17 CFR 242.600(b)(55).

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 240.24b–2 by:

■ a. After the words PRELIMINARY NOTE: Adding the words ''Except as otherwise provided in this rule,'' and revising the word ''Confidential'' to read ''confidential''.

■ b. Adding at the beginning of paragraph (b) introductory text the words ''Except as otherwise provided in paragraph (g) of this section,'' and revising the word ''The'' to read ''the''.

■ c. Adding paragraph (g).

The addition reads as follows:

### § 240.24b–2. Nondisclosure of information filed with the Commission and with any exchange.

* * * * *

(g) An SCI entity (as defined in § 242.1000 of this chapter) shall not omit the confidential portion from the material filed in electronic format on Form SCI pursuant to Regulation SCI, § 242.1000 *et. seq.,* and, in lieu of the procedures described in paragraph (b) of this section, may request confidential treatment of all information provided on Form SCI by completing Section IV of Form SCI.

## PART 242—REGULATIONS M, SHO, ATS, AC, NMS AND SCI AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 3. The authority citation for part 242 continues to read as follows:

**Authority:** 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78*o*(b), 78*o*(c), 78*o*(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a23, 80a–29, and 80a–37.

* * * * *

■ 4. The heading of part 242 is revised to read as set forth above.

### § 242.301 [Amended]

■ 5. Amend § 242.301 by removing paragraphs (b)(6)(i)(A) and (B) and redesignating paragraphs (b)(6)(i)(C) and (D) as paragraphs (b)(6)(i)(A) and (B), respectively.

■ 6. Add §§ 242.1000 through 242.1007 to read as follows:

Sec.

**Regulation SCI—Systems Compliance and Integrity**

242.1000 Definitions.
242.1001 Obligations related to policies and procedures of SCI entities.
242.1002 Obligations related to SCI events.
242.1003 Obligations related to systems changes; SCI review.
242.1004 SCI entity business continuity and disaster recovery plans testing requirements for members or participants.
242.1005 Recordkeeping requirements related to compliance with Regulation SCI.
242.1006 Electronic filing and submission.
242.1007 Requirements for service bureaus.

### § 242.1000 Definitions.

For purposes of Regulation SCI (§§ 242.1000 through 242.1007), the following definitions shall apply:

*Critical SCI systems* means any SCI systems of, or operated by or on behalf of, an SCI entity that:

(1) Directly support functionality relating to:

(i) Clearance and settlement systems of clearing agencies;

(ii) Openings, reopenings, and closings on the primary listing market;

(iii) Trading halts;

(iv) Initial public offerings;

(v) The provision of consolidated market data; or

(vi) Exclusively-listed securities; or

(2) Provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.

*Electronic signature* has the meaning set forth in § 240.19b–4(j) of this chapter.

*Exempt clearing agency subject to ARP* means an entity that has received from the Commission an exemption from registration as a clearing agency under Section 17A of the Act, and whose exemption contains conditions that relate to the Commission's Automation Review Policies (ARP), or any Commission regulation that supersedes or replaces such policies.

*Indirect SCI systems* means any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.

*Major SCI event* means an SCI event that has had, or the SCI entity reasonably estimates would have:

(1) Any impact on a critical SCI system; or

(2) A significant impact on the SCI entity's operations or on market participants.

*Plan processor* has the meaning set forth in § 242.600(b)(55).

*Responsible SCI personnel* means, for a particular SCI system or indirect SCI system impacted by an SCI event, such senior manager(s) of the SCI entity having responsibility for such system, and their designee(s).

*SCI alternative trading system* or *SCI ATS* means an alternative trading system, as defined in § 242.300(a), which during at least four of the preceding six calendar months:

(1) Had with respect to NMS stocks:

(i) Five percent (5%) or more in any single NMS stock, and one-quarter percent (0.25%) or more in all NMS stocks, of the average daily dollar volume reported by applicable transaction reporting plans; or

(ii) One percent (1%) or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or

(2) Had with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, five percent (5%) or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported;

(3) Provided, however, that such SCI ATS shall not be required to comply with the requirements of Regulation SCI until six months after satisfying any of paragraphs (a) or (b) of this section, as applicable, for the first time.

*SCI entity* means an SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to ARP.

*SCI event* means an event at an SCI entity that constitutes:

(1) A systems disruption;

(2) A systems compliance issue; or

(3) A systems intrusion.

*SCI review* means a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains:

(1) A risk assessment with respect to such systems of an SCI entity; and

(2) An assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.

*SCI self-regulatory organization* or *SCI SRO* means any national securities exchange, registered securities association, or registered clearing agency, or the Municipal Securities Rulemaking Board; *provided however,* that for purposes of this section, the term SCI self-regulatory organization shall not include an exchange that is notice registered with the Commission pursuant to 15 U.S.C. 78f(g) or a limited purpose national securities association registered with the Commission pursuant to 15 U.S.C. 78*o*–3(k).

*SCI systems* means all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.

*Senior management* means, for purposes of Rule 1003(b), an SCI entity's Chief Executive Officer, Chief Technology Officer, Chief Information Officer, General Counsel, and Chief Compliance Officer, or the equivalent of such employees or officers of an SCI entity.

*Systems compliance issue* means an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Act and the rules and regulations thereunder or the entity's rules or governing documents, as applicable.

*Systems disruption* means an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system.

*Systems intrusion* means any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.

**§ 242.1001 Obligations related to policies and procedures of SCI entities.**

(a) *Capacity, integrity, resiliency, availability, and security.* (1) Each SCI entity shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets.

(2) Policies and procedures required by paragraph (a)(1) of this section shall include, at a minimum:

(i) The establishment of reasonable current and future technological infrastructure capacity planning estimates;

(ii) Periodic capacity stress tests of such systems to determine their ability to process transactions in an accurate, timely, and efficient manner;

(iii) A program to review and keep current systems development and testing methodology for such systems;

(iv) Regular reviews and testing, as applicable, of such systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters;

(v) Business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption;

(vi) Standards that result in such systems being designed, developed, tested, maintained, operated, and surveilled in a manner that facilitates the successful collection, processing, and dissemination of market data; and

(vii) Monitoring of such systems to identify potential SCI events.

(3) Each SCI entity shall periodically review the effectiveness of the policies and procedures required by this paragraph (a), and take prompt action to remedy deficiencies in such policies and procedures.

(4) For purposes of this paragraph (a), such policies and procedures shall be deemed to be reasonably designed if they are consistent with current SCI industry standards, which shall be comprised of information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization. Compliance with such current SCI industry standards, however, shall not be the exclusive means to comply with the requirements of this paragraph (a).

(b) *Systems compliance.* (1) Each SCI entity shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Act and the rules and regulations thereunder and the entity's rules and governing documents, as applicable.

(2) Policies and procedures required by paragraph (b)(1) of this section shall include, at a minimum:

(i) Testing of all SCI systems and any changes to SCI systems prior to implementation;

(ii) A system of internal controls over changes to SCI systems;

(iii) A plan for assessments of the functionality of SCI systems designed to

detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Act and the rules and regulations thereunder and the SCI entity's rules and governing documents; and

(iv) A plan of coordination and communication between regulatory and other personnel of the SCI entity, including by responsible SCI personnel, regarding SCI systems design, changes, testing, and controls designed to detect and prevent systems compliance issues.

(3) Each SCI entity shall periodically review the effectiveness of the policies and procedures required by this paragraph (b), and take prompt action to remedy deficiencies in such policies and procedures.

(4) Safe harbor from liability for individuals. Personnel of an SCI entity shall be deemed not to have aided, abetted, counseled, commanded, caused, induced, or procured the violation by an SCI entity of this paragraph (b) if the person:

(i) Has reasonably discharged the duties and obligations incumbent upon such person by the SCI entity's policies and procedures; and

(ii) Was without reasonable cause to believe that the policies and procedures relating to an SCI system for which such person was responsible, or had supervisory responsibility, were not established, maintained, or enforced in accordance with this paragraph (b) in any material respect.

(c) *Responsible SCI personnel.* (1) Each SCI entity shall establish, maintain, and enforce reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform responsible SCI personnel of potential SCI events.

(2) Each SCI entity shall periodically review the effectiveness of the policies and procedures required by paragraph (c)(1) of this section, and take prompt action to remedy deficiencies in such policies and procedures.

**§ 242.1002 Obligations related to SCI events.**

(a) *Corrective action.* Upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, each SCI entity shall begin to take appropriate corrective action which shall include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable.

(b) *Commission notification and recordkeeping of SCI events.* Each SCI entity shall:

(1) Upon any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred, notify the Commission of such SCI event immediately;

(2) Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, submit a written notification pertaining to such SCI event to the Commission, which shall be made on a good faith, best efforts basis and include:

(i) A description of the SCI event, including the system(s) affected; and

(ii) To the extent available as of the time of the notification: The SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event;

(3) Until such time as the SCI event is resolved and the SCI entity's investigation of the SCI event is closed, provide updates pertaining to such SCI event to the Commission on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, to correct any materially incorrect information previously provided, or when new material information is discovered, including but not limited to, any of the information listed in paragraph (b)(2)(ii) of this section;

(4)(i)(A) If an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 calendar days of the occurrence of the SCI event, then within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event, submit a final written notification pertaining to such SCI event to the Commission containing the information required in paragraph (b)(4)(ii) of this section.

(B)(*1*) If an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 calendar days of the occurrence of the SCI event, then submit an interim written notification pertaining to such SCI event to the Commission within 30 calendar days after the occurrence of the SCI event containing the information required in paragraph (b)(4)(ii) of this section, to the extent known at the time.

(*2*) Within five business days after the resolution of such SCI event and closure of the investigation regarding such SCI event, submit a final written notification pertaining to such SCI event to the Commission containing the information required in paragraph (b)(4)(ii) of this section.

(ii) Written notifications required by paragraph (b)(4)(i) of this section shall include:

(A) A detailed description of: The SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event;

(B) A copy of any information disseminated pursuant to paragraph (c) of this section by the SCI entity to date regarding the SCI event to any of its members or participants; and

(C) An analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss.

(5) The requirements of paragraphs (b)(1) through (4) of this section shall not apply to any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. For such events, each SCI entity shall:

(i) Make, keep, and preserve records relating to all such SCI events; and

(ii) Submit to the Commission a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of such systems disruptions and systems intrusions, including the SCI systems and, for systems intrusions, indirect SCI systems, affected by such systems disruptions and systems intrusions during the applicable calendar quarter.

(c) *Dissemination of SCI events.* (1) Each SCI entity shall:

(i) Promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event that is a systems disruption or systems compliance issue has occurred, disseminate the following information about such SCI event:

(A) The system(s) affected by the SCI event; and

(B) A summary description of the SCI event; and

(ii) When known, promptly further disseminate the following information about such SCI event:

(A) A detailed description of the SCI event;

(B) The SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; and

(C) A description of the progress of its corrective action for the SCI event and when the SCI event has been or is expected to be resolved; and

(iii) Until resolved, provide regular updates of any information required to be disseminated under paragraphs (c)(1)(i) and (ii) of this section.

(2) Each SCI entity shall, promptly after any responsible SCI personnel has a reasonable basis to conclude that a SCI event that is a systems intrusion has occurred, disseminate a summary description of the systems intrusion, including a description of the corrective action taken by the SCI entity and when the systems intrusion has been or is expected to be resolved, unless the SCI entity determines that dissemination of such information would likely compromise the security of the SCI entity's SCI systems or indirect SCI systems, or an investigation of the systems intrusion, and documents the reasons for such determination.

(3) The information required to be disseminated under paragraphs (c)(1) and (2) of this section promptly after any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred, shall be promptly disseminated by the SCI entity to those members or participants of the SCI entity that any responsible SCI personnel has reasonably estimated may have been affected by the SCI event, and promptly disseminated to any additional members or participants that any responsible SCI personnel subsequently reasonably estimates may have been affected by the SCI event; *provided, however,* that for major SCI events, the information required to be disseminated under paragraphs (c)(1) and (2) of this section shall be promptly disseminated by the SCI entity to all of its members or participants.

(4) The requirements of paragraphs (c)(1) through (3) of this section shall not apply to:

(i) SCI events to the extent they relate to market regulation or market surveillance systems; or

(ii) Any SCI event that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants.

**§ 242.1003 Obligations related to systems changes; SCI review.**

(a) *Systems changes.* Each SCI entity shall:

(1) Within 30 calendar days after the end of each calendar quarter, submit to the Commission a report describing completed, ongoing, and planned material changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. An SCI entity shall establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and report such changes in accordance with such criteria.

(2) Promptly submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under this paragraph (a).

(b) *SCI review.* Each SCI entity shall:

(1) Conduct an SCI review of the SCI entity's compliance with Regulation SCI not less than once each calendar year; *provided, however,* that:

(i) Penetration test reviews of the network, firewalls, and production systems shall be conducted at a frequency of not less than once every three years; and

(ii) Assessments of SCI systems directly supporting market regulation or market surveillance shall be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years; and

(2) Submit a report of the SCI review required by paragraph (b)(1) of this section to senior management of the SCI entity for review no more than 30 calendar days after completion of such SCI review; and

(3) Submit to the Commission, and to the board of directors of the SCI entity or the equivalent of such board, a report of the SCI review required by paragraph (b)(1) of this section, together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity.

**§ 242.1004 SCI entity business continuity and disaster recovery plans testing requirements for members or participants.**

With respect to an SCI entity's business continuity and disaster recovery plans, including its backup systems, each SCI entity shall:

(a) Establish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans;

(b) Designate members or participants pursuant to the standards established in paragraph (a) of this section and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months; and

(c) Coordinate the testing of such plans on an industry- or sector-wide basis with other SCI entities.

**§ 242.1005 Recordkeeping requirements related to compliance with Regulation SCI.**

(a) An SCI SRO shall make, keep, and preserve all documents relating to its compliance with Regulation SCI as prescribed in § 240.17a–1 of this chapter.

(b) An SCI entity that is not an SCI SRO shall:

(1) Make, keep, and preserve at least one copy of all documents, including correspondence, memoranda, papers, books, notices, accounts, and other such records, relating to its compliance with Regulation SCI, including, but not limited to, records relating to any changes to its SCI systems and indirect SCI systems;

(2) Keep all such documents for a period of not less than five years, the first two years in a place that is readily accessible to the Commission or its representatives for inspection and examination; and

(3) Upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (b)(1) and (2) of this section.

(c) Upon or immediately prior to ceasing to do business or ceasing to be registered under the Securities Exchange Act of 1934, an SCI entity shall take all necessary action to ensure that the records required to be made, kept, and preserved by this section shall be accessible to the Commission and its representatives in the manner required by this section and for the remainder of the period required by this section.

**§ 242.1006 Electronic filing and submission.**

(a) Except with respect to notifications to the Commission made pursuant to § 242.1002(b)(1) or updates to the Commission made pursuant to paragraph § 242.1002(b)(3), any notification, review, description, analysis, or report to the Commission

required to be submitted under Regulation SCI shall be filed electronically on Form SCI (§ 249.1900 of this chapter), include all information as prescribed in Form SCI and the instructions thereto, and contain an electronic signature; and

(b) The signatory to an electronically filed Form SCI shall manually sign a signature page or document, in the manner prescribed by Form SCI, authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document shall be executed before or at the time Form SCI is electronically filed and shall be retained by the SCI entity in accordance with § 242.1005.

**§ 242.1007 Requirements for service bureaus.**

If records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity, the SCI entity shall ensure that the records are available for review by the Commission and its representatives by submitting a written undertaking, in a form acceptable to the Commission, by such service bureau or other recordkeeping service, signed by a duly authorized person at such service bureau or other recordkeeping service. Such a written undertaking shall include an agreement by the service bureau to permit the Commission and its representatives to examine such records at any time or from time to time during business hours, and to promptly furnish to the Commission and its representatives true, correct, and current electronic files in a form acceptable to the Commission or its representatives or hard copies of any or all or any part of such records, upon request, periodically, or continuously and, in any case, within the same time periods as would apply to the SCI entity for such records. The preparation or maintenance of records by a service bureau or other recordkeeping service shall not relieve an SCI entity from its obligation to prepare, maintain, and provide the Commission and its representatives access to such records.

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The general authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201; and 18 U.S.C. 1350 unless otherwise noted.

* * * * *

■ 8. Add subpart T, consisting of § 249.1900 to read as follows:

### Subpart T—Form SCI, for filing notices and reports as required by Regulation SCI.

**§ 249.1900. Form SCI, for filing notices and reports as required by Regulation SCI.**

Form SCI shall be used to file notices and reports as required by Regulation SCI (§§ 242.1000 through 242.1007).

**Note:** The text of Form SCI does not, and the amendments will not, appear in the Code of Federal Regulations.

BILLING CODE P

OMB Number:
Expiration Date:
Estimated Average burden hours per response.....

# Securities and Exchange Commission
# Washington, DC 20549
# Form SCI

Page 1 of _____ File No. SCI-{name}-YYYY-###

**SCI Notification and Reporting by:** {SCI entity name}

Pursuant to Rules 1002 and 1003 of Regulation SCI under the Securities Exchange Act of 1934

- ❑ Initial
- ❑ Withdrawal

## SECTION I: Rule 1002 - Commission Notification of SCI Event

### A. Submission Type (select one only)

- ❑ Rule 1002(b)(1) Initial Notification of SCI event
- ❑ Rule 1002(b)(2) Notification of SCI event
- ❑ Rule 1002(b)(3) Update of SCI event: ####
- ❑ Rule 1002(b)(4) Final Report of SCI Event
- ❑ Rule 1002(b)(4) Interim Status Report of SCI event

If filing a Rule 1002(b)(1) or Rule 1002(b)(3) submission, please provide a brief description:

_____

_____

_____

### B. SCI Event Type(s) (select all that apply)

- ❑ Systems compliance issue
- ❑ Systems disruption
- ❑ Systems intrusion

### C. General Information Required for (b)(2) filings.

1) Has the Commission previously been notified of the SCI event pursuant to 1002(b)(1)? *yes/no*

2) Date/time SCI event occurred: *mm/dd/yyyy hh:mm am/pm*

3) Duration of SCI event: *hh:mm*, or *days*

4) Please provide the date and time when a responsible SCI personnel had reasonable basis to conclude the SCI event occurred:

   *mm/dd/yyyy* *hh:mm am/pm*

5) Has the SCI event been resolved? *yes/no*

   a) If yes, provide date and time of resolution: *mm/dd/yyyy* *hh:mm am/pm*

6) Is the investigation of the SCI event closed? *yes/no*

   a) If yes, provide date of closure: *mm/dd/yyyy*

7) Estimated number of market participants potentially affected by the SCI event: ####

8) Is the SCI event a major SCI event (as defined in Rule 1000)? *yes/no*

**D. Information about impacted systems:**

**Name(s) of system(s):**

_____

_____

_____

**Type(s) of system(s) impacted by the SCI event (check all that apply):**

- ❑ Trading
- ❑ Clearance and settlement
- ❑ Order routing
- ❑ Market data
- ❑ Market regulation
- ❑ Market surveillance
- ❑ Indirect SCI systems (please describe):

_____

_____

_____

**Are any critical SCI systems impacted by the SCI event (check all that apply)? Yes/No**

1) Systems that directly support functionality relating to:
   - ❑ Clearance and settlement systems of clearing agencies
   - ❑ Openings, reopenings, and closings on the primary listing market
   - ❑ Trading halts
   - ❑ Initial public offerings
   - ❑ The provision of consolidated market data
   - ❑ Exclusively-listed securities

2) ❑ Systems that provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets (please describe):

_____

_____

_____

---

**SECTION II: Periodic Reporting (select one only)**

**A. Quarterly Reports:** For the quarter ended: mm/dd/yyyy

- ❑ Rule 1002(b)(5)(ii): Quarterly report of systems disruptions and systems intrusions with no or a de minimis impact.
- ❑ Rule 1003(a)(1): Quarterly report of material systems changes
- ❑ Rule 1003(a)(2): Supplemental report of material systems changes

**B. SCI Review Reports**

- ❑ Rule 1003(b)(3): Report of SCI review, together with any response by senior management

  Date of completion of SCI review: *mm/dd/yyyy*

  Date of submission of SCI review to senior management: *mm/dd/yyyy*

---

**SECTION III: Contact Information**

Provide the following information of the person at the {SCI entity name} prepared to respond to questions for this submission:

First Name: Last Name:

Title:

E-Mail:

Telephone: Fax:

**Additional Contacts (Optional)**

First Name: Last Name:

Title:

E-Mail:

Telephone: Fax:

First Name: Last Name:

Title:

E-Mail:

Telephone: Fax:

---

**SECTION IV: Signature**

Confidential treatment is requested pursuant to Rule 24b-2(g). Additionally, pursuant to the requirements of the Securities Exchange Act of 1934, {SCI Entity name} has duly caused this {notification}{report} to be signed on its behalf by the undersigned duly authorized officer:

Date:

By (Name) Title (_____)

"Digitally Sign and Lock Form"

---

| | |
|---|---|
| Exhibit 1: Rule 1002(b)(2) Notification of SCI Event. Add/Remove/View | Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, the SCI entity shall submit a written notification pertaining to such SCI event to the Commission, which shall be made on a good faith, best efforts basis and include:<br>(a) a description of the SCI event, including the system(s) affected; and<br>(b) to the extent available as of the time of the notification: The SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event. |
| Exhibit 2: Rule 1002(b)(4) Final or Interim Report of SCI Event. Add/Remove/View | When submitting a final report pursuant to either Rule 1002(b)(4)(i)(A) or Rule 1002(b)(4)(i)(B)(*2*), the SCI entity shall include:<br>(a) a detailed description of: The SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event;<br>(b) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants; and<br>(c) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss.<br>When submitting an interim report pursuant to Rule 1002(b)(4)(i)(B)(*1*), the SCI entity shall include such information to the extent known at the time. |
| Exhibit 3: Rule 1002(b)(5)(ii) Quarterly Report of De Minimis SCI Events. Add/Remove/View | The SCI entity shall submit a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of systems disruptions and systems intrusions that have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants, including the SCI systems and, for systems intrusions, indirect SCI systems, affected by such SCI events during the applicable calendar quarter. |

| | |
|---|---|
| Exhibit 4: Rule 1003 (a) Quarterly Report of Systems Changes. Add/Remove/View | When submitting a report pursuant to Rule 1003(a)(1), the SCI entity shall provide a report, within 30 calendar days after the end of each calendar quarter, describing completed, ongoing, and planned material changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. An SCI entity shall establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and report such changes in accordance with such criteria. When submitting a report pursuant to Rule 1003(a)(2), the SCI entity shall provide a supplemental report of a material error in or material omission from a report previously submitted under Rule 1003(a)(1). |
| Exhibit 5: Rule 1003(b)(3) Report of SCI review. Add/Remove/View | The SCI entity shall provide a report of the SCI review, together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity. |
| Exhibit 6: Optional Attachments. Add/Remove/View | This exhibit may be used in order to attach other documents that the SCI entity may wish to submit as part of a Rule 1002(b)(1) initial notification submission or Rule 1002(b)(3) update submission. |

**General Instructions for Form SCI**

*A. Use of the Form*

Except with respect to notifications to the Commission made pursuant to Rule 1002(b)(1) or updates to the Commission made pursuant to Rule 1002(b)(3), any notification, review, description, analysis, or report required to be submitted pursuant to Regulation SCI under the Securities Exchange Act of 1934 (''Act'') shall be filed in an electronic format through an electronic form filing system (''EFFS''), a secure Web site operated by the Securities and Exchange Commission (''Commission''). Documents attached as exhibits filed through the EFFS system must be in a text-searchable format without the use of optical character recognition. If, however, a portion of a Form SCI submission (*e.g.,* an image or diagram) cannot be made available in a text-searchable format, such portion may be submitted in a non-text searchable format.

*B. Need for Careful Preparation of the Completed Form, Including Exhibits*

This form, including the exhibits, is intended to elicit information necessary for Commission staff to work with SCI self-regulatory organizations, SCI alternative trading systems, plan processors, and exempt clearing agencies subject to ARP (collectively, ''SCI entities'') to ensure the capacity, integrity, resiliency, availability, security, and compliance of their automated systems. An SCI entity must provide all the information required by the form, including the exhibits, and must present the information in a clear and comprehensible manner. A filing that is incomplete or similarly deficient may be returned to the SCI entity. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. *See also* Rule 0–3 under the Act (17 CFR 240.0–3).

*C. When To Use the Form*

Form SCI is comprised of six types of required submissions to the Commission pursuant to Rules 1002 and 1003. In addition, Form SCI permits SCI entities to submit to the Commission two additional types of submissions pursuant to Rules 1002(b)(1) and 1002(b)(3); however, SCI entities are not required to use Form SCI for these two types of submissions to the Commission. In filling out Form SCI, an SCI entity shall select the type of filing and provide all information required by Regulation SCI specific to that type of filing.

The first two types of required submissions relate to Commission notification of certain SCI events:

(1) ''Rule 1002(b)(2) Notification of SCI Event'' submissions for notifications regarding systems disruptions, systems compliance issues, or systems intrusions (collectively, ''SCI events''), other than any systems disruption or systems intrusion that has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants; and

(2) ''Rule 1002(b)(4) Final or Interim Report of SCI Event'' submissions, of which there are two kinds (a final report under Rule 1002(b)(4)(i)(A) or Rule 1002(b)(4)(i)(B)(*2*); or an interim status report under Rule 1002(b)(4)(i)(B)(*1*)).

The other four types of required submissions are periodic reports, and include:

(1) ''Rule 1002(b)(5)(ii)'' submissions for quarterly reports of systems disruptions and systems intrusions which have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants (''de minimis SCI events'');

(2) ''Rule 1003(a)(1)'' submissions for quarterly reports of material systems changes;

(3) ''Rule 1003(a)(2)'' submissions for supplemental reports of material systems changes; and

(4) ''Rule 1003(b)(3)'' submissions for reports of SCI reviews.

Required Submissions for SCI Events

For 1002(b)(2) submissions, an SCI entity must notify the Commission using Form SCI by selecting the appropriate box in Section I and filling out all information required by the form, including Exhibit 1. 1002(b)(2) submissions must be submitted within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that an SCI event has occurred.

For 1002(b)(4) submissions, if an SCI event is resolved and the SCI entity's investigation of the SCI event is closed within 30 calendar days of the occurrence of the SCI event, an SCI entity must file a final report under Rule 1002(b)(4)(i)(A) within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event. However, if an SCI event is not resolved or the SCI entity's investigation of the SCI event is not closed within 30 calendar days of the occurrence of the SCI event, an SCI entity must file an interim status report under Rule 1002(b)(4)(i)(B)(*1*) within 30 calendar days after the occurrence of the SCI event. For SCI events in which an interim status report is required to be filed, an SCI entity must file a final report under Rule 1002(b)(4)(i)(B)(*2*) within five business days after the resolution of the SCI event and closure of the investigation regarding the SCI event. For 1002(b)(4) submissions, an SCI entity must notify the Commission using Form SCI by selecting the appropriate box in Section I and filling out all information required by the form, including Exhibit 2.

Required Submissions for Periodic Reporting

For 1002(b)(5)(ii) submissions, an SCI entity must submit quarterly reports of systems disruptions and systems intrusions which have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants. The SCI entity must select

the appropriate box in Section II and fill out all information required by the form, including Exhibit 3.

For 1003(a)(1) submissions, an SCI entity must submit its quarterly report of material systems changes to the Commission using Form SCI. The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 4.

Filings made pursuant to Rule 1002(b)(5)(ii) and Rule 1003(a)(1) must be submitted to the Commission within 30 calendar days after the end of each calendar quarter (*i.e.,* March 31st, June 30th, September 30th and December 31st) of each year.

For 1003(a)(2) submissions, an SCI entity must submit a supplemental report notifying the Commission of a material error in or material omission from a report previously submitted under Rule 1003(a). The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 4.

For 1003(b)(3) submissions, an SCI entity must submit its report of its SCI review, together with any response by senior management, to the Commission using Form SCI. A 1003(b)(3) submission is required within 60 calendar days after the report of the SCI review has been submitted to senior management of the SCI entity. The SCI entity must select the appropriate box in Section II and fill out all information required by the form, including Exhibit 5.

Optional Submissions

An SCI entity may, but is not required to, use Form SCI to submit a notification pursuant to Rule 1002(b)(1). If the SCI entity uses Form SCI to submit a notification pursuant to Rule 1002(b)(1), it must select the appropriate box in Section I and provide a short description of the SCI event. Documents may also be attached as Exhibit 6 if the SCI entity chooses to do so. An SCI entity may, but is not required to, use Form SCI to submit an update pursuant to Rule 1002(b)(3). Rule 1002(b)(3) requires an SCI entity to, until such time as the SCI event is resolved and the SCI entity's investigation of the SCI event is closed, provide updates pertaining to such SCI event to the Commission on a regular basis, or at such frequency as reasonably requested by a representative of the Commission, to correct any materially incorrect information previously provided, or when new material information is discovered, including but not limited to, any of the information listed in Rule 1002(b)(2)(ii). If the SCI entity uses Form SCI to submit an update pursuant to Rule 1002(b)(3), it must select the appropriate box in Section I and provide a short description of the SCI event. Documents may also be attached as Exhibit 6 if the SCI entity chooses to do so.

*D. Documents Comprising the Completed Form*

The completed form filed with the Commission shall consist of Form SCI, responses to all applicable items, and any exhibits required in connection with the filing. Each filing shall be marked on Form SCI with the initials of the SCI entity, the four-digit year, and the number of the filing for the year (*e.g.,* SCI Name-YYYY–XXX).

*E. Contact Information; Signature; and Filing of the Completed Form*

Each time an SCI entity submits a filing to the Commission on Form SCI, the SCI entity must provide the contact information required by Section III of Form SCI. Space for additional contact information, if appropriate, is also provided.

All notifications and reports required to be submitted through Form SCI shall be filed through the EFFS. In order to file Form SCI through the EFFS, SCI entities must request access to the Commission's External Application Server by completing a request for an external account user ID and password. Initial requests will be received by contacting (202) 551–5777. An email will be sent to the requestor that will provide a link to a secure Web site where basic profile information will be requested. A duly authorized individual of the SCI entity shall electronically sign the completed Form SCI as indicated in Section IV of the form. In addition, a duly authorized individual of the SCI entity shall manually sign one copy of the completed Form SCI, and the manually signed signature page shall be preserved pursuant to the requirements of Rule 1005.

*F. Withdrawals of Commission Notifications and Periodic Reports*

If an SCI entity determines to withdraw a Form SCI, it must complete Page 1 of the Form SCI and indicate by selecting the appropriate check box to withdraw the submission.

*G. Paperwork Reduction Act Disclosure*

This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 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 control number. The Commission estimates that the average burden to respond to Form SCI will be between one and 125 hours, depending upon the purpose for which the form is being filed. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

Except with respect to notifications to the Commission made pursuant to Rule 1002(b)(1) or updates to the Commission made pursuant to Rule 1002(b)(3), it is mandatory that an SCI entity file all notifications, reviews, descriptions, analyses, and reports required by Regulation SCI using Form SCI. The Commission will keep the information collected pursuant to Form SCI confidential to the extent permitted by law. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522 (''FOIA''), and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

*H. Exhibits*

List of exhibits to be filed, as applicable:

*Exhibit 1: Rule 1002(b)(2)—Notification of SCI Event.* Within 24 hours of any responsible SCI personnel having a reasonable basis to conclude that the SCI event has occurred, the SCI entity shall submit a written notification pertaining to such SCI event to the Commission, which shall be made on a good faith, best efforts basis and include: (a) A description of the SCI event, including the system(s) affected; and (b) to the extent available as of the time of the notification: the SCI entity's current assessment of the types and number of market participants potentially affected by the SCI event; the potential impact of the SCI event on the market; a description of the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved or timeframe within which the SCI event is expected to be resolved; and any other pertinent information known by the SCI entity about the SCI event.

*Exhibit 2: Rule 1002(b)(4)—Final or Interim Report of SCI Event.* When submitting a final report pursuant to either Rule 1002(b)(4)(i)(A) or Rule 1002(b)(4)(i)(B)(*2*), the SCI entity shall include: (a) A detailed description of:

The SCI entity's assessment of the types and number of market participants affected by the SCI event; the SCI entity's assessment of the impact of the SCI event on the market; the steps the SCI entity has taken, is taking, or plans to take, with respect to the SCI event; the time the SCI event was resolved; the SCI entity's rule(s) and/or governing document(s), as applicable, that relate to the SCI event; and any other pertinent information known by the SCI entity about the SCI event; (b) a copy of any information disseminated pursuant to Rule 1002(c) by the SCI entity to date regarding the SCI event to any of its members or participants; and (c) an analysis of parties that may have experienced a loss, whether monetary or otherwise, due to the SCI event, the number of such parties, and an estimate of the aggregate amount of such loss. When submitting an interim report pursuant to Rule 1002(b)(4)(i)(B)(*1*), the SCI entity shall include such information to the extent known at the time.

*Exhibit 3: Rule 1002(b)(5)(ii)—Quarterly Report of De Minimis SCI Events.* The SCI entity shall submit a report, within 30 calendar days after the end of each calendar quarter, containing a summary description of systems disruptions and systems intrusions that have had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants, including the SCI systems and, for systems intrusions, indirect SCI systems, affected by such SCI events during the applicable calendar quarter.

*Exhibit 4: Rule 1003(a)—Quarterly Report of Systems Changes.* When submitting a report pursuant to Rule 1003(a)(1), the SCI entity shall provide a report, within 30 calendar days after the end of each calendar quarter, describing completed, ongoing, and planned material changes to its SCI systems and the security of indirect SCI systems, during the prior, current, and subsequent calendar quarters, including the dates or expected dates of commencement and completion. An SCI entity shall establish reasonable written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and report such changes in accordance with such criteria. When submitting a report pursuant to Rule 1003(a)(2), the SCI entity shall provide a supplemental report of a material error in or material omission from a report previously submitted under Rule 1003(a); provided, however, that a supplemental report is not required if information regarding a material systems change is or will be provided as part of a notification made pursuant to Rule 1002(b).

*Exhibit 5: Rule 1003(b)(3)—Report of SCI Review.* The SCI entity shall provide a report of the SCI review, together with any response by senior management, within 60 calendar days after its submission to senior management of the SCI entity.

*Exhibit 6: Optional Attachments.* This exhibit may be used in order to attach other documents that the SCI entity may wish to submit as part of a Rule 1002(b)(1) initial notification submission or Rule 1002(b)(3) update submission.

*I. Explanation of Terms*

Critical SCI systems means any SCI systems of, or operated by or on behalf of, an SCI entity that: (1) directly support functionality relating to: (i) clearance and settlement systems of clearing agencies; (ii) openings, reopenings, and closings on the primary listing market; (iii) trading halts; (iv) initial public offerings; (v) the provision of consolidated market data; or (vi) exclusively-listed securities; or (2) provide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.

Indirect SCI systems means any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.

Major SCI event means an SCI event that has had, or the SCI entity reasonably estimates would have: (1) Any impact on a critical SCI system; or (2) a significant impact on the SCI entity's operations or on market participants.

Responsible SCI personnel means, for a particular SCI system or indirect SCI system impacted by an SCI event, such senior manager(s) of the SCI entity having responsibility for such system, and their designee(s).

SCI entity means an SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to ARP.

SCI event means an event at an SCI entity that constitutes: (1) A systems disruption; (2) a systems compliance issue; or (3) a systems intrusion.

SCI review means a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains: (1) A risk assessment with respect to such systems of an SCI entity; and (2) an assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.

SCI systems means all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.

Systems Compliance Issue means an event at an SCI entity that has caused any SCI system of such entity to operate in a manner that does not comply with the Act and the rules and regulations thereunder or the entity's rules or governing documents, as applicable.

Systems Disruption means an event in an SCI entity's SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system.

Systems Intrusion means any unauthorized entry into the SCI systems or indirect SCI systems of an SCI entity.

By the Commission.

Dated: November 19, 2014.

**Brent J. Fields,**

*Secretary.*

## Exhibit A

Key to Comment Letters Cited in Regulation SCI Adopting Release (File No. S7–01–13)

Letter from Charles V. Rossi, President, The Securities Transfer Association, Inc. to Elizabeth Murphy, Secretary, Commission, dated April 3, 2013 (''STA Letter'')

Letter from John J. Rapa, President/Chief Executive Officer, Tellefsen and Company, L.L.C., Northborough, Massachusetts to Elizabeth Murphy, Commission, dated April 19, 2013 (''Tellefsen Letter'')

Letter from Cynthia Fuller, Executive Director, on behalf of Accredited Standards Committee X9, Inc. Financial Industry Standards to the Commission, dated May 23, 2013 (''X9 Letter'')

Letter from Scott Cooper, Vice President, Government Relations and Public Policy, American National Standards Institute to the Commission, dated May 23, 2013 (''ANSI Letter'')

Letter from James J. Angel, Ph.D., CFA, Visiting Associate Professor, The Wharton School, University of Pennsylvania to the Commission, dated June 3, 2013 (''Angel Letter'')

Letter from Raymond M. Tierney III, President and Chief Executive Officer, Bloomberg Tradebook LLC to Elizabeth Murphy, Secretary, Commission, dated June 19, 2013 (''Tradebook Letter'')

Letter from Jay M. Goldstone, Chairman, Municipal Securities Rulemaking Board, Alexandria, Virginia to Elizabeth Murphy, Secretary, Commission, dated June 28, 2013 (''MSRB Letter'')

Letter from Thomas V. D'Ambrosio, Chairman, Committee on Futures and Derivatives, New York City Bar Association to Elizabeth Murphy, Secretary, Commission, dated July 1, 2013 (''NYC Bar Letter'')

Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable to Elizabeth Murphy, Secretary, Commission, dated July 5, 2013 (''FSR Letter'')

Letter from Rob Flatley, Chief Executive Officer and President, CoreOne Technologies to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''CoreOne Letter'')

Letter from Manisha Kimmel, Executive Director, Financial Information Forum to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''FIF Letter'')

Letter from Larry E. Thompson, Managing Director and General Counsel, The Depository Trust Clearing Corporation to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''DTCC Letter'')

Letter from Raymond Tamayo, Chief Information Officer, Options Clearing Corporation to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''OCC Letter'')

Letter from Timothy J. Mahoney, CEO, BIDS Trading, L.P., New York, New York to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''BIDS Letter'')

Letter from Michael Simon, Secretary, International Securities Exchange, LLC to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''ISE Letter'')

Letter from Courtney D. McGuinn, Operations Director, FIX Protocol Ltd., New York, New York to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''FIX Letter'')

Letter from R.T. Leuchtkafer to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''Leuchtkafer Letter '')

Letter from Dennis M. Kelleher, President & CEO; Stephen W. Hall, Securities Specialist; Katelynn O. Bradley, Attorney; and David Frenk, Director of Research; Better Markets, Inc. to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''Better Markets Letter'')

Letter from Lev Lesokhin, Executive Vice President, Strategy and Markets, CAST, Inc., New York, New York to the Commission, dated July 8, 2013 (''CAST Letter'')

Letter from Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''Wells Fargo Letter'')

Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''FINRA Letter'')

Letter from Dr. Bill Curtis, Director, Consortium for IT Software Quality to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''CISQ Letter'')

Letter from Howard Meyerson, General Counsel, Liquidnet, Inc., New York, New York to the Commission, dated July 8, 2013 (''Liquidnet Letter'')

Letter from David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute, Washington, District of Columbia to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''FSI Letter'')

Letter from Scott C. Goebel, General Counsel, Fidelity Management and Research Co., Boston, Massachusetts to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''Fidelity Letter'')

Letter from Joseph Adamczyk, Executive Director, Associate General Counsel, CME Group Inc. to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''CME Letter'')

Letter from Norman M. Reed, Omgeo LLC, New York, New York to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''Omgeo Letter'')

Letter from David Lauer, Market Structure and Technology Architecture Consultant, Step Ahead Technologies, LLC to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''Lauer Letter'')

Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''SIFMA Letter'')

Letter from Jeffrey Wallis, Managing Partner, SunGard Consulting Services, New York, New York to Elizabeth Murphy, Secretary, Commission, dated July 8, 2013 (''SunGard Letter'')

Letter from Janet McGinness, EVP & Corporate Secretary, NYSE Euronext to Elizabeth Murphy, Secretary, Commission, dated July 9, 2013 (''NYSE Letter'')

Letter from Eric J. Swanson, Secretary, BATS Global Markets to Elizabeth Murphy, Secretary, Commission, dated July 10, 2013 (''BATS Letter'')

Letter from Mary Ann Burns, Futures Industry Association Principal Traders Group, Washington, District of Columbia to Elizabeth Murphy, Secretary, Commission, dated July 11, 2013 (''FIA PTG Letter'')

Letter from James P. Selway, III, P. Mats Goebels and Sudhanshu Arya, ITG Inc. to Elizabeth Murphy, Secretary, Commission, dated July 11, 2013 (''ITG Letter'')

Letter from Karrie McMillan, General Counsel, Investment Company Institute to Elizabeth Murphy, Secretary, Commission, dated July 12, 2013 (''ICI Letter'')

Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, Managed Funds Association, and Jirí Król, Deputy CEO, Head of Government and Regulatory Affairs, Alternative Investment Management Association to Elizabeth Murphy, Secretary, Commission, dated July 17, 2013 (''MFA Letter'')

Letter from Anthony J. Saliba, Chief Executive Officer, LiquidPoint, LLC to Elizabeth Murphy, Secretary, Commission, dated July 22, 2013 (''LiquidPoint Letter'')

Letter from Elizabeth K. King, Global Head of Regulatory Affairs, KCG Holdings, Inc., Jersey City, New Jersey to Elizabeth Murphy, Secretary, Commission, dated July 25, 2013 (''KCG Letter'')

Letter from Roger Anerella, Managing Director, Global Head of Securities Execution Services, UBS Investment Bank to Elizabeth Murphy, Secretary, Commission, dated July 26, 2013 (''UBS Letter'')

Letter from Eric Swanson, SVP, General Counsel and Secretary, BATS Global Markets, Inc., et al. to Elizabeth Murphy, Secretary, Commission, dated July 30, 2013 (''Joint SROs Letter'')

Letter from Thomas S. Vales, Chief Executive Officer, TMC Bonds LLC to Elizabeth Murphy, Secretary, Commission, dated August 6, 2013 (''TMC Bonds Letter'')

Letter from James J. Angel, Ph.D., CFA, Visiting Associate Professor, The Wharton School, University of Pennsylvania to the Commission, dated September 3, 2013 (''Angel2 Letter'')

Letter from Benjamin R. Londergan, Chief Executive Officer, Group One Trading L.P. to Elizabeth Murphy, Secretary, Commission, dated September 3, 2013 (''Group One Letter'')

Letter from Ari Gabinet, Executive Vice President and General Counsel, OFI Global Asset Management to Elizabeth Murphy, Secretary, Commission, dated September 9, 2013 (''Oppenheimer Letter'')

Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc. to Elizabeth Murphy, Secretary, Commission, dated September 12, 2013 (''OTC Markets Letter'')

Letter from Dr. Bill Curtis, Director, Consortium for IT Software Quality to Elizabeth Murphy, Secretary, Commission, dated September 17, 2013 (''CISQ2 Letter'')

Letter from William O'Brien, Chief Executive Officer, Direct Edge Holdings to Elizabeth M. Murphy, Secretary, Commission, dated September 25, 2013 (''Direct Edge Letter'')

Letter from Richie Prager, Managing Director, Head of Trading & Liquidity Strategies, Hubert De Jesus, Managing Director, Co-Head of Market Structure & Electronic Trading, Supurna Vedbrat, Managing Director, Co-Head of Market Structure & Electronic Trading, and Joanne Medero, Managing Director, Government Relations & Public Policy, BlackRock, Inc. to Mary Jo White, Chair, Commission, dated September 12, 2014 (''BlackRock Letter'').

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Part III

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–HQ–ES–2014–0032; FF09E21000 FXES11190900000 145]**

# Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of review.

**SUMMARY:** In this Candidate Notice of Review (CNOR), we, the U.S. Fish and Wildlife Service (Service), present an updated list of plant and animal species native to the United States that we regard as candidates for or have proposed for addition to the Lists of Endangered and Threatened Wildlife and Plants under the Endangered Species Act of 1973, as amended. Identification of candidate species can assist environmental planning efforts by providing advance notice of potential listings, allowing landowners and resource managers to alleviate threats and thereby possibly remove the need to list species as endangered or threatened. Even if we subsequently list a candidate species, the early notice provided here could result in more options for species management and recovery by prompting candidate conservation measures to alleviate threats to the species.

The CNOR summarizes the status and threats that we evaluated in order to determine that species qualify as candidates, to assign a listing priority number (LPN) to each species, and to determine whether a species should be removed from candidate status. Additional material that we relied on is available in the Species Assessment and Listing Priority Assignment Forms (species assessment forms) for each candidate species.

Overall, this CNOR recognizes 23 new candidates, changes the LPN for one candidate, and removes one species from candidate status. Combined with other decisions for individual species that were published separately from this CNOR in the past year, the current number of species that are candidates for listing is 146.

This document also includes our findings on resubmitted petitions and describes our progress in revising the Lists of Endangered and Threatened Wildlife and Plants (Lists) during the period October 1, 2013, through September 30, 2014.

We request additional status information that may be available for the 146 candidate species identified in this CNOR.

**DATES:** We will accept information on any of the species in this Candidate Notice of Review at any time.

**ADDRESSES:** This notice is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/endangered/what-we-do/cnor.html.* Species assessment forms with information and references on a particular candidate species' range, status, habitat needs, and listing priority assignment are available for review at the appropriate Regional Office listed below in **SUPPLEMENTARY INFORMATION** or at the Branch of Communications and Candidate Conservation, Falls Church, VA (see address under **FOR FURTHER INFORMATION CONTACT**), or on our Web site (*http://ecos.fws.gov/tess_public/pub/candidateSpecies.jsp*). Please submit any new information, materials, comments, or questions of a general nature on this notice to the Falls Church, VA, address listed under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions pertaining to a particular species to the address of the Endangered Species Coordinator in the appropriate Regional Office listed in **SUPPLEMENTARY INFORMATION**. Species-specific information and materials we receive will be available for public inspection by appointment, during normal business hours, at the appropriate Regional Office listed below under Request for Information in **SUPPLEMENTARY INFORMATION**. General information we receive will be available at the Branch of Communications and Candidate Conservation, Falls Church, VA (see address under **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Chief, Branch of Communications and Candidate Conservation, U.S. Fish and Wildlife Service Headquarters, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (telephone 703–358–2171). Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** We request additional status information that may be available for any of the candidate species identified in this CNOR. We will consider this information to monitor changes in the status or LPN of candidate species and to manage candidates as we prepare listing documents and future revisions to the notice of review. We also request information on additional species to consider including as candidates as we prepare future updates of this notice.

## Candidate Notice of Review

### *Background*

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), requires that we identify species of wildlife and plants that are endangered or threatened based on the best available scientific and commercial information. As defined in section 3 of the ESA, an endangered species is any species that is in danger of extinction throughout all or a significant portion of its range, and a threatened species is any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Through the Federal rulemaking process, we add species that meet these definitions to the List of Endangered and Threatened Wildlife at 50 CFR 17.11 or the List of Endangered and Threatened Plants at 50 CFR 17.12. As part of this program, we maintain a list of species that we regard as candidates for listing. A candidate species is one for which we have on file sufficient information on biological vulnerability and threats to support a proposal for listing as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher priority listing actions. We may identify a species as a candidate for listing after we have conducted an evaluation of its status on our own initiative, or resulting from a petition we have received. If we have made a positive finding on a petition to list a species, but we have found that listing is warranted but precluded by other higher priority listing actions, we will add the species to our list of candidates.

We maintain this list of candidates for a variety of reasons: (1) To notify the public that these species are facing threats to their survival; (2) to provide advance knowledge of potential listings that could affect decisions of environmental planners and developers; (3) to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary; (4) to request input from interested parties to help us identify those candidate species that may not require protection under the ESA as well as additional species that may require the ESA's protections; and (5) to request necessary information for setting priorities for preparing listing proposals. We strongly encourage collaborative

conservation efforts for candidate species, and offer technical and financial assistance to facilitate such efforts. For additional information regarding such assistance, please contact the appropriate Regional Office listed under Request for Information or visit our Web site, *http://www.fws.gov/endangered/what-we-do/cca.html.*

*Previous Notices of Review*

We have been publishing candidate notices of review (CNOR) since 1975. The most recent CNOR (prior to this CNOR) was published on November 22, 2013 (78 FR 70104). CNORs published since 1994 are available on our Web site, *http://www.fws.gov/endangered/what-we-do/cnor.html.* For copies of CNORs published prior to 1994, please contact the Branch of Communications and Candidate Conservation (see **FOR FURTHER INFORMATION CONTACT** section above).

On September 21, 1983, we published guidance for assigning an LPN for each candidate species (48 FR 43098). Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats, immediacy of threats, and taxonomic status; the lower the LPN, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). Section 4(h)(3) of the ESA (16 U.S.C. 1533(h)(3)) requires the Secretary to establish guidelines for such a priority-ranking guidance system. As explained below, in using this system, we first categorize based on the magnitude of the threat(s), then by the immediacy of the threat(s), and finally by taxonomic status.

Under this priority-ranking system, magnitude of threat can be either ''high'' or ''moderate to low.'' This criterion helps ensure that the species facing the greatest threats to their continued existence receive the highest listing priority. It is important to recognize that all candidate species face threats to their continued existence, so the magnitude of threats is in relative terms. For all candidate species, the threats are of sufficiently high magnitude to put them in danger of extinction, or make them likely to become in danger of extinction in the foreseeable future. But for species with higher magnitude threats, the threats have a greater likelihood of bringing about extinction or are expected to bring about extinction on a shorter timescale (once the threats are imminent) than for species with lower magnitude threats. Because we do not routinely quantify how likely or how soon extinction would be expected to occur absent listing, we must evaluate factors that contribute to the likelihood and time scale for extinction. We therefore consider information such as: (1) The number of populations or extent of range of the species affected by the threat(s), or both; (2) the biological significance of the affected population(s), taking into consideration the life-history characteristics of the species and its current abundance and distribution; (3) whether the threats affect the species in only a portion of its range, and, if so, the likelihood of persistence of the species in the unaffected portions; (4) the severity of the effects and the rapidity with which they have caused or are likely to cause mortality to individuals and accompanying declines in population levels; (5) whether the effects are likely to be permanent; and (6) the extent to which any ongoing conservation efforts reduce the severity of the threat.

As used in our priority-ranking system, immediacy of threat is categorized as either ''imminent'' or ''nonimminent,'' and is based on when the threats will begin. If a threat is currently occurring or likely to occur in the very near future, we classify the threat as imminent. Determining the immediacy of threats helps ensure that species facing actual, identifiable threats are given priority for listing proposals over those for which threats are only potential or species that are intrinsically vulnerable to certain types of threats but are not known to be presently facing such threats.

Our priority ranking system has three categories for taxonomic status: Species that are the sole members of a genus; full species (in genera that have more than one species); and subspecies and distinct population segments of vertebrate species (DPS).

The result of the ranking system is that we assign each candidate a listing priority number of 1 to 12. For example, if the threats are of high magnitude, with immediacy classified as imminent, the listable entity is assigned an LPN of 1, 2, or 3 based on its taxonomic status (*i.e.,* a species that is the only member of its genus would be assigned to the LPN 1 category, a full species to LPN 2, and a subspecies or DPS would be assigned to LPN 3). In summary, the LPN ranking system provides a basis for making decisions about the relative priority for preparing a proposed rule to list a given species. No matter which LPN we assign to a species, each species included in this notice as a candidate is one for which we have sufficient information to prepare a proposed rule for listing because it is in danger of extinction or likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

For more information on the process and standards used in assigning LPNs, a copy of the 1983 guidance is available on our Web site at: *http://www.fws.gov/endangered/esa-library/pdf/48fr43098-43105.pdf.* Information on the LPN assigned to a particular species is summarized in this CNOR and the species assessment for each candidate contains the LPN chart and a rationale for the determination of the magnitude and immediacy of threat(s) and assignment of the LPN.

This revised notice supersedes all previous animal, plant, and combined candidate notices of review for native species and supersedes previous 12-month warranted-but-precluded petition findings for those candidate species that were petitioned for listing.

*Summary of This CNOR*

Since publication of the previous CNOR on November 22, 2013 (78 FR 70104), we reviewed the available information on candidate species to ensure that a proposed listing is justified for each species, and reevaluated the relative LPN assigned to each species. We also evaluated the need to emergency list any of these species, particularly species with higher priorities (*i.e.,* species with LPNs of 1, 2, or 3). This review and reevaluation ensures that we focus conservation efforts on those species at greatest risk.

In addition to reviewing candidate species since publication of the last CNOR, we have worked on findings in response to petitions to list species, and on proposed and final determinations for rules to list species under the ESA. Some of these findings and determinations have been completed and published in the **Federal Register**, while work on others is still under way (see *Preclusion and Expeditious Progress,* below, for details).

Based on our review of the best available scientific and commercial information, with this CNOR, we are identifying 23 new candidates, we change the LPN for one candidate, and determine that a listing proposal is not warranted for one species and thus remove it from candidate status (see Candidate Removals, below). Combined with the other decisions published separately from this CNOR, a total of 146 species (67 plant and 79 animal species) are now candidates awaiting preparation of rules proposing their listing. These 146 species, along with the 36 species currently proposed for listing (including 1 species proposed for listing due to similarity in appearance), are included in Table 1.

Table 2 lists the changes from the previous CNOR, and includes 49 species identified in the previous CNOR as either proposed for listing or classified as candidates that are no longer in those categories. This includes 33 species for which we published a final listing rule, 11 candidate species for which we published a separate not-warranted finding and removed from candidate status, 3 species for which we published a withdrawal of a proposed rule, 1 species for which we published a separate notice of removal from candidate status, and the 1 species in this notice that we have determined does not meet the definition of an endangered or threatened species and therefore does not warrant listing. We have removed this species from candidate status in this CNOR.

**New Candidates**

We have identified 23 new candidate species through this notice discussed below.

*Birds*

Ma'oma'o (*Gymnomyza samoensis*)—The ma'oma'o is a large, dusky olive-green honeyeater that is known for making a variety of loud distinctive calls. The genus *Gymnomyza* consists of three honeyeaters restricted to a few islands in the southwestern Pacific. The ma'oma'o is endemic to Upolu and Savaii, Independent Samoa (Samoa), and Tutuila Island, American Samoa. The ma'oma'o is now believed to be extirpated from Tutuila Island, American Samoa. It is currently only found in small populations on the islands of Savaii and Upolu in Samoa. The ma'oma'o is primarily restricted to mature, well-developed, moist, mossy forests at upper elevations. Monitoring over the last decade has provided evidence of a decline in the relative abundance of the species. In 2007, the total population was estimated to be approximately 500 individuals.

Little mature forest remains in Samoa, and the loss of forested habitat due to logging, agricultural clearing, and catastrophic storms is the primary threat to the ma'oma'o. Two storms in the 1990s, Cyclones Ofa (1990) and Val (1991), destroyed much of the forested habitat in Samoa, reducing forest canopy cover by 73 percent. In 2012, Cyclone Evan caused additional severe forest damage. Loss of mature forest is likely to affect the ma'oma'o by reducing breeding and foraging habitat, increasing forest fragmentation, and increasing the abundance and diversity of invasive species. Other threats to the species include habitat degradation, predation by nonnative species, and small population size. Habitat quality has degraded with the loss of closed forest space and the spread of nonnative invasive weeds. Nest predation by rats (*Rattus* spp.) and feral cats (*Felis catus*) is an important threat to many island birds, including the ma'oma'o, and may impede population growth. Small populations are more susceptible to inbreeding depression (reduced reproductive vigor) and extirpation from stochastic events (*e.g.,* inclement weather, population demographics, and altered predation patterns). Based on our evaluation that these ongoing threats pose an imminent risk of a high magnitude, we assign a LPN of 2 for this species.

*Flowering Plants*

Eighteen Hawaiian flowering plants (*Cyanea kauaulaensis, Cyperus neokunthianus, Cyrtandra hematos, Exocarpos menziesii, Kadua haupuensis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia brevidens, Phyllostegia helleri, Phyllostegia stachyoides, Portulaca villosa, Pritchardia bakeri, Sanicula sandwicensis, Santalum involutum, Schiedea diffusa* ssp. *diffusa, Sicyos lanceoloideus, Stenogyne kaalae* ssp. *sherffii, Wikstromoemia skottsbergiana*)—Each of these 18 species is endemic to one or more islands in the State of Hawaii ((*Cyanea kauaulaensis* (Maui), *Cyperus neokunthianus* (Maui), *Cyrtandra hematos* (Molokai), *Exocarpos menziesii* (Hawaii Island; extirpated from Lanai), *Kadua haupuensis* (Kauai), *Labordia lorenciana* (Kauai), *Lepidium orbiculare* (Kauai), *Phyllostegia brevidens* (Maui; extirpated from Hawaii Island), *Phyllostegia helleri* (Kauai), *Phyllostegia stachyoides* (Maui, Molokai, and Hawaii Island), *Portulaca villosa* (Maui and Nihoa), *Pritchardia bakeri* (Oahu), *Sanicula sandwicensis* (Maui and Hawaii Island), *Santalum involutum* (Kauai), *Schiedea diffusa* ssp. *diffusa* (Maui), *Sicyos lanceoloideus* (Kauai and Oahu), *Stenogyne kaalae* ssp. *sherffii* (Oahu), and *Wikstromoemia skottsbergiana* (Kauai)), and each is negatively affected by nonnative animals and plants.

Introduced, nonnative animals damage and destroy plants and seeds, modify habitat, create habitat more conducive to nonnative plant introductions, and spread nonnative plant seeds. Nonnative plants displace and outcompete native species. Introduced, nonnative plants and animals are serious and ongoing threats to these species rangewide, and these threats are increased by the continued inadequacy of existing protective regulations. In addition, small population size (each species has fewer than 100 individuals) is a serious and ongoing threat to each of these species because (1) they may experience reduced reproductive vigor due to ineffective pollination or inbreeding depression; (2) they may experience reduced levels of genetic variability, leading to diminished capacity to adapt and respond to environmental changes, thereby lessening the probability of long-term persistence; and (3) a single catastrophic event may result in extirpation of remaining populations and extinction of the species. Climate change may pose a threat to the ecosystems that support these species, thus exacerbating the effects of the aforementioned threats. There are varying degrees of conservation efforts ongoing for these species; however, at a minimum, all of these species are listed on the Hawaii Plant Extinction Prevention Program (PEPP) species list. Species on the PEPP list are prioritized for monitoring, surveys, collection and storing of seeds, propagation, and outplanting. The threats to each of these species are imminent and of high magnitude, leading to a relatively high likelihood of extinction. Therefore, we assign a LPN of 2 for the above plants that are full species and an LPN of 3 for those that are subspecies or varieties.

*Ferns and Allies*

Four Hawaiian ferns (*Asplenium diellaciniatum, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Hypolepis hawaiiensis* var. *mauiensis*)—Each of these four species is endemic to one or more islands in the State of Hawaii (*Asplenium diellaciniatum* (Kauai), *Deparia kaalaana* (Maui; extirpated from Kauai and Hawaii Island), *Dryopteris glabra* var. *pusilla* (Kauai), *Hypolepis hawaiiensis* var. *mauiensis* (Maui)); and each is negatively affected by nonnative animals and plants. Introduced, nonnative animals damage and destroy plants and seeds, modify habitat, create habitat more conducive to nonnative plant introductions, and spread nonnative plant seeds. Nonnative plants displace and outcompete native species. Introduced nonnative plants and animals are serious and ongoing threats to these species rangewide, and these threats are increased by the continued inadequacy of existing protective regulations. In addition, small population size (each species has fewer than 100 individuals) is a serious and ongoing threat to each of these species because (1) they may experience reduced reproductive vigor due to ineffective pollination or inbreeding depression; (2) they may

experience reduced levels of genetic variability, leading to diminished capacity to adapt and respond to environmental changes, thereby lessening the probability of long-term persistence; and (3) a single catastrophic event may result in extirpation of remaining populations and extinction of the species. Climate change may pose a threat to the ecosystems that support these species, thus exacerbating the effects of the aforementioned threats. There are varying degrees of conservation efforts ongoing for these species; however, at a minimum, all of these species are listed on the Hawaii Plant Extinction Prevention Program (PEPP) species list. Species on the PEPP list are prioritized for monitoring, surveys, collection and storing of seeds, propagation, and outplanting. The threats to each of these species are imminent and of high magnitude, leading to a relatively high likelihood of extinction. Therefore, we assign a LPN of 2 for *Asplenium diellaciniatum* and *Deparia kaalaana* and an LPN of 3 for *Dryopteris glabra* var. *pusilla* and *Hypolepis hawaiiensis* var. *mauiensis.*

**Listing Priority Changes in Candidates**

We reviewed the LPN for all candidate species and are changing the number for the following species discussed below.

*Birds*

Sprague's pipit (*Anthus spragueii*)—The Sprague's pipit is a small grassland bird characterized by its high breeding flight display and otherwise very secretive behavior. Sprague's pipits are strongly associated with native prairie (land that has never been plowed), especially on the breeding grounds. Its current breeding range includes portions of Montana, North Dakota, South Dakota, and Canada. The wintering range includes south-central and southeast Arizona, southern New Mexico, Texas, southern Oklahoma, southern Arkansas, northwest Mississippi, southern Louisiana, and northern Mexico; the vast majority of the U.S. winter sightings have been in Texas. During migration, the species has been sighted in areas outside of the direct flight path between its breeding and wintering sites, including Michigan, western Ontario, Ohio, Massachusetts, and Gulf and Atlantic States from Mississippi east and north to South Carolina. Sprague's pipits also have been sighted in California during fall migration.

The primary stressor to the species is habitat conversion on the breeding grounds. The Breeding Bird Survey shows a long-term decline from 1966 through 2012. From 2002 through 2012, however, the long-term population decline has leveled off and currently, there is no discernable trend. The Christmas Bird Count data also indicates that the population decline has stopped and the population trend has no direction, either increasing or decreasing between 2003 and 2012.

In the Service's 12-month finding published on September 15, 2010, we identified oil and gas development and associated infrastructure as having a strong negative influence on the species based upon the available information at that time. New information suggests that Sprague's pipit avoidance response of these features is highly variable across the range and thus the species' response to oil and gas development and roads does not indicate that these are a threat.

Landscape modelling to predict Sprague's pipit habitat use on the breeding range indicates the population is concentrated in north-central Montana, Alberta, and Saskatchewan, Canada. Analysis of the likelihood of prairie conversion in the area where most pipits occur suggests that the risk of widespread conversion is low, with the most likely risk scenario of future conversion to cropland predicting a relatively low proportion (10–15 percent) of the breeding population affected.

On the wintering range, conversion of prairie to cropland appears to be accelerating. The species is widely distributed and mobile during winter, but grassland conversion is ongoing and apparently widespread. At this time, we believe that the species' trends can be explained by the habitat changes that have occurred on the breeding range; however, we will be more closely assessing the changes to the wintering range and whether those changes threaten the Sprague's pipit.

The threats to the Sprague's pipit described above are moderate to low in magnitude. Because of the relatively large population remaining and the stable-to-uncertain (*i.e.* not showing a clear decline) trends shown by surveys on both the breeding and wintering grounds, the potential decline is nonimminent. In addition, the threat from conversion of habitat on the breeding grounds is now nonimment. Therefore, we are revising the LPN from 8 to an 11.

**Candidate Removals**

As summarized below, we have evaluated the threats to the following species and considered factors that, individually and in combination, currently or potentially could pose a risk to the species and its habitats. After a review of the best available scientific and commercial data, we conclude that listing this species under the Endangered Species Act is not warranted because this species is not likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Therefore, we no longer consider it to be a candidate species for listing. We will continue to monitor the status of this species and to accept additional information and comments concerning this finding. We will reconsider our determination in the event that new information indicates that the threats to the species are of a considerably greater magnitude or imminence than identified through assessments of information contained in our files, as summarized here.

*Flowering Plants*

*Astragalus cusickii* var. *packardiae* (Packard's milkvetch)—The following summary is based on information contained in our files. Packard's milkvetch is narrowly endemic to a specific group of light-colored sedimentary outcrops in southwestern Idaho. The total range of the species covers approximately 26 square kilometers ($km^2$) (10 square miles ($mi^2$)) in Payette County. Suboccurrences of Packard's milkvetch, which are typically represented by individual occupied outcrops, are found at elevations ranging from 793 to 915 meters (m) (2,600 to 3,000 feet (ft)). Occupied outcrops tend to be found on steep, south- to west-facing slopes, and are relatively sparsely vegetated.

Packard's milkvetch became a candidate species in 2010, based on the identified primary threat of habitat degradation due to off highway vehicles (OHVs). In response, on December 13, 2013, the Bureau of Land Management (BLM) made a decision that permanently closed 5,620 acres within and near Packard's milkvetch habitat to OHV use, covering 68 percent of the species' occurrences. Monitoring data collected since the closure was implemented in 2011 indicates that the OHV closure has been effective at eliminating the primary threat to the species throughout a large majority of the species' range.

Other natural and anthropogenic activities identified at the time it was designated a candidate included an altered wildfire regime due to invasive nonnative plant species and livestock use. There was little data at the time to suggest whether these potential threats were significant, but out of an abundance of caution, the Idaho Fish and Wildlife Office (IFWO) considered

these activities along with the OHV monitoring data from 2008–2010 when making the 2010 decision. However, by 2013, a 5-year monitoring dataset (2008–2013) suggested a stable population and no association between cover of nonnative plant species and wildfire and the abundance of Packard's milkvetch.

In 2010, the population of Packard's milkvetch was estimated at approximately 5,000 plants located within 26 suboccurrences with abundance ranges from 3 to approximately 500 plants per suboccurrence. Surveys in 2012 documented several additional occupied outcrops collectively totaling approximately 2,000 individuals, which revised the range-wide population estimate to 6,500 plants occurring within 28 suboccurrences. The 5-year monitoring dataset (2008–2013) has suggested a stable population overall.

Therefore, based on (1) the reduction of the species' primary threat (*i.e.,* OHV use), (2) the increase in number of known suboccurrences and resulting increase in the overall population, and (3) the species' overall stable population status over a 5-year monitoring period, we find that listing of Packard's milkvetch as threatened or endangered throughout all or a significant portion of its range is no longer warranted; the species no longer meets the definition of a candidate species, and we are removing it from candidate status.

In addition to the factors that led us to conclude that Packard's milkvetch no longer warrants candidate status, the BLM and IFWO signed a 20-year Candidate Conservation Agreement (CCA) on December 20, 2013, which further supports the BLM's OHV closure decision and commits to continued enforcement and monitoring of the OHV closure. The CCA also outlines the BLM's plans for long-term monitoring and future proactive conservation measures to address new potential threats that may arise.

**Petition Findings**

The ESA provides two mechanisms for considering species for listing. One method allows the Secretary, on the Secretary's own initiative, to identify species for listing under the standards of section 4(a)(1). We implement this authority through the candidate program, discussed above. The second method for listing a species provides a mechanism for the public to petition us to add a species to the Lists. The CNOR serves several purposes as part of the petition process: (1) In some instances (in particular, for petitions to list species that the Service has already identified as candidates on its own initiative), it serves as the initial petition finding; (2) for candidate species for which the Service has made a warranted-but-precluded petition finding, it serves as a ''resubmitted'' petition finding that the ESA requires the Service to make each year; and (3) it documents the Service's compliance with the statutory requirement to monitor the status of species for which listing is warranted but precluded, and to ascertain if they need emergency listing.

First, the CNOR serves as an initial petition finding in some instances. Under section 4(b)(3)(A), when we receive a listing petition, we must determine within 90 days, to the maximum extent practicable, whether the petition presents substantial information indicating that listing may be warranted (a ''90-day finding''). If we make a positive 90-day finding, we must promptly commence a status review of the species under section 4(b)(3)(A); we must then make and publish one of three possible findings within 12 months of the receipt of the petition (a ''12-month finding''):

(1) The petitioned action is not warranted;

(2) The petitioned action is warranted (in which case we are required to promptly publish a proposed regulation to implement the petitioned action; once we publish a proposed rule for a species, sections 4(b)(5) and 4(b)(6) of the ESA govern further procedures, regardless of whether we issued the proposal in response to a petition); or

(3) The petitioned action is warranted, but (a) the immediate proposal of a regulation and final promulgation of a regulation implementing the petitioned action is precluded by pending proposals to determine whether any species is endangered or threatened, and (b) expeditious progress is being made to add qualified species to the Lists. We refer to this third option as a ''warranted-but-precluded finding.''

We define ''candidate species'' to mean those species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but for which issuance of the proposed rule is precluded (61 FR 64481; December 5, 1996). The standard for making a species a candidate through our own initiative is identical to the standard for making a warranted-but-precluded 12-month petition finding on a petition to list, and we add all petitioned species for which we have made a warranted-but-precluded 12-month finding to the candidate list.

Therefore, all candidate species identified through our own initiative already have received the equivalent of substantial 90-day and warranted-but-precluded 12-month findings. Nevertheless, we review the status of the newly petitioned candidate species and through this CNOR publish specific section 4(b)(3) findings (*i.e.,* substantial 90-day and warranted-but-precluded 12-month findings) in response to the petitions to list these candidate species. We publish these findings as part of the first CNOR following receipt of the petition. We have identified the candidate species for which we received petitions by the code ''C*'' in the category column on the left side of Table 1 below.

Second, the CNOR serves as a ''resubmitted'' petition finding. Section 4(b)(3)(C)(i) of the ESA requires that when we make a warranted-but-precluded finding on a petition, we treat the petition as one that is resubmitted on the date of the finding. Thus, we must make a 12-month petition finding in compliance with section 4(b)(3)(B) of the ESA at least once a year, until we publish a proposal to list the species or make a final not-warranted finding. We make these annual findings for petitioned candidate species through the CNOR. These annual findings supercede any findings from previous CNORs and the initial 12-month warranted-but-precluded finding, although all previous findings are part of the administrative record for the new finding, and we may rely upon them or incorporate them by reference in the new finding as appropriate.

Third, through undertaking the analysis required to complete the CNOR, the Service determines if any candidate species needs emergency listing. Section 4(b)(3)(C)(iii) of the ESA requires us to ''implement a system to monitor effectively the status of all species'' for which we have made a warranted-but-precluded 12-month finding, and to ''make prompt use of the [emergency listing] authority [under section 4(b)(7)] to prevent a significant risk to the well being of any such species.'' The CNOR plays a crucial role in the monitoring system that we have implemented for all candidate species by providing notice that we are actively seeking information regarding the status of those species. We review all new information on candidate species as it becomes available, prepare an annual species assessment form that reflects monitoring results and other new information, and identify any species for which emergency listing may be appropriate. If we determine that emergency listing is appropriate for any

candidate, we will make prompt use of the emergency listing authority under section 4(b)(7). For example, on August 10, 2011, we emergency listed the Miami blue butterfly (76 FR 49542). We have been reviewing and will continue to review, at least annually, the status of every candidate, whether or not we have received a petition to list it. Thus, the CNOR and accompanying species assessment forms constitute the Service's system for monitoring and making annual findings on the status of petitioned species under sections 4(b)(3)(C)(i) and 4(b)(3)(C)(iii) of the ESA.

A number of court decisions have elaborated on the nature and specificity of information that we must consider in making and describing the petition findings in the CNOR. The CNOR that published on November 9, 2009 (74 FR 57804), describes these court decisions in further detail. As with previous CNORs, we continue to incorporate information of the nature and specificity required by the courts. For example, we include a description of the reasons why the listing of every petitioned candidate species is both warranted and precluded at this time. We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis (see below). Regional priorities can also be discerned from Table 1, below, which includes the lead region and the LPN for each species. Our preclusion determinations are further based upon our budget for listing activities for unlisted species only, and we explain the priority system and why the work we have accomplished does preclude action on listing candidate species.

In preparing this CNOR, we reviewed the current status of, and threats to, the 112 candidates for which we have received a petition to list and the 5 listed species for which we have received a petition to reclassify from threatened to endangered, where we found the petitioned action to be warranted but precluded. We find that the immediate issuance of a proposed rule and timely promulgation of a final rule for each of these species, except for the Selkirk ecosystem population and the Cabinet-Yaak ecosystem population of Grizzly bear (see *Petitions To Reclassify Species Already Listed*), has been, for the preceding months, and continues to be, precluded by higher priority listing actions. Additional information that is the basis for this finding is found in the species assessments and our administrative record for each species.

Our review included updating the status of, and threats to, petitioned candidate or listed species for which we published findings, under section 4(b)(3)(B) of the ESA, in the previous CNOR. We have incorporated new information we gathered since the prior finding and, as a result of this review, we are making continued warranted-but-precluded 12-month findings on the petitions for these species.

The immediate publication of proposed rules to list these species was precluded by our work on higher priority listing actions, listed below, during the period from October 1, 2013, through September 30, 2014. Below we describe the actions that continue to preclude the immediate proposal and final promulgation of a regulation implementing each of the petitioned actions for which we have made a warranted-but-precluded finding, and we describe the expeditious progress we are making to add qualified species to, and remove species from, the Lists. We will continue to monitor the status of all candidate species, including petitioned species, as new information becomes available to determine if a change in status is warranted, including the need to emergency-list a species under section 4(b)(7) of the ESA.

In addition to identifying petitioned candidate species in Table 1 below, we also present brief summaries of why each of these candidates warrants listing. More complete information, including references, is found in the species assessment forms. You may obtain a copy of these forms from the Regional Office having the lead for the species, or from the Fish and Wildlife Service's Internet Web site: *http://ecos.fws.gov/tess_public/pub/candidateSpecies.jsp.* As described above, under section 4 of the ESA, we identify and propose species for listing based on the factors identified in section 4(a)(1), and section 4 also provides a mechanism for the public to petition us to add species to the Lists of Endangered or Threatened Wildlife and Plants under the ESA.

*Preclusion and Expeditious Progress*

To make a finding that a particular action is warranted but precluded, the Service must make two determinations: (1) That the immediate proposal and timely promulgation of a final regulation is precluded by pending listing proposals and (2) that expeditious progress is being made to add qualified species to either of the lists and to remove species from the lists. 16 U.S.C. 1533(b)(3)(B)(iii).

Preclusion

A listing proposal is precluded if the Service does not have sufficient resources available to complete the proposal, because there are competing demands for those resources, and the relative priority of those competing demands is higher. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a listing proposal regulation or whether promulgation of such a proposal is precluded by higher priority listing actions—(1) The amount of resources available for completing the listing function, (2) the estimated cost of completing the proposed listing, and (3) the Service's workload and prioritization of the proposed listing in relation to other actions.

Available Resources

The resources available for listing actions are determined through the annual Congressional appropriations process. In FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the Listing Program. This spending cap was designed to prevent the listing function from depleting funds needed for other functions under the ESA (for example, recovery functions, such as removing species from the Lists), or for other Service programs (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997). The funds within the spending cap are available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists or to change the status of a species from threatened to endangered; annual ''resubmitted'' petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the ESA; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat).

We cannot spend more for the Listing Program than the amount of funds within the spending cap without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A)). In addition, since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for completing Listing Program actions other than critical habitat designations

(''The critical habitat designation subcap will ensure that some funding is available to address other listing activities'' (House Report No. 107–103, 107th Congress, 1st Session. June 19, 2001)). In FY 2002 and each year until FY 2006, the Service had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds were available for other listing activities. In some FYs since 2006, we have been able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In other FYs, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. In FY 2014, based on the Service's workload, we were able to use some of the critical habitat subcap funds to fund proposed listing determinations.

For FY 2012 Congress also put in place two additional subcaps within the listing cap: One for listing actions for foreign species and one for petition findings. As with the critical habitat subcap, if the Service does not need to use all of the funds within the subcap, we are able to use the remaining funds for completing proposed or final listing determinations. In FY 2014, based on the Service's workload, we were able to use some of the funds within the foreign species subcap and the petitions subcap to fund proposed listing determinations.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first, and also because we allocate our listing budget on a nationwide basis. Through the listing cap, the three subcaps, and the amount of funds needed to complete court-mandated actions within those subcaps, Congress and the courts have in effect determined the amount of money available for other listing activities nationwide. Therefore, the funds in the listing cap—other than those within the subcaps needed to comply with court orders or court-approved settlement agreements requiring critical habitat actions for already-listed species, listing actions for foreign species, and petition findings—set the framework within which we make our determinations of preclusion and expeditious progress.

For FY 2014, on January 17, 2014, Congress passed a Consolidated Appropriations Act, 2014 (Pub. L. 113–76), which provided funding through September 30, 2014. In particular, it included an overall spending cap of $20,515,000 for the listing program. Of that, no more than $1,504,000 could be used for listing actions for foreign species, and no more than $1,501,000 could be used to make 90-day or 12-month findings on petitions. The Service thus had $ 12,905,000 available to work on proposed and final listing determinations for domestic species. In addition, if the Service had funding available within the critical habitat, foreign species, or petition subcaps after those workloads had been completed, it could use those funds to work on listing actions other than critical habitat designations or foreign species.

*Costs of Listing Actions.* The work involved in preparing various listing documents can be extensive, and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90-day finding is $39,276; for a 12-month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, $305,000.

*Prioritizing Listing Actions.* The Service's Listing Program workload is broadly composed of four types of actions, which the Service prioritizes as follows: (1) Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing or critical habitat determinations be completed by a specific date; (2) essential litigation-related, administrative, and listing program-management functions; (3) section 4 (of the Act) listing and critical habitat actions with absolute statutory deadlines; and (4) section 4 listing actions that do not have absolute statutory deadlines. In the last few years, the Service received many new petitions and a single petition to list 404 species, significantly increasing the number of actions within the second category of our workload—actions that have absolute statutory deadlines. As a result of the petitions to list hundreds of species, we currently have over 450 12-month petition findings yet to be initiated and completed.

An additional way in which we prioritize work in the section 4 program is application of the listing priority guidelines (48 FR 43098; September 21, 1983). Under those guidelines, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus), species, or part of a species (subspecies or distinct population segment)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). A species with a higher LPN would generally be precluded from listing by species with lower LPNs, unless work on a proposed rule for the species with the higher LPN can be combined with work on a proposed rule for other high-priority species. In addition to prioritizing species with our 1983 guidance, because of the large number of high-priority species we have had in the recent past, we had further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species (''Top 40''). These 40 candidate species had the highest priority to receive funding to work on a proposed listing determination and we used this to formulate our work plan for FYs 2010 and 2011 that was included in the MDL Settlement Agreement (see below), as well as for work on proposed and final listing rules for the remaining candidate species with LPNs of 2 and 3.

Finally, proposed rules for reclassification of threatened species to endangered species are lower priority, because as listed species, they are already afforded the protections of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to

reclassify a species to endangered if we can combine this with work that is subject to a court order or court-approved deadline.

Since before Congress first established the spending cap for the Listing Program in 1998, the Listing Program workload has required considerably more resources than the amount of funds Congress has allowed for the Listing Program. It is therefore important that we be as efficient as possible in our listing process. As we implement our listing work plan and work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as one of the highest priority species. In addition, we take into consideration the availability of staff resources when we determine which high-priority species will receive funding to minimize the amount of time and resources required to complete each listing action.

*Listing Program Workload.* Each FY we determine, based on the amount of funding Congress has made available within the Listing Program spending cap, specifically which actions we will have the resources to work on in that FY. We then prepare Allocation Tables that identify the actions that we are funding for that FY, and how much we estimate it will cost to complete each action; these Allocation Tables are part of our record for this notice and the listing program. Our Allocation Table for FY 2012, which incorporated the Service's approach to prioritizing its workload, was adopted as part of a settlement agreement in a case before the U.S. District Court for the District of Columbia (Endangered Species Act Section 4 Deadline Litigation, No. 10–377 (EGS), MDL Docket No. 2165 (''MDL Litigation''), Document 31–1 (D.D.C. May 10, 2011) (''MDL Settlement Agreement'')). The requirements of paragraphs 1 through 7 of that settlement agreement, combined with the work plan attached to the agreement as Exhibit B, reflected the Service's Allocation Tables for FY 2011 and FY 2012. In addition, paragraphs 2 through 7 of the agreement require the Service to take numerous other actions through FY 2017—in particular, complete either a proposed listing rule or a not-warranted finding for all 251 species designated as ''candidates'' in the 2010 candidate notice of review (''CNOR'') before the end of FY 2016, and complete final listing determinations for those species proposed for listing within the statutory deadline (usually one year from the proposal). Paragraph 10 of that settlement agreement sets forth the Service's conclusion that ''fulfilling the commitments set forth in this Agreement, along with other commitments required by court orders or court-approved settlement agreements already in existence at the signing of this Settlement Agreement (listed in Exhibit A), will require substantially all of the resources in the Listing Program.'' As part of the same lawsuit, the court also approved a separate settlement agreement with the other plaintiff in the case; that settlement agreement requires the Service to complete additional actions in specific fiscal years—including 12-month petition findings for 11 species, 90-day petition findings for 477 species, and proposed listing determinations or not-warranted findings for 39 species.

These settlement agreements have led to a number of results that affect our preclusion analysis. First, the Service has been, and will continue to be, limited in the extent to which it can undertake additional actions within the Listing Program through FY 2017, beyond what is required by the MDL Settlement Agreements. Second, because the settlement is court approved, two broad categories of actions now fall within the Service's highest priority (compliance with a court order): (1) The actions required to be completed in FY 2014 by the MDL Settlement Agreements; and (2) completion, before the end of FY 2016, of proposed listings or not-warranted findings for most of the candidate species identified in this CNOR (in particular, for those candidate species that were included in the 2010 CNOR). Therefore, each year, one of the Service's highest priorities is to make steady progress towards completing by the end of 2017 proposed and final listing determinations for the 2010 candidate species—based on the Service's LPN prioritization system, preparing multi-species actions when appropriate, and taking into consideration the availability of staff resources.

Based on these prioritization factors, we continue to find that proposals to list the petitioned candidate species included in Table 1 are all precluded by higher priority listing actions including those with court-ordered and court-approved settlement agreements and listing actions with absolute statutory deadlines.

Expeditious Progress

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists. As with our ''precluded'' finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the list under the Recovery program in light of the resources available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. During FY 2014, we completed a delisting rule for one species.) As discussed below, given the limited resources available for listing, we find that we made expeditious progress in FY 2014 in the Listing Program.

We provide below tables cataloguing the work of the Service's Listing Program in FY 2014. This work includes all three of the steps necessary for adding species to the Lists: (1) Identifying species that warrant listing; (2) undertaking the evaluation of the best available scientific data about those species and the threats they face, and preparing proposed and final listing rules; and (3) adding species to the Lists by publishing proposed and final listing rules that include a summary of the data on which the rule is based and show the relationship of that data to the rule. After taking into consideration the limited resources available for listing, the competing demands for those funds, and the completed work catalogued in the tables below, we find that we made expeditious progress to add qualified species to the Lists in FY 2014.

First, we made expeditious progress in the third and final step: Listing qualified species. In FY 2014, we resolved the status of 35 species that we determined, or had previously determined, qualified for listing. Moreover, for 32 species, the resolution was to add them to the Lists, most with concurrent designations of critical habitat, and for 3 species we published a withdrawal of the proposed rule. We also proposed to list an additional 24 qualified species, most with concurrent critical habitat proposals.

Second, we are making expeditious progress in the second step: Working towards adding qualified species to the Lists. In FY 2014, we worked on developing proposed listing rules for 34 species (most of them with concurrent critical habitat proposals). Although we have not yet completed those actions, we are making expeditious progress towards doing so.

Third, we are making expeditious progress in the first step towards adding qualified species to the Lists: Identifying additional species that qualify for listing. In FY 2014, we completed two 90-day petition findings for two species.

Our accomplishments this year should also be considered in the broader context of our commitment to reduce the number of candidate species for which we have not made final determinations whether or not to list. On May 10, 2011, the Service filed in the MDL Litigation a settlement agreement that put in place an ambitious schedule for completing proposed and final listing determinations at least through FY 2016; the court approved that settlement agreement on September 9, 2011. That agreement required, among other things, that for all 251 species that were included as candidates in the 2010 CNOR, the Service submit to the **Federal Register** proposed listing rules or not-warranted findings by the end of FY 2016, and for any proposed listing rules, the Service complete final listing determinations within the statutory time frame. Paragraph 6 of the agreement provided indicators that the Service is making adequate progress towards meeting that requirement: Completing proposed listing rules or not-warranted findings for at least 130 of the species by the end of FY 2013, at least 160 species by the end of FY 2014, and at least 200 species by the end of FY 2015. The Service has completed proposed listing rules or not-warranted findings for 166 of the 2010 candidate species, as well as final listing rules for 118 of those proposed rules, and is therefore is making adequate progress towards meeting all of the requirements of the MDL settlement agreement. Both by entering into the settlement agreement and by making adequate progress towards making final listing determinations for the 251 species on the 2010 candidate, the Service is making expeditious progress to add qualified species to the lists.

The Service's progress in FY 2014 included completing and publishing the following determinations:

FY 2014 COMPLETED LISTING ACTIONS

| Publication date | Title | Actions | FR Pages |
|---|---|---|---|
| 11/14/2013 | 12-Month Finding on a Petition To List the Gunnison's Prairie Dog as an Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted. | 78 FR 68660–68685. |
| 11/26/2013 | Initiation of Status Review of Arctic Grayling in the Upper Missouri River System. | Notice of Status Review | 78 FR 70525–70527. |
| 12/19/2013 | 12-Month Finding on a Petition To List Coleman's Coralroot as an Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted. | 78 FR 76795–76807. |
| 12/20/2013 | Threatened Status for *Eriogonum codium* (Umtanum Desert Buckwheat) and *Physaria douglasii* subsp. *tuplashensis* (White Bluffs Bladderpod) and Designation of Critical Habitat. | Final Rule—Revision | 78 FR 76995–77005. |
| 2/24/2014 | Determination of Threatened Species Status for the Georgetown Salamander and Salado Salamander Throughout Their Ranges. | Final Listing Threatened | 79 FR 10235–10293. |
| 3/31/2014 | 90-Day Finding on a Petition To List the Alexander Archipelago Wolf as Threatened or Endangered. | Notice of 90-day petition finding, Substantial | 79 FR 17993–17995. |
| 4/9/2014 | Threatened Species Status for the Olympia Pocket Gopher, Roy Prairie Pocket Gopher, Tenino Pocket Gopher, and Yelm Pocket Gopher, with Special Rule. | Final Listing Threatened, with Special Rule | 79 FR 19759–19796. |
| 4/10/2014 | Determination of Threatened Status for the Lesser Prairie-Chicken. | Final Listing Threatened | 79 FR 19973–20071. |
| 4/29/2014 | Endangered Species Status for Sierra Nevada Yellow-Legged Frog and Northern Distinct Population Segment of the Mountain Yellow-Legged Frog, and Threatened Species Status for Yosemite Toad. | Final Listing Threatened and Endangered | 79 FR 24255–24310. |
| 5/6/2014 | Determination of Threatened Status for *Leavenworthia exigua* var. *laciniata* (Kentucky Glade Cress). | Final Listing Threatened | 79 FR 25683–25688. |
| 6/3/2014 | Threatened Species Status for *Ivesia webberi* | Final Listing Threatened | 79 FR 31878–31883. |
| 6/10/2014 | Determination of Endangered Status for the New Mexico Meadow Jumping Mouse Throughout Its Range. | Final Listing Endangered | 79 FR 33119–33137. |
| 7/8/2014 | Threatened Status for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake. | Final Listing Threatened | 79 FR 38677–38746. |
| 7/24/2014 | Endangered Species Status for the Zuni Bluehead Sucker. | Final Listing Endangered | 79 FR 43131–43161. |
| 8/1/2014 | Endangered Status for *Physaria globosa* (Short's bladderpod), *Helianthus verticillatus* (whorled sunflower), and *Leavenworthia crassa* (fleshy-fruit gladecress). | Final Listing Endangered | 79 FR 44712–44718. |
| 8/4/2014 | Determination of Endangered Status for the Sharpnose Shiner and Smalleye Shiner. | Final Listing Endangered | 79 FR 45273–45286. |

FY 2014 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR Pages |
|---|---|---|---|
| 8/6/2014 | Withdrawal of the Proposed Rules To List Graham's Beardtongue (*Penstemon grahamii*) and White River Beardtongue (*Penstemon scariosus* var. *albifluvis*) and Designate Critical Habitat. | Proposed Listing Withdrawal | 79 FR 46041–46087. |
| 8/12/2014 | Endangered Status for the Florida Leafwing and Bartram's Scrub-Hairstreak Butterflies. | Final Listing Endangered | 79 FR 47222–47244. |
| 8/13/2014 | 12-Month Finding on a Petition To List the Warton's Cave Meshweaver as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 47413–47415. |
| 8/13/2014 | Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States; Establishment of a Nonessential Experimental Population of the North American Wolverine in Colorado, Wyoming, and New Mexico. | Proposed Listing Withdrawal | 79 FR 47521–47545. |
| 8/19/2014 | 90-Day Finding on a Petition To List the Island Marble Butterfly as an Endangered Species. | Notice of 90-day petition finding, Substantial | 79 FR 49045–49047. |
| 8/20/2014 | Revised 12-Month Finding on a Petition To List the Upper Missouri River Distinct Population Segment of Arctic Grayling as an Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 49383–49422. |
| 8/26/2014 | 12-Month Finding on the Petition To List Least Chub as an Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 51041–51066. |
| 8/26/2014 | Endangered Status for Vandenberg Monkeyflower. | Final Listing Endangered | 79 FR 50844–50854. |
| 8/29/2014 | Threatened Status for Oregon Spotted Frog | Final Listing Threatened | 79 FR 51657–51710. |
| 9/4/2014 | Endangered Species Status for *Brickellia mosieri* (Florida Brickell-bush) and *Linum carteri* var. *carteri* (Carter's Small-flowered Flax). | Final Listing Endangered | 79 FR 52567–52575. |
| 9/9/2014 | Endangered Species Status for *Agave eggersiana* and *Gonocalyx concolor,* and Threatened Species Status for *Varronia rupicola*. | Final Listing Endangered and Threatened | 79 FR 53315–53344. |
| 9/12/2014 | Threatened Status for *Arabis georgiana* (Georgia rockcress). | Final Listing Threatened | 79 FR 54627–54635. |
| 9/12/2014 | Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx and Revised Distinct Population Segment Boundary. | Final Critical Habitat Final Listing—adding New Mexico to DPS boundary. | 79 FR 54781–54846. |
| 9/18/2014 | 12-Month Finding on a Petition To List *Eriogonum kelloggii* (Red Mountain buckwheat) and *Sedum eastwoodiae* (Red Mountain stonecrop) as Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 56029–56040. |
| 9/18/2014 | 12-Month Finding on a Petition To List *Symphyotrichum georgianum* (Georgia aster) as Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 56041–56047. |
| 9/23/2014 | 12-Month Finding on a Petition To List the Tucson Shovel-Nosed Snake. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 56730–56738. |
| 9/24/2014 | 12-Month Finding on a Petition To List *Eriogonum corymbosum* var. *nilesii* and *Eriogonum diatomaceum*. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 57032–57041. |
| 10/1/2014 | 12-Month Finding on a Petition To List Rio Grande Cutthroat Trout as an Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 59140–59150. |
| 10/1/2014 | 12-Month Finding on a Petition To List Yellow-Billed Loon (*Gavia adamsii*) as an Endangered or Threatened Species. | Notice of 12-month petition finding, Not warranted Candidate removal. | 79 FR 59195–59204. |
| 10/1/2014 | Proposed Endangered Status for 21 Species and Proposed Threatened Status for 2 Species in Guam and the Commonwealth of the Northern Mariana Islands. | Proposed Listing Endangered and Threatened. | 79 FR 59363–59413. |

FY 2014 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR Pages |
|---|---|---|---|
| 10/3/2014 | Threatened Species Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo. | Final Listing Threatened | 79 FR 59991–60038. |
| 10/7/2014 | Threatened Species Status for Black Pinesnake. | Proposed Listing Threatened | 79 FR 60406–60419. |
| 10/7/2014 | Threatened Species Status for West Coast Distinct Population Segment of Fisher. | Proposed Listing Threatened | 79 FR 60419–60443. |
| 10/9/2014 | Endangered Species Status for *Trichomanes punctatum ssp. floridanum* (Florida Bristle Fern). | Proposed Listing Endangered | 79 FR 61135–61161. |

Our expeditious progress also included work on listing actions that we funded in previous fiscal years and in FY 2014 but did not complete in FY 2014. For these species, we have completed the first step, and have been working on the second step, necessary for adding species to the Lists. These actions are listed below. All the actions in the table are being conducted under a deadline set by a court through a court order or settlement agreement.

ACTIONS FUNDED IN PREVIOUS FYS AND FY 2014 BUT NOT COMPLETED IN FY 2014

| Species | Action |
|---|---|
| **Actions Subject to Court Order/Settlement Agreement** | |
| Gunnison sage-grouse | Final listing. |
| Dakota skipper and Poweshiek skipperling | Final listing. |
| Red knot (rufa subspecies) | Final listing. |
| Northern long-eared bat | Final listing. |
| Greater sage-grouse—Bi-State DPS | Final listing. |
| Washington ground squirrel | Proposed listing. |
| Xantus's murrelet | Proposed listing. |
| Columbia spotted frog—Great Basin DPS | Proposed listing. |
| Sequatchie caddisfly | Proposed listing. |
| Four Florida Keys plants (sand flax, Big Pine partridge pea, Blodgett's silverbush, and wedge spurge) | Proposed listing. |
| Four Florida plants (Florida pineland crabgrass, Florida prairie clover, pineland sandmat, and Everglades bully) | Proposed listing. |
| White fringeless orchid | Proposed listing. |
| Black warrior waterdog | Proposed listing. |
| Black mudalia | Proposed listing. |
| Elfin-woods warbler | Proposed listing. |
| Kentucky arrow darter and Cumberland arrow darter | Proposed listing. |
| Six Cave beetles (Nobletts, Baker Station, Fowler's, Indian Grave Point, inquirer, and Coleman) | Proposed listing. |
| *Sicyos macrophyllus* | Proposed listing. |
| Highlands tiger beetle | Proposed listing. |
| Sicklefin redhorse | Proposed listing. |
| Headwater chub | Proposed listing. |
| Roundtail chub DPS | Proposed listing. |
| Page springsnail | Proposed listing. |
| Sonoran desert tortoise | Proposed listing. |
| Texas hornshell | Proposed listing. |
| New England cottontail | Proposed listing. |
| Eastern massasauga | Proposed listing. |

We also funded work on resubmitted petitions findings for 112 candidate species (species petitioned prior to the last CNOR). In our resubmitted petition finding for the Columbia Basin population of the greater sage-grouse in this notice, although we completed a new analysis of the threats facing the species, we did not include new information, as the significance of the Columbia Basin DPS of the greater sage-grouse will require further review and we will update our finding when we resolve the status of the greater sage-grouse at a later date (see 75 FR 13910; March 23, 2010). We also did not include an updated assessment form as part of our resubmitted petition findings for the 34 candidate species for which we are preparing proposed listing determinations. However, for both the Columbia Basin DPS of the greater sage-grouse and for the other resubmitted petition findings, in the course of preparing proposed listing determinations, we continue to monitor new information about their status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the well-being of any of these candidate species; see summaries below regarding publication of these determinations (these species will remain on the candidate list until a proposed listing rule is published). We also funded a revised 12-month petition finding for the petitioned candidate species that we are removing from candidate status, which is being published as part of this CNOR (see Candidate Removals). Because the majority of these petitioned species were already candidate species prior to our receipt of a petition to list them, we had already assessed their status using funds from our Candidate Conservation Program, so we continue to monitor the

status of these species through our Candidate Conservation Program. The cost of updating the species assessment forms and publishing the joint publication of the CNOR and resubmitted petition findings is shared between the Listing Program and the Candidate Conservation Program.

During FY 2014, we also funded work on resubmitted petition findings for uplisting five listed species (three grizzly bear populations, Delta smelt, and *Sclerocactus brevispinus* (Pariette cactus)), for which we had previously received a petition and made a warranted-but-precluded finding.

Another way that we have been expeditious in making progress to add qualified species to the Lists is that we have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the ESA, these efforts also contribute towards finding that we are making expeditious progress to add qualified species to the Lists.

Although we have not been able to resolve the listing status of many of the candidates, we continue to contribute to the conservation of these species through several programs in the Service. In particular, the Candidate Conservation Program, which is separately budgeted, focuses on providing technical expertise for developing conservation strategies and agreements to guide voluntary on-the-ground conservation work for candidate and other at-risk species. The main goal of this program is to address the threats facing candidate species. Through this program, we work with our partners (other Federal agencies, State agencies, Tribes, local governments, private landowners, and private conservation organizations) to address the threats to candidate species and other species at risk. We are currently working with our partners to implement voluntary conservation agreements for more than 110 species covering 3.6 million ac of habitat. In some instances, the sustained implementation of strategically designed conservation efforts culminates in making listing unnecessary for species that are candidates for listing or for which listing has been proposed.

**Findings for Petitioned Candidate Species**

Below are updated summaries for petitioned candidates for which we published findings under section 4(b)(3)(B). In accordance with section 4(b)(3)(C)(i), we treat any petitions for which we made warranted-but-precluded 12-month findings within the past year as having been resubmitted on the date of the warranted-but-precluded finding. We are making continued warranted-but-precluded 12-month findings on the petitions for these species (for 12-month findings on resubmitted petitions for species that we determined no longer meet the definition of ''endangered species'' or ''threatened species,'' see summaries above under Candidate Removals).

*Mammals*

Pacific sheath-tailed bat, American Samoa DPS (*Emballonura semicaudata semicaudata*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This small insectivorous bat is a member of the Emballonuridae family, an Old World bat family that has an extensive distribution, primarily in the tropics. *Emballonura semicaudata semicaudata* was once common and widespread in Polynesia and Micronesia. The species as a whole (*E. semicaudata*) occurred on several of the Caroline Islands (Palau, Chuuk, and Pohnpei), Samoa (Independent and American), the Mariana Islands (Guam and the Commonwealth of the Northern Mariana Islands (CNMI)), Tonga, Fiji, and Vanuatu. While populations appear to be healthy in some locations, mainly in the Caroline Islands, they have declined substantially in other areas, including Independent and American Samoa, the Mariana Islands, Fiji, and possibly Tonga. Scientists recognize four subspecies: *E. s. rotensis,* endemic to the Mariana Islands (Guam and the Commonwealth of the Northern Mariana Islands (CNMI)); *E. s. sulcata,* occurring in Chuuk and Pohnpei; *E. s. palauensis,* found in Palau; and *E. s. semicaudata,* occurring in American and Independent Samoa, Tonga, Fiji, and Vanuatu. The candidate assessment form addresses the DPS of *E. s. semicaudata* that occurs in American Samoa.

*Emballonura semicaudata semicaudata* historically occurred in American and Independent Samoa, Tonga, Fiji, and Vanuatu. It is extant in Fiji and Tonga, but may be extirpated from Vanuatu and Independent Samoa. There is some concern that it is also extirpated from American Samoa, the location of this DPS, where surveys are currently ongoing to ascertain its status. The factors that led to the decline of this subspecies and the DPS are poorly understood; however, current threats to this subspecies and the DPS include habitat loss, predation by introduced species, and its small population size and distribution, which make the taxon extremely vulnerable to extinction due to typhoons and similar natural catastrophes. The subspecies may also be susceptible to disturbance in its roosting caves. The threats are imminent and of high magnitude, since they are ongoing and severe enough to pose a relatively high likelihood of extinction. Therefore, we have retained an LPN of 3 for this DPS of a subspecies.

Peñasco least chipmunk (*Tamias minimus atristria*)—The following summary is based on information contained in our files. Peñasco least chipmunk is endemic to the White Mountains, Otero and Lincoln Counties, and the Sacramento Mountains, Otero County, New Mexico. The Peñasco least chipmunk historically had a broad distribution throughout the Sacramento Mountains within ponderosa pine forests. The last verification of persistence of the Sacramento Mountains population of Peñasco least chipmunk was in 1966, and the subspecies appears to be extirpated from the Sacramento Mountains. The only remaining known distribution of the least chipmunk is restricted to open, high-elevation talus slopes within a subalpine grassland, located in the Sierra Blanca area of the White Mountains in Lincoln and Otero Counties, New Mexico.

The Peñasco least chipmunk faces threats from present or threatened destruction, modification, and curtailment of its habitat from the alteration or loss of mature ponderosa pine forests in one of the two historically occupied areas. The documented decline in occupied localities, in conjunction with the small numbers of individuals captured, are linked to widespread habitat alteration. Moreover, the highly fragmented nature of its distribution is a significant contributor to the vulnerability of this subspecies and increases the likelihood of very small, isolated populations being extirpated. As a result of this fragmentation, even if suitable habitat exists (or is restored) in the Sacramento Mountains, the likelihood of natural recolonization of historical habitat or population expansion from the White Mountains is extremely remote. Considering the high magnitude and immediacy of these threats to the subspecies and its habitat, and the

vulnerability of the White Mountains population, we conclude that the least chipmunk is in danger of extinction throughout all of its known range now or in the foreseeable future.

The one known remaining extant population of Peñasco least chipmunk in the White Mountains is particularly susceptible to extinction as a result of small, reduced population sizes and its isolation. Because of the reduced population size and lack of contiguous habitat adjacent to the extant White Mountains population, even a small impact on the White Mountains could have a very large impact on the status of the species as a whole. As a result of its restricted range, apparent small population size, and fragmented historical habitat, the White Mountains population is inherently vulnerable to extinction due to effects of small, population sizes (*e.g.* loss of genetic diversity). These impacts are likely to be seen in the population at some point in the foreseeable future, but do not appear to be affecting this population currently as it appears to be stable at this time. Therefore, we conclude that the threats to this population are of high magnitude, but not imminent. Therefore, we assign an LPN of 6 to the subspecies.

New England cottontail (*Sylvilagus transitionalis*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Southern Idaho ground squirrel (*Urocitellus endemicus*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The southern Idaho ground squirrel is endemic to four counties in southwest Idaho; its total known range is approximately 292,000 hectares (ha) (722,000 acres (ac)). The population declined significantly between 1985 and 2001, and approximately 37 percent of the historical known sites were occupied in 1999 by a relatively small number of individuals. More recently, southern Idaho ground squirrels have increased in abundance, and monitoring suggests that the population may now be stable.

Threats to southern Idaho ground squirrels include: Habitat degradation; direct killing from shooting, trapping, or poisoning; predation; and competition with other ground squirrel species. Habitat degradation appears to be the primary threat. Nonnative annuals such as *Bromus tectorum* (cheatgrass) and *Taeniatherum caput-medusae* (medusahead) now dominate much of this species' range and have altered the fire regime by increasing the frequency of wildfire. Nonnative annuals may provide inconsistent forage quality for southern Idaho ground squirrels compared to native vegetation. A programmatic Candidate Conservation Agreement with Assurances (CCAA) has been completed for this species and contains conservation measures that minimize ground disturbing activities, allow for the investigation of methods to restore currently degraded habitat, provide for additional protection to southern Idaho ground squirrels from recreational shooting and other direct killing on enrolled lands, and allow for the translocation of squirrels to or from enrolled lands, if necessary. The acreage enrolled through the CCAA encompasses approximately 9 percent of the known range of the species. While the ongoing conservation efforts have helped to reduce the magnitude of threats to a moderate level, habitat degradation remains the primary threat to the species throughout most of its range. This threat is imminent, due to the ongoing and increasing prevalence of nonnative vegetation. Therefore, we have retained an LPN of 8 for this species.

Washington ground squirrel (*Urocitellus washingtoni*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing rule that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Red tree vole, north Oregon coast DPS (*Arborimus longicaudus*)—The following summary is based on information contained in our files and in our initial warranted-but-precluded finding, published in the **Federal Register** on October 13, 2011 (76 FR 63720). Red tree voles are small, mouse-sized rodents that live in conifer forests and spend almost all of their time in the tree canopy. They are one of the few animals that can persist on a diet of conifer needles, which is their principal food. Red tree voles are endemic to the humid, coniferous forests of western Oregon (generally west of the crest of the Cascade Range) and northwestern California (north of the Klamath River). The north Oregon coast DPS of the red tree vole comprises that portion of the Oregon Coast Range from the Columbia River south to the Siuslaw River. Red tree voles demonstrate strong selection for nesting in older conifer forests, which are now relatively rare across the DPS; they avoid nesting in younger forests.

Although data are not available to rigorously assess population trends, information from retrospective surveys indicates red tree voles have declined in the DPS and are largely absent in areas where they were once relatively abundant. Older forests that provide habitat for red tree voles are limited and highly fragmented, while ongoing forest practices in much of the DPS maintain the remnant patches of older forest in a highly fragmented and isolated condition. Modeling indicates that only 11 percent of the DPS currently contains tree vole habitat, largely restricted to the 22 percent of the DPS that is under Federal ownership.

Existing regulatory mechanisms on State and private lands are inadequate to prevent continued harvest of forest stands at a scale and extent that would be meaningful for conserving red tree voles. Biological characteristics of red tree voles, such as small home ranges, limited dispersal distances, and low reproductive potential, limit their ability to respond to and persist in areas of extensive habitat loss and alteration. These biological characteristics also make it difficult for the tree voles to recolonize isolated habitat patches. Due to its reduced distribution, the red tree vole is now vulnerable to random environmental disturbances that may remove or further isolate large blocks of already limited habitat, and to extirpation within the DPS from such factors as lack of genetic variability, inbreeding depression, and demographic stochasticity. Although the entire population is experiencing threats, the impact is less pronounced on Federal lands, where much of the red tree vole habitat remains. Hence, the magnitude of these threats is moderate to low. The threats are imminent because habitat loss and reduced distribution are currently occurring within the DPS. Therefore, we have retained an LPN of 9 for this DPS.

Pacific walrus (*Odobenus rosmarus divergens*)—The following information

is based on information in our files and our warranted-but-precluded 12-month petition finding published on February 10, 2011 (76 FR 7634). The Pacific walrus is an ice-dependent species found across the continental shelf waters of the northern Bering and Chukchi Seas. Unlike seals, which can remain in the water for extended periods, walrus must haul out onto ice or land periodically. Pacific walrus is a traditional and important source of food and products to native Alaskans, especially those living on Saint Lawrence Island, and to native Russians.

Annually, walrus migrate up to 1,500 kilometers (km) (932 miles (mi)) between winter breeding areas in the sub-Arctic (northern Bering Sea) and summer foraging areas in the Arctic. Historically, the females and calves remained on pack ice over the continental shelf of the Chukchi Sea throughout the summer, using it as a platform for resting after making shallow foraging dives for invertebrates on the sea floor. Sea ice also provides isolation from disturbance and terrestrial predators such as polar bears. Since 1979, the extent of summer Arctic sea ice has declined. The five lowest records of minimum sea ice extent occurred from 2007 to 2012. Based on the best scientific information available, we anticipate that sea ice will retreat northward off the Chukchi continental shelf for 1 to 5 months every year in the foreseeable future.

When the ice melts beyond the limits of the continental shelf (and the ability of the walrus to obtain food), thousands of walrus congregate at coastal haulouts. Although coastal haulouts have historically provided a place to rest, the aggregation of so many animals, in particular females and calves, at this time of year has increased in the last 5 years. Not only are the number of animals more concentrated at coastal haulouts than on widely dispersed sea ice, but also the probability of disturbance from humans and terrestrial animals is much higher. Disturbances at coastal haulouts can cause stampedes, leading to mortalities and injuries. In addition, there is also concern that the concentration of animals will cause local prey depletion, leading to longer foraging trips, increased energy costs, and potential effects on female condition and calf survival. We expect these effects to lead to a population decline.

We recognize that Pacific walrus face additional stressors from ocean warming, ocean acidification, disease, oil and gas exploration and development, increased shipping, commercial fishing, and subsistence harvest, but none rise to the level of a threat except subsistence harvest. We found that subsistence harvest will rise to the level of a threat if the population declines but harvest levels remain the same. Because both the loss of sea ice habitat and the ongoing practice of subsistence harvest are presently occurring, these threats are imminent. However, these threats are not having significant population-level effects currently, but are projected to, we determined that the magnitude of the threats is moderate, not high. Thus, we assigned an LPN of 9 to this subspecies.

*Birds*

Spotless crake, American Samoa DPS (*Porzana tabuensis*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The spotless crake is a small, dark, cryptic bird found in wetlands and rank scrublands or forests in the Philippines, Australia, Fiji, Tonga, Society Islands, Marquesas, Independent Samoa, and American Samoa (Ofu, Tau). The genus *Porzana* is widespread in the Pacific, where it is represented by numerous island-endemic and flightless species (many of which are extinct as a result of anthropogenic disturbances), as well as several more cosmopolitan species, including *P. tabuensis.* No subspecies of *P. tabuensis* are recognized.

The American Samoa population is the only population of spotless crakes under U.S. jurisdiction. The available information indicates that distinct populations of the spotless crake, a species not noted for long-distance dispersal, are definable. The population of spotless crakes in American Samoa is discrete in relation to the remainder of the species as a whole, which is distributed in widely separated locations. Although the spotless crake (and other rails) have dispersed widely in the Pacific, flight in island rails has atrophied or been completely lost over evolutionary time, causing populations to become isolated (and vulnerable to terrestrial predators such as rats). The population of this species in American Samoa is therefore distinct based on geographic and distributional isolation from spotless crake populations on other islands in the oceanic Pacific, the Philippines, and Australia. The American Samoa population of the spotless crake links the Central and Eastern Pacific portions of the species' range. The loss of this population would result in an increase of roughly 500 mi (805 km) in the distance between the central and eastern Polynesian portions of the spotless crake's range, and could result in the isolation of the Marquesas and Society Islands populations by further limiting the potential for even rare genetic exchange. Based on the discreteness and significance of the American Samoa population of the spotless crake, we consider this population to be a distinct vertebrate population segment.

Threats to this population have not changed over the past year. The population in American Samoa is threatened by small population size, limited distribution, predation by nonnative and native animals, continued development of wetland habitat, and natural catastrophes such as hurricanes. The co-occurrence of a known predator of ground-nesting birds, the Norway rat (*Rattus norvegicus*), and native predators, the Pacific boa (*Candoia bibroni*) and the Purple Swamphen (*Porphyrio porphyrio*), along with the extremely restricted observed distribution and low numbers, indicates that the threats to the American Samoa DPS of the spotless crake continue to be both imminent and high in magnitude because the ongoing threats have a high likelihood of affecting the ability of the species to survive in a relatively short time frame. Based on this assessment of existing information about the imminence and high magnitude of these threats, we have retained an LPN of 3 for this DPS.

Friendly ground-dove, American Samoa DPS (*Gallicolumba stairi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The genus *Gallicolumba* is distributed throughout the Pacific and Southeast Asia. The genus is represented in the oceanic Pacific by six species: Three are endemic to Micronesian islands or archipelagos, two are endemic to island groups in French Polynesia, and *G. stairi* is endemic to Samoa, Tonga, and Fiji. Some authors recognize two subspecies of the friendly ground-dove, one, slightly smaller, in the Samoan archipelago (*G. s. stairi*), and one in Tonga and Fiji (*G. s. vitiensis*), but because morphological differences between the two are minimal, we are not recognizing separate subspecies at this time.

In American Samoa, the friendly ground-dove has been found on the islands of Ofu and Olosega (Manua Group). Threats to this species have not changed over the past year. Predation by nonnative species and natural catastrophes such as hurricanes are the primary threats to the DPS. Of these, predation by nonnative species is

thought to be occurring now and likely has been occurring for several decades. This predation may be an important impediment to population growth. Predation by introduced species has played a significant role in reducing, limiting, and extirpating populations of island birds, especially ground-nesters like the friendly ground-dove, in the Pacific and other locations worldwide. Nonnative predators known or thought to occur in the range of the friendly ground-dove in American Samoa include feral cats (*Felis catus*), Polynesian rats (*Rattus exulans*), black rats (*R. rattus*), and Norway rats (*R. norvegicus*).

In January 2004 and February of 2005, hurricanes virtually destroyed the habitat of *G. stairi* in the area on Olosega Island where the species had been most frequently recorded. Although this species has evolved on islands subject to severe storms, this example illustrates the potential for natural disturbance to exacerbate the effect of anthropogenic disturbance on small populations. Consistent monitoring using a variety of methods over the last 5 years yielded few observations and no change in the relative abundance of this taxon in American Samoa. The total population size remains poorly known but is unlikely to number more than a few hundred pairs. The distribution of the friendly ground-dove is limited to steep, forested slopes with an open understory and a substrate of fine scree or exposed earth; this habitat is not common in American Samoa. The threats are ongoing and therefore imminent, and the magnitude is moderate because relative abundance has remained unchanged for several years. Thus, we have retained an LPN of 9 for this DPS.

Xantus's murrelet (*Synthliboramphus hypoleucus*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Red-crowned parrot (*Amazona viridigenalis*)—The following summary is based on information contained in the notice of 12-month finding (76 FR 62016) as well as communication with the U.S. Fish and Wildlife Service (Service), Texas Parks and Wildlife Department, The Nature Conservancy, Rio Grande Joint Venture, World Birding Center, Rio Grande Valley Birding Festival, and the Universidad Autónoma de Tamaulipas. As of April, 2014, there are no changes to the range or distribution of the red-crowned parrot. The red-crowned parrot is non-migratory, and occurs in fragmented isolated habitat in the Mexican States of Tamaulipas, Veracruz, San Luis Potosi, Nuevo Leon, and northeast Queretaro. The species also occurs within the southern tip of Texas, in the cities of Mission, McAllen, Pharr, and Edinburg (Hidalgo County), and in Brownsville, Los Fresnos, San Benito, and Harlingen (Cameron County). Feral populations also exist in southern California, Puerto Rico, Hawaii, and Florida and escaped birds have been reported in central Texas. As of 2004, half of the native population is believed to be found in the United States. The species is nomadic during the winter (non-breeding) season when large flocks range widely to forage, moving tens of kilometers during a single flight in Mexico. In Texas, red-crowned parrots are thought to move between urban areas in search of food and other available resources. There has not been systematic annual monitoring of red-crowned parrot populations in Texas's Lower Rio Grande Valley (LRGV), so no population trend information is available; instead, numbers of parrots are most often reported from more informal surveys including Christmas Bird Counts and E-bird; surveys with wide variation in observers' skill levels. Counts of nesting pairs have not been documented since McKinney's 1995 survey. In Mexico, the level of monitoring of red-crowned parrots within the last two decades is not well known; however, community groups did include the species in bird surveys in the Ejido El Sabinito, in Sierras of Tamaulipas, in 2012 and 2013, where they reported approximately 2,500 and 1,889 individuals, respectively. Anecdotal reports from Mexico suggest that the species may be increasing in numbers in urban areas of Tamaulipas and Neuvo Leon.

The primary threats within Mexico and Texas remain habitat destruction and modification from logging, deforestation, and conversion of suitable habitat for agricultural and urban development purposes. In addition, existing regulations do not adequately address the habitat or capture and trade threats to the species. Thus, the inadequacy of existing regulations and their enforcement continue to threaten the red-crowned parrot. Disease and predation are not documented to threaten the species. Pesticide exposure is not known to affect the red-crowned parrot. Conservation efforts include the artificial nest structure projects, as well as habitat creation projects such as one initiated by the Service and the Rio Grande Joint Venture in the LRGV to understand and compare how birds are using revegetated tracts of land that were previously affected by flooding. The project is in its initial steps and no results are yet available. Threats to the species are imminent because habitat destruction and inadequate regulatory mechanisms are ongoing. In addition, the threats are high in magnitude, because they affect the species extensively at a population level; therefore, we have determined that a LPN of 2 remains appropriate for the species.

Sprague's pipit (*Anthus spragueii*)—See above in ''Listing Priority Changes in Candidates.''

Greater sage-grouse (*Centrocercus urophasianus)*—The following summary is based on information in our files and in the petition we received on January 30, 2002. Currently, greater sage-grouse occur in 11 States (Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, Utah, South Dakota, and North Dakota) and 2 Canadian provinces (Alberta and Saskatchewan), occupying approximately 56 percent of their historical range. Greater sage-grouse depend on a variety of shrub-steppe habitats throughout their life cycle, and are obligate users of several species of sagebrush.

The primary threat to greater sage-grouse is ongoing fragmentation and loss of shrub-steppe habitats through a variety of mechanisms. Most importantly, increasing fire cycles and invasive plants (and the interaction between them) in more westerly parts of the range, along with energy development and related infrastructure in more easterly areas, are negatively affecting the species. In addition, direct loss of habitat and fragmentation is occurring due to agriculture, urbanization, and infrastructure such as roads and power lines built in support of several activities. We also have determined that currently existing regulatory mechanisms are inadequate to protect the species from these ongoing threats. However, many of these habitat impacts are being actively addressed through conservation actions taken by local working groups, and State and Federal agencies. Notably, the Natural Resources Conservation Service has committed significant financial and technical resources to address threats to this species on private lands through

their Sage-grouse Initiative. Also notably, the Bureau of Land Management and U.S. Forest Service are in the process of revising 98 Land Management Plans through 6 Environmental Impact Statements to provide adequate regulatory mechanisms. These efforts, when fully implemented, will potentially provide important conservation benefits to the greater sage-grouse and its habitats. We consider the threats to the greater sage-grouse to be of moderate magnitude, because the threats are not occurring with uniform intensity or distribution across the wide range of the species at this time, and substantial habitat still remains to support the species in many areas. The threats are imminent because the species is currently facing them in many portions of its range. Therefore, we assigned the greater sage-grouse an LPN of 8.

Greater sage-grouse, Columbia Basin DPS (*Centrocercus urophasianus*)—The following summary is based on information in our files and a petition, dated May 14, 1999, requesting the listing of the Washington population of the western sage-grouse (*C. u. phaios*). This population was historically found in northern Oregon and central Washington. On May 7, 2001, we concluded that listing the Columbia Basin DPS of the western sage-grouse was warranted, but precluded by higher priority listing actions (66 FR 22984). Following our May 7, 2001, finding, the Service received additional petitions requesting listing actions for various other greater sage-grouse populations, including one for the nominal western subspecies, dated January 24, 2002, and three for the entire species, dated June 18, 2002, and March 19 and December 22, 2003. The Service subsequently found that the petition for the western subspecies did not present substantial information indicating that listing may be warranted (68 FR 6500; February 7, 2003), and that listing the greater sage-grouse was not warranted (70 FR 2244; January 12, 2005). The court subsequently remanded these latter findings to the Service for further consideration. In response, we initiated a new rangewide status review for the entire species (73 FR 10218; February 26, 2008). On March 5, 2010, we found that listing of the greater sage-grouse was warranted but precluded by higher priority listing actions (75 FR 13909; March 23, 2010), and it was added to the list of candidates. We also found that the western subspecies of the greater sage-grouse, the taxonomic entity we relied on in our DPS analysis for the Columbia Basin population, was no longer considered a valid subspecies. In light of our conclusions regarding the taxonomic invalidity of the western sage-grouse subspecies, the significance of the Columbia Basin DPS to the greater sage-grouse will require further review. The Service intends to complete an analysis to determine if this population continues to warrant recognition as a DPS in accordance with our Policy Regarding the Recognition of Distinct Vertebrate Population Segments (61 FR 4722; February 7, 1996) at the time we make a listing decision on the status of the greater sage-grouse. Until that time, the Columbia Basin DPS will remain a candidate for listing.

Band-rumped storm-petrel, Hawaii DPS (*Oceanodroma castro*)—The following summary is based on information contained in our files and the petition we received on May 8, 1989. No new information was provided in the second petition received on May 11, 2004. The band-rumped storm-petrel is a small seabird that is found in several areas of the subtropical Pacific and Atlantic Oceans. In the Pacific, there are three widely separated breeding populations—one in Japan, one in Hawaii, and one in the Galapagos. Populations in Japan and the Galapagos are comparatively large and number in the thousands, while the Hawaiian birds represent a small, remnant population of possibly only a few hundred pairs. Band-rumped storm-petrels are most commonly found in close proximity to breeding islands. The three populations in the Pacific are separated by long distances across the ocean where birds are not found. Extensive at-sea surveys of the Pacific have revealed a broad gap in distribution of the band-rumped storm-petrel to the east and west of the Hawaiian Islands, indicating that the distribution of birds in the central Pacific around Hawaii is disjunct from other nesting areas. The available information indicates that distinct populations of band-rumped storm-petrels are definable and that the Hawaiian population is distinct based on geographic and distributional isolation from other band-rumped storm-petrel populations in Japan, the Galapagos, and the Atlantic Ocean. Loss of the Hawaiian population would cause a significant gap in the distribution of the band-rumped storm-petrel in the Pacific, and could result in the complete isolation of the Galapagos and Japan populations without even occasional genetic exchange. Therefore, the population is both discrete and significant, and constitutes a DPS.

The band-rumped storm-petrel probably was common on all of the main Hawaiian Islands when Polynesians arrived about 1,500 years ago, based on storm-petrel bones found in middens on the island of Hawaii and in excavation sites on Oahu and Molokai, Hawaii. Nesting colonies of this species in the Hawaiian Islands currently are restricted to remote cliffs on Kauai and Lehua Island and high-elevation lava fields on Hawaii. Vocalizations of the species were heard in Haleakala Crater on Maui as recently as 2006; however, no nesting sites have been located on the island to date. The significant reduction in numbers and range of the band-rumped storm-petrel is due primarily to predation by nonnative species introduced by humans, including the domestic cat (*Felis catus*), small Indian mongoose (*Herpestes auropunctatus*), common barn owl (*Tyto alba*), black rat (*Rattus rattus*), Polynesian rat (*R. exulans*), and Norway rat (*R. norvegicus*). These nonnative predators occur throughout the main Hawaiian Islands, with the exception of the mongoose, which is not established on Kauai. Attraction of fledglings to artificial lights, which disrupt their night-time navigation, resulting in collisions with buildings and other objects, and collisions with artificial structures such as communication towers and utility lines, are also threats. Erosion of nest sites caused by the actions of nonnative ungulates is a potential threat in some locations. Efforts are under way in some areas to reduce light pollution and mitigate the threat of collisions, as well as to control some of the nonnative predators in the Hawaiian Islands; however, the threats are ongoing and are therefore imminent. They are of a high magnitude, because they can severely affect the survival of this DPS, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 3 for this DPS.

Elfin-woods warbler (*Dendroica angelae*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Reptiles*

Eastern massasauga rattlesnake (*Sistrurus catenatus*)—We continue to

find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Louisiana pine snake (*Pituophis ruthveni*)—The following summary is based on information contained in our files and the petition we received on July 20, 2000, and updated through April 22, 2014. The Louisiana pine snake historically occurred in the fire-maintained longleaf pine ecosystem within west-central Louisiana and extreme east-central Texas. Most of the historical longleaf pine habitat of the Louisiana pine snake has been destroyed or degraded due to logging, fire suppression, roadways, short rotation silviculture, and grazing. Over time, the extensive loss, degradation, and fragmentation of the longleaf pine ecosystem, coupled with the disruption of natural fire regimes, have resulted in extant Louisiana pine snake populations that are isolated and small.

The Louisiana pine snake is currently restricted to six small, isolated naturally occupied areas; four of these areas occur on Federal lands, and two occur mainly on private industrial timberlands. All of these remnant individuals may be vulnerable to factors associated with low population sizes and demographic isolation, such as reduced genetic heterozygosity. The currently occupied area in Louisiana and Texas is estimated to be approximately 58,497 ha (144,549 ac). All remnant Louisiana pine snake habitats require active management to remain suitable. A Candidate Conservation Agreement (CCA) was completed in 2003 to maintain and enhance occupied and potential habitat on public lands, and to protect known Louisiana pine snake populations. This proactive habitat management has likely slowed or reversed the rate of Louisiana pine snake habitat degradation on many portions of Federal lands. The 2003 CCA was updated in 2013. The 2013 updated CCA directly links the specific conservation actions performed by the cooperators to the specific threats affecting the species. However, the historical and ongoing loss or unavailability of preferable habitat (via fire suppression, conversion to short rotation, dense-canopy, off-site pine plantations, increases in the number and width of roads, and urbanization) on private lands in the matrix between these extant populations has eliminated dispersal among remnant populations and the natural recolonization of vacant habitat patches. Because corridors linking extant populations are extremely unlikely to be established, the loss of any extant population would be permanent without future reintroduction of captive-bred individuals.

All populations require active habitat management, and the lack of adequate amounts of suitable habitat remains a threat for several populations. The potential threats to nearly all extant Louisiana pine snake populations, coupled with the likely permanence of these effects and the species' low fecundity and low population sizes (based on capture rates and occurrence data), lead us to conclude that the threats have a relatively high likelihood of bringing about extinction and therefore remain high in magnitude. The threats are not imminent, because, while the extent of Louisiana pine snake habitat loss has been great in the past, the rate of habitat loss on Federal lands is declining and habitat conditions within occupied or preferable areas is improving due to proactive habitat management and other threat reduction through the CCA. Thus, based on nonimminent, high-magnitude threats, we assign an LPN of 5 to this species.

Desert tortoise, Sonoran (*Gopherus morafkai*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Gopher tortoise, eastern population (*Gopherus polyphemus*) — The following summary is based on information in our files. The gopher tortoise is a large, terrestrial, herbivorous turtle that reaches a total length up to 15 inches (in) (38 centimeters (cm)), and typically inhabits the sandhills, pine/scrub oak uplands, and pine flatwoods associated with the longleaf pine (*Pinus palustris*) ecosystem. A fossorial animal, the gopher tortoise is usually found in areas with well-drained, deep, sandy soils, an open tree canopy, and a diverse, abundant herbaceous groundcover.

The gopher tortoise ranges from extreme southern South Carolina south through peninsular Florida, and west through southern Georgia, Florida, southern Alabama, and Mississippi, into extreme southeastern Louisiana. The eastern population of the gopher tortoise in South Carolina, Florida, Georgia, and Alabama (east of the Mobile and Tombigbee Rivers) is a candidate species; the gopher tortoise is federally listed as threatened in the western portion of its range, which includes Alabama (west of the Mobile and Tombigbee Rivers), Mississippi, and Louisiana.

The primary threat to the gopher tortoise is habitat fragmentation, destruction, and modification (either deliberately or from inattention), including conversion of longleaf pine forests to incompatible silvicultural or agricultural habitats, urbanization, shrub/hardwood encroachment (mainly from fire exclusion or insufficient fire management), and establishment and spread of invasive species. Other threats include disease, predation (mainly on nests and young tortoises), and inadequate regulatory mechanisms, specifically those needed to protect and enhance relocated tortoise populations in perpetuity. The magnitude of threats to the eastern range of the gopher tortoise is considered to be moderate to low, since populations extend over a broad geographic area and conservation measures are in place in some areas. However, since the species is currently being affected by a number of threats including destruction and modification of its habitat, disease, predation, exotics, and inadequate regulatory mechanisms, the threats are imminent. Thus, we have assigned a LPN of 8 for this species.

Sonoyta mud turtle (*Kinosternon sonoriense longifemorale*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Sonoyta mud turtle occurs in a spring and pond at Quitobaquito Springs on Organ Pipe Cactus National Monument in Arizona, and in the Rio Sonoyta and Quitovac Spring of Sonora, Mexico. Loss and degradation of stream habitat from water diversion and groundwater pumping, along with its very limited distribution, are the primary threats to the Sonoyta mud turtle. Sonoyta mud turtles are highly aquatic and depend on permanent water for survival. The area of southwest Arizona and northern Sonora where the Sonoyta mud turtle occurs is one of the driest regions in the Southwest. While

currently there is sufficient water for the turtles, so the threats are not imminent we expect drought and irrigated agriculture in the region to cause surface water in the Rio Sonoyta and Quitobaquito Springs to dwindle further in the foreseeable future and negatively affect this species. National Park Service staff continue to implement actions to stabilize the water levels in the pond at Quitobaquito Springs. However, surface water use in the Rio Sonoyta, in Sonora Mexico, will have a significant impact on the survival of this water-dependent subspecies. We retained a LPN of 6 for Sonoyta mud turtle due to high-magnitude, nonimminent threats.

*Amphibians*

Columbia spotted frog, Great Basin DPS (*Rana luteiventris*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Relict leopard frog (*Lithobates onca*)—The following summary is based on information contained in our files. Natural relict leopard frog populations occur in two general areas in Nevada: near the Overton Arm area of Lake Mead and Black Canyon below Lake Mead. These two areas include a small fraction of the historical distribution of the species. Its historical range included springs, streams, and wetlands within the Virgin River drainage downstream from the vicinity of Hurricane, Utah; along the Muddy River in Nevada; and along the Colorado River in Nevada and Arizona, from its confluence with the Virgin River downstream to Black Canyon below Lake Mead.

Factors contributing to the decline of the species include alteration, loss, and degradation of aquatic habitat due to water developments and impoundments, and scouring and erosion; changes in plant communities that result in dense growth and the prevalence of vegetation; introduced predators; climate change; and stochastic events. The presence of chytrid fungus in relict leopard frogs at Lower Blue Point Spring is a concern and warrants further evaluation of the threat of disease to the relict leopard frog. The size of natural and translocated populations is small and, therefore, these populations are vulnerable to stochastic events, such as floods and wildfire. Climate change that results in reduced spring flow, habitat loss, and increased prevalence of wildfire would adversely affect relict leopard frog populations.

In 2005, the National Park Service, in cooperation with the Fish and Wildlife Service and other Federal, State, and local partners, developed a conservation agreement and strategy, which is intended to improve the status of the species through prescribed management actions and protection. Conservation actions identified in the agreement and strategy include captive rearing of tadpoles for translocation and refugium populations, habitat and natural history studies, habitat enhancement, population and habitat monitoring, and translocation. New sites within the historical range of the species have been successfully established with captive-reared frogs. Conservation is proceeding under the agreement and strategy; however, additional time is needed to determine whether or not the agreement and strategy will be effective in eliminating or reducing the threats to the point that the relict leopard frog is no longer a candidate for listing. In consideration of these conservation efforts and the overall threat level to the species, we determined that the magnitude of existing threats is moderate to low. Potential water development and other habitat effects, presence of introduced predators, chytrid fungus, limited distribution, small population size, and climate change are ongoing, and thus, imminent threats. Therefore, we continue to assign a LPN of 8 to this species.

Striped newt (*Notophthalmus perstriatus*)—The following summary is based on information contained in our files. The striped newt is a small salamander that inhabits ephemeral ponds surrounded by upland habitats of high pine, scrubby flatwoods, and scrub. Longleaf pine–turkey oak stands with intact ground cover containing wiregrass are the preferred upland habitat for striped newts, followed by scrub, then flatwoods. Life-history stages of the striped newt are complex, and include the use of both aquatic and terrestrial habitats throughout their life cycle. Striped newts are opportunistic feeders that prey on a variety of items such as frog eggs, worms, snails, fairy shrimp, spiders, and insects (adult and larvae) that are of appropriate size. They occur in appropriate habitats from the Atlantic Coastal Plain of southeastern Georgia to the north-central peninsula of Florida and through the Florida panhandle into portions of southwest Georgia. Prior to 2014, there was thought to be a 125-km (78-mile (mi)) separation between the western and eastern portions of the striped newt's range. However, the discovery of five adult striped newts in Taylor County, Florida, represents a significant possible range connection. The historical range of the striped newt was likely similar to the current range. However, loss of native longleaf habitat, fire suppression, and the natural patchy distribution of upland habitats used by striped newts have resulted in fragmentation of existing populations.

Other threats to the species include disease, drought, and inadequate regulatory mechanisms. Overall, we conclude that the magnitude of the threats is moderate because most of the known striped newt metapopulations are on conservation lands which reduces the threat from further habitat fragmentation, and currently no diseases have been found in striped newts. Since the majority of threats are ongoing, they are imminent. Therefore, we assigned an LPN of 8 to this species. However, due to recent information that suggests the striped newt is likely extirpated from Apalachicola National Forest, the LPN may warrant changing to a lower number in the future.

Berry Cave salamander (*Gyrinophilus gulolineatus*)—The following summary is based on information in our files. The Berry Cave salamander is recorded from Berry Cave in Roane County; from Mud Flats, Aycock Spring, Christian, Meades Quarry, Meades River, and Fifth caves in Knox County; from Blythe Ferry Cave in Meigs County; and from an unknown cave in Athens, McMinn County, Tennessee. In May of 2012, the species was also discovered in an additional cave, The Lost Puddle Cave, in Knox County. These cave systems are all located within the Upper Tennessee River and Clinch River drainages. A total of 113 caves in Middle and East Tennessee were surveyed from the time period of April 2004 through June 2007, resulting in observations of 63 Berry Cave salamanders. These surveys concluded that Berry Cave salamander populations are robust at Berry and Mudflats caves where population declines had been previously reported, and documented two new populations of Berry Cave salamanders at Aycock Spring and Christian caves. Three Berry Cave salamanders were spotted during the May, 2012, survey in The Lost Puddle, and local cavers also reported sighting one individual in August 2012. Surveys for new populations are planned along the Valley and Ridge

Province between Knoxville and Chattanooga.

Ongoing threats to this species are in the form of lye leaching in the Meades Quarry Cave as a result of past quarrying activities, the possible development of a roadway with potential to impact the recharge area for the Meades Quarry Cave system, urban development in Knox County, water quality impacts despite existing State and Federal laws, and hybridization between spring salamanders and Berry Cave salamanders in Meades Quarry Cave. These threats, coupled with confined distribution of the species and apparent low population densities, are all factors that leave the Berry Cave salamander vulnerable to extirpation. We have determined that the Berry Cave salamander faces imminent threats of moderate magnitude. The threats are moderate because the species still occurs in several different cave systems, and existing populations appear stable. Based on moderate-magnitude imminent threats, we continue to assign this species a LPN of 8.

Black Warrior waterdog (*Necturus alabamensis*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Fishes*

Headwater chub (*Gila nigra*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Roundtail chub (*Gila robusta*), Lower Colorado River DPS—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Arkansas darter (*Etheostoma cragini*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This fish species occurs in Arkansas, Colorado, Kansas, Missouri, and Oklahoma. The species is found most often in sand- or pebble-bottomed pools of small, spring-fed streams and marshes, with cool water and broadleaved aquatic vegetation. Its current distribution is indicative of a species that once was widely dispersed throughout its range, but has been relegated to isolated areas separated by unsuitable habitat that prevents dispersal.

Factors influencing the current distribution include: Surface and groundwater irrigation resulting in decreased flows or stream dewatering; the dewatering of long reaches of riverine habitat; conversion of prairie to cropland, which influences groundwater recharge and spring flows; water quality degradation from a variety of sources; and the construction of dams, which act as barriers preventing emigration upstream and downstream through the reservoir pool. A current drought in the western portions of the species' range is also a threat. If drought conditions continue into the future, these conditions are likely to have a severe impact on many of these isolated populations. However, at present, the magnitude of threats facing this species is still moderate to low, given the number of different locations where the species occurs, and the fact that no single threat or combination of threats affects more than a portion of the species' widely distributed range. The immediacy of threats varies across the species' range; groundwater pumping is an ongoing concern in the western portion of the species range, although it has declined in some portions, and groundwater levels continue to support surface spring and stream flow in the majority of the species' range. Development, spills, and runoff are not currently affecting the species on a rangewide basis. Overall, the threats are nonimminent. Thus, we are retaining an LPN of 11 for the Arkansas darter.

Pearl darter (*Percina aurora*)—The following summary is based on information contained in our files. Little is known about the specific habitat requirements or natural history of the Pearl darter. Pearl darters have been collected from a variety of river/stream attributes, mainly over gravel bottom substrate. This species is historically known only from localized sites within the Pascagoula and Pearl River drainages in Mississippi and Louisiana. Currently, the Pearl darter is considered extirpated from the Pearl River drainage and rare in the Pascagoula River drainage. Since 1983, the range of the Pearl darter has decreased by 55 percent.

The Pearl darter is vulnerable to non-point source pollution caused by urbanization and other land use activities; gravel mining and resultant changes in river geomorphology, especially head cutting; and the possibility of water quantity decline from the proposed Department of Energy Strategic Petroleum Reserve project and a proposed dam on the Bouie River. Additional threats are posed by the apparent lack of adequate State and Federal water quality regulations resulting in the continued degradation of water quality within the species' habitat. The Pearl darter's localized distribution and apparent low population numbers may indicate a species with lower genetic diversity; this would also make this species more vulnerable to catastrophic events. Threats affecting the Pearl darter are localized in nature, affecting only portions of the population within the drainage having only a localized impact on the species and its' habitat. While water quality degradation is the most pervasive threat, it is not significant within the areas protected through The Nature Conservancy ownership and other areas where best managmenet practices are routinely practiced. Thus, we assigned a threat magnitude of moderate to low to this species. In addition, the threats are imminent since the identified threats are currently impacting this species in some portions of its range. Therefore, we have assigned an LPN of 8 for this species.

Sicklefin redhorse (*Moxostoma* sp.)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an

emergency posing a significant risk to the species.

Longfin smelt (*Spirinchus thaleichthys*), Bay-Delta DPS—The following summary is based on information contained in our files and the petition we received on August 8, 2007. On April 2, 2012 (77 FR19756), we determined that listing the longfin smelt San Francisco Bay-Delta distinct population segment (Bay-Delta DPS) was warranted but precluded. Longfin smelt measure 9–11 cm (3.5–4.3 in) standard length. Longfin smelt are considered pelagic and anadromous, although anadromy in longfin smelt is poorly understood, and certain populations in other parts of the species' range are not anadromous and complete their entire life cycle in freshwater lakes and streams. Longfin smelt usually live for 2 years, spawn, and then die, although some individuals may spawn as 1- or 3-year-old fish before dying. In the Bay-Delta, longfin smelt are believed to spawn primarily in freshwater in the lower reaches of the Sacramento River and San Joaquin River.

Longfin smelt numbers in the Bay-Delta have declined significantly since the 1980s. Abundance indices derived from the Fall Midwater Trawl (FMWT), Bay Study Midwater Trawl (BSMT), and Bay Study Otter Trawl (BSOT) all show marked declines in Bay-Delta longfin smelt populations from 2002 to 2012. Longfin smelt abundance over the last decade is the lowest recorded in the 40-year history of CDFG's FMWT monitoring surveys.

The primary threat to the DPS is from reduced freshwater flows. Freshwater flows, especially winter-spring flows, are significantly correlated with longfin smelt abundance—longfin smelt abundance is lower when winter-spring flows are lower. The long-term decline in abundance of longfin smelt in the Bay-Delta has been partially attributed to reductions in food availability and disruptions of the Bay-Delta food web caused by establishment of the nonnative overbite clam and likely by increasing ammonium concentrations. In the 2012, 12-month finding, we determined that threats were high in magnitude and imminent, resulting in an LPN of 3. The threats still remain high in magnitude since they pose a significant risk to the DPS throughout its range. The threats are ongoing, and thus are imminent. We are maintaining an LPN of 3 for this population.

*Clams*

Texas fatmucket (*Lampsilis bracteata*)—The following summary is based on information contained in our files. The Texas fatmucket is a large, elongated freshwater mussel that is endemic to central Texas. Its shell can be moderately thick, smooth, and rhomboidal to oval in shape. Its external coloration varies from tan to brown with continuous dark brown, green-brown, or black rays, and internally it is pearly white, with some having a light salmon tint. This species historically occurred throughout the Colorado and Guadalupe-San Antonio River basins but is now known to occur only in nine streams within these basins in very limited numbers. All existing populations are represented by only one or two individuals and are not likely to be stable or recruiting.

The Texas fatmucket is primarily threatened by habitat destruction and modification from impoundments, which scour river beds, thereby removing mussel habitat; decrease water quality; modify stream flows; and prevent fish host migration and distribution of freshwater mussels. This species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. Additionally, these threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the Texas fatmucket and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats are likely to result in the extinction of the Texas fatmucket in the foreseeable future.

The threats to the Texas fatmucket are high in magnitude, because habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the Texas fatmucket and profoundly affect its survival and recruitment. These threats are exacerbated by climate change, which will increase the frequency and magnitude of droughts. Remaining populations are small, isolated, and highly vulnerable to stochastic events, which could lead to extirpation or extinction. These threats are imminent because they are ongoing and will continue in the foreseeable future. Habitat loss and degradation have already occurred and will continue as the human population continues to grow in central Texas. Texas fatmucket populations may already be below the minimum viable population requirement, which causes a reduction in the number of populations and an increase in the species' vulnerability to extinction. Based on imminent, high-magnitude threats, we maintained an LPN of 2 for the Texas fatmucket.

Texas fawnsfoot (*Truncilla macrodon*)—The following summary is based on information contained in our files. The Texas fawnsfoot is a small, relatively thin-shelled freshwater mussel that is endemic to central Texas. Its shell is long and oval, generally free of external sculpturing, with external coloration that varies from yellowish- or orangish-tan, brown, reddish-brown, to smoky-green with a pattern of broken rays or irregular blotches. The internal color is bluish-white or white and iridescent posteriorly. This species historically occurred throughout the Colorado and Brazos River basins and is now known from only five locations. The Texas fawnsfoot has been extirpated from nearly all of the Colorado River basin and from much of the Brazos River basin. Of the populations that remain, only three are likely to be stable and recruiting; the remaining populations are disjunct and restricted to short stream reaches.

The Texas fawnsfoot is primarily threatened by habitat destruction and modification from impoundments, which scour river beds, thereby removing mussel habitat; decrease water quality; modify stream flows; and prevent fish host migration and distribution of freshwater mussels, as well as by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. Additionally, these threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the Texas fawnsfoot and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats are likely to result in the extinction of the Texas fawnsfoot in the foreseeable future.

The threats to the Texas fawnsfoot are high in magnitude. Habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the Texas fawnsfoot and profoundly affect its habitat. These threats are exacerbated by climate change, which will increase the frequency and magnitude of droughts. Remaining populations are small, isolated, and highly vulnerable to stochastic events. These threats are imminent because they are ongoing and will continue in the foreseeable future. Habitat loss and degradation has already occurred and will continue as the

human population continues to grow in central Texas. The Texas fawnsfoot populations may already be below the minimum viable population requirement, which causes a reduction in the number of populations and an increase in the species' vulnerability to extinction. Based on imminent, high-magnitude threats, we assigned the Texas fawnsfoot an LPN of 2.

Texas hornshell (*Popenaias popei*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Golden orb (*Quadrula aurea*)—The following summary is based on information contained in our files. The golden orb is a small, round-shaped freshwater mussel that is endemic to central Texas. This species historically occurred throughout the Nueces-Frio and Guadalupe-San Antonio River basins and is now known from only nine locations in four rivers. The golden orb has been eliminated from nearly the entire Nueces-Frio River basin. Four of these populations appear to be stable and reproducing, and the remaining five populations are small and isolated and show no evidence of recruitment. It appears that the populations in the middle Guadalupe and lower San Marcos Rivers are likely connected. The remaining extant populations are highly fragmented and restricted to short reaches.

The golden orb is primarily threatened by habitat destruction and modification from impoundments, which scour river beds (thereby removing mussel habitat), decrease water quality, modify stream flows, and prevent fish host migration and distribution of freshwater mussels. The species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. Additionally, these threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the golden orb and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats may be likely to result in the golden orb becoming in danger of extinction in the foreseeable future.

The threats to the golden orb are moderate in magnitude. Although habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the golden orb, and are likely to be exacerbated by climate change, which will increase the frequency and magnitude of droughts, four large populations remain, including one that was recently discovered, suggesting that the threats are not high in magnitude. The threats from habitat loss and degradation are imminent because habitat loss and degradation have already occurred and will likely continue as the human population continues to grow in central Texas. Several golden orb populations may already be below the minimum viable population requirement, which causes a reduction in the number of populations and an increase in the species' vulnerability to extinction. Based on imminent, moderate threats, we maintain an LPN of 8 for the golden orb.

Smooth pimpleback (*Quadrula houstonensis*)—The following summary is based on information contained in our files. The smooth pimpleback is a small, round-shaped freshwater mussel that is endemic to central Texas. This species historically occurred throughout the Colorado and Brazos River basins and is now known from only nine locations. The smooth pimpleback has been eliminated from nearly the entire Colorado River and all but one of its tributaries, and has been limited to the central and lower Brazos River drainage. Five of the populations are represented by no more than a few individuals and are small and isolated. Six of the existing populations appear to be relatively stable and recruiting.

The smooth pimpleback is primarily threatened by habitat destruction and modification from impoundments, which scour river beds (thereby removing mussel habitat), decrease water quality, modify stream flows, and prevent fish host migration and distribution of freshwater mussels. The species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. Additionally, these threats may be exacerbated by the current and projected effects of climate change, population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the smooth pimpleback and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats may be likely to result in the smooth pimpleback becoming in danger of extinction in the foreseeable future.

The threats to the smooth pimpleback are moderate in magnitude. Although habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the range of the smooth pimpleback, and may be exacerbated by climate change, which will increase the frequency and magnitude of droughts, several large populations remain, including one that was recently discovered, suggesting that the threats are not high in magnitude. The threats from habitat loss and degradation are imminent because they have already occurred and will continue as the human population continues to grow in central Texas. Several smooth pimpleback populations may already be below the minimum viable population requirement, which causes a reduction in the number of populations and an increase in the species' vulnerability to extinction. Based on imminent, moderate threats, we maintain an LPN of 8 for the smooth pimpleback.

Texas pimpleback (*Quadrula petrina*)—The following summary is based on information contained in our files. The Texas pimpleback is a large, freshwater mussel that is endemic to central Texas. This species historically occurred throughout the Colorado and Guadalupe-San Antonio River basins, but is now known to only occur in four streams within these basins. Only two populations appear large enough to be stable, but evidence of recruitment is limited in the Concho River population and is present in the San Saba River population, which may be the only remaining recruiting populations of Texas pimpleback. The remaining two populations are represented by one or two individuals and are highly disjunct.

The Texas pimpleback is primarily threatened by habitat destruction and modification from impoundments, which scour river beds (thereby removing mussel habitat), decrease water quality, modify stream flows, and prevent fish host migration and distribution of freshwater mussels. This species is also threatened by sedimentation, dewatering, sand and gravel mining, and chemical contaminants. Additionally, these threats may be exacerbated by the current and projected effects of climate change (which will increase the frequency and magnitude of droughts),

population fragmentation and isolation, and the anticipated threat of nonnative species. Threats to the Texas pimpleback and its habitat are not being adequately addressed through existing regulatory mechanisms. Because of the limited distribution of this endemic species and its lack of mobility, these threats may be likely to result in the Texas pimpleback becoming in danger of extinction in the foreseeable future.

The threats to the Texas pimpleback are high in magnitude, because habitat loss and degradation from impoundments, sedimentation, sand and gravel mining, and chemical contaminants are widespread throughout the entire range of the Texas pimpleback and profoundly affect its survival and recruitment. The only remaining populations are small, isolated, and highly vulnerable to stochastic events, which could lead to extirpation or extinction. The threats are imminent because habitat loss and degradation have already occurred and will continue as the human population continues to grow in central Texas. All Texas pimpleback populations may already be below the minimum viable population requirement, which causes a reduction in the number of populations and an increase in the species' vulnerability to extinction. Based on imminent, high-magnitude threats, we assigned the Texas pimpleback an LPN of 2.

*Snails*

Black mudalia (*Elimia melanoides*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Magnificent ramshorn (*Planorbella magnifica*)—Magnificent ramshorn, is the largest North American air-breathing freshwater snail in the family Planorbidae. It has a relatively thin discoidal (*i.e.,* coiling in one plane) shell that reaches a diameter commonly exceeding 35mm and heights exceeding 20mm. The great width of its shell, in relation to the diameter, makes it easily identifiable at all ages. The shell is brown colored (often with leopard-like spots) and fragile, thus indicating it is adapted to still or slow-flowing aquatic habitats. The magnificent ramshorn is believed to be a southeastern North Carolina endemic. The species is known from only four sites in the lower Cape Fear River Basin in North Carolina. Although the complete historical range of the species is unknown, the size of the species and the fact that it was not reported until 1903 are indications that the species may have always been rare and localized.

Salinity and pH are major factors limiting the distribution of the magnificent ramshorn, as the snail prefers freshwater bodies with circumneutral pH (*i.e.,* pH within the range of 6.8–7.5). While members of the family Planorbidae are hermaphroditic, it is currently unknown whether magnificent ramshorns self-fertilize their eggs, mate with other individuals of the species, or both. Like other members of the Planorbidae family, the magnificent ramshorn is believed to be primarily a vegetarian, feeding on submerged aquatic plants, algae, and detritus. While several factors likely have contributed to the possible extirpation of the magnificent ramshorn in the wild, the primary factors include loss of habitat associated with the extirpation of beavers (and their impoundments) in the early 20th century and increased salinity and alteration of flow patterns, as well as increased input of nutrients and other pollutants.

The magnificent ramshorn appears to be extirpated from the wild due to habitat loss and degradation resulting from a variety of human-induced and natural factors. The only known surviving individuals of the species are presently being held and propagated at a private residence, a lab at North Carolina State University's Veterinary School, and the North Carolina Wildlife Resources Commission's Watha State Fish Hatchery. While efforts have been made to restore habitat for the magnificent ramshorn at one of the sites known to have previously supported the species, all of the sites continue to be affected or threatened by the same factors (*i.e.,* salt water intrusion and other water-quality degradation, nuisance aquatic plant control, storms, sea level rise, etc.) believed to have resulted in extirpation of the species from the wild. Currently, only three captive populations exist; a single robust captive population of the species comprised of greater than 200 adults, and two small populations of 50 or more individuals. Although the robust captive population of the species has been maintained since 1993, a single catastrophic event affecting this captive population, such as a severe storm, disease, or predator infestation, could result in the near extinction of the species. Therefore, we assigned this species a LPN of 2.

Sisi snail (*Ostodes strigatus*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The sisi snail is a ground-dwelling species in the Potaridae family, and is endemic to American Samoa. The species is now known from a single population on the island of Tutuila, American Samoa.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory snails. The decline of the sisi snail in American Samoa has resulted, in part, from loss of habitat to logging and agriculture, and loss of forest structure to hurricanes and nonnative weeds that become established after these storms. All live sisi snails have been found in the leaf litter beneath remaining intact forest canopy. No snails were found in areas bordering agricultural plots or in forested areas that were severely damaged by hurricanes. Under natural historical conditions, loss of forest canopy to storms did not pose a great threat to the long-term survival of these snails; enough intact forest with healthy populations of snails would support dispersal back into newly regrown forest canopy. However, the presence of nonnative weeds such as mile-a-minute vine (*Mikania micrantha*) may reduce the likelihood that native forests will re-establish in areas damaged by hurricanes. This loss of habitat to storms is greatly exacerbated by expanding agriculture. Agricultural plots on Tutuila have spread from low elevation up to middle and some high elevations, greatly reducing the forested area and thus reducing the resilience of native forests and populations of native snails. These reductions also increase the likelihood that future storms will lead to the extinction of populations or species that rely on the remaining forest canopy. In an effort to eradicate the nonnative giant African snail (*Achatina fulica*), the nonnative rosy carnivore snail (*Euglandina rosea*) was introduced in 1980. The rosy carnivore snail has spread throughout the main island of Tutuila. Numerous studies show that the rosy carnivore snail feeds on endemic island snails, including the sisi snail, and is a major agent in their declines and extirpations. At present, the major threat to the long-term survival of the native snail fauna in American Samoa, including the sisi snail, is predation by nonnative predatory snails. The threats are

imminent and of high magnitude, since they are severe enough to affect the continued existence of the species, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

Tutuila tree snail (*Eua zebrina*)—A tree-dwelling species, the Tutuila tree snail is a member of the Partulidae family of snails and is endemic to American Samoa. The species is known from 32 populations on the islands of Tutuila, Manua, and Ofu.

This species is currently threatened by habitat loss and modification and by predation from nonnative predatory snails and rats (*Rattus* spp.). All live Tutuila tree snails were found on understory vegetation beneath remaining intact forest canopy. No snails were found in areas bordering agricultural plots or in forested areas that were severely damaged by three hurricanes (1987, 1990, and 1991). (See summary for the sisi snail, above, regarding impacts of nonnative weeds and of the rosy carnivore snail.) Rats have also been shown to devastate snail populations, and rat-damaged snail shells have been found at sites where the Tutuila snail occurs. At present, the major threat to the long-term survival of the native snail fauna in American Samoa is ongoing predation by nonnative predatory snails and rats. The magnitude of threats is high because they result in direct mortality leading to significant population declines to the Tutuila tree snail rangewide. Therefore, we have retained an LPN of 2 for this species.

Huachuca springsnail (*Pyrgulopsis thompsoni*)—The following is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. The Huachuca springsnail is endemic to Santa Cruz and Cochise Counties in southeastern Arizona and adjacent portions of northern Sonora, Mexico. Currently, the Huachuca springsnail inhabits at least 21 spring sites in southeastern Arizona and northern Sonora, Mexico. The species is most commonly found in shallow water habitats, often in rocky seeps at the spring source. Threats include habitat modification and destruction through catastrophic wildfire, unmanaged grazing at the landscape scale, and the inadequacy of regulatory mechanisms. Overall, the threats are low in magnitude, because threats are not occurring throughout the range of the species uniformly and not all populations would likely be affected simultaneously by the known threats. We have no site-specific information indicating that grazing is currently ongoing in or adjacent to occupied habitats, and catastrophic wildfire is not known to be an imminent threat. Accordingly, threats are nonimminent. Therefore, we retain an LPN of 11 for the Huachuca springsnail.

Page springsnail (*Pyrgulopsis morrisoni*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Insects*

Hawaiian yellow-faced bee (*Hylaeus anthracinus*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus anthracinus* is a species of Hawaiian yellow-faced bee (family Colletidae) found in certain coastal areas and dry lowland forests containing native plant communities on the islands of Hawaii, Kahoolawe, Lanai, Maui, Molokai, and Oahu, Hawaii. *Hylaeus anthracinus* is currently known from 16 populations containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *Hylaeus anthracinus* is directly threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the limited number and small size of populations, competition from European honey bees (*Apis mellifera*), the possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

Some *H. anthracinus* populations occur in areas that are managed for one or more of the threats affecting habitat; however, no population is entirely protected from impacts to habitat, and predation on the species is not currently managed at any population site. Because the ongoing threats adversely affect *H. anthracinus* throughout its entire range, and cause impacts that are sufficiently severe that they could lead to population declines, the threats are high in magnitude and are imminent. Therefore, we have retained an LPN of 2 for this species.

Hawaiian yellow-faced bee (*Hylaeus assimulans*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus assimulans* is a species of Hawaiian yellow-faced bee (family Colletidae) found in certain coastal areas and dry lowland forests containing native plant communities on the islands of Hawaii, Kahoolawe, Lanai, Maui, Molokai, and Oahu, Hawaii. *Hylaeus assimulans* is currently known from five populations containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *Hylaeus assimulans* is directly threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the limited number and small size of populations, competition from European honey bees (*Apis mellifera*), the possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

Some *H. assimulans* populations occur in areas that are managed for one or more of the threats affecting habitat; however, no population is entirely protected from impacts to habitat, and predation on the species is not currently managed at any population site. Because the ongoing threats adversely affect *H. assimulans* throughout its entire range, and cause impacts that are sufficiently severe that they could lead to population declines, the threats are high in magnitude and are imminent. Therefore, we have retained an LPN of 2 for this species.

Hawaiian yellow-faced bee (*Hylaeus facilis*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus facilis* is a species of Hawaiian yellow-faced bee (family Colletidae) with a wide historical range of native plant community habitat including coastal areas, lowland dry and wet forests, and montane mesic forests on the islands of Lanai, Maui, Molokai, and Oahu, Hawaii. Now extirpated from the islands of Lanai and Maui, *H. facilis* is currently known from two populations containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *H. facilis* is directly

threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the limited number and small size of populations, competition from European honey bees (*Apis mellifera*), the possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

Both of the *Hylaeus facilis* populations occur in areas that are managed for one or more of the threats affecting habitat; however, neither population is entirely protected from impacts to habitat and predation upon the species is not currently managed within either population site. The threats to *H. facilis* are high in magnitude because their severity endangers the species with a relatively high likelihood of extinction throughout its entire range. The threats are ongoing throughout its entire range, thus the threats are imminent. Therefore, we have retained an LPN of 2 for this species.

Hawaiian yellow-faced bee (*Hylaeus hilaris*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus hilaris* is a cleptoparasitic species of Hawaiian yellow-faced bee (family Colletidae) with a historical range in coastal habitat on the islands of Lanai, Maui, and Molokai, Hawaii. Now extirpated from the islands of Lanai and Maui, *H. hilaris* is currently known from a single population on Molokai containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *H. hilaris* is directly threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the small size of its remaining population, lack of additional populations, competition from European honey bees (*Apis mellifera*), possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

The *Hylaeus hilaris* population occurs within a private preserve that is managed for some of the threats affecting habitat; however, the population is not entirely protected from impacts to habitat, and predation upon the species is not currently managed at all. The threats to *H. hilaris* are high in magnitude because their severity presents a relatively high likelihood of extinction throughout its entire range. The threats to *H. hilaris* are imminent, since they are ongoing. Therefore, we have retained an LPN of 2 for this species.

Hawaiian yellow-faced bee (*Hylaeus kuakea*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus kuakea* is a species of Hawaiian yellow-faced bee (family Colletidae) found in lowland mesic forests on the island of Oahu, Hawaii. *H. kuakea* is currently known from two populations containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *H. kuakea* is directly threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the limited number and small size of populations, competition from European honey bees (*Apis mellifera*), the possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

Both *Hylaeus kuakea* populations occur in areas that are managed for one or more of the threats affecting habitat; however, neither population is entirely protected from impacts to habitat, and predation on the species is not currently managed within either population site. The threats to *H. kuakea* are high in magnitude because their severity presents a relatively high likelihood of extinction throughout its entire range. The threats to *H. kuakea* are imminent, since they are ongoing. Therefore, we have retained an LPN of 2 for this species.

Hawaiian yellow-faced bee (*Hylaeus longiceps*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus longiceps* is a species of Hawaiian yellow-faced bee (family Colletidae) found in certain coastal areas and dry lowland forest containing native plant communities on the islands of Lanai, Maui, Molokai, and Oahu, Hawaii. *H. longiceps* is currently known from six populations containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *H. longiceps* is directly threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the limited number and small size of populations, competition from European honey bees (*Apis mellifera*), the possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

Some *Hylaeus longiceps* populations occur in areas that are managed for one or more of the threats affecting habitat; however, no population is entirely protected from impacts to habitat, and predation on the species is not currently managed within any population site. The threats to *H. longiceps* are high in magnitude because their severity presents a relatively high likelihood of extinction throughout its entire range. The threats to *H. longiceps* are imminent, since they are ongoing. Therefore, we have retained an LPN of 2 for this species.

Hawaiian yellow-faced bee (*Hylaeus mana*)—The following summary is based on information contained in our files and in the petition that we received for this species on March 23, 2009. *Hylaeus mana* is a species of Hawaiian yellow-faced bee (family Colletidae) found in lowland mesic forests on the island of Oahu, Hawaii. *H. mana* is currently known from four populations containing an unknown number of individuals. This species is threatened by ongoing habitat loss and modification due to the effects of feral ungulates, nonnative plants, wildfire, and climate change. *H. mana* is directly threatened by predation from yellow jacket wasps (*Vespula pensylvanica*) and several species of nonnative ants. Additional indirect threats to the species include the limited number and small size of populations, competition from European honey bees (*Apis mellifera*), the possibility of habitat destruction from stochastic and catastrophic events, and a lack of regulatory mechanisms affording protection to the species.

The *Hylaeus mana* populations occur in areas that are managed for one or more of the threats affecting habitat; however, the population is not entirely protected from impacts to habitat, and predation on the species is not currently managed at all. The threats to *H. mana* are high in magnitude because their severity presents a relatively high likelihood of extinction throughout its entire range. The threats to *H. mana* are imminent, since they are ongoing. Therefore, we have retained an LPN of 2 for this species.

Hermes copper butterfly (*Hermelycaena* [Lycaena] *hermes*)—

Hermes copper butterfly primarily occurs in San Diego County, California, and a few records of the species have been documented in Baja California, Mexico. The species inhabits coastal sage scrub and southern mixed chaparral, and is dependent on its larval host plant, *Rhamnus crocea* (spiny redberry), to complete its lifecycle. Adult Hermes copper butterflies lay single eggs on spiny redberry stems where they hatch and feed until pupation occurs at the base of the plant. Hermes copper butterflies have one flight period occurring in mid-May to early-July, depending on weather conditions and elevation. We estimate there were at least 59 known separate historical populations throughout the species' range since the species was first described. Of the 59 known Hermes copper butterfly populations, 21 are extant, 27 are believed to have been extirpated, and 11 are of unknown status.

Primary threats to Hermes copper butterfly are megafires (large wildfires), and small and isolated populations. Secondary threats include increased wildfire frequency that results in habitat loss, and combined impacts of existing development, possible future (limited) development, existing dispersal barriers, and fires that fragment habitat. Hermes copper butterfly occupies scattered areas of sage scrub and chaparral habitat in an arid region susceptible to wildfires of increasing frequency and size. The likelihood that individuals of the species will be burned as a result of catastrophic wildfires, combined with the isolation and small size of extant populations, makes Hermes copper butterfly particularly vulnerable to population extirpation rangewide. Overall, the threats that Hermes copper butterfly faces are high in magnitude, because the major threats (particularly mortality due to wildfire and increased wildfire frequency) occur throughout all of the species' range and are likely to result in significant adverse impacts to the status of the species. The threats are nonimminent overall, because the impact of wildfire to Hermes copper butterfly and its habitat occurs on a sporadic basis, and we do not have the ability to predict when wildfires will occur. This species faces high-magnitude nonimminent threats; therefore, we assigned this species a LPN of 5.

Puerto Rican harlequin butterfly (*Atlantea tulita*)—The following summary is based on information in our files and in the petition we received on February 29, 2009. The Puerto Rican harlequin butterfly is endemic to Puerto Rico, and one of the four species endemic to the Greater Antilles within the genus *Atlantea.* This species occurs within the subtropical moist forest life zone in the northern karst region (*i.e.,* municipality of Quebradillas) of Puerto Rico, and in the subtropical wet forest (*i.e.,* Maricao Commonwealth Forest, municipality of Maricao). The Puerto Rican harlequin butterfly has only been found utilizing *Oplonia spinosa* (prickly bush) as its host plant (*i.e.,* a plant that is used for laying the eggs, and also serves as a food source for development of the larvae).

The primary threats to the Puerto Rican harlequin butterfly are development, habitat fragmentation, and other natural or manmade factors such as human-induced fires, use of herbicides and pesticides, vegetation management, and climate change. These threats would substantially affect the distribution and abundance of the species, as well as its habitat. In addition, the lack of effective enforcement makes the existing policies and regulations inadequate for the protection of the species' habitat. Activities leading to habitat modification and destruction are expected to continue and potentially increase in the foreseeable future. These threats are high in magnitude and imminent because known populations occur in areas that are subject to ongoing development, increased traffic, and increased road maintenance and construction and they directly affect populations during all life stages throughout the range of the species. Therefore, we assigned a LPN of 2 to this species.

Sequatchie caddisfly (*Glyphopsyche sequatchie*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species..

Clifton Cave beetle (*Pseudanophthalmus caecus*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. Clifton Cave beetle is a small, eyeless, reddish-brown, predatory insect that feeds upon small cave invertebrates. It is cave dependent and is not found outside the cave environment. Clifton Cave beetle is known only from two privately owned caves in Woodford County, Kentucky. Soon after the species was first observed in 1963, the cave entrance was blocked due to road construction and placement of fill material along KY Highway 1964. We do not know whether the species still occurs at the original location or if it has been extirpated from the site by the closure of the cave entrance. A 2008 attempt to re-open the cave was unsuccessful. Other caves in the vicinity of this cave were surveyed for the species during 1995 and 1996, and only one additional site (Richardson's Spring) was found to support the Clifton Cave beetle.

The limestone caves in which the Clifton Cave beetle is found provide a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on more wide-ranging insects. Events such as toxic chemical spills, discharges of large amounts of polluted water or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances could have serious adverse impacts on on the survival of this species. Therefore, the magnitude of threat is high for this species. The threats are nonimminent because there are no known projects that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Coleman cave beetle (*Pseudanophthalmus colemanensis*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Icebox Cave beetle (*Pseudanophthalmus frigidus*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. Icebox Cave beetle is a small, eyeless, reddish-brown, predatory insect that feeds upon small cave invertebrates. It is not found outside the cave

environment, and is only known from one privately owned Kentucky cave in Bell County.

The limestone cave in which this species is found provides a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The species has not been observed since it was originally collected, but species experts believe that it may still exist in the cave in low numbers. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on more wide-ranging insects. Events such as toxic chemical spills or discharges of large amounts of polluted water, or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances, could have serious adverse impacts on the survival of this species. The magnitude of threat is high for this species because it is limited in distribution and the threats would result in a high level of mortality or reduced reproductive capacity. The threats are nonimminent because there are no known projects that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Inquirer Cave beetle (*Pseudanophthalmus inquisitor*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

Louisville Cave beetle (*Pseudanophthalmus troglodytes*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. The Louisville cave beetle is a small, eyeless, reddish-brown, predatory insect that feeds upon cave invertebrates. It is not found outside the cave environment and is only known from two privately owned Kentucky caves in Jefferson County. The cave entrance at the species' original location (Oxmoor, also called Highbaugh Cave) was closed due to residential development and placement of fill in the early 1990s. We do not know whether the species still occurs at the original location or if it has been extirpated from the site by the closure of the cave entrance. Several other caves in Jefferson County were surveyed for the species in 1994, but individuals of the species were observed at only one additional location, Eleven Jones Cave. This cave is located on the southeast bank of Beargrass Creek near Cave Hill Cemetery and Arboretum. Due to pollution and reportedly high carbon dioxide levels in the cave, additional searches of the cave have not been possible.

The limestone caves in which this species is found provide a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on more wide-ranging insects. Events such as toxic chemical spills, discharges of large amounts of polluted water, or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances, could have serious adverse impacts on the survival of this species. The magnitude of threat is high for this species, because it is limited in distribution and the threats would have severe negative impacts on the species. The threats are non-imminent because there are no known projects that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Tatum Cave beetle (*Pseudanophthalmus parvus*)—The following summary is based upon information contained in our files. No new information was provided in the petition we received on May 11, 2004. Tatum Cave beetle is a small, eyeless, reddish-brown predatory insect that feeds upon cave invertebrates. It is not found outside the cave environment and is only known from one privately owned Kentucky cave (Tatum Cave) in Marion County. Despite searches in 1980, 1996, 2004, and 2005, the species has not been observed in Tatum Cave since 1965.

The limestone cave in which this species is found provides a unique and fragile environment that supports a variety of species that have evolved to survive and reproduce under the demanding conditions found in cave ecosystems. The species has not been observed since 1965, but species experts believe that it still exists in low numbers. The limited distribution of the species makes it vulnerable to isolated events that would only have a minimal effect on more wide-ranging insects. Events such as toxic chemical spills, discharges of large amounts of polluted water, or indirect impacts from off-site construction activities, closure of entrances, alteration of entrances, or the creation of new entrances, could have serious adverse impacts on this species. The magnitude of threat is high for this species, because its limited numbers mean that any threats could severely affect its continued existence. The threats are nonimminent, because there are no known projects that would affect the species in the near future. We therefore have assigned an LPN of 5 to this species.

Orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. The orangeblack Hawaiian damselfly is a stream- and pool-dwelling species endemic to the Hawaiian Islands of Kauai, Oahu, Molokai, Maui, Lanai, and Hawaii. The species no longer is found on Kauai, and is now restricted to a total of 16 populations distributed across the islands of Oahu, Maui, Molokai, Lanai, and Hawaii. This species is threatened by predation from nonnative aquatic species such as fish and predacious insects, and habitat loss through dewatering of streams and invasion by nonnative plants. Nonnative fish and insects prey on the larval-stage naiads of the damselfly, and loss of water reduces the amount of suitable habitat for the naiad life stage. Invasive plants (*e.g.,* California grass (*Brachiaria mutica*)) also contribute to loss of habitat by forming dense, monotypic stands that completely eliminate open water. Nonnative fish and plants are found in all the streams where orangeblack Hawaiian damselflies occur, except at the single Oahu population, where there are no nonnative fish. We have retained an LPN of 8 for this species because, although the threats are ongoing and therefore imminent, they affect the different populations of the species to varying degrees throughout the species' range and are thus of moderate magnitude.

Rattlesnake-master borer moth *(Papaipema eryngii)*—The following information is based on information in our files. Rattlesnake-master borer moths are obligate residents of undisturbed prairie remnants, savanna, and pine barrens that contain their only food plant—rattlesnake-master *(Eryngium yuccifolium).* The rattlesnake-master borer moth is known from 16 sites distributed over 5 States: Illinois, Arkansas, Kentucky, Oklahoma,

and North Carolina. Currently 12 of the sites contain extant populations, 3 contain populations with unknown status, and 1 contains a population that is considered extirpated.

Although the rattlesnake-master plant is widely distributed across 26 States and is a common plant in remnant prairies, it is a conservative species, meaning it is not found in disturbed areas, with relative frequencies of less than 1 percent. The habitat range for the rattlesnake-master borer moth is very narrow and appears to be limiting for the species. The ongoing effects of habitat loss, fragmentation, degradation, and modification from agriculture, development, flooding, invasive species, and secondary succession have resulted in fragmented populations and population declines. Rattlesnake-master borer moths are affected by habitat fragmentation and population isolation. Almost all of the sites with extant populations of the rattlesnake-master borer moth are isolated from one another, with the populations in Kentucky, North Carolina, and Oklahoma occurring within a single site for each State, thus precluding recolonization from other populations. These small, isolated populations are likely to become unviable over time due to lower genetic diversity reducing their ability to adapt to environmental change, effects of stochastic events, and inability to recolonize areas where they are extirpated.

Rattlesnake-master borer moths have life-history traits that make them more susceptible to outside stressors. They are univoltine (having a single flight per year), do not disperse widely, and are monophagous (have only one food source). The life history of the species makes it particularly sensitive to fire, which is the primary practice used in prairie management. The species is only safe from fire once it bores into the root of the host plant, which makes adult, egg, and first larval stages subject to mortality during prescribed burns and wildfires. Fire and grazing cause direct mortality to the moth and destroy food plants if the intensity, extent, or timing is not conducive to the species' biology. Although fire management is a threat to the species, lack of management is also a threat, and at least one site has become extirpated likely because of the succession to woody habitat. The species is sought after by collectors, and the host plant is very easy to identify, making the moth susceptible to collection, and thus many sites are kept undisclosed to the public.

Existing regulatory mechanisms provide protection for 12 of the 16 sites containing rattlesnake-master borer moth populations. Illinois' endangered species statute provides regulatory mechanisms to protect the species from potential impacts from actions such as development and collecting on the 10 Illinois sites; however, illegal collections of the species have occurred at two sites. A permit is required for collection by site managers within the sites in North Carolina and Oklahoma. The rattlesnake-master borer moth is also listed as endangered in Kentucky by the State's Nature Preserves Commission, although at this time the Kentucky legislature has not enacted any statute that provides legal protection for species listed as threatened or endangered. There are no statutory mechanisms in place to protect the populations in North Carolina, Arkansas, or Oklahoma.

Some threats that the rattlesnake-master moth faces are high in magnitude, such as habitat conversion and fragmentation, and population isolation. These threats with the highest magnitude occur in many of the populations throughout the species' range, but although they are likely to affect each population at some time, they are not likely to affect all of the populations at any one time. Other threats, such as agricultural and nonagricultural development, mortality from implementation of some prairie management tools (such as fire), flooding, succession, and climate change are of moderate to low magnitude. For example, the life history of rattlesnake-master borer moths makes them highly sensitive to fire, which can cause mortality of individuals through most of the year and can affect entire populations. Conversely, complete fire suppression can also be a threat to rattlesnake-master borer moths as prairie habitat declines and woody or invasive species become established such that the species' only food plant is not found in disturbed prairies. Although these threats can cause direct and indirect mortality of the species, they are of moderate or low magnitude because they affect only some populations throughout the range and to varying degrees. Overall, the threats are moderate. The threats are imminent because they are ongoing; every known population of rattlesnake-master borer moth has at least one ongoing threat, and some have several working in tandem. Thus, we assigned a LPN of 8 to this species.

Stephan's riffle beetle (*Heterelmis stephani*)—The following summary is based on information contained in our files. No new information was provided in the petition received on May 11, 2004. The Stephan's riffle beetle is an endemic riffle beetle historically found in limited spring environments within the Santa Rita Mountains, Pima County, Arizona. In the most recent surveys conducted in 1993, the Stephan's riffle beetle was documented only in Sylvester Spring in Madera Canyon, Santa Cruz County, within the Coronado National Forest. Suspected potential threats to that spring are largely from habitat modification, and potential changes in water quality and quantity due to catastrophic natural events (such as wildfire or flooding from storms). The threats are of low to moderate magnitude because the Forest Service has no plans to modify the springs where this species occurs. In addition, the effects of the other threats are unlikely to be permanent, as they stem from occasional natural events that do not result in permanent water quality degradation. In addition, because of the physical habitat structure (large boulders surrounding the springs) and the location of the springs (on hillsides above the stream or in the headwaters where there is little watershed to generate large flood flows), flooding, resulting from thunderstorms or post-fire runoff is not a factor affecting this species at this time. Additionally, there is a higher likelihood that the species will persist in areas that are unaffected by the threats; it is unlikely that all areas of the spring would be simultaneously be affected. Threats from habitat modification have already occurred and are no longer ongoing. Therefore, the threats are not imminent. Thus, we retain an LPN of 11 for the Stephan's riffle beetle.

Arapahoe snowfly (*Capnia arapahoe*)—The following summary is based on information contained in our files. This insect is a winter stonefly associated with clean, cool, running waters. Adult snowflies emerge in late winter from the space underneath stream ice. The Arapahoe snowfly is known to be found only in a short section of Elkhorn Creek, a small tributary of the Cache la Poudre River in the Roosevelt National Forest, Larimer County, Colorado. New surveys completed in 2013 indicate that the Arapahoe snowfly may occur in additional drainages other than Elkhorn Creek; however, the results are preliminary, and surveys are continuing in 2014. We will evaluate and incorporate the results of these new surveys into our review when they become available. The species previously occurred downriver at Young Gulch, but it is likely that either habitat became unsuitable or other unknown causes extirpated the species. Habitats

at Young Gulch were further degraded by the High Park Fire in 2012, and potentially by a flash flood disaster in September 2013.

Climate change is a threat to the Arapahoe snowfly, and modifies its habitats by reducing snowpacks, increasing temperatures, fostering mountain pine beetle outbreaks, and increasing the frequency of destructive wildfires. Limited dispersal capabilities, an extremely restricted range, dependence on pristine habitats, and a small population size make the Arapahoe snowfly vulnerable to demographic stochasticity, environmental stochasticity, and random catastrophes. Furthermore, regulatory mechanisms inadequately reduce these threats, which may act cumulatively to affect the species. The threats to the Arapahoe snowfly are high in magnitude because they occur throughout the species' limited range. However, the threats are nonimminent. While limited dispersal capabilities, restricted range, dependence on pristine habitats, and small population size are characteristics that make this species vulnerable to stochastic events and catastrophes (and potential impacts from climate change), these events are not currently occurring and increased temperatures will adversely affect the species in the future. Therefore, we have assigned the Arapahoe snowfly an LPN of 5.

Meltwater lednian stonefly (*Lednia tumana*)—The following summary is based on information contained in our files and in the petition we received on July 30, 2007. This species is an aquatic insect in the order Plecoptera (stoneflies). Stoneflies are primarily associated with clean, cool streams and rivers. Eggs and nymphs (juveniles) of the meltwater lednian stonefly are found in high-elevation, alpine, and subalpine streams, most typically in locations closely linked to glacial runoff. The species is generally restricted to streams with mean summer water temperature less than 10 °C (50 °F). The only known meltwater lednian stonefly occurrences are within Glacier National Park (NP), Montana.

Climate change, and the associated effects of glacier loss (with glaciers predicted to be gone by 2030)—including reduced streamflows, and increased water temperatures—are expected to significantly reduce the occurrence of populations and extent of suitable habitat for the species in Glacier NP. In addition, the existing regulatory mechanisms are not adequate to address these environmental changes due to global climate change. We determined that the meltwater lednian stonefly was a candidate for listing in a warranted-but-precluded 12-month petition finding published on April 5, 2011 (76 FR 18684). We have assigned the species an LPN of 5, based on three criteria: (1) The high magnitude of threat, which is projected to substantially reduce the amount of suitable habitat relative to the species' current range; (2) the low immediacy of the threat based on the lack of documented evidence that climate change is affecting stonefly habitat; and (3) the taxonomic status of the species, which is a full species.

Highlands tiger beetle (*Cicindela highlandensis*)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Crustaceans*

Anchialine pool shrimp (*Metabetaeus lohena*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Metabetaeus lohena* is a species of shrimp belonging to the family Alpheidae that inhabits anchialine pools. This species is endemic to the Hawaiian Islands, with populations on the islands of Oahu, Maui, and Hawaii. The primary threats to this species are predation by fish (*i.e.,* fish species that do not naturally occur in the pools inhabited by this species) and habitat loss from degradation (primarily from illegal trash dumping). Populations of *M. lohena* on the islands of Maui and Hawaii are located within State Natural Area Reserves (NARs) and in a National Park. Both the State NARs and the National Park prohibit the collection of the species and the disturbance of the pools. However, enforcement of collection and disturbance prohibitions is difficult, and the negative effects from the introduction of fish can occur suddenly and could quickly decimate a population. On Oahu, four pools containing this species are located in a National Wildlife Refuge and are protected from collection and disturbance to the pool; however, on State-owned land where the species occurs, there is no protection from collection or disturbance of the pools. Threats to this species could have a significant adverse effect on the survival of the species, leading to a relatively high likelihood of extinction, and are thus of a high magnitude. The primary threats of predation from fish and loss of habitat due to degradation are nonimminent, because on the islands of Maui and Hawaii no fish were observed in any of the pools where this species occurs, and there has been no documented trash dumping in these pools. Therefore, we have retained an LPN of 5 for this species.

Anchialine pool shrimp (*Palaemonella burnsi*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Palaemonella burnsi* is a species of shrimp belonging to the family Palaemonidae, that inhabits anchialine pools. This species is endemic to the Hawaiian Islands with populations on the islands of Maui and Hawaii. The primary threats to this species are predation by nonnative fish (*i.e.,* fish species that do not naturally occur in the pools inhabited by this species) and habitat loss due to degradation (primarily from illegal trash dumping). This species' populations on Maui are located within a State Natural Area Reserve (NAR). Hawaii's State statutes prohibit the collection of the species and the disturbance of the pools in State NARs. On the island of Hawaii, the species occurs within a State NAR and a National Park, where collection and disturbance are also prohibited. However, enforcement of these prohibitions is difficult, and the negative effects from the introduction of fish can occur suddenly and could quickly decimate a population. Therefore, threats to this species could have a significant adverse effect on the survival of the species, leading to a relatively high likelihood of extinction, and thus are of a high magnitude. The threats are nonimminent, because surveys in 2004 and 2007 did not find fish in the pools where these shrimp occur on Maui or the island of Hawaii. Also, there was no evidence of recent habitat degradation at those pools. Therefore, we have retained an LPN of 5 for this species.

Anchialine pool shrimp (*Procaris hawaiana*)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Procaris hawaiana* is a species of shrimp belonging to the family Procarididae that inhabits anchialine pools. This species is endemic to the Hawaiian Islands, and is currently

known from 2 pools on the island of Maui and 12 pools on the island of Hawaii. The primary threats to this species are predation from nonnative fish (*i.e.,* fish species that do not naturally occur in the pools inhabited by this species) and habitat loss due to degradation (primarily from illegal trash dumping). This species' populations on Maui are located within a State Natural Area Reserve (NAR). Twelve pools containing this species on the island of Hawaii are also located within a State NAR. Hawaii's State statutes prohibit the collection of the species and the disturbance of the pools in State NARs. However, enforcement of these prohibitions is difficult, and the negative effects from the introduction of fish can occur suddenly and could quickly decimate a population. In addition, there are no prohibitions for either removal of the species or disturbance to one pool containing this species located outside a NAR on the island of Hawaii. Therefore, threats to this species could have a significant adverse effect on the survival of the species, leading to a relatively high likelihood of extinction, and thus remain at a high magnitude. The threats to the species are nonimminent, because, during 2004 and 2007 surveys, no nonnative fish were observed in the pools where these shrimp occur on Maui, nor were they observed in the one pool on the island of Hawaii that was surveyed in 2005. In addition, there were no signs of dumping or fill in any of the pools where the species occurs. Therefore, we have retained an LPN of 5 for this species.

*Flowering Plants*

*Abronia alpina* (Ramshaw Meadows sand-verbena)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Abronia alpina* is a small perennial herb in the Nyctaginaceae (four-o'clock) family, 2.5 to 15.2 cm (1 to 6 in) across, forming compact mats with lavender-pink, trumpet-shaped, and generally fragrant flowers. *Abronia alpina* is known from one main population center at Ramshaw Meadow and a smaller population at the adjacent Templeton Meadow. The meadows are located on the Kern River Plateau in the Sierra Nevada, on lands administered by the Inyo National Forest, in Tulare County, California. The total estimated area occupied is approximately 6 hectares (15 acres). The population fluctuates from year to year without any clear trends. Population estimates for the years from 1985 up to, but not including, 2012 range from a high of approximately 130,000 plants in 1997 to a low of approximately 40,000 plants in 2003. In 2012, when the population was last monitored, the estimated total population increased to approximately 156,000 plants.

The factors currently threatening *Abronia alpina* include natural and human habitat alteration, lowering of the water table due to erosion within the meadow system, and recreational use within meadow habitats. Lodgepole pines are encroaching upon meadow habitat with trees germinating within *A. alpina* habitat, occupying up to 20 percent of two *A. alpina* subpopulations. Lodgepole pine encroachment may alter soil characteristics by increasing organic matter levels, decreasing porosity, and moderating diurnal temperature fluctuations thus reducing the competitive ability of *A. alpina* to persist in an environment more hospitable to other plant species. The habitat occupied by *Abronia alpina* directly borders the meadow system, which is supported by the South Fork of the Kern River. The river flows through the meadow, at times coming within 15 m (50 ft) of *Abronia alpina* habitat, particularly in the vicinity of five subpopulations. Past livestock trampling and past removal of bank-stabilizing vegetation by grazing livestock have contributed to down-cutting of the river channel through the meadow, leaving the meadow subject to potential alteration by lowering of the water table. In 2001, the Forest Service began resting the grazing allotment for 10 years, thereby eliminating cattle use. The allotment is still being rested while the Forest Service assesses the data collected on the rested allotment for eventual inclusion in an environmental analysis to consider resumption of grazing. Established hiker, packstock, and cattle trails pass through *A. alpina* subpopulations. Two main hiker trails pass through Ramshaw Meadow, but in 1988 and 1997, they were rerouted out of *A. alpina* subpopulations. Occasional incidental use by horses and hikers sometimes occurs on the remnants of cattle trails that pass through subpopulations in several places.

The Service has funded studies to determine appropriate conservation measures for the species and is working with the U.S. Forest Service on developing a conservation strategy for the species. The remaining threats affect individuals in the population and have not appeared to have population-level effects. Therefore, the threats are low in magnitude. In addition, because the grazing activities have been eliminated for the time being and the hiking trails have been rerouted, the threats are not imminent. The LPN for *A. alpina* remains an 11 due to the presence of moderate-to-low threats, and the determination that the threats are not imminent at this point in time.

*Argythamnia blodgettii* (Blodgett's silverbush)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Artemisia borealis* var. *wormskioldii* (Northern wormwood)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Historically known from eight sites, *Artemisia campestris* var. *wormskioldii* (formerly *A. borealis* var. *wormskioldii*) is currently known from two natural populations (one in Klickitat County and one in Grant County, Washington) and four outplanted populations in Oregon and Washington. This plant is restricted to exposed basalt, cobbly-sandy terraces, and sand habitat along the shore of, and on islands within, the Columbia River. Annual monitoring indicates that the two natural populations have declined from historical numbers and now total roughly 550 individuals. Two populations were outplanted with approximately 3,000 individuals, and when monitored in 2012, approximately 900 individuals still remained; the other two outplanted populations have not been monitored since 120 individuals were outplanted at the sites in 2013. It is possible that additional natural populations of the species exist as there are relatively large stretches of the mid-Columbia River and its tributaries that have not been surveyed specifically for this plant; however, we currently know of the species only from the above six locations. The species is also cultivated *ex situ* for future translocation projects.

Habitat loss from inundation behind hydroelectric dams and placement of riprap along the Columbia River is thought to be the cause of historical population loss. Current threats to northern wormwood include possible direct loss of habitat through regulation of water levels in the Columbia River;

human trampling of plants from recreation; competition with nonnative invasive species; burial by wind- and water-borne sediments; small population sizes; susceptibility to genetic drift and inbreeding; and the potential for hybridization with two other species of *Artemisia.* At the Grant County site, ongoing conservation actions have reduced trampling, but have not eliminated or reduced the other threats. At the Klickitat County site (Miller Island), active conservation measures are not currently in place. The magnitude of these threats is high, as the remaining populations are small, isolated, and each could be eliminated by a single disturbance. The threats are imminent because recreational use is ongoing, invasive nonnative species occur at both sites, erosion of the substrate is ongoing at the Klickitat County site, and high water flows may occur unpredictably in any year. Therefore, we have retained an LPN of 3 for this variety.

*Astragalus anserinus* (Goose Creek milkvetch)—The following summary is based on information in our files and in the petition received on February 3, 2004. The majority (over 80 percent) of Goose Creek milkvetch sites in Idaho, Utah, and Nevada occur on Federal lands managed by the Bureau of Land Management. The rest of the sites occur as small populations on private and State lands in Utah and on private land in Idaho and Nevada. Goose Creek milkvetch occurs in a variety of habitats, but is typically associated with dry, tuffaceous soils (made up of rock consisting of smaller kinds of volcanic detritus) from the Salt Lake Formation. The species grows on steep or flat sites, with soil textures ranging from silty to sandy to somewhat gravelly. The species tolerates some level of disturbance, based on its occurrence on steep slopes, where downhill movement of soil is common.

The primary threat to Goose Creek milkvetch is habitat degradation and modification resulting from an altered wildfire regime, fire suppression activities, and rehabilitation efforts to recover lands that have burned. Other factors that also appear to threaten Goose Creek milkvetch include livestock use and invasive nonnative species. The existing regulatory mechanisms are not adequate to address these threats. Climate change effects to Goose Creek drainage habitats are possible, but we are unable to predict the specific impacts of this change to Goose Creek milkvetch at this time.

The magnitude of threats is high as available monitoring data indicate declines in excess of 70 percent within the perimeter of wildfires that occurred in 2007 which negatively affected nearly 50 percent of the known occurrences in Nevada and Utah. In addition, livestock use impacts were observed at all sites visited in Utah in 2011 with 25 percent of the sites (containing 73 percent of the individuals) being directly affected. The threats to the species are imminent, or currently occurring, largely as a result of land management actions taken since fires initially altered the habitat. The threats associated with livestock grazing and invasive species are occurring throughout a large portion of the species' range. The high magnitude and immediacy of threats leave the species and its small populations more vulnerable to stochastic events. Therefore, we have assigned the Goose Creek milkvetch an LPN of 2.

*Astragalus microcymbus* (Skiff milkvetch)—The following summary is based on information contained in our files and in the petition we received on July 30, 2007. Skiff milkvetch is a perennial forb that dies back to the ground every year. It has a very limited range and a spotty distribution within Gunnison and Saguache Counties in Colorado, where it is found in open, park-like landscapes in the sagebrush-steppe ecosystem on rocky or cobbly, moderate-to-steep slopes of hills and draws.

The most significant threats to skiff milkvetch are recreation, roads, trails, and habitat fragmentation and degradation. Existing regulatory mechanisms are not adequate to protect the species from these threats. Recreational impacts are likely to increase, given the close proximity of skiff milkvetch to the town of Gunnison and the increasing popularity of mountain biking, motorcycling, and all-terrain vehicles. Furthermore, the Hartman Rocks Recreation Area draws users, and contains over 40 percent of the skiff milkvetch units. Other threats to the species include residential and urban development; livestock, deer, and elk use; climate change; increasing periodic drought; nonnative invasive cheatgrass; and wildfire. The threats to skiff milkvetch are moderate in magnitude, because, while serious and occurring rangewide, they do not collectively result in population declines on a short time scale. The threats are imminent, because the species is currently facing them in many portions of its range. Therefore, we have assigned skiff milkvetch an LPN of 8.

*Astragalus schmolliae* (Schmoll milkvetch)—The following summary is based on information contained in our files and in the petition we received on July 30, 2007. Schmoll milkvetch is a narrow endemic perennial plant that grows in the mature pinyon-juniper woodland of mesa tops in the Mesa Verde National Park area and in the Ute Mountain Ute Tribal Park in Colorado.

The most significant threats to the species are degradation of habitat by fire, followed by invasion by nonnative cheatgrass and subsequent increase in fire frequency. These threats currently affect about 40 percent of the species' entire known range, and cheatgrass is likely to increase, given (1) its rapid spread and persistence in habitat disturbed by wildfires, fire and fuels management and development of infrastructure, and (2) the inability of land managers to control it on a landscape scale. Other threats to Schmoll milkvetch include fire break clearings, drought, and feral livestock grazing; existing regulatory mechanisms are not adequate to address these threats. The threats to the species overall are imminent, because they are ongoing, and moderate in magnitude, because the species is currently facing them in many portions of its range, but the threats do not collectively result in population declines on a short time scale. Therefore, we have assigned Schmoll milkvetch an LPN of 8.

*Astragalus tortipes* (sleeping Ute milkvetch)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. Sleeping Ute milkvetch is a perennial plant that grows only on the Smokey Hills layer of the Mancos Shale Formation on the Ute Mountain Ute Indian Reservation in Montezuma County, Colorado.

In 2000, a total of 3,744 plants were recorded at 24 locations covering 500 acres within an overall range of 6,400 acres. Available information from 2000 and 2009 indicated that the species' status was stable at that time. However, previous and ongoing threats from borrow pit excavation, off-highway vehicles, irrigation canal construction, and a prairie dog colony have had minor impacts that reduced the range and number of plants by small amounts. Off road-vehicle use of the habitat has reportedly been controlled by fencing. Oil and gas development is active in the general area, but the Service has received no information to indicate that there is development within plant habitat. In 2011, the tribal Environmental Programs Department reported habitat disturbance by vehicles and activity at the shooting range located within the plant habitat. The Tribe reported that the status of the species remained unchanged. The Tribe has been working on a management

plan that will include a monitoring program for this species, among others. We had expected the final plan to be released in 2010, but it still has not been completed. We have no documentation concerning the current status of the plants, condition of habitat, and terms of the species management plan being drafted by the Tribe. Thus, at this time, we cannot accurately assess whether populations are being adequately protected from previously existing threats. The threats are moderate in magnitude, since they have had only minor impacts. Until the management plan is completed there are no regulatory mechanisms in place to protect the species from the threats described above. Overall, we conclude that threats are moderate to low and nonimminent. Therefore, we assigned an LPN of 11 to this species.

*Boechera pusilla* (Fremont County rockcress)—The following summary is based on information in our files and in the petition received on July 24, 2007. *Boechera pusilla* is a perennial herb that occupies sparsely vegetated, coarse granite soil pockets in exposed granite-pegmatite outcrops, with slopes generally less than 10 degrees, at an elevation between 2,438 and 2,469 m (8,000 and 8,100 ft). The only known population of *B. pusilla* is located in Wyoming on lands administered by the Bureau of Land Management in the southern foothills of the Wind River Range. *B. pusilla* is likely restricted in distribution by the limited occurrence of pegmatite (a very coarse-grained rock formed from magma or lava) in the area. The specialized habitat requirements of *B. pusilla* have allowed the plant to persist without competition from other herbaceous plants or sagebrush-grassland species that are present in the surrounding landscape.

*Boechera pusilla* has a threat that is not identified, but that is indicated by the small and overall declining population size. Although the threat is not fully understood, we know it exists as indicated by the declining population. The population size may be declining from a variety of unknown causes, with drought or disease possibly contributing to the trend. The downward trend may have been leveled off somewhat recently, but without improved population numbers, the species may reach a population level at which other stressors become threats. We are unable to determine how climate change may affect the species in the future. To the extent that we understand the species, other potential habitat-related threats have been removed through the implementation of Federal regulatory mechanisms and associated actions. Overutilization, predation, and the inadequacy of regulatory mechanisms are likely threats to the species. The threats that *B. pusilla* faces are moderate in magnitude, primarily because of the recent leveling off of the population decline. The threat to *B. pusilla* is imminent, because we have evidence that the species is currently facing a threat indicated by reduced population size. The threat appears to be ongoing, although we are unsure of the extent and timing of its effects on the species. Thus, we have assigned *B. pusilla* an LPN of 8.

*Calamagrostis expansa* (Maui reedgrass)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Calamagrostis expansa* is a perennial grass found in wet forests and bogs, and in bog margins, on the Hawaiian Islands of Maui and Hawaii. This species is known from 13 populations collectively totaling fewer than 750 individuals.

*Calamagrostis expansa* is threatened by habitat degradation and loss by feral pigs (*Sus scrofa*), and by competition with nonnative plants. All of the known populations of *C. expansa* on Maui occur in managed areas. Pig exclusion fences have been constructed, and control of nonnative plants is ongoing within the exclosures but still pose a threat to the species. On the island of Hawaii, the population in the Upper Waiakea Forest Reserve has been fenced entirely. This species is not represented in an *ex situ* collection. Threats to this species from feral pigs and nonnative plants are still ongoing despite the conservation actions, and are thus imminent and of high magnitude, given the limited number of individuals, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Calochortus persistens* (Siskiyou mariposa lily)—The following summary is based on information contained in our files and the petition we received on September 10, 2001. The Siskiyou mariposa lily is a narrow endemic that is restricted to three disjunct ridge tops in the Klamath-Siskiyou Range near the California-Oregon border. The southernmost occurrence of this species is composed of nine separate sites on approximately 17.6 ha (43.4 ac) of Klamath National Forest and privately owned lands that stretch for 10 km (6 mi) along the Gunsight-Humbug Ridge, Siskiyou County, California. In 2007, a new occurrence was confirmed in the locality of Cottonwood Peak and Little Cottonwood Peak, Siskiyou County, where several populations are distributed over 164 ha (405 ac) on three individual mountain peaks in the Klamath National Forest and on private lands. The northernmost occurrence consists of not more than five Siskiyou mariposa lily plants that were discovered in 1998, on Bald Mountain, west of Ashland, Jackson County, Oregon.

Major threats include competition and shading by native and nonnative species fostered by suppression of wildfire; increased fuel loading and subsequent risk of wildfire; fragmentation by roads, fire breaks, tree plantations, and radio-tower facilities; maintenance and construction around radio towers and telephone relay stations located on Gunsight Peak and Mahogany Point; and soil disturbance, direct damage, and nonnative weed and grass species introduction as a result of heavy recreational use and construction of fire breaks. Dyer's woad (*Isatis tinctoria*), an invasive, nonnative plant that may prevent germination of Siskiyou mariposa lily seedlings, has invaded 75 percent of the known lily habitat on Gunsight-Humbug Ridge, the southernmost California occurrence. Forest Service staff and the Klamath-Siskiyou Wildlands Center cite competition with dyer's woad as a significant and chronic threat to the survival of Siskiyou mariposa lily.

The combination of restricted range, extremely low numbers (five plants) in one of three disjunct populations, poor competitive ability, short seed dispersal distance, slow growth rates, low seed production, apparently poor survival rates in some years, herbivory, habitat disturbance, and competition from nonnative invasive plants threatens the continued existence of this species. The main threat is competition by dyer's woad. However, because efforts are under way to reduce the threat of dyer's woad where it is found and there is no evidence of a decline in *C. persistens* populations where this weed has become most widely distributed, the magnitude of existing threats is moderate. Overall, the threats are nonimment since the threats of competition from nonnative invasive plants has been reduced to localized areas and are not anticipated to overwhelm a large portion of the species' range in the immediate future. The likelihood that a large proportion of the Gunsight-Humbug Ridge range would be affected by disturbance, and therefore invaded by dyer's woad at the same time, is low. Therefore, we have assigned a LPN of 11 to this species.

*Chamaecrista lineata* var. *keyensis* (Big Pine partridge pea)—We continue to find that listing this species is

warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Chamaesyce deltoidea* ssp. *pinetorum* (Pineland sandmat)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Chamaesyce deltoidea* ssp. *serpyllum* (Wedge spurge)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Chorizanthe parryi* var. *fernandina* (San Fernando Valley spineflower)—The following summary is based on information contained in our files and the petition received on December 14, 1999. *Chorizanthe parryi* var. *fernandina* is a low-growing herbaceous annual plant in the buckwheat family. Germination occurs following the onset of late-fall and winter rains and typically represents different cohorts from the seed bank. Flowering occurs in the spring, generally between April and June. The plant currently is known from two disjunct localities: The first is in the southeastern portion of Ventura County on a site within the Upper Las Virgenes Canyon Open Space Preserve, formerly known as Ahmanson Ranch, and the second is in an area of southwestern Los Angeles County known as Newhall Ranch. Investigations of historical locations and seemingly suitable habitat within the range of the species have not revealed any other occurrences.

The threats facing *C. parryi* var. *fernandina* include threatened destruction, modification, or curtailment of its habitat or range (Factor A), inadequacy of existing regulatory mechanisms (Factor D), and other natural or manmade factors (Factor E). The threats to *C. parryi* var. *fernandina* from habitat destruction or modification are lower in magnitude than they were 9 years ago when we originally determined that the species was a candidate for listing. One of the two populations (Upper Las Virgenes Canyon Open Space Preserve) is now in permanent public ownership and is being managed by an agency that is working to conserve the plant; however, the use of adjacent habitat for Hollywood film productions was brought to our attention in 2007, and the potential impacts to *C. parryi* var. *fernandina* are not yet clear. During a site visit to the Preserve in April 2012, we noted an abundance of nonnative species that, if not managed, could degrade the quality of the habitat for *C. parryi* var. *fernandina* over time. We will be working with the landowners to manage the site for the benefit of *C. parryi* var. *fernandina.*

The other population (Newhall Ranch) is under the threat of development. A CCA was being developed with the landowner to address conservation of the plants; however, as of 2014, work on the CCA has been suspended. Until such an agreement is finalized, the threat of development and the potential damage to the Newhall Ranch population still exist, as shown by the destruction of some plants during installation of an agave farm. Furthermore, cattle grazing on Newhall Ranch may be a current threat. Cattle grazing may harm *C. parryi* var. *fernandina* by trampling and soil compaction. Grazing activity could also alter the nutrient (*e.g.,* elevated organic material levels) content of the soils for *C. parryi* var. *fernandina* habitat through fecal inputs, which in turn may favor the growth of other plant species that would otherwise not grow so readily on the mineral-based soils. Over time, changes in species composition may render the sites less favorable for the persistence of *C. parryi* var. *fernandina. Chorizanthe parryi* var. *fernandina* may be threatened by invasive nonnative plants, including grasses, which could potentially displace it from available habitat; compete for light, water, and nutrients; and reduce survival and establishment.

*Chorizanthe parryi* var. *fernandina* is particularly vulnerable to extinction due to its concentration in two isolated areas. The existence of only two areas of occurrence, and a relatively small range, makes the variety highly susceptible to extinction or extirpation from a significant portion of its range due to random events such as fire, drought, and erosion. We retained an LPN of 6 for this species due to high-magnitude, nonimminent threats.

*Cirsium wrightii* (Wright's marsh thistle)—The following summary is based on information from the 12-month warranted-but-precluded finding published November 4, 2010 (75 FR 67925), as well as any new information gathered since then. Wright's marsh thistle is a flowering plant in the sunflower family. It is prickly with short black spines and a 3- to 8-foot (ft) (0.9- to 2.4-meter (m)) single stalk covered with succulent leaves. Flowers are white to pale pink in areas of the Sacramento Mountains, but are vivid pink in all the Pecos Valley locations. There are eight general confirmed locations of Wright's marsh thistle in New Mexico: Santa Rosa, Guadalupe County; Bitter Lake National Wildlife Refuge, Chaves County; Blue Spring, Eddy County; La Luz Canyon, Karr Canyon, Silver Springs, and Tularosa Creek, Otero County; and Alamosa Creek, Socorro County. Wright's marsh thistle has been extirpated from all previously known locations in Arizona, and was misidentified and likely not ever present in Texas. The status of the species in Mexico is uncertain, with few verified collections.

Wright's marsh thistle faces threats primarily from natural and human-caused modifications of its habitat due to ground and surface water depletion, drought, invasion of *Phragmites australis,* and from the inadequacy of existing regulatory mechanisms. The species occupies relatively small areas of seeps, springs, and wetland habitat in an arid region plagued by drought and ongoing and future water withdrawals. The species' highly specific requirements of saturated soils with surface or subsurface water flow make it particularly vulnerable.

Long-term drought, in combination with ground and surface waterwithdrawal, pose a current and future threat to Wright's marsh thistle and its habitat. In addition, we expect that these threats will likely intensify in the foreseeable future. However, the threats are moderate in magnitude because the majority of the threats (habitat loss and degradation due to alteration of the hydrology of its rare wetland habitat), while serious and

occurring rangewide, do not at this time collectively and significantly adversely affect the species at a population level. All of the threats are ongoing and therefore imminent. Thus, we continue to assign an LPN of 8 to Wright's marsh thistle.

*Dalea carthagenensis* ssp. *floridana* (Florida prairie-clover)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Dichanthelium hirstii* (Hirst Brothers' panic grass)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Dichanthelium hirstii* is a perennial grass that produces erect, leafy, flowering stems from May to October. The species occurs in coastal plain intermittent ponds, usually in wet savanna or pine barren habitats, and is known to occur at only three sites in New Jersey, one site in Delaware, and two sites in North Carolina. While all six extant *D. hirstii* populations are located on public land, threats to the species from encroachment of woody and herbaceous vegetation, competition from rhizomatous perennials, fluctuations in hydrology, and threats associated with small population number and size are significant. Given the naturally fluctuating number of plants found at each site, and the isolated nature of the wetlands (limiting dispersal opportunities), even small changes in the species' habitat could result in local extirpation. With so few populations, the loss of any known sites would constitute a significant contraction of the species' range and increase the risk of extinction of the species. Because most of the significant threats to *D. hirstii* affect the species over a period of years and, in some cases, are being managed to some extent, the threats are nonimminent. Based on nonimminent threats of a high magnitude, we retain a LPN of 5 for this species.

*Digitaria pauciflora* (Florida pineland crabgrass)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Eriogonum soredium* (Frisco buckwheat)—The following summary is based on information in our files and the petition we received on July 30, 2007. Frisco buckwheat is a narrow endemic perennial plant restricted to soils derived from Ordovician limestone outcrops. The range of the species is less than 5 sq mi (13 sq km), with four known populations. All four populations occur exclusively on private lands in Beaver County, Utah, and each population occupies a very small area with high densities of plants. Available population estimates are highly variable and inaccurate due to the limited access for surveys associated with private lands.

The primary threat to Frisco buckwheat is habitat destruction from precious metal and gravel mining. Mining for precious metals historically occurred within the vicinity of all four populations. Three of the populations are currently in the immediate vicinity of active limestone quarries. Ongoing mining in the species' habitat has the potential to extirpate one population in the near future and extirpate all populations in the foreseeable future. Ongoing exploration for precious metals and gravel indicate that mining will continue, but will take time for the mining operations to be put into place. This will result in the loss and fragmentation of Frisco buckwheat populations over a longer time scale. Other threats to the species include nonnative species, vulnerability associated with small population size, and climate change. Existing regulatory mechanisms are inadequate to protect the species from these threats. The threats that Frisco buckwheat faces are moderate in magnitude, because while serious and occurring rangewide, the threats do not significantly reduce populations on a short time scale. The threats are imminent, because three of the populations are currently in the immediate vicinity of active limestone quarries. Therefore, we have assigned Frisco buckwheat an LPN of 8.

*Festuca hawaiiensis* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. This species is a cespitose (growing in dense, low tufts) annual found in dry forests on Hawaii Island. *Festuca hawaiiensis* is known from four populations collectively totaling approximately 1,000 individuals in and around the Pohakuloa Training Area. Historically, this species was also found on Hualalai and Puu Huluhulu, but it no longer occurs at these sites. In addition, the historical range of *F. hawaiiensis* may have included Maui.

This species is threatened by pigs (*Sus scrofa*), goats (*Capra hircus*), mouflon (*Ovis musimon*), and feral sheep (*O. aries*) that degrade and destroy habitat; fire; military training activities; and nonnative plants that outcompete and displace it. Feral pigs, goats, mouflon, and feral sheep have been fenced out of a portion of the populations of *F. hawaiiensis* and nonnative plants have been reduced in the fenced area, but the majority of the populations are still affected by threats from ungulates. The threats are imminent because they are not controlled and are ongoing in the remaining, unfenced populations. Firebreaks have been established to protect two populations, but fire is an imminent threat to the remaining populations that have no firebreaks. There are no *ex situ* collections. The threats are of a high magnitude because they could adversely affect the majority of *F. hawaiiensis* populations resulting in direct mortality or reduced reproductive capacity which could bring about extinction on a relatively short time scale. Therefore, we have retained an LPN of 2 for this species.

*Festuca ligulata* (Guadalupe fescue)—The following summary is based on information obtained from the original species petition, received in 1975, and from our files, on-line herbarium databases, and scientific publications. Six small populations of Guadalupe fescue, a member of the Poaceae (grass family), have been documented in mountains of the Chihuahuan desert in Texas and in Coahuila, Mexico. Only two extant populations have been confirmed in the last 5 years: One in the Chisos Mountains, Big Bend National Park (BIBE), Texas, and one in the privately owned *Area de Protección de Flora y Fauna* (APFF, Protected Area for Flora and Fauna) Maderas del Carmen in northern Coahuila. Despite intensive searches, a population known from Guadalupe Mountains National Park, Texas, has not been found since 1952, and is presumed extirpated. In 2009, botanists confirmed Guadalupe fescue at one site in APFF Maderas del Carmen, but could not find the species at the

original site, known as Sierra El Jardín, which was first reported in 1973. Two additional Mexican populations, near Fraile in southern Coahuila, and the Sierra de la Madera in central Coahuila, have not been monitored since 1941 and 1977, respectively. A great amount of potentially suitable habitat in Coahuila and adjacent Mexican States has never been surveyed; due to prevailing security issues in northern Mexico. We do not know if or when these sites can be safely monitored. The BIBE site was monitored in September 2013; at that time the total population was estimated to be less than 200 individual plants.

The potential threats to Guadalupe fescue include changes in the wildfire cycle and vegetation structure, trampling from humans and pack animals, possible grazing, trail runoff, fungal infection of seeds, small sizes and isolation of populations, and limited genetic diversity. A historically unprecedented period of exceptional drought and high temperatures prevailed throughout the species' range from October 2010 until November 2011. The Service and the National Park Service established a candidate conservation agreement (CCA) in 2008 to provide additional protection for the Chisos Mountains population and to promote cooperative conservation efforts with U.S. and Mexican partners. The threats to Guadalupe fescue are of moderate magnitude and are not imminent due to the provisions of the CCA and other conservation efforts that address threats from trampling, grazing, trail runoff, and genetic diversity. Thus, we maintained an LPN of 11 for this species.

*Gardenia remyi* (Nanu)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Gardenia remyi* is a tree found in mesic to wet forests on the Hawaiian Islands of Kauai, Molokai, Maui, and Hawaii. *Gardenia remyi* is known from 19 populations collectively totaling between 85 and 87 individuals. This species is threatened by pigs (*Sus scrofa*), goats (*Capra hircus*), and deer (*Axis axis* and *Odocoileus hemionus*), which degrade and destroy habitat and possibly forage upon the species, and by nonnative plants that outcompete and displace it. *G. remyi* is also threatened by landslides and reduced reproductive vigor on the island of Hawaii. This species is represented in *ex situ* collections. On Kauai, *G. remyi* individuals have been outplanted within ungulate-proof exclosures in two locations. Feral pigs have been fenced out of the west Maui populations of *G. remyi,* and nonnative plants have been reduced in those areas. However, these threats are ongoing in the remaining, unfenced populations, and are therefore imminent. In addition, the threat from goats and deer is ongoing and imminent throughout the range of the species, because no goat or deer control measures have been undertaken for any of the populations of *G. remyi.* All of the threats are of a high magnitude, because habitat destruction, predation, and landslides could significantly affect the entire species, resulting in direct mortality or reduced reproductive capacity, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Joinvillea ascendens* ssp. *ascendens* (Ohe)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Joinvillea ascendens* ssp. *ascendens* is an erect herb found in wet to mesic *Metrosideros polymorpha-Acacia koa* (ohia-koa) lowland and montane forests on the Hawaiian Islands of Kauai, Oahu, Molokai, Maui, and Hawaii. This subspecies is known from 44 widely scattered populations collectively totaling approximately 200 individuals. Many of the populations, which are widely separated, include only one or two individuals. This subspecies is threatened by destruction or modification of habitat by pigs (*Sus scrofa*), goats (*Capra hircus*), and deer (*Axis axis* and *Odocoileus hemionus*), and by nonnative plants that outcompete and displace native plants. Herbivory by pigs, goats, deer, and rats (*Rattus exulans, R. norvegicus,* and *R. rattus*) is a likely threat to this species. Landslides are a potential threat to populations on Kauai and Molokai. Seedlings have rarely been observed in the wild. Seeds germinate in cultivation, but most die soon thereafter. It is uncertain if the apparent low seedling recruitment is typical of this subspecies, or if it is related to habitat disturbance. Feral pigs have been fenced out of a few of the populations of this subspecies, and nonnative plants have been reduced in those populations that are fenced. However, these threats are not controlled and are ongoing in the remaining, unfenced populations. This species is represented in *ex situ* collections. The threats are imminent because they are ongoing and are of high magnitude because habitat degradation, nonnative plants, and predation result in mortality and may severely affect the reproductive capacity of the majority of populations of this species, leading to a relatively high probability of extinction. Therefore, we have retained an LPN of 3 for this subspecies.

*Kadua* (=*Hedyotis) fluviatilis* (Kamapuaa)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Kadua fluviatilis* (formerly *Hedyotis fluviatilis*) is a scandent (climbing) shrub found in mixed shrubland to wet lowland forests on the islands of Oahu and Kauai, Hawaii. This species is known from 11 populations collectively totaling between 400 and 900 individuals. *Kadua fluviatilis* is threatened by pigs (*Sus scrofa*) and goats (*Capra hircus*) that degrade and destroy habitat, and by nonnative plants that outcompete and displace it. Landslides and hurricanes are a potential threat to populations on Kauai. Herbivory by pigs and goats is a likely threat. This species is not represented in an *ex situ* collection. Threats to this species are imminent because they are ongoing, and are of high magnitude, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Lepidium ostleri* (Ostler's peppergrass)—The following summary is based on information in our files and the petition we received on July 30, 2007. Ostler's peppergrass is a long-lived perennial herb in the mustard family that grows in dense, cushion-like tufts. Ostler's peppergrass is a narrow endemic restricted to soils derived from Ordovician limestone outcrops. The range of the species is less than 5 sq mi (13 sq km), with only four known populations. All four populations occur exclusively on private lands in the southern San Francisco Mountains of Beaver County, Utah. Available population estimates are highly variable and inaccurate due largely to the limited access for surveys associated with private lands.

The primary threat to Ostler's peppergrass is habitat destruction from precious metal and gravel mining. Mining for precious metals historically occurred within the vicinity of all four populations. Three of the populations are currently in the immediate vicinity of active limestone quarries, but mining is only currently occurring in the area of one population. Ongoing mining in the species' habitat has the potential to extirpate one population in the near future. Ongoing exploration for precious metals and gravel indicate that mining will continue, but will take time for the mining operations to be put into place. This will result in the loss and fragmentation of Ostler's peppergrass populations over a longer time scale.

Other threats to the species include nonnative species, vulnerability associated with small population size, climate change, and the overall inadequacy of existing regulatory mechanisms. The threats that Ostler's peppergrass faces are moderate in magnitude, because, while serious and occurring rangewide, the threats do not collectively result in significant population declines on a short time scale. The threats are imminent because the species is currently facing them across its entire range. Therefore, we have assigned Ostler's peppergrass an LPN of 8.

*Linum arenicola* (Sand flax)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Myrsine fosbergii* (Kolea)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Myrsine fosbergii* is a branched shrub or small tree found in lowland mesic and wet forests, on watercourses or stream banks, on the islands of Kauai and Oahu, Hawaii. This species is currently known from 14 populations collectively totaling a little more than 100 individuals. *Myrsine fosbergii* is threatened by feral pigs (*Sus scrofa*) and goats (*Capra hircus*) that degrade and destroy habitat and may forage upon the plant, and by nonnative plants that compete for light and nutrients. This species is represented in an *ex situ* collection. Although there are plans to fence and remove ungulates from the Helemano area of Oahu, which may benefit this species, no conservation measures have yet been taken to protect this species from nonnative herbivores. Feral pigs and goats are found throughout the known range of *M. fosbergii,* as are nonnative plants. The threats from feral pigs, goats, and nonnative plants are imminent and of high magnitude because because they are ongoing and they pose a severe threat throughout the limited range of this species leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Nothocestrum latifolium* ('Aiea)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Nothocestrum latifolium* is a small tree found in dry to mesic forests on the islands of Kauai, Oahu, Maui, Molokai, and Lanai, Hawaii. *N. latifolium* is known from 17 declining populations collectively totaling fewer than 1,200 individuals. This species is threatened by feral pigs (*Sus scrofa*), goats (*Capra hircus*), and deer (*Axis axis* and *Odocoileus hemionus*) that degrade and destroy habitat and may forage upon it; by nonnative plants that compete for light and nutrients; and by decreased reproductive viability through the loss of pollinators. This species is represented in an *ex situ* collection. Ungulates have been fenced out of four areas where *N. latifolium* currently occurs, hundreds of *N. latifolium* individuals have been outplanted in fenced areas, and nonnative plants have been reduced in some populations that are fenced. However, these ongoing conservation efforts for this species benefit only a few of the known populations. The threats are not controlled and are ongoing in the remaining unfenced populations. In addition, little natural regeneration has been observed in this species. The threats are imminent because they are ongoing and of high magnitude, since they are severe enough to affect the continued existence of the species, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Ochrosia haleakalae* (Holei)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ochrosia haleakalae* is a tree found in dry to mesic forests, often on lava, on the islands of Hawaii and Maui, Hawaii. This species is currently known from 8 populations collectively totaling between 64 and 76 individuals. *Ochrosia haleakalae* is threatened by fire; by feral pigs (*Sus scrofa*), goats (*Capra hircus*), and cattle (*Bos taurus*) that degrade and destroy habitat and may directly forage upon it; and, by nonnative plants that compete for light and nutrients. This species is represented in *ex situ* collections. Feral pigs, goats, and cattle have been fenced out of one wild and one outplanted population on private lands on the island of Maui and one outplanted population in Hawaii Volcanoes National Park on the island of Hawaii. Nonnative plants have been reduced in the fenced areas. The threat from fire is of a high magnitude and imminent because no control measures have been undertaken to address this threat that could adversely affect most *O. haleakalae* population sites. The threats from feral pigs, goats, and cattle are ongoing to the unfenced populations of *O. haleakalae.* The threat from nonnative plants is imminent and of a high magnitude to the wild populations on both islands, because it is ongoing and adversely affects the survival and reproductive capacity of the majority of the individuals of this species, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Pinus albicaulis* (Whitebark pine)—The following summary is based on information in our files and in the petition received on December 9, 2008. *Pinus albicaulis* is a hardy conifer found at alpine tree line and subalpine elevations in Washington, Oregon, Nevada, California, Idaho, Montana, and Wyoming, and in British Columbia and Alberta, Canada. In the United States, approximately 96 percent of land where the species occurs is federally owned or managed, primarily by the U.S. Forest Service. *Pinus albicaulis* is a slow-growing, long-lived tree that often lives for 500 and sometimes more than 1,000 years. It is considered a keystone, or foundation, species in western North America, where it increases biodiversity and contributes to critical ecosystem functions.

The primary threat to the species is from disease in the form of the nonnative white pine blister rust and its interaction with other threats. *Pinus albicaulis* also is currently experiencing significant mortality from predation by the native mountain pine beetle. We also anticipate that continuing environmental effects resulting from climate change will result in direct habitat loss for *P. albicaulis.* Models predict that suitable habitat for *P. albicaulis* will decline precipitously within the next 100 years. Past and ongoing fire suppression is also negatively affecting populations of *P. albicaulis* through direct habitat loss. Additionally, environmental changes resulting from changing climatic conditions are acting alone and in combination with the effects of fire suppression to increase the frequency and severity of wildfires. Lastly, the existing regulatory mechanisms are inadequate to address the threats presented above. The threats that face *P. albicaulis* are high in magnitude, because the major threats occur throughout all of the species' range and are having a major population-level

effect on the species. The threats are imminent, because rangewide disease, predation, fire and fire suppression, and environmental effects of climate change are affecting *P. albicaulis* currently and are expected to continue and likely intensify in the foreseeable future. Thus, we have assigned *P. albicaulis* an LPN of 2.

*Platanthera integrilabia* (Correll) Leur (White fringeless orchid)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing rule, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Pseudognaphalium* (= *Gnaphalium*) *sandwicensium* var. *molokaiense* (Enaena)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Pseudognaphalium sandwicensium* var. *molokaiense* is a perennial herb found in strand vegetation in dry consolidated dunes on the islands of Molokai and Maui, Hawaii. Historically, this variety was also found on Oahu and Lanai. This variety is known from five populations collectively totaling approximately 200 to 20,000 individuals (depending upon rainfall) in the Moomomi area on the island of Molokai, and from 2 populations of a few individuals at Waiehu dunes and at Puu Kahulianapa on west Maui. *Pseudognaphalium s.* var. *molokaiense* is threatened by feral goats (*Capra hircus*) and axis deer (*Axis axis*) that degrade and destroy habitat and possibly browse upon it, and by nonnative plants that compete for light and nutrients. Potential threats also include collection for cultural use, and off-road vehicles that directly damage plants and degrade habitat. Weed control is conducted for one population on Molokai; however, no conservation efforts have been initiated to date for the other populations on Molokai or for the individuals on Maui. This species is represented in an *ex situ* collection. The ongoing threats from feral goats, axis deer, nonnative plants, collection, and off-road vehicles are of a high magnitude, because no control measures have been undertaken for the Maui population or for the four of the five Molokai populations, and the threats result in direct mortality or significantly reduce reproductive capacity for the majority of the populations, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 3 for this plant variety.

*Ranunculus hawaiensis* (Makou)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ranunculus hawaiensis* is an erect or ascending perennial herb found in mesic to wet forests dominated by *Metrosideros polymorpha* (ohia) and *Acacia koa* (koa) with scree substrate (loose stones or rocky debris on a slope) on the Hawaiian Islands of Maui and Hawaii. This species is currently known from 6 populations collectively totaling 14 individuals on the island of Hawaii. On Maui, it was historically known from an area in east Maui, but individuals have not been seen at this location since 1995. *Ranunculus hawaiensis* is threatened by direct predation by feral pigs (*Sus scrofa*), goats (*Capra hircus*), cattle (*Bos taurus*), mouflon (*Ovis musimon*), feral sheep (*O. aries*), and slugs (*Limax maximus, Milax gagates,* and *Vaginulus plebeius*); by degradation and destruction of habitat by feral ungulates; and by nonnative plants that compete for light and nutrients. This species is represented in *ex situ* collections, and three populations have been outplanted into protected exclosures; however, feral ungulates and nonnative plants are not controlled in the remaining, unfenced populations. In addition, the threat from introduced slugs is of a high magnitude because slugs occur throughout the limited range of this species and no effective measures have been undertaken to control them or prevent them from predating on the plants which can result in death or reduction in reproductive capacity. Overall, the threats to the species from pigs, goats, cattle, mouflon, feral sheep, slugs, and nonnative plants are imminent and of high magnitude. Therefore, we have retained an LPN of 2 for this species.

*Ranunculus mauiensis* (Makou)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Ranunculus mauiensis* is an erect to weakly ascending perennial herb found in open sites in mesic to wet forests and along streams on the islands of Maui, Kauai, and Molokai, Hawaii. This species is currently known from 14 populations collectively totaling 198 individuals. *Ranunculus mauiensis* is threatened by direct predation by feral pigs (*Sus scrofa*), goats (*Capra hircus*), mule deer (*Odocoileus hemionus*), axis deer (*Axis axis*), and slugs (*Limax maximus, Milax gagates,* and *Vaginulus plebeius*); by habitat degradation and destruction by feral ungulates; and by nonnative plants that compete for light and nutrients. This species is represented in an *ex situ* collection. Feral pigs have been fenced out of one Maui population of *R. mauiensis,* and nonnative plants have been reduced in the fenced area. One individual occurs in the Kamakou Preserve on Molokai, managed by The Nature Conservancy. However, ongoing conservation efforts benefit only two populations. The threats are imminent and of high magnitude, since they are severe enough to affect the continued existence of the species, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Rorippa subumbellata* (Tahoe yellow cress)—The following summary is based on information contained in our files and the petition received on December 27, 2000. *Rorippa subumbellata* is a small, branching perennial herb known only from the shores of Lake Tahoe in California and Nevada.

Data collected over the last 25 years generally indicate that species occurrence fluctuates yearly as a function of both lake level and the amount of exposed habitat. Records kept since 1900 show a preponderance of years with high lake levels that would isolate and reduce *R. subumbellata* occurrences at higher beach elevations. From the standpoint of the species, less favorable peak years have occurred almost twice as often as more favorable low-level years. Annual surveys are conducted to determine population numbers, site occupancy, and general disturbance regime. At least within a certain range, the data clearly show that more individuals are present when lake levels are low and fewer when lake levels are high.

Many *Rorippa subumbellata* sites are intensively used for commercial and public purposes, and are subject to various activities such as erosion control, marina developments, pier construction, and recreation. The U.S. Forest Service, California Tahoe Conservancy, and California Department of Parks and Recreation have management programs for *R. subumbellata* that include monitoring, fenced enclosures, and transplanting efforts when funds and staff are available. Public agencies (including the Service), private landowners, and environmental groups collaborated to develop a Conservation Strategy coupled with a Memorandum of

Understanding–Conservation Agreement. The Conservation Strategy, completed in 2003, contains goals and objectives for recovery and survival and a research and monitoring agenda, and serves as the foundation for an adaptive management program. Because of the continued commitments to conservation demonstrated by regulatory and land management agencies participating in the conservation strategy, the threats to *R. subumbellata* from various land uses have been reduced to a moderate magnitude. In high lake level years such as 2011 and 2013, however, recreational use is concentrated within *R. subumbellata* habitat, and we consider this threat in particular to be ongoing and imminent. Therefore, we are maintaining an LPN of 8 for this species.

*Schiedea pubescens* (Maolioli)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Schiedea pubescens* is a reclining or weakly climbing vine found in diverse mesic to wet forests on the Hawaiian Islands of Maui, Molokai, and Hawaii. It is presumed extirpated from Lanai. Currently, this species is known from 8 populations collectively totaling between 30 and 32 individuals on Maui, from 4 populations collectively totaling between 21 and 22 individuals on Molokai, and from 1 population of 4 to 6 individuals on the island of Hawaii. *Schiedea pubescens* is threatened by feral pigs (*Sus scrofa*) and goats (*Capra hircus*) that consume it and degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. Feral ungulates have been fenced out of the population of *S. pubescens* on the island of Hawaii. Feral goats have been fenced out of a few of the west Maui populations of *S. pubescens.* Nonnative plants have been reduced in the populations that are fenced on Maui. However, the threats are not controlled and are ongoing in the remaining unfenced populations on Maui and the four populations on Molokai. Additional fenced areas are planned for the Hawaii Island population at Pohakuloa Training Area. Nonnative feral ungulates and nonnative plants will be controlled within these fenced areas. Fire is a potential threat to the Hawaii Island population. This species is not represented in an *ex situ* collection. Due to the extremely low number of individuals of this species, the ongoing threats from goats and nonnative plants are imminent and of high magnitude. These threats cause mortality and reduced reproductive capacity for the majority of the populations, leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Sicyos macrophyllus* (ʻAnunu)—We continue to find that listing this species is warranted but precluded as of the date of publication of this notice. However, we are working on a proposed listing determination that we expect to publish prior to making the next annual resubmitted petition 12-month finding. In the course of preparing the proposed listing determination, we are continuing to monitor new information about this species' status so that we can make prompt use of our authority under section 4(b)(7) in the case of an emergency posing a significant risk to the species.

*Solanum conocarpum* (marron bacora)—The following summary is based on information in our files and in the petition we received on November 21, 1996. *Solanum conocarpum* is a dry-forest shrub in the island of St. John, U.S. Virgin Islands. Its current distribution includes eight localities in the island of St. John, each ranging from 1 to 144 individuals. The species has been reported to occur on dry, poor soils. It can be locally abundant in exposed topography on sites disturbed by erosion, areas that have received moderate grazing, and around ridgelines as an understory component in diverse woodland communities. A habitat suitability model suggests that the vast majority of *Solanum conocarpum* habitat is found in the lower elevation coastal scrub forest. Efforts have been conducted to propagate the species to enhance natural populations, and planting of seedlings has been conducted in the island of St. John.

*Solanum conocarpum* is threatened by the lack of natural recruitment, absence of dispersers, fragmented distribution, lack of genetic variation, climate change, and habitat destruction or modification by exotic mammal species. These threats are evidenced by the reduced number of individuals, low number of populations, and lack of connectivity between populations. Overall, the threats are of high magnitude because they are leading to populations declines for a species that already has low population numbers and fragmented distribution; the threats are also ongoing and therefore imminent. Therefore, we assigned a LPN of 2 to *Solanum conocarpum.*

*Solanum nelsonii* (popolo)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Solanum nelsonii* is a sprawling or trailing shrub found in coral rubble or sand in coastal sites. This species is known from populations on Molokai (approximately 300 individuals), the island of Hawaii (5 individuals), and the northwestern Hawaiian Islands (NWHI), Hawaii. The current populations in the NWHI are found on Kure (unknown number of individuals), Midway (approximately 260 individuals), Laysan (approximately 490 individuals), Pearl and Hermes (unknown number of individuals), and Nihoa (8,000 to 15,000 individuals). On Molokai, *S. nelsonii* is moderately threatened by ungulates which degrade and destroy habitat and which may eat individuals. On Molokai and the NWHI, this species is exposed to threats from nonnative plants that outcompete and displace it. *Solanum nelsonii* is exposed to threats by herbivory by a nonnative grasshopper (*Schistocera nitens*) in the NWHI. On Kure, Midway, Laysan, and Pearl and Hermes in the NWHI, tsunamis are also a potential threat to *S. nelsonii.* This species is represented in *ex situ* collections. Ungulate exclusion fences, routine fence monitoring and maintenance, and weed control protect the population of *S. nelsonii* on Molokai. Limited weed control is conducted in the NWHI. However, the threats are ongoing and are not being controlled in the majority of sites, they are therefore imminent. These threats are of moderate magnitude because of the relatively large number of plants, and the fact that this species is found on more than one island. Therefore, we have retained an LPN of 8 for this species.

*Trifolium friscanum* (Frisco clover)—The following summary is based on information in our files and the petition we received on July 30, 2007. Frisco clover is a narrow endemic perennial herb found only in Utah, with five known populations restricted to sparsely vegetated, pinion-juniper sagebrush communities and shallow, gravel soils derived from volcanic gravels, Ordovician limestone, and dolomite outcrops. The majority (68 percent) of Frisco clover plants occur on private lands, with the remaining plants found on Federal and State lands.

On the private and State lands, the most significant threat to Frisco clover is habitat destruction from mining for precious metals and gravel. Active mining claims, recent prospecting, and an increasing demand for precious metals and gravel indicate that mining in Frisco clover habitats will increase in the foreseeable future, likely resulting in the loss of large numbers of plants. Other threats to Frisco clover include nonnative, invasive species;

vulnerability associated with small population size; and drought associated with climate change. Existing regulatory mechanisms are inadequate to protect the species from these threats. The threats to Frisco clover are moderate in magnitude because, while serious and occurring rangewide, they are not acting independently or cumulatively to have a highly significant negative impact on its survival or reproductive capacity. For example, although mining for precious metals and gravel historically occurred throughout Frisco clover's range, and mining operations may eventually expand into occupied habitats, there are no active mines within the immediate vicinity of any known population. The threats are imminent because the species is currently facing them across its entire range. Therefore, we have assigned Frisco clover an LPN of 8.

*Ferns and Allies*

*Cyclosorus boydiae* (no common name)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Cyclosorus boydiae* is a small- to medium-sized fern found in mesic to wet forests along stream banks on the Hawaiian Islands of Oahu and Maui. It has been extirpated from the island of Hawaii. Currently, *C. boydiae* is known from seven populations collectively totaling approximately 400 individuals. This species is threatened by feral pigs that degrade and destroy habitat and may eat this plant, and by nonnative plants that compete for light and nutrients. Feral pigs have been fenced out of the largest population on Maui, and nonnative plants have been reduced in the fenced area. No conservation efforts are under way to alleviate threats to the other two populations on Maui, or the two populations on Oahu. This species is represented in an *ex situ* collection. The threats are imminent because they are ongoing, and of moderate magnitude because pigs no longer threaten the largest population and nonnative plants have been reduced. Therefore, we have retained an LPN of 8 for this species.

*Huperzia stemmermanniae* (Waewaeiole)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Huperzia stemmermanniae* is an epiphytic, pendant clubmoss found in mesic-to-wet *Metrosideros polymorpha-Acacia koa* (ohia-koa) forests on the Hawaiian Islands of Maui and Hawaii. Only 3 populations are known, collectively totaling approximately 20 individuals. The Maui population has not been observed since 1995. *Huperzia stemmermanniae* is threatened by feral pigs (*Sus scrofa*), goats (*Capra hircus*), cattle (*Bos taurus*), and axis deer (*Axis axis*) that degrade and destroy habitat, and by nonnative plants that compete for light, space, and nutrients. *Huperzia stemmermanniae* is also threatened by randomly occurring natural events due to its small population size. One individual at Waikamoi Preserve may benefit from fencing for axis deer and pigs. This species is represented in *ex situ* collections. The threats from pigs, goats, cattle, axis deer, and nonnative plants are imminent and of a high magnitude because they are sufficiently severe to adversely affect the species throughout its limited range, resulting in direct mortality or significantly reducing reproductive capacity and leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 2 for this species.

*Microlepia strigosa* var. *mauiensis* (Palapalai)—The following summary is based on information contained in our files. No new information was provided in the petition we received on May 11, 2004. *Microlepia strigosa* var. *mauiensis* is a terrestrial fern found in mesic-to-wet forests. It is currently found on the Hawaiian Islands of Maui, Oahu, and Hawaii in 9 known populations collectively totaling at least 50 individuals. *M. s.* var. *mauiensis* is threatened by feral pigs (*Sus scrofa*) that degrade and destroy habitat, and by nonnative plants that compete for light and nutrients. Pigs have been fenced out of some areas on east and west Maui, Oahu, and on Hawaii, where *M. s.* var. *mauiensis* currently occurs and nonnative plants have been reduced in the fenced areas. However, the threats are not controlled and are ongoing in the remaining unfenced populations on Maui, Oahu, and Hawaii. Therefore, the threats from feral pigs and nonnative plants are imminent. The threats are of a high magnitude because they are sufficiently severe to adversely affect the species throughout its range, resulting in direct mortality or significantly reducing reproductive capacity and leading to a relatively high likelihood of extinction. Therefore, we have retained an LPN of 3 for this plant variety.

**Petitions To Reclassify Species Already Listed**

We previously made warranted-but-precluded findings on five petitions seeking to reclassify threatened species to endangered status. The taxa involved in the reclassification petitions are three populations of the grizzly bear (*Ursus arctos horribilis*), delta smelt (*Hypomesus transpacificus*), and *Sclerocactus brevispinus* (Pariette cactus). Because these species are already listed under the ESA, they are not candidates for listing and are not included in Table 1. However, this notice and associated species assessment forms or 5-year review documents also constitute the findings for the resubmitted petitions to reclassify these species. Our updated assessments for these species are provided below. We find that reclassification to endangered status for one grizzly bear ecosystem population, delta smelt, and *Sclerocactus brevispinus* are all currently warranted but precluded by work identified above (see Findings for Petitioned Candidate Species). We find that uplisting the Selkirk ecosystem population and the Cabinet-Yaak ecosystem population of grizzly bear is no longer warranted; the species remains listed as threatened. One of the primary reasons that the work identified above is considered to have higher priority is that the grizzly bear population, delta smelt, and *Sclerocactus brevispinus* are currently listed as threatened, and therefore already receive certain protections under the ESA. We promulgated regulations extending take prohibitions for wildlife and plants under section 9 to threatened species (50 CFR 17.31 and 50 CFR 17.71, respectively). Prohibited actions under section 9 for wildlife include, but are not limited to, take (*i.e.,* to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such activity). For plants, prohibited actions under section 9 include removing or reducing to possession any listed plant from an area under Federal jurisdiction (50 CFR 17.61). Other protections that apply to these threatened species even before we complete proposed and final reclassification rules include those under section 7(a)(2) of the ESA, whereby Federal agencies must insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species.

Grizzly bear (*Ursus arctos horribilis*)—North Cascades ecosystem population (Region 6)—Since 1990, we have received and reviewed five petitions requesting a change in status for the North Cascades grizzly bear population (55 FR 32103, August 7, 1990; 56 FR 33892, July 24, 1991; 57 FR 14372, April 20, 1992; 58 FR 43856, August 18, 1993; 63 FR 30453, June 4, 1998). In response to these petitions, we

determined that grizzly bears in the North Cascade ecosystem warrant a change to endangered status. In 2014, we continue to find that reclassifying this population as endangered is warranted but precluded and we continue to assign a LPN of 3 for the uplisting of the North Cascades population based on high magnitude threats that are ongoing, thus imminent. However, higher priority listing actions, including court-approved settlements, court-ordered and statutory deadlines for petition findings and listing determinations, emergency listing determinations, and responses to litigation, continue to preclude reclassifying grizzly bears in this ecosystem. Furthermore, proposed rules to reclassify threatened species to endangered are a lower priority than listing currently unprotected species (*i.e.,* candidate species), since species currently listed as threatened are already afforded the protection of the ESA and the implementing regulations. We continue to monitor this population and will change its status or implement an emergency uplisting if necessary.

Grizzly bear (*Ursus arctos horribilis*)—Cabinet-Yaak ecosystem population (Region 6)—Since 1992, we have received and reviewed six petitions requesting a change in status for the Cabinet-Yaak grizzly bear population (57 FR 14372, April 20, 1992; 58 FR 8250, February 12, 1993; 58 FR 43856, August 18, 1993; 58 FR 43856, August 18, 1993; 63 FR 30453, June 4, 1998; 64 FR 26725, May 17, 1999). In response to these petitions, we previously determined that grizzly bears in the Cabinet-Yaak ecosystem warranted a change to endangered status. However, for several years, this population's status has been improving. The population trend has now changed from declining to stable. The U.S. Forest Service has established regulatory mechanisms for motorized access management and attractant storage, and researchers have documented some movement between the Cabinet-Yaak and other populations in Canada. Together, these improvements have reduced the threats to this population. Until the Record of Decision for motorized access management is more fully implemented and we have several more years of a positive population trend, we remain cautious in our interpretation. We conclude that the Cabinet-Yaak ecosystem population continues to face several threats, and retain this populations's threatened status, but we no longer find that the population is warranted for uplisting to endangered status (*i.e.,* ''on the brink of extinction''). This constitutes our not-warranted finding on the six uplisting petitions we received.

Grizzly bear (*Ursus arctos horribilis*)—Selkirk ecosystem population (Region 6)—Since 1992, we have received and reviewed four petitions requesting a change in status for individual grizzly bear populations (57 FR 14372, April 20, 1992; 58 FR 8250, February 12, 1993; 58 FR 43856, August 18, 1993; 64 FR 26725, May 17, 1999). In response to these petitions, we previously determined that grizzly bears within the Selkirk ecosystem warranted a change to endangered status but reclassification was precluded by higher priority listing actions. However, improvements to habitat and the institutionalization of those improvements in National Forest Land Management Plans, as well as new information about population size have significantly reduced threats to this population from habitat destruction, and improved the adequacy of regulatory mechanisms. Population estimates indicate that the population is approaching recovery goals of 90 bears, and levels of human-caused mortality have been low in recent years. Additionally, food storage orders have been implemented and some movement between the Selkirk Mountains and other populations in Canada has been documented. However, until there are significant improvements to regulatory mechanisms in Canada, full implementation of motorized access management by the U.S. Forest Service, and improved population connectivity, we remain cautious in our interpretation. We conclude that the Selkirk ecosystem population continues to face several threats and will retain this populations's threatened status, but we no longer find that the population is warranted for uplisting to endangered status (*i.e.,* ''on the brink of extinction''). This constitutes our not-warranted finding on the four uplisting petitions we received.

Delta smelt (*Hypomesus transpacificus*) (Region 8) (see 75 FR 17667, April 7, 2010, for additional information on why reclassification to endangered is warranted but precluded)—The following summary is based on information contained in our files. In April, 2010 we completed a 12-month finding for delta smelt in which we determined that a change in status from threatened to endangered was warranted, although precluded by other high priority listings. The primary rationale for reclassifying delta smelt from threatened to endangered was the significant declines in delta smelt abundance that have occurred since 2001. Delta smelt abundance, as indicated by the Fall Mid-Water Trawl survey, was exceptionally low between 2004 and 2010, increased during the wet year of 2011, and decreased again to a very a low level in 2012.

The primary threats to the delta smelt are direct entrainments by State and Federal water export facilities, summer and fall increases in salinity and water clarity resulting from decreases in freshwater flow into the estuary, and effects from introduced species. Ammonia in the form of ammonium may also be a significant threat to the survival of the delta smelt. Additional potential threats are predation by striped and largemouth bass and inland silversides, entrainment into power plants, contaminants, and small population size. Existing regulatory mechanisms have not proven adequate to halt the decline of delta smelt since the time of listing as a threatened species.

As a result of our analysis of the best available scientific and commercial data, we have retained the recommendation of uplisting the delta smelt to an endangered species with a LPN of 2, based on high magnitude and imminent threats. The magnitude of the threats is high, because the threats occur rangewide and result in mortality at a population level, or significantly reduce the reproductive capacity of the species. Threats are imminent because they are ongoing and, in some cases (*e.g.,* nonnative species), considered irreversible.

*Sclerocactus brevispinus* (Pariette cactus) (Region 6) (see 72 FR 53211, September 18, 2007, and the species assessment form (see **ADDRESSES**) for additional information on why reclassification to endangered is warranted but precluded)—*Sclerocactus brevispinus* is restricted to clay badlands of the Uinta geologic formation in the Uinta Basin of northeastern Utah. The species is restricted to one population with an overall range of approximately 16 mi by 5 mi in extent. The species' entire population is within a developed and expanding oil and gas field. The location of the species' habitat exposes it to destruction from road, pipeline, and well-site construction in connection with oil and gas development. The species may be collected as a specimen plant for horticultural use. Recreational off-road vehicle use and livestock trampling are additional potential threats. The species is currently federally listed as threatened by its previous inclusion within the species *Sclerocactus glaucus.* The threats are of a high magnitude because any one of the

threats has the potential to severely affect the survival of this species, a narrow endemic with a highly limited range and distribution. Threats are ongoing and, therefore, are imminent. Thus, we assigned an LPN of 2 to this species for uplisting.

**Current Notice of Review**

We gather data on plants and animals native to the United States that appear to merit consideration for addition to the Lists of Endangered and Threatened Wildlife and Plants (Lists). This notice identifies those species that we currently regard as candidates for addition to the Lists. These candidates include species and subspecies of fish, wildlife, or plants, and DPSs of vertebrate animals. This compilation relies on information from status surveys conducted for candidate assessment and on information from State Natural Heritage Programs, other State and Federal agencies, knowledgeable scientists, public and private natural resource interests, and comments received in response to previous notices of review.

Tables 1 and 2 list animals arranged alphabetically by common names under the major group headings, and list plants alphabetically by names of genera, species, and relevant subspecies and varieties. Animals are grouped by class or order. Plants are subdivided into two groups: (1) Flowering plants and (2) ferns and their allies. Useful synonyms and subgeneric scientific names appear in parentheses with the synonyms preceded by an ''equals'' sign. Several species that have not yet been formally described in the scientific literature are included; such species are identified by a generic or specific name (in italics), followed by ''sp.'' or ''ssp.'' We incorporate standardized common names in these notices as they become available. We sort plants by scientific name due to the inconsistencies in common names, the inclusion of vernacular and composite subspecific names, and the fact that many plants still lack a standardized common name.

Table 1 lists all candidate species, plus species currently proposed for listing under the ESA. We emphasize that in this notice we are not proposing to list any of the candidate species; rather, we will develop and publish proposed listing rules for these species in the future. We encourage State agencies, other Federal agencies, and other parties to give consideration to these species in environmental planning.

In Table 1, the ''category'' column on the left side of the table identifies the status of each species according to the following codes:

PE—Species proposed for listing as endangered. Proposed species are those species for which we have published a proposed rule to list as endangered or threatened in the **Federal Register**. This category does not include species for which we have withdrawn or finalized the proposed rule.

PT—Species proposed for listing as threatened.

PSAT—Species proposed for listing as threatened due to similarity of appearance.

C—Candidates: Species for which we have on file sufficient information on biological vulnerability and threats to support proposals to list them as endangered or threatened. Issuance of proposed rules for these species is precluded at present by other higher priority listing actions. This category includes species for which we made a 12-month warranted-but-precluded finding on a petition to list. We made new findings on all petitions for which we previously made ''warranted-but-precluded'' findings. We identify the species for which we made a continued warranted-but-precluded finding on a resubmitted petition by the code ''C*'' in the category column (see the *Findings for Petitioned Candidate Species* section for additional information).

The ''Priority'' column indicates the LPN for each candidate species, which we use to determine the most appropriate use of our available resources. The lowest numbers have the highest priority. We assign LPNs based on the immediacy and magnitude of threats, as well as on taxonomic status. We published a complete description of our listing priority system in the **Federal Register** (48 FR 43098, September 21, 1983).

The third column, ''Lead Region,'' identifies the Regional Office to which you should direct information, comments, or questions (see addresses under Request for Information at the end of the **SUPPLEMENTARY INFORMATION** section).

Following the scientific name (fourth column) and the family designation (fifth column) is the common name (sixth column). The seventh column provides the known historical range for the species or vertebrate population (for vertebrate populations, this is the historical range for the entire species or subspecies and not just the historical range for the distinct population segment), indicated by postal code abbreviations for States and U.S. territories. Many species no longer occur in all of the areas listed.

Species in Table 2 of this notice are those we included either as proposed species or as candidates in the previous CNOR (published November 22, 2013, at 78 FR 70104) that are no longer proposed species or candidates for listing. Since November 22, 2013, we listed 33 species, withdrew 3 species from proposed status, and removed 13 species from the candidate list. The first column indicates the present status of each species, using the following codes (not all of these codes may have been used in this CNOR):

E—Species we listed as endangered.

T—Species we listed as threatened.

Rc—Species we removed from the candidate list because currently available information does not support a proposed listing.

Rp—Species we removed from because we have withdrawn the proposed listing.

The second column indicates why the species is no longer a candidate or proposed species using the following codes (not all of these codes may have been used in this CNOR):

A—Species that are more abundant or widespread than previously believed and species that are not subject to the degree of threats sufficient that the species is a candidate for listing (for reasons other than that conservation efforts have removed or reduced the threats to the species).

F—Species whose range no longer includes a U.S. territory.

I—Species for which we have insufficient information on biological vulnerability and threats to support issuance of a proposed rule to list.

L—Species we added to the Lists of Endangered and Threatened Wildlife and Plants.

M—Species we mistakenly included as candidates or proposed species in the last notice of review.

N—Species that are not listable entities based on the ESA's definition of ''species'' and current taxonomic understanding.

U—Species that are not subject to the degree of threats sufficient to warrant issuance of a proposed listing and therefore are not candidates for listing, due, in part or totally, to conservation efforts that remove or reduce the threats to the species.

X—Species we believe to be extinct.

The columns describing lead region, scientific name, family, common name, and historical range include information as previously described for Table 1.

**Request for Information**

We request you submit any further information on the species named in this notice as soon as possible or whenever it becomes available. We are particularly interested in any information:

(1) Indicating that we should add a species to the list of candidate species;

(2) Indicating that we should remove a species from candidate status;

(3) Recommending areas that we should designate as critical habitat for a species, or indicating that designation of critical habitat would not be prudent for a species;

(4) Documenting threats to any of the included species;

(5) Describing the immediacy or magnitude of threats facing candidate species;

(6) Pointing out taxonomic or nomenclature changes for any of the species;

(7) Suggesting appropriate common names; and

(8) Noting any mistakes, such as errors in the indicated historical ranges.

Submit information, materials, or comments regarding a particular species to the Regional Director of the Region identified as having the lead responsibility for that species. The regional addresses follow:

Region 1. Hawaii, Idaho, Oregon, Washington, American Samoa, Guam, and Commonwealth of the Northern Mariana Islands. Regional Director (TE), U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, OR 97232–4181 (503/231–6158).

Region 2. Arizona, New Mexico, Oklahoma, and Texas. Regional Director (TE), U.S. Fish and Wildlife Service, 500 Gold Avenue SW., Room 4012, Albuquerque, NM 87102 (505/248–6920).

Region 3. Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. Regional Director (TE), U.S. Fish and Wildlife Service, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458 (612/713–5334).

Region 4. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the U.S. Virgin Islands. Regional Director (TE), U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (404/679–4156).

Region 5. Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. Regional Director (TE), U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035–9589 (413/253–8615).

Region 6. Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. Regional Director (TE), U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225–0486 (303/236–7400).

Region 7. Alaska. Regional Director (TE), U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503–6199 (907/786–3505).

Region 8. California and Nevada. Regional Director (TE), U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W2606, Sacramento, CA 95825 (916/414–6464).

We will provide information received in response to the previous CNOR to the Region having lead responsibility for each candidate species mentioned in the submission. We will likewise consider all information provided in response to this CNOR in deciding whether to propose species for listing and when to undertake necessary listing actions (including whether emergency listing under section 4(b)(7) of the ESA is appropriate). Information and comments we receive will become part of the administrative record for the species, which we maintain at the appropriate Regional Office.

**Public Availability of Comments**

Before including your address, phone number, email address, or other personal identifying information in your submission, be advised that your entire submission—including your personal identifying information—may be made publicly available at any time. Although you can ask us in your submission to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

**Authority**

This notice is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 18, 2014.

**David Cottingham,**

*Acting Director, Fish and Wildlife Service.*

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| **MAMMALS** | | | | | | |
| PE | | R3 | *Myotis septentrionalis* | | Bat, northern long-eared | U.S.A. (AL, AR, CT, DE, DC, FL, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, VT, VA, WV, WI, WY); Canada (AB, BC, LB, MB, NB, NF, NS, NT, ON, PE, QC, SK, YT). |
| PE | 3 | R1 | *Emballonura semicaudata rotensis.* | Emballonuridae | Bat, Pacific sheath-tailed (Mariana Islands subspecies). | U.S.A. (GU, CNMI). |
| C* | 3 | R1 | *Emballonura semicaudata semicaudata.* | Emballonuridae | Bat, Pacific sheath-tailed (American Samoa DPS). | U.S.A. (AS), Fiji, Independent Samoa, Tonga, Vanuatu. |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 6 | R2 | *Tamias minimus atristriatus.* | Sciuridae | Chipmunk, Peñasco least. | U.S.A. (NM). |
| C* | 2 | R5 | *Sylvilagus transitionalis* | Leporidae | Cottontail, New England | U.S.A. (CT, MA, ME, NH, NY, RI, VT). |
| PT | 6 | R8 | *Martes pennanti* | Mustelidae | Fisher (west coast DPS) | U.S.A. (CA, CT, IA, ID, IL, IN, KY, MA, MD, ME, MI, MN, MT, ND, NH, NJ, NY, OH, OR, PA, RI, TN, UT, VA, VT, WA, WI, WV, WY), Canada. |
| C* | 8 | R1 | *Urocitellus endemicus* | Sciuridae | Squirrel, Southern Idaho ground. | U.S.A. (ID). |
| C* | 5 | R1 | *Urocitellus washingtoni* | Sciuridae | Squirrel, Washington ground. | U.S.A. (WA, OR). |
| C* | 9 | R1 | *Arborimus longicaudus* | Cricetidae | Vole, Red (north Oregon coast DPS). | U.S.A. (OR). |
| C* | 9 | R7 | *Odobenus rosmarus divergens.* | Odobenidae | Walrus, Pacific | U.S.A. (AK), Russian Federation (Kamchatka and Chukotka). |
| PE | | R2 | *Canis lupus baileyi* | Canidae | Wolf, Mexican gray | U.S.A. (AZ, NM). |
| **BIRDS** | | | | | | |
| C* | 3 | R1 | *Porzana tabuensis* | Rallidae | Crake, spotless (American Samoa DPS). | U.S.A. (AS), Australia, Fiji, Independent Samoa, Marquesas, Philippines, Society Islands, Tonga. |
| C* | 9 | R1 | *Gallicolumba stairi* | Columbidae | Ground-dove, friendly (American Samoa DPS). | U.S.A. (AS), Independent Samoa. |
| PT | 3 | R5 | *Calidris canutus rufa* | Scolopacidae | Knot, red | U.S.A. (Atlantic coast), Canada, South America. |
| C | 2 | R1 | *Gymnomyza samoensis* | Meliphagidae | Ma'oma'o | U.S.A. (AS), Independent Samoa. |
| C* | 5 | R8 | *Synthliboramphus hypoleucus.* | Alcidae | Murrelet, Xantus's | U.S.A. (CA), Mexico. |
| C* | 2 | R2 | *Amazona viridigenalis* | Psittacidae | Parrot, red-crowned | U.S.A. (TX), Mexico. |
| C* | 8 | R6 | *Anthus spragueii* | Motacillidae | Pipit, Sprague's | U.S.A. (AR, AZ, CO, KS, LA, MN, MS, MT, ND, NE, NM, OK, SD, TX), Canada, Mexico. |
| C* | 8 | R6 | *Centrocercus urophasianus.* | Phasianidae | Sage-grouse, greater | U.S.A. (AZ, CA, CO, ID, MT, ND, NE, NV, OR, SD, UT, WA, WY), Canada (AB, BC, SK). |
| PT | 3 | R8 | *Centrocercus urophasianus.* | Phasianidae | Sage-grouse, greater (Bi-State DPS). | U.S.A. (AZ, CA, CO, ID, MT, ND, NE, NV, OR, SD, UT, WA, WY), Canada (AB, BC, SK). |
| C* | 6 | R1 | *Centrocercus urophasianus.* | Phasianidae | Sage-grouse, greater (Columbia Basin DPS). | U.S.A. (AZ, CA, CO, ID, MT, ND, NE, NV, OR, SD, UT, WA, WY), Canada (AB, BC, SK). |
| PE | 2 | R6 | *Centrocercus minimus* | Phasianidae | Sage-grouse, Gunnison | U.S.A. (AZ, CO, NM, UT). |
| C* | 3 | R1 | *Oceanodroma castro* | Hydrobatidae | Storm-petrel, band-rumped (Hawaii DPS). | U.S.A. (HI), Atlantic Ocean, Ecuador (Galapagos Islands), Japan. |
| C* | 11 | R4 | *Dendroica angelae* | Emberizidae | Warbler, elfin-woods | U.S.A. (PR). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| **REPTILES** | | | | | | |
| C* | 8 | R3 | *Sistrurus catenatus* | Viperidae | Massasauga (=rattlesnake), eastern. | U.S.A. (IA, IL, IN, MI, MN, MO, NY, OH, PA, WI), Canada. |
| PE | | R1 | *Emoia slevini* | Scincidae | Skink, Slevin's (Guali'ek Halom Tano). | U.S.A. (Guam, Mariana Islands). |
| PT | 3 | R4 | *Pituophis melanoleucus lodingi.* | Colubridae | Snake, black pine | U.S.A. (AL, LA, MS). |
| C* | 5 | R4 | *Pituophis ruthveni* | Colubridae | Snake, Louisiana pine | U.S.A. (LA, TX). |
| C* | 5 | R2 | *Gopherus morafkai* | Testudinidae | Tortoise, Sonoran desert | U.S.A. (AZ, CA, NV, UT). |
| C* | 8 | R4 | *Gopherus polyphemus* | Testudinidae | Tortoise, gopher (eastern population). | U.S.A. (AL, FL, GA, LA, MS, SC). |
| C* | 6 | R2 | *Kinosternon sonoriense longifemorale.* | Kinosternidae | Turtle, Sonoyta mud | U.S.A. (AZ), Mexico. |
| **AMPHIBIANS** | | | | | | |
| C* | 9 | R8 | *Rana luteiventris* | Ranidae | Frog, Columbia spotted (Great Basin DPS). | U.S.A. (AK, ID, MT, NV, OR, UT, WA, WY), Canada (BC). |
| C* | 8 | R8 | *Lithobates onca* | Ranidae | Frog, relict leopard | U.S.A. (AZ, NV, UT). |
| C* | 8 | R4 | *Notophthalmus perstriatus.* | Salamandridae | Newt, striped | U.S.A. (FL, GA). |
| C* | 8 | R4 | *Gyrinophilus gulolineatus* | Plethodontidae | Salamander, Berry Cave | U.S.A. (TN). |
| C | 3 | R2 | *Hyla wrightorum* | Hylidae | Treefrog, Arizona (Huachuca/Canelo DPS). | U.S.A. (AZ), Mexico (Sonora). |
| C* | 2 | R4 | *Necturus alabamensis* | Proteidae | Waterdog, black warrior (=Sipsey Fork). | U.S.A. (AL). |
| **FISHES** | | | | | | |
| C* | 8 | R2 | *Gila nigra* | Cyprinidae | Chub, headwater | U.S.A. (AZ, NM). |
| C* | 9 | R2 | *Gila robusta* | Cyprinidae | Chub, roundtail (Lower Colorado River Basin DPS). | U.S.A. (AZ, CO, NM, UT, WY). |
| C* | 11 | R6 | *Etheostoma cragini* | Percidae | Darter, Arkansas | U.S.A. (AR, CO, KS, MO, OK). |
| C | 8 | R4 | *Etheostoma sagitta* | Percidae | Darter, Cumberland arrow. | U.S.A. (KY, TN). |
| PE | 2 | R5 | *Crystallaria cincotta* | Percidae | Darter, diamond | U.S.A. (KY, OH, TN, WV). |
| C | 2 | R4 | *Etheostoma spilotum* | Percidae | Darter, Kentucky arrow | U.S.A. (KY). |
| C* | 8 | R4 | *Percina aurora* | Percidae | Darter, Pearl | U.S.A. (LA, MS). |
| C* | 5 | R4 | *Moxostoma* sp | Catostomidae | Redhorse, sicklefin | U.S.A. (GA, NC, TN). |
| C* | 3 | R8 | *Spirinchus thaleichthys* | Osmeridae | Smelt, longfin (San Francisco bay-delta DPS). | U.S.A. (AK, CA, OR, WA), Canada. |
| PSAT | N/A | R1 | *Salvelinus malma* | Salmonidae | Trout, Dolly Varden | U.S.A. (AK, WA), Canada, East Asia. |
| **CLAMS** | | | | | | |
| C* | 2 | R2 | *Lampsilis bracteata* | Unionidae | Fatmucket, Texas | U.S.A. (TX). |
| C* | 2 | R2 | *Truncilla macrodon* | Unionidae | Fawnsfoot, Texas | U.S.A. (TX). |
| C* | 8 | R2 | *Popenaias popei* | Unionidae | Hornshell, Texas | U.S.A. (NM, TX), Mexico. |
| C* | 8 | R2 | *Quadrula aurea* | Unionidae | Orb, golden | U.S.A. (TX). |
| C* | 8 | R2 | *Quadrula houstonensis* | Unionidae | Pimpleback, smooth | U.S.A. (TX). |
| C* | 2 | R2 | *Quadrula petrina* | Unionidae | Pimpleback, Texas | U.S.A. (TX). |
| **SNAILS** | | | | | | |
| C* | 8 | R4 | *Elimia melanoides* | Pleuroceridae | Mudalia, black | U.S.A. (AL). |
| C* | 2 | R4 | *Planorbella magnifica* | Planorbidae | Ramshorn, magnificent | U.S.A. (NC). |
| C* | 2 | R1 | *Ostodes strigatus* | Potaridae | Sisi snail | U.S.A. (AS). |
| PE | 2 | R1 | *Samoana fragilis* | Partulidae | Snail, fragile tree | U.S.A. (GU, MP). |
| PE | 2 | R1 | *Partula radiolata* | Partulidae | Snail, Guam tree | U.S.A. (GU). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| PE | 2 | R1 | *Partula gibba* | Partulidae | Snail, Humped tree | U.S.A. (GU, MP). |
| PE | 2 | R1 | *Partula langfordi* | Partulidae | Snail, Langford's tree | U.S.A. (MP). |
| C* | 2 | R1 | *Eua zebrina* | Partulidae | Snail, Tutuila tree | U.S.A. (AS). |
| C* | 11 | R2 | *Pyrgulopsis thompsoni* | Hydrobiidae | Springsnail, Huachuca | U.S.A. (AZ), Mexico. |
| C* | 11 | R2 | *Pyrgulopsis morrisoni* | Hydrobiidae | Springsnail, Page | U.S.A. (AZ). |
| **INSECTS** | | | | | | |
| C* | 2 | R1 | *Hylaeus anthracinus* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 2 | R1 | *Hylaeus assimulans* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 2 | R1 | *Hylaeus facilis* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 2 | R1 | *Hylaeus hilaris* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 2 | R1 | *Hylaeus kuakea* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 2 | R1 | *Hylaeus longiceps* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 2 | R1 | *Hylaeus mana* | Colletidae | Bee, Hawaiian yellow-faced. | U.S.A. (HI). |
| C* | 5 | R8 | *Hermelycaena* [*Lycaena*] *hermes*. | Lycaenidae | Butterfly, Hermes copper | U.S.A. (CA). |
| PE | 3 | R1 | *Hypolimnas octucula mariannensis*. | Nymphalidae | Butterfly, Mariana eight-spot. | U.S.A. (GU, MP). |
| PE | 2 | R1 | *Vagrans egistina* | Nymphalidae | Butterfly, Mariana wandering. | U.S.A. (GU, MP). |
| C* | 2 | R4 | *Atlantea tulita* | Nymphalidae | Butterfly, Puerto Rican harlequin. | U.S.A. (PR). |
| C* | 5 | R4 | *Glyphopsyche sequatchie*. | Limnephilidae | Caddisfly, Sequatchie | U.S.A. (TN). |
| C | 5 | R4 | *Pseudanophthalmus insularis*. | Carabidae | Cave beetle, Baker Station (=insular). | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus caecus*. | Carabidae | Cave beetle, Clifton | U.S.A. (KY). |
| C* | 11 | R4 | *Pseudanophthalmus colemanensis*. | Carabidae | Cave beetle, Coleman | U.S.A. (TN). |
| C | 5 | R4 | *Pseudanophthalmus fowlerae*. | Carabidae | Cave beetle, Fowler's | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus frigidus*. | Carabidae | Cave beetle, icebox | U.S.A. (KY). |
| C | 5 | R4 | *Pseudanophthalmus tiresias*. | Carabidae | Cave beetle, Indian Grave Point (= Soothsayer). | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus inquisitor*. | Carabidae | Cave beetle, inquirer | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus troglodytes*. | Carabidae | Cave beetle, Louisville | U.S.A. (KY). |
| C | 5 | R4 | *Pseudanophthalmus paulus*. | Carabidae | Cave beetle, Noblett's | U.S.A. (TN). |
| C* | 5 | R4 | *Pseudanophthalmus parvus*. | Carabidae | Cave beetle, Tatum | U.S.A. (KY). |
| C* | 8 | R1 | *Megalagrion xanthomelas*. | Coenagrionidae | Damselfly, orangeblack Hawaiian. | U.S.A. (HI). |
| PE | | R1 | *Ischnura luta* | Coenagrionidae | Damselfly, Rota blue | U.S.A. (Mariana Islands). |
| C | 2 | R8 | *Ambrysus funebris* | Naucoridae | Naucorid bug (=Furnace Creek), Nevares Spring. | U.S.A. (CA). |
| C* | 8 | R3 | *Papaipema eryngii* | Noctuidae | Moth, rattlesnake-master borer. | U.S.A. (AR, IL, KY, NC, OK). |
| C* | 11 | R2 | *Heterelmis stephani* | Elmidae | Riffle beetle, Stephan's | U.S.A. (AZ). |
| PT | 8 | R3 | *Hesperia dacotae* | Hesperiidae | Skipper, Dakota | U.S.A. (MN, IA, SD, ND, IL), Canada. |
| PE | 2 | R3 | *Oarisma poweshiek* | Hesperiidae | Skipperling, Poweshiek | U.S.A. (IA, IL, IN, MI, MN, ND, SD, WI), Canada (MB). |
| C* | 5 | R6 | *Capnia arapahoe* | Capniidae | Snowfly, Arapahoe | U.S.A. (CO). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| C* | 5 | R6 | *Lednia tumana* | Nemouridae | Stonefly, meltwater lednian. | U.S.A. (MT). |
| C* | 5 | R4 | *Cicindela highlandensis* | Cicindelidae | Tiger beetle, highlands | U.S.A. (FL). |
| **CRUSTACEANS** | | | | | | |
| C | 8 | R5 | *Stygobromus kenki* | Crangonyctidae | Amphipod, Kenk's | U.S.A. (DC). |
| C* | 5 | R1 | *Metabetaeus lohena* | Alpheidae | Shrimp, anchialine pool | U.S.A. (HI). |
| C* | 5 | R1 | *Palaemonella burnsi* | Palaemonidae | Shrimp, anchialine pool | U.S.A. (HI). |
| C* | 5 | R1 | *Procaris hawaiana* | Procarididae | Shrimp, anchialine pool | U.S.A. (HI). |
| **FLOWERING PLANTS** | | | | | | |
| C* | 11 | R8 | *Abronia alpina* | Nyctaginaceae | Sand-verbena, Ramshaw Meadows. | U.S.A. (CA). |
| C* | 11 | R4 | *Argythamnia blodgettii* | Euphorbiaceae | Silverbush, Blodgett's | U.S.A. (FL). |
| C* | 3 | R1 | *Artemisia borealis var. wormskioldii.* | Asteraceae | Wormwood, northern | U.S.A. (OR, WA). |
| C* | 2 | R6 | *Astragalus anserinus* | Fabaceae | Milkvetch, Goose Creek | U.S.A. (ID, NV, UT). |
| C* | 8 | R6 | *Astragalus microcymbus* | Fabaceae | Milkvetch, skiff | U.S.A. (CO). |
| C* | 8 | R6 | *Astragalus schmolliae* | Fabaceae | Milkvetch, Schmoll | U.S.A. (CO). |
| C* | 11 | R6 | *Astragalus tortipes* | Fabaceae | Milkvetch, Sleeping Ute | U.S.A. (CO). |
| C* | 8 | R6 | *Boechera* (*Arabis*) *pusilla* | Brassicaceae | Rockcress, Fremont County or small. | U.S.A. (WY). |
| PE | | R1 | *Bulbophyllum guamense* | Orchidaceae | Cebello halumtano | U.S.A. (Guam, Mariana Islands). |
| C* | 2 | R1 | *Calamagrostis expansa* | Poaceae | Reedgrass, Maui | U.S.A. (HI). |
| C* | 11 | R8 | *Calochortus persistens* | Liliaceae | Mariposa lily, Siskiyou | U.S.A. (CA, OR). |
| C* | 9 | R4 | *Chamaecrista lineata* var. *keyensis.* | Fabaceae | Pea, Big Pine partridge | U.S.A. (FL). |
| C* | 12 | R4 | *Chamaesyce deltoidea pinetorum.* | Euphorbiaceae | Sandmat, pineland | U.S.A. (FL). |
| C* | 9 | R4 | *Chamaesyce deltoidea serpyllum.* | Euphorbiaceae | Spurge, wedge | U.S.A. (FL). |
| C* | 6 | R8 | *Chorizanthe parryi* var. *fernandina.* | Polygonaceae | Spineflower, San Fernando Valley. | U.S.A. (CA). |
| C* | 8 | R2 | *Cirsium wrightii* | Asteraceae | Thistle, Wright's | U.S.A. (AZ, NM), Mexico. |
| C | 2 | R1 | *Cyanea kauaulaensis* | Campanulaceae | No common name | U.S.A. (HI). |
| PT | | R1 | *Cycas micronesica* | Cycadaceae | Fadang | U.S.A. (Guam, Mariana Islands). |
| C | 2 | R1 | *Cyperus neokunthianus* | Cyperaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Cyrtandra hematos* | Gesneriaceae | Ha'iwale | U.S.A. (HI). |
| C* | 3 | R4 | *Dalea carthagenensis* var. *floridana.* | Fabaceae | Prairie-clover, Florida | U.S.A. (FL). |
| PE | | R1 | *Dendrobium guamens* | Orchidaceae | No common name | U.S.A. (Guam, Mariana Islands). |
| C* | 5 | R5 | *Dichanthelium hirstii* | Poaceae | Panic grass, Hirst Brothers'. | U.S.A. (DE, GA, NC, NJ). |
| C* | 5 | R4 | *Digitaria pauciflora* | Poaceae | Crabgrass, Florida pineland. | U.S.A. (FL). |
| C* | 8 | R6 | *Eriogonum soredium* | Polygonaceae | Buckwheat, Frisco | U.S.A. (UT). |
| PE | | R1 | *Eugenia bryanii* | Myrtaceae | No common name | U.S.A. (Guam). |
| C | 2 | R1 | *Exocarpos menziesii* | Santalaceae | Menzies ballart | U.S.A. (HI). |
| C* | 2 | R1 | *Festuca hawaiiensis* | Poaceae | No common name | U.S.A. (HI). |
| C* | 11 | R2 | *Festuca ligulata* | Poaceae | Fescue, Guadalupe | U.S.A. (TX), Mexico. |
| C* | 2 | R1 | *Gardenia remyi* | Rubiaceae | Nanu | U.S.A. (HI). |
| PE | | R1 | *Hedyotis megalantha* | Rubiaceae | Paudedo | U.S.A. (Guam). |
| PE | | R1 | *Heritiera longipetiolata* | Malvaceae | Ufa-halomtano | U.S.A. (Guam, Mariana Islands). |
| C* | 3 | R1 | *Joinvillea ascendens ascendens.* | Joinvilleaceae | 'Ohe | U.S.A. (HI). |
| C* | 2 | R1 | *Kadua* (=*Hedyotis*) *fluviatilis.* | Rubiaceae | Kampua'a | U.S.A. (HI). |
| C | 2 | R1 | *Kadua haupuensis* | Rubiaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Labordia lorenciana* | Loganiaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Lepidium orbiculare* | Brassicaceae | No common name | U.S.A. (HI). |
| C* | 8 | R6 | *Lepidium ostleri* | Brassicaceae | Peppergrass, Ostler's | U.S.A. (UT). |
| C* | 5 | R4 | *Linum arenicola* | Linaceae | Flax, sand | U.S.A. (FL). |

TABLE 1—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Category | Priority | | | | | |
| PE | | R1 | *Maesa walkeri* | Primulaceae | No common name | U.S.A. (Guam, Mariana Islands). |
| C* | 2 | R1 | *Myrsine fosbergii* | Myrsinaceae | Kolea | U.S.A. (HI). |
| PE | | R1 | *Nervilia jacksoniae* | Orchidaceae | No common name | U.S.A. (Guam, Mariana Islands). |
| C* | 2 | R1 | *Nothocestrum latifolium* | Solanaceae | ʻAiea | U.S.A. (HI). |
| C* | 2 | R1 | *Ochrosia haleakalae* | Apocynaceae | Holei | U.S.A. (HI). |
| PE | | R1 | *Phyllanthus saffordii* | Phyllanthaceae | No common name | U.S.A. (Guam). |
| C | 2 | R1 | *Phyllostegia brevidens* | Lamiaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Phyllostegia helleri* | Lamiaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Phyllostegia stachyoides* | Lamiaceae | No common name | U.S.A. (HI). |
| C* | 2 | R6 | *Pinus albicaulis* | Pinaceae | Pine, whitebark | U.S.A. (CA, ID, MT, NV, OR, WA, WY), Canada (AB, BC). |
| C* | 8 | R4 | *Platanthera integrilabia* | Orchidaceae | Orchid, white fringeless | U.S.A. (AL, GA, KY, MS, NC, SC, TN, VA). |
| C | 2 | R1 | *Portulaca villosa* | Portulacaceae | Ihi | U.S.A. (HI). |
| C | 2 | R1 | *Pritchardia bakeri* | Arecaceae | Loʻulu (=Loʻulu lelo) | U.S.A. (HI). |
| C* | 3 | R1 | *Pseudognaphalium* (=*Gnaphalium*) *sandwicensium* var. *molokaiense*. | Asteraceae | ʻEnaʻena | U.S.A. (HI). |
| PE | | R1 | *Psychotria malaspinae* | Rubiaceae | Aplokating-palaoan | U.S.A. (Guam). |
| C* | 2 | R1 | *Ranunculus hawaiensis* | Ranunculaceae | Makou | U.S.A. (HI). |
| C* | 2 | R1 | *Ranunculus mauiensis* | Ranunculaceae | Makou | U.S.A. (HI). |
| C* | 8 | R8 | *Rorippa subumbellata* | Brassicaceae | Cress, Tahoe yellow | U.S.A. (CA, NV). |
| C | 2 | R1 | *Sanicula sandwicensis* | Apiaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Santalum involutum* | Santalaceae | No common name | U.S.A. (HI). |
| C | 3 | R1 | *Schiedea diffusa* ssp. *diffusa*. | Caryophyllaceae | No common name | U.S.A. (HI). |
| C* | 2 | R1 | *Schiedea pubescens* | Caryophyllaceae | Maʻoliʻoli | U.S.A. (HI). |
| C | 2 | R1 | *Sicyos lanceoloideus* | Cucurbitaceae | No common name | U.S.A. (HI). |
| C* | 2 | R1 | *Sicyos macrophyllus* | Cucurbitaceae | ʻAnunu | U.S.A. (HI). |
| C | 12 | R4 | *Sideroxylon reclinatum austrofloridense*. | Sapotaceae | Bully, Everglades | U.S.A. (FL). |
| C* | 2 | R4 | *Solanum conocarpum* | Solanaceae | Bacora, marron | U.S.A. (PR). |
| PE | | R1 | *Solanum guamense* | Solanaceae | Bereng-henas halomtano | U.S.A. (Guam, Mariana Islands). |
| C* | 8 | R1 | *Solanum nelsonii* | Solanaceae | Popolo | U.S.A. (HI). |
| C | 3 | R1 | *Stenogyne kaalae* ssp. *sherffii*. | Lamiaceae | No common name | U.S.A. (HI). |
| C | 8 | R2 | *Streptanthus bracteatus* | Brassicaceae | Twistflower, bracted | U.S.A. (TX). |
| PT | | R1 | *Tabernaemontana rotensis*. | Apocynaceae | No common name | U.S.A. (Guam, Mariana Islands). |
| PE | | R1 | *Tinospora homosepala* | Menispermaceae | No common name | U.S.A (Guam). |
| C* | 8 | R6 | *Trifolium friscanum* | Fabaceae | Clover, Frisco | U.S.A. (UT). |
| PE | | R1 | *Tuberolabium guamense* | Orchidaceae | No common name | U.S.A. (Guam, Mariana Islands). |
| C | 2 | R1 | *Wikstroemia skottsbergiana*. | Thymelaeaceae | No common name | U.S.A. (HI). |
| **FERNS AND ALLIES** | | | | | | |
| C | 2 | R1 | *Asplenium diellaciniatum* | Aspleniaceae | No common name | U.S.A. (HI). |
| C* | 8 | R1 | *Cyclosorus boydiae* | Thelypteridaceae | No common name | U.S.A. (HI). |
| C | 2 | R1 | *Deparia kaalaana* | Woodsiaceae | No common name | U.S.A. (HI). |
| C | 3 | R1 | *Dryopteris glabra* var. *pusilla*. | Dryopteridaceae | Kilau | U.S.A. (HI). |
| C | 3 | R1 | *Hypolepis hawaiiensis* var. *mauiensis*. | Dennstaedtiaceae | Olua | U.S.A. (HI). |
| C* | 2 | R1 | *Huperzia* (=*Phlegmariurus*) *stemmermanniae*. | Lycopodiaceae | Wawaeʻiole | U.S.A. (HI). |
| C* | 3 | R1 | *Microlepia strigosa* var. *mauiensis* (=*Microlepia mauiensis*). | Dennstaedtiaceae | Palapalai | U.S.A. (HI). |
| PE | 3 | R4 | *Trichomanes punctatum floridanum*. | Hymenophyllaceae | Florida bristle fern | U.S.A. (FL). |

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Code | Expl. | | | | | |
| **MAMMALS** | | | | | | |
| T | L | R6 | *Lynx canadensis* | Felidae | Lynx, Canada (New Mexico population). | U.S.A. (CO, ID, ME, MI, MN, MT, NH, NY, OR, UT, VT, WA, WI, WY), Canada. |
| E | L | R2 | *Zapus hudsonius luteus* | Zapodidae | Mouse, New Mexico meadow jumping. | U.S.A. (AZ, CO, NM). |
| T | L | R1 | *Thomomys mazama glacialis.* | Geomyidae | Pocket gopher, Roy Prairie. | U.S.A. (WA). |
| T | L | R1 | *Thomomys mazama pugetensis.* | Geomyidae | Pocket gopher, Olympia | U.S.A. (WA). |
| T | L | R1 | *Thomomys mazama tumuli.* | Geomyidae | Pocket gopher, Tenino | U.S.A. (WA). |
| T | L | R1 | *Thomomys mazama yelmensis.* | Geomyidae | Pocket gopher, Yelm | U.S.A. (WA). |
| Rc | A | R6 | *Cynomys gunnisoni* | Sciuridae | Prairie dog, Gunnison's (populations in central and south-central Colorado, north-central New Mexico). | U.S.A. (CO, NM). |
| Rp | A | R6 | *Gulo gulo luscus* | Mustelidae | Wolverine, North American (Contiguous U.S. DPS). | U.S.A. (CA, CO, ID, MT, OR, UT, WA, WY). |
| **BIRDS** | | | | | | |
| T | L | R8 | *Coccyzus americanus* | Cuculidae | Cuckoo, yellow-billed (Western U.S. DPS). | U.S.A. (Lower 48 States), Canada, Mexico, Central and South America. |
| Rc | A | R7 | *Gavia adamsii* | Gaviidae | Loon, yellow-billed | U.S.A. (AK), Canada, Norway, Russia, coastal waters of southern Pacific and North Sea. |
| T | L | R2 | *Tympanuchus pallidicinctus.* | Phasianidae | Prairie-chicken, lesser | U.S.A. (CO, KA, NM, OK, TX). |
| **REPTILES** | | | | | | |
| T | L | R2 | *Thamnophis rufipunctatus.* | Colubridae | Gartersnake, narrow-headed. | U.S.A. (AZ, NM). |
| T | L | R2 | *Thamnophis eques megalops.* | Colubridae | Gartersnake, northern Mexican. | U.S.A. (AZ, NM, NV), Mexico. |
| Rc | A | R2 | *Chionactis occipitalis klauberi.* | Colubridae | Snake, Tucson shovel-nosed. | U.S.A. (AZ). |
| **AMPHIBIANS** | | | | | | |
| E | L | R8 | *Rana muscosa* | Ranidae | Frog, mountain yellow-legged (northern California DPS). | U.S.A (CA, NV). |
| T | L | R1 | *Rana pretiosa* | Ranidae | Frog, Oregon spotted | U.S.A. (CA, OR, WA), Canada (BC). |
| E | L | R8 | *Rana sierrae* | Ranidae | Frog, Sierra Nevada yellow-legged frog. | U.S.A. (CA, NV). |
| T | L | R2 | *Eurycea naufragia* | Plethodontidae | Salamander, Georgetown. | U.S.A. (TX). |
| T | L | R2 | *Eurycea chisholmensis* | Plethodontidae | Salamander, Salado | U.S.A. (TX). |
| T | L | R8 | *Anaxyrus canorus* | Bufonidae | Toad, Yosemite | U.S.A. (CA). |
| **FISHES** | | | | | | |
| Rc | A | R6 | *Iotichthys phlegethontis* | Cyprinidae | Chub, least | U.S.A. (UT). |
| Rc | A | R6 | *Thymallus arcticus* | Salmonidae | Grayling, Arctic (upper Missouri River DPS). | U.S.A. (AK, MI, MT, WY), Canada, northern Asia, northern Europe. |

TABLE 2—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING—Continued

[Note: See end of **SUPPLEMENTARY INFORMATION** for an explanation of symbols used in this table]

| Status | | Lead region | Scientific name | Family | Common name | Historical range |
|---|---|---|---|---|---|---|
| Code | Expl. | | | | | |
| E | L | R2 | *Notropis oxyrhynchus* | Cyprinidae | Shiner, sharpnose | U.S.A. (TX). |
| E | L | R2 | *Notropis buccula* | Cyprinidae | Shiner, smalleye | U.S.A. (TX). |
| E | L | R2 | *Catostomus discobolus yarrowi.* | Catostomidae | Sucker, Zuni bluehead | U.S.A. (AZ, NM). |
| Rc | U | R2 | *Oncorhynchus clarki virginalis.* | Salmonidae | Trout, Rio Grande cutthroat. | U.S.A. (CO, NM). |
| **INSECTS** | | | | | | |
| E | L | R4 | *Strymon acis bartrami* | Lycaenidae | Butterfly, Bartram's scrub-hairstreak. | U.S.A. (FL). |
| E | L | R4 | *Anaea troglodyta floridalis.* | Nymphalidae | Butterfly, Florida leafwing. | U.S.A. (FL). |
| **ARACHNIDS** | | | | | | |
| Rc | N | R2 | *Cicurina wartoni* | Dictynidae | Meshweaver, Warton's cave. | U.S.A. (TX). |
| **FLOWERING PLANTS** | | | | | | |
| E | L | R4 | *Agave eggersiana* | Agavaceae | No common name | U.S.A. (VI). |
| T | L | R4 | *Arabis georgiana* | Brassicaceae | Rockcress, Georgia | U.S.A. (AL, GA). |
| Rc | A | R1 | *Astragalus cusickii* var. *packardiae.* | Fabaceae | Milkvetch, Packard's | U.S.A. (ID). |
| E | L | R4 | *Brickellia mosieri* | Asteraceae | Brickell-bush, Florida | U.S.A. (FL). |
| Rc | A | R8 | *Eriogonum corymbosum* var. *nilesii.* | Polygonaceae | Buckwheat, Las Vegas | U.S.A. (NV). |
| Rc | A | R8 | *Eriogonum diatomaceum* | Polygonaceae | Buckwheat, Churchill Narrows. | U.S.A (NV). |
| Rc | A | R8 | *Eriogonum kelloggii* | Polygonaceae | Buckwheat, Red Mountain. | U.S.A. (CA). |
| E | L | R4 | *Gonocalyx concolor* | Ericaceae | No common name | U.S.A. (PR). |
| E | L | R4 | *Helianthus verticillatus* | Asteraceae | Sunflower, whorled | U.S.A. (AL, GA, TN). |
| T | L | R8 | *Ivesia webberi* | Rosaceae | Ivesia, Webber | U.S.A. (CA, NV). |
| E | L | R4 | *Leavenworthia crassa* | Brassicaceae | Gladecress, fleshy-fruit | U.S.A. (AL). |
| T | L | R4 | *Leavenworthia exigua* var. *laciniata.* | Brassicaceae | Gladecress, Kentucky | U.S.A. (KY). |
| E | L | R4 | *Linum carteri* var. *carteri* | Linaceae | Flax, Carter's small-flowered. | U.S.A. (FL). |
| E | L | R8 | *Mimulus fremontii* var. *vandenbergensis.* | Phrymaceae | Monkeyflower, Vandenberg. | U.S.A. (CA). |
| Rp | A | R6 | *Penstemon grahamii* | Scrophulariaceae | Beardtongue, Graham's | U.S.A. (CO, UT). |
| Rp | A | R6 | *Penstemon scariosus* var. *albifluvis.* | Scrophulariaceae | Beardtongue, White River. | U.S.A. (CO, UT). |
| E | L | R4 | *Physaria globosa* | Brassicaceae | Bladderpod, Short's | U.S.A. (IN, KY, TN). |
| Rc | A | R8 | *Sedum eastwoodiae* | Crassulaceae | Stonecrop, Red Mountain. | U.S.A. (CA). |
| Rc | U | R4 | *Symphyotrichum georgianum.* | Asteraceae | Aster, Georgia | U.S.A. (AL, FL, GA, NC, SC). |
| T | L | R4 | *Varronia (=Cordia) rupicola.* | Boraginaceae | No common name | U.S.A. (PR), Anegada. |

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Part IV

## Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 424, and 498

Medicare Program; Requirements for the Medicare Incentive Reward Program and Provider Enrollment; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Parts 405, 424, and 498**

**[CMS–6045–F]**

**RIN 0938–AP01**

# Medicare Program; Requirements for the Medicare Incentive Reward Program and Provider Enrollment

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements various provider enrollment requirements. These include: Expanding the instances in which a felony conviction can serve as a basis for denial or revocation of a provider or supplier's enrollment; if certain criteria are met, enabling us to deny enrollment if the enrolling provider, supplier, or owner thereof had an ownership relationship with a previously enrolled provider or supplier that had a Medicare debt; enabling us to revoke Medicare billing privileges if we determine that the provider or supplier has a pattern or practice of submitting claims that fail to meet Medicare requirements; and limiting the ability of ambulance suppliers to ''backbill'' for services performed prior to enrollment.

**DATES:** These regulations are effective on February 3, 2015.

**FOR FURTHER INFORMATION CONTACT:** Frank Whelan, (410) 786–1302.

**SUPPLEMENTARY INFORMATION:**

## I. Executive Summary and Background

### *A. Executive Summary*

1. Purpose

a. Need for Regulatory Action

This final rule is necessary to make certain changes to the provider enrollment provisions in 42 CFR part 424, subpart P. This final rule will strengthen program integrity and help ensure that fraudulent entities and individuals do not enroll in or maintain their enrollment in the Medicare program.

b. Legal Authority

Sections 1102 and 1871 of the Social Security Act provide general authority for the Secretary to prescribe regulations for the efficient administration of the Medicare program. Also, section 1866(j) of the Act, codified at 42 U.S.C. 1395cc(j), provides specific authority with respect to the enrollment process for providers and suppliers.

2. Brief Summary of the Major Provider Enrollment Provisions

We are finalizing the following major provisions regarding provider enrollment:

• Allowing denial of enrollment if the provider, supplier, or owner thereof was previously the owner of a provider or supplier that had a Medicare debt that existed when the latter's enrollment was voluntarily terminated, involuntarily terminated or revoked and—

++ The owner left the provider or supplier that had the Medicare debt within 1 year of that provider or supplier's voluntary termination, involuntary termination, or revocation;

++ The Medicare debt has not been fully repaid; and

++ We determine that the uncollected debt poses an undue risk of fraud, waste, or abuse.

A denial under this provision can be averted if the enrolling provider, supplier, or owner thereof—(1) satisfies the criteria set forth in § 401.607 and agrees to a CMS-approved extended repayment schedule for the entire outstanding Medicare debt; or (2) repays the debt in full.

• Allowing denial of enrollment or revocation of Medicare billing privileges if, within the preceding 10 years, the provider or supplier, or any owner or managing employee thereof, was convicted of a federal or state felony offense that CMS determines to be detrimental to the best interests of the Medicare program and its beneficiaries. (Under the previous regulation, enrollment could not be denied or revoked based on a managing employee's felony conviction.)

• Allowing revocation of Medicare billing privileges if the provider or supplier has a pattern or practice of submitting claims that fail to meet Medicare requirements.

• With the exception noted in section II.B.5. of this final rule, requiring all revoked providers and suppliers (regardless of type) to submit all of their remaining claims within 60 days after the effective date of their revocation.

• Limiting the ability of ambulance companies to ''back bill'' for services furnished prior to enrollment. Under § 424.520(d), physicians, non-physician practitioners, and physician and non-physician practitioner organizations currently cannot bill for services furnished prior to the later of the date the supplier filed a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date the supplier first began furnishing services at a new practice location. (Independent diagnostic testing facilities (IDTFs) and suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) have similar restrictions.) We are expanding this to include ambulance suppliers.

• Limiting the ability of revoked providers and suppliers to submit a corrective action plan (CAP) to situations where the revocation was based on § 424.535(a)(1).

3. Incentive Reward Program (IRP)

We may finalize the provisions relating to the IRP in future rulemaking.

4. Summary of Costs and Benefits

The following table provides a summary of the costs and benefits associated with the principal provisions of this final rule.

TABLE 1—SUMMARY OF COSTS AND IMPACTS

| Provision description | Impacts |
|---|---|
| Denial of Enrollment Based on Medicare Debt | Though a savings to the federal government will accrue from such a denial, the monetary amount cannot be quantified. |
| Expansion of Ability to Deny or Revoke Medicare Billing Privileges Based on Felony Conviction. | Though a savings to the federal government will accrue from such a denial or revocation, the monetary amount cannot be quantified. |
| Revocation Based on Pattern or Practice of Submitting Claims that Do Not Meet Medicare Requirements. | Though a savings to the federal government will accrue from such a revocation, the monetary amount cannot be quantified. |
| Requirement for Revoked Providers and Suppliers to Submit Remaining Claims within 60 Days after Effective Date of Revocation. | Monetary amount cannot be quantified. However, we believe this requirement will—(1) limit the Medicare program's vulnerability to fraudulent claims; and (2) allow more focused medical review. This will likely result in some savings to the federal government. |

TABLE 1—SUMMARY OF COSTS AND IMPACTS—Continued

| Provision description | Impacts |
|---|---|
| Inclusion of Ambulance Suppliers within § 424.520(d) | Will result in a transfer of $327.4 million per year (primary estimate) from ambulance suppliers to the federal government. |
| Limitation of Ability to Submit CAP to Situations where Revocation based on § 424.535(a)(1). | Monetary amount cannot be quantified. However, the provision will prevent these providers and suppliers from being able to immediately begin billing Medicare again once they submit the correct information. |

*B. Background and General Overview*

In the April 21, 2006 **Federal Register** (71 FR 20754), we published a final rule titled, ''Medicare Program; Requirements for Providers and Suppliers to Establish and Maintain Medicare Enrollment.'' The final rule set forth requirements in part 424, subpart P that providers and suppliers must meet in order to obtain and maintain Medicare billing privileges. Since its publication in April 2006, we have updated subpart P to address a number of enrollment issues.

In the April 2006 final rule, we cited sections 1102 and 1871 of the Act as general authority for our establishment of these requirements, which were designed for the efficient administration of the Medicare program. Pursuant to this general rulemaking authority as well as to section 1866(j) of the Act, we proposed several additional changes to our provider enrollment regulations to help ensure that Medicare payments are only made to qualified providers and suppliers.

In the April 29, 2013 **Federal Register** (78 FR 25013), we published a proposed rule that would revise the IRP provisions and certain provider enrollment requirements in part 424, subpart P.

## II. Provisions of the Proposed Rule and Analysis of and Responses to Public Comments

*A. Incentive Reward Program (IRP)*

We received a number of comments regarding our proposed IRP provisions. They focused largely on several issues.

First, a number of commenters stated that the significantly increased reward amount would lead to many reports containing irrelevant or erroneous information that would ultimately impose a heavy burden on CMS and its contractors. Providers would also be seriously burdened because they would constantly have to fight unwarranted complaints, perhaps leaving less time for such providers to treat Medicare beneficiaries.

Second, several commenters expressed concern regarding our proposal to limit reward eligibility to the first reporter of information about a provider's actual or potential sanctionable conduct. They contended that this could create ''shoot first, ask questions later'' situations; such a rush to report could also create tension between providers and patients.

Third, several commenters stated that our proposal would encourage whistleblowers to first report their concerns to CMS: (1) Instead of using established internal compliance reporting methods (such as hotlines) created within Medicare provider organizations; and (2) without undertaking any initial validation of facts or discussing the matter with the provider.

Fourth, commenters questioned whether CMS has the resources in place to handle the enormous influx of tips and complaints that our proposal would generate.

Due to the complexity of the operational aspects of our proposal, we are not finalizing our proposed IRP provisions in this rule. We may finalize them in future rulemaking.

*B. Provider Enrollment*

As noted previously, in April 2006 we published a final rule that set forth requirements that providers and suppliers must meet in order to obtain and maintain Medicare billing privileges. Since that rule's publication, we have revised and supplemented various provisions in part 424, subpart P to address certain payment safeguard issues. As discussed in the following section, this final rule makes additional changes to subpart P.

1. Definition of Enrollment

Most physicians and non-physician practitioners enroll in Medicare to become eligible to receive payment for covered services furnished to Medicare beneficiaries. However, some physicians and non-physician practitioners who are not enrolled in Medicare via the Form CMS–855I enrollment application may wish to enroll for the sole and exclusive purpose of ordering or certifying items or services for Medicare beneficiaries. Consistent with § 424.507, and assuming all other applicable requirements are met, these individuals are eligible to enroll for the sole purpose of ordering or certifying Medicare items or services by completing the CMS–855O application. The CMS–855O (OMB Approval #0938–0685), which became available for use in July 2011, is exclusively designed to allow physicians and eligible professionals to enroll in Medicare solely to order or certify items or services.

Physicians and non-physician practitioners who complete the CMS–855O are not eligible to submit claims to Medicare for services they provide, for they are not granted Medicare billing privileges. Because some of our regulatory provisions did not clearly articulate the difference between enrolling in Medicare: (1) To obtain Medicare billing privileges; and (2) solely to order or certify items or services for Medicare beneficiaries, we proposed three remedial changes.

The first change involved the definition of ''Enroll/Enrollment'' in § 424.502, the initial sentence of which stated: ''Enroll/Enrollment means the process that Medicare uses to establish eligibility to submit claims for Medicare-covered services and supplies.'' We proposed to change this to read: ''Enroll/Enrollment means the process that Medicare uses to establish eligibility to submit claims for Medicare-covered items and services, and the process that Medicare uses to establish eligibility to order or certify for Medicare-covered items and services.'' Our purpose was to clarify that the overall enrollment process includes enrollment via the CMS–855O.

The second revision concerned paragraph (4) of the definition of ''Enroll/Enrollment'' in § 424.502. We proposed to change the language in this paragraph from ''(g)ranting the provider or supplier Medicare billing privileges'' to the following: ''(4) Except for those suppliers that complete the CMS–855O form or CMS-identified equivalent or successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services, granting the Medicare provider or supplier Medicare billing privileges.'' This was intended to emphasize that

although enrollment via the CMS–855O enables the supplier to order or certify Medicare-covered items and services, it does not convey Medicare billing privileges to the supplier.

The third change involved § 424.505, which states in part that a provider or supplier, once enrolled, receives Medicare billing privileges. We proposed to revise the second sentence of this section to state: ''Except for those suppliers that complete the CMS–855O or CMS-identified equivalent or successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services, once enrolled the provider or supplier receives billing privileges and is issued a valid billing number effective for the date a claim was submitted for an item that was furnished or a service that was rendered. (See 45 CFR part 162 for information on the National Provider Identifier and its use as the Medicare billing number.)'' Again, our purpose was to clarify that enrollment via the CMS–855O enables the supplier to order or certify Medicare-covered items and services but does not grant Medicare billing privileges to the supplier.

The following is a summary of the comments we received on these three changes and our responses:

*Comment:* Several commenters recommended that the CMS–855O be modified to require the applicant to provide information about his or her practice location and medical record location. The commenters contended that § 424.510(d)(2)(ii) mandates that each submitted enrollment application include the submission of all documentation to uniquely identify a provider or supplier—including, but not limited to, proof of a practice location and medical record storage location. Such proof, the commenters stated, can help reduce identity theft and other forms of Medicare fraud, waste and abuse. A commenter recommended that CMS deactivate the billing privileges of any individual who enrolled in Medicare using the CMS–855O because the CMS–855O does not collect information on practice locations and medical record storage locations. Another commenter suggested that CMS require individuals who have enrolled using the CMS–855O to provide practice location information.

*Response:* These recommended changes regarding the CMS–855O are outside the scope of this rule, though we may consider adding practice location information to the CMS–855O at a later date.

Some of the enrollment requirements in § 424.510 are applicable only to providers and suppliers enrolling in Medicare to obtain billing privileges, and do not apply to providers and suppliers enrolling strictly to order or certify items or services for Medicare beneficiaries. In order to clarify those requirements that apply to all enrollments and those that only apply to enrollments to obtain billing privileges, we are revising § 424.510 as follows:

- The first two sentences of existing paragraph (a) will be designated as new paragraph (a)(1).
- The third sentence of existing paragraph (a) will be designated as new paragraph (a)(2) and is revised to read: ''To be enrolled to furnish Medicare-covered items and services, a provider or supplier must meet the requirements specified in paragraphs (d) and (e) of this section.''
- New paragraph (a)(3) will state the following: ''To be enrolled solely to order and certify Medicare items or services, a physician or non-physician practitioner must meet the requirements specified in paragraph (d) of this section except for paragraphs (2)(iii)(B), (2)(iv), (3)(ii), (5), (6), and (9).'' These paragraphs only apply to individuals enrolling to obtain Medicare billing privileges.

With respect to the commenter's suggestion regarding deactivation, enrollment via the CMS–855O does not confer billing privileges. Hence, there are no billing privileges to deactivate.

*Comment:* Several commenters disagreed with the use of the CMS–855O, arguing that CMS: (1) Lacks the statutory and regulatory basis to either establish a registration process for ordering and certifying physicians and non-physician practitioners or to use an enrollment application for any purpose other than to enroll a provider or supplier (including physicians and non-physician practitioners); and (2) violates 5 U.S.C. 551 *et seq.* in its use of the CMS–855O without having issued a proposed and final regulation. The commenters further contended that § 424.500 does not contemplate such a registration process and that CMS did not solicit comments on revising § 424.500 for such purpose. A commenter recommended that CMS: (1) Discontinue use of the CMS–855O until it completes the notice and comment rulemaking process described in section 1871 of the Act; and (2) furnish the legal basis for registering physicians and non-physician practitioners for the sole purpose of ordering or certifying Medicare services or items.

Other commenters expressed concern that CMS is using the Paperwork Reduction Act of 1995 (PRA) to circumvent the notice and comment rulemaking requirements of the Administrative Procedure Act as a means of establishing a new Medicare enrollment application—specifically, the CMS–855O. A commenter contended that CMS essentially used the PRA process to prohibit physicians from obtaining Medicare billing privileges via the CMS–855O. The commenter recommended that CMS explain its use of the CMS–855O: (1) Without having utilized the notice and comment rulemaking process; and (2) in lieu of using the CMS–855I, which has a legal basis, has already been subject to rulemaking, and duplicates all of the data on the CMS–855O; the commenter argued that CMS has already established an enrollment application for physicians (that is, the CMS–855I) and that the CMS–855O is therefore duplicative of the CMS–855I. With respect to the second suggestion regarding CMS using the PRA process to prohibit physicians from enrolling to obtain billing privileges, the commenter added that CMS could modify the CMS–855I to accommodate physicians and non-physician practitioners seeking only to order or certify items or services. The commenter stated that this would ease the paperwork burden on such individuals should they later wish to obtain Medicare billing privileges; rather than having to complete two separate forms (the CMS–855I and CMS–855O), the commenter continued, the individual would only need to submit an updated CMS–855I application as part of the enrollment process.

Another commenter stated that the Privacy Act Statement for the CMS–855O includes various references to payments to providers and suppliers. Since the CMS–855O is designed for the sole purpose of ordering and certifying, the commenter requested that CMS explain its rationale for including such references in the CMS–855O Privacy Act Statement.

*Response:* As already indicated, comments regarding the use or content of the CMS–855O are outside the scope of this rule. However, we note that section 6405 of the Affordable Care Act gave us the authority to require the Medicare enrollment of physicians and non-physician practitioners who order or certify certain items or services for Medicare beneficiaries. We implemented this statutory provision at § 424.507 via a May 5, 2010 interim final rule with comment period (75 FR 24437) and an April 27, 2012 final rule (77 FR 25284). These two rules, as well as the CMS–855O itself, were subject to a notice-and-comment process. (We solicited public comments on the CMS–855O in two **Federal Register** notices as

mandated by the PRA.) Moreover, we disagree with the contention that the PRA process was used to prohibit physicians from obtaining Medicare billing privileges via the CMS–855O. The CMS–855O was not designed as a prohibition of any kind but instead as means of permitting—consistent with section 6405 of the Affordable Care Act—certain physicians and non-physician practitioners to enroll in Medicare solely to order or certify Medicare items or services. We believe that completion of an abbreviated form such as the CMS–855O, rather than all or part of the CMS–855I, has eased the burden on the physician and non-physician practitioner communities.

*Comment:* A commenter questioned whether physicians who submit the CMS–855O are required to revalidate their enrollment with the Medicare contractor every 5 years.

*Response:* We reserve the right to require individuals who are enrolled solely to order or certify items or services to revalidate their enrollment information every 5 years.

*Comment:* A commenter stated that since CMS did not discuss reassignment in this proposed rule, it would seem that section 1871 of the Act would not preclude CMS from barring physicians and non-physician practitioners from enrolling in Medicare via the CMS–855O and reassigning their benefits to a medical group. The commenter sought clarification as to whether a physician can enroll using the CMS–855O and reassign payment/benefits to either an employer or an entity under contractual arrangement. Another commenter questioned whether a physician can simultaneously submit a CMS–855O and CMS–855R if he or she is billing for services through a group practice.

*Response:* The concept of reassignment (as that term is used in § 424.80) does not apply to CMS–855O situations because there is no right to payment associated with an enrollment via the CMS–855O. In other words, a physician or non-physician practitioner who enrolls via the CMS–855O does not have Medicare billing privileges, and therefore has no right to payment to reassign via the CMS–855R. If he or she wishes to enroll in Medicare, bill the program for services, and reassign his or her benefits to an eligible party, he or she must complete both the CMS–855I and CMS–855R forms. A CMS–855O form cannot be used as a means of obtaining Medicare billing privileges.

*Comment:* A commenter questioned whether a physician or non-physician practitioner can use the CMS–855O if he or she submits only very few claims to Medicare per year or whether he or she must use the CMS–855I.

*Response:* In the scenario the commenter poses, the physician or non-physician practitioner must use the CMS–855I because he or she will be billing for Medicare services. As discussed previously, the CMS–855O may only be used by physicians or other eligible practitioners who wish to enroll solely to order or certify items or services. It cannot be used to obtain Medicare billing privileges.

*Comment:* A commenter questioned whether a Medicare-enrolled physician or non-physician practitioner who also works part-time at (and only orders services from) a rural health clinic (RHC) must complete the CMS–855O for his or her activities at the RHC.

*Response:* The individual need not complete a CMS–855O in this scenario, for he or she is already enrolled in Medicare via the CMS–855I.

*Comment:* A commenter stated that if suppliers who enroll solely to order or certify Medicare items or services are not granted Medicare billing privileges, the regulatory provisions found in Part 424, subpart P do not apply and CMS does not have the authority to approve, deny, deactivate, or revoke individuals who have enrolled or seek to enroll in Medicare via the CMS–855O solely to order and certify. The commenter recommended that CMS propose a new rule to allow CMS to approve, deny, revoke, or deactivate the enrollment of a physician or non-physician practitioner in such instances.

*Response:* The regulations in Part 424, subpart P apply to suppliers who are enrolled or enrolling in Medicare and are not limited to suppliers who have or seek Medicare billing privileges. In light of our changes to §§ 424.502, 424.505, and 424.510, the provisions of subpart P apply equally to suppliers who enroll in order to obtain Medicare billing privileges and those who enroll exclusively to order or certify Medicare items or services.

*Comment:* A commenter requested clarification as to whether a physician must have a valid enrollment record in PECOS to order infusion and nebulizer drugs or other Part B drugs.

*Response:* We believe this comment is outside the scope of this final rule.

*Comment:* Several commenters sought clarification from CMS concerning the difference between the use of the term ''registration'' on the CMS–855O and the proposed changes to §§ 424.502 and 424.505, which use the term ''enrollment.'' One commenter questioned whether these two terms have the same meaning. Another commenter suggested that CMS establish a definition of ''register.''

*Response:* Our use of the term ''registration'' on the CMS–855O was designed to clarify the distinction between enrolling in Medicare to obtain billing privileges and enrolling in Medicare solely to order or certify items and services. In the latter situation, the process is the same irrespective of the precise term that is used to describe it. For this reason, and because the CMS–855O process will now be included within the scope of the enrollment provisions of §§ 424.502, 424.505, and 424.510, we do not believe a separate definition of ''register'' is warranted or needed.

*Comment:* Citing the current definition of ''Enroll/Enrollment'' in § 424.502, a commenter noted that the enrollment process includes identifying and confirming the provider's practice locations. The commenter contended that since the CMS–855O does not collect practice location information, referencing the CMS–855O in § 424.502 is inappropriate. The commenter suggested that CMS discontinue use of the CMS–855O until it proposes changes to the definition of ''Enroll/Enrollment'' that eliminate the reference to practice location data.

*Response:* As mentioned earlier, we may consider adding practice location information to the CMS–855O at a later date. Therefore, we do not believe that the definition of ''Enroll/Enrollment'' in § 424.502 should be revised to remove the reference to practice locations. However, we will modify paragraph (2) of the definition of ''Enroll/Enrollment'' in § 424.502 to account for that paragraph's inapplicability to CMS–855O applications. The current version of paragraph (2) states that the enrollment process includes, ''Validation of the provider's or supplier's eligibility to provide items or services to Medicare beneficiaries.'' Since suppliers who complete the CMS–855O are enrolling solely to order or certify Medicare items and services, we are modifying paragraph (2) to state: ''Except for those suppliers who complete the CMS–855O form, CMS-identified equivalent, successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services, validating the provider or supplier's eligibility to provide items or services to Medicare beneficiaries.'' We note that the new language in paragraph (2) is the same as that which is being added to paragraph (4).

*Comment:* Several commenters supported our proposed changes to §§ 424.502 and 424.505 to reflect that

some physicians and non-physician practitioners may enroll solely to order or certify certain items or services for Medicare beneficiaries. However, one commenter suggested that the verbiage ''or CMS-equivalent or successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services'' is too wordy and confusing and should be stricken from both sections.

*Response:* While we appreciate the commenters' support, we do not believe the quoted language should be stricken from §§ 424.502 and 424.505. This language is necessary to account for the possibility that a different process for enabling individuals to enroll solely to order or certify Medicare items and services could be established in the future.

*Comment:* A commenter believed that there remains confusion in the physician and non-physician practitioner communities regarding the difference between enrolling exclusively to order and certify Medicare services, and enrolling for the purpose of participating in and billing Medicare. The commenter urged CMS to make this distinction clear on the CMS–855O form itself and in all applicable CMS educational efforts.

*Response:* We have undertaken extensive educational efforts—including close collaboration with various professional associations—to clarify for the public and the provider community the distinction between the two processes. We will continue our outreach activities on this issue.

*Comment:* A commenter questioned whether CMS is changing its longstanding policy of requiring providers and suppliers to submit to CMS or its Medicare contractor the applicable provider enrollment application based on the type of provider or supplier enrolling. The commenter also requested that CMS propose and explain the differences between the Medicare enrollment process to convey Medicare billing privileges and this ostensibly new concept of enrolling solely to order and certify items and services in the Medicare program.

*Response:* All providers and suppliers, including those suppliers submitting the CMS–855O, will continue to submit enrollment applications based on the provider or supplier type involved. As for the second comment, we will continue our educational efforts to clarify the distinction between these two processes.

*Comment:* A commenter contended that §§ 424.507 and 424.510 must be revised in order for CMS to establish a registration process for physicians and non-physician practitioners seeking only to order or certify items and services.

*Response:* Our use of the term ''registration'' on the CMS–855O was intended to articulate the distinction between enrolling in Medicare to obtain billing privileges and enrolling in Medicare strictly to order or certify items and services. In the latter situation, the process is the same regardless of the precise term that is used to describe it. The general procedures for completing the CMS–855O and the contractor's processing of the application are similar to those used for other CMS–855 forms. As such, we do not believe that §§ 424.507 and 424.510 need to be revised to establish a unique process for submitting and reviewing CMS–855O applications. Nevertheless, we have (as explained earlier) revised § 424.510 to clarify which paragraphs in that section do not apply to individuals who enroll solely to order or certify items or services.

*Comment:* A commenter questioned whether a physician who completes the CMS–855O can elect to be a participating physician even though he or she is ordering services in the Medicare program.

*Response:* A CMS–855O form cannot be used as a means of obtaining Medicare billing privileges. Medicare participation status does not apply in situations where the physician or non-physician practitioner enrolls solely for the purpose of ordering or certifying items or services. If the individual wishes to enroll in Medicare to furnish Medicare services, he or she must submit a CMS–855I application.

*Comment:* A commenter recommended that CMS identify whether any other federal or state health plan or any state Medicaid agency permits a physician or non-physician practitioner to obtain Medicare billing privileges for the sole purpose of ordering or certifying services for their members. The commenter was unaware of any other health plan that permits this.

*Response:* One cannot obtain Medicare billing privileges through any state health plan, state Medicaid agency, or federal health plan other than Medicare.

*Comment:* A commenter stated that on May 20, 2011, September 30, 2011, and April 14, 2012, CMS published a summary of the information collection for the CMS–855O in the **Federal Register**. The commenter noted that in each of these summaries, CMS stated that the CMS–855O permits a physician to receive a Medicare identification number (without being approved for billing privileges) for the sole purpose of ordering and referring beneficiaries to approved Medicare providers and suppliers. The commenter indicated further that CMS states, in the proposed rule on which the commenter is commenting, that the CMS–855O is exclusively designed to allow physicians and eligible professionals to enroll in Medicare solely to order or certify items or services. The commenter requested that CMS explain this apparent discrepancy. The commenter also requested CMS to outline how giving a physician or practitioner a Medicare billing number (which is already required to be the National Provider Identifier) is consistent with enrolling in the Medicare program. Another commenter questioned why the September 30, 2011 and April 14, 2012 notices refer to the registration of such individuals while our proposed rule refers to enrollment. This commenter also urged CMS to explain why it did not choose to solicit public comments on changes to regulatory provisions found in §§ 424.502 and 424.505 for almost 2 years after adopting and using the CMS–855O.

*Response:* If the commenter is referring to the use of the term ''order or certify'' in lieu of the term ''order or refer,'' we replaced ''refer'' with ''certify'' because, as explained in the April 27, 2012 final rule: (1) A ''certifying'' provider generally means a person who orders/certifies home health services for a beneficiary, and (2) home health services fall within the purview of § 424.507.

The Medicare number referenced in the three notices is not a ''billing number'' and is not intended to grant billing privileges to the individual; it instead serves as an identifier of the physician or non-physician practitioner. Likewise, our revisions to §§ 424.502 and 424.505 do not furnish billing privileges to an individual who is enrolling solely to order or certify items or services.

As explained earlier, our use of the term ''registration'' was intended to clarify the difference between enrolling in Medicare to obtain billing privileges and enrolling in Medicare solely to order or certify items and services.

*Comment:* A commenter requested whether completion of another CMS–855O is required if the applicable physician or non-physician practitioner moves and opens a new practice in another contractor jurisdiction.

*Response:* At this time, a separate CMS–855O is required for each

Medicare contractor jurisdiction in which the individual practices.

*Comment:* Section 1866(j) of the Act states that the Secretary shall establish by regulation a process for enrolling providers and suppliers; such process shall include, in part, a screening process. A commenter contended that CMS has violated section 1866(j) of the Act because our proposed rule does not establish a screening process for physicians and non-physician practitioners enrolling solely to order or certify items or services. The commenter recommended that CMS propose a moderate level of risk for such physicians and non-physician practitioners because CMS cannot link an order from such individual to the billing by a DMEPOS supplier, imaging facility, or clinical laboratory.

*Response:* We disagree with the commenter. The screening process implemented pursuant to section 1866(j) of the Act applies to all CMS–855 applications, including the CMS–855O. Regardless of which CMS–855 enrollment application is used, physician and non-physician practitioners are designated to the limited screening level pursuant to § 424.518(a)(1)(i), unless an adjustment applies under § 424.518(c)(3).

*Comment:* A commenter recommended that CMS provide the number of individuals enrolled or registered in the Medicare program using the CMS–855O since July 2011.

*Response:* This comment is outside the scope of this rule.

*Comment:* A commenter stated that contrary to the information found in the CMS–855O Privacy Act Notice, CMS has not updated the PECOS System of Records document to include the CMS–855O. The commenter recommended that CMS update the System of Records document No 09–70–0532 to reflect the collection and dissemination of information from the CMS–855O.

*Response:* This comment is outside the scope of this rule.

*Comment:* A commenter stated that permitting physicians who do not bill Medicare to order services for Medicare beneficiaries will likely increase Medicare fraud and the number of improper Medicare payments. The commenter recommended that CMS: (1) Explain how it will protect the Medicare Trust Funds from fraud when it cannot verify whether the physician actually conducted an exam or treated a Medicare beneficiary; and (2) require prior authorization for any service ordered by a physician or practitioner who does not have an associated claim for medical services; using prior authorization, the commenter believed, is the only way that Medicare can verify that a physician is treating a patient and not merely signing an order for services.

*Response:* This comment is outside the scope of this rule.

*Comment:* A commenter recommended that in lieu of using the CMS–855O, CMS should exempt infrequent billers or physicians who see Medicare patients at a rural health clinic from deactivation for 3 or 5 years. This approach ensures that a physician can bill if he/she needs to, but reduces the amount of paperwork associated with an annual deactivation process. Another commenter offered several alternatives to the use of the CMS–855O: (1) A 1-year deactivation process for physicians who accept assignment and bill the Medicare program on a regular basis; (2) a 5-year deactivation process for physicians who bill Medicare as non-participating and only bill infrequently; and (3) an exception to the 1-year deactivation process for certain physicians—such as those listed on the CMS–855O—who bill the Medicare program infrequently.

*Response:* These comments are outside the scope of this rule.

After consideration of the comments received, we are finalizing the three proposed changes to §§ 424.502 and 424.505. We are also further modifying the definition of ''enroll/enrollment'' in § 424.502 and modifying § 424.510(a) as previously discussed.

2. Debts to Medicare

Under § 424.530(a)(6), an application can be denied if ''[t]he current owner (as defined in § 424.502), physician or non-physician practitioner has an existing overpayment at the time of filing of an enrollment application.'' This provision was established in large part to address situations in which the owner of a provider or supplier incurs a substantial debt to Medicare, exits the Medicare program or shuts down operations altogether, and attempts to re-enroll through another vehicle or under a new business identity.

As we explained in II.B.2. of the proposed rule, such situations were discussed in a November 2008 Department of Health and Human Services Office of Inspector General (OIG) Early Alert Memorandum entitled, ''Payments to Medicare Suppliers and Home Health Agencies Associated with 'Currently Not Collectible' Overpayments'' (OEI–06–07–00080). The memorandum noted that anecdotal information from OIG investigators and assistant United States Attorneys indicated that DMEPOS suppliers with outstanding Medicare debts may inappropriately receive Medicare payments by, among other means, operating businesses that are publicly fronted by business associates, family members, or other individuals posing as owners.[1] In its study, the OIG selected a random sample of 10 DMEPOS suppliers in Texas that each had Medicare debt of at least $50,000 deemed currently not collectible (CNC) by CMS during 2005 and 2006.[2] The OIG found that 6 of the 10 reviewed DMEPOS suppliers were associated with 15 other DMEPOS suppliers or HHAs that received Medicare payments totaling $58 million during 2002 through 2007.[3] The OIG also found that most of the reviewed DMEPOS suppliers were connected with their associated DMEPOS suppliers and HHAs through shared owners or managers.[4]

We have continued to receive reports of providers, suppliers, and owners thereof accumulating large Medicare debts, departing Medicare, and then attempting to reenter the program through other channels—often to incur additional debts. While our current authority to deny based on § 424.530(a)(6) enables us to stem this practice to a certain extent, it is limited to situations where an enrolling physician, non-physician practitioner, or an owner of the enrolling provider or supplier has a current Medicare overpayment. It does not apply to instances where an enrolling provider or supplier entity has a current Medicare debt, be it an overpayment or some other type of financial obligation to the Medicare program. Furthermore, it does not address cases where an entity with which the enrolling provider, supplier, or owner was affiliated had incurred the debt. We believed that these latter situations were of particular concern to the OIG in the 2008 memorandum. Therefore, we proposed several changes to § 424.530(a)(6).

First, we proposed to incorporate the existing language of § 424.530(a)(6) into a new paragraph (a)(6)(i) that would apply to all enrolling providers, suppliers (including physicians and non-physician practitioners), and owners thereof. We stated that we did not believe (a)(6) should be limited to individual physicians and non-physician practitioners. All providers and suppliers, regardless of type, are

[1] Department of Health and Human Services, Office of Inspector General (OIG). ''Early Alert Memorandum: Payments to Medicare Suppliers and Home Health Agencies Associated with 'Currently Not Collectible' Overpayments (OEI–06–07–00080),'' November 26, 2008, p.1.

[2] Ibid. p.1.

[3] Ibid. p.7.

[4] Ibid. p.2.

responsible for reimbursing Medicare for any debts they owe to the program. Permitting them to enroll additional provider or supplier sites in Medicare when they have existing debts to Medicare potentially endangers the Trust Funds. If the provider or supplier cannot repay its existing Medicare debts, this raises questions about its ability to pay future debts incurred as part of any additional enrollments.

We proposed that a denial of Medicare enrollment under paragraph (a)(6)(i) could be avoided if the enrolling provider, supplier, or owner thereof satisfied the criteria set forth in § 401.607 and agreed to an extended CMS-approved repayment schedule for the entire outstanding Medicare debt; agreement to such a schedule would indicate that the provider, supplier, or owner is not seeking to avoid its debts to Medicare. The provider, supplier, or owner thereof could also avoid denial by repaying the debt in full. We also solicited comment on whether the scope of our proposed revision to § 424.530(a)(6)(i) should be expanded to include the enrolling provider or supplier's managing employees (as that term is defined in § 424.502), corporate officers, corporate directors, and/or board members.

Second, we proposed to replace the term ''overpayment,'' as it is currently used in § 424.530(a)(6), with ''Medicare debt'' in our regulatory text. We noted that ''overpayment'' more appropriately describes the types of debts that are subject to (a)(6). We also stated that our denial authority under proposed (a)(6) should include all forms of debt to Medicare, not just overpayments. We solicited comments on this proposed change as well as on the appropriate scope of the term ''Medicare debt'' for purposes of § 424.530(a)(6).

Third, we proposed to add a new paragraph (ii) to § 424.530(a)(6) permitting a denial of Medicare enrollment if the provider, supplier, or current owner (as defined in § 424.502) thereof was the owner (as defined in § 424.502) of a provider or supplier that had a Medicare debt that existed when the latter's enrollment was voluntarily or involuntarily terminated or revoked, and the following criteria are met:

- The owner left the provider or supplier that had the Medicare debt within 1 year of that provider or supplier's voluntary termination, involuntary termination, or revocation.
- The Medicare debt has not been fully repaid.
- We determine that the uncollected debt poses an undue risk of fraud, waste, or abuse.

Similar to proposed § 424.530(a)(6)(i), we proposed in § 424.530(a)(6)(iii) that the enrolling provider or supplier would be able to avoid a denial under § 424.530 (a)(6) if the enrolling provider, supplier, or owner thereof satisfies the criteria set forth in § 401.607 and agrees to an extended repayment schedule for the entire outstanding Medicare debt of the revoked provider or supplier. We noted our belief that this provision is warranted because agreement to a repayment plan evidences an intention to pay back the debt. We also proposed in § 424.530(a)(6)(iii) that no denial would occur under paragraph (a)(6)(ii) if the debt was repaid in full.

We explained that the difference between our proposed § 424.530(a)(6)(ii) and the existing language in § 424.530(a)(6) was that the latter involved situations in which the current owner, physician or non-physician practitioner had a Medicare debt. Section 424.530(a)(6)(ii), on the other hand, would focus on the entity with which the enrolling provider, supplier, or owner thereof had a prior relationship. That is, the ''prior entity'' had a debt to Medicare rather than the enrolling provider, supplier, or owner thereof. We offered the following illustration: Provider X is applying for enrollment in Medicare. Y owns 50 percent of X. Y was also a 20 percent owner of Supplier Entity Z, which was revoked from Medicare 12 months ago and currently has a large outstanding Medicare debt. The current version of § 424.530(a)(6) could not be used to deny X's application because X's current owner (Y) does not have a Medicare debt. Rather, the entity with which Y was affiliated (Z) has the debt. However, under proposed § 424.530(a)(6)(ii), and assuming the other criteria are met, X's application could be denied because X's owner was an owner of a supplier (Z) that has a Medicare debt. We cited section 1866(j)(5) of the Act, codified at 42 U.S.C. 1395cc(j)(5) and which was established by section 6401(a)(3) of the Affordable Care Act, as authority for proposed paragraph (ii).

We proposed the following as factors we would consider in determining whether an ''undue risk'' exists under paragraph (ii): (1) The amount of the Medicare debt; (2) the length and timeframe that the enrolling provider, supplier, or owner thereof was an owner of the prior entity; and (3) the percentage of the enrolling provider's, supplier's, or owner's ownership of the prior entity. We also noted that the scope and breadth of ownership interests would vary widely (for example, the amount of ownership; direct versus indirect ownership). For this reason, we believed it was important that CMS have the flexibility to make enrollment decisions under § 424.530(a)(6)(ii) on a case-by-case basis, using the factors previously outlined. However, we also solicited comment on the following issues related to these factors:

- Whether additional factors should be considered and, if so, what those factors should be.
- Which, if any, of the proposed factors should not be considered.
- Which, if any, factors should be given greater or lesser weight than others.
- Whether a minimum or maximum threshold for consideration should be established for the ''amount of Medicare debt'' and ''percentage of ownership'' factors.

We also solicited comments on whether paragraph (ii) should apply to the enrolling entity's managing employees (as that term is defined in § 424.502), corporate officers, corporate directors, and/or board members.

Many of the comments we received regarding our proposed changes to § 424.530(a)(6) were applicable to two or more of the proposals. Hence, we have summarized and collectively listed all of the comments we received on § 424.530(a)(6). Our responses to these comments are as follows:

*Comment:* Several commenters supported CMS's proposal to use the term ''Medicare debt'' instead of ''overpayment'' for the reasons specified in the proposed rule, with one commenter stating that the term ''overpayment'' has long seemed inaccurate and, at times, confusing to Medicare physicians. One commenter, encouraged CMS to more thoroughly define ''Medicare debt.'' Another commenter recommended that the term ''Medicare debt'' be interpreted liberally.

*Response:* We appreciate the commenters' support for our proposed change. We did not propose a definition of ''Medicare debt'' and do not do so in this final rule; rather, we had sought comments on the appropriate scope of the term for purposes of applying § 424.530(a)(6).

With respect to § 424.530(a)(6)(i) and (ii), we agree that the term ''Medicare debt'' should be interpreted broadly. An existing Medicare liability, simply put, is an unpaid Medicare debt. As such, an existing debt to the Medicare program—regardless of its type, or how the debt was incurred or discovered—may result in the denial of Medicare enrollment under § 424.530(a)(6). The only exceptions to this would be the

situations described in proposed § 424.530(a)(6)(iii) regarding: (1) The satisfaction of the criteria set forth in § 401.607 and the agreement to an extended repayment schedule for the entire outstanding Medicare debt; or (2) the repayment of the debt in full. We are finalizing these two exceptions.

We do not believe that specific types of Medicare debt should be articulated in the text of § 424.530(a)(6). Since the particular facts of each case will differ, we must retain the flexibility to address a variety of situations. We also note that our denial authority under § 424.530(a)(6) is discretionary, and there may be instances when a denial under § 424.530(a)(6) might not be warranted. For instance, under § 424.530(a)(6)(ii), our determination as to whether the debt poses an undue risk to the Medicare program will include consideration of the three factors we proposed: (1) The amount of the Medicare debt; (2) the length and timeframe of the ownership interest; and (3) the percentage of ownership interest—as well as two additional factors that we discuss in more detail later in this section—specifically; (4) whether the Medicare debt is currently being appealed; and (5) whether the provider was an owner when the debt was incurred. (These factors will be added at § 424.530(a)(6)(ii)(C).) We will make all final determinations regarding § 424.530(a)(6)(i) and (ii), and may conclude after reviewing the relevant factors that a particular denial under § 424.530(a)(6)(i) is unwarranted.

*Comment:* A commenter suggested that CMS limit the term ''Medicare debt'' to those debts that have undergone and completed the CMS appeals process and final administrative adjudication; the commenter specifically requested that the phrase ''after final administration adjudication'' be inserted into a definition of ''Medicare debt.'' Otherwise, the commenter stated, honest and legitimate providers and suppliers could be prohibited from expanding or selling their practices based upon a single claim determination.

*Response:* We have added at § 424.530(a)(6)(ii)(C)(4) the appeal status of the debt as a factor in the determination of whether the debt poses an undue risk to Medicare. However, we are not wholly excluding debts that are being appealed from § 424.530(a)(6)'s application for two reasons. First, a provider or supplier with a Medicare debt (particularly a large debt) that poses an undue risk to the Medicare program should not be given an automatic opportunity to incur future debts with additional Medicare billing privileges simply because the debt is being appealed. Second, permitting providers and suppliers to obtain additional Medicare billing privileges if a Medicare debt is being appealed may encourage providers and suppliers to file meritless appeals simply to avoid and circumvent the application of § 424.530(a)(6)(ii).

*Comment:* A commenter expressed concern that an expansion of the word ''overpayment'' to the word ''debt'' could lead to inequitable results, such as denials due to debts stemming from—(1) coordination of benefits issues with secondary payers; and (2) meaningful use audits. The commenter urged CMS to strictly narrow the scope of whatever term it finalizes to ensure that physicians do not unreasonably experience enrollment denials.

*Response:* As alluded to earlier, we believe that any type of Medicare debt—regardless of how it was incurred or discovered—is of concern to us. It is for this reason that we are not excluding particular types of debts (such as those to which the commenter refers) from § 424.530(a)(6)'s scope. Nevertheless, we do not believe that our intended use of the term ''Medicare debt'' will lead to inequitable results, for we will only exercise our discretion under § 424.530(a)(6) in a careful and consistent manner.

*Comment:* Several commenters did not support expanding § 424.530(a)(6)'s purview to include the enrolling entity's current managing employees, corporate officers, directors, or board members. They contended that such an expansion would be excessively broad and unnecessarily complicated.

*Response:* We disagree that such an expansion would be overly broad and complex. To nonetheless ensure that we can focus on the implementation of our revisions to § 424.530(a)(6), we have decided not to include the enrolling entity's current managing employees, corporate officers, directors, or board members within the scope of § 424.530(a)(6) at this time, although we may consider doing so via future rulemaking.

*Comment:* A commenter expressed general support for our proposed § 424.530(a)(6)(ii) and stated that CMS identified the appropriate factors to consider in this respect. However, the commenter did: (1) Suggest that CMS also adopt as a factor whether or not the person was an owner at the time the debt was incurred; and (2) urge CMS to exercise its discretion regarding § 424.530(a)(6)(ii) fairly and carefully; the commenter, citing an example, argued that a 5 percent owner for 6 months should not be penalized to the same extent as someone who has been a 50 percent owner for 5 years.

*Response:* We appreciate the commenter's support and, as stated, will apply § 424.530(a)(6)(ii) in a fair and careful manner. We also agree with the commenter's suggestion to include as a factor the party's ownership status at the time the debt was incurred. We have added this as a factor at § 424.530(a)(6)(C)(5), although a finding that the party was not an owner when the debt was incurred will not in and of itself result in § 424.530(a)(6)(ii)'s non-application. All factors and particular circumstances will be considered before a denial under § 424.530(a)(6)(ii) is imposed.

*Comment:* A commenter expressed concern that a physician group may not be aware that an individual physician has unpaid Medicare debt related to previous affiliations. The commenter urged CMS to make such information available in an accessible database.

*Response:* While we understand the commenter's concern, it is ultimately the hiring provider or supplier's responsibility to perform a thorough review of the physician's background, including his or her prior affiliations. We do not believe that such a review should be dependent upon the creation of a publicly available database.

*Comment:* A commenter disagreed with our proposal to add § 424.530(a)(6)(ii), contending that CMS did not explain why it—(1) needs this new authority; and (2) cannot collect a debt through the Federal Payment Levy Program. The commenter also requested CMS to explain why it did not propose revoking existing providers and suppliers that have Medicare overpayments.

*Response:* Our rationale for the proposed addition of § 424.530(a)(6)(ii) was contained in the preamble of the proposed rule and is restated earlier in this final rule. While we are aware of the authority furnished by the Federal Payment Levy Program, the issue is not merely the collection of existing Medicare debts; it is also the need to prevent the accumulation of additional Medicare debts. We believe that our denial authority under § 424.530(a)(6)(ii) will be an important step in this direction.

We did not propose to incorporate a new revocation reason regarding Medicare debts that would apply to currently enrolled providers (for example, via revalidation), for this is a different situation than what is being described here. However, we may consider establishing such a revocation reason via future rulemaking.

*Comment:* A commenter supported the denial of enrollment of providers and suppliers that have existing Medicare debts that have not been fully repaid or if the provider or supplier is not current in its existing repayment schedule. Yet the commenter urged CMS to exclude from § 424.530(a)(6)'s purview debts that: (1) Are currently within a CMS-approved appeals process; and (2) have not been forgiven by CMS due to financial considerations. Other commenters, too, suggested that debts that are currently being appealed or are part of an extended repayment plan should be exempt from § 424.530(a)(6)'s application. With respect to appeals, one commenter contended that the Congress' passage of section 935 of the Medicare Modernization Act (MMA) envisioned a congressional intent to permit physicians to delay repaying an overpayment pending the completion of the appeals process.

*Response:* As explained earlier, we will consider a debt's appeal status in our determination of whether the debt poses an undue risk to the Medicare program under § 424.530(a)(6)(ii). In addition, we will exclude from § 424.530(a)(6)(i) and (ii) those situations where the enrolling provider, supplier, or owner thereof meets the criteria of § 401.607 and agrees to an extended repayment schedule for the entire outstanding Medicare debt. While we are unclear as to the commenter's suggestion that debts that CMS has not forgiven due to financial considerations be excluded from our § 424.530(a)(6) determinations, we can assure the commenter that we will apply § 424.530(a)(6)(i) and (ii) in a careful and judicious manner.

We do not believe that our revisions to § 424.530(a)(6) are inconsistent with section 935 of the MMA. Our provisions address enrollment denials, not recoupment. Nothing in § 424.530(a)(6) requires a provider to repay an overpayment prior to the completion of the appeals process.

*Comment:* Several commenters opposed our proposed § 424.530(a)(6)(ii), contending that the provision would potentially punish persons and entities who: (1) Were not responsible for the debt; or (2) had only a very limited association with the party that was responsible for the debt. One commenter noted that our proposed criteria for denying enrollment under § 424.530(a)(6)(ii) did not take into account whether the enrolling provider or supplier is actually responsible for the debt. Another commenter contended that our proposal is overreaching and exhibits a lack of understanding of the complexities of the new coordinated care models that are evolving pursuant to payment and delivery reform advanced by the Affordable Care Act. The commenter stated that denials under our proposed provision could be frequent because many of today's systems of health care are diverse, geographically large, and encompass numerous entities and groups.

*Response:* We are adopting as a factor in our § 424.530(a)(6)(ii) determinations whether or not the person was an owner at the time the debt was incurred. In addition, we will only deny a Medicare application under § 424.530(a)(6)(ii) after careful review of all the factors associated with a particular situation. We believe these actions may alleviate to some extent the commenters' concerns about § 424.530(a)(6)(ii)'s application.

*Comment:* A commenter requested that CMS furnish evidence that the problem of suppliers departing Medicare with large, unpaid overpayments and then re-enrolling in Medicare exists with respect to physicians and group practices.

*Response:* As explained in the proposed rule and earlier in this final rule, the OIG's November 2008 Early Alert Memorandum titled ''Payments to Medicare Suppliers and Home Health Agencies Associated with 'Currently Not Collectible' Overpayments'' (OEI–06–07–00080) cautioned that DMEPOS suppliers with outstanding Medicare debts may inappropriately receive Medicare payments by, among other means, operating businesses that are publicly fronted by business associates, family members, or other individuals posing as owners. We also noted our receipt of reports of providers, suppliers, and owners thereof accumulating large Medicare debts, departing Medicare, and then attempting to reenter the program through other channels.

*Comment:* A commenter expressed concern with CMS's publication of Transmittal 469, which operationalizes the current version of § 424.530(a)(6). The commenter contended that CMS did not abide by the Administrative Procedure Act (APA) in issuing Transmittal 469 because it did not use the prescribed notice and public comment process. Another commenter urged CMS to retract Transmittal 469, contending that certain policies in the transmittal conflict with the contents of our proposed rule, thereby causing confusion in the provider community. Another commenter sought clarification as to how Transmittal 469 would interact with our proposed revisions to § 424.530(a)(6). As an example, the commenter stated that Transmittal 469 contained a $1,500 threshold—which the commenter believed was too low—yet the proposed rule contained no such threshold and does not define the scope of the overpayments that would be subject to our proposed provisions.

*Response:* The publication of Transmittal 469—which has since been rescinded and replaced by Transmittal 479—did not violate the APA. The current version of § 424.530(a)(6) was subject to public notice and comment prior to its enactment. Transmittal 479 adds guidance regarding existing § 424.530(a)(6) to chapter 15 of our Program Integrity Manual (CMS Pub. 100–08).

Upon publication of this final rule, we will revise CMS Publication 100–08, chapter 15, to ensure that the guidance to our contractors and the public is consistent with our changes to § 424.530(a)(6).

*Comment:* A commenter offered several suggestions regarding our proposed changes to § 424.530(a)(6). First, the commenter recommended that CMS exclude from § 424.530(a)(6)'s scope those debts resulting from contractor error or from retroactive changes made by CMS or the Congress. Second, the commenter suggested that CMS establish a debt monetary threshold below which § 424.530(a)(6) would not apply; the commenter cited the $1,500 threshold set forth in the aforementioned Transmittal 469 as an example. Third, the commenter suggested that CMS establish an ownership percentage threshold below which § 424.530(a)(6) would not apply; the commenter recommended 20 percent. The commenter stated that such thresholds would foster consistency and assist CMS's efforts to curb fraud and abuse without unnecessarily burdening providers and suppliers that have small debts.

*Response:* We mentioned earlier that the amount of the debt and the percentage of ownership will be factors in our § 424.530(a)(6)(ii) determinations, although specific thresholds will not be established due to the need to maintain flexibility to address various situations. In terms of contractor errors, we will be including the debt's appeal status as another factor.

We are not adding retroactive changes as a factor because we are unclear as to the types of situations to which the commenter is referring.

*Comment:* A commenter requested that CMS identify the enrollment applications and types of enrollment changes that would be impacted by our proposed revisions to § 424.530(a)(6).

*Response:* Initial CMS–855 applications are the only applications subject to § 424.530(a)(6).

*Comment:* A commenter expressed support for our proposed revisions to § 424.530(a)(6), stating that this will lead to increased scrutiny of the ownership and leadership of provider and supplier organizations.

*Response:* We appreciate the commenter's support.

*Comment:* A commenter contended that our proposed § 424.530(a)(6) exceeds the statutory authority granted to the Secretary in 42 U.S.C. 1395cc(j)(5), which provides that the Secretary may deny an application based on a disclosure of a current or previous affiliation, subject to a finding of ''undue risk.'' At a minimum, the commenter recommended, CMS should revise the proposed regulatory text to: (1) Include the criteria for a finding of undue risk as described in the proposed rule's preamble; and (2) state that a denial of enrollment ''may be warranted,'' rather than ''is warranted''.

*Response:* We agree with the commenter's first recommendation and will revise the regulatory text accordingly. We note that the second recommendation is moot because the regulatory text does not contain the phrase ''is warranted.''

We disagree with the assertion that our changes to § 424.530(a)(6) exceed our statutory authority. Our expansion of § 424.530(a)(6)(i)—the existing version of which has been in effect since 2009—and our addition of § 424.530(a)(6)(ii) are consistent with the authority in section 1866(j)(1) and (5) of the Act (42 U.S.C. 1395cc(j)(1) and (5)). It is also consistent with our general rulemaking authority in sections 1102 and 1871 of the Act.

*Comment:* A commenter supported CMS's proposal to extend § 424.530(a)(6)(i) to other provider and supplier entities. The commenter stated that since physicians are in the ''limited'' screening level in § 424.518(a), it is sensible to include higher risk providers and suppliers in that category as well.

*Response:* We appreciate the commenter's support.

*Comment:* A commenter stated that CMS proposed § 424.530(a)(6)(ii) is based on a false premise that any uncollected debt poses an undue risk of fraud, waste or abuse and does not take into consideration the due process rights that should be afforded to providers through the appeals process.

*Response:* We do not believe that every uncollected debt poses an undue risk of fraud, waste or abuse. As we stated in the proposed rule, we will make an individual determination—based on the factors set forth at § 424.530(a)(6)(ii)(C)—as to whether the debt in question poses an undue risk. If the debt, after our analysis, does not present such a risk, we will not deny the enrollment application under § 424.530(a)(6)(ii).

*Comment:* A commenter noted that certain DMEPOS suppliers are subject to a $50,000 bond requirement. As such, there is an existing avenue—outside of denying enrollment—to address CMS's concerns regarding uncollected debts.

*Response:* Though it is true that certain DMEPOS suppliers must obtain a surety bond in order to enroll in Medicare, there are at least 1.4 million other Medicare providers and suppliers that do not. Moreover, the presence of a surety bond does not in itself guarantee that the full amount of a Medicare debt will be recovered via the bond. Therefore, we need additional mechanisms—such as those we are finalizing with respect to § 424.530(a)(6)—to help ensure that Medicare debts are repaid and that providers and suppliers with unpaid debts do not incur additional Medicare debts through the establishment of additional enrollments.

Given the comments received and the preceding discussion, we are finalizing our proposed revisions to § 424.530(a)(6), albeit with three revisions to § 424.530(a)(6)(ii)(C) and one change to § 424.530(a)(6)(iii):

- We are revising § 424.530(a)(6)(ii)(A) to state: ''The owner left the provider or supplier with the Medicare debt within 1 year before or after that provider or supplier's voluntary termination, involuntary termination or revocation.'' The insertion of ''with'' in lieu of ''that had'' and the insertion of ''before or after'' are merely intended to clarify our original intention that the 1-year period applies to separations occurring prior to or after the provider or supplier's termination or revocation.
- To § 424.530(a)(6)(ii)(C) will be added a second sentence that reads: ''In making this determination, we consider the following factors:''
- New paragraphs (1) through (5) will be added to § 424.530(a)(6)(ii)(C) identifying these factors. The paragraphs state the following:

++ The amount of the Medicare debt.

++ The length and timeframe that the enrolling provider, supplier, or owner thereof was an owner of the prior entity.

++ The percentage of the enrolling provider's, supplier's, or owner's ownership of the prior entity.

++ Whether the Medicare debt is currently being appealed.

++ Whether the enrolling provider, supplier, or owner thereof was an owner of the prior entity at the time the Medicare debt was incurred.

- To ensure consistency in application, in § 424.530(a)(6)(iii) we are combining proposed paragraphs (A) and (B)(1) into a revised paragraph (A) that will read as follows: ''(1) Satisfies the criteria set forth in § 401.607; and (2) agrees to a CMS-approved extended repayment schedule for the entire outstanding Medicare debt.'' Proposed paragraph (B)(2) will be redesignated as new paragraph (B) and will read as follows: ''Repays the debt in full.''

3. Felony Convictions

Under § 424.530(a)(3) and § 424.535(a)(3), respectively, a provider or supplier's Medicare enrollment may be denied or revoked if the provider or supplier—or any owner of the provider or supplier—has, within the 10 years preceding enrollment or revalidation of enrollment, been convicted of a federal or state felony offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries. Under § 424.535(a)(3)(i), as currently codified, such offenses include the following:

- Felony crimes against persons; such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
- Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
- Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
- Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

(Section 424.530(a)(3)(i) mirrors § 424.535(a)(3)(i) with the exception of paragraph (D), which uses the phrase: ''Any felonies outlined in section 1128 of the Act.'')

We proposed several changes to §§ 424.530(a)(3) and 424.535(a)(3).

First, we proposed to modify the list of felonies in each section such that any felony conviction that we determine to be detrimental to the best interests of the Medicare program and its beneficiaries would constitute a basis for denial or revocation. We stated that considering the very serious nature of any felony conviction, our authority in §§ 424.530(a)(3)(i) and 424.535(a)(3)(i) should not be restricted to the categories

of felonies identified in (a)(3)(i); this was especially true considering that the types of felony offenses often vary from state to state.

Second, we proposed to expand §§ 424.530(a)(3) and 424.535(a)(3) to include felony convictions against a provider or supplier's ''managing employee,'' as that term is defined in § 424.502. Since certain managing employees of a provider or supplier may have as much (if not more) day-to-day control as an owner, we explained that managing employees should be held to the same standard as owners.

Third, we proposed to revise the language ''within the 10 years preceding enrollment or revalidation of enrollment'' in § 424.530(a)(3) and § 424.535(a)(3) to ''within the preceding 10 years.'' The existing language has caused confusion as to how the 10-year period is calculated. We believe that our revised wording clarifies this timeframe.

Fourth, we proposed to clarify in §§ 424.530(a)(3) and 424.535(a)(3) that the term ''convicted''—as used in these two sections—has the same definition as the one set forth in 42 CFR 1001.2. This was intended to address the numerous inquiries we have received regarding the proper interpretation of the term ''convicted'' as it relates to §§ 424.530(a)(3) and 424.535(a)(3).

The following is a summary of the comments received regarding these four proposed changes and our responses thereto.

*Comment:* A commenter urged CMS to retain the current language in §§ 424.530(a)(3) and 424.535(a)(3) that states that CMS will consider the severity of the underlying offense before denying or revoking enrollment. The commenter contended that while some felony convictions may bear directly on a provider's ability to care for patients, other convictions may be irrelevant to patient care—especially those that may be as many as 10 years old. In all instances, the commenter added, CMS should employ its denial and revocation authority under §§ 424.530(a)(3) and 424.535(a)(3) judiciously and should use a reasonableness standard in making such determinations.

*Response:* Regardless of whether the ''severity of the underlying offense'' language is present in §§ 424.530(a)(3) and 424.535(a)(3), we have always considered—and will continue to do so—the seriousness of the offense in determining whether a denial or revocation is warranted under §§ 424.530(a)(3) and 424.535(a)(3). Therefore, we do not believe that including the ''severity'' verbiage in §§ 424.530(a)(3) and 424.535(a)(3) is necessary, for CMS already takes this factor into account in such determinations.

Although we did propose to expand the categories of felonies that can serve as the basis of a denial or revocation, we are not suggesting that every felony conviction will automatically result in such an action. Each case will be carefully reviewed on its own merits and, as the commenter recommends, we will act judiciously and with reasonableness in our determinations.

*Comment:* Several commenters disagreed with CMS's proposed expansion of §§ 424.530(a)(3) and 424.535(a)(3) to include all felonies. They contended that (1) our proposal is arbitrary and an abuse of discretion; and (2) CMS offered no facts to support its proposal. One commenter stated that some felonies—such as those related to drugs, alcohol, or traffic violations—could not reasonably be considered as detrimental to the Medicare program, yet CMS would have the discretion to deny or revoke a provider for such a felony. This could lead to unfair results, particularly if a sentence of less than 3 years (which is the maximum re-enrollment bar period) is imposed. The commenter—as well as several other commenters—requested that CMS reconsider its proposal and: (1) Furnish a definition of ''detrimental to the Medicare program or its beneficiaries;'' and (2) exclude felonies related to drugs, alcohol, or traffic violations from the scope of §§ 424.530(a)(3) and 424.535(a)(3).

*Response:* We disagree that our proposal was arbitrary or an abuse of discretion. Section 4302 of the Balanced Budget Act (BBA) amended section 1866 of the Act to furnish CMS with broad authority to refuse to enter into Medicare agreements with individuals or entities convicted of felonies that the Secretary determines to be detrimental to the best interests of the program or program beneficiaries. We identified in the proposed rule the legal grounds for all of our proposed enrollment provisions and explained the policy rationale for each of them. For instance, we indicated the need for flexibility with respect to the application of §§ 424.530(a)(3)(i) and 424.535(a)(3)(i) when considering that categories of felony offenses often vary from state to state. We do not believe that felonies relating to drugs, alcohol, or traffic violations cannot be detrimental to the best interests of Medicare beneficiaries, and thus should be automatically excluded from the purview of §§ 424.530(a)(3) and 424.535(a)(3). While certain felonies carry different, potentially more severe penalties than others, each case is distinct and state law classifications of certain criminal actions can vary widely. Therefore, we must maintain the flexibility to address all potential situations.

*Comment:* A commenter supported our proposed expansion of §§ 424.530(a)(3) and 424.535(a)(3), believing it was a step forward in CMS's attempts to prevent Medicare fraud on the front end.

*Response:* We appreciate the commenter's support.

*Comment:* A commenter questioned whether CMS will revoke the Medicare billing privileges of a physician who is convicted of a non-violent firearm felony.

*Response:* The determination of whether a particular conviction will or will not result in the revocation or denial of Medicare enrollment will depend upon the specific facts of each individual situation.

*Comment:* A commenter expressed concern that CMS will deny or revoke billing privileges under § 424.530(a)(3) or § 424.535(a)(3), respectively, such that a physician's right to participate in the Medicaid program will be affected.

*Response:* The commenter correctly notes that under § 455.416(c), a State Medicaid agency must deny enrollment or terminate the enrollment of any provider whose Medicare enrollment is revoked for cause, although there is no corresponding requirement in cases where a provider is denied enrollment in the Medicare program. As noted previously, we will only exercise our authority under § 424.530(a)(3) or § 424.535(a)(3) after consideration of the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction.

*Comment:* A commenter contended that our proposed expansions of §§ 424.530(a)(3) and 424.535(a)(3) violate the principles of federalism established in Executive Order 13132 3(b), 3(c) and 3(d) and diminishes the role of state licensing boards across the country. The commenter requested that CMS furnish justification for expanding the role of the federal government into matters best resolved by state licensing boards.

*Response:* We disagree with the commenter. As mentioned earlier, section 4302 of the BBA (which amended section 1866 of the Act) gave CMS broad authority to refuse to enter into Medicare agreements with individuals or entities convicted of felonies that the Secretary determines to be detrimental to the best interests of the program or program beneficiaries. Additionally, our changes to §§ 424.530(a)(3) and 424.535(a)(3) in no way impair or infringe upon a state

licensing agency's ability to take or not take action on a provider's licensure status in the event of a criminal conviction. Such a decision will—as it should—remain within the purview of the state.

*Comment:* A commenter stated that CMS should not deny or revoke a supplier's enrollment based on § 424.530(a)(3) or § 424.535(a)(3) if the supplier made a good-faith effort—using generally accepted employee screening and hiring practices—to ensure that an employee did not have a felony conviction. The commenter added, if CMS desires comprehensive screening for felony convictions, it should work with other government agencies to develop a nationwide database so that employers have one reliable source from which to screen their employees for felony convictions. The commenter further stated that recent enforcement actions by the United States Equal Employment Opportunity Commission (EEOC) have targeted companies for alleged discrimination against minority applicants based on policies to exclude people from employment based on a criminal record. CMS's revisions to §§ 424.530(a)(3) and 424.535(a)(3) should be reconciled with the EEOC's current enforcement position.

*Response:* We disagree with the commenter. The core issue is not whether the organization made a good-faith effort to determine whether a current or prospective owner or managing employee has a felony conviction. Rather, it is whether the owner or managing employee has such a conviction and whether the conviction poses a risk to the Medicare program or its beneficiaries. In other words, it is the felony conviction itself—not whether the organization screened for such convictions—that is the relevant matter. We note that there are many resources available to help organizations ascertain one's criminal background history; a CMS-initiated project to establish a single, all-encompassing felony database for the use of employers is not necessary. We further add that CMS is not requiring, through its expansion of § 424.530(a)(3) and § 424.535(a)(3), that providers and suppliers perform criminal background checks of their current or prospective owners or managing employees as part of the enrollment process.

We do not believe that the EEOC's recent enforcement actions mandate that prospective employers discourage taking into account a prospective employee's criminal background history. Our principal focus in this rule is to protect the Medicare program from individuals and entities that could threaten its integrity, and we believe our expansion of §§ 424.530(a)(3) and 424.535(a)(3) is an important step towards this end.

*Comment:* A commenter stated that providers seeking to hire physicians or managing employees must have clear rules as to the types of felonies that CMS would consider detrimental to the Medicare program. The commenter favored retaining the current versions of §§ 424.530(a)(3) and 424.535(a)(3) because CMS identifies specific felonies that fall within the scope of these two provisions. If, the commenter added, CMS seeks to include additional categories of felonies, it should use the formal rulemaking process to propose these new categories and allow the public to comment. Another commenter stated that our proposed revisions to §§ 424.530(a)(3) and 424.535(a)(3) fail to provide adequate notice of the types of felony convictions that may lead to a denial or revocation of Medicare enrollment.

*Response:* In light of the differences in state laws, it would be impossible to identify in our revised §§ 424.530(a)(3) and 424.535(a)(3) every felony offense that could result in a denial or revocation; indeed, if we accepted the commenter's suggestion, hundreds of crimes—perhaps even identified on a state-by-state basis—might have to be listed. Nevertheless, we agree that retaining the lists of felonies in the current versions of §§ 424.530(a)(3) and 424.535(a)(3) could prove helpful in identifying for the public some of the felonies that may serve as a basis for denial or revocation, respectively. Therefore, we are combining our proposed revisions to §§ 424.530(a)(3) and 424.535(a)(3) with the existing language in both provisions.

Section 424.530(a)(3) will state that the provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries. Offenses include, but are not limited in scope or severity to—

++ Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

++ Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.''

Section 424.535(a)(3) will state that the provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a federal or state felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries. Offenses include, but are not limited in scope or severity to—

++ Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

++ Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

(Revocations based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.)

Note that the previous revisions contain two important changes. First, the current language in §§ 424.530(a)(3) and 424.535(a)(3) refers to a felony offense that CMS ''*has determined* to be detrimental to the best interests of the program and its beneficiaries.'' (Emphasis added.) Consistent with our proposed revisions to §§ 424.530(a)(3) and 424.535(a)(3), we are revising this language to include any felony offense that CMS ''*determines* is detrimental to the best interests of the Medicare program and its beneficiaries.'' (Emphasis added.) This distinction is important. The phrase ''has determined'' incorrectly implies that the only felonies that may serve as a basis for denial or revocation are those specifically listed in §§ 424.530(a)(3) and 424.535(a)(3). We believe that the term ''determines'' makes clearer that the lists of felonies in these two provisions are not exhaustive and

include other felonies that CMS may deem as meeting the ''detrimental'' standard based on the particular facts of the case. Second, and to further emphasize CMS' discretion to use felonies other than those specified in §§ 424.530(a)(3) and 424.535(a)(3) as grounds for denial or revocation, we have included the phrase ''but are not limited in scope or severity'' within both provisions.

However, notwithstanding these changes, we again stress that we will only exercise our authority under §§ 424.530(a)(3) and 424.535(a)(3) after very careful consideration of the relative seriousness of the underlying offense and all of the circumstances surrounding the conviction. It should in no way be assumed that every felony conviction will automatically result in a denial or revocation.

*Comment:* A commenter stated that in proposing its expansion of §§ 424.530(a)(3) and 424.535(a)(3) to include all felonies, CMS did not comply with section 1(b)(7) of Executive Order 12866 and base its proposal on reasonably obtainable scientific, technical and other information. The commenter recommended that CMS identify the specific felony reasons in a new proposed rule.

*Response:* We do not agree that our proposed changes to §§ 424.530(a)(3) and 424.535(a)(3) violated section 1(b)(7) of Executive Order 12866. To the contrary, the changes were based on a careful consideration of the need to ensure that individuals and entities convicted of a felony offense that is detrimental to the best interests of the Medicare program and its beneficiaries are kept out of the Medicare program. For the reasons previously stated, we believe it is neither feasible nor practical to identify every conceivable felony offense that could result in the application of §§ 424.530(a)(3) or 424.535(a)(3).

*Comment:* A commenter recommended that CMS establish protections, such as a knowledge threshold, for suppliers that perform reasonable due diligence to determine if a potential employee has a felony record. The commenter stated that CMS should work with suppliers that act in good-faith to determine if a prospective employee has a felony record rather than automatically excluding a supplier. The commenter specifically suggested adding language to §§ 424.530(a)(3) and 424.535(a)(3) that, in effect, would permit a denial or revocation only if: (1) The provider or supplier knew or should have known about the conviction; (2) the provider or supplier did not have industry standard hiring practices in place; (3) the provider or supplier has not submitted a corrective action plan; (4) the disruption to beneficiaries does not outweigh the provider or supplier's termination due to one individual; and (5) CMS has already established and implemented a comprehensive state and federal database that is available to providers and suppliers.

*Response:* We disagree with the commenter's suggestion. As stated earlier, it is the felony conviction itself and not the extent of the organization's efforts in performing a criminal background check that is the crucial consideration.

*Comment:* To improve transparency—and since the OIG publicly posts information about individuals and entities excluded from federal health care programs—a commenter suggested that CMS post on its provider enrollment Web page the name and NPI (if applicable) of any person who has had his or her Medicare billing privileges denied or revoked based upon a felony conviction; the date of the denial or revocation and, if applicable, the length of the re-enrollment bar should be listed as well.

*Response:* We appreciate this suggestion and may consider it in a future initiative to the extent it is consistent with the Privacy Act.

*Comment:* A commenter was concerned that the expansion of the felonies encompassed by § 424.535(a)(3) would be applied to providers and suppliers whose recently submitted revalidation applications were approved. The commenter, in other words, opposed the retroactive application of our proposed § 424.535(a)(3).

*Response:* Our changes to § 424.535(a)(3) do not preclude CMS from reviewing the enrollment records of currently enrolled providers and suppliers to determine if the provider, supplier, or an owner or managing employee thereof has a felony conviction that CMS deems detrimental to the best interests of the Medicare program or its beneficiaries. However, we again stress that not every felony conviction will necessarily result in a denial or revocation.

*Comment:* A commenter expressed support for our proposed revisions to §§ 424.530(a)(3) and 424.535(a)(3).

*Response:* We appreciate the commenter's support.

*Comment:* A commenter agreed with CMS's proposal to clarify that the enrollment bar is for felony convictions ''within the preceding 10 years'' but suggested that the date be further clarified as ''within the 10 years preceding the effective date of the enrollment application.''

*Response:* While we appreciate the commenter's support, we disagree with the commenter's suggestion because it would be difficult to use a future date—that is, a date that could be well after the date the application was submitted—as the 10-year cut-off point.

After a careful consideration of the comments and in light of the previous discussion, we are revising §§ 424.530(a)(3) and 424.535(a)(3) as follows:

Section § 424.530(a)(3) will state that the provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a federal or state felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries. Offenses include, but are not limited in scope or severity to—

++ Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

++ Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.''

Section 424.535(a)(3) will state that the provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a federal or state felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

Offenses include, but are not limited in scope or severity to—

++ Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

++ Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice

suit that results in a conviction of criminal neglect or misconduct.

++ Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

Revocations based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

4. Abuse of Billing Privileges

Section 424.535(a)(8) currently states that a provider or supplier's Medicare billing privileges may be revoked if the provider or supplier submits a claim or claims for services that could not have been furnished to a specific individual on the date of service. These instances include, but are not limited to, situations where the beneficiary is deceased, the directing physician or beneficiary is not in the state or country when the service was provided, or when the equipment necessary for testing was not present where the testing is said to have occurred.

We proposed to expand this revocation reason by adding a new paragraph (a)(8)(ii) to § 424.535. The existing revocation reason would be incorporated into a new paragraph (a)(8)(i). Proposed new paragraph (a)(8)(ii) would permit revocation if we determine that the provider or supplier has a pattern or practice of billing for services that do not meet Medicare requirements such as, but not limited to, the requirement that the service be reasonable and necessary. We explained that a provider or supplier should be responsible for submitting valid claims at all times and that the provider or supplier's repeated failure to do so poses a risk to the Medicare Trust Funds. We note that the responsibility for submitting valid claims exists irrespective of whether the provider or supplier itself submits the claims or hires a billing agency to perform this function; in either case, the claims are submitted on behalf of the provider or supplier.

We solicited comment on what should qualify as a ''pattern or practice'' under our proposed change. We also proposed several factors we would take into account when determining whether a revocation under § 424.535(a)(8)(ii) is warranted including, but not limited to the following:

- The percentage of submitted claims that were denied.
- The total number of claims that were denied.
- The reason(s) for the claim denials.
- Whether the provider or supplier has any history of ''final adverse actions'' (as that term is defined in § 424.502).
- The length of time over which the pattern has continued.
- How long the provider or supplier has been enrolled in Medicare.

With respect to these factors, we solicited comment on the following:

- Whether additional factors should be considered and, if so, what those factors should be.
- Which, if any, of these factors should not be considered.
- Which, if any, of these factors should be given greater or lesser weight than others.
- Whether a minimum or maximum threshold for consideration should be established for the ''percentage of claims denied'' and ''total number of claims denied'' factors.

We further solicited comment on whether there should be a set knowledge standard associated with our proposed provision—for example, whether revocation is warranted only if the provider or supplier submitted the claims in question with ''reckless disregard'' as to their accuracy or the provider ''knew or should have known'' that the claims did not meet Medicare requirements.

The following is summary of the comments received regarding § 424.535(a)(8)(ii) and our responses thereto:

*Comment:* A commenter stated that it did not dispute CMS's right to revoke billing privileges if a Medicare provider has a pattern of billing for services that do not meet Medicare requirements. However, the commenter recommended that in applying any criteria regarding the number of claim denials, CMS should take into account the number of denials that were overturned on appeal. Several other commenters also stated that they did not object to CMS's proposal, but urged that results of the administrative appeals process be considered as a significant factor before CMS concludes that a provider has engaged in a ''pattern or practice'' of submitting improper claims. Other commenters stated that due process mandates that claim denials under appeal be excluded from any measurement that takes into account the number or percentage of denied claims. Another commenter questioned whether an appeal is considered to be successful when it is pursued up to and including the Administrative Law Judge (ALJ) level.

*Response:* A provider or supplier's claim denial that has been both—(1) fully (rather than partially) overturned on appeal; and (2) finally and fully adjudicated will be excluded from our consideration in determining whether the provider or supplier's Medicare billing privileges should be revoked under § 424.535(a)(8)(ii). This is because, for purposes of § 424.535(a)(8)(ii), the claim denial has been effectively negated. Yet we do not believe a claim denial that fails to meet both of these requirements should be excluded from our review for two reasons. First, excluding claims that are currently being appealed could encourage providers and suppliers to file meritless appeals simply to circumvent the application of § 424.535(a)(8)(ii). Second, merely because a claim is under appeal does not necessarily mean it will be overturned.

For purposes of this claim denial exclusion, the term ''finally and fully adjudicated'' means that—(1) the appeals process has been exhausted; or (2) the deadline for filing an appeal has passed.

*Comment:* A number of commenters opposed CMS's proposed § 424.535(a)(8)(ii). They stated that: (1) The proposal is arbitrary and subjective and grants too much discretion to CMS and its contractors; (2) CMS failed to include in its proposed rule a thorough discussion of the factors that would be used in making determinations related to § 424.535(a)(8)(ii); (3) did not define ''pattern or practice''; and (4) there is nothing in the proposed rule that limits CMS's authority under § 424.535(a)(8)(ii). They added that despite CMS's statement in the proposed rule's preamble that it would not use this provision to revoke providers for isolated and sporadic claim denials or innocent billing errors, there are no safeguards to prohibit CMS or its multiple contractors from doing so. The commenters stated that given the complexity of Medicare's billing and coding rules and the frequency with which they change, Medicare providers would inevitably submit claims that fail to meet Medicare requirements though without any nefarious intent. They urged CMS to furnish appropriate, consistent, and clear guidelines regarding billing, coding, and payment policies before implementing § 424.535(a)(8)(ii). Other commenters stated that contractor errors, which can include a contractor's misinterpretation or misunderstanding of CMS requirements, sometimes result in claim denials.

*Response:* We do not believe that our proposal is arbitrary or grants CMS unlimited discretion. To the contrary, and as the commenters noted, we were

very clear in the preamble of the proposed rule that sporadic billing errors would not result in revocation under § 424.535(a)(8)(ii). Although we did not define ''pattern or practice'' to maintain flexibility to address a variety of factual scenarios, we listed several factors that would be considered in our § 424.535(a)(8)(ii) determinations and requested feedback regarding other potential factors. Additionally, not only will CMS (rather than its contractors) make all such determinations, but also § 424.535(a)(8)(ii) will be applied only: (1) In situations where the behavior could not be considered sporadic; and (2) after the most careful and thorough consideration of the relevant factors. These points cannot be stressed enough.

We recognize that Medicare has many rules and requirements regarding billing and coding, and that claims are occasionally submitted in error due to a provider's misunderstanding of these policies or denied incorrectly by the contractor. It is not CMS's intention to revoke billing privileges under § 424.535(a)(8)(ii) in such instances. However, Medicare billing privileges come with a responsibility for the provider to diligently seek and obtain clarification of Medicare policies should there be a misunderstanding or confusion. Constant, repeated, and systemic claim denials (as opposed to sporadic or occasional claim denials) can be indicative of the provider's failure to do so. To address such situations, we believe that the implementation of § 424.535(a)(8)(ii) should not be delayed, as some of the commenters appeared to suggest we do.

*Comment:* Several commenters believed that any appeals stemming from revocations initiated under § 424.535(a)(8)(ii) should be subject to an expedited appeals process.

*Response:* Since the impact of a revocation is the same regardless of the reason involved, we do not believe that revocations based on certain reasons should be subject to a faster appeals process than those predicated on other reasons.

*Comment:* A commenter contended that CMS's proposed § 424.535(a)(8)(ii) will have a chilling effect on the practice of medicine because it gives the federal government significant authority to target honest physicians. The commenter requested that CMS remove this proposed provision from the final rule or at least develop and solicit comments on a process for notifying providers of their billing issues and giving them an opportunity to correct the problem prior to revoking billing privileges.

*Response:* We disagree that our proposal will have a chilling effect on health care. This rule will not affect providers that take seriously their responsibilities to submit valid claims and to seek clarification when there is confusion or disagreement involving applicable policies. No payer, public or private, should be required to continue doing business with a provider or supplier that demonstrates the type of clear pattern or practice of billing abuse that this rule addresses. Moreover, we do not believe that any additional formal notification to the provider of its billing deficiencies prior to the potential application of § 424.535(a)(8)(ii) is required. Under our current rules and practices, by the time CMS would revoke a provider or supplier under § 424.535(a)(8)(ii), the provider would have received information and education about the reasons for the claim denials on multiple occasions. From the first claim denial, when a provider of supplier is notified of the reason for the denial, providers receive information indicating compliance or non-compliance with Medicare rules and requirements. It is ultimately the provider's responsibility to review its denied claims and to take whatever remedial action is necessary.

*Comment:* A commenter contended that proposed § 424.535(a)(8)(ii) should have certain objective measures and standards—such as a 50 percent benchmark—to ensure that it is not applied in an arbitrary manner.

*Response:* We solicited and received several comments regarding whether certain numerical thresholds should be established in § 424.535(a)(8)(ii). After considering these comments, we have concluded that numerical thresholds should not be established because we need the flexibility to address a myriad of scenarios. For example, merely because a provider had over 30 percent of its claims denied does not automatically mean that a § 424.535(a)(8)(ii) revocation should be imposed; likewise, an under-30 percent denial rate does not mean that a § 424.535(a)(8)(ii) revocation is never warranted. Each case must be judged on its own specific facts, and establishing numerical thresholds would, we believe, hinder our ability to do so.

*Comment:* A few commenters recommended that CMS exclude providers from the application of § 424.535(a)(8)(ii) for a period of 1 year when Medicare changes the Medicare Administrative Contractor for the provider's state, as providers in such instances must learn new local coverage determination (LCD) policies.

*Response:* We disagree with this recommendation. While we concede that providers in these circumstances often need to learn new LCD policies, claims can be denied for many reasons unrelated to LCDs. We thus believe it would be inappropriate to institute a blanket 1-year exemption in such cases, for we would lose the ability during that time to take action to address repeated claim denials over a period of time. Again, though, and as we have stated elsewhere in this preamble, we recognize that Medicare has many rules and requirements regarding billing and coding, and that claims are sometimes submitted in error due to a provider's honest misunderstanding of these policies. It is not our intention to revoke billing privileges under § 424.535(a)(8)(ii) for such occasional misinterpretations.

*Comment:* A commenter recommended that CMS delay implementation of § 424.535(a)(8)(ii) for 2 years after the implementation of the ICD–10 standard. The commenter believed that ICD–10's implementation will likely lead to the submission of incorrect claims for a period of time.

*Response:* We do not believe that a delay in the implementation of § 424.535(a)(8)(ii) is necessary. Again, any delay of the applicability of § 424.535(a)(8)(ii) would deny us the ability to address situations (unrelated to the ICD–10 implementation) involving repeated claim denials. Furthermore, as we have already noted, we recognize that Medicare has many requirements and that in isolated instances claims are submitted erroneously due to a provider's misinterpretation of these policies. Such occasional misunderstandings will generally not rise to the level of a ''pattern or practice'' of improper billing, and thus will not warrant revocation under § 424.535(a)(8)(ii).

*Comment:* A commenter stated that it would be inappropriate for CMS to revoke billing privileges under § 424.535(a)(8)(ii) when no finding of fraud is involved. The commenter recommended that CMS withdraw this proposed provision.

*Response:* We disagree. Revocation is an administrative remedy separate and distinct from the government's other remedies for fraudulent behavior, and is intended to protect the Medicare program and its beneficiaries from fraud, waste, and abuse. Indeed, many of our existing revocation reasons under § 424.535(a) do not require a finding of fraud. For example, § 424.535(a)(1) permits revocation of the provider or supplier's Medicare billing privileges if the provider or supplier is out of

compliance with Medicare enrollment requirements. The fact that there has not been a legal finding of fraudulent conduct does not automatically mean the behavior or activity in question is compliant with Medicare requirements. We maintain that repeated claim denials over a period of time raise questions as to the provider or supplier's ability or willingness to comply with Medicare's billing and coding requirements and procedures.

*Comment:* A commenter opposed proposed § 424.535(a)(8)(ii), contending that: (1) CMS already has the authority and tools to revoke the billing privileges of unscrupulous actors who defraud or abuse the Medicare program; (2) denial of payment is the appropriate remedy for the submission of an incorrect claim; (3) CMS should not assume that providers cannot correct their existing practices to ensure that accurate claims are submitted; and (4) there is no guarantee that the determination criteria CMS has outlined would not be improperly or inconsistently applied.

*Response:* We currently do not have the ability to revoke a provider or supplier's billing privileges based on a pattern or practice of submitting non-compliant claims, hence the need for § 424.535(a)(8)(ii). We agree that a claim denial can serve as an adequate remedy in many cases. However a repeated pattern of submitting non-compliant claims indicates that the associated claim denials are not altering the provider's behavior. More serious remedial action—specifically, the revocation of billing privileges under § 424.535(a)(8)(ii)—may thus be necessary in some cases.

We do not assume that providers cannot correct their existing practices to ensure that they submit compliant claims. We believe very strongly that they can, which is precisely why a failure to do so could warrant a revocation under § 424.535(a)(8)(ii).

CMS, rather than our contractors, will make all determinations under § 424.535(a)(8)(ii) and will consistently apply the criteria.

*Comment:* A commenter stated that existing procedures, including audits, are more than sufficient to detect improper billing and to educate providers in complying with Medicare's intricate rules. The commenter believes that § 424.535(a)(8)(ii) is in effect duplicative of these procedures, and would simply impose another layer of complexity and financial burden on providers.

*Response:* We agree with the commenter's premise: our current rules and procedures are sufficient to bring most providers into compliance when mistakes or errors are brought to their attention. However, this final rule is focused on providers who cannot or will not come into compliance with our payment requirements after repeated claim denials. Despite our audit practices and educational activities, we continue to see situations where certain providers and suppliers regularly submit non-compliant claims. Clearly, our audit and education activities have not been enough to sufficiently stem this behavior in all instances, thus demonstrating the need for § 424.535(a)(8)(ii). Yet we reiterate that not only will we make all determinations under § 424.535(a)(8)(ii), but also that this provision will be applied in situations where the behavior was not sporadic in nature. We are focused on instances where the provider is engaged in an ongoing pattern of submitting non-compliant claims.

*Comment:* A commenter stated that the proposed rule does not explain how or why billing is ''abusive'' merely because the claim appears not to meet medical necessity criteria.

*Response:* There are reasons other than a failure to meet medical necessity requirements for which a claim can be denied (although the continuous submission of claims for medically unnecessary services can trigger § 424.535(a)(8)(ii)). The term ''abusive,'' as used in the context of § 424.535(a)(8)(ii), is meant to capture a variety of situations in which a provider or supplier regularly and repeatedly submits non-compliant claims over a period of time.

*Comment:* Several commenters stated that whatever criteria CMS plans to use in determining whether a revocation under § 424.535(a)(8)(ii) is appropriate should be included in the final rule's regulatory text or, as one commenter suggested, be accompanied by a binding administrative document (such as an administrator's ruling) as part of its implementation.

*Response:* We have included in the regulatory text the factors that CMS will consider prior to imposing a revocation under § 424.535(a)(8)(ii).

*Comment:* A commenter recommended that before CMS finalizes § 424.535(a)(8)(ii), it should: (1) Instruct its contractors not to repeatedly audit the same beneficiary's claims once the claims have been upheld on appeal or in medical review; (2) instruct its contractors not to audit a provider for a 1-year period if the provider has been audited and found to have an acceptable error rate; (3) restore contractors' ability to use clinical judgment when performing complex medical reviews; (4) develop a comprehensive education program for practitioners who prescribe DMEPOS items; (5) exercise better supervision of its contractors; and (6) establish clear guidelines for calculating provider-specific error rates used to place providers on prepayment review. The commenter believed these changes are necessary to better ensure that providers—who are often confused by CMS policy changes, which the commenter stated are sometimes applied retroactively—are able to submit correct claims and that CMS's policies are consistent, clear, and appropriately announced to providers with adequate notice.

*Response:* While we appreciate the commenter's suggestions, they are outside the scope of this rule.

*Comment:* A commenter expressed concern that CMS will use audits performed by its contractors (for example, RACs) as a legitimate, ultimate indicator of either fraudulent behavior or noncompliance with Medicare payment policies. The commenter recommended, as did a number of other commenters, that CMS eliminate pre-payment audits as a basis for detrimental action under § 424.535(a)(8)(ii). These commenters stated that some providers undergo pre-payment review merely as a preventative or precautionary measure to make sure that the claims submitted are appropriate and well-documented or because of the amount of the claim. They added that certain providers are subjected to pre-payment review for reasons beyond their control, and that losing billing privileges for being placed on pre-payment review is a draconian and inappropriate penalty. Several other commenters stated that there is no evidence to suggest that placing certain categories of suppliers or product categories under pre-payment review is resulting in lower error rates.

*Response:* While we do not intend to use the results of audits performed by our contractors as the sole and absolute criterion of fraudulent behavior or noncompliance with Medicare payment policies, such results will be considered in our review of all of the factors in § 424.535(a)(8)(ii).

We will not consider the provider's pre-payment review status in and of itself as a factor in § 424.535(a)(8)(ii) determinations. Our concern is with actual claim denials, rather than the means through which such denials were issued.

*Comment:* Several commenters stated that the claim denials of some individual practitioners and other suppliers sometimes stem from deficiencies in the physician's documentation. The commenters

believed that CMS's inclusion of such claim denials—that is, claim denials based on the insufficient documentation of another provider—in its § 424.535(a)(8)(ii) determinations would be arbitrary and capricious.

*Response:* We disagree. We believe it is the responsibility of the provider submitting the claim to ensure that all requirements—including, as necessary, proper and compliant supporting documentation—have been met prior to the claim's submission. Repeated denials due to improper documentation are an indication to a provider or supplier that its billing behavior must change in order to become compliant with Medicare requirements—including documentation requirements.

*Comment:* A commenter stated that proposed § 424.535(a)(8)(ii) should contain a knowledge standard that the provider knew that the claims did not meet Medicare requirements. Several other commenters contended that CMS should only revoke billing privileges under § 424.535(a)(8)(ii) if the supplier has specific or actual knowledge of the erroneous nature of a particular claim or set of claims. This would preclude revocations based on honest mistakes; one commenter noted the challenges associated with EHR systems and the possibility that erroneous claims could be submitted as a result. One commenter stated that the proposed provision lacks any standards concerning the state of mind of the entity. Another commenter stated that between the two intent standards that are under CMS consideration—''reckless disregard'' and ''knew or should have known''—the former would be more appropriate. Another commenter urged CMS to apply § 424.535(a)(8)(ii) only when there is clear evidence that a provider acted knowingly and willfully in submitting non-compliant claims. This commenter stated that under Medicare's complex billing rules, it would be too easy for CMS or a contractor to assert that a provider ''should have known'' about a billing rule; as such, CMS should delete the phrase ''should have known'' in the final rule. The commenter believed that CMS should focus more on educating providers about changes to Medicare billing rules than on the punitive remedies outlined in § 424.535(a)(8)(ii).

*Response:* Although we solicited comments on whether a knowledge standard should be applied to § 424.535(a)(8)(ii), we have decided not to implement such a standard for two principal reasons. First, the burden on CMS of determining the provider or supplier's intent for each claim it submitted (especially when there could be hundreds of claims at issue) would be excessive. Second, if a provider submits a claim with specific or actual knowledge that it does not meet Medicare requirements or with reckless disregard of said compliance, the federal government already has various means to address these situations, such as the False Claims Act. Associating a knowledge standard with § 424.535(a)(8)(ii) would simply duplicate existing authorities.

*Comment:* A commenter stated that CMS appears to be attempting to keep providers and suppliers from being able to effectively provide care for beneficiaries and to limit the overall number of providers and suppliers. The commenter believed that: (1) § 424.535(a)(8)(ii) Is based on a rationale that all providers and suppliers are a risk to the Medicare Trust Funds; and (2) CMS has not fully gauged the proposed provision's impact on many honest providers and suppliers that furnish services to Medicare beneficiaries.

*Response:* We are neither attempting to impede patient care nor reduce the number of providers and suppliers. We believe most Medicare suppliers and providers are conscientious about submitting claims that meet Medicare requirements, and this rule will not affect that majority. Once again, we are merely attempting to address the problem of providers and suppliers with patterns of non-compliant claim submissions. Providers and suppliers that are not engaged in a pattern or practice of non-compliant billing will not be adversely affected by § 424.535(a)(8)(ii).

*Comment:* Several commenters stated that a mere difference of opinion about what is medically necessary—a term that is not ''black and white''—should not be the basis for a revocation of billing privileges, particularly considering that LCDs and views on medical necessity will differ among MACs.

*Response:* We understand the commenter's concern and believe that sporadic claim denials based on a lack of medical necessity generally should not result in revocation under § 424.535(a)(8)(ii). However, we do not believe that medical necessity-based denials should be excluded from the scope of § 424.535(a)(8)(ii). It is of concern to us when a provider consistently submits claims for services that are not medically necessary, for this raises quality of care issues as well as the possibility that the provider is seeking to defraud the Medicare program.

*Comment:* A commenter noted that while CMS states that § 424.535(a)(8)(ii) is not designed to revoke enrollment for isolated and sporadic claim denials or for innocent errors in billing, the provision itself (as proposed) does not make that intent clear.

*Response:* The regulatory text of § 424.535(a)(8)(ii) states that CMS may revoke billing privileges if a provider or supplier has a pattern or practice of submitting claims that fail to meet Medicare requirements. It also identified five factors that we will use to make such a determination, including: (1) The percentage of claims denied; (2) the reasons for the claim denials; (3) a history of final adverse actions; (4) the length of time the pattern has continued; and (5) the length of time the provider or supplier has been enrolled in Medicare.

*Comment:* Several commenters stated that some providers submit many claims each year electronically, meaning that a single inadvertent error could easily be repeated on numerous claims. The commenters expressed concern that such errors when repeated could constitute a pattern or practice of submitting erroneous claims under § 424.535(a)(8)(ii). One of these commenters added that in light of the great complexity of Medicare billing and coding requirements, a provider could inadvertently submit a claim that failed to meet at least one Medicare requirement, even though the provider in good-faith believed that the claim was correct.

*Response:* We recognize the possibility that a single inadvertent error on similar electronic claim submissions could result in multiple claim denials. As we stated earlier, we recognize that Medicare has many rules and requirements regarding billing and coding, and that claims are sometimes submitted in error due to a provider's honest misunderstanding of these policies. It is not our intention to revoke billing privileges under § 424.535(a)(8)(ii) for such sporadic misinterpretations.

*Comment:* A commenter suggested that the following factors—in order of importance—be used in determining whether a ''pattern or practice'' exists under § 424.535(a)(8)(ii) and that such factors be included in the regulatory text: (1) The reason(s) for the claim denials; (2) the percentage of submitted claims that were denied (for which there should be a minimum threshold); (3) how long the provider has been enrolled in Medicare; (4) whether the provider has had any final adverse actions; and (5) the length of time of the pattern or practice. Another commenter requested

that CMS not use the ''total number of claims denied'' as a criterion, for this could disproportionately and unfairly impact larger providers that submit many claims. The commenter also requested CMS to clarify whether the percentage of submitted claims that were denied would be determined using individual, subpart, or organizational NPIs.

*Response:* We have decided not to give certain factors greater weight in our § 424.535(a)(8)(ii) determinations than other, for the importance of each factor may vary based on the particular situation. We have also decided not to establish a minimum percentage threshold for claim denials; as stated earlier, we need flexibility to address a variety of scenarios. However, we included the five factors that the first commenter identified—all of which we proposed—in the regulatory text as criteria that CMS will consider, as appropriate or applicable, in its § 424.535(a)(8)(ii) determinations.

We agree with the second commenter that the ''total number of claims denied'' factor could present a distorted view of the provider or supplier's billing practices for purposes of § 424.535(a)(8)(ii). Therefore, we will not be finalizing this as criterion.

The ''percentage of claims denied'' criterion will be based on the NPI listed on the claim.

*Comment:* A commenter suggested that: (1) The provider should have an opportunity to show that it has remedied any error that occurred; and (2) proposed § 424.535(a)(8)(ii) should be limited to situations that are within the provider's control. With respect to this second suggestion, the commenter stated that providers sometimes rely upon physicians to provide information that must be included on the claim; if such information is incorrect, CMS should not use this as a basis for revocation under § 424.535(a)(8)(ii). Other commenters shared this view.

*Response:* We disagree with both of the commenter's suggestions. We believe that the provider already has an opportunity to remedy an error once it receives a claim denial notice. Repeated errors over a period of time indicate that the provider is not taking necessary corrective steps. Also, while we recognize that providers sometimes rely on physicians for certain information, the provider remains ultimately responsible for ensuring that the claim and the supporting documentation meet Medicare requirements.

*Comment:* A commenter stated that inconsistent claim determinations, policies, and interpretations of policies among MACs would lead to inequitable results under § 424.535(a)(8)(ii). As written, they provide far too much latitude for administrative folly, which is nearly guaranteed to occur. At a minimum, the commenter stated, the proposed rule must not be finalized without: (1) Substantial clarifying text written into the regulation itself; or (2) being accompanied by a binding administrative document (such as an administrator's ruling) for its implementation.

*Response:* As stated earlier, CMS, rather than its contractors, will make all § 424.535(a)(8)(ii) determinations.

*Comment:* Several commenters recommended that CMS include in the regulatory text of § 424.535(a)(8)(ii) a statement that the authority to make determinations that a ''pattern or practice'' does not rest with CMS's contractors. The commenters also suggested that CMS incorporate into the regulatory text the following criteria that CMS should use in making § 424.535(a)(8)(ii) determinations: (1) Whether the provider has any history of ''final adverse actions'' and the nature of those actions; (2) the length of time over which the pattern or practice has continued; (3) how long the provider has been enrolled in Medicare; (4) whether the pattern or practice occurs throughout the provider or supplier's industry; (5) whether the provider had a specific intent to submit a false or fraudulent claim; (6) whether the provider has a corrective action plan in place; (7) the number of claims overturned on appeal; and (8) the reasons for the claim denials. With respect to the fourth criterion, the commenters stated that consistently high industry-wide error rates among suppliers are the result of constant changes to billing requirements, uncertain and inconsistent interpretation of requirements by regulating and enforcing entities (including Medicare contractors), inadequately written LCDs, and CMS's expectation that suppliers can enforce physician documentation requirements. They recommended that CMS consider addressing high industry-wide error rates through billing requirement reform rather than implementing another instrument of supplier punishment via § 424.535(a)(8)(ii).

*Response:* As we have stated elsewhere in this final rule, we will make all determinations for revocations under § 424.535(a)(8)(ii). We do not believe this needs to be restated in the regulatory text.

Insofar as the commenters' suggested factors for consideration, we agree with the first, second, third, and eighth factors and have included them in the regulatory text. We do not agree with the fourth suggested factor. Each provider or supplier must be reviewed individually, rather than as part of a larger class of providers and suppliers. We do not agree with the fifth suggested factor, either; for reasons already stated, we will not be applying a knowledge standard to § 424.535(a)(8)(ii). We disagree with the sixth factor as well. If a provider is repeatedly and consistently submitting non-compliant claims, this indicates that the provider's corrective action plan—assuming it has one—is either being partially or wholly disregarded or is inadequate. As for the seventh factor, and as stated earlier, a provider or supplier's claim denial that has been both: (1) Fully (rather than partially) overturned on appeal; and (2) finally and fully adjudicated will be excluded from our § 424.535(a)(8)(ii) determinations.

Finally, we recognize that there may be special circumstances surrounding the provider or supplier's non-compliant billing that are beyond the scope of the five factors we are finalizing. The particular facts of each case will vary widely, and the scenarios the commenters have presented underscore this point. To effectively address these situations, we believe that a sixth criterion should be established that enables CMS to consider any other applicable and available information regarding the provider or supplier's specific circumstances that CMS deems relevant to its determination of a pattern or practice of non-compliant billing. However, information considered under this criterion will not alone be decisive in our determinations under § 424.535(a)(8)(ii); the five other factors will, of course, be considered as well. Regardless, we believe that such information, to the extent it exists, should be considered in our § 424.535(a)(8)(ii) determinations to help ensure that the Medicare Trust Funds are protected and, by the same token, that providers and suppliers are treated fairly.

*Comment:* Several commenters recommended that CMS give low consideration to claim volume and percentage of claims denied as factors under § 424.535(a)(8)(ii) and that thresholds not be established for these criteria. The commenters believed that these factors may lead CMS to focus on the largest suppliers that rely on automated claims administration systems, while missing smaller suppliers that do not attract attention because their data does not exceed certain thresholds.

*Response:* The number of denied claims will not be a factor in our

§ 424.535(a)(8)(ii) determinations, though the ''percentage of denied claims'' will remain as a factor and one that is no less important than the others. Also, and as explained earlier, we are not establishing thresholds for any of our criteria.

*Comment:* Several commenters expressed concern that § 424.535(a)(8)(ii) could be easily misapplied or misused because the provision is very vague and without clear standards.

*Response:* As previously explained, we are finalizing all but one of the factors we proposed and are adopting an additional factor in response to the comments we received. We believe this will furnish sufficient clarity as to the scope of § 424.535(a)(8)(ii).

*Comment:* Several commenters expressed concern about the potential application of § 424.535(a)(8)(ii) considering that RACs have a financial incentive to deny claims.

*Response:* RACs review claim decisions on a post-payment basis. and are only paid for a claim denial if a Medicare Administrative Contractor (MAC) denial of a claim is upheld on appeal; this, we believe, reduces the incentive for RACs to make inappropriate determinations regarding claims. We also reiterate that claim denials that are reversed on appeal will be excluded from the application of § 424.535(a)(8)(ii) if they meet certain criteria.

*Comment:* Several commenters urged CMS to reconsider revocations based on billing patterns because it does not appear that there is—nor does CMS cite any—statutory authority to support such a remedy.

*Response:* We cited our statutory authority for § 424.535(a)(8)(ii) and all of our other provider enrollment provisions in both this rule and the proposed rule. Specifically, sections 1102 and 1871 of the Act provide general authority for the Secretary to prescribe regulations for the efficient administration of the Medicare program; also, section 1866(j) of the Act (codified at 42 U.S.C. 1395cc(j)) provides specific authority with regard to the enrollment process for providers and suppliers.

*Comment:* A commenter stated that: (1) There are often good-faith differences between providers and contractors over appropriate coding; and (2) different payers may have different rules, which can cause confusion over the appropriate way to bill. The commenter contended that if there is no evidence that the provider intended to defraud Medicare, the provider should be given a chance to remedy the error. Medicare, the commenter added, should engage in education, counseling, and guidance that leads to correct coding before taking draconian measures.

*Response:* We believe that frequent claim denials should alert the provider that there may be an issue with its claim submissions and that remedial action may be required. We do not believe that an interim notification from CMS (for example, a ''warning letter'') should be a prerequisite for taking action under § 424.535(a)(8)(ii). Further, if the provider has questions regarding CMS's billing and coding requirements, it should review CMS's manuals, educational articles, and other informational documents at CMS's Web site (*www.cms.hhs.gov*); the provider may also contact its local MAC if it has additional questions.

*Comment:* A commenter stated that it fully supported proposed § 424.535(a)(8)(ii).

*Response:* We appreciate the commenter's support.

*Comment:* Several commenters stated that Medicare providers are already well aware of their legal obligation to submit correct and accurate claims for services that were reasonable and necessary. They noted that: (1) The current claim submission forms require the physician to certify that the services ''were medically indicated and necessary for the health of the patient''; and (2) enforcement agencies already have ample authority under several statutory schemes to penalize providers found to have inaccurate claims, including the False Claims Act. Therefore, the commenters questioned the benefit of or need for § 424.535(a)(8)(ii), especially in light of the danger of CMS overreach in its application of this provision.

*Response:* We acknowledge these authorities as well as the certification language on the current claim submission forms. However, we continue to see instances where, despite these obligations, providers and suppliers repeatedly submit non-compliant claims. The other federal authorities provide remedies different from what we have proposed. We thus believe that the authority to revoke billing privileges under § 424.535(a)(8)(ii) can be part of a comprehensive strategy to address these situations.

*Comment:* A commenter stated that there do not appear to be any administrative appeal rights if a provider is revoked under § 424.535(a)(8)(ii).

*Response:* Under § 424.545, a provider or supplier may appeal any revocation of Medicare billing privileges under 42 CFR part 498.

*Comment:* A commenter stated that CMS should exclude physicians from the purview of § 424.535(a)(8)(ii) because they fall within the ''limited'' screening category under § 424.518(a).

*Response:* We do not agree. The issue is the correct submission of claims, rather than the level of screening to which the provider or supplier is normally subject under § 424.518(a).

*Comment:* A commenter stated that revocations under proposed § 424.535(a)(8)(ii) should be limited to instances where CMS has data indicating that the provider is engaging in extreme outlier billing and has an established and ongoing pattern of abusive practices.

*Response:* As stated, we will consider, as appropriate or applicable, the six factors discussed previously (and contained in § 424.535(a)(8)(ii)(A) through (F)) in determining whether a revocation under § 424.535(a)(8)(ii) is warranted. A provider or supplier could be an ''outlier biller'' for any number of reasons. Hence, a provider or supplier that is an ''outlier biller'' should not automatically be subject to revocation based on § 424.535(a)(8)(ii). We have noted previously that we will only take revocation action under § 424.535(a)(8)(ii) after careful review of factors surrounding the provider or supplier's billing behavior.

*Comment:* A commenter stated that while the proposed rule's preamble indicated that ''claims for services that fail to meet Medicare requirements'' meant claims denied for failing to satisfy Medicare's medical necessity requirements, the regulatory text did not explicitly state as such. The commenter recommended that CMS either: (1) Delete its proposed § 424.535(a)(8)(ii); or (2) revise the provision to clearly limit ''claims for services that fail to meet Medicare requirements'' to claims that do not meet medical necessity requirements. The lack of a specific reference to ''reasonable and necessary'' requirements, the commenter believed, would enable CMS to unreasonably apply § 424.535(a)(8)(ii) to a failure to meet any Medicare requirement.

*Response:* We do not believe that revocations under § 424.535(a)(8)(ii) should be limited to claim denials based on medical necessity. Indeed, proposed § 424.535(a)(8)(ii) was not meant to apply only to certain claim denial reasons. Repeated claim denials over a period of time are of concern to us irrespective of the particular reason(s) involved. To alleviate any confusion about the scope of § 424.535(a)(8)(ii), we are deleting the language ''for services'' from this provision. This will clarify that § 424.535(a)(8)(ii) applies to claims

that are denied for failing to meet Medicare requirements and is not limited to cases where the claim is denied because the *services* did not mean Medicare requirements.

*Comment:* A commenter stated that CMS should establish a dispute resolution process prior to revoking a provider's privileges related to claims denials for not meeting Medicare requirements. Several other commenters stated that CMS should afford appeal rights under § 424.535(a)(8)(ii) prior to revoking a provider's billing privileges.

*Response:* We disagree with the commenters. No other revocation reason under § 424.535(a) currently has an interim appeals or dispute resolution process, and we do not see any basis or rationale for permitting such processes in the case of § 424.535(a)(8)(ii). As with all other revocation reasons, the provider or supplier may appeal the revocation.

*Comment:* A commenter stated that revocations under § 424.535(a)(8)(ii) should be reserved for only the most serious of abuses.

*Response:* We agree. As we have stated, § 424.535(a)(8)(ii) will only be applied when it is clearly appropriate. For instance, a § 424.535(a)(8)(ii) revocation could be proper, once all of the appropriate factors have been considered, if—

- There is a demonstrable pattern or practice;
- The pattern is long-term or has otherwise continued over a period of time;
- Education regarding appropriate billing is or has been made available to the provider in the form of claim denial notices, CMS instructional materials (such as manuals and articles) on CMS' Web site, etc., yet the provider or supplier continues to submit non-compliant claims, and
- A significant percentage of the provider's or supplier's claims have been denied.

(We stress that this is merely an example and should be not be interpreted as the formal establishment of minimum criteria.)

We again state that § 424.535(a)(8)(ii) is not targeted toward honest providers and suppliers that make occasional billing mistakes. Our sole focus is on providers and suppliers that engage in a systemic, ongoing, and repetitive practice of improper billing notwithstanding the public availability of CMS educational materials or guidance and CMS' issuance of claim denial notices to the provider. While we hope that this helps to reassure the provider and supplier communities of CMS' intentions, we recognize that concerns may linger. To that end, we plan to issue written guidance to and communicate with the public once this final rule is implemented, whereby we will once again reiterate the objective behind § 424.535(a)(8)(ii) and, as necessary, discuss certain operational aspects of this provision.

*Comment:* A commenter stated that CMS did not—(1) explain how determinations under § 424.535(a)(8)(ii) would be made; (2) explain how errors in a revocation determination can be remedied short of a reapplication after the enrollment bar expires; and (3) furnish rationale as to the specific standards—such as the establishment of a percentage threshold for claim denials—that CMS will use in its determinations.

*Response:* We will make all § 424.535(a)(8)(ii) determinations after a careful and thorough consideration of the factors outlined in § 424.535(a)(8)(ii)(A) through (F). As we explained in the proposed rule, any revocation under § 424.535(a)(8)(ii) may be appealed if the provider or supplier chooses to do so.

We stated earlier that each case will be judged on its own specific facts, and that establishing specific thresholds would, we believe, hinder our ability to do so. We believe that the factors outlined in § 424.535(a)(8)(ii)(A) through (F) sufficiently indicate to providers and suppliers the rationale we will use in our § 424.535(a)(8)(ii) determinations.

*Comment:* A commenter questioned whether a system would be established to ensure that § 424.535(a)(8)(ii) would be implemented and enforced uniformly across jurisdictions. The commenter also requested which entities (for example, RACs) would be tasked with enforcing these provisions as well as any financial incentives for identifying wrongdoing.

*Response:* Once again, we (not our contractors) will make all determinations regarding whether a § 424.535(a)(8)(ii) revocation should be imposed. We will apply the criteria consistently.

*Comment:* A commenter suggested that in light of the seriousness of a revocation under § 424.535(a)(8)(ii), CMS should provide direct notice to a provider that its billing privileges may be revoked if its continues to bill for services that do not meet Medicare requirements. The commenter believed that such a preliminary ''warning'' could encourage the provider to improve its claim submission accuracy. The commenter also suggested that CMS consider a sliding scale that includes a lower-level consequence—such as a suspension—for less severe occurrences.

*Response:* We do not believe that an interim alert to the provider is necessary. The provider's receipt of a substantial number of claim denials, in our view, furnishes adequate notice to the provider that corrective action is necessary.

While we appreciate the commenter's suggestion regarding lower-level consequences for less severe cases, we note again that § 424.535(a)(8)(ii) is only intended to address the most severe of situations. Still, we will closely monitor our application of this provision and the scenarios that come before us. Should we determine that other sanctions may be appropriate, we may, as needed, undertake future rulemaking.

*Comment:* A commenter stated that CMS should not finalize § 424.535(a)(8)(ii) until the public has had an opportunity to comment on the specific policy CMS will use in defining ''pattern or practice.''

*Response:* As stated, we are not formally defining ''pattern or practice'' in this rule. We will instead consider a number of factors in our determinations as to whether a § 424.535(a)(8)(ii) revocation is warranted.

*Comment:* A commenter stated that although CMS sought feedback from the provider community regarding § 424.535(a)(8)(ii), it did not believe that engaging in this type of review and analysis during a 60-day public comment period was appropriate. The commenter believed that discussions and collaboration with the provider community via a stakeholder group should occur beforehand.

*Response:* We disagree with the commenter. While we recognize the provider community's concerns regarding § 424.535(a)(8)(ii), we do not believe that formal discussions with a stakeholder group resulting in an agreement as to what § 424.535(a)(8)(ii) should consist of are necessary prior to the provision's implementation. This is especially true considering that we received valuable comments from providers and suppliers regarding § 424.535(a)(8)(ii) and have incorporated them into our final provisions as needed. We believe that the notice-and-comment process under the APA is the most appropriate means of soliciting feedback from the public.

*Comment:* A commenter, expressing concern about CMS's potential use of statistical analysis in determining patterns under § 424.535(a)(8)(ii), cited several instances in which a claim is denied but cannot automatically or necessarily be considered an abusive billing situation: (1) A patient dies prior

to the interpretation of an applicable test; (2) claims for services deemed not medically necessary; (3) the beneficiary needs a Medicare denial to file secondary insurance; and (4) the beneficiary has exceeded a benefit category unbeknownst to the provider. The commenter believed CMS has the capability to distinguish between (a) abusive billing patterns and (b) claim denials that occur in the normal course of business and are not based on any nefarious intent. The commenter added that in providing examples of what may constitute a pattern of abusive billing behavior, CMS must account for certain specialty-specific situations that can occur due to the nature of the provider-patient encounter; diagnostic services, for example, should not be subject to the same standard as other providers due to the remote nature of the physician-patient relationship.

*Response:* We agree with the commenter's apparent rationale that certain claim denials may be for purely innocuous reasons and that CMS has the ability to distinguish between these situations and extreme instances of non-compliant billing. We note once more that the reason(s) for the claim denials will be a factor in our § 424.535(a)(8)(ii) determinations.

*Comment:* A commenter stated that a provider often will not be aware of a pattern of alleged improper billing under § 424.535(a)(8)(ii) until after a contractor performs an audit. Under such circumstances, the commenter believed, the provider should be given an opportunity to correct the allegedly improper billing via a plan of correction.

*Response:* As already stated, we acknowledge that in sporadic instances providers and suppliers may submit claims in error due to a misunderstanding of Medicare policies. It is not our intention to revoke billing privileges under § 424.535(a)(8)(ii) for such isolated misinterpretations.

*Comment:* A commenter stated that in situations where coordination of benefits is involved, a provider must exhaust all efforts to receive payment from a primary payer—such as Medicare—before billing a secondary payer. The commenter urged CMS to exclude coordination of benefit situations from the category of claim denials that can be considered under § 424.535(a)(8)(ii).

*Response:* While we do not believe that such situations should be automatically excluded from the purview of § 424.535(a)(8)(ii), we note that the reasons for the claim denials will be a factor in our § 424.535(a)(8)(ii) determinations. Consequently, the situation the commenter describes will be considered in such determinations.

*Comment:* A commenter stated that ''length of time'' should only be considered as a factor if the provider acted in reckless disregard of whether its claims did not meet Medicare requirements. The commenter added that: (1) The reckless disregard standard should be used in all cases involving § 424.535(a)(8)(ii); and (2) CMS should not use ''the total number of claims denied'' and ''percentage of claims denied'' categories in applying § 424.535(a)(8)(ii) because there are many instances in which claims are denied—such as in coordination of benefit situations—for innocuous purposes.

*Response:* As stated, we will neither be applying a knowledge standard to § 424.535(a)(8)(ii) nor eliminating the ''percentage of claims denied'' or ''length of time'' criteria from our analysis. However, we are removing ''the total number of claims denied'' criterion.

*Comment:* A commenter stated that CMS must furnish the provider community with guidance regarding CMS's requirements for proper medical record documentation, including the frequency of documentation to support medical necessity for each product category. The commenter also recommended the inclusion of these documents within an electronic health record template.

*Response:* We believe these comments are outside the scope of this rule.

*Comment:* A commenter stated that a provider's claims are sometimes denied because of insufficient physician medical record documentation; such instances should not be included within the purview of § 424.535(a)(8)(ii) because the provider had no control over the physician's documentation.

*Response:* We do not believe that denials based on insufficient medical record documentation should be automatically excluded from the scope of § 424.535(a)(8)(ii). Again it is ultimately the provider's responsibility to ensure that the documentation it furnishes in support of a claim meets Medicare requirements, though the reason(s) for the claim denial will be a factor in our § 424.535(a)(8)(ii) determinations.

*Comment:* A commenter stated that claims are occasionally denied because information on the certificate of medical necessity is inconsistent with CMS's national coverage criteria. The commenter suggested that the two decisional documents be streamlined to coordinate coverage criteria effectively and uniformly.

*Response:* We believe this comment is outside the scope of this rule.

*Comment:* A commenter expressed concern about what the commenter believed was a lack of definition of ''directing physician'' as that term is used in § 424.535(a)(8)(i). The commenter stated that the professional component of diagnostic testing services is often not performed in the same physical location or contractor jurisdiction as the technical component, and that the date of service may be different if the interpretation is not done on the same date done as the technical component. Such normal, compliant practices could be misinterpreted under § 424.535(a)(8)(i).

*Response:* As we did not propose any changes to the content of existing § 424.535(a)(8), which is merely renumbered in this final rule as § 424.535(a)(8)(i), this comment is outside the scope of this rule.

*Comment:* A commenter contended that although § 424.535(a)(8)(i) suggests that an abuse of billing privileges includes billing for a service when it would have been impossible to actually provide the service—such as when the physician performing the service was not available to furnish the service, or the patient was not available to receive the service because he or she was out of the state or country—the regulation does not clearly state as such. The commenter expressed particular concern regarding the situation where a laboratory is not in the same state in which the physician who ordered the service is located, meaning that the service could not have been furnished to that beneficiary on that date of service. The commenter requested that CMS clarify that this situation is outside the scope of scenarios to which this rule is meant to apply.

*Response:* As we did not propose any changes to the content of existing § 424.535(a)(8), which is merely renumbered in this final rule as § 424.535(a)(8)(i), we believe this comment is outside the scope of this rule.

Given the comments received and the foregoing discussion, we are finalizing proposed § 424.535(a)(8)(ii) with a modification. We are adding new paragraphs (A) through (F) to identify the factors for consideration.

5. Post-Revocation Submission of Claims

Section § 424.535(h) currently states that a revoked physician organization, physician, non-physician practitioner or IDTF must submit all claims for furnished items and services within 60 calendar days of the effective date of the

revocation. As we explained in the proposed rule, the reason for such a relatively short post-revocation claim submission period is to limit Medicare's exposure to future vulnerabilities and potentially fraudulent claims from such revoked individuals and organizations.

With this in mind, we proposed to expand § 424.535(h) to require all revoked providers and suppliers to submit, within 60 days after the effective date of the revocation, all claims for items and services furnished prior to the date of the revocation letter. For HHAs, the date would be 60 days after the later of: (1) The effective date of the revocation; or (2) the date that the HHA's last payable episode ends.

A summary of the comments received and our responses thereto are as follows:

*Comment:* A commenter questioned why CMS is proposing to grant DMEPOS suppliers an additional 45 days after revocation to submit claims, for § 424.57(d) currently grants DMEPOS suppliers only 15 days to submit claims after revocation.

*Response:* We believe that the commenter is misreading § 424.57(d), in that § 424.57(d) does not address the timeframe in which post-revocation claims must be submitted.

*Comment:* A commenter expressed support for our proposed change, stating that all providers and suppliers would now be treated equally with respect to the post-revocation claim submission requirement.

*Response:* We appreciate the commenter's support.

Given the very few comments received and the foregoing discussion, we are finalizing our proposed changes to § 424.535(h).

6. Effective Date of Billing Privileges

Under the current version of § 424.520(d), the effective date of billing privileges for physicians, non-physician practitioners, and physician and non-physician practitioner organizations is the later of: (1) The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or (2) the date an enrolled physician or non-physician practitioner first began furnishing services at a new practice location. This policy is meant to address our concerns about providers and suppliers being able to bill for Medicare services rendered well before enrollment, for it is not always possible to verify whether a supplier has met all Medicare enrollment requirements prior to the date it submits an enrollment application. Thus, the Medicare program should not be billed for services performed before the later of the two aforementioned dates. In light of this concern, we proposed to expand the scope of § 424.520(d) to include ambulance suppliers, based in part on the elevated risk they pose to the Medicare program as stated in § 424.518. Indeed, in a January 2006 OIG report entitled, ''Medicare Payments for Ambulance Transports'' (OEI–05–02–000590), the OIG found that 25 percent of ambulance transports did not meet Medicare's program requirements; this resulted in an estimated $402 million in improper payments.

As explained in the proposed rule, we did not include certified providers and certified suppliers in our proposed revision to § 424.520(d) because of: (1) Existing limitations posed by § 489.13 on their ability to ''backbill'' for services; and (2) the extensive, multilayered review process they must undergo prior to enrolling in Medicare. Yet we did solicit comments on whether any other non-certified provider or non-certified supplier types that are not currently subject to a backbilling restriction similar to the one we proposed should be included.

The following is a summary of the comments received regarding this proposed change and our responses thereto.

*Comment:* A commenter stated that CMS should treat ambulance services in a manner consistent with physicians and non-physician practitioners when it comes to enrollment and the filing of Medicare claims. Retroactive billing for ambulance services, the commenter continued, should be similar to the 30-day retroactive billing authority that exists for these individuals; the supplier could seek a longer retroactive billing period if it can demonstrate that exigent circumstances led to a situation that forced it to provide transport services prior to the normal billing requirements.

*Response:* We agree that the 30-day and 90-day retroactive billing provisions in § 424.521(a), to which the commenter is referring, should apply to ambulance suppliers to the same extent that they do to physicians, physician groups, non-physician practitioners, and non-physician practitioner groups. This approach would ensure: (1) Consistent treatment between ambulance suppliers and the other supplier types covered under § 424.520(d); and (2) that ambulance suppliers can avail themselves of a brief retroactive billing period if they are able to show that urgent circumstances precluded the supplier from submitting its enrollment application earlier than it did. Therefore, we have revised the regulatory text in § 424.521(a) to include ambulance suppliers.

*Comment:* Several commenters stated that proposed § 424.520(d) should have a mechanism by which ambulance suppliers can obtain retroactive billing privileges in situations where the failure to file the enrollment application prior to commencing operations resulted from circumstances beyond the supplier's control; one commenter cited the example of a county-owned ambulance supplier that needs approval from the county's governing board before expanding its service area, a process that could delay the submission of the supplier's application. The commenters had two suggestions in this regard. First, the supplier could file a preliminary CMS–855 application when it anticipates expanding into a new service area; the supplier could supplement the application with additional information at a later date. Second, the supplier could appeal for retroactive billing privileges.

*Response:* As we explained earlier, we have incorporated a revised § 424.521(a) into this final rule. It will permit limited retrospective billing in exceptional circumstances. We believe this will alleviate some of the commenters' concerns.

*Comment:* Several commenters requested CMS to clarify that the ''date of filing'' of a CMS–855 application is the date on which the contractor initially received the application, not the date on which the contractor deemed the application ''complete.''

*Response:* The ''date of filing'' is the date on which the provider or supplier submitted its CMS–855 application via mail or Internet-based PECOS.

*Comment:* Several commenters stated that a more definitive distinction must be made as to what is meant by the date of an application that is subsequently approved. One commenter stated that it is not uncommon for contractors to return applications with a request for supporting documentation. Another commenter requested an explicit statement that the date the application is entered into PECOS or a paper CMS–855B is mailed is the effective date of billing privileges, assuming the application is eventually accepted; this would make it clear that a request for additional documentation is part of the original process and does not begin an entirely new cycle.

*Response:* We indicated earlier that the effective date of billing privileges under § 424.520(d) will be the later of: (1) The ''date of filing'' of an enrollment application that is subsequently approved; or (2) the date the supplier began furnishing services at a practice

location. The ''date of filing'' is considered to be the date on which the supplier submitted its CMS–855 application via mail or Internet-based PECOS.

The term ''subsequently approved'' includes application submissions for which the contractor requested additional information from the supplier (or otherwise undertook developmental activities with respect to the application) and the application was ultimately approved. It does not include applications that were rejected under § 424.525 or returned pursuant to CMS Publication 100–08, chapter 15, and were later resubmitted. A contractor's request for additional information does not constitute a final disposition regarding the application; that is, the application is still in process. However, a rejection or return indicates that the contractor was unable to process the application to completion, meaning that the application processing cycle has ended and the supplier must submit a new application.

*Comment:* A commenter stated that municipalities are sometimes required to temporarily curtail their ambulance services and must contract with another ambulance supplier on an emergency, short-term basis; in such emergency situations, it may not be possible for the municipality to quickly secure all of the necessary paperwork to permit Medicare billing for transport services. The commenter stated that the municipality should not be held financially responsible for providing appropriate transport services for such emergency patients.

*Response:* In response to the comments received, we have revised § 424.521(a) to allow ambulance suppliers limited retrospective billing in exceptional circumstances.

*Comment:* A commenter requested that CMS clarify how the 2006 OIG report supports CMS's proposed § 424.520(d). The OIG report, the commenter contended, did not indicate whether the ambulance transports discussed therein occurred prior to the date the ambulance supplier submitted its enrollment application; citing the OIG report is misleading and creates an unfair and negative view of all ambulance suppliers.

*Response:* Our citation of the report was not intended to disparage all ambulance suppliers but to present examples of instances where certain ambulance suppliers were not in compliance with Medicare requirements. Our concern about non-compliance is the precise reason for our revision to § 424.520(d). We explained earlier that allowing an extensive period of backbilling makes it difficult to verify whether an ambulance supplier was in compliance with Medicare requirements well before it submitted an enrollment application.

*Comment:* A commenter requested that CMS: (1) Furnish the information it used to single-out ambulance suppliers in § 424.520(d); and (2) explain why it did not propose a similar backbilling limitation for other supplier types such as clinical laboratories and mass immunization roster billers.

*Response:* As we discussed in the proposed rule, we elected to include ambulance suppliers within § 424.520(d) based on: (1) Their status as moderate-risk category suppliers under § 424.514; (2) the OIG report cited in the preamble; and (3) other program integrity issues we have detected regarding ambulance suppliers. Indeed, these issues were outlined in a July 31, 2013 notice (78 FR 46339) in which we imposed a temporary moratorium on the enrollment of new ground ambulance suppliers in several Texas counties; a similar moratorium was imposed effective January 30, 2014 against ambulance suppliers in the Philadelphia, Pennsylvania area (79 FR 6475).

*Comment:* A commenter stated that the loss of revenue to ambulance suppliers resulting from § 424.520(d) could preclude them from expanding into new areas.

*Response:* We understand the commenter's concern. Yet as we have stated, it is not always possible for us to verify that the supplier met all enrollment requirements many months prior to the application submission. To ensure that Medicare payments are made to suppliers that we have confirmed met enrollment requirements at the time the service was provided, we believe it is necessary to restrict the period of backbilling.

Given these comments and in accordance with the previous discussion, we are finalizing our proposed change to § 424.520(d). We have also revised the regulatory text of § 424.521(a) to include ambulance suppliers.

7. Effective Date of Re-Enrollment Bar

Currently under § 424.535(c), a revoked provider, supplier, delegated official, or authorizing official is barred from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation. In accordance with § 424.535(g), the effective date of a revocation is either of the following:

- Thirty days after CMS or the CMS contractor mails notice of its determination to the provider or supplier.
- If the revocation is based on a federal exclusion or debarment, felony conviction, license suspension or revocation, or if the practice location is determined by CMS or its contractor not to be operational, the date of the exclusion, debarment, felony conviction, license suspension or revocation, or the date that CMS or its contractor determined that the provider or supplier was no longer operational constitutes the effective date of the revocation and, hence, the date on which the re-enrollment bar commences.

We proposed to revise § 424.535(c) to specify that all re-enrollment bars begin 30 days after CMS or the CMS contractor mails notice of the revocation determination to the provider or supplier. The rationale for this change was to address situations where the revocation is based on a federal exclusion or debarment, felony conviction, license revocation or suspension, or non-operational status. Due to potential delays in the updating of databases with criminal conviction and licensure information, the revocation effective dates for these actions can be months prior to the date the contractor mails the revocation letter, and it is from these retroactive effective dates that the re-enrollment bar runs. By starting the re-enrollment bar period after the revocation letter is sent, the full period can be imposed.

A summary of the comments we received as well as our responses follow:

*Comment:* A commenter requested that CMS identify the reason for its statement in the preamble discussion for proposed § 424.535(a)(3) regarding months of potential delay in updating databases with criminal conviction and licensure information. The commenter further requested CMS to indicate: (1) Whether the requirement under § 424.516 for physicians, non-physician practitioners, and owners to report a felony conviction within 30 days is being waived; and (2) if § 424.516 is being waived, whether CMS is also waiving the requirement in § 424.565 that CMS assess an overpayment back to the date of the adverse action.

*Response:* We indicated in the proposed rule that there could be instances where a delay exists in updating a state Web site with felony or licensure data. With respect to the commenter's two requests, this rule

does not waive the aforementioned requirement to report felony convictions or the overpayment assessment mandate in § 424.565.

*Comment:* A commenter disagreed with CMS's proposed revision to § 424.535(c) because this would effectively limit overpayment collections from the date of the felony conviction or guilty plea, or would expose physicians and non-physician practitioners to higher Medicare overpayment amounts. The commenter stated that CMS should retain the current policies in these two provisions until it explains: (1) Their impact on the overpayment provision found in § 424.565; and (2) CMS's intent to impose overpayments based on an OIG exclusion or felony conviction from the date of the felony conviction or exclusion, the date of the revocation letter, or the actual revocation date.

*Response:* Our revision to § 424.535(c) neither addresses nor impacts overpayment determinations or collections. It simply specifies when the enrollment bar begins. For example, if a provider is revoked with a retroactive effective date, the enrollment bar—whatever the length—will commence as specified in § 424.535(c). Yet the effective date of the revocation (and from which date overpayments can be collected) will be the same as that which currently exists under our regulations.

*Comment:* A commenter stated that our proposal that all re-enrollment bars would begin 30 days after CMS mails the revocation notice to the provider appears prudent, for it would streamline and simplify current policy. The commenter also expressed support for our additional proposals to eliminate redundancies and make technical corrections to the regulatory text.

*Response:* We appreciate the commenter's support.

Given this, we are finalizing our proposal to revise § 424.535(c) to state that the re-enrollment bar is effective 30 days after CMS or its contractor mails notice of its revocation determination to the provider or supplier.

8. Corrective Action Plans

Consistent with § 405.809, a provider or supplier whose Medicare billing privileges are revoked may currently submit a corrective action plan (CAP). The CAP must provide evidence that the provider or supplier is in compliance with Medicare requirements. If CMS or the Medicare contractor determines that the provider or supplier is, in fact, compliant with Medicare requirements, the provider or supplier's billing privileges can be reinstated.

We proposed to revise § 405.809 to state in new paragraph (a)(1) that a provider or supplier may only submit a CAP when the revocation was based on § 424.535(a)(1), which states in part that a provider or supplier's billing privileges may be revoked if the provider or supplier is determined not to be in compliance with our enrollment requirements. We stated that providers and suppliers generally should not be exonerated from failing to fully comply with Medicare enrollment requirements simply by furnishing a CAP, for it is the duty of providers and suppliers to always maintain such compliance. The proposed exception for § 424.535(a)(1) was based on our experiences where a provider or supplier revoked under § 424.535(a)(1) had only minimally failed to comply with our enrollment requirements. To revoke its billing privileges when the problem can be quickly and easily corrected via a CAP could in some instances lead to unfair results. In cases where § 424.535(a)(1) is one of several reasons for a particular revocation, the provider would be able to submit a CAP with respect to the § 424.535(a)(1) revocation reason. For the other revocation grounds, though, the provider would not be able to use the CAP process; the provider would instead have to use the appeals process under Part 498.

We also proposed in new paragraph (a)(2) that providers and suppliers would have only one opportunity through a particular CAP to correct all of the deficiencies that served as the basis of the revocation. We expressed our view that providers and suppliers should not be given multiple opportunities to become compliant when it is crucial that such compliance always be maintained.

We further proposed to delete the last sentence of § 424.535(a)(1), which reads: ''All providers and suppliers are granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges, except for those imposed under paragraphs (a)(2), (a)(3), or (a)(5) of this section.'' This sentence was inconsistent with our proposed change to § 405.809(a)(1).

Lastly, we proposed to incorporate the existing language of § 405.809 into a new paragraph § 405.809(b).

A summary of the comments we received on these proposed changes and our responses follow:

*Comment:* Several commenters noted that under CMS's proposal to restrict the availability of CAPs, a CAP could not be used in cases where a revocation occurred due to the provider's failure to report a practice location under § 424.535(a)(9). Although these commenters generally supported the proposed change, they urged CMS to clarify the definition of a ''practice location'' for ambulance services because Medicare contractors may be interpreting this term differently; for instance, some may define it as the location of the supplier's management, billing, or administrative staff, while others consider it to be where the supplier garages and/or maintains its vehicles.

*Response:* We clarified the meaning of the term ''practice location'' as it pertains to ambulance suppliers in CMS Transmittal 499, dated December 27, 2013.

*Comment:* Several commenters opposed our proposed change to § 405.809 and urged CMS to allow CAPs to be available for additional scenarios beyond those encompassed by § 424.535(a)(1). One commenter stated that many enrollment violations can be cured. The commenter stated that CAPs should be permitted except in cases where a CAP clearly jeopardizes program integrity or beneficiary health and safety. Another commenter expressed concern about CMS's statement in the preamble concerning the revocation of billing privileges for failing to report a practice location change; to have the provider in such an instance go through the appeals process without the availability of a CAP, the commenter believed, would be unjust. Another commenter stated that CMS should never be unwilling to receive correct information and that, in the commenter's opinion, Medicare contractors furnish misleading and inaccurate information to providers and suppliers during the enrollment process.

*Response:* As we explained in the proposed rule, we believe that CAPs are inappropriate in a number of revocation situations and should accordingly be unavailable; to illustrate, revocations based on a failure to timely report a practice location change should not be retroactively corrected via a CAP. Indeed, we must be promptly notified of all practice location changes so we can ensure that services are only performed at valid locations and, consequently, that payments are made correctly. More basically, it is the provider or supplier's responsibility—as indicated on the CMS–855 forms that the provider or supplier completes and signs as part of the enrollment process—to report changes to CMS on a timely basis.

*Comment:* A commenter recommended that CMS eliminate the provider enrollment CAP process and work with Medicare contractors to

eliminate revocations based on a trivial matter.

*Response:* We believe that CAPs are appropriate for revocations based on § 424.535(a)(1), and they will remain available. Moreover, we stress that revocations are not imposed for trivial reasons. Each prospective revocation is carefully reviewed to ensure that there are legitimate grounds for taking such action and that the integrity of the Medicare program warrants it.

*Comment:* A commenter stated that there generally is not enough time for a provider to submit both a corrective action plan and appeal, for the latter is frequently not filed until the results of the former are known. The commenter thus recommended that CMS either discontinue the CAP process or require its contractors to decide upon and respond to a CAP within 10 days of receipt.

*Response:* We do not agree that the CAP process should be entirely discontinued or that a provider must wait until the CAP determination has been made before filing an appeal. In fact, many providers and suppliers file a CAP and an appeal as part of the same package. Requiring a 10-day period is unnecessary and could hinder the reviewer's ability to conduct a thorough, careful analysis of the merits of the CAP.

*Comment:* A commenter urged the continued use of CAPs in situations where the provider misinterpreted a requirement or failed to comply with an administrative or record-keeping requirement but otherwise acted in good-faith.

*Response:* CAPs will remain available for revocations based on § 424.535(a)(1). With respect to other revocation reasons that we suspect the commenter may classify as ''record-keeping'' in nature—specifically, § 424.535(a)(9) and (a)(10)—we do not view these as mere administrative requirements. The reporting mandates referred to in paragraph (a)(9)—and which are codified in § 424.516(d)(1)(ii)—help ensure that CMS has correct, up-to-date information on the provider so CMS can determine if a provider or supplier is still in compliance with Medicare requirements. The maintenance of documentation requirements referred to in paragraph (a)(10) and codified in § 424.516(f) assist CMS in confirming that the physician or other eligible professional was qualified to order or certify the item or service that the provider or supplier furnished.

*Comment:* Another commenter stated that unless DHHS can provide suppliers with accurate and routine visibility to statistics (such as the supplier's error rates, enrollment file, and beneficiary complaints) that furnish an opportunity for suppliers to investigate, respond to, and correct potential deficiencies, CMS should not finalize its proposed change to § 405.809.

*Response:* Much of the data the commenter refers to is either currently available to individual providers and suppliers (for example, by reviewing the provider or supplier's PECOS record) or can be made available to them upon request. However, it is ultimately the provider or supplier's responsibility to ensure that it has sufficient internal controls to detect deficiencies on its own. Providers and suppliers must be proactive in their efforts to comply with Medicare requirements. Thus, we do not believe that the commenter's contention constitutes grounds for withdrawing our proposed change to § 405.809.

Given these comments and the aforementioned discussion, we are finalizing our proposed CAP provisions without modification.

9. Revisions to §§ 424.530(a)(5) and 424.535(a)(5)

We also proposed to revise §§ 424.530(a)(5) and 424.535(a)(5). We stated in the proposed rule that the language in these two subsections is redundant. To illustrate, the first sentence of § 424.530(a)(5) states that a provider or supplier's Medicare enrollment may be denied if, upon on-site review or other reliable evidence, CMS determines that the provider or supplier is not operational or is not meeting Medicare enrollment requirements. Later, paragraphs § 424.530(a)(5)(i) and (a)(5)(ii) essentially repeat this language. The same repetition is evident in § 424.535(a)(5), wherein paragraphs (a)(5)(i) and (a)(5)(ii) effectively duplicate the language in the first sentence of § 424.535(a)(5).

Accordingly, we proposed to revise § 424.530(a)(5) to state that the provider or supplier's enrollment can be denied if (u)pon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following: (1) Not operational to furnish Medicare-covered items or services; or (2) otherwise fails to satisfy any Medicare enrollment requirements. Likewise, we proposed to revise § 424.535(a)(5) to state that a provider or supplier's Medicare billing privileges would be revoked if (u)pon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following: (1) No longer operational to furnish Medicare-covered items or services; or (2) otherwise fails to satisfy any Medicare enrollment requirements.

We also proposed to add the phrase ''or other reliable evidence'' to § 424.535(a)(5) for two reasons. First, § 424.530(a)(5) currently contains the ''or other reliable evidence'' standard, and we believe these two paragraphs (§ 424.530(a)(5) and § 424.535(a)(5)) should have consistent standards. Second, we believe it is important to be able to ascertain and take action under § 424.535(a)(5) against a non-operational or non-compliant provider or supplier through means other than a site review.

We received one comment regarding these proposed changes:

*Comment:* A commenter requested clarification of the term ''other reliable evidence'' as it is used in § 424.530(a)(5) and § 424.535(a)(5).

*Response:* The term means any credible evidence that demonstrates that the provider is not in compliance with Medicare requirements.

Given the foregoing, we are finalizing the proposed changes discussed in section II.B.9 of this final rule albeit with one very minor technical edit. The term ''enrollment requirements'' will be changed to ''enrollment requirement'' to clarify our original intention that the provider or supplier's non-compliance with any enrollment requirement can constitute grounds for revocation.

10. Technical Changes

We also proposed certain technical changes related to our provider and supplier enrollment regulations.

In § 424.530(a)(1), we proposed to change the word ''section'' to ''subpart P'' in the first sentence so that the sentence would read—''[t]he provider or supplier is determined not to be in compliance with the enrollment requirements described in this subpart P or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter.'' The purpose of this change was to clarify that the provider or supplier must comply with all of the provider enrollment provisions in 42 CFR subpart P, not merely those in § 424.530.

For the same reason, we proposed to revise § 424.535(a)(1) to state as follows: ''The provider or supplier is determined not to be in compliance with the enrollment requirements described in this subpart P or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter.''

Also, in § 424.535(a)(3)(ii) we proposed to change the term ''denials''

to ''revocations,'' as § 424.535 does not address denials.

Finally, § 498.5(l)(4) states that for appeals of denials based on § 424.530(a)(9) related to temporary moratoria, the scope of the review is limited to whether the temporary moratorium applies to the provider or supplier. Yet § 424.530(a)(10), rather than § 424.530(a)(9), applies to temporary moratoria. We proposed to correct § 498.5(l)(4) by changing the reference to § 424.530(a)(9) therein to § 424.530(a)(10).

We received no comments on these proposed technical changes. Therefore, we are finalizing these revisions without modification.

*C. General and Other Comments*

We also received a number of general comments regarding the proposed rule. A summary of these comments and our responses are as follows:

*Comment:* A commenter indicated general support for the changes in this rule that expand CMS's enrollment denial authority, for this would improve CMS's ability to detect new fraud schemes. However, the commenter expressed concern that CMS's anti-fraud efforts could inadvertently harm law-abiding physicians who unintentionally make a mistake during the enrollment process—a process, the commenter believed, that has become increasingly complicated. The commenter recommended that CMS continually evaluate PECOS and remove and identify unnecessary and outdated requirements.

*Response:* Although we are unclear as to the specific anti-fraud effort(s) or regulatory provision(s) of concern to the commenter, we are committed to ensuring that the enrollment process poses as minimal a burden as possible on those providers and suppliers that are conscientious about complying with Medicare requirements. We have taken steps in this direction, including—but not limited to—allowing providers and suppliers to complete CMS–855 applications via the Internet as opposed to requiring a paper application. We also, as the commenter suggested, regularly evaluate PECOS, our Program Integrity Manual instructions, and our regulations to determine whether improvements or revisions are necessary. We believe it is important and indeed necessary to strive to achieve an appropriate balance between ensuring the integrity of the Medicare Trust Funds and easing the burden on the provider and supplier communities.

*Comment:* A commenter recommended that CMS develop the systems and resources necessary to effectively implement our new provider enrollment requirements.

*Response:* We will ensure that the resources are available and the necessary systems changes are made to implement the provider enrollment requirements outlined in this rule.

*Comment:* A commenter suggested that CMS consider sharing with other payers (both public and private) information regarding actions taken against providers pursuant to our proposed provisions (for example, revocations under § 424.535(a)(8)(ii)). The commenter stated that such dissemination of data is critical to the prevention of fraud and abuse in our nation's health care system.

*Response:* We agree with the commenter that the exchange of information between medical payers is important to the prevention of health care fraud and abuse. CMS, is working to expand the exchange of information with other payers as evidenced by its initiative, the Healthcare Fraud Prevention Partnership.

*Comment:* A commenter stated that any final decision regarding the revocation of a provider's Medicare billing privileges should come from CMS Central Office rather than from the Medicare contractor.

*Response:* For reasons mentioned earlier, we agree.

*Comment:* A commenter expressed support for CMS's clarification that the re-enrollment bar does not apply if a revocation is based on the provider's failure to respond timely to a revalidation request or other request for information.

*Response:* We appreciate the commenter's support.

*Comment:* Several commenters stated that physicians need more information and education on common billing and coding mistakes and better guidance on how to avoid audits. The commenters recommended that CMS: (1) Publicly release information on frequent billing and coding errors, including aggregate statistics on such errors at a local (MAC level) and national level, as well as by specialty; (2) educate providers on these errors through existing educational channels (for instance, Open Door Forum calls and MedLearn Matters articles); (3) develop a dedicated web presence for publishing the aforementioned information and an associated CMS email list-serve to disseminate new data as it becomes public; (4) provide technical assistance for physician practices—primarily those with a high volume of coding and billing errors—on how to avoid these errors, perhaps through an expanded scope of work for Medicare's quality improvement organizations (QIOs); and (5) furnish additional guidance on the myriad of Medicare rules and regulations, which the commenter believes are often burdensome and confusing.

*Response:* We appreciate these suggestions and will continue, as necessary, to expand our outreach efforts to providers and suppliers regarding important coding and billing issues.

*Comment:* With respect to §§ 424.530(a)(1) and 424.535(a)(1), a commenter stated that CMS should make available to providers various information (for example, the supplier's error rates, enrollment file, and beneficiary complaints) that would enable providers to investigate and address potential deficiencies. Only through this vehicle can a provider confirm that it is in compliance with enrollment requirements and, if necessary, take corrective action.

*Response:* As we stated earlier in response to a similar comment, much of this information is either currently available to the provider or can be made available upon request. Still, providers must be proactive in establishing adequate internal controls to ensure compliance with Medicare requirements; such compliance should not be contingent upon the provider first receiving substantial quantities of information from CMS.

*Comment:* A commenter stated that program integrity is best ensured when providers fully understand how to comply with complex Medicare requirements. The commenter thus urged CMS to issue final rules regarding the requirements of mandatory compliance programs (as outlined in the Affordable Care Act) as soon as possible. The commenter added that CMS should work with the OIG to update the current compliance guidance by working with industry stakeholders.

*Response:* We appreciate the commenter's concerns. However, the compliance plan provisions outlined in section 6401 of the Affordable Care Act are outside the scope of this rule.

*Comment:* A commenter stated that if CMS sees any provider or Medicare debt as a risk and plans to do everything possible to prevent unnecessary threats to Medicare beneficiaries and the Medicare Trust Funds, this gives CMS unrestrained discretion to deny enrollment or revoke billing privileges. The proposed rule, the commenter continued, does not focus on narrowly tailoring the approach to target fraud and abuse but instead seems geared towards reducing the total number of providers (including those not engaged

in fraudulent or abusive actions) based on CMS's apparent belief that doing so will concomitantly reduce fraud and abuse.

*Response:* We have repeatedly stated in numerous forums and throughout this rule that the overwhelming majority of Medicare providers and suppliers submit claims that meet Medicare requirements. It is not CMS's overriding objective to reduce the total number of Medicare providers and suppliers. Nonetheless, a small percentage of providers and suppliers are engaging in fraudulent, wasteful, inappropriate, or abusive activities. Our provider enrollment revisions are directed at such providers and suppliers, and we believe that removing them, as necessary, from the Medicare program will only serve to benefit Medicare beneficiaries, the Trust Funds, the taxpayers, and the hundreds of thousands of legitimate Medicare providers and suppliers that have proven to be reliable partners of the program.

*Comment:* A commenter expressed concern that the proposed rule would give CMS's contractors unprecedented discretion to revoke Medicare billing privileges. The commenter also stated that CMS must clearly articulate the appeal rights that providers have in revocation cases.

*Response:* As stated previously, a MAC must receive prior CMS approval before revoking a provider's Medicare billing privileges. With respect to appeal rights in revocation cases, these are outlined in 42 CFR part 498 and in CMS Publication 100–08, chapter 15.

*Comment:* A commenter supported the proposed rule's intent to reduce the time necessary to institute a recovery of Medicare funds for a provider who has submitted bad or faulty billings.

*Response:* We appreciate the commenter's support for our anti-fraud efforts.

*Comment:* A commenter urged CMS to amend its opt-out policy to allow physicians to opt-out of the Medicare program without a requirement to reaffirm the opt-out. After the 2-year minimum required by law, the commenter explained, the opt-out period should be effective indefinitely unless and until the physician chooses to terminate his or her opt-out status and private contracts with patients in order to rejoin Medicare as a participating or non-participating physician.

*Response:* This comment is outside the scope of this rule.

*Comment:* A commenter questioned why Medicaid was excluded from the scope of our proposed rule.

*Response:* We have chosen to address only Medicare enrollment in this rule, though Medicaid enrollment may be addressed in the future.

## III. Provisions of the Final Rule

### *A. Incentive Reward Program*

In light of the complexity of the operational aspects of our proposal, we are not finalizing our proposed IRP provisions in this rule. We may finalize them in future rulemaking.

### *B. Enrollment Provisions*

Based on public comments, we are finalizing our proposed provider enrollment provisions with the following revisions:

• In § 424.502, we are modifying paragraph (2) of the definition of ''Enroll/Enrollment'' to read as follows: Except for those suppliers who complete the CMS–855O form, CMS-identified equivalent, successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services, validating the provider or supplier's eligibility to provide items or services to Medicare beneficiaries.

• In § 424.510, we are redesignating the first two sentences of existing paragraph (a) as new paragraph (a)(1).

++ Revising the third sentence of existing paragraph (a) and redesignating as new paragraph (a)(2). The new paragraph (a)(2) will state the following: To be enrolled to furnish Medicare-covered items and services, a provider or supplier must meet the requirements specified in paragraphs (d) and (e) of this section.

++ Adding a new paragraph (a)(3) that states the following: To be enrolled solely to order and certify Medicare items or services, a physician or non-physician practitioner must meet the requirements specified in paragraph (d) of this section except for paragraphs (2)(iii)(B), (2)(iv), (3)(ii), (5), (6), and (9).

• In § 424.521, we are revising paragraph (a) to include ambulance suppliers.

• In § 424.530 we are making the following revisions:

++ Revising § 424.530(a)(3).

++ In § 424.530(a)(5), we are changing ''requirements'' to ''requirement.''

—Paragraph (a)(6)(ii)(A) we are revising the sentence to state that the owner left the provider or supplier with the Medicare debt within 1 year before or after that provider or supplier's voluntary termination, involuntary termination or revocation.

—In paragraph (a)(6)(ii)(C)—

—Adding additional language to the introductory text, a second sentence that reads: In making this determination, we consider the following factors.

—Adding new paragraphs (a)(6)(ii)(C)(*1*) through (*5*)

—In § 424.530(a)(6)(iii), we are making the following changes:

—Combining proposed paragraphs (A) and (B)(1)

—Redesignating proposed paragraph (a)(6)(iii) as new paragraph (B)(*2*).

• In § 424.535 we are making the following revisions:

++ Revising paragraph (a)(3).

++ In § 424.535(a)(5), we are changing ''requirements'' to ''requirement.''

++ Adding paragraphs A through F to paragraph (a)(8)(ii).

## IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-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 (ICRs):

### *A. ICRs Regarding the Definition of Enrollment (§ 424.502, § 424.505, and § 424.510)*

Our revisions to § 424.502, § 424.505, and § 424.510 reflect the existing usage of the CMS–855O (OMB Approval number 0938–0685) and, as such, will not impose any additional information collection burden. Consistent with § 424.507, an individual who wishes to enroll in Medicare for the sole purpose of ordering or certifying items or services for Medicare beneficiaries can become eligible to do so by completing the CMS–855O. Use of the CMS–855O commenced in July 2011, and OMB at that time approved the information collection burden associated with its use. The CMS–855O is approved under

OMB control number 0938–1135 and expires August 31, 2015.

*B. ICRs Regarding the Debts to Medicare (§ 424.530(a)(6))*

Our revisions to § 424.530(a)(6) will likely result in an increase in application denials. While these revisions will not directly impose an information collection burden, the increase in denials could lead to more appeals from denied providers and suppliers. However, we are unable to estimate the number of possible denials because we do not have data available that can support such an estimate. Accordingly, we cannot project the potential information collection burden that could arise from an increased number of: (1) Appeals of denials; or (2) resubmitted enrollment applications from the denied providers and suppliers.

*C. ICRs Regarding the Felony Convictions (§§ 424.530(a)(3) and 424.535(a)(3))*

Although our revisions to §§ 424.530(a)(3) and 424.535(a)(3) do not directly impose paperwork burdens, they will likely result in an increase in application denials and revocations, respectively. Yet we cannot estimate the potential increase in denials and revocations based on these changes, for we do not have data available that can support such an estimate. Therefore, we are unable to project the potential information collection burden that may result from an increased number of appeals of denials and revocations.

*D. ICRs Regarding the Abuse of Billing Privileges (§ 424.535(a)(8)(ii))*

Our addition of § 424.535(a)(8)(ii) will likely lead to an increase in the information collection burden because there will be a concomitant increase in revocations and associated appeals. However, we are unable to estimate the number of potential revocations. We do not have data available that can help us make such an estimate, for each situation will have to be reviewed and addressed on a case-by-case basis.

*E. ICRs Regarding the Post-Revocation Submission of Claims (§ 424.535(h))*

We do not believe that our revisions to § 424.535(h) will result in a change in the information collection burden. While the claims in question will need to be submitted within a shorter timeframe (60 days), they will likely be submitted regardless of the applicable submission period. The shorter timeframe will, in general, neither increase nor decrease the number of claims submitted.

*F. ICRs Regarding the Effective Date of Billing Privileges (§ 424.520(d))*

Our revisions to § 424.520(d) will most likely result in a decrease in the information collection burden because fewer claims will be eligible for submission under this change. Yet we are unable to project the extent of the decrease in the number of claims because we do not have data available to support such an estimate. Therefore, we cannot estimate the decrease in the information collection burden.

*G. ICRs Regarding the Effective Date of Re-Enrollment Bar (§ 424.535(c))*

We believe that our revisions to § 424.535(c) will neither increase nor decrease the information collection burden. With or without this revision, the provider will still need to submit the applicable CMS–855 application (based on the provider or supplier type involved) after the expiration of the re-enrollment bar in order to enroll again in Medicare.

*H. ICRs Regarding the Corrective Action Plans (§ 405.809)*

Our revisions to § 405.809 will result in a decrease in the information collection burden because there will be a reduction in the number of CAPs submitted. However, we are unable to project the extent of the decrease in submitted CAPs because we do not have sufficient data to support such an estimate.

*I. ICRs Regarding the Revisions to § 424.530(a)(5) and § 424.535(a)(5)*

Our revisions to §§ 424.530(a)(5) and 424.535(a)(5) will not result in a change to the information collection burden, for we do not believe there will be any change in the number of denials or revocations, respectively. We note that § 424.530(a)(5) already permits revocation based upon a site review ''or other reliable evidence.'' Thus, we do not foresee any change in the number of: (1) Appeals of denials, or (2) resubmitted enrollment applications from denied providers and suppliers. As for § 424.535(a)(5), the ''or other reliable evidence'' standard is not in the current version of that paragraph. But we note that § 424.535(a)(1) permits revocation if the provider or supplier is determined not to be in compliance with the enrollment requirements in this section, or in the enrollment application that is applicable to its provider or supplier type. Therefore, the authority to revoke based on reliable evidence of non-compliance is largely similar to the reasons for revocation stated in § 424.535(a)(1). Hence, we do not believe there will be any change in the number of: (1) Appeals of revocations; or (2) resubmitted enrollment applications from revoked providers and suppliers.

The aforementioned burden projections for our provider enrollment revisions are identical to those we proposed and on which we solicited comments. We received no comments on these estimates.

## V. Regulatory Impact Analysis

*A. Statement of Need*

This final rule is necessary to make important revisions to certain Medicare provider enrollment requirements in order to strengthen our program integrity efforts and to help ensure that fraudulent parties neither enroll in nor maintain their enrollment in the Medicare program.

*B. Overview*

We have examined the impacts 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 Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4) and Executive Order 13132 on Federalism (August 4, 1999).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

As explained in more detail later in this section, we encountered several uncertainties in estimating the economic impact of many of our final provisions. We could not estimate the number of denials and revocations that might stem from the finalized enrollment changes. We were also unable to estimate the potential monetary savings to the federal government or the costs to providers and suppliers resulting from the remaining finalized revisions. However, we estimate that our change to § 424.520(d) will result in an annual transfer of more than $100 million from providers and suppliers to the federal government. Therefore, we have

prepared an RIA because this is a major rule.

The RFA requires agencies to analyze options for regulatory relief for small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organization, and small governmental jurisdictions. Most entities and most other providers and suppliers are small entities, either by nonprofit status or by having revenues below Small Business Administration thresholds that range from $7 million and $35.5 million per year. Individuals and states are not included in the definition of a small entity.

As we stated in the proposed rule, several provisions will have at least some effect on certain small entities. These include: (1) The changes at § 424.520(d) to the effective date of billing privileges for ambulance suppliers; (2) the changes at § 424.530(a)(6) regarding Medicare debt; (3) the addition of § 424.535(a)(8)(ii) concerning patterns or practices of non-compliant claim submissions; (4) the revision of § 424.535(h) regarding the submission of claims after revocation; and (5) the revision of § 405.809 concerning the reinstatement of provider or supplier billing privileges following corrective action. Yet as discussed later in this section, we do not believe that this final rule will have a significant economic impact on a substantial number of small entities.

Section 424.520(d), which changes the effective date of billing privileges for ambulance suppliers, will only impact newly-enrolling ambulance suppliers. Each year, new ambulance providers constitute only a very small addition to the overall universe of the roughly 1.4 million Medicare-enrolled providers and suppliers—an average of 1,127 ambulance suppliers enrolled in Medicare each year between 2006 and 2011. We further note that this provision will not affect their ability to bill for services furnished after the later of the two events specified in § 424.520(d)(1) and (2).

Denials and revocations under, respectively, § 424.530(a)(6) and § 424.535(a)(8), will not occur until after a careful examination by CMS of: (1) The level of undue risk that the unpaid debt poses; or (2) the criteria for determining whether the provider or supplier has a pattern or practice of submitting non-compliant claims. As such, while we anticipate an increase in some denials and revocations under these two provisions, we do not believe they will impact a substantial number of small entities.

Our revisions to § 424.535(h) will not have a significant impact on small businesses because: (1) Only a small number of Medicare providers and suppliers have their billing privileges revoked; and (2) the revoked provider's claims will likely be submitted regardless of the shorter submission period.

Our revisions to § 405.809 will impact the ability of some small entities to submit CAPs in response to a revocation. However, these entities will still be able to file a request for reconsideration. The overall effect of this change will thus not impact a substantial number of small entities.

In short, we believe that the vast majority of providers and suppliers—both small and large—do not commit fraud, have not been convicted of a felony, and are otherwise compliant with Medicare enrollment requirements. Consequently, they will not be affected by most of the provisions in this rule.

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined and the Secretary certified that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2014, this is approximately $141 million. We believe that this final rule will have no consequential effect on state, local or tribal governments or on the private sector.

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 requirements or costs on state and local governments, preempts state law, or otherwise has federalism implications. Since this regulation does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

*C. Anticipated Effects*

We indicated in section IV. of this final rule that there may be an ICR burden associated with several of our provider enrollment provisions but that the burden cannot be estimated. The following sections discuss other potential costs—as well as savings—associated with our enrollment changes.

1. Definition of Enrollment

As stated earlier, use of the CMS–855O commenced in July 2011. Our revisions to §§ 424.502, 424.505, and 424.510 are intended to clarify that the CMS–855O does not convey billing privileges. As such, these changes will not result in any additional costs or savings.

2. Debts to Medicare

Our revisions to § 424.530(a)(6) will likely result in additional application denials. Yet we are unable to estimate the number of potential denials because we do not have data available to support such an estimate. Therefore, we cannot project any costs in possible lost billings to providers and suppliers or any associated potential savings to the government.

While there may be an increase in costs to the federal government from identifying and making available to enrollment contractors information about individuals that were associated with a revoked entity with an unpaid Medicare debt, we are unable to estimate the magnitude of any such increase. We also anticipate that an increase in costs will be offset by savings to the government—(1) in preventing billing by such providers and suppliers, and (2) the repayment of debt by these providers and suppliers.

3. Felony Convictions

As stated in section IV.B. of this final rule, our revisions to § 424.530(a)(3) and § 424.535(a)(3) will likely result in additional application denials and revocations, respectively. However, we are unable to estimate the potential increase in denials and revocations and associated appeals, for we do not have sufficient information to support such a projection. Thus, we cannot project the potential costs to providers and suppliers in lost billings or the potential costs or savings to the government arising from these revisions.

4. Abuse of Billing Privileges

Our addition of § 424.535(a)(8)(ii) will likely result in an increase in revocations. Yet we are unable to project the number of providers and suppliers that might be revoked based on this change because we do not have data

available to help us make such an estimate. Thus, we cannot forecast the potential costs to providers and suppliers in lost billings or the possible costs or savings to the government arising from this provision.

5. Post-Revocation Submission of Claims

Our revision to § 424.535(h) is unlikely to increase or decrease the number of claims submitted. While the revoked provider or supplier's claims will need to be submitted within a shorter timeframe, we believe that the vast majority of claims will still be submitted. Therefore, we project only a negligible change in costs to providers and suppliers in their claim submissions.

6. Effective Date of Billing Privileges

The revisions to § 424.520(d) will likely result in a decrease in claims submitted to Medicare. Rather than being able to bill for Medicare services furnished up to 12 months prior to enrollment, newly enrolling ambulance suppliers will be unable to bill for services furnished prior to the later of: (1) The date of filing a Medicare enrollment application that was subsequently approved; or (2) the date the supplier first began furnishing services at a new practice location.

According to our statistics, and as stated earlier, an average of 1,127 ambulance suppliers enrolled in Medicare each year between 2006 and 2011. We will use this figure in our calculations. As a result of our revisions, these suppliers could lose up to 10 months in potential Medicare billings for services furnished prior to the later of the two events cited in § 424.520(d).

Based on our data, the average ambulance supplier receives approximately $581,000 in Medicare payments per year, though this of course varies by individual supplier. Ten-twelfths of this amount (that is, 10 months divided by 12 months) is $484,167. Thus, we estimate that up to $545.7 million each year (or $484,167 × 1,127) in savings to the federal government could accrue as a result of this change.

We emphasize that our $545.7 million estimate is a high-end estimate. There may be new ambulance suppliers that, absent our change to § 424.520(d), would have met our requirements less than 10 months prior to enrollment. For instance, if the average newly enrolling ambulance supplier would have met our requirements 3 months prior to enrollment, the potential savings would be roughly $163.7 million (or $581,000 × 3/12 × 1,127). If the average figure is 6 months, our projection would be approximately $327.4 million. We have no way of predicting the ratio of ambulance suppliers that would have met our requirements 10 months, 6 months or 3 months (or any other point) prior to enrollment. Therefore, we will use these three timeframes as, respectively, high-end, primary, and low-end estimates in the accounting statement.

7. Effective Date of Re-Enrollment Bar

Our revisions to § 424.535(c) will result in a longer re-enrollment bar than that which currently exists in cases where the basis of the revocation occurs months before the issuance of the revocation letter. The longer period during which a provider or supplier is unable to re-enroll in Medicare may result in lost billings to the provider or supplier. This may also lead to savings to the government because a provider or supplier that may have been billing Medicare will not be eligible to do so as soon as would otherwise be the case. However, we are unable to project the possible costs to providers and suppliers or the savings to the federal government because we do not have data available to support such estimates. We also cannot estimate: (1) How many providers and suppliers will be affected by this proposed change; or (2) the specific types of providers and suppliers that will be affected.

8. Corrective Action Plans

Our revisions to § 405.809 will result in a reduction in the number of CAPs submitted, as noted in the ICR. This may result in lost billings to the provider or supplier in cases where CMS' acceptance of a CAP has occurred more quickly than a reversal of the revocation at the appeals level, as the CAP review process often takes place sooner than the reconsideration process. The reduction in the submission of CAPs will probably also result in a savings to the federal government due to a decrease in the resources needed to review the CAPs. However, we cannot estimate the potential lost billings of providers or suppliers resulting from this proposed provision, or the savings to the federal government. We do not have data that can assist us in predicting: (1) The number of provider and suppliers that our proposed change will impact; or (2) the specific types of providers and suppliers that will be affected.

9. Revisions to § 424.530(a)(5) and § 424.535(a)(5)

We stated earlier that we do not believe there will be any change in the total number of denials or revocations based on our revisions to §§ 424.530(a)(5) and 424.535(a)(5). Therefore, we do not anticipate any resultant change in overall costs or savings.

10. Technical Changes

As these are simply technical revisions, there are no costs or savings associated with these provisions.

*D. Comments Received and Conclusion*

While we were unable—and remain unable—to furnish detailed cost and savings estimates for many of our enrollment revisions, we solicited comments from the public regarding their views as to the potential burdens and costs of our proposals as well as the possible savings. We received several comments, which are summarized and accompanied by our responses as follows:

*Comment:* With respect to our savings estimates for the proposed change to § 424.520(d), a few commenters believed that our projections were inflated and that actual data (as opposed to estimates) should be used. One of the commenters suggested that CMS use data regarding Medicare payments made for services furnished prior to the submission of the CMS–855B. The other commenter recommended that CMS calculate the actual payments made to new ambulance suppliers after January 1, 2011, for this is the date on which CMS began limiting payments to suppliers to 12 months from the date of service per § 424.520(d).

*Response:* We indeed based our estimates on actual data—specifically, the actual average amount of payments a Medicare-enrolled ambulance supplier receives per year. As we indicated in the proposed rule, we cannot predict the number of ambulance suppliers that would have met CMS's requirements at various points (for example, 3 months; 10 months) prior to enrollment. Therefore, we can only furnish high-end, primary, and low-end estimates. Despite the commenters' request for greater monetary specificity, we believe that our estimates are reasonable.

*Comment:* A commenter expressed concern that CMS did not furnish more detailed monetary estimates of the rule's potential impact on providers and beneficiaries.

*Response:* As we explained in both sections III. and IV. of the proposed rule, we were unable to formulate

detailed workload, cost, or savings projections for many of our provisions because—(1) the necessary background data were not available; and (2) future behavior often cannot be predicted. Thus, we solicited feedback from the public that could perhaps assist us in developing quantifiable, numerical estimates, though we received very few comments in response to our request. Therefore, we are finalizing our proposed projections while reiterating our inability to develop estimates with respect to other provisions.

In light of these comments, we are finalizing the estimates as previously outlined.

*E. Accounting Statement and Table*

As required by OMB Circular A–4 (available at link *http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf*), we have prepared an accounting statement.

The ''transfer'' category in Table 2 reflects the application of a 7 percent and 3 percent annualized rate to the high-end, primary, and low-end estimates referred to in section IV.C.2.f. of this final rule and involving our change to § 424.520(d).

The 7 and 3 percent figures were applied over a 10-year period beginning in 2013, with the figures in the accounting statement reflecting the average annualized costs over this period.

The accounting statement does not address the potential financial benefits of this proposed rule from the standpoint of its effectiveness in preventing or deterring certain providers and suppliers from enrolling in Medicare or maintaining their enrollment in Medicare. It is not possible for us to quantify these benefits in monetary terms. In addition, the statement does not include those provisions previously discussed that may result in a cost or savings that nevertheless cannot be estimated.

TABLE 2—ACCOUNTING STATEMENT AND TABLE

[In millions]

| Category | Primary estimates | Low estimates | High estimates | Year dollars | Discount rate | Period covered |
|---|---|---|---|---|---|---|
| Transfers: | | | | | | |
| Resulting from the change in the effective date of billing privileges for ambulance suppliers | 327.4 | 163.7 | 545.7 | 2013 | 7% | 2014–2023 |
| | 327.4 | 163.7 | 545.7 | 2013 | 3% | 2014–2023 |
| From Whom to Whom | Transfers from Ambulance Suppliers to Federal Government. | | | | | |

* Rounded to the nearest hundred-thousandth.

*F. Alternatives Considered*

As stated, our provider enrollment provisions are needed to help ensure that fraudulent parties do not enroll in or maintain their enrollment in the Medicare program. Nonetheless, we did consider four alternatives when preparing our enrollment provisions.

First, with respect to § 424.530(a)(6)(i) and (ii), we considered and elected to propose and finalize an exception to these denial reasons for providers, suppliers, and owners thereof that have agreed to an extended repayment schedule. We believe that such an agreement indicates a willingness to satisfy the debt.

Second, we considered expanding the scope of § 424.520(d) to include all certified providers and certified suppliers. Yet as we explained previously, there already: (1) Is an exhaustive and extensive review process for certified providers and certified suppliers, and (2) are limitations posed by § 489.13 on the ability of such providers and suppliers to ''backbill'' for services.

Third, we contemplated eliminating CAPs altogether, as the existing appeals process affords providers and suppliers adequate due process rights. In the interests of fairness and efficiency, we elected to retain the CAP process for revocations based on § 424.535(a)(1). We believe this will continue to give certain providers and suppliers an additional opportunity to remedy inadvertent or minor errors without subjecting all parties to the lengthier appeals process, although we continue to believe that eliminating the CAP process for all other revocation reasons is warranted.

*G. Impact on Beneficiary Access*

We do not believe that our finalized provisions will impact beneficiary access. While some providers and suppliers may have their Medicare enrollment applications denied or their Medicare billing privileges revoked as a result of these provisions, we believe this number will be small.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

**List of Subjects**

*42 CFR Part 405*

Administrative practice and procedure, Health facilities, Health professions. Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

*42 CFR Part 424*

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

*42 CFR Part 498*

Administrative practice and procedure, Health facilities, Health professions Medicare, Reporting and recordkeeping requirements.

For the reasons stated in the preamble of this final rule, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as follows:

## PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 1. The authority for part 405 continues to read as follows:

**Authority:** Secs. 205(a), 1102, 1861, 1862(a), 1869, 1871, 1874, 1881, and 1886(k) of the Social Security Act (42 U.S.C. 405(a), 1302, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr and 1395ww(k)), and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

■ 2. Section 405.809 is revised to read as follows:

**§ 405.809 Reinstatement of provider or supplier billing privileges following corrective action.**

(a) *General rule.* A provider or supplier—

(1) May only submit a corrective action plan for a revocation for

noncompliance under § 424.535(a)(1) of this chapter; and

(2) Subject to paragraph (a)(1) of this section, has only one opportunity to correct all deficiencies that served as the basis of its revocation through a corrective action plan.

(b) *Review of a corrective action plan.* Subject to paragraph (a)(1) of this section, CMS or its contractor reviews a submitted corrective action plan and does either of the following:

(1) Reinstates the provider or supplier's billing privileges if the provider or supplier provides sufficient evidence to CMS or its contractor that it has complied fully with the Medicare requirements, in which case—

(i) The effective date of the reinstatement is based on the date the provider or supplier is in compliance with all Medicare requirements; and

(ii) CMS or its contractor may pay for services furnished on or after the effective date of the reinstatement.

(2) Refuses to reinstate a provider or supplier's billing privileges. The refusal of CMS or its contractor to reinstate a provider or supplier's billing privileges based on a corrective action plan is not an initial determination under part 498 of this chapter.

## PART 424—CONDITIONS FOR MEDICARE PAYMENT

■ 3. The authority for part 424 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 4. In § 424.502, the definition of ''Enroll/Enrollment'' is amended by revising the introductory text and paragraphs (2) and (4) to read as follows:

### § 424.502 Definitions

* * * * *

*Enroll/Enrollment* means the process that Medicare uses to establish eligibility to submit claims for Medicare-covered items and services, and the process that Medicare uses to establish eligibility to order or certify Medicare-covered items and services. The process includes—

* * * * *

(2) Except for those suppliers that complete the CMS–855O form, CMS-identified equivalent, successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services, validating the provider or supplier's eligibility to provide items or services to Medicare beneficiaries;

* * * * *

(4) Except for those suppliers that complete the CMS–855O form, CMS-identified equivalent, successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services, granting the Medicare provider or supplier Medicare billing privileges.

* * * * *

### § 424.505 [Amended]

■ 5. Section 424.505 is amended by removing the phrase ''Once enrolled, the provider or supplier receives'' and adding in its place the phrase ''Except for those suppliers that complete the CMS–855O form or CMS-identified equivalent, successor form or process for the sole purpose of obtaining eligibility to order or certify Medicare-covered items and services; once enrolled the provider or supplier receives''.

■ 6. Section 424.510 is amended by revising paragraph (a) to read as follows:

### § 424.510 Requirements for enrolling in the Medicare program.

(a)(1) Providers and suppliers must submit enrollment information on the applicable enrollment application. Once the provider or supplier successfully completes the enrollment process, including, if applicable, a State survey and certification or accreditation process, CMS enrolls the provider or supplier into the Medicare program.

(2) To be enrolled to furnish Medicare-covered items and services, a provider or supplier must meet the requirements specified in paragraphs (d) and (e) of this section.

(3) To be enrolled solely to order and certify Medicare items or services, a physician or non-physician practitioner must meet the requirements specified in paragraph (d) of this section except for paragraphs (d)(2)(iii)(B), (d)(2)(iv), (d)(3)(ii), and (d)(5), (6), and (9) of this section.

* * * * *

■ 7. Section 424.520 is amended by revising paragraph (d) to read as follows:

### § 424.520 Effective date of Medicare billing privileges.

* * * * *

(d) *Physicians, non-physician practitioners, physician and non-physician practitioner organizations, and ambulance suppliers.* The effective date for billing privileges for physicians, non-physician practitioners, physician and non-physician practitioner organizations, and ambulance suppliers is the later of—

(1) The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or

(2) The date that the supplier first began furnishing services at a new practice location.

■ 8. Section 424.521 is revised to read as follows:

### § 424.521 Request for payment by physicians, non-physician practitioners, physician and non-physician organizations, and ambulance suppliers.

(a) Physicians, non-physician practitioners, physician and non-physician practitioner organizations, and ambulance suppliers may retrospectively bill for services when the physician, non-physician practitioner, physician or non-physician organization, and ambulance supplier has met all program requirements, including State licensure requirements, and services were provided at the enrolled practice location for up to—

(1) Thirty days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries; or

(2) Ninety days prior to their effective date if a Presidentially-declared disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act) precluded enrollment in advance of providing services to Medicare beneficiaries.

(b) [Reserved]

■ 9. Section 424.530 is amended by revising paragraphs (a)(1), (a)(3) introductory text and (a)(3)(i), and (a)(5) and (6) to read as follows:

### § 424.530 Denial of enrollment in the Medicare program

(a) * * *

(1) *Noncompliance.* The provider or supplier is determined to not be in compliance with the enrollment requirements in this subpart P or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter.

* * * * *

(3) *Felonies.* The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

(i) Offenses include, but are not limited in scope or severity to—

(A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

(B) Financial crimes, such as extortion, embezzlement, income tax

evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

(C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

* * * * *

(5) *On-site review.* Upon on-site review or other reliable evidence, CMS determines that the provider or supplier:

(i) Is not operational to furnish Medicare-covered items or services; or

(ii) Otherwise fails to satisfy any Medicare enrollment requirement.

(6) *Medicare debt.* (i) The enrolling provider, supplier, or owner thereof (as defined in § 424.502), has an existing Medicare debt.

(ii) The enrolling provider, supplier, or owner (as defined in § 424.502) thereof was previously the owner (as defined in § 424.502) of a provider or supplier that had a Medicare debt that existed when the latter's enrollment was voluntarily terminated, involuntarily terminated, or revoked, and all of the following criteria are met:

(A) The owner left the provider or supplier with the Medicare debt within 1 year before or after that provider or supplier's voluntary termination, involuntary termination or revocation.

(B) The Medicare debt has not been fully repaid.

(C) CMS determines that the uncollected debt poses an undue risk of fraud, waste, or abuse. In making this determination, CMS considers the following factors:

(*1*) The amount of the Medicare debt.

(*2*) The length and timeframe that the enrolling provider, supplier, or owner thereof was an owner of the prior entity.

(*3*) The percentage of the enrolling provider, supplier, or owner's ownership of the prior entity.

(*4*) Whether the Medicare debt is currently being appealed.

(*5*) Whether the enrolling provider, supplier, or owner thereof was an owner of the prior entity at the time the Medicare debt was incurred.

(iii) A denial of Medicare enrollment under this paragraph (a)(6) can be avoided if the enrolling provider, supplier or owner thereof does either of the following:

(A)(*1*) Satisfies the criteria set forth in § 401.607; and

(*2*) Agrees to a CMS-approved extended repayment schedule for the entire outstanding Medicare debt.

(B) Repays the debt in full.

* * * * *

■ 10. Section 424.535 is amended by revising paragraphs (a)(1) introductory text, (a)(3), (a)(5), (a)(8), (c), and (h) to read as follows:

**§ 424.535 Revocation of enrollment and billing privileges in the Medicare program.**

* * * * *

(a) * * *

(1) *Noncompliance.* The provider or supplier is determined to not be in compliance with the enrollment requirements described in this subpart P or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter. The provider or supplier may also be determined not to be in compliance if it has failed to pay any user fees as assessed under part 488 of this chapter.

* * * * *

(3) *Felonies.* (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

(ii) Offenses include, but are not limited in scope or severity to—

(A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

(B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

(C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

(iii) Revocations based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

* * * * *

(5) *On-site review.* Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following:

(i) No longer operational to furnish Medicare-covered items or services.

(ii) Otherwise fails to satisfy any Medicare enrollment requirement.

* * * * *

(8) *Abuse of billing privileges.* Abuse of billing privileges includes either of the following:

(i) The provider or supplier submits a claim or claims for services that could not have been furnished to a specific individual on the date of service. These instances include but are not limited to the following situations:

(A) Where the beneficiary is deceased.

(B) The directing physician or beneficiary is not in the state or country when services were furnished.

(C) When the equipment necessary for testing is not present where the testing is said to have occurred.

(ii) CMS determines that the provider or supplier has a pattern or practice of submitting claims that fail to meet Medicare requirements. In making this determination, CMS considers, as appropriate or applicable, the following:

(A) The percentage of submitted claims that were denied.

(B) The reason(s) for the claim denials.

(C) Whether the provider or supplier has any history of final adverse actions (as that term is defined under § 424.502) and the nature of any such actions.

(D) The length of time over which the pattern has continued.

(E) How long the provider or supplier has been enrolled in Medicare.

(F) Any other information regarding the provider or supplier's specific circumstances that CMS deems relevant to its determination as to whether the provider or supplier has or has not engaged in the pattern or practice described in this paragraph.

* * * * *

(c) *Reapplying after revocation.* If a provider, supplier, owner, or managing employee has their billing privileges revoked, they are barred from participating in the Medicare program from the date of the revocation until the end of the re-enrollment bar.

(1) The re-enrollment bar begins 30 days after CMS or its contractor mails notice of the revocation and lasts a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.

(2) The re-enrollment bar does not apply in the event a revocation of Medicare billing privileges is imposed under paragraph (a)(1) of this section based upon a provider or supplier's failure to respond timely to a revalidation request or other request for information.

* * * * *

(h) *Submission of claims for services furnished before revocation.* (1)(i)

Except for HHAs as described in paragraph (h)(1)(ii) of this section, a revoked provider or supplier must, within 60 calendar days after the effective date of revocation, submit all claims for items and services furnished before the date of the revocation letter.

(ii) A revoked HHA must submit all claims for items and services within 60 days after the later of the following:

(A) The effective date of the revocation.

(B) The date that the HHA's last payable episode ends.

(2) Nothing in this paragraph (h) impacts the requirements of § 424.44 regarding the timely filing of claims.

## PART 498—APPEALS PROCEDURES FOR DETERMINATIONS THAT AFFECT PARTICIPATION IN THE MEDICARE PROGRAM AND FOR DETERMINATIONS THAT AFFECT THE PARTICIPATION OF ICFs/MR AND CERTAIN NFs IN THE MEDICAID PROGRAM

■ 11. The authority citation for part 498 continues to read as follows:

**Authority:** Secs. 1102, 1128I and 1871 of the Social Security Act (42 U.S.C. 1302, 1320a–7j, and 1395hh).

### § 498.5 [Amended]

■ 12. In § 498.5, paragraph (l)(4) is amended by removing the cross-reference ''§ 424.530(a)(9)'' and adding the cross-reference ''§ 424.530(a)(10)'' in its place.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: August 8, 2014.

**Marilyn Tavenner,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: November 20, 2014.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2014–28505 Filed 12–3–14; 8:45 am]

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# FEDERAL REGISTER

Vol. 79 Friday,

No. 234 December 5, 2014


Part V

## The President

Proclamation 9217—International Day of Persons With Disabilities, 2014

Federal Register
Vol. 79, No. 234
Friday, December 5, 2014

# Presidential Documents

Title 3—

The President

## Proclamation 9217 of December 2, 2014

## International Day of Persons With Disabilities, 2014

**By the President of the United States of America**

**A Proclamation**

Each year, the United States joins with the international community to celebrate the inherent dignity and worth of every person. In America and in countries around the world, individuals with disabilities support families, strengthen their communities, and contribute to the global economy. On International Day of Persons with Disabilities, we reaffirm the fundamental principle that those with disabilities are entitled to the same rights and freedoms as everyone else: to belong and fully participate in society, to live with respect and free from discrimination, and to make of their lives what they will.

Nearly a quarter century ago, the Congress came together to pass the Americans with Disabilities Act (ADA), a landmark civil rights bill and a historic milestone in our journey toward a more perfect Union. The first Nation on earth to comprehensively declare equality for its citizens with disabilities, we enshrined into law the promise of equal access, equal opportunity, and equal respect for every American. The ADA was a formal acknowledgement that individuals with disabilities deserve to live full and independent lives the way they choose, and today, my Administration continues to fight to give every person a fair shot at realizing their greatest potential. We are working to rigorously enforce the protections against disability-based discrimination and expand workforce training and employment opportunities for people with disabilities, including our wounded warriors and those with serious disabilities. Today's theme, ''Sustainable Development: The promise of technology,'' reminds us that as we strive to increase accessibility in our communities, we cannot allow the benefits of groundbreaking innovation to be out of reach for those who seek to participate fully in our democracy and economy.

Disability rights are not only civil rights to be enforced here at home; they are universal rights to be recognized and promoted around the globe. That is why I am proud that during my time in Office, the United States signed the Convention on the Rights of Persons with Disabilities, and why I continue to call on the Senate to provide its advice and consent to the ratification of what is the first new human rights convention of the 21st century. Around the world, more than 1 billion people experience a disability. These women, men, and children seek a fair chance to complete an education, succeed in a career, and support a family—and the United States stands with them wherever they live.

America continues to be the world leader on disability rights. Today, we celebrate the courage and commitment of all who have agitated and sacrificed to bring us to this point, and all who continue to press ahead toward greater access, opportunity, and inclusion. With advocates from around the world and all those whose lives have been touched by a disability, we can build on our progress. Let us recommit to fostering a society free of barriers and full of a deeper understanding of the value each person adds to our global community.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution

and the laws of the United States, do hereby proclaim December 3, 2014, as International Day of Persons with Disabilities. I call on all Americans to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, in the year of our Lord two thousand fourteen, and of the Independence of the United States of America the two hundred and thirty-ninth.

[FR Doc. 2014–28774
Filed 12–4–14; 11:15 am]
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