



# FEDERAL REGISTER

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Vol. 81

Thursday,

No. 32

February 18, 2016

Pages 8133–8388

OFFICE OF THE FEDERAL REGISTER



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# Contents

## Federal Register

Vol. 81, No. 32

Thursday, February 18, 2016

### Bureau of Consumer Financial Protection

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8180  
Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Emergency Processing Request, 8179–8180

### Centers for Disease Control and Prevention

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8201–8204

### Centers for Medicare & Medicaid Services

#### NOTICES

Privacy Act; Systems of Records, 8204

### Coast Guard

#### PROPOSED RULES

Drawbridge Operations:  
Indian Creek, Miami Beach, FL, 8168–8170

#### NOTICES

Meetings:  
Merchant Mariner Medical Advisory Committee, 8213–8214

### Commerce Department

*See* Foreign-Trade Zones Board  
*See* International Trade Administration  
*See* National Oceanic and Atmospheric Administration

### Community Development Financial Institutions Fund

#### NOTICES

Funds Availability:  
Community Development Financial Institutions Program  
FY 2016 Funding Round, 8328–8342  
Native American CDFI Assistance Program FY 2016  
Funding Round, 8342–8357

### Community Living Administration

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
New Funding Formula for the State Councils on  
Developmental Disabilities and Protection and  
Advocacy Systems, 8204–8205

### Defense Department

#### NOTICES

Defense Personal Property Program (DP3), 8180–8181

### Defense Nuclear Facilities Safety Board

#### NOTICES

Meetings; Sunshine Act, 8181

### Drug Enforcement Administration

#### NOTICES

Bulk Manufacturer of Controlled Substances; Applications:  
Cedarburg Pharmaceuticals, Inc., Grafton, WI, 8246  
Decisions and Orders:  
Arvinder Singh, M.D., 8247–8251  
Hatem M. Ataya, M.D., 8221–8245

Importer of Controlled Substances; Registration:

Catalent Pharma Solutions, LLC, Philadelphia, PA, 8246–8247

Sigma Aldrich International GMBH–Sigma Aldrich Co. LLC, 8247

Manufacturer of Controlled Substances; Registration:

Euticals, Inc., Springfield, MO, 8246

Mallinckrodt, LLC, Saint Louis, MO, 8245

### Education Department

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Client Assistance Program, 8184  
Integrated Postsecondary Education Data System 2016–2019, 8181–8182

Meetings:

National Assessment Governing Board, 8182–8184

### Employment and Training Administration

#### NOTICES

Availability of Funds and Funding Opportunity:  
Summer Jobs and Beyond — Career Pathways for Youth, 8251

### Energy Department

*See* Federal Energy Regulatory Commission

*See* Western Area Power Administration

#### NOTICES

Authority to Import and Export Natural Gas, to Import and Export Liquefied Natural Gas, and to Vacate

Authorization:

Toyota Motor Engineering and Manufacturing North America, et al., 8184–8185

### Environmental Protection Agency

#### NOTICES

Requests for Nominations:

National Environmental Justice Advisory Council, 8197–8198

### Federal Aviation Administration

#### RULES

Airworthiness Directives:

Airbus Airplanes, 8134–8138

B–N Group Ltd. Airplanes, 8143–8146

The Boeing Company Airplanes, 8138–8143

#### PROPOSED RULES

Airworthiness Directives:

Airbus Airplanes, 8155–8157, 8160–8164

Fokker Services B.V. Airplanes, 8166–8168

The Boeing Company Airplanes, 8157–8160, 8164–8166

### Federal Communications Commission

#### PROPOSED RULES

Television Broadcasting Services:

Scottsbluff, Nebraska and Sidney, NE, 8171

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8199–8200

Meetings; Sunshine Act, 8198–8199

**Federal Election Commission****NOTICES**

Meetings; Sunshine Act, 8200

**Federal Energy Regulatory Commission****NOTICES**

Combined Filings, 8185–8186, 8189–8190, 8195–8196

Environmental Assessments; Availability, etc.:

- Eastern Shore Natural Gas Co.; Schedule for  
Environmental Review of the White Oak Mainline  
Expansion Project and System Reliability Project,  
8192–8193

Filings:

- City of West Memphis, AR, 8191–8192
- Conway Corporation, 8187

Hydroelectric Applications:

- Clark Canyon Hydro, LLC, 8193–8194
- Idaho Power Co., 8188

Initial Market-Based Rate Filings Including Requests for

Blanket Section 204 Authorizations:

- 62SK 8ME, LLC, 8187
- Axpo U.S. LLC, 8187–8188
- Comanche Solar PV, LLC, 8194–8195
- Smith Creek Hydro, LLC, 8186
- Summer Solar, LLC, 8191
- Voyager Wind I, LLC, 8190–8191

Schedule for Environmental Review of the Leach Xpress  
and Rayne Xpress Expansion Projects:

- Columbia Gas Transmission, LLC; Columbia Gulf  
Transmission, LLC, 8196–8197

Schedules for Environmental Review:

- Transcontinental Gas Pipe Line Company, LLC; The New  
York Bay Expansion Project, 8190

Staff Attendances, 8189

**Federal Highway Administration****NOTICES**

Final Federal Agency Actions on Proposed Highway in  
California, 8327–8328

**Federal Maritime Commission****NOTICES**

Agreements Filed, 8200–8201

**Federal Reserve System****RULES**

Unfair or Deceptive Acts or Practices, 8133–8134

**Fish and Wildlife Service****NOTICES**

Permit Applications:

- Endangered Species, 8215–8216

**Food and Drug Administration****RULES**

Effective Date of Requirement for Premarket Approval for  
Total Metal-on-Metal Semi-Constrained Hip Joint  
Systems, 8146–8149

**NOTICES**

Agency Information Collection Activities; Proposals,  
Submissions, and Approvals:

- Substances Generally Recognized as Safe — Notification  
Procedure, 8206–8207

Requests for Nominations:

- Public Advisory Panels of the Medical Devices Advisory  
Committee, 8207–8208

**Foreign-Trade Zones Board****NOTICES**

Public Hearings:

- Application for Additional Production Authority, The  
Coleman Company, Inc., Subzone 119I; Location  
Change, 8173

**Health and Human Services Department**

*See* Centers for Disease Control and Prevention

*See* Centers for Medicare & Medicaid Services

*See* Community Living Administration

*See* Food and Drug Administration

*See* National Institutes of Health

**NOTICES**

Agency Information Collection Activities; Proposals,  
Submissions, and Approvals, 8208–8209

**Homeland Security Department**

*See* Coast Guard

**NOTICES**

Availabilities:

- Cybersecurity Information Sharing Act of 2015 Interim  
Guidance Documents, 8214

**Housing and Urban Development Department****NOTICES**

Agency Information Collection Activities; Proposals,  
Submissions, and Approvals, 8215

**Interior Department**

*See* Fish and Wildlife Service

*See* National Park Service

**Internal Revenue Service****RULES**

Reporting of Original Issue Discount on Tax-Exempt  
Obligations:

- Basis and Transfer Reporting by Securities Brokers for  
Debt Instruments and Options, 8149–8154

**NOTICES**

Charter Renewals:

- Art Advisory Panel of the Commissioner of Internal  
Revenue, 8357

**International Trade Administration****NOTICES**

Antidumping or Countervailing Duty Investigations, Orders,  
or Reviews:

- Certain Cut-to-Length Carbon Steel Plate from the  
People's Republic of China, 8173–8176

**International Trade Commission****NOTICES**

Complaints:

- Certain Mobile Electronic Devices Incorporating Haptics  
(Including Smartphones and Smartwatches) and  
Components Thereof, 8220–8221

**Justice Department**

*See* Drug Enforcement Administration

**Labor Department**

*See* Employment and Training Administration

*See* Occupational Safety and Health Administration

**NOTICES**

Agency Information Collection Activities; Proposals,  
Submissions, and Approvals:  
Representative Fee Request, 8251–8252

Request for Employment Information, 8252–8253

## **National Institutes of Health**

### **NOTICES**

#### Meetings:

Center for Scientific Review, 8211–8212  
National Eye Institute, 8210  
National Institute of Allergy and Infectious Diseases, 8212  
National Institute of Dental and Craniofacial Research, 8210  
National Institute of Environmental Health Sciences, 8210–8211  
National Institute of Mental Health, 8209–8210  
National Institute on Aging, 8212  
National Institute on Alcohol Abuse and Alcoholism, 8209

## **National Oceanic and Atmospheric Administration**

### **NOTICES**

#### Meetings:

Atlantic Highly Migratory Species, Atlantic Highly Migratory Species Advisory Panel, 8178–8179  
Gulf of Mexico Fishery Management Council, 8177–8178  
Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 8177

## **National Park Service**

### **NOTICES**

#### Inventory Completions:

Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA, 8218–8219  
U.S. Department of Defense, Department of the Navy, Washington, DC, 8217–8218

#### Native American Graves Protection and Repatriation Review Committee:

Findings and Recommendations Regarding Human Remains and Associated Funerary Objects for the Osage Nation, 8219–8220

#### Repatriation of Cultural Items:

Mount Holyoke College Art Museum, South Hadley, MA, 8216–8217

## **National Science Foundation**

### **NOTICES**

Meetings; Sunshine Act, 8254

## **Nuclear Regulatory Commission**

### **NOTICES**

#### Atomic Safety and Licensing Board; Orders:

Southern Nuclear Operating Co., Inc., Vogtle Electric Generating Plant, Units 3 and 4, 8258

#### Guidance:

Criteria and Design Features for Inspection of Water-Control Structures Associated with Nuclear Power Plants, 8254–8255

#### Independent Spent Fuel Storage Installation:

Maine Yankee Atomic Power Company, 8258–8261

#### License Terminations:

Mallinckrodt, LLC., 8256–8258

#### Meetings:

Advisory Committee on Reactor Safeguards  
Subcommittee on Plant License Renewal, 8255  
Advisory Committee on Reactor Safeguards  
Subcommittee on Radiation Protection and Nuclear Materials, 8255–8256  
Advisory Committee on Reactor Safeguards  
Subcommittee on Reliability and PRA, 8256

## **Occupational Safety and Health Administration**

### **NOTICES**

#### Committee Membership:

Maritime Advisory Committee for Occupational Safety and Health, 8253–8254

## **Overseas Private Investment Corporation**

### **NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8261

## **Postal Regulatory Commission**

### **NOTICES**

New Postal Products, 8261–8262

## **Presidential Documents**

### **PROCLAMATIONS**

Castle Mountains National Monument; Establishment (Proc. 9394), 8363–8369  
Mojave Trails National Monument; Establishment (Proc. 9395), 8371–8377  
Sand to Snow National Monument; Establishment (Proc. 9396), 8379–8385  
Special Observances:  
Death of Antonin G. Scalia (Proc. 9397), 8387

## **Railroad Retirement Board**

### **NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8262–8264

## **Securities and Exchange Commission**

### **NOTICES**

#### Applications:

PowerShares Exchange-Traded Self-Indexed Fund Trust, et al., 8282–8291

#### Joint Industry Plan; Filing of Amendment No. 3 to the National Market System Plan:

Financial Industry Regulatory Authority, Inc., BATS Exchange, Inc., BOX Options Exchange, LLC, et al., 8264–8265

#### Self-Regulatory Organizations; Proposed Rule Changes:

NASDAQ PHLX LLC, 8308–8310  
New York Stock Exchange LLC, 8313–8316  
NYSE Arca, Inc., 8265–8282, 8291–8294  
NYSE MKT, LLC, 8310–8313, 8316–8319  
The NASDAQ Stock Market LLC, 8319–8323  
The Options Clearing Corporation, 8294–8308

## **Social Security Administration**

### **NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8323–8326

## **State Department**

### **NOTICES**

#### Delegations of Authority:

Further Assignment of Functions under the Bipartisan Congressional Trade Priorities and Accountability Act to Other Departments and Agencies of the Executive Branch, 8326

#### Meetings:

U.S. Advisory Commission on Public Diplomacy, 8326

## **Surface Transportation Board**

### **PROPOSED RULES**

Accelerating Reporting Requirements for Class I Railroads, 8171–8172

**NOTICES**

Discontinuance of Service Exemptions:

CSX Transportation, Inc. in Harlan County, KY, 8327

Productivity Adjustments:

Railroad Cost Recovery Procedures, 8326–8327

**Transportation Department***See* Federal Aviation Administration*See* Federal Highway Administration**Treasury Department***See* Community Development Financial Institutions Fund*See* Internal Revenue Service**U.S.-China Economic and Security Review Commission****NOTICES**

Meetings:

U.S.-China Economic and Security Review Commission;  
Public Hearing, 8357–8358**Veterans Affairs Department****NOTICES**Agency Information Collection Activities; Proposals,  
Submissions, and Approvals:Civilian Health And Medical Program of the Department  
of Veterans Affairs Benefits — Application, Claim,  
Other Health Insurance and Potential Liability, 8359–  
8360Dependents' Request for Change of Program or Place of  
Training, 8358Report of Subcontracts to Small and Veteran-Owned  
Business, 8358–8359Request for a Certificate of Eligibility VA Form, 8359  
Self-Regulatory Organizations; Proposed Rule Changes:  
Loan Analysis, 8361**Western Area Power Administration****NOTICES**Pick–Sloan Missouri Basin Program — Eastern Division,  
8197

---

**Separate Parts In This Issue****Part II**Presidential Documents, 8363–8369, 8371–8377, 8379–  
8385, 8387

---

**Reader Aids**Consult the Reader Aids section at the end of this issue for  
phone numbers, online resources, finding aids, and notice  
of recently enacted public laws.To subscribe to the Federal Register Table of Contents  
LISTSERV electronic mailing list, go to <http://listserv.access.gpo.gov> and select Online mailing list  
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**CFR PARTS AFFECTED IN THIS ISSUE**

---

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

**3 CFR****Proclamations:**

9394.....	8365
9395.....	8371
9396.....	8379
9397.....	8387

**12 CFR**

227.....	8133
----------	------

**14 CFR**

39 (4 documents) ...	8134, 8138, 8140, 8143
----------------------	---------------------------

**Proposed Rules:**

39 (5 documents) ...	8155, 8157, 8160, 8164, 8166
----------------------	---------------------------------

**21 CFR**

888.....	8146
----------	------

**26 CFR**

1.....	8149
--------	------

**33 CFR****Proposed Rules:**

117.....	8168
----------	------

**47 CFR****Proposed Rules:**

73.....	8171
---------	------

**49 CFR****Proposed Rules:**

1241.....	8171
1242.....	8171
1243.....	8171
1244.....	8171
1245.....	8171
1246.....	8171
1247.....	8171
1248.....	8171

# Rules and Regulations

Federal Register

Vol. 81, No. 32

Thursday, February 18, 2016

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 227

[Docket No. R-1490; RIN 7100 AE-19]

#### Unfair or Deceptive Acts or Practices (Regulation AA)

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

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is repealing its Regulation AA, which was issued pursuant to its rule writing authority under section 18(f)(1) of the Federal Trade Commission Act (FTC Act or Act). Section 1092(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) repealed section 18(f)(1) of the FTC Act, thus eliminating the Board's rule writing authority under the Act.

**DATES:** The final rule is effective March 21, 2016.

**FOR FURTHER INFORMATION CONTACT:** Mandie K. Aubrey, Counsel, Division of Consumer and Community Affairs, at (202) 452-3667, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The FTC Act directs the Federal Trade Commission (FTC) to promulgate rules to define and prevent unfair or deceptive acts or practices for persons other than banks, savings and loans, and Federal credit unions.<sup>1</sup> Pursuant to the Act, in 1984 the FTC issued its Credit Practices Rule, which applied to persons within the FTC's jurisdiction.<sup>2</sup>

Prior to amendments to the FTC Act made by the Dodd-Frank Act in 2010, section 18(f)(1) of the FTC Act required the Board to promulgate rules applicable to banks that were "substantially similar" to these FTC rules, with some exceptions.<sup>3</sup> In addition, section 18(f)(1) of the Act provided the Board the authority to prescribe additional rules for banks addressing unfair or deceptive acts or practices—regardless of whether the FTC had promulgated rules about such acts or practices. The Act also required the Board to take appropriate action on complaints about unfair or deceptive acts or practices by banks.<sup>4</sup>

Pursuant to its rule writing authority in section 18(f)(1) of the FTC Act, the Board issued Regulation AA, including the Board's credit practices rule, which was adopted in 1985.<sup>5</sup> The Board's credit practices rule was substantially similar to the FTC's Credit Practices Rule; in adopting the rule, the Board relied on the extensive findings that had been made by the FTC that the prohibited practices were unfair or deceptive.

The Board's credit practices rule in Regulation AA prohibited banks from using certain remedies to enforce consumer credit obligations and from including these remedies in their consumer credit contracts. The rule also prohibited banks from: (1) Obliging a co-signer on the debt unless the co-signer previously received a clear and conspicuous written notice explaining the nature of the co-signer's obligations and liabilities under the contract; and (2) imposing a late fee when a consumer makes a full loan payment on time or within the grace period, solely because the consumer did not pay a previous late fee imposed on an earlier installment (the "pyramiding" of late fees).

<sup>3</sup> Section 18(f)(1) of the Act was previously codified at 15 U.S.C. 57a(f)(1). The Board was not required to impose substantially similar rules if it found that: (1) Such acts or practices of banks were not unfair or deceptive, or (2) implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board.

<sup>4</sup> The same authority that was conferred to the Board by section 18(f)(1) of the Act also applied to the Federal Home Loan Bank Board (FHLBB) (predecessor to the Office of Thrift Supervision), with respect to savings associations, and to the National Credit Union Administration (NCUA), with respect to Federal credit unions.

<sup>5</sup> 12 CFR part 227, subpart B.

In addition, Regulation AA contained a provision that informed consumers how to file a complaint regarding a state member bank and explained the Board's procedure for responding to such complaints.<sup>6</sup> Regulation AA also contained information regarding state exemptions from the credit practices rule.<sup>7</sup> The Board published, separately from the regulation, Staff Guidelines to clarify how Regulation AA applied in particular circumstances.<sup>8</sup>

The Dodd-Frank Act<sup>9</sup> repealed section 18(f)(1) of the FTC Act.<sup>10</sup> This legislative repeal of the Board's rulemaking authority nullified the provisions in Regulation AA that were issued pursuant to that authority. Regulation AA did not transfer from the Board to the Consumer Financial Protection Bureau (Bureau) under the Dodd-Frank Act, as did other consumer protection laws and regulations.<sup>11</sup> As a result, neither the Board nor the Bureau has authority to promulgate rules pursuant to the FTC Act. The Bureau, however, was given separate authority under the Dodd-Frank Act to promulgate rules to identify unfair, deceptive, or abusive acts or practices.<sup>12</sup>

In August 2014, the Board published a proposal to repeal Regulation AA (Proposed Rule).<sup>13</sup> Simultaneously with the proposed repeal of Regulation AA, the Board joined the Bureau, Federal Deposit Insurance Corporation, NCUA, and Office of the Comptroller of the

<sup>6</sup> 12 CFR 227.2. This provision listed an address to which consumers may send their complaint, and explained that consumers will receive, within 15 business days, either a substantive response or an acknowledgment setting a reasonable time for a substantive response.

<sup>7</sup> 12 CFR 227.16.

<sup>8</sup> <http://www.federalreserve.gov/regulations/cg/crdtprcrul.htm>.

<sup>9</sup> Public Law 111-203, 124 Stat. 1376 (Jul. 21, 2010).

<sup>10</sup> See section 1092(2) of the Dodd-Frank Act. The repeal of section 18(f)(1) of the FTC Act also repealed the authorities of the former FHLBB and the NCUA. See *supra* note 4. Section 1092(2) of the Dodd-Frank Act did not repeal FTC Act rule writing authority for the FTC, so the FTC Credit Practices Rule remains in effect. See *supra* note 2.

<sup>11</sup> The Dodd-Frank Act transferred rule writing authority only for "Federal consumer financial laws," but did not include the FTC Act in the definition of "Federal consumer financial law." Therefore, Regulation AA was excluded from the authority that transferred from the Board to the Bureau. See Dodd-Frank Act sections 1061(a)(1), (b)(1) (transferring authority of "Federal consumer financial laws" to the Bureau) and section 1002(14) (defining "Federal consumer financial laws").

<sup>12</sup> Section 1031 of the Dodd-Frank Act.

<sup>13</sup> 79 FR 51115 (Aug. 27, 2014).

<sup>1</sup> 15 U.S.C. 45 and 57a(a)(1).

<sup>2</sup> 16 CFR 444.1-5.



Currency in issuing interagency guidance stating that, depending on the facts and circumstances, a depository institution might violate the prohibition against unfair or deceptive practices in the FTC Act and the Dodd-Frank Act if it engages in the practices prohibited by the former credit practices rules.<sup>14</sup>

## II. Discussion

Fourteen commenters responded to the proposed repeal of Regulation AA. Three individual commenters stated that Regulation AA was a necessary and helpful regulation; two of these commenters stated that the Board's reasons for repealing the regulation were unclear. A comment letter received from seven consumer advocate organizations acknowledged that the Board's repeal of Regulation AA was required by the Dodd-Frank Act. In their letter, these commenters also provided recommendations to the Bureau regarding acts or practices that the Bureau now has to authority to regulate if it finds they are unfair or deceptive.<sup>15</sup>

Eight commenters addressed the interagency guidance that was issued simultaneously with the proposed repeal of Regulation AA. One individual commenter believed the guidance would discourage banks from engaging in unfair or deceptive acts or practices, but seven consumer advocate commenters recommended strengthening the guidance language. The consumer advocate commenters also recommended that the Board issue additional guidance regarding other acts or practices that the commenters believe should be declared unfair or deceptive acts or practices.

The Board is finalizing the repeal of Regulation AA as proposed. As the Board discussed in the Proposed Rule, the Dodd-Frank Act eliminated the Board's rule writing authority under the FTC Act, which nullified the regulation. The Board will continue to monitor developments with respect to unfair or deceptive acts or practices and assess whether to issue additional supervisory guidance.

The repeal of Regulation AA also eliminates Subpart A of the regulation, which generally describes the internal procedures used by the Board in handling consumer complaints. The Board did not receive comment on the

removal of these internal procedures from the Code of Federal Regulations. Information about how the Board processes consumer complaints is provided on the Board's public Web site.<sup>16</sup>

## III. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act<sup>17</sup> (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities. Based on its analysis, and for the reasons stated below, the Board believes that this final rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the final rule.* Regulation AA was issued pursuant to section 18(f)(1) of the FTC Act. As noted above, the Dodd-Frank Act repealed this provision of the FTC Act.<sup>18</sup> Accordingly, the Board is repealing its Regulation AA.

2. *Summary of issues raised by comments in response to the initial regulatory flexibility analysis.* The Board did not receive any comments on the initial regulatory flexibility analysis.

3. *Small entities affected by the final rule.* The final rule repeals Regulation AA, which was issued pursuant to section 18(f)(1) of the FTC Act. As a result of the FTC Act amendments made by the Dodd-Frank Act, the Board no longer has rule writing authority under section 18(f)(1). The legislative repeal of the Board's rulemaking authority nullified the provisions in Regulation AA that were issued pursuant to that authority. Consequently, the Board's repeal of the regulation, which no longer has legal effect, will not affect any entity, including any small entity. The repeal of Regulation AA will also remove information about how the Board processes consumer complaints from the Code of Federal Regulations. This is not expected to have an effect on small entities because that information is provided on the Board's public Web site.

4. *Recordkeeping, reporting, and compliance requirements.* The final rule repeals Regulation AA and therefore does not impose any recordkeeping, reporting, or compliance requirements on any entities.

5. *Significant alternatives to the final revisions.* Because the repeal of Regulation AA will have no impact, there are no alternatives that would

further minimize the economic impact of the final rule on small entities.

## IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Federal Reserve by the Office of Management and Budget (OMB). The final rule contains no requirements subject to the PRA.

### List of Subjects in 12 CFR Part 227

Banks, Banking, Consumer protection, Credit, Federal Reserve System, Finance.

### Authority and Issuance

For the reasons set forth in the preamble, and under the authority of section 1092(2) of Public Law 111–203, 124 Stat. 1376 (Jul. 21, 2010), the Board amends 12 CFR chapter II by removing part 227.

### PART 227—[REMOVED]

By order of the Board of Governors of the Federal Reserve System, February 11, 2016.

**Robert deV. Frierson,**  
Secretary of the Board.

[FR Doc. 2016–03228 Filed 2–17–16; 8:45 am]

**BILLING CODE–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2016–0467; Directorate Identifier 2016–NM–008–AD; Amendment 39–18395; AD 2016–04–01]

RIN 2120–AA64

#### Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2015–26–02 for all Airbus Model A330–200, A330–200 Freighter, and A330–300 series airplanes; and Airbus Model A340–200, A340–300, A340–500, and A340–600 series airplanes. AD 2015–26–02 required, for certain airplanes, identification of the part number, serial number, and standard of the ram air turbine (RAT) pump, RAT module, RAT actuator, and RAT lower gearbox assembly; replacement of the balance

<sup>14</sup> “Interagency Guidance Regarding Unfair or Deceptive Credit Practices” (Aug. 22, 2014). <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140822a2.pdf>.

<sup>15</sup> One state chartered bank commenter did not address the proposed repeal, but objected to examiners' citations of banks for unfair or deceptive practices in the supervisory process. Two individual commenters did not address the proposed repeal of Regulation AA.

<sup>16</sup> <https://www.federalreserveconsumerhelp.gov/>.

<sup>17</sup> 5 U.S.C. 601 *et seq.*

<sup>18</sup> See section 1092(2) of the Dodd-Frank Act.

weight screw, modification of the actuator coil spring, modification of the actuator, an inspection of the anti-stall valve for correct installation in the RAT pump housing; and corrective actions if necessary. For certain other airplanes, AD 2015–26–02 required re-identification or replacement of the RAT module. This new AD requires the same actions as AD 2015–26–02. This new AD was prompted by a report of a typographical error in the regulatory text of AD 2015–26–02. We are issuing this AD to prevent loss of the impeller function and RAT pump pressurization capability, which, if preceded by a total engine flame-out, could result in loss of control of the airplane.

**DATES:** This AD becomes effective March 4, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 2, 2016 (80 FR 81174, December 29, 2015).

We must receive comments on this AD by April 4, 2016.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

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

For Airbus service information identified in this final rule, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email [airworthiness.A330A340@airbus.com](mailto:airworthiness.A330A340@airbus.com); Internet <http://www.airbus.com>.

For Hamilton Sundstrand service information identified in this final rule, contact Hamilton Sundstrand, Technical Publications, Mail Stop 302–9, 4747 Harrison Avenue, P.O. Box 7002, Rockford, IL 61125–7002; telephone 860–654–3575; fax 860–998–4564; email [tech.solutions@hs.utc.com](mailto:tech.solutions@hs.utc.com); Internet <http://www.hamiltonsundstrand.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. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–0467.

### 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–2016–0467; 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, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

### FOR FURTHER INFORMATION CONTACT:

Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149.

### SUPPLEMENTARY INFORMATION:

### Discussion

On December 9, 2015, we issued AD 2015–26–02, Amendment 39–18350 (80 FR 81174, December 29, 2015) (“AD 2015–26–02”). AD 2015–26–02 applied to all Airbus Model A330–200, A330–200 Freighter, and A330–300 series airplanes; and Airbus Model A340–200, A340–300, A340–500, and A340–600 series airplanes. AD 2015–26–02 was prompted by a report indicating that, during a production flight test, the RAT did not pressurize the green hydraulic system. AD 2015–26–02 required for certain airplanes, identification of the part number, serial number, and standard of the RAT pump, RAT module, RAT actuator, and RAT lower gearbox assembly; replacement of the balance weight screw, modification of the actuator coil spring, modification of the actuator, an inspection of the anti-stall valve for correct installation in the RAT pump housing; and corrective actions if necessary. For certain other airplanes, AD 2015–26–02 required re-identification or replacement of the RAT module. We issued AD 2015–26–02 to prevent loss of the impeller function and RAT pump pressurization capability, which, if preceded by a total engine flame-out, could result in loss of control of the airplane.

Since we issued AD 2015–26–02, we received a report of a typographical

error in the regulatory text of AD 2015–26–02. Paragraph (m) of AD 2015–26–02 inadvertently referred to paragraph (n) and should have referred to paragraph (o), “Parts Installation Prohibition.”

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2013–0274, dated November 15, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Airbus Model A330–200, A330–200 Freighter, and A330–300 series airplanes; and Airbus Model A340–200, A340–300, A340–500, and A340–600 series airplanes. The MCAI states:

During a production flight test of an A330–300 aeroplane, the Ram Air Turbine (RAT) did not pressurize the green hydraulic system. Investigation revealed that the impeller drive (hex) shaft had a reduced length of engagement with the pump drive shaft. This caused the impeller drive shaft to disengage from the pump and disconnect the impeller. It was determined that the disconnection was the result of internal hex dimensions on the pump impeller shaft, which had been changed in a manufacturing drawing. From the investigation analysis, it was possible to identify a list of affected parts.

This condition, if not detected and corrected, could lead to the loss of impeller function and RAT pump pressurization capability, possibly resulting, in case of total engine flame out, to the loss of control of the aeroplane.

To address this unsafe condition, a new design RAT pump shaft has been developed with a decreased hexagonal shaft housing depth, which increases the hexagonal drive shaft engagement in the impeller shaft to carry the impeller torque. Airbus issued Service Bulletin (SB) A330–29–3122, SB A340–29–4093 and SB A340–29–5021 to provide instructions for in-service replacement of the affected RAT hydraulic pumps, or re-identification of the RAT pump and complete RAT module, as applicable.

For the reasons described above, this [EASA] AD requires identification and replacement [modification] or re-identification of all affected RAT hydraulic pumps on A330 and A340–200/300 aeroplanes, and replacement [modification] of all affected RAT modules on A340–500/–600 aeroplanes.

For affected pumps, the required actions also include concurrent actions, as applicable, including replacement of the balance weight screw, modification of the actuator coil spring, modification of the actuator, an inspection of the anti-stall valve for correct installation in the RAT pump housing and re-installation if necessary. For affected pumps, corrective actions include replacement of the RAT hydraulic pump, and re-identification of the part number of the

RAT module. You may examine the MCAI on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-0467.

#### Related Service Information Under 14 CFR Part 51

Airbus has issued the following service information:

- Airbus Service Bulletin A330-29-3122, dated October 25, 2012.
- Airbus Service Bulletin A340-29-4093, dated October 25, 2012.

This service information describes procedures for identifying the part number, serial number, and standard of the RAT pump, RAT module, RAT actuator, and RAT lower gearbox assembly; replacing the balance weight screw, modifying the actuator coil spring, modifying the actuator, and doing an inspection of the anti-stall valve for correct installation; and re-identifying the part numbers of the RAT hydraulic pump and RAT module.

Airbus also issued Service Bulletin A330-29-3126, dated June 12, 2014; and Service Bulletin A340-29-4097, dated June 12, 2014, which describe procedures for identifying the part number and serial number of the RAT actuator; modifying the RAT actuators; and re-identifying the part numbers of the RAT module.

In addition, Airbus issued Service Bulletin A340-29-5021, dated October 2, 2012; and Service Bulletin A340-29-5025, dated June 16, 2014, which describe procedures for replacing (modifying) the RAT module.

Hamilton Sundstrand has issued Service Bulletin ERPS06M-29-19, dated August 6, 2012, which identifies the serial numbers of the suspect hydraulic pump.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

#### FAA's Determination and Requirements of This AD

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

#### FAA's Determination of the Effective Date

We are superseding AD 2015-26-02 to correct a typographical error in the regulatory text. No other changes have been made to AD 2015-26-02. Therefore, we determined that notice and opportunity for prior public comment are unnecessary.

#### Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the ADDRESSES section. Include "Docket No. FAA-2016-0467; Directorate Identifier 2016-NM-008-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

#### Costs of Compliance

We estimate that this AD affects 66 airplanes of U.S. registry.

We also estimate that it will take about 14 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 \$78,540, or \$1,190 per product.

In addition, we estimate that any necessary follow-on actions will take about 18 work-hours and require parts costing up to \$427,301, for a cost of \$428,831 per product. We have no way of determining the number of aircraft that might need this action.

#### 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.

#### 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) 2015-26-02, Amendment 39-18350 (80 FR 81174, December 29, 2015), and adding the following new AD:

**2016-04-01 Airbus:** Amendment 39-18395; Docket No. FAA-2016-0467; Directorate Identifier 2016-NM-008-AD.

#### (a) Effective Date

This AD becomes effective March 4, 2016.

**(b) Affected ADs**

(1) This AD replaces AD 2015–26–02, Amendment 39–18350 (80 FR 81174, December 29, 2015).

(2) This AD affects AD 2012–21–19, Amendment 39–17235 (77 FR 65812, October 31, 2012); and AD 2012–21–20, Amendment 39–17236 (77 FR 65799, October 31, 2012).

**(c) Applicability**

This AD applies to all Airbus airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of this AD, all manufacturer serial numbers.

(1) Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(2) Model A340–211, –212, –213, –311, –312, –313, –541, and –642 airplanes.

**(d) Subject**

Air Transport Association (ATA) of America Code 29, Hydraulic Power.

**(e) Reason**

This AD was prompted by a report indicating that, during a production flight test, the ram air turbine (RAT) did not pressurize the green hydraulic system. We are issuing this AD to prevent loss of the impeller function and RAT pump pressurization capability, which, if preceded by a total engine flame-out, could result in loss of control of the airplane.

**(f) Compliance**

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

**(g) Identification of RAT Components**

For Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, –213, –311, –312, and –313 airplanes: Except as provided by paragraph (i) of this AD, within 36 months after the effective date of this AD, identify the part number, serial number, and standard (through the mod-dots) of the RAT pump, RAT module, RAT actuator, and RAT lower gearbox assembly, in accordance with the Accomplishment Instructions of the applicable Airbus service information specified in paragraphs (g)(1) and (g)(2) of this AD. A review of airplane maintenance records is acceptable in lieu of this identification if the part number, serial number, and standard can be conclusively determined from that review.

(1) For Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes: Airbus Service Bulletin A330–29–3122, dated October 25, 2012.

(2) For Airbus Model A340–211, –212, –213, –311, –312, and –313 airplanes: Airbus Service Bulletin A340–29–4093, dated October 25, 2012.

**(h) Corrective and Concurrent Actions**

If the serial number of the RAT hydraulic pump is included in table 7, “Suspect Hydraulic Pump Serial Numbers,” of Hamilton Sundstrand Service Bulletin ERPS06M–29–19, dated August 6, 2012: Within 36 months after the effective date of

this AD, do all applicable corrective actions, in accordance with the Accomplishment Instructions of the applicable Airbus service information specified in paragraphs (g)(1) and (g)(2) of this AD. Prior to or concurrently with doing the corrective actions required by this paragraph, do the actions specified in paragraphs (h)(1) through (h)(4) of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–29–3122, dated October 25, 2012 (for Model A330–200, –200 Freighter, and –300 series airplanes); or Airbus Service Bulletin A340–29–4093, dated October 25, 2012 (for Airbus Model A340–211, –212, –213, –311, –312, and –313 airplanes).

(1) Replace the balance weight screw.

(2) Modify the actuator coil spring.

(3) Modify the actuator.

(4) Do a general visual inspection of the anti-stall valve for correct installation in the RAT pump housing, and if any incorrect installation is found, before further flight, correctly install the anti-stall valve.

**(i) Exception to Service Information Specifications**

Airbus Service Bulletin A330–29–3122, dated October 25, 2012 (for Model A330–200, –200 Freighter, and –300 series airplanes), refers to Hamilton Sundstrand Service Bulletin “ERPS06M–29–13” as an additional source of guidance for doing certain actions required by paragraph (h) of this AD. The first “P” in the citation should have been omitted; the correct reference is to Hamilton Sundstrand Service Bulletin “ERPS06M–29–13.”

**(j) Re-Identification of Part Numbers**

If the serial number of the RAT hydraulic pump is not included in table 7, “Suspect Hydraulic Pump Serial Numbers,” of Hamilton Sundstrand Service Bulletin ERPS06M–29–19, dated August 6, 2012: Within 36 months after the effective date of this AD, re-identify the part numbers of the RAT hydraulic pump and RAT module, in accordance with the Accomplishment Instructions of the applicable Airbus service information specified in paragraphs (g)(1) and (g)(2) of this AD.

**(k) Service Information for Optional Actions**

Accomplishment of the actions required by paragraphs (g), (h), and (j) of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–29–3126, dated June 12, 2014; or Airbus Service Bulletin A340–29–4097, dated June 12, 2014, as applicable, constitutes compliance with the requirements of paragraphs (g), (h), and (j) of this AD.

**(l) RAT Module Replacement (Modification)**

For Airbus Model A340–541 and –642 airplanes having RAT module part number (P/N) 772722D, 772722E, 772722F, or 772722G: Within 36 months after the effective date of this AD, replace (modify) the RAT module, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–29–5021, dated October 2, 2012. As an option, accomplishment of the RAT module replacement (modification), in accordance with the Accomplishment Instructions of

Airbus Service Bulletin A340–29–5025, dated June 16, 2014, constitutes compliance with the requirement of this paragraph.

**(m) Exception to Paragraphs (g), (h), and (j) of This AD**

The actions required by paragraphs (g), (h), and (j) of this AD are not required for airplanes on which Airbus Modification 202537 was embodied in production, provided it can be determined that, since the airplane's first flight, no RAT hydraulic pump or RAT module having a part number identified in paragraph (o) of this AD is installed on that airplane.

**(n) Terminating Action for Certain Requirements of Other ADs**

(1) For Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, –213, –311, –312, and –313 airplanes: Accomplishment of the actions required by paragraphs (g), (h), and (j) of this AD constitutes compliance with the requirements of paragraphs (g)(1) and (g)(2) of AD 2012–21–19, Amendment 39–17235 (77 FR 65812, October 31, 2012); and paragraphs (g)(1) and (g)(2) of AD 2012–21–20, Amendment 39–17236 (77 FR 65799, October 31, 2012).

(2) For Airbus Model A340–541 and –642 airplanes: Accomplishment of the actions required by paragraph (l) of this AD constitutes compliance with the requirements of paragraphs (h)(1) and (h)(2) of AD 2012–21–20, Amendment 39–17236 (77 FR 65799, October 31, 2012).

**(o) Parts Installation Prohibition**

(1) For Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and A340–211, –212, –213, –311, –312, and –313 airplanes: After modification of the RAT module as required by paragraph (h) of this AD, no person may install any complete RAT module having a part number identified in paragraph (o)(1)(i) of this AD, or any RAT hydraulic pump having the part number identified in paragraph (o)(1)(ii) of this AD, on any airplane.

(i) RAT module P/N 766351, 768084, 770379, 770952, 770952A, 770952B, 1702934, 1702934A, or 1702934B.

(ii) RAT hydraulic pump P/N 5909522 (Parker P/N 4207902).

(2) For Airbus Model A340–541 and –642 airplanes: After modification of the RAT module as required by paragraph (l) of this AD, no person may install any complete RAT module having P/N 772722D, 772722E, 772722F, or 772722G, on any airplane.

**(p) 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: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-1138; fax 425-227-1149. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto: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 the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

#### (g) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013-0274, dated November 15, 2013, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-0467.

#### (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 February 2, 2016 (80 FR 81174, December 29, 2015).

(i) Airbus Service Bulletin A330-29-3122, dated October 25, 2012.

(ii) Airbus Service Bulletin A330-29-3126, dated June 12, 2014.

(iii) Airbus Service Bulletin A340-29-4093, dated October 25, 2012.

(iv) Airbus Service Bulletin A340-29-4097, dated June 12, 2014.

(v) Airbus Service Bulletin A340-29-5021, dated October 2, 2012.

(vi) Airbus Service Bulletin A340-29-5025, dated June 16, 2014.

(vii) Hamilton Sundstrand Service Bulletin ERPS06M-29-19, dated August 6, 2012.

(4) For Airbus service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email [airworthiness.A330-A340@airbus.com](mailto:airworthiness.A330-A340@airbus.com); Internet <http://www.airbus.com>.

(5) For Hamilton Sundstrand service information identified in this AD, contact Hamilton Sundstrand, Technical Publications, Mail Stop 302-9, 4747 Harrison Avenue, P.O. Box 7002, Rockford, IL 61125-

7002; telephone 860-654-3575; fax 860-998-4564; email [tech.solutions@hs.utc.com](mailto:tech.solutions@hs.utc.com); Internet <http://www.hamiltonsundstrand.com>.

(6) 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.

(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 Renton, Washington, on February 8, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016-03215 Filed 2-17-16; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

**[Docket No. FAA-2015-3630; Directorate Identifier 2014-NM-253-AD; Amendment 39-18397; AD 2016-04-03]**

**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 all The Boeing Company Model 747-400F series airplanes. This AD was prompted by an analysis of the production methods used to increase fatigue resistance of the upper closure fittings at the nose cargo door portal's C-3 frame, which showed that cracking could start too early to be caught in a timely manner by the inspection or maintenance program. This AD requires inspections of the upper closure fitting and connected strap and doubler at the nose cargo door portal for cracking, and related investigative and corrective actions if necessary. We are issuing this AD to detect and correct such cracking, which could result in sudden decompression and loss of the airplane's structural integrity.

**DATES:** This AD is effective March 24, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 24, 2016.

**ADDRESSES:** For service information identified in this final rule, 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. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-3630.

#### **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-2015-3630; 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:** Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057-3356; phone: 425-917-6432; fax: 425-917-6590; email: [bill.ashforth@faa.gov](mailto:bill.ashforth@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 all The Boeing Company Model 747-400F series airplanes. The NPRM published in the **Federal Register** on September 15, 2015 (80 FR 55273) ("the NPRM"). The NPRM was prompted by a report indicating that an analysis of the production methods used to increase fatigue resistance of the upper closure fittings at the nose cargo door portal's C-3 frame showed that cracking could start too early to be caught in a timely manner by the inspection or maintenance program. The upper closure fittings used in the nose cargo door portal C-3 frame were shot peened to increase fatigue resistance. However, an analysis showed that the increase in

fatigue resistance was still not enough to ensure that cracking would be caught by the inspection program specified in the Boeing 747–400 maintenance planning data (MPD) document. The NPRM proposed to require inspections of the upper closure fitting and connected strap and doubler at the nose cargo door portal for cracking, and related investigative and corrective actions if necessary. We are issuing this AD to detect and correct such cracking, which could result in sudden decompression and loss of the airplane's structural integrity.

#### Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received. Boeing supported the NPRM.

#### Conclusion

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

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

#### Related Service Information Under 14 CFR Part 51

We reviewed Boeing Alert Service Bulletin 747–53A2880, dated December 3, 2014. This service information

describes procedures for a detailed inspection of the upper closure fitting and connected strap and doubler, a surface high frequency eddy current (HFEC) inspection of the upper closure fitting for cracking, and related investigative and corrective actions. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

#### Costs of Compliance

We estimate that this AD affects 38 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

#### ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections .....	9 work-hours × \$85 per hour = \$765 per inspection cycle.	\$0	\$765 per inspection cycle	\$29,070 per inspection cycle.

We estimate the following costs to do any necessary repairs or replacements that would be required based on the results of the inspection. Parts costs could be up to \$42,930 per airplane. We have no way of determining the number of work hours (because the type of repair will vary depending on findings) or the number of aircraft that might need the repairs or replacements.

#### 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):

#### 2016–04–03 The Boeing Company:

Amendment 39–18397; Docket No. FAA–2015–3630; Directorate Identifier 2014–NM–253–AD.

#### (a) Effective Date

This AD is effective March 24, 2016.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to all The Boeing Company Model 747–400F series airplanes, certificated in any category, as identified in paragraph 1.A., "Effectivity," of Boeing Alert Service Bulletin 747–53A2880, dated December 3, 2014.

#### (d) Subject

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

#### (e) Unsafe Condition

This AD was prompted by a report that an analysis of the production methods used to increase fatigue resistance of the upper closure fittings at the nose cargo door portal's C–3 frame showed that cracking could still start too early to be caught in a timely

manner by the inspection or maintenance program. We are issuing this AD to detect and correct such cracking, which could result in sudden decompression and loss of the airplane's structural integrity.

#### (f) Compliance

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

#### (g) Inspections and Corrective Actions

Except as required by paragraph (h) of this AD: At the applicable time specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014, do a detailed inspection of the upper closure fitting, strap, and doubler and a surface high frequency eddy current (HFEC) inspection of the upper closure fitting at the nose cargo door portal for cracking, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014. Repeat the inspections at the time specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014. Do the applicable related investigative and corrective actions at the times specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014.

#### (h) Exceptions to the Service Information

(1) Where paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014, refers to a compliance time "after the original issue date of this service bulletin," this AD requires compliance within the specific compliance time after the effective date of this AD.

(2) If any crack is found during any inspection required by this AD, and Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014, specifies to contact Boeing for appropriate action: Before further flight, repair the cracking using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

#### (i) 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 (j)(1) of this AD. Information may be emailed to: [9-ANM-Seattle-ACO-AMOC-Requests@faa.gov](mailto: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, modification, or alteration 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 method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (h)(2) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (i)(4)(i) and (i)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

#### (j) Related Information

For more information about this AD, contact Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057-3356; phone: 425-917-6432; fax: 425-917-6590; email: [bill.ashforth@faa.gov](mailto:bill.ashforth@faa.gov).

#### (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.

(i) Boeing Alert Service Bulletin 747-53A2880, dated December 3, 2014.

(ii) Reserved.

(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 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 February 8, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016-03217 Filed 2-17-16; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

**[Docket No. FAA-2015-2460; Directorate Identifier 2014-NM-163-AD; Amendment 39-18396; AD 2016-04-02]**

**RIN 2120-AA64**

#### **Airworthiness Directives; The Boeing Company Airplanes**

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2010-26-10, which applied to certain The Boeing Company Model 747-200C, -200F, -400, -400D, and -400F series airplanes. AD 2010-26-10 required repetitive inspections for cracking of the lap joints, modification of certain lap joints, and certain post-repair inspections of the lap joints. This new AD adds new repetitive post-modification inspections for cracking in the lap joints, and repair if necessary. This AD was prompted by an evaluation by the design approval holder (DAH) which indicated that certain lap joints are subject to widespread fatigue damage (WFD). We are issuing this AD to detect and correct fatigue cracking in certain lap joints, which could result in rapid depressurization and consequent reduced structural integrity of the airplane.

**DATES:** This AD is effective March 24, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 24, 2016.

**ADDRESSES:** For service information identified in this final rule, 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. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-2460.

### 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-2015-2460; 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:

Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057-3356; phone: 425-917-6428; fax: 425-917-6590; email: [nathan.p.weigand@faa.gov](mailto:nathan.p.weigand@faa.gov).

### SUPPLEMENTARY INFORMATION:

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2010-26-10, Amendment 39-16549 (75 FR 81427, December 28, 2010). AD 2010-26-10 applied to certain The Boeing Company Model 747-200C, -200F, -400, -400D, and -400F series airplanes. The NPRM published in the **Federal Register** on July 9, 2015 (80 FR 39394). The NPRM was prompted by an evaluation by the DAH that indicated that certain lap joints are subject to WFD. The NPRM proposed to continue to require repetitive inspections for cracking of the lap joints, modification of certain lap joints, and certain post-repair

inspections of the lap joints. The NPRM also proposed to require new repetitive post-modification inspections for cracking in the lap joints, and repair if necessary. We are issuing this AD to detect and correct fatigue cracking in certain lap joints, which could result in rapid depressurization and consequent reduced structural integrity of the airplane.

### Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM (80 FR 39394, July 9, 2015) and the FAA's response to each comment. United Airlines concurred with the NPRM.

### Request To Correct Typographical Error

Boeing asked that we correct the reference in the "Related Service Information under 1 CFR part 51" from ". . . sections 41, 42, and 43" to ". . . sections 41, 42, and 46." Boeing stated that section 43 should be section 46, and noted that this is a typographical error.

We agree with the commenter's request for the reason provided. We have corrected this typographical error in "Related Service Information under 1 CFR part 51" accordingly.

### Request To Clarify Certain Requirements

Boeing asked that we clarify paragraph (i)(1) of the proposed AD (80 FR 39394, July 9, 2015) by including "per Table 7" in that paragraph. Boeing also asked that we clarify paragraph (i)(3) of the proposed AD by including "per Table 10" in that paragraph.

We agree that clarification is necessary but we do not agree to change paragraphs (i)(1) and (i)(3) of this AD. Paragraph (i) of this AD specifies doing the applicable inspections in paragraphs (i)(1), (i)(2), or (i)(3) of this AD, in accordance with the Accomplishment Instructions of the referenced service information; and repeating the

applicable inspections at the applicable times specified in Tables 7, 8, 9, and 10 of paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747-53A2499, Revision 3, dated July 15, 2014. In each of these tables the applicable groups are identified and match the groups identified in paragraphs (i)(1), (i)(2), and (i)(3) of this AD. We refer to the tables in paragraph 1.E., "Compliance," of service information for the applicable compliance times and not for how to accomplish the required actions. Therefore, we have not changed this AD in this regard.

### Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (80 FR 39394, July 9, 2015) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (80 FR 39394, July 9, 2015).

### Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 747-53A2499, Revision 3, dated July 15, 2014. The service information describes procedures for body skin lap joint inspections and modifications in sections 41, 42, and 46. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

### Costs of Compliance

We estimate that this AD affects 120 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

### ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Pre-modification inspections [retained action from AD 2010-26-10, Amendment 39-16549 (75 FR 81427, December 28, 2010)].	Up to 675 work-hours × \$85 per hour = up to \$57,375.	\$0	Up to \$57,375 per inspection cycle.	Up to \$6,885,000 per inspection cycle.
Modification [retained action from AD 2010-26-10, Amendment 39-16549 (75 FR 81427, December 28, 2010)].	Up to 5,819 work-hours × \$85 per hour = up to \$494,615.	0	Up to \$494,615 .....	Up to \$59,353,800.
New proposed post-modification inspections.	Up to 105 work-hours × \$85 per hour = up to \$8,925.	0	Up to \$8,925 per inspection cycle.	Up to \$1,071,000 per inspection cycle.



We have received no definitive data that would enable us to provide a cost estimate 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 have 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 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 removing Airworthiness Directive (AD) 2010–26–10, Amendment 39–16549 (75 FR 81427, December 28, 2010), and adding the following new AD:

**2016–04–02 The Boeing Company:**  
Amendment 39–18396; Docket No. FAA–2015–2460; Directorate Identifier 2014–NM–163–AD.

#### (a) Effective Date

This AD is effective March 24, 2016.

#### (b) Affected ADs

This AD replaces AD 2010–26–10, Amendment 39–16549 (75 FR 81427, December 28, 2010).

#### (c) Applicability

This AD applies to The Boeing Company Model 747–200C, –200F, –400, –400D, and –400F series airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014.

#### (d) Subject

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

#### (e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder indicating that certain lap joints are subject to widespread fatigue damage. We are issuing this AD to detect and correct fatigue cracking in certain lap joints, which could result in rapid depressurization and consequent reduced structural integrity of the airplane.

#### (f) Compliance

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

#### (g) Repetitive Lap Joint Inspections

At the applicable time specified in Table 1 and Table 3 of paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, except as required by paragraph (j)(1) of this AD: Do eddy current inspections for cracks in the skin of the lap joints, and do all applicable repairs, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, except as required by paragraph (j)(2) of this AD. Do all applicable repairs before further flight. Repeat the applicable inspections thereafter at intervals not to exceed those specified in Table 1 and Table 3 of paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014.

#### (h) Lap Joint Modification

At the applicable time specified in Tables 2, 4, 5, and 6 of paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, except as required by paragraph (j)(1) of this AD: Modify the applicable lap joints, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, except as required by paragraph (j)(2) of this AD. Accomplishment of the modification required by this paragraph terminates the repetitive inspections required by paragraph (g) of this AD for the length of the modified lap joint.

#### (i) Lap Joint Post-Modification Inspections

At the applicable time specified in Tables 7, 8, 9, and 10 of paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, except as required by paragraph (j)(1) of this AD: Do the applicable inspections specified in paragraph (i)(1), (i)(2), or (i)(3) of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014. Repeat the applicable inspections thereafter at the applicable times specified in Tables 7, 8, 9, and 10 of paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014. If any crack is found during any inspection, repair before further flight using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(1) For airplanes identified as Groups 2 through 5 and 8 through 10 in Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014: Internal detailed and surface high frequency eddy current (HFEC) inspections for any crack in the skin or internal doubler.

(2) For airplanes identified as Groups 6, 11, and 19 in Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014: External detailed and low frequency eddy current inspections of the upper and lower skin panels for cracking, external detailed and HFEC inspections of the doubler for cracking, and internal detailed and HFEC inspections of the upper and lower skin panels for cracking (for airplanes with a stringer 6 lap joint modification installed between STA 340 and STA 400 as specified in Boeing Service Bulletin 747–53–2272); or internal detailed and surface HFEC inspections for any crack in the skin or internal doubler (for airplanes with lap joints modified as specified in Boeing Alert Service Bulletin 747–53A2499.)

(3) For airplanes identified as Groups 1, 7, and 12 through 18 in Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014: Internal detailed and surface HFEC inspections for any crack in the skin or internal doubler.

#### (j) Exceptions to Service Bulletin Procedures

(1) Where Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, specifies a compliance time "after the Revision 3 date of this service bulletin," this AD requires compliance within the specified

compliance time after the effective date of this AD.

(2) Where Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014, specifies to contact Boeing for repair instructions: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

#### (k) Credit for Previous Actions

Actions done before the effective date of this AD using the service information identified in paragraph (k)(1) or (k)(2) of this AD are acceptable for compliance with the corresponding requirements of paragraphs (g) and (h) of this AD.

(1) Boeing Alert Service Bulletin 747–53A2499, Revision 1, dated October 30, 2008, which is not incorporated by reference in this AD.

(2) Boeing Alert Service Bulletin 747–53A2499, Revision 2, dated August 12, 2010, which was incorporated by reference in AD 2010–26–10, Amendment 39–16549 (75 FR 81427, December 28, 2010).

#### (l) 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 (m)(1) of this AD. Information may be emailed to: [9-ANM-Seattle-ACO-AMOC-Requests@faa.gov](mailto: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, modification, or alteration 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. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane and the approval must specifically refer to this AD.

(4) AMOCs approved for AD 2010–26–10, Amendment 39–16549 (75 FR 81427, December 28, 2010), are approved as AMOCs for the corresponding provisions of paragraphs (g) and (h) of this AD.

#### (m) Related Information

(1) For more information about this AD, contact Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: [nathan.p.weigand@faa.gov](mailto:nathan.p.weigand@faa.gov).

(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 the AD specifies otherwise.

(i) Boeing Alert Service Bulletin 747–53A2499, Revision 3, dated July 15, 2014.

(ii) Reserved.

(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 February 7, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016–03219 Filed 2–17–16; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2015–4803; Directorate Identifier 2015–CE–034–AD; Amendment 39–18399; AD 2016–04–05]

**RIN 2120–AA64**

#### Airworthiness Directives; B–N Group Ltd. Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding an airworthiness directive (AD) 2014–03–18 for B–N Group Ltd. Models BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN2A MK. III, BN2A MK. III–2, and BN2A MK. III–3 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of

another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as damage of the cable sliding end assembly and installation of the incorrect end fitting on engine control cable assemblies. We are issuing this AD to require actions to address the unsafe condition on these products.

**DATES:** This AD is effective March 24, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 24, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of April 1, 2014 (79 FR 10340, February 25, 2014).

**ADDRESSES:** You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–4803; 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 20590.

For service information identified in this final rule, contact Britten-Norman Aircraft Limited, Commodore House, Mountbatten Business Centre, Millbrook Road East, Southampton SO15 1HY, United Kingdom; telephone: +44 20 3371 4000; fax: +44 20 3371 4001; email: [info@bnaircraft.com](mailto:info@bnaircraft.com); Internet: <http://www.britten-norman.com/customer-support/>. You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available on the Internet at <http://www.regulations.gov> by searching for Docket No. FAA–2015–4803.

#### FOR FURTHER INFORMATION CONTACT:

Raymond Johnston, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4159; fax: (816) 329–3047; email: [raymond.johnston@faa.gov](mailto:raymond.johnston@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 B–N Group Ltd. Models BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN2A MK. III, BN2A MK. III–2, and

BN2A MK. III-3 airplanes. The NPRM was published in the **Federal Register** on October 29, 2015 (80 FR 66482), and proposed to supersede AD 2014-03-18, Amendment 39-17755 (79 FR 10340; February 25, 2014).

The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. The MCAI states that:

Britten-Norman Aircraft Limited was made aware of two occurrences where a failure of engine control cable assemblies has caused engine control difficulties. In both reported cases, the cable sliding end assemblies were in poor condition and in both cases, an incorrect end-fitting was installed, which may have contributed to the failures.

This condition, if not detected and corrected, could result in reduced engine control, possibly resulting in reduced control of the aeroplane.

To address this potential unsafe condition, Britten-Norman Aircraft issued Service Bulletin (SB) 334 to provide inspection instructions, and EASA issued AD 2013-0215 to require a one-time inspection and functional test of the engine control cables and, depending on findings, replacement of the cables.

Subsequently, as it was found that BN2 “Islander” aeroplanes were mistakenly omitted from the AD applicability, EASA issued AD 2013-0263, retaining the requirements of EASA AD 2013-0215, which was superseded, and extending the applicability to BN2 aeroplanes.

Since EASA AD 2013-0263 was issued, it was found that certain parts, specific to BN2A “Trislander” aeroplanes only, were inadvertently not included in SB 334 and, as a consequence, not required by AD 2013-0263 to be inspected.

Prompted by these findings, Britten-Norman revised SB 334 (now at issue 2) to include the missing parts.

For the reason described above, this AD retains the requirements of EASA AD 2013-0263, which is superseded, and adds inspection requirements for the additional parts.

The MCAI can be found in the AD docket on the Internet at: <http://www.regulations.gov/#!documentDetail;D=FAA-2015-4803-0001>.

## Comments

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

## Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial

changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (80 FR 66482, October 29, 2015) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (80 FR 66482, October 29, 2015).

## Related Service Information Under 1 CFR Part 51

We reviewed Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 1, dated August 30, 2013; and Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015. The service information describes procedures for inspection and replacement if necessary of the engine control cable assemblies. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section of this final rule.

## Costs of Compliance

We estimate that this AD will affect 96 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour.

Based on these figures, we estimate the cost of this AD on U.S. operators to be \$8,160 or \$85 per product.

In addition, we estimate that any necessary follow-on actions would take about 10 work-hours and require parts costing \$6,000, for a cost of \$6,850 per product. We have no way of determining the number of products that may 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 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> by searching for and locating Docket No. FAA-2015-4803; 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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

## 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 Amendment 39-17755 (79 FR 10340; February 25, 2014) and adding the following new AD:

**2016-04-05 B-N Group Ltd.:** Amendment 39-18399; Docket No. FAA-2015-4803; Directorate Identifier 2015-CE-034-AD.

**(a) Effective Date**

This airworthiness directive (AD) becomes effective March 24, 2016.

**(b) Affected ADs**

This AD supersedes AD 2014-03-18, Amendment 39-17755 (79 FR 10340; February 25, 2014) ("AD 2014-03-18").

**(c) Applicability**

This AD applies to B-N Group Ltd. Models BN-2, BN-2A, BN-2A-2, BN-2A-3, BN-2A-6, BN-2A-8, BN-2A-9, BN-2A-20, BN-2A-21, BN-2A-26, BN-2A-27, BN-2B-20, BN-2B-21, BN-2B-26, BN-2B-27, BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3 airplanes, all serial numbers, certificated in any category.

**(d) Subject**

Air Transport Association of America (ATA) Code 76: Engine Controls.

**(e) Reason**

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as possible damage of the cable sliding end assembly and installation of the incorrect end fitting on engine control cable assemblies. We are issuing this proposed AD to detect and correct damage of the cable sliding end assembly (cracking, distortion, corrosion) and incorrect end fittings on the engine control assemblies, which could lead to reduced engine control with consequent loss of control, and to incorporate revised service information with updated information on applicability and on the identity of parts to be inspected on some airplanes.

**(f) Actions and Compliance**

Unless already done, do the actions in paragraphs (f)(1) through (f)(6) of this AD:

(1) *For all airplanes except the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3:* Within the next 6 months after April 1, 2014 (the effective date retained from AD 2014-03-18), do a one-time inspection of the engine control cable assemblies, part number (P/N) 137835, P/N 172449-1, P/N 172450, and P/N 172451, and surrounding areas for damage (cracking, distortion, corrosion); for the correct cable end-fitting; and to assure the wire locking is intact following Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 1, dated August 30, 2013; or Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(2) *For the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3 airplanes:* Within the next 3 months after March 24, 2016 (the effective date of this AD), do a one-time inspection of the engine control cable assemblies, P/N 80468 and P/N NB-45-2883, and surrounding areas for damage (cracking, distortion, corrosion); for the correct cable end-fitting; and to assure the wire locking is intact following Britten-

Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(3) *For all airplanes except the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3:* If no discrepancies are found during the inspection required in paragraph (f)(1) of this AD, before further flight, inspect the control linkages for proper adjustment and make any necessary changes following Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 1, dated August 30, 2013; or Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(4) *For the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3 airplanes:* If no discrepancies are found during the inspection required in paragraph (f)(2) of this AD, before further flight, inspect the control linkages for proper adjustment and make any necessary changes following Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(5) *For all airplanes except the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3:* If any discrepancies are found during the inspection required in paragraph (f)(1) of this AD and/or the control linkages cannot be properly adjusted as specified in paragraph (f)(3) of this AD, before further flight, replace the engine control cable assembly with a serviceable unit following Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 1, dated August 30, 2013; or Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(6) *For the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3 airplanes:* If any discrepancies are found during the inspection required in paragraph (f)(2) of this AD and/or the control linkages cannot be properly adjusted as specified in paragraph (f)(4) of this AD, before further flight, replace the engine control cable assembly with a serviceable unit following Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(7) *For all airplanes except the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3:* After April 1, 2014 (the effective date retained from AD 2014-03-18), do not install on any airplane engine control cable assemblies, P/N 137835, P/N 172449-1, P/N 172450, and P/N 172451, unless they are new or have been inspected as required in paragraphs (f)(1) and (f)(3) of this AD and found free of any discrepancies and have proper adjustment.

(8) *For the Trislander Models BN2A MK. III, BN2A MK. III-2, and BN2A MK. III-3 airplanes:* After March 24, 2016 (the effective date of this AD), do not install on any airplane engine control cable assemblies P/N 80468 and/or P/N NB-45-2883, unless they are new or have been inspected as required in paragraphs (f)(2) and (f)(4) of this AD and found free of any discrepancies and have proper adjustment.

**(g) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office,

FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Raymond Johnston, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4159; fax: (816) 329-3047; email: [raymond.johnston@faa.gov](mailto:raymond.johnston@faa.gov). Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

**(h) Related Information**

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2015-0184, dated September 1, 2015; for related information. The MCAI can be found in the AD docket on the Internet at: <http://www.regulations.gov/#!documentDetail;D=FAA-2015-4803-0001>.

**(i) 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 March 24, 2016 (the effective date of this AD).

(i) Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 2, dated July 17, 2015.

(ii) Reserved.

(4) The following service information was approved for IBR on April 1, 2014 (79 FR 10340; February 25, 2014).

(i) Britten-Norman Aircraft Limited Service Bulletin No. SB 334, Issue 1, dated August 30, 2013.

(ii) Reserved.

(5) For Britten-Norman service information identified in this AD, contact Britten-Norman Aircraft Limited, Commodore House, Mountbatten Business Centre, Millbrook Road East, Southampton SO15 1HY, United Kingdom; telephone: +44 20 3371 4000; fax: +44 20 3371 4001; email: [info@bnaircraft.com](mailto:info@bnaircraft.com); Internet: <http://www.britten-norman.com/customer-support/>.

(6) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816-329-4148. In addition, you can access this service information on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-4803.

(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 Kansas City, Missouri, on February 10, 2016.

**Pat Mullen,**

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

[FR Doc. 2016-03307 Filed 2-17-16; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 888

[Docket No. FDA-2011-N-0661]

#### Effective Date of Requirement for Premarket Approval for Total Metal-on-Metal Semi-Constrained Hip Joint Systems

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a final order to require the filing of a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP) for the hip joint metal/metal semi-constrained, with a cemented acetabular component, prosthesis; and hip joint metal/metal semi-constrained, with an uncemented acetabular component, prosthesis.

**DATES:** This order is effective on February 18, 2016.

**FOR FURTHER INFORMATION CONTACT:** Sergio M. de del Castillo, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. 1538, Silver Spring, MD 20993, 301-796-6419.

#### SUPPLEMENTARY INFORMATION:

#### I. Background—Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94-295), the Safe Medical Devices Act of 1990 (Pub. L. 101-629), the Food and Drug Administration Modernization Act of 1997 (Pub. L. 105-115), the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107-250), the Medical Devices Technical Corrections Act (Pub. L. 108-214), the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110-85), and the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112-

144), among other amendments, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513(d) of the FD&C Act, devices that were in commercial distribution before the enactment of the 1976 amendments, May 28, 1976 (generally referred to as preamendments devices), are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices), are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807.

A preamendments device that has been classified into class III and devices found substantially equivalent by means of premarket notification (510(k)) procedures to such a preamendments device or to a device within that type (both the preamendments and substantially equivalent devices are referred to as preamendments class III devices) may be marketed without submission of a PMA until FDA issues a final order under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval. Section 515(b)(1) of the FD&C Act directs FDA to issue an order requiring premarket approval for a preamendments class III device.

Although, under the FD&C Act, the manufacturer of a preamendments class

III device may respond to the call for PMAs by filing a PMA or a notice of completion of a PDP. In practice, the option of filing a notice of completion of a PDP has rarely been used. For simplicity, although the PDP option remains available to manufacturers in response to a final order under section 515(b) of the FD&C Act, this document will refer only to the requirement for the filing of, and obtaining approval of, a PMA.

On July 9, 2012, FDASIA was enacted. Section 608(a) of FDASIA amended section 513(e) of the FD&C Act, changing the process for reclassifying a device from rulemaking to an administrative order. Section 608(b) of FDASIA amended section 515(b) of the FD&C Act, changing the process for requiring premarket approval for a preamendments class III device from rulemaking to an administrative order.

FDA is requiring PMAs for total metal-on-metal (MoM) semi-constrained hip joint systems (heretofore referenced as "MoM hips"), which include the following two specific preamendments class III devices: Hip joint metal/metal semi-constrained, with a cemented acetabular component, prosthesis; and hip joint metal/metal semi-constrained, with an uncemented acetabular component, prosthesis.

Section 515(b)(1) of the FD&C Act sets forth the process for issuing a final order. Specifically, prior to the issuance of a final order requiring premarket approval for a preamendments class III device, the following must occur: (1) Publication of a proposed order in the **Federal Register**; (2) a meeting of a device classification panel described in section 513(b) of the FD&C Act; and (3) consideration of comments from all affected stakeholders, including patients, payors, and providers. FDA published a proposed order to require PMAs for MoM hips in the **Federal Register** of January 18, 2013 (78 FR 4094), and convened a meeting of a device classification panel for MoM hips as discussed in the proposed order and in this document.

Section 515(b)(3) of the FD&C Act provides that FDA shall, after the close of the comment period on the proposed order, consideration of any comments received, and a meeting of a device classification panel described in section 513(b) of the FD&C Act, issue a final order to require premarket approval or publish a document terminating the proceeding together with the reasons for such termination.

A preamendments class III device may be commercially distributed without a PMA until 90 days after FDA issues a final order (a final rule issued

under section 515(b) of the FD&C Act prior to the enactment of FDASIA is considered to be a final order for purposes of section 501(f) of the FD&C Act (21 U.S.C. 351(f)) requiring premarket approval for the device, or 30 months after final classification of the device under section 513 of the FD&C Act, whichever is later. For MoM hips, the later of these two time periods is the 90-day period. Therefore, section 501(f)(2)(B) of the FD&C Act requires that a PMA for such devices be filed within 90 days of the date of issuance of this final order. If a PMA is not filed for such devices within 90 days after the issuance of this final order, the devices will be deemed adulterated under section 501(f) of the FD&C Act.

Also, a preamendments device subject to the order process under section 515(b) of the FD&C Act is not required to have an approved investigational device exemption (IDE) (see part 812 (21 CFR part 812)) contemporaneous with its interstate distribution until the date identified by FDA in the final order, requiring the filing of a PMA for the device. At that time, an IDE is required only if a PMA has not been filed. If the manufacturer, importer, or other sponsor of the device submits an IDE application and FDA approves it, the device may be distributed for investigational use. If a PMA is not filed by the later of the two dates, and the device is not distributed for investigational use under an IDE, the device is deemed to be adulterated within the meaning of section 501(f)(1)(A) of the FD&C Act, and subject to seizure and condemnation under section 304 of the FD&C Act (21 U.S.C. 334), if its distribution continues. Other enforcement actions include, but are not limited to, the following: Shipment of devices in interstate commerce may be subject to injunction under section 302 of the FD&C Act (21 U.S.C. 332), and the individuals responsible for such shipment may be subject to prosecution under section 303 of the FD&C Act (21 U.S.C. 333).

FDA held a meeting of a device classification panel described in section 513(b) of the FD&C Act with respect to MoM hips on August 8, 2001, and therefore, has met this requirement under section 515(b)(1) of the FD&C Act. The panel recommended that the devices remain in class III because there was insufficient information to establish special controls; the panel also agreed unanimously that MoM hips are for a use which is of substantial importance in preventing impairment of human health (Ref. 1). FDA is not aware of new information that would provide a basis for a different recommendation or

findings, and the recent reports and evaluations discussed in the proposed order further support that reclassification of MoM hips is not appropriate. Furthermore, the problems identified in the medical device reporting systems and recalls for MoM hips further indicate the need to review these devices under a PMA to provide reasonable assurance of their safety and effectiveness.

FDA received and has considered several sets of comments from nine commenters on the proposed order, as discussed in section II.

## II. Public Comments in Response to the Proposed Order

In response to the January 18, 2013 (78 FR 4094), proposed order to require premarket approval for MoM hips, FDA received several sets of comments from nine commenters. These comments, as well as the Agency's consideration of them, are summarized further in this section.

Six commenters generally agreed with FDA's proposal to require PMAs for MoM hips. One commenter (the American Academy of Orthopaedic Surgeons, also referred to as AAOS) stated that the existing data is not adequate to support reclassification of MoM hips because special controls could not be established to provide a reasonable assurance of device safety and effectiveness. This comment echoes the findings and recommendations of the August 8, 2001, panel.

Another commenter stated that MoM hip resurfacing devices should be classified as Class III; however, MoM hip resurfacing devices are not regulated under 21 CFR 888.3320 or 21 CFR 888.3330 and are not the subject of this order.

Several commenters requested that all currently marketed MoM hips be removed from the market, either through a FDA-initiated recall or voluntary action by the device manufacturer.

As explained in more detail in section III of this order, if a PMA for a currently marketed MoM hip is not filed on or before the 90th day past the effective date of this order, that device will be deemed adulterated under section 501(f)(1)(A) of the FD&C Act, and commercial distribution of the device must cease immediately. FDA intends to take appropriate action to ensure compliance with the 90-day deadline for the submission of PMAs. The Agency believes this information adequately addresses the commenters' concern.

One commenter recommended standardizing the modularity and other design features of MoM hips to mitigate

adverse events attributed to the manufacturing process for these devices. The Agency does not believe sufficient information exists to establish any manufacturing standards or specific technical specifications for MoM hips that could potentially be generalized for this technology to mitigate adverse events.

One commenter requested that the Agency set revision surgery standards. Revision surgery involves a complex clinical decision that falls within the practice of medicine, which FDA generally does not regulate. In addition, insufficient information exists to establish any standards for revision surgery. FDA notes, however, that the American Association of Hip and Knee Surgeons, the American Academy of Orthopaedic Surgeons, and the Hip Society issued a consensus statement regarding assessment of risks in patients implanted with MoM hips, including factors to consider for revision surgery, based on currently available information (Ref. 2). FDA's Web site for MoM hips also provides some general considerations regarding revision surgery (Ref. 3).

One commenter requested that MoM hips not be used in women, including those of child-bearing age, and children who are still growing (*i.e.*, skeletally immature). As noted in the proposed order and as presented during the June 27–28, 2012, panel meeting, labeling for MoM hips includes warnings or contraindications for skeletally immature patients and patients who are pregnant or who may become pregnant (Ref. 4). In addition, the Agency will review all data included in the required PMA for a MoM hip to determine what information needs to be included in the device labeling to assure its safe and effective use, including any warnings and contraindications. The removal of any current contraindications for these patient populations would need to be supported by valid scientific evidence, in accordance with 21 CFR 860.7.

One commenter requested the adoption of standards for metal ion levels in the serum of patients implanted with a MoM hip. As discussed in detail during the June 28, 2012, panel meeting, there are challenges to implementing metal ion testing into clinical evaluations of patients treated with MoM hips, as well as challenges in the interpretation of metal ion testing results (Ref. 5). For example, the equipment and expertise required to conduct such testing are currently not widely available in health care facilities. In addition, there can be significant variability in test results, based on a number of factors, including



the laboratory conducting the testing (inter-laboratory variability) and the specific MoM hip implanted in the patient. Further, insufficient information exists to establish a definitive correlation between metal ion levels and clinical outcomes. Therefore, the Agency does not believe such standards can be adequately developed at this time. Nonetheless, the Agency acknowledges the importance of using metal ion levels within the overall clinical assessment of patients implanted with MoM hips. On May 6, 2011, under section 522 of the FD&C Act (21 U.S.C. 360l), FDA ordered manufacturers of MoM hips to conduct postmarket surveillance studies of these devices. As part of these studies, manufacturers are required to study the effects of metal ion concentrations in the bloodstream. The Agency will use the data from these studies to determine if any additional recommendations can be developed with respect to metal ion levels.

One commenter stated that FDA should affirmatively assert that common law liability claims relating to MoM hips that are included under this final order, which were cleared through the 510(k) process before the effective date of this final order, should not be preempted under section 521 of the FD&C Act (21 U.S.C. 360k). Section 521 of the FD&C Act includes an express preemption provision that preempts certain state requirements that are “different from, or in addition to” certain Federal requirements applicable to devices. Two Supreme Court cases: *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) and *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), address the scope of this provision. In *Lohr*, the Court held that design defect, manufacturing, and failure to warn claims relating to a 510(k)-cleared device were not preempted because there were no Federal “requirements” imposed by the 510(k) review where (1) the device could “take any particular form for any particular reason,” and (2) the general Federal manufacturing and labeling requirements were not specific to the device in question. Id. at 493, 497–502. In contrast, the Court determined in *Riegel* that the PMA review imposed Federal “requirements” under section 521 of the FD&C Act because FDA required that the PMA-approved device be made with almost no deviations from the specifications in the approved PMA. 552 U.S. at 323. The *Riegel* Court went on to hold that the Riegels’ common law claims were preempted where New York law imposed requirements on the PMA-approved device that were

“different from, or in addition to” the Federal requirements. Id. at 327–330. As seen in these cases, the preemption analysis under section 521 of the FD&C Act depends on whether “requirements” imposed by State law are different from or in addition to “requirements” imposed by Federal law. This determination involves resolution of a number of critical factual issues, including identifying the applicable State and Federal (if any) requirements that relate to the claims asserted, defining the scope of those requirements, and evaluating their relationship to one another. Although *Lohr* may be relevant to the situation described in the comment, FDA notes that the inquiry into preemption needs to consider the context and all relevant facts. The situation described in the comment is fairly generalized, and as such, FDA believes it would not be helpful to opine on this issue at this point in time.

Finally, several comments recommended actions that address broader issues or programmatic areas, such as changes to the postmarket surveillance process for all class III medical devices, recommendations for research studies, and the establishment of a “trust fund” for healthcare reimbursement of failed MoM hips. These requests are outside the scope of the regulatory actions described in this order.

### III. The Final Order

Under section 515(b)(3) of the FD&C Act, FDA is adopting its findings as published in the proposed order (78 FR 4094), and is issuing this final order to require the filing of a PMA for MoM hips, which specifically includes the following two device types: Hip joint metal/metal semi-constrained, with a cemented acetabular component, prosthesis; and hip joint metal/metal semi-constrained, with an uncemented acetabular component, prosthesis. This final order will revise 21 CFR part 888.

Under the final order, a PMA is required to be filed on or before May 18, 2016, for any of these preamendments class III devices that were in commercial distribution before May 28, 1976, or that has been found by FDA to be substantially equivalent to such a device on or before May 18, 2016. An applicant of a device subject to this order that was legally in commercial distribution before May 28, 1976, or that has been found to be substantially equivalent to a device that was legally in commercial distribution before May 28, 1976, may continue marketing such class III device during FDA’s review of the PMA provided that the PMA is filed on or

before May 18, 2016. However, if FDA denies approval of the PMA, then the device will be deemed adulterated under section 501(f)(1)(A) of the FD&C Act, and commercial distribution of the device must cease immediately. Any other device subject to this order is required to have an approved PMA in effect before it may be marketed. FDA intends to review any PMA for the device within 180 days, and any notice of completion of a PDP for the device within 90 days of the date of filing. FDA cautions that under section 515(d)(1)(B)(i) of the FD&C Act, the Agency may not enter into an agreement to extend the review period for a PMA beyond 180 days unless the Agency finds that “the continued availability of the device is necessary for the public health.”

If a PMA for any of the preamendments class III devices subject to this order is not filed on or before May 18, 2016, that device will be deemed adulterated under section 501(f)(1)(A) of the FD&C Act, and commercial distribution of the device must cease immediately. FDA requests that manufacturers take action to prevent the further use of MoM hips for which no PMA has been filed.

The device may, however, be distributed for investigational use, if the applicable requirements of the IDE regulations (part 812), including obtaining IDE approval, are met on or before 90 days after the effective date of this order. There will be no extended period for filing an IDE or exemption from the IDE requirements (see § 812.2(d)), and clinical studies may not be initiated without appropriate IDE approvals, as required.

### IV. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

### V. Paperwork Reduction Act of 1995

This final order refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120;

the collections of information in 21 CFR part 814, subpart B, have been approved under OMB control number 0910–0231; and the collections of information under 21 CFR part 801 have been approved under OMB control number 0910–0485.

## VI. Codification of Orders

Prior to the amendments by FDASIA, section 515(b) of the FD&C Act provided for FDA to issue regulations to require approval of an application for premarket approval for preamendments devices or devices found substantially equivalent to preamendments devices. Section 515(b) of the FD&C Act, as amended by FDASIA, provides for FDA to require approval of an application for premarket approval for such devices by issuing a final order following the issuance of a proposed order in the **Federal Register**. FDA will continue to codify the requirement for an application for premarket approval in the Code of Federal Regulations (CFR). Therefore, under section 515(b)(1) of the FD&C Act, as amended by FDASIA, in this final order, FDA is requiring approval of an application for premarket approval for total MoM semi-constrained hip joint systems, which include the following two specific preamendments class III devices: Hip joint metal/metal semi-constrained, with a cemented acetabular component, prosthesis; and hip joint metal/metal semi-constrained, with an uncemented acetabular component, prosthesis; and the Agency is making the language in 21 CFR 888.3320 and 888.3330 consistent with this final order.

## VII. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <http://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. FDA, Orthopaedic and Rehabilitation Devices Panel transcript, August 8, 2001. Available at <http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3780t1.rtf>.
2. Kwon *et al.* “Risk Stratification Algorithm for Management of Patients with Metal-on-Metal Hip Arthroplasty.” *Journal of Bone and Joint Surgery, American Volume*, 96:e4, 2014.
3. FDA, Metal-on-Metal Hip Implants Web site, Information for Orthopaedic Surgeons. Available at <http://www.fda.gov/MedicalDevices/>

*Products and Medical Procedures/Implants and Prosthetics/Metal on Metal Hip Implants/ucm241667.htm*.

4. FDA, Orthopaedic and Rehabilitation Devices Panel, FDA Executive Summary, June 27–28, 2012. Available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/OrthopaedicandRehabilitationDevicesPanel/UCM309302.pdf>.
5. FDA, Orthopaedic and Rehabilitation Devices Panel transcript, June 28, 2012. Available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/OrthopaedicandRehabilitationDevicesPanel/UCM313605.pdf>.

## List of Subjects in 21 CFR Part 888

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 888 is amended as follows:

## PART 888—ORTHOPEDIC DEVICES

- 1. The authority citation for 21 CFR part 888 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

- 2. Section 888.3320 is amended by revising paragraph (c) to read as follows:

**§ 888.3320 Hip joint metal/metal semi-constrained, with a cemented acetabular component, prosthesis.**

\* \* \* \* \*

(c) *Date PMA or notice of completion of PDP is required.* A PMA or a notice of completion of a PDP is required to be filed with the Food and Drug Administration on or before May 18, 2016, for any hip joint metal/metal semi-constrained prosthesis with a cemented acetabular component that was in commercial distribution before May 28, 1976, or that has, on or before May 18, 2016, been found to be substantially equivalent to a hip joint metal/metal semi-constrained prosthesis with a cemented acetabular component that was in commercial distribution before May 28, 1976. Any other hip joint metal/metal semi-constrained prosthesis with a cemented acetabular component shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

- 3. Section 888.3330 is amended by revising paragraph (c) to read as follows:

**§ 888.3330 Hip joint metal/metal semi-constrained, with an uncemented acetabular component, prosthesis.**

\* \* \* \* \*

(c) *Date PMA or notice of completion of PDP is required.* A PMA or a notice of completion of a PDP is required to be filed with the Food and Drug Administration on or before May 18, 2016, for any hip joint metal/metal semi-constrained prosthesis with an uncemented acetabular component that was in commercial distribution before May 28, 1976, or that has, on or before May 18, 2016, been found to be substantially equivalent to a hip joint metal/metal semi-constrained prosthesis with an uncemented acetabular component that was in commercial distribution before May 28, 1976. Any other hip joint metal/metal semi-constrained prosthesis with an uncemented acetabular component shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

Dated: February 11, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016–03331 Filed 2–17–16; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

[TD 9750]

RIN 1545–BM59

### Reporting of Original Issue Discount on Tax-Exempt Obligations; Basis and Transfer Reporting by Securities Brokers for Debt Instruments and Options

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations relating to information reporting by brokers for transactions involving debt instruments and options, including the reporting of original issue discount (OID) on tax-exempt obligations, the treatment of certain holder elections for reporting a taxpayer's adjusted basis in a debt instrument, and transfer reporting for section 1256 options and debt instruments. The regulations in this document provide guidance to brokers and payors and to their customers.

### DATES:

**Effective date:** These regulations are effective on February 18, 2016.



*Applicability dates:* For the dates of applicability, see §§ 1.6045–1(n)(11)(i)(A), 1.6045–1(n)(11)(i)(B), 1.6045–1(n)(12)(ii), 1.6045A–1(b)(3)(x), 1.6045A–1(b)(4)(iv), and 1.6049–10(c).

**FOR FURTHER INFORMATION CONTACT:**

Pamela Lew of the Office of the Associate Chief Counsel (Financial Institutions and Products) at (202) 317–7053 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

The collection of information contained in §§ 1.6045–1(n) and 1.6045A–1(b) of these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2186. The collection of information is required to comply with the provisions of section 403 of the Energy Improvement and Extension Act of 2008, Division B of Public Law 110–343 (122 Stat. 3765, 3854 (2008)) (the Act). The information required under § 1.6045–1(n) minimizes the need for reconciliation between information reported by a broker to both a customer and the IRS and the amounts reported on the customer's tax return. The information required under § 1.6045A–1 is necessary to allow brokers that effect sales of transferred section 1256 options and debt instruments that are covered securities to determine and report the adjusted basis of these securities in compliance with section 6045(g) of the Internal Revenue Code (Code). The burden for the collection of information contained in § 1.6049–10 of these final regulations will be reflected in the burden for Form 1099–OID, Original Issue Discount (OMB control number 1545–0117), when it is revised to request the additional information in the regulations. This information is required to enable the IRS to verify that a taxpayer is reporting the correct amount of tax-exempt interest each year for alternative minimum tax and other purposes. In addition, because this information is used to determine a taxpayer's adjusted basis in a debt instrument for purposes of section 6045(g), this information is required to enable the IRS to verify that a taxpayer is reporting the correct amount of gain or loss upon the sale of a tax-exempt obligation.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

**Background**

Section 6045 generally requires a broker to report gross proceeds upon the sale of a security. Section 6045 was amended by section 403 of the Act to require the reporting of adjusted basis for a covered security and whether any gain or loss upon the sale of the security is long-term or short-term. In addition, the Act added section 6045A of the Code, which requires certain information to be reported in connection with a transfer of a covered security to another broker, and section 6045B of the Code, which requires an issuer of a specified security to file a return relating to certain actions that affect the basis of the security. Section 6049 requires the reporting of interest payments (including accruals of OID treated as payments).

On November 25, 2011, the Treasury Department and the IRS published in the **Federal Register** proposed regulations relating to information reporting by brokers, transferors, and issuers of securities under sections 6045, 6045A, and 6045B for debt instruments, options, and securities futures contracts (REG–102988–11 at 76 FR 72652) (the 2011 proposed basis reporting regulations). On April 18, 2013, the Treasury Department and the IRS published in the **Federal Register** final regulations under sections 6045, 6045A, and 6045B (the 2013 final basis reporting regulations) and temporary regulations relating to information reporting for bond premium and acquisition premium under section 6049 (TD 9616 at 78 FR 23116) (the 2013 temporary interest reporting regulations). A notice of proposed rulemaking cross-referencing the 2013 temporary interest reporting regulations also was published in the **Federal Register** on April 18, 2013 (REG–154563–12 at 78 FR 23183) (the 2013 proposed interest reporting regulations).

On March 13, 2015, the Treasury Department and the IRS published in the **Federal Register** final regulations under sections 6045, 6045A, and 6049 (TD 9713 at 80 FR 13233) (the 2015 final basis reporting regulations, and, together with the 2013 final basis reporting regulations, the final basis reporting regulations). A number of commenters on the 2013 final basis reporting regulations requested changes

to the basis reporting rules relating to certain debt elections. In addition, for purposes of section 6045A, several commenters requested that a transferring broker provide additional information on the transfer statement for a debt instrument and that a transferring broker provide a transfer statement for a section 1256 option contract. Several commenters also suggested that the rules for reporting OID associated with a tax-exempt obligation be conformed to the rules regarding basis reporting for those debt instruments. Accordingly, TD 9713 also included temporary regulations relating to information reporting for debt instruments under sections 6045, 6045A, and 6049 (the 2015 temporary reporting regulations). A notice of proposed rulemaking cross-referencing the 2015 temporary reporting regulations was published in the **Federal Register** on March 13, 2015 (REG–143040–14 at 80 FR 13292) (the 2015 proposed reporting regulations). A correction to § 1.6045A–1T(f) was published on June 5, 2015 (TD 9713 at 80 FR 31995), delaying the effective date of § 1.6045A–1T(f) from June 30, 2015, to January 1, 2016.

Written comments were received on the 2015 proposed reporting regulations and are summarized below. No public hearing was requested or held. In general, these final regulations adopt the provisions of the 2015 proposed reporting regulations. These final regulations also remove the corresponding 2015 temporary reporting regulations.

After the publication of the 2015 final basis reporting regulations, the Treasury Department and the IRS received written comments on certain provisions of the final basis reporting regulations. In response to these comments, this document contains final regulations under section 6045 relating to the treatment of certain debt instruments as non-covered securities.

The written comments on the 2015 proposed reporting regulations and the 2015 final basis reporting regulations are available for public inspection at <http://www.regulations.gov> or upon request.

**Explanation of Provisions**

*A. Constant Yield Election for Accruals of Market Discount*

Under section 1276(b)(2), a customer may elect to accrue market discount on a constant yield method rather than a ratable method. The election may be made on a debt instrument by debt instrument basis and must be made for the earliest taxable year for which the customer is required to determine

accrued market discount. The election may not be revoked once it has been made. In most cases, the use of a constant yield method backloads market discount and is therefore more taxpayer favorable than the use of a ratable method.

In response to comments on the 2013 final basis reporting regulations (which required the broker to assume that the customer had not made a constant yield election), § 1.6045-1T(n)(11)(i)(B) of the 2015 temporary reporting regulations provided that for a debt instrument acquired on or after January 1, 2015, brokers are required to assume that a customer has elected to determine accrued market discount using a constant yield method unless the customer notifies the broker otherwise. A customer that does not want to use a constant yield method to determine accrued market discount must, by the end of the calendar year in which the customer acquired the debt instrument in an account with the broker, notify the broker in writing that the customer wants the broker to use the ratable method to determine accrued market discount.

No comments were received on the substantive rules in § 1.6045-1T(n)(11)(i)(B). Accordingly, the rules in the final regulations in this document are the same as the rules in § 1.6045-1T(n)(11)(i)(B). Several commenters requested permission to apply the default constant yield method to debt instruments acquired on or after January 1, 2014, which was the first date for which a broker was required to report accrued market discount under section 6045, provided that the broker had not reported accrued market discount to a customer for the 2014 calendar year using the ratable method. According to the commenters, the use of a single method to compute market discount accruals for all covered securities with market discount would simplify the calculation of accrued market discount and the reporting of this information to their customers.

The final regulations in this document permit, but do not require, a broker to apply the default constant yield method to a debt instrument acquired on or after January 1, 2014, and before January 1, 2015, provided the broker was not informed that the customer had made a section 1278(b) election (the election to include market discount in income as it accrues rather than upon a disposition or receipt of a partial principal payment), there were no principal payments on the debt instrument during the 2014 calendar year, and the broker therefore had not reported accrued market discount to the customer for the

2014 calendar year using the ratable method.

#### *B. Transfer Statements*

Under § 1.6045A-1T(e) of the 2015 temporary reporting regulations, a transferring broker is required to provide a transfer statement upon the transfer of a section 1256 option to ensure that the receiving broker has all of the information required for purposes of section 6045. The temporary regulations provide that a transfer statement is required for the transfer of a section 1256 option that occurs on or after January 1, 2016. The temporary regulations also list the data specific to section 1256 options that must be provided.

One commenter asserted that including the fair market value information on a transfer statement for a section 1256 option is unnecessary because the receiving broker can look up the information if it is needed and suggested saving space on the transfer statement by eliminating this data item. After considering the suggestion, the Treasury Department and IRS decline to adopt this suggestion. Providing fair market value information on a transfer statement will help ensure that the receiving broker is reporting an amount of realized but unrecognized gain or loss from the prior year that is consistent with the amount reported in the prior year by the transferring broker, which will minimize the possibility of double counting or omission of gain or loss.

No other comments were received on § 1.6045A-1T of the 2015 temporary reporting regulations. The rules in the final regulations in this document are substantively the same as the rules in the 2015 temporary regulations. However, the rules in § 1.6045A-1T(e) are in § 1.6045A-1(b)(4)(iv) of the final regulations in this document and the rules in § 1.6045A-1T(f) are in § 1.6045A-1(b)(3)(x) of the final regulations in this document.

#### *C. Reporting of OID on a Tax-Exempt Obligation*

To coordinate the reporting of OID under section 6049 with the reporting of basis for tax-exempt obligations under section 6045, § 1.6049-10T of the 2015 temporary reporting regulations provides that a payor must report under section 6049 the daily portions of OID on a tax-exempt obligation. The daily portions of OID are determined as if section 1272 and § 1.1272-1 applied to a tax-exempt obligation. A payor must determine whether a tax-exempt obligation was issued with OID and the amount that accrues for each relevant period. In addition, OID on a tax-exempt

obligation is determined without regard to the de minimis rule in section 1273(a)(3) and § 1.1273-1(d). Because the temporary regulations require the reporting of OID, payors also must report amortized acquisition premium (which offsets OID) on a tax-exempt obligation. A broker may report either a gross amount for both OID and amortized acquisition premium, or a net amount of OID that reflects the offset of the OID by the amount of amortized acquisition premium allocable to the OID. Section 1.6049-10T of the 2015 temporary reporting regulations applies to a tax-exempt obligation acquired on or after January 1, 2017.

No comments were received on the substantive rules in § 1.6049-10T. Accordingly, the rules in the final regulations in this document are the same as the rules in § 1.6049-10T. However, several commenters requested that, for taxable years beginning after December 31, 2016, a broker be permitted to report on Form 1099-OID the OID and acquisition premium on a tax-exempt obligation that is a covered security acquired before January 1, 2017. According to the commenters, customers might be confused because of the difference between the date that a tax-exempt obligation generally became a covered security (that is, an obligation acquired on or after January 1, 2014), and the date after which a tax-exempt obligation that is a covered security becomes subject to mandatory reporting of OID and acquisition premium (that is, an obligation acquired on or after January 1, 2017). Because a broker is required to track basis for a tax-exempt obligation that is a covered security for purposes of section 6045, the broker is responsible for calculating OID on a tax-exempt obligation acquired on or after January 1, 2014, even if the broker has no obligation to report the obligation's OID to the customer for purposes of section 6049. To simplify the reporting of OID and acquisition premium and to minimize any customer confusion, the commenters requested that the final regulations permit a broker to report OID and acquisition discount on all tax-exempt bonds that are covered securities.

After considering the requests, for taxable years beginning after December 31, 2016, the final regulations in this document permit, but do not require, a broker to report OID and acquisition discount for a tax-exempt obligation that is a covered security acquired before January 1, 2017.

*D. Treatment of Certain Debt Instruments Subject to January 1, 2016, Reporting*

Under § 1.6045–1(n)(3) of the 2013 final basis reporting regulations, certain debt instruments are subject to basis reporting only if the debt instrument is acquired by a customer on or after January 1, 2016. For example, § 1.6045–1(n)(3) applies to a contingent payment debt instrument, a debt instrument that is not issued by a U.S. issuer, and a debt instrument the terms of which are not reasonably available to a broker within 90 days of acquisition of the debt instrument by the customer.

Several commenters on the 2013 final basis reporting regulations requested guidance for a debt instrument the terms of which are not reasonably available to the broker. The commenters stated that they would not have the information necessary to comply with the information reporting rules for these instruments. Several commenters stated that information for a debt instrument issued by a non-U.S. issuer and for a tax-exempt obligation is particularly difficult to obtain. One commenter noted that under SEC Release 34–67908, issued on September 21, 2012 (77 FR 59427), issuers of municipal securities are required to provide certain data to the Electronic Municipal Market Access system set up by the Municipal Securities Rulemaking Board for new issuances, but there is no requirement to file similar information for issuances already outstanding as of the November 1, 2012, effective date of the release.

The Treasury Department and the IRS agree that a broker may not always be able to obtain information for a debt instrument issued by a non-U.S. issuer or for a tax-exempt obligation issued before January 1, 2014. The final regulations in this document therefore provide that a debt instrument issued by a non-U.S. issuer or a tax-exempt obligation issued before January 1, 2014, is treated as a noncovered security (and, therefore, is not subject to basis reporting under section 6045) if the terms of the debt instrument are not reasonably available to the broker within 90 days of the date the debt instrument was acquired by the customer. The Treasury Department and the IRS believe that the information necessary for section 6045 compliance should be available for other debt instruments.

**Applicability Dates**

The final regulations under section 6045 in this document (other than § 1.6045–1(n)(12)) apply to a debt instrument acquired on or after January

1, 2015. Section 1.6045–1(n)(12) applies to a debt instrument acquired on or after February 18, 2016. The final regulations under section 6049 in this document apply to a tax-exempt obligation that is a covered security acquired on or after January 1, 2017. The final regulations under section 6045A in this document apply to a transfer of a section 1256 option that occurs on or after January 1, 2016, and to a transfer of a debt instrument that occurs on or after January 1, 2016.

**Special Analyses**

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that the final regulations in this document will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. It is anticipated that the requirements in the final regulations in this document, except in the case of the notification by a customer discussed in the next paragraph, will fall only on financial services firms with annual receipts greater than the \$38.5 million threshold and, therefore, on no small entities.

Section 403(a) of the Act requires a broker to report the adjusted basis of a debt instrument that is a covered security. Although a holder of a debt instrument (customer) is permitted to make a number of elections that affect how basis is computed, a broker only is required to take into account specified elections in reporting the adjusted basis of a debt instrument, including the election under section 1276(b)(2) to determine accruals of market discount on a constant yield method. Under the 2013 final basis reporting regulations, a customer was required to notify the broker that the customer had made the section 1276(b)(2) election. However, § 1.6045–1(n)(11)(i)(B) requires a broker to take into account the election under section 1276(b)(2) in reporting a debt instrument's adjusted basis unless the customer timely notifies the broker that the customer has not made the election. The notification must be in writing, which includes a writing in electronic format. In most cases, this election results in a more taxpayer-favorable result than the default ratable method.

It is anticipated that this collection of information in the regulations will not fall on a substantial number of small entities, especially because fewer customers will need to notify brokers about the election. Further, the regulations implement the statutory requirements for reporting adjusted basis under section 403 of the Act. Moreover, any economic impact is expected to be minimal because it should take a customer no more than seven minutes to satisfy the information-sharing requirement in these regulations.

Section 403(c) of the Act added section 6045A, which requires applicable persons to provide a transfer statement in connection with the transfer of custody of a covered security. Section 1.6045A–1 effectuates the Act by giving the broker who receives the transfer statement the information necessary to determine and report adjusted basis and whether any gain or loss with respect to a debt instrument or section 1256 option is long-term or short-term as required by section 6045 when the security is subsequently sold. Consequently, § 1.6045A–1 does not add to the impact on small entities imposed by the statutory provisions. Instead, the regulations limit the information to be reported to only those items necessary to effectuate the statutory scheme.

The information required under § 1.6049–10 will enable the IRS to verify that a taxpayer is reporting the correct amount of tax-exempt interest each year for alternative minimum tax and other purposes. In addition, because this information is used to determine a taxpayer's adjusted basis in a debt instrument for purposes of section 6045(g), this information is required to enable the IRS to verify that a taxpayer is reporting the correct amount of gain or loss upon the sale of a tax-exempt obligation. Any economic impact on small entities is expected to be minimal because a broker already is required to determine the accruals of OID and acquisition premium for purposes of determining and reporting a customer's adjusted basis on Form 1099–B under section 6045. Moreover, any effect on small entities of the rules in the final regulations flows from section 6049 and section 403 of the Act.

Therefore, because the final regulations in this document will not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, the proposed regulations preceding the final regulations in this document were

submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses. No comments were received.

#### Drafting Information

The principal author of these regulations is Pamela Lew, Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the Treasury Department and the IRS participated in their development.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entries for §§ 1.6045A–1T and 1.6049–10T and adding an entry for § 1.6049–10 to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 1.6049–10 also issued under 26 U.S.C. 6049(a). \* \* \*

■ **Par. 2.** Section 1.6045–1 is amended by:

- 1. Adding a sentence at the end of paragraph (n)(4) introductory text.
- 2. Revising the last sentence in paragraph (n)(4)(iv).
- 3. Revising the last sentence in paragraph (n)(5)(i).
- 4. Revising the second sentence in paragraph (n)(6)(i).
- 5. Adding a sentence at the end of paragraph (n)(6)(ii).
- 6. Revising the last sentence in paragraph (n)(7)(iii).
- 7. Revising “§ 1.6049–9T” to read “§ 1.6049–9” in two places in paragraph (n)(9).
- 8. Revising paragraph (n)(11).
- 9. Adding paragraph (n)(12).

The revisions and additions read as follows:

#### § 1.6045–1 Returns of information of brokers and barter exchanges.

\* \* \* \* \*

(n) \* \* \*

(4) \* \* \* However, see paragraph (n)(11) of this section for the treatment of an election described in paragraph (n)(4)(iii) of this section (election to accrue market discount based on a constant yield) and an election described in paragraph (n)(4)(iv) of this section (election to treat all interest as OID).

(iv) \* \* \* However, see paragraph (n)(11)(i)(A) of this section for a debt instrument acquired on or after January 1, 2014.

\* \* \* \* \*

(5) \* \* \*

(i) \* \* \* However, see paragraph (n)(11) of this section for the treatment of an election described in paragraph (n)(4)(iii) of this section (election to accrue market discount based on a constant yield) and an election described in paragraph (n)(4)(iv) of this section (election to treat all interest as OID).

\* \* \* \* \*

(6) \* \* \*

(i) \* \* \* See paragraphs (n)(5) and (n)(11)(i)(B) of this section to determine whether the amount reported should take into account a customer election under section 1276(b)(2). \* \* \*

(ii) \* \* \* See paragraphs (n)(5) and (n)(11)(i)(B) of this section to determine whether the amount reported should take into account a customer election under section 1276(b)(2).

(7) \* \* \*

(iii) \* \* \* However, if a broker took into account a customer election under § 1.1272–3 in 2014, the broker must decrease the customer's basis in the debt instrument by the amount of acquisition premium that is taken into account each year to reduce the amount of the original issue discount that is otherwise includible in the customer's income for that year in accordance with §§ 1.1272–2(b)(5) and 1.1272–3.

\* \* \* \* \*

(11) *Additional rules for certain holder elections*—(i) *In general.* For purposes of this section, the rules in this paragraph (n)(11) apply notwithstanding any other rule in paragraph (n) of this section.

(A) *Election to treat all interest as OID.* A broker must report the information required under paragraph (d) of this section without taking into account any election described in paragraph (n)(4)(iv) of this section (the election to treat all interest as OID in § 1.1272–3). As a result, for example, a broker must determine the amount of any acquisition premium taken into account each year for purposes of this section in accordance with § 1.1272–2(b)(4). This paragraph (n)(11)(i)(A) applies to a debt instrument acquired on or after January 1, 2015. A broker, however, may rely on this paragraph (n)(11)(i)(A) for a debt instrument acquired on or after January 1, 2014, and before January 1, 2015.

(B) *Election to accrue market discount based on a constant yield.* A broker must report the information required

under paragraph (d) of this section by assuming that a customer has made the election described in paragraph (n)(4)(iii) of this section (the election to accrue market discount based on a constant yield). However, if a customer notifies a broker in writing that the customer does not want the broker to take into account this election, the broker must report the information required under paragraph (d) of this section without taking into account this election. The customer must provide this notification to the broker by the end of the calendar year in which the customer acquired the debt instrument in an account with the broker. This paragraph (n)(11)(i)(B) applies to a debt instrument acquired on or after January 1, 2015. A broker, however, may rely on this paragraph (n)(11)(i)(B) to report accrued market discount for a debt instrument that is a covered security acquired on or after January 1, 2014, and before January 1, 2015, if the customer had not informed the broker that the customer had made a section 1278(b) election and there were no principal payments on the debt instrument during this period.

(ii) [Reserved].

(12) *Certain debt instruments treated as noncovered securities*—(i) *In general.* Notwithstanding paragraph (a)(15) of this section, a debt instrument is treated as a noncovered security for purposes of this section if the terms of the debt instrument are not reasonably available to the broker within 90 days of the date the debt instrument was acquired by the customer and the debt instrument is either—

(A) A debt instrument issued by a non-U.S. issuer; or

(B) A tax-exempt obligation issued before January 1, 2014.

(ii) *Effective/applicability date.* Paragraph (n)(12)(i) of this section applies to a debt instrument described in paragraph (n)(12)(i)(A) or (B) of this section that is acquired on or after February 18, 2016. However, a broker may rely on paragraph (n)(12)(i) of this section for a debt instrument described in paragraph (n)(12)(i)(A) or (B) of this section acquired before February 18, 2016.

\* \* \* \* \*

■ **Par. 3.** Section 1.6045–1T is amended by revising paragraphs (h) through (p) to read as follows:

#### § 1.6045–1T Returns of information of brokers and barter exchanges (temporary).

\* \* \* \* \*

(h) through (p) [Reserved]. For further guidance, see § 1.6045–1(h) through (p).

\* \* \* \* \*

■ **Par. 4.** Section 1.6045A-1 is amended by:

■ 1. Removing “and” at the end of paragraph (b)(3)(viii), removing the period at the end of paragraph (b)(3)(ix) and adding “and;” in its place, and adding paragraph (b)(3)(x).

■ 2. Removing “and” at the end of paragraph (b)(4)(ii), removing the period at the end of paragraph (b)(4)(iii) and adding “and;” in its place, and adding paragraph (b)(4)(iv).

■ 3. Removing paragraphs (e) and (f).

The additions read as follows:

**§ 1.6045A-1 Statements of information required in connection with transfers of securities.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(x) For a transfer that occurs on or after January 1, 2016, the last date on or before the transfer date that the transferor made an adjustment for a particular item (for example, the last date on or before the transfer date that bond premium was amortized). A broker, however, may rely on this paragraph (b)(3)(x) for a transfer of a covered security that occurs on or after June 30, 2015, and before January 1, 2016.

(4) \* \* \*

(iv) For a transfer of an option described in § 1.6045-1(m)(3) (section 1256 option) that occurs on or after January 1, 2016, the original basis of the

option and the fair market value of the option as of the end of the prior calendar year.

\* \* \* \* \*

**§ 1.6045A-1T [Removed]**

■ **Par. 5.** Section 1.6045A-1T is removed.

■ **Par. 6.** Section 1.6049-10 is added to read as follows:

**§ 1.6049-10 Reporting of original issue discount on a tax-exempt obligation.**

(a) *In general.* For purposes of section 6049, a payor (as defined in § 1.6049-4(a)(2)) of original issue discount (OID) on a tax-exempt obligation (as defined in section 1288(b)(2)) is required to report the daily portions of OID on the obligation as if the daily portions of OID that accrued during a calendar year were paid to the holder (or holders) of the obligation in the calendar year. The amount of the daily portions of OID that accrues during a calendar year is determined as if section 1272 and § 1.1272-1 applied to a tax-exempt obligation. Notwithstanding any other rule in section 6049 and the regulations thereunder, a payor must determine whether a tax-exempt obligation was issued with OID and the amount of OID that accrues for each relevant period. As prescribed by section 1288(b)(1), OID on a tax-exempt obligation is determined without regard to the de minimis rules in section 1273(a)(3) and § 1.1273-1(d).

(b) *Acquisition premium.* A payor is required to report acquisition premium amortization on a tax-exempt obligation in accordance with the rules in § 1.6049-9(c) as if section 1272 applied to a tax-exempt obligation. See paragraph (a) of this section to determine the amount of OID allocable to an accrual period.

(c) *Effective/applicability date.* This section applies to a tax-exempt obligation that is a covered security (within the meaning of § 1.6045-1(a)(15) and (n)(12)) acquired on or after January 1, 2017. For a taxable year beginning after December 31, 2016, a broker, however, may rely on this section to report OID and acquisition premium for a tax-exempt obligation that is a covered security acquired before January 1, 2017.

**§ 1.6049-10T [Removed]**

■ **Par. 7.** Section 1.6049-10T is removed.

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

Approved: January 13, 2016.

**Mark J. Mazur,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2016-03429 Filed 2-17-16; 8:45 am]

**BILLING CODE 4830-01-P**

# Proposed Rules

Federal Register

Vol. 81, No. 32

Thursday, February 18, 2016

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

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2016-0466; Directorate Identifier 2014-NM-188-AD]

RIN 2120-AA64

#### Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for certain Airbus Model A300 B4-603, B4-605R, and B4-622R airplanes; and Model A310-304, -324, and -325 airplanes. This proposed AD was prompted by a report of a crack found on door frame (FR) 73A between stringers 24 and 25. This proposed AD would require inspections around the rivet heads of the seal retainer run-out holes at certain frames and corrective actions if necessary. We are proposing this AD to detect and correct cracking of the door frame, which could result in reduced structural integrity of the airplane.

**DATES:** We must receive comments on this proposed AD by April 4, 2016.

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

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Fax:** 202-493-2251.
- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9

a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, 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](mailto: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.

#### 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-2016-0466; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2016-0466; Directorate Identifier 2014-NM-188-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We

will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

#### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2014-0202R1, dated September 19, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus Model A300 B4-603, B4-605R, and B4-622R airplanes; and Model A310-304, -324, and -325 airplanes. The MCAI states:

During the preparation phase for conversion of an A300-600 aeroplane from passenger to freighter configuration, a crack was detected on door frame (FR) 73A, between stringer (STRG) 24 and STRG 25.

DGAC France had issued AD 1999-013-276R1 [<http://ad.easa.europa.eu/ad/F-1999-013-276R1>] to require inspections at FR 73A in accordance with the instructions of Airbus Service Bulletin (SB) A310-53-2107 or SB A300-53-6116, as applicable. However, the new crack was found in an area not covered by the existing inspection and is therefore addressed by this new [EASA] AD. (DGAC France AD 1999-013-276R1 remains in place).

Further investigations identified that, on A300-600 aeroplanes, the areas at FR 56A and FR 57A have the same design and material as at FR 73A.

This condition, if not detected and corrected, could affect the structural integrity of the airframe.

For the reasons described above, this [EASA] AD requires repetitive [high frequency eddy current (HFEC)] inspections of the rivet heads of the seal retainer run out holes to detect cracks and, depending on findings, accomplishment of corrective actions [repair].

Even though no crack has been identified at FR 56A and FR 57A, as a preventive measure, the inspection is extended to these areas. On A310 aeroplanes, only the area at FR 73A needs to be inspected.

This [EASA] AD is revised to reduce the applicability to aeroplanes in post-MOD 06924 configuration.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-0466.

#### Related Service Information Under 14 CFR Part 51

Airbus has issued Service Bulletins A300-53-6175, and A310-53-2138, both dated May 28, 2014. The service

information describes procedures to do HFEC inspections around the rivet heads of the seal retainer run-out holes at certain frame locations on the left-hand and right-hand sides. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

#### FAA's Determination and Requirements of This Proposed AD

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

#### Costs of Compliance

We estimate that this proposed AD affects 24 airplanes of U.S. registry.

We also estimate that it would take about 11 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be \$22,440, or \$935 per product.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed 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 proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

##### § 39.13 [Amended]

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

**Airbus:** Docket No. FAA-2016-0466; Directorate Identifier 2014-NM-188-AD.

##### (a) Comments Due Date

We must receive comments by April 4, 2016.

##### (b) Affected ADs

None.

##### (c) Applicability

This AD applies to Airbus Model A300B4-603, A300B4-605R, A300B4-622R, A310-304, A310-324, and A310-325 airplanes; certificated in any category; all manufacturer serial numbers (MSNs) in post-modification (MOD) 06924 configuration, except MSN 464, 477, 479, 481, 482, 483, 484, and 488.

**Note 1 to paragraph (c) of this AD:** MSNs 464, 477, 479, 481, 482, 483, 484 and 488 partially embodied MOD 06924 by means of modification proposal D05902.

#### (d) Subject

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

#### (e) Reason

This AD was prompted by a report of a crack found on door frame (FR) 73A between stringers 24 and 25. We are issuing this AD to detect and correct cracking, which could reduce the structural integrity of the airplane.

#### (f) Compliance

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

#### (g) Inspection

At the later of the compliance times specified in paragraphs (g)(1) and (g)(2) of this AD: Do a high frequency eddy current (HFEC) inspection for any crack around the rivet heads of the seal retainer run-out holes at FR 56A, FR 57A, and FR 73A, left-hand (LH) and right-hand (RH) sides on Model A300-600 airplanes; and at FR 73A, LH and RH sides on Model A310 airplanes; in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310-53-2138, dated May 28, 2014; or Airbus Service Bulletin A300-53-6175, dated May 28, 2014; as applicable. Repeat the HFEC inspection thereafter at intervals not to exceed 7,500 flight cycles.

(1) Before the accumulation of 32,000 total flight cycles.

(2) Within 36 months after the effective date of this AD, or before the accumulation of 36,000 total flight cycles, whichever occurs first.

#### (h) Corrective Actions

If any crack is found during any inspection required by paragraph (g) of this AD, repair before further flight 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) 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: 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. 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 the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (h) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

#### (j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2014-0202R1, dated September 19, 2014, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-0466.

(2) 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](mailto:account.airworth-eas@airbus.com); Internet <http://www.airbus.com>. 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.

Issued in Renton, Washington, on February 6, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016-03135 Filed 2-17-16; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2016-3697; Directorate Identifier 2015-NM-143-AD]

RIN 2120-AA64

### Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede Airworthiness Directive (AD) 2011-01-15, which applies to certain The Boeing Company Model 757-200, -200CB, and -300 series airplanes. AD 2011-01-15 currently requires repetitive inspections for cracking of the fuselage skin of the crown skin panel along the chem-milled step at stringers S-4L (left) and S-4R (right), from stations (STA) 297 through STA 439, and repair, if necessary. AD 2011-01-15 also includes terminating action for the repetitive inspections of the repaired areas only. Since we issued AD 2011-01-15, we received reports of the initiation of new fatigue cracking in the fuselage skin of the crown skin panel along locally thinned channels adjacent to the chem-milled steps. This proposed AD would add repetitive inspections for cracking in additional areas and repair if necessary. This proposed AD would also remove airplanes from the applicability in AD 2011-01-15. This proposed AD would also add an optional skin panel replacement which would terminate all inspections and an optional preventative modification that would terminate certain inspections. We are proposing this AD to detect and correct fatigue cracking of the fuselage skin of the crown skin panel, which could result in pressure venting and consequent rapid decompression of the airplane.

**DATES:** We must receive comments on this proposed AD by April 4, 2016.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800-0019, Long Beach, CA 90846-0001; telephone: 206-544-5000, extension 2; fax: 206-766-5683; 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. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-3697.

#### 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-2016-3697; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Eric Schrieber, Aerospace Engineer, Airframe Branch, ANM-120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5348; fax: 562-627-5210; email: [eric.schrieber@faa.gov](mailto:eric.schrieber@faa.gov).

#### SUPPLEMENTARY INFORMATION:

#### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2016-3697; Directorate Identifier 2015-NM-143-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

#### Discussion

On December 28, 2010, we issued AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 10, 2011), for certain The Boeing Company Model 757-200, -200CB, and -300 series airplanes. AD 2011-01-15 requires repetitive inspections for cracking of the fuselage skin of the crown skin panel along the



chem-milled step at stringers S-4L and S-4R, from stations (STA) 297 through STA 439, and repair if necessary. AD 2011-01-15 also includes terminating action for the repetitive inspections of the repaired areas only. AD 2011-01-15 resulted from reports of cracking in the fuselage skin of the crown skin panel. We issued AD 2011-01-15 to detect and correct fatigue cracking of the fuselage skin of the crown skin panel, which could result in pressure venting and consequent rapid decompression of the airplane.

**Actions Since AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 10, 2011), Was Issued**

The preamble to AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 10, 2011), specifies that we consider the requirements “interim action.” AD 2011-01-15 explains that we might consider further rulemaking if final action is later identified. We now have determined that it is necessary to initiate further rulemaking to add repetitive inspections for cracking in additional areas for certain airplanes, and repair if necessary.

We have removed Model 757-200 CB series airplanes from the applicability because the crown skins on those airplanes are manufactured differently and therefore are not affected by the identified unsafe condition.

We have also determined that the external detailed inspection that is

allowed as an option in AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 12, 2011), does not adequately address the identified unsafe condition. Only eddy current inspections are adequate to address the identified unsafe condition.

**Related Service Information Under 1 CFR Part 51**

We reviewed Boeing Special Attention Service Bulletin 757-53-0097, Revision 2, dated July 28, 2015. The service information describes procedures for repetitive external sliding probe eddy current (EC) and external spot-probe-medium-frequency EC inspections for cracking of the crown skin panel, repair, a preventive modification, and replacement of the crown skin panel. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

**FAA’s Determination**

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

**Proposed AD Requirements**

This proposed AD would require accomplishing the actions specified in

the service information described previously. For information on the procedures and compliance times, see this service information at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-3697.

**Explanation of “RC” Steps in Service Information**

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (ARC), to enhance the AD system. One enhancement was a new process for annotating which steps in the service information are required for compliance with an AD. Differentiating these steps from other tasks in the service information is expected to improve an owner’s/operator’s understanding of crucial AD requirements and help provide consistent judgment in AD compliance. The steps identified as RC (required for compliance) in any service information identified previously have a direct effect on detecting, preventing, resolving, or eliminating an identified unsafe condition.

**Costs of Compliance**

We estimate that this proposed AD affects 652 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

**ESTIMATED COSTS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections (Zone 1) [Retained actions from AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 10, 2011)].	2 work-hour × \$85 per hour = \$170 per inspection cycle.	\$0 .....	\$170 per inspection cycle.	\$110,840 per inspection cycle.
Inspections (Zones 2 and 3) [new proposed action].	Up to 4 work-hours × \$85 per hour = Up to \$340 per inspection cycle.	\$0 .....	Up to \$340 per inspection cycle.	\$221,680 per inspection cycle.
Optional modification .....	Up to 615 work-hours × \$85 per hour = Up to \$52,275.	Up to \$26,496 .....	Up to \$78,771 .....	Up to \$51,358,692.

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

We have received no definitive data that would enable us to provide a cost estimate for the optional replacement specified in this proposed 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 have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

##### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2011–01–15, Amendment 39–16572 (76 FR 1351, January 10, 2011), and adding the following new AD:

**The Boeing Company:** Docket No. FAA–2016–3697; Directorate Identifier 2015–NM–143–AD.

##### (a) Comments Due Date

The FAA must receive comments on this AD action by April 4, 2016.

##### (b) Affected ADs

This AD replaces AD 2011–01–15, Amendment 39–16572 (76 FR 1351, January 10, 2011).

##### (c) Applicability

(c) This AD applies to The Boeing Company Model 757–200 and –300 series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015.

##### (d) Subject

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

##### (e) Unsafe Condition

This AD was prompted by reports of the initiation of fatigue cracking in the fuselage skin of the crown skin panel along locally thinned channels adjacent to the chem-milled steps. We are issuing this AD to detect and correct fatigue cracking of the fuselage skin of the crown skin panel, which could result in pressure venting and consequent rapid decompression of the airplane.

##### (f) Compliance

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

##### (g) Repetitive Inspections

Do the applicable inspections required by paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

(1) For all airplanes: At the applicable time specified in table 1 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015: Do the inspection specified in paragraph (g)(1)(i) or (g)(1)(ii) of this AD in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Repeat the inspection thereafter at the applicable times specified in table 1 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Accomplishing the preventative modification specified in paragraph (j)(1) of this AD or the replacement specified in paragraph (j)(2) of this AD terminates the inspections required by this paragraph.

(i) Do an external sliding probe eddy current (EC) inspection for cracking of the crown skin panel at stringers S–4L (left) and S–4R (right).

(ii) Do an external spot-probe-medium-frequency EC inspection for cracking of the crown skin panel at stringers S–4L and S–4R.

(2) For airplanes on which any crack is found during any inspection required by paragraph (g)(1) of this AD; or any repair is installed that covers the Zone 1 inspection area specified in Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015; or any preventive modification is installed as specified in Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015: At the applicable time specified in table 2 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015, except as required by paragraph (k)(1) of this AD: Do the inspection specified in paragraph (g)(2)(i) or (g)(2)(ii) of this AD, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Repeat the inspection thereafter at the applicable times specified in table 2 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Accomplishing the replacement specified in paragraph (j)(2) of this AD terminates the inspections required by this paragraph.

(i) Do an external sliding probe EC inspection for cracking of the crown skin panel at stringers S–2L, S–3L, and S–3R, as applicable.

(ii) Do an external spot-probe-medium-frequency EC inspection for cracking of the crown skin panel at stringers S–2L, S–3L, and S–3R, as applicable.

(3) For airplanes on which any crack is found during any inspection required by paragraph (g)(1) of this AD; or any repair is

installed that covers the Zone 1 inspection area specified in Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015; or any preventive modification is installed as specified in Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015: At the applicable time specified in table 3 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015, except as required by paragraph (k)(1) of this AD: Do the inspection specified in paragraph (g)(3)(i) or (g)(3)(ii) of this AD, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Repeat the inspection thereafter at the applicable times specified in table 3 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Accomplishing the replacement specified in paragraph (j)(2) of this AD terminates the inspections required by this paragraph.

(i) Do an external sliding probe EC inspection for cracking of the crown skin panel at stringers S–3L and S–3R.

(ii) Do an external spot-probe-medium-frequency EC inspection for cracking of the crown skin panel at stringers S–3L and S–3R.

##### (h) Post-Preventive Modification Supplemental Inspections

For airplanes on which a preventive modification has been installed as specified in Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015: At the applicable time specified in table 4 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015; do eddy current and detailed inspections for cracking of the applicable areas of the fuselage skin of the doublers, triplers, and fillers of the preventive modification, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015. Repeat the inspection thereafter at the applicable times specified in table 4 of paragraph 1.E., “Compliance,” of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015.

##### (i) Repair

If any cracking is found during any inspection required by paragraph (g)(1), (g)(2), (g)(3), or (h) of this AD, repair before further flight using a method approved in accordance with the procedures specified in paragraph (m) of this AD. Doing the repair ends the repetitive inspections for the repaired area only.

##### (j) Optional Terminating Actions

(1) Accomplishing the preventative modification, including doing high frequency EC inspections for cracking around existing fastener holes, in accordance with Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 757–53–0097, Revision 2, dated July 28, 2015, except

as required by paragraphs (k)(2) and (k)(3) of this AD, terminates the inspections required by paragraph (g)(1) of this AD, provided the preventative modification is done before further flight after accomplishing an inspection required by paragraph (g) of this AD.

(2) Replacing the crown skin panel between STA 297 and STA 439, S-4L to S-4R, using a method approved in accordance with the procedures specified in paragraph (m) of this AD, terminates the inspections required by paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

#### **(k) Exceptions to Service Information Specifications and Preventative Modification**

(1) Where Boeing Special Attention Service Bulletin 757-53-0097, Revision 2, dated July 28, 2015, specifies a compliance time "after the Revision 2 date of this service bulletin," this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Special Attention Service Bulletin 757-53-0097, Revision 2, dated July 28, 2015, specifies to contact Boeing for repair instructions: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(3) If any cracking is found during any inspection specified in paragraph (j)(1) of this AD, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

#### **(l) Credit for Previous Actions**

(1) This paragraph provides credit for Zone 1 inspections required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Special Attention Service Bulletin 757-53-0097, dated November 22, 2010, which was incorporated by reference in AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 10, 2011).

(2) This paragraph provides credit for the Zone 1 inspection required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD, using Boeing Special Attention Service Bulletin 757-53-0097, Revision 1, dated January 6, 2011, which is not incorporated by reference in this AD.

#### **(m) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Los Angeles 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 (m)(1) of this AD. Information may be emailed to: [9-ANM-LAACO-AMOC-Requests@faa.gov](mailto:9-ANM-LAACO-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, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane and the approval must specifically refer to this AD.

(4) AMOCs approved for AD 2011-01-15, Amendment 39-16572 (76 FR 1351, January 10, 2011), are not approved as AMOCs for the corresponding provisions of paragraph (g) of this AD.

(5) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (m)(5)(i) and (m)(5)(ii) apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

#### **(n) Related Information**

(1) For more information about this AD, contact Eric Schrieber, Aerospace Engineer, Airframe Branch, ANM-120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5348; fax: 562-627-5210; email: [Eric.Schrieber@faa.gov](mailto:Eric.Schrieber@faa.gov).

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800-0019, Long Beach, CA 90846-0001; telephone: 206-544-5000, extension 2; fax: 206-766-5683; 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.

Issued in Renton, Washington, on February 8, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016-03297 Filed 2-17-16; 8:45 am]

**BILLING CODE 4910-13-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 39**

[Docket No. FAA-2016-0465; Directorate Identifier 2015-NM-096-AD]

**RIN 2120-AA64**

#### **Airworthiness Directives; Airbus Airplanes**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for certain Airbus Model A330-200 and -300 series airplanes; and Model A340-200 and -300 series airplanes. This proposed AD was prompted by a determination that the compliance times for certain post-repair inspections and certain allowable damage limits (ADLs) must be reduced in order to address fatigue. This proposed AD would require identifying any repairs and ADLs used to assess or control any structural damage on certain structural areas, and corrective action if necessary. We are proposing this AD to prevent fatigue damage on primary structure and structural repairs, which could result in reduced structural integrity of the airplane.

**DATES:** We must receive comments on this proposed AD by April 4, 2016.

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

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Fax:** 202-493-2251.
- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 45 80; email: [airworthiness.A330-A340@airbus.com](mailto:airworthiness.A330-A340@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.

### 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-2016-0465; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone: 425-227-1138; fax: 425-227-1149.

### SUPPLEMENTARY INFORMATION:

#### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2016-0465; Directorate Identifier 2015-NM-096-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

#### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2015-0101R1, dated June 12, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus Model A330-200 and -300 series airplanes; and Model A340-200 and -300 series airplanes. The MCAI states:

Result of a fleet survey accomplished in 2008 identified that the nature of flight

missions of A330 and A340-200/300 fleets had significantly changed in comparison with assumed usage during the type certification. Consequently, it was decided to recalculate the Structural Repair Manual (SRM) fatigue values to ensure that the given threshold and intervals remain valid.

The results of this recalculation identified reduced thresholds and intervals applicable for repairs and Allowable Damage Limits (ADL) affecting the following areas:

- Door cut-out corners of door surrounding panels (forward cargo door, forward passenger (PAX) door, mid PAX door, emergency exit door/PAX door 3, aft cargo door, bulk cargo door, aft PAX door), on both Left Hand (LH) and Right Hand (RH) sides,
- Stringer (STGR) 9 junction between Frame (FR) 10 and FR13 on both LH and RH sides, and
- Fuselage skin doubler repairs on both LH and RH sides.

Failing to apply the reduced thresholds and intervals, could adversely affect the structural integrity of the aeroplane.

To address this unsafe condition, Airbus issued SRM revision dated April 2013 and temporary revision (TR) 53-001 for the STGR9 junction between FR10 and FR13 area (and subsequent revisions) to introduce reduced thresholds and intervals for the affected ADLs and repairs and issued a set of Service Bulletins (SB) to identify the ADLs used and repairs made, as well as to enable operators to update aeroplane repair records.

Consequently EASA issued AD \* \* \*, to require identification of any repairs and/or ADL used to assess or control any structural damage on certain structural areas and, depending on findings, accomplishment of corrective action(s) [including revising the maintenance or inspection program as applicable to incorporate revised thresholds and intervals and repair].

Since that [EASA] AD was issued, data review confirmed that A330 freighter versions are not affected by the unsafe condition.

This [EASA] AD is revised to remove A330-223F and A330-243F from the Applicability.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-0465.

### Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information. The service information describes procedures for updating the airplane repair records with revised thresholds and intervals.

- Airbus Service Bulletin A330-53-3232, dated November 4, 2014.
- Airbus Service Bulletin A330-53-3233, dated September 26, 2014.
- Airbus Service Bulletin A330-53-3234, dated December 8, 2014.
- Airbus Service Bulletin A330-53-3235, Revision 01, dated January 14, 2015.

- Airbus Service Bulletin A340-53-4222, dated November 25, 2014.
- Airbus Service Bulletin A340-53-4223, dated September 26, 2014.
- Airbus Service Bulletin A340-53-4224, dated December 15, 2014.
- Airbus Service Bulletin A340-53-4225, Revision 01, dated January 14, 2015.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

### FAA's Determination and Requirements of This Proposed AD

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

### Costs of Compliance

We estimate that this proposed AD affects 95 airplanes of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be \$16,150, or \$170 per product.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed 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 proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

### List of Subjects in 14 CFR Part 39

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

### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Airbus:** Docket No. FAA–2016–0465; Directorate Identifier 2015–NM–096–AD.

#### (a) Comments Due Date

We must receive comments by April 4, 2016.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to the airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of this AD; manufacturer serial numbers (MSNs) 1 through 1,600 inclusive.

(1) Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(2) Airbus Model A340–211, –212, –213, –311, –312, and –313 airplanes.

#### (d) Subject

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

#### (e) Reason

This AD was prompted by a determination that the compliance times for certain post-repair inspections and certain allowable damage limits (ADLs) must be reduced in order to address fatigue. We are issuing this AD to prevent fatigue damage on primary structure and structural repairs, which could result in reduced structural integrity of the airplane.

#### (f) Compliance

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

#### (g) Records Review

At the applicable times in table 1 to paragraph (g) of this AD, review the airplane maintenance records to identify any structural repair manual (SRM) ADLs used to assess or control any structural damage or any structural repair accomplished as specified in an SRM, as applicable, that have been applied on the areas as specified in table 2 to paragraph (g) of this AD.

TABLE 1 TO PARAGRAPH (g) OF THIS AD—COMPLIANCE TIMES

Affected airplanes	ADL location/repair	Compliance time	Related Service Bulletin
A330–200 Pre-mod 49144 .....	Mid passenger (PAX) door surround panels.	Within 12 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3232, dated November 4, 2014.
A330–200 Pre-mod 49144 .....	Forward cargo door, emergency exit door/PAX door 3, aft cargo door, bulk cargo door, and aft PAX door surround panels.	Within 24 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3232, dated November 4, 2014.
A330–300 Pre-mod 49144 and A340–200/–300 pre-mod 49144.	Mid PAX door surround panels, forward cargo door, emergency exit door/PAX door 3, aft cargo door, bulk cargo door, and aft PAX door surround panels.	Within 24 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3232, dated November 4, 2014 or Airbus Service Bulletin A340–53–4222, dated November 25, 2014.
All, Post-mod 40347 .....	Forward PAX door surround panels with an ADL with a Temporary Life Limit.	Within 12 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3233, dated September 26, 2014 or Airbus Service Bulletin A340–53–4223, dated September 26, 2014.
All, Post-mod 40347 .....	Forward PAX door surround panels with an ADL with a Permanent Acceptance.	Within 24 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3233, dated September 26, 2014 or Airbus Service Bulletin A340–53–4223, dated September 26, 2014.
All .....	STGR9 junction between frame (FR) 10 and FR13.	Within 12 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3235, Revision 01, dated January 14, 2015 or Airbus Service Bulletin A340–53–4225, Revision 01, dated January 14, 2015.
A340–200/–300 Weight Variant (WV)00s.	Forward and rear fuselage .....	Within 12 months after the effective date of this AD.	Airbus Service Bulletin A340–53–4224, dated December 15, 2014.
A340–200/–300 WV00s .....	Nose forward and center fuselage	Within 24 months after the effective date of this AD.	Airbus Service Bulletin A340–53–4224, dated December 15, 2014.

TABLE 1 TO PARAGRAPH (g) OF THIS AD—COMPLIANCE TIMES—Continued

Affected airplanes	ADL location/repair	Compliance time	Related Service Bulletin
A330–200/–300 pre-MOD 49144 and A340–200/–300 WV20s.	Forward and rear fuselage, nose forward and center fuselage.	Within 24 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3234, dated December 8, 2014 or Airbus Service Bulletin A340–53–4224, dated December 15, 2014.
A330–200/–300 post-MOD 49144 and A340–200/–300 post-MOD 49144.	Nose forward and center fuselage	Within 24 months after the effective date of this AD.	Airbus Service Bulletin A330–53–3234, dated December 8, 2014 or Airbus Service Bulletin A340–53–4224, dated December 15, 2014.

TABLE 2 TO PARAGRAPH (g) OF THIS AD—AFFECTED AREAS

Affected areas (on both left-hand and right-hand sides)	As specified in Airbus Service Bulletin—
Door cut-out corners of door surrounding panels (forward cargo door, mid PAX door, emergency exit door/PAX door 3, aft cargo door, bulk cargo door, aft PAX door).	A330–53–3232, dated November 4, 2014 (for Model A330 series airplanes) or A340–53–4222, dated November 25, 2014 (for Model A340 series airplanes).
Forward PAX door surround panels .....	A330–53–3233, dated September 26, 2014 (for Model A330 series airplanes) or A340–53–4223, dated September 26, 2014 (for Model A340 series airplanes).
Fuselage skin doubler repairs .....	A330–53–3234, dated December 8, 2014 (for Model A330 series airplanes) or A340–53–4224, dated December 15, 2014 (for Model A340 series airplanes).
STGR9 junction between FR10 and FR13 .....	A330–53–3235, Revision 01, dated January 14, 2015 (for Model A330 series airplanes) or A340–53–4225, Revision 01, dated January 14, 2015 (for Model A340 series airplanes).

**(h) Corrective Actions**

If, during any review required by paragraph (g) of this AD, it is determined that an SRM ADL was used on an area specified in table 2 to paragraph (g) of this AD to assess or control any structural damage, or any structural repair of an area specified in table 2 to paragraph (g) of this AD was accomplished as specified in the instructions of the applicable SRM revision, dated before April 2013 or SRM temporary revision (TR) dated before November 28, 2014: Within the applicable compliance time specified in table 1 to paragraph (g) of this AD, do the actions specified in paragraph (h)(1) or (h)(2) of this AD, as applicable.

(1) Revise the maintenance or inspection program, as applicable, with the applicable revised thresholds and intervals for the identified structural repairs embodied on the airplane, and accomplish all updated inspections, in accordance with the Accomplishment Instructions of the applicable service information identified in table 2 to paragraph (g) of this AD, except as required by paragraphs (h)(1)(i) and (h)(1)(ii) of this AD.

(i) Where the applicable Airbus service information identified in table 2 to paragraph (g) of this AD specifies to contact Airbus for specific assessment, revise the maintenance or inspection program and accomplish all updated inspections, as applicable, 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).

(ii) Where the Airbus applicable service information identified in table 2 to paragraph (g) of this AD specifies “current SRM,” no

SRM revision dated before April 2013 or SRM TR dated before November 28, 2014, is considered a “current SRM.”

(2) For any repair that was previously allowed in any revision of the Airbus A330 or A340 SRM, as applicable, dated before April 2013; or in any SRM TR dated before November 28, 2014, to the applicable SRM: Make an assessment using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA and perform necessary corrective actions at the applicable times identified therein.

**(i) Limitation on Repair/Replacement**

As of the effective date of this AD, for any structural damage in the areas identified in table 2 to paragraph (g) of this AD that has exceeded the ADL, no repair or replacement may be done using an Airbus A330 or A340 SRM dated before April 2013, or any SRM TR dated before November 28, 2014.

**(j) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM–116, 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: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356;

telephone: 425–227–1138; 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 Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC)*: Except as required by paragraphs (h)(1)(i), (h)(1)(ii), and (h)(2) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

**(k) Related Information**

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD

2015–0101R1, dated June 12, 2015, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–0465.

(2) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 45 80; email: [airworthiness.A330-A340@airbus.com](mailto:airworthiness.A330-A340@airbus.com); Internet: <http://www.airbus.com>. 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.

Issued in Renton, Washington, on February 6, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016–03137 Filed 2–17–16; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2016–0463; Directorate Identifier 2015–NM–155–AD]

RIN 2120–AA64

#### Airworthiness Directives; The Boeing Company Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 777 airplanes. This proposed AD was prompted by a report of an incident involving a landing in which the pilots needed to input corrections due to airplane yaw and roll to the right; the main landing gear (MLG) aft trunnion pin was later found to be fractured. This proposed AD would require identification and replacement of certain MLG aft trunnion pins. We are proposing this AD to prevent a fractured MLG aft trunnion pin, which could result in collapse of the MLG and consequent loss of control of the airplane during landing.

**DATES:** We must receive comments on this proposed AD by April 4, 2016.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, 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. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–0463.

#### 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–2016–0463; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

#### FOR FURTHER INFORMATION CONTACT:

Narinder Luthra, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6513; fax: 415–917–6590; email: [Narinder.Luthra@faa.gov](mailto:Narinder.Luthra@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2016–0463; Directorate Identifier 2015–NM–155–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will

consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

#### Discussion

We have received a report of an incident involving a landing in which the pilots needed to input corrections due to airplane yaw and roll to the right; the MLG aft trunnion pin was later found to be fractured. Other damage included minor damage to the gear beam and trunnion door panel and a broken tie rod. Analysis of the fractured pin showed that the crack started from an area of heat damage introduced during manufacturing. A review of gear overhaul records indicated that other pins manufactured by the same supplier had similar signs of heat damage, suspected to have been caused by abusive chrome grinding. This evidence suggests that the heat damage occurred during manufacturing, so it is possible that other airplanes have aft trunnion pins with similar heat damage. This condition, if not corrected, could result in collapse of the MLG and consequent loss of control of the airplane during landing.

#### Related Service Information Under 14 CFR Part 51

We reviewed Boeing Alert Service Bulletin 777–32A0103, Revision 1, dated December 10, 2015. The service information describes procedures for identifying and replacing certain MLG aft trunnion pins. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

#### FAA’s Determination

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

#### Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.



**Differences Between This Proposed AD and the Service Information**

Boeing Alert Service Bulletin 777–32A0103, Revision 1, dated December 10, 2015, limits the effectivity to Model 777 airplanes, line numbers 1 through 1330 inclusive. However, this proposed AD does not propose to limit the applicability to those line numbers. The applicability of this proposed AD includes all The Boeing Company Model 777–200, 777–200LR, 777–300, 777–300ER, and 777F series airplanes. Because the affected trunnion pins are rotatable parts, we have determined that these parts could later be installed on airplanes that were initially delivered with acceptable pins, thereby subjecting those airplanes to the unsafe condition. This difference has been coordinated with Boeing.

**Explanation of “RC” Steps in Service Information**

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (ARC), to enhance the AD system. One enhancement was a new process for annotating which steps in the service information are required for compliance with an AD. Differentiating these steps from other tasks in the service information is expected to improve an owner's/operator's understanding of crucial AD requirements and help provide consistent judgment in AD compliance. The steps identified as Required for Compliance (RC) in any service information identified previously have a direct effect on detecting, preventing, resolving, or eliminating an identified unsafe condition.

For service information that contains steps that are labeled as RC, the following provisions apply: (1) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD, and an AMOC is required for any deviations to RC steps, including substeps and identified figures; and (2) steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

**Costs of Compliance**

We estimate that this proposed AD affects 123 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

**ESTIMATED COSTS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection .....	2 work-hours × \$85 per hour = \$170 .....	\$0	\$170	\$20,910

We estimate the following costs to do any necessary replacements that would

be required based on the results of the proposed inspection. We have no way of

determining the number of aircraft that might need this repair:

**ON-CONDITION COSTS**

Action	Labor cost	Parts cost	Cost per product
Replacement of aft trunnion pin .....	34 work-hours × \$85 per hour = \$2,890 .....	\$5,291	\$8,181

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

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

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

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

under the criteria of the Regulatory Flexibility Act.

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

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

**The Proposed Amendment**

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

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

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



**The Boeing Company:** Docket No. FAA–2016–0463; Directorate Identifier 2015–NM–155–AD.

**(a) Comments Due Date**

We must receive comments by April 4, 2016.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all The Boeing Company Model 777–200, 777–200LR, 777–300, 777–300ER, and 777F series airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 32, Landing gear.

**(e) Unsafe Condition**

This AD was prompted by a report of an incident involving a landing in which the pilots needed to input corrections due to airplane yaw and roll to the right; the main landing gear (MLG) aft trunnion pin was later found to be fractured. We are issuing this AD to prevent a fractured MLG aft trunnion pin, which could result in collapse of the MLG and consequent loss of control of the airplane during landing.

**(f) Compliance**

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

**(g) Aft Trunnion Pin Identification**

Within 36 months after the effective date of this AD, identify the serial number and marking of the MLG aft trunnion pins, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–32A0103, Revision 1, dated December 10, 2015.

**(h) MLG Aft Trunnion Pin Replacement**

For any MLG aft trunnion pin that begins with serial number “EGL” or “MAL,” on which no “BASE METAL INSPECTED” marking is found, replace with a new or serviceable MLG aft trunnion pin within 36 months after the effective date of this AD, in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–32A0103, Revision 1, dated December 10, 2015.

**(i) Part Installation Prohibition**

As of the effective date of this AD, no person may install, on any airplane, any MLG aft trunnion pin that begins with serial number “EGL” or “MAL” and is not marked “BASE METAL INSPECTED.”

**(j) Credit for Previous Actions**

(1) This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Multi-Operator Message (MOM) MOM–MOM15–0303–01B, dated May 13, 2015, which is not incorporated by reference in this AD.

(2) This paragraph provides credit for the actions specified in paragraphs (g) and (h) of this AD, if those actions were performed

before the effective date of this AD using Boeing Alert Service Bulletin 777–32A0103, dated September 11, 2015, which is not incorporated by reference in this AD.

**(k) 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 (l)(1) of this AD. Information may be emailed to: [9-ANM-Seattle-ACO-AMOC-Requests@faa.gov](mailto: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, modification, or alteration 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. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane and the approval must specifically refer to this AD.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (k)(4)(i) and (k)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

**(l) Related Information**

(1) For more information about this AD, contact Narinder Luthra, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6513; fax: 415–917–6590; email: [Narinder.Luthra@faa.gov](mailto:Narinder.Luthra@faa.gov).

(2) 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 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.

Issued in Renton, Washington, on February 6, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016–03138 Filed 2–17–16; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2016–0464; Directorate Identifier 2015–NM–046–AD]**

**RIN 2120–AA64**

**Airworthiness Directives; Fokker Services B.V. Airplanes**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for all Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes. This proposed AD was prompted by the need for more restrictive airworthiness limitations. This proposed AD would require revising the maintenance program or inspection program, as applicable, to incorporate certain maintenance requirement tasks, thresholds, and intervals. We are proposing this AD to reduce the potential for significant failure conditions and consequent loss of controllability of the airplane.

**DATES:** We must receive comments on this proposed AD by April 4, 2016.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

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

For service information identified in this NPRM, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone +31 (0)88–6280–

350; fax +31 (0)88-6280-111; email [technicalservices@fokker.com](mailto:technicalservices@fokker.com); Internet <http://www.myfokkerfleet.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-2016-0464; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-1137; fax 425-227-1149.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2016-0464; Directorate Identifier 2015-NM-046-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

##### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015-0027, dated February 20, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Fokker

Services B.V. Model F.28 Mark 0070 and 0100 airplanes. The MCAI states:

Fokker Services published issue 11 of Engineering Report SE-473, containing Certification Maintenance Requirements (CMRs). This report is Part 1 of the Airworthiness Limitations Section (ALS Part 1) of the Instructions for Continued Airworthiness, referred to in Section 06, Appendix 1, of the Fokker 70/100 Maintenance Review Board (MRB) document.

The complete ALS currently consists of: Part 1—Report SE-473 (CMRs), Part 2—Report SE-623, Airworthiness Limitation Items (ALIs) and Safe Life Items (SLIs), and Part 3—Report SE-672, Fuel ALIs and Critical Design Configuration Control Limitations (CDCCs).

The instructions contained in those reports have been identified as mandatory actions for continued airworthiness.

For the reasons described above, this [EASA] AD requires implementation of the maintenance actions as specified in ALS Part 1 of the Instructions for Continued Airworthiness, Fokker Services Engineering Report SE-473 at issue 11.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-0464.

#### Related Service Information Under 1 CFR Part 51

Fokker Services B.V. has issued Engineering Report, Airworthiness Limitations Section (ALS), “Fokker 70/100 Certification Maintenance Requirements,” of Fokker Services B.V. Engineering Report SE-473, Issue 11, released January 19, 2015. This service information describes certification maintenance requirements. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

#### FAA’s Determination and Requirements of This Proposed AD

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

This proposed AD would require revisions to certain operator maintenance documents to include new actions (e.g., inspections). Compliance with these actions is required by 14 CFR

91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (i)(1) of this proposed AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

#### Differences Between This Proposed AD and the MCAI or Service Information

The MCAI specifies that if there are findings from the ALS inspection tasks, corrective actions must be accomplished in accordance with Fokker Services B.V. maintenance documentation or by contacting Fokker Services B.V. for repair instructions, and provides for varying compliance times for the corrective actions depending on the inspection findings. However, this proposed AD does not include that requirement. Operators of U.S.-registered airplanes are required by general airworthiness and operational regulations to perform all maintenance before further flight using methods that are acceptable to the FAA. We consider those methods to be adequate to address any corrective actions necessitated by the findings of ALS inspections required by this proposed AD.

#### Costs of Compliance

We estimate that this proposed AD affects 8 airplanes of U.S. registry.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be \$680, or \$85 per product.

#### Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. “Subtitle VII: Aviation Programs,” describes in more detail the scope of the Agency’s authority.

We are issuing this rulemaking under the authority described in “Subtitle VII, Part A, Subpart III, Section 44701: General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for

safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

### Regulatory Findings

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

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

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

### List of Subjects in 14 CFR Part 39

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

### The Proposed Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Fokker Services B.V.:** Docket No. FAA–2016–0464; Directorate Identifier 2015–NM–046–AD.

#### (a) Comments Due Date

We must receive comments by April 4, 2016.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes, certificated in any category, all serial numbers.

#### (d) Subject

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

#### (e) Reason

This AD was prompted by the need for more restrictive airworthiness limitations. We are issuing this AD to reduce the potential for significant failure conditions and consequent loss of controllability of the airplane.

#### (f) Compliance

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

#### (g) Maintenance Program Revision

(1) Within 12 months after the effective date of this AD, revise the maintenance or inspection program, as applicable, to incorporate the certification maintenance requirements (CMR) specified in Fokker Services B.V. Engineering Report, Airworthiness Limitations Section (ALS), "Fokker 70/100 Certification Maintenance Requirements," of Fokker Services B.V. Engineering Report SE–473, Issue 11, released January 19, 2015.

(2) Do the applicable initial CMR inspection at the time specified in paragraph (g)(2)(i) or (g)(2)(ii) of this AD, as applicable, as specified in Fokker Services B.V. Engineering ALS, "Fokker 70/100 Certification Maintenance Requirements," Fokker Services B.V. Engineering Report SE–473, Issue 11, released January 19, 2015. If any discrepancy is found during any inspection, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency; or Fokker B.V. Service's EASA Design Organization Approval (DOA). Repair any discrepancy before further flight.

(i) For CMR inspection 783100–CM–01: Within 1 year or 3,000 flight hours after the effective date of this AD, whichever occurs first, but not later than 12,000 flight hours after accomplishing MRB task 783100–00–04.

(ii) For CMR inspection 783500–CM–01: Within 1 year or 3,000 flight hours after the effective date of this AD, whichever occurs first, but not later than 10,000 flight hours after accomplishing MRB task 783100–01–01.

#### (h) No Alternative Inspections or Inspection Intervals

After accomplishment of the actions specified in paragraph (g)(2) of this AD, no alternative actions (e.g., inspections) and intervals, may be used, unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i)(1) of this AD.

#### (i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; 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 the European Aviation Safety Agency (EASA); or Fokker Services B.V.'s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

#### (j) Related Information

(1) Refer to MCAI EASA Airworthiness Directive 2015–0027, dated February 20, 2015, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2016–0464.

(2) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone +31 (0)88–6280–350; fax +31 (0)88–6280–111; email [technicalservices@fokker.com](mailto:technicalservices@fokker.com); Internet <http://www.myfokkerfleet.com>. 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.

Issued in Renton, Washington, on February 6, 2016.

**Michael Kaszycki,**

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

[FR Doc. 2016–03136 Filed 2–17–16; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[Docket No. USCG–2015–0940]

RIN 1625–AA09

### Drawbridge Operation Regulation; Indian Creek, Miami Beach, FL

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to modify the operating schedule that governs the 63rd Street Bridge across Indian Creek, mile 4.0, at Miami Beach, FL. This proposed rule implements restrictions that allow the bridge to not open for vessels during peak vehicle traffic times. Bridge openings during peak vehicle traffic times cause major traffic jams that may be avoided without negatively impacting vessel traffic on the Indian Creek. Modifying the bridge operating schedule will reduce major vehicle traffic issues during rush hour times.

**DATES:** Comments and related material must reach the Coast Guard on or before April 18, 2016.

**ADDRESSES:** You may submit comments identified by docket number USCG–2015–0940 using Federal eRulemaking Portal at <http://www.regulations.gov>.

See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or email Mr. Rod Elkins with the Coast Guard; telephone 305–415–6989, email [rodneym.j.elkins@uscg.mil](mailto:rodneym.j.elkins@uscg.mil).

**SUPPLEMENTARY INFORMATION:****I. Table of Abbreviations**

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
E.O. Executive Order  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

**II. Background, Purpose and Legal Basis**

On March 11th, 2015 the Miami Beach City Commission held a public meeting to discuss appropriate action for modifying the bridge operations. Additionally, the City conducted traffic studies and reviewed the bridge logs which showed a 45% increase in vehicular traffic from 7 a.m. to 10 a.m. and 4 p.m. to 7 p.m. with no corresponding increase in vessel traffic during those time periods. Input from the public meeting and the traffic data was used to develop the proposed rule. That data will be included in the electronic docket for this proposed rulemaking.

63rd Street Bridge across Indian Creek, mile 4.0, at Miami Beach, FL is a single leaf bascule bridge. It has a vertical clearance of 11 feet at mean high water in the closed position and a horizontal clearance of 50 feet.

Presently, in accordance with 33 CFR 117.5, the 63rd Street Bridge is required to open on signal for the passage of vessels. The City of Miami Beach and Miami Dade County determined that restricting bridge openings during peak traffic hours will significantly reduce traffic congestion. Based on this determination, the City of Miami Beach requested this action to alleviate additional traffic congestion created by bridge openings during peak hours.

In addition to proposing a schedule that will allow for limited openings during the regular work week, the Coast Guard is proposing a regulation change that will apply during the annual boat show. Every year in mid-February the City of Miami Beach hosts the Yacht and Brokerage Show which creates unusually high vehicle and vessel traffic during the weeks before and after the show. The Coast Guard typically issues temporary deviations to the 63rd Street Bridge operations that help balance vessel and vehicle needs during those times. The Coast Guard proposes adopting the annual temporary deviation as part of this bridge regulation.

**III. Discussion of Proposed Rule**

The Coast Guard proposes to add a new regulation for the operations of the 63rd Street Bridge, Indian Creek mile 4.0, at Miami Beach. The proposed regulation would implement three closure periods, which would allow the bridge to not open for vessels during morning and afternoon peak vehicle traffic times. The following schedule is proposed: (1) From Monday through Friday from 7 a.m. to 7 p.m. the bridge would only open on the hour and half hour; (2) from 7:10 a.m. to 9:55 a.m. and 4:05 p.m. to 6:59 p.m. Monday through Friday, the bridge would remain closed; and (3) from 10 a.m. to 4 p.m. the seven days before and the four days following the City of Miami Beach Yacht and Brokerage Show the second week of February, the bridge would only open for ten minutes at the top of the hour. For federal holidays, weekends, and other times the bridge would continue to open for vessels on signal.

These proposed changes will still allow vessels to pass through the bridge while taking into account the reasonable needs of other modes of transportation.

**IV. Regulatory Analyses**

We developed this proposed rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes and E.O.s and we also discuss First Amendment rights of protestors.

**A. Regulatory Planning and Review**

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a “significant regulatory action,” under E.O. 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the limited impact that it is anticipated to have on vessel traffic on the Indian Creek while taking into account the needs of vehicular traffic. Vessels that can transit under the bridge without an opening may do so. Other vessels can transit during non closure period times, and emergency vessels and tugs with tows can still request openings at any time.

**B. 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 would not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a significant economic impact on any vessel owner or operator.

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.

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.

### C. Collection of Information

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

### D. Federalism and Indian Tribal Government

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 have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, 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. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

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

### F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guides 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 which do not individually or cumulatively have a significant effect on the human environment. This proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

### G. 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.

### V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. 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.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this notice, and all public comments, are in our online docket at <http://www.regulations.gov> and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

### List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

### PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 117.293 to read as follows:

#### § 117.293 Indian Creek.

The draw of the 63rd Street Bridge, Indian Creek mile 4.0, at Miami Beach, shall open on signal except as follows:

(a) From 7 a.m. to 7 p.m., Monday through Friday except Federal holidays, the draw need open only on the hour and half-hour.

(b) From 7:10 a.m. to 9:55 a.m. and 4:05 p.m. to 6:59 p.m., Monday through Friday except Federal holidays, the draw need not open for the passage of vessels.

(c) In February of each year during the period seven days prior to the City of Miami Beach Yacht and Brokerage Show and the four days following the show, from 10:00 a.m. to 4:00 p.m., the bridge need not open except for 10 minutes at the top of the hour. At all other times the bridge shall operate on its normal schedule.

Dated: February 11, 2016.

**S.A. Buschman,**

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

[FR Doc. 2016–03262 Filed 2–17–16; 8:45 am]

**BILLING CODE 9110–04–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MB Docket No. 16–29, RM–11758; DA 16–139]

#### Television Broadcasting Services; Scottsbluff, Nebraska and Sidney, Nebraska

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission has before it a petition for rulemaking filed by Gray Television License, LLC, proposed assignee of KDUH-TV, Scottsbluff, Nebraska and New Rushmore Radio, Inc., the licensee of station KDUH-TV, channel 7, Scottsbluff, Nebraska (collectively “Petitioners”), requesting an amendment of the DTV Table of Allotments to delete channel 7 at Scottsbluff and substitute channel 7 at Sidney, Nebraska. While the Commission instituted a freeze on the acceptance of full power television rulemaking petitions requesting channel substitutions in May 2011, Petitioners are seeking a waiver asserting that because the proposed change in community of license does not involve any proposed change in technical facilities, grant of the petition would not impact on the Post-Transition Table of DTV Allotments. Petitioners believe that a waiver here would serve the public interest and that community in Sidney would remain well-served after reallocation.

**DATES:** Comments must be filed on or before March 21, 2016, and reply comments on or before April 4, 2016.

**ADDRESSES:** Federal Communications Commission, Office of the Secretary, 445 12th Street SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Gray Television License, LLC, c/o Cooley LLP, John R. Feore, Jr. Esq. and Derek Teslik, Esq., 1299 Pennsylvania Avenue NW., Suite 700, Washington, DC 20004; New Rushmore Radio Inc., c/o Law Office of Jack N. Goodman, Jack N. Goodman, Esq., 1200 New Hampshire Ave. NW., Suite 600, Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Adrienne Y. Denysyk, [adrienne.denysyk@fcc.gov](mailto:adrienne.denysyk@fcc.gov), Media Bureau, (202) 418–2561.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission’s Notice of Proposed Rule Making, MB Docket No. 16–29, adopted February 8, 2016, and

released February 8, 2016. The full text of this document is available for public 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 will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.). To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission’s Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden “for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts (other than *ex parte* presentations exempt under 47 CFR 1.1204(a)) are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1208 for rules governing restricted proceedings.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.  
**Thomas Horan,**  
*Chief of Staff, Media Bureau.*

#### Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 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.

#### § 73.622 [Amended]

- 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Nebraska is amended by removing channel 7 at Scottsbluff.
- 3. Section 73.622(i), the Post-Transition Table of DTV Allotments under Nebraska is amended by adding Sidney.
- 4. Section 73.622(i), the Post-Transition Table of DTV allotments under Nebraska is amended by adding channel 7 at Sidney.

[FR Doc. 2016–03345 Filed 2–17–16; 8:45 am]

**BILLING CODE** 6712–01–P

## SURFACE TRANSPORTATION BOARD

### 49 CFR Parts 1241, 1242, 1243, 1244, 1245, 1246, 1247, and 1248

[Docket No. EP 701]

#### Accelerating Reporting Requirements for Class I Railroads

**AGENCY:** Surface Transportation Board.  
**ACTION:** Proposed rule, withdrawn.

**SUMMARY:** The Board is withdrawing the proposed rules and discontinuing the EP 701 rulemaking proceeding which proposed to accelerate the filing deadlines for certain financial, employee, and traffic reports submitted by Class I railroads.

**DATES:** The proposed rule is withdrawn and the rulemaking proceeding is discontinued on February 18, 2016.

**FOR FURTHER INFORMATION CONTACT:** Pedro Ramirez, (202) 245–0333. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** On July 8, 2015, the Board issued a Notice of Proposed Rulemaking (NPRM) seeking public comment on a proposal to accelerate the filing deadlines for certain financial, employee, and traffic reports submitted by Class I railroads.<sup>1</sup> The Board has authority to collect financial and statistical data from railroads as necessary for the economic oversight of the industry. 49 U.S.C. 1321(b),<sup>2</sup> 11145. To this end, the Board’s regulations require Class I railroads to submit annual, quarterly, and monthly reports containing financial and operating statistics, including employment and traffic data.

<sup>1</sup> The NPRM was published in the **Federal Register** on July 8, 2015 (80 FR 39045).

<sup>2</sup> The recently enacted Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110, recodifies provisions of title 49, United States Code, redesignating 49 U.S.C. 721, as § 1321.

49 U.S.C. 11145; 49 CFR 1241–1248. The data collected is used by the Board in various proceedings, as well as by other governmental agencies and interested parties in evaluating the railroad industry.

In the NPRM, the Board proposed changing the filing deadlines for a number of these reports. Specifically, the NPRM proposed the following deadlines: Schedule 250 would be filed by March 31 each year, at the same time as the Annual Report Form R–1; Quarterly Report Form RE&I, Form CBS, Quarterly Wage Forms A & B, and Reports of Fuel Cost, Consumption, and Surcharge Revenue would be filed within 15 days after the end of each quarter; Annual Wage Forms A & B and Annual Form QCS would be filed 30 days after the end of each year; Quarterly Form QCS would be filed 30 days after the end of each quarter; Form STB–54 would be filed within 60 days after the end of each year; and Form C would be filed 10 days after the end of each month.

The NPRM also proposed to: Update several form titles; clarify the method by which carriers arrive at the number of employees reported on Form C, pursuant to part 1246; replace references to the “Interstate Commerce Act” with “pt. A of subtitle IV of tit. 49,

United States Code” between 49 CFR parts 1241 and 1248 to accurately describe the current controlling statute; and eliminate the requirement of railroads to file duplicate copies of reports, with the exception of the Annual Report Form R–1, which requires hard copies to be filed.

On August 21, 2015, the AAR filed comments on the proposed rules. AAR expresses concern that the proposed accelerated deadlines would impose significant burdens while not conferring a public benefit. (AAR Comment 7.) AAR states that the proposed deadlines for the STB reports would be incompatible with and would create additional reporting obligations for the railroads under Securities and Exchange Commission (SEC) regulations. (*Id.* at 10–12.) AAR also states that accelerated deadlines could cause investor confusion because the information in Board filings is based on a different corporate entity than information in the SEC filings, and there are also differences in accounting between Board reports and SEC reports. (*Id.* at 13.)

Based on AAR’s comments, the proposed rules could impose a significant burden on the railroads and conflict with SEC reporting requirements. No other comments were

submitted. Therefore, we will not adopt the proposed accelerated deadlines and will discontinue this proceeding.

However, some of the nonsubstantive updates that the Board proposed will be adopted in *Improving Regulation and Regulatory Review*, EP 712. These updates include changing the following form titles: “Form MRRE” to “Form C” (49 CFR 1246.1) and; “Form QRSC” and “Form ARSC” to “Quarterly Wage Forms A & B” and “Annual Wage Forms A & B” respectively (49 CFR 1245.2). In that proceeding, we will also eliminate the requirement for railroads to file duplicate copies of reports, with the exception of the Annual Report Form R–1, which requires hard copies to be filed.

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

Decided: February 11, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

**Brendetta S. Jones,**

*Clearance Clerk.*

[FR Doc. 2016–03332 Filed 2–17–16; 8:45 am]

**BILLING CODE 4915–01–P**



# Notices

Federal Register

Vol. 81, No. 32

Thursday, February 18, 2016

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 COMMERCE

### Foreign-Trade Zones Board

[B-53-2015]

#### Application for Additional Production Authority; The Coleman Company, Inc.; Subzone 119I; (Textile-Based Personal Flotation Devices); Change of Location for Public Hearing

A public hearing has been scheduled for February 24, 2016, at 9:30 a.m., on the application for additional production authority submitted by The Coleman Company, Inc., for activity within Subzone 119I in Sauk Rapids, Minnesota (see 80 FR 79820, December 23, 2015). The location for the hearing has been changed to Room 48019, U.S. Department of Commerce, Hoover Building, 1401 Constitution Avenue NW., Washington, DC 20230.

For further information, contact Pierre Duy at [Pierre.Duy@trade.gov](mailto:Pierre.Duy@trade.gov) or (202) 482-1378.

Dated: February 12, 2016.

**Pierre V. Duy,**

*Acting Executive Secretary.*

[FR Doc. 2016-03423 Filed 2-17-16; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-570-849]

#### Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Initiation of Circumvention Inquiry on Antidumping Duty Order

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* February 18, 2016.

**SUMMARY:** In response to a request from Nucor Corporation and SSAB Enterprises LLC (collectively "Domestic

Producers"), the Department of Commerce ("Department") is initiating a circumvention inquiry, pursuant to section 781(c) of the Tariff Act of 1930, as amended (the "Act"), to determine whether certain imports of certain cut-to-length carbon steel plate ("CTL plate") are circumventing the antidumping duty order on CTL plate from the People's Republic of China ("PRC").<sup>1</sup>

#### FOR FURTHER INFORMATION CONTACT:

Patrick O'Connor or Thomas Martin, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-0989, and (202) 482-3936, respectively.

**SUPPLEMENTARY INFORMATION:** On June 17, 2015, Domestic Producers requested that the Department make a final circumvention ruling within 45 days pursuant to 19 CFR 351.225(c)(2) and (d) with respect to CTL plate from the PRC with small amounts of any alloying elements added so as to classify the steel as alloy steel under the Harmonized Tariff Schedule of the United States ("HTSUS"), regardless of exporter or importer.<sup>2</sup> As a result of further clarification and comments regarding Domestic Producers' allegation, we extended the deadline to make a final ruling or initiate a circumvention inquiry until February 10, 2016.<sup>3</sup>

Domestic Producers alleged that producers, exporters and importers are

circumventing the *Order* by adding alloying elements (*i.e.*, making minor alterations) to CTL plate that is otherwise ASTM A36 and A572 commodity-grade steel plate.<sup>4</sup> Domestic Producers provided business proprietary evidence which they believe supports their allegation.<sup>5</sup>

Domestic Producers noted that there is a history of evading the *Order*, and that the Department has made two separate circumvention determinations with regard to CTL plate from the PRC. In the first determination, the Department found that merchandise produced by Tianjin Iron and Steel Co., Ltd. and merchandise imported by Toyota Tsusho America Inc., regardless of producer or exporter, containing 0.0008 percent or more boron, by weight, and otherwise meeting the description of in-scope merchandise is subject to the *Order* unless the merchandise meets all of the following requirements: (1) An aluminum level of 0.02 percent or greater, by weight; (2) a ratio of 3.4 to 1 or greater, by weight, of titanium to nitrogen; and (3) a hardenability test (*i.e.*, Jominy test) result indicating a boron factor of 1.8 or greater.<sup>6</sup> In the second determination, the Department found "that it is appropriate to consider all plate with at least 0.0008 percent boron content and otherwise meeting the description of the scope to be covered by the order, unless the merchandise also possesses the three distinguishing characteristics referenced above."<sup>7</sup> The Department

<sup>4</sup> See 781(c) of the Act; *see also* Letter from Domestic Producers regarding, "Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Re-submission of Request for Circumvention Ruling," dated June 17, 2015 ("Domestic Producers' Request").

<sup>5</sup> See Memorandum from Thomas Martin to the File, regarding "Anti-Circumvention Inquiry on Certain Cut-To Length Carbon Steel Plate ("CTL plate"), from the People's Republic of China: Initiation of Antidumping Circumvention Inquiry" with the subject "Memorandum of Business Proprietary Information Accompanying the Notice of Initiation of Antidumping Circumvention Inquiry," dated concurrently with this notice ("Alloying Elements Circumvention BPI Memorandum") at Note 1.

<sup>6</sup> See *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 74 FR 40565 (August 12, 2009) ("Toyota Tsusho Circumvention Final Determination").

<sup>7</sup> See *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate From the*

Continued

<sup>1</sup> See *Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China; Termination of Suspension Agreement and Notice of Antidumping Duty Order*, 68 FR 60081 (October 21, 2003) ("Order").

<sup>2</sup> Domestic Producers initially filed versions of their request on April 30, 2015 (Business Proprietary) and May 1, 2015 (Public Version), but these submissions were rejected by the Department due to filing deficiencies. See Letter from Robert Bolling to Domestic Producers, "Re: Rejection of Submission- Certain Cut-To-Length Carbon Steel Plate from the People's Republic of China," dated June 9, 2015 letter.

<sup>3</sup> See Letter from Abdelali Elouaradia to Petitioners, "Re: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Request for Circumvention Ruling," dated January 13, 2016. The Department tolled this deadline by four business days. See Memorandum from Ron Lorentzen to The Record, "Tolling of Administrative Deadlines as a Result of the Government Closure during Snowstorm 'Jonas,'" dated January 27, 2016.



also found it appropriate to apply its second determination “on a countrywide basis, given that multiple parties have been found to be circumventing the order using the same general approach (*i.e.*, inclusion of small inconsequential amounts of an alloying element in order to change the tariff classification from non-alloy to alloy steel).”<sup>8</sup>

Domestic Producers contended that PRC producers are now adding other alloying elements, in addition to boron, to otherwise subject CTL plate in order to circumvent the *Order*.<sup>9</sup> According to Domestic Producers, PRC manufacturers have an incentive to produce the CTL plate at issue to circumvent antidumping duties, and only began adding certain alloying elements in response to the *Order* and the Department’s prior circumvention findings.<sup>10</sup> Domestic Producers stated that another possible motivation for PRC CTL plate producers to add other alloying elements to their plate, such as chromium, is the PRC government’s cancellation of the Value Added Tax (“VAT”) export rebate for steel with boron added. CTL plate with other alloys continues to receive the VAT rebate.<sup>11</sup> Domestic Producers submitted news articles to support this contention.<sup>12</sup>

On July 6, 2015, the Department identified various areas of the Domestic Producers’ Request that required clarification and therefore issued questions to them.<sup>13</sup> On July 22, 2015, Domestic Producers submitted their responses to those questions.<sup>14</sup> In their responses, Domestic Producers clarified the names and addresses of the exporters and importers of the product that they believe is being produced to circumvent the *Order*.<sup>15</sup> Regarding the PRC government’s cancellation of VAT rebates for steel with boron added, Domestic Producers submitted an official announcement from the PRC government’s Ministry of Finance,

cancelling the rebate program.<sup>16</sup> Domestic Producers also clarified that 80 percent of the market for commodity-grade carbon steel plate meets ASTM specifications A36 and A572, and that there is no overlap between these specifications and alloy steel specifications that require heat treatment, have a higher tensile strength, and require minimum levels of nickel, chromium, and molybdenum.<sup>17</sup>

Domestic Producers also stated that the exclusion criteria in *Toyota Tsusho Circumvention Final Determination* is specific to boron’s intended purpose of increasing hardenability in steel that has been heat treated, and is not relevant to other alloying elements such as chromium and titanium.<sup>18</sup> They contended that the addition of alloying elements to steel plate is only useful when steel plate is heat treated, which has a substantial cost, and PRC producers are not heat treating the steel plate at issue.<sup>19</sup> Domestic Producers claimed that commodity-grade carbon steel plate of ASTM specifications A36 and A572 is not heat-treated.<sup>20</sup> Thus, Domestic Producers contended that there is no reason to produce CTL plate which meets the exclusion criteria in *Toyota Tsusho Circumvention Final Determination*, but that is not heat treated, other than to circumvent the *Order*. According to Domestic Producers, it is possible to determine from mill test certificates whether CTL steel plate has been heat treated.<sup>21</sup> Domestic Producers provided relevant business proprietary evidence in their supplemental submission.<sup>22</sup>

On August 5, 2015, Wuyang Iron and Steel Co., Ltd. (“Wuyang”) commented on Domestic Producers’ First Supplemental Submission.<sup>23</sup> Wuyang contended that although Domestic Producers requested the Department to initiate a circumvention inquiry regarding all alloys, Domestic Producers failed to identify any alloy, other than boron, chromium and titanium, which they claim PRC producers add to steel plate, and failed to claim whether adding any of the other alloys can actually have a beneficial effect on

steel.<sup>24</sup> Further, Wuyang stated that Domestic Producers should not be permitted to add heat treatment to the three-part test to exclude CTL plate with at least 0.0008 percent boron content from the *Order*, (the exception established in *Toyota Tsusho Circumvention Final Determination*), without specifying whether the heat treatment must occur before or after importation, how U.S. Customs and Border Protection (“CBP”) can administer such a proposed rule, and what alloy ASTM specifications are at issue.<sup>25</sup>

On August 28, 2015, the Department issued another request for information to Domestic Producers,<sup>26</sup> to which they responded on September 11, 2015.<sup>27</sup> In their response, Domestic Producers clarified that their request covers steel plate with any alloy listed in note (f) of Chapter 72 of the HTSUS at levels that would allow the plate to be classified as alloy steel under the HTSUS, that is marketed, priced or sold in the United States as commodity-grade carbon steel plate or made to specifications considered to be carbon steel specifications in the market (*e.g.*, ASTM specifications A36 and A572).<sup>28</sup> For further support of their claim that PRC producers are adding alloying elements other than boron, chromium and titanium to CTL plate to circumvent the *Order*, Domestic Producers submitted news articles regarding PRC steel overproduction, as well as information regarding a circumvention inquiry in Australia.<sup>29</sup> Domestic Producers claimed that adding any alloys to commodity-grade steel plate has no commercial or metallurgical purpose other than to change the tariff classification of the plate in the HTSUS.<sup>30</sup> Domestic Producers also explicitly stated that the three-part exclusion established in *Toyota Tsusho Circumvention Final Determination* is no longer a legitimate or reliable exclusion for the *Order*, and that the Department should analyze boron in the

People’s Republic of China, 76 FR 50996 (August 17, 2011) (“*Wuyang Circumvention Final Determination*”).

<sup>8</sup> *Id.* at 50997.

<sup>9</sup> See Domestic Producers’ Request at 12–15.

<sup>10</sup> *Id.* at 21–23.

<sup>11</sup> *Id.* at 10–11.

<sup>12</sup> *Id.* at Exhibits 6–7.

<sup>13</sup> See Letter from Howard Smith, “Re: Certain Cut-To-Length Carbon Steel Plate (“CTL Carbon Plate”) from the People’s Republic of China (“PRC”): Anti-circumvention Ruling Request,” dated July 6, 2015.

<sup>14</sup> See Letter from Domestic Producers regarding, “Certain Cut-to-Length Carbon Steel Plate From the People’s Republic of China: Supplemental Response to Questions Regarding Petitioners’ Request for an Anti-Circumvention Ruling,” dated July 22, 2015 (“First Supplemental Submission”).

<sup>15</sup> See First Supplemental Submission at 5.

<sup>16</sup> *Id.* at Exhibit 9.

<sup>17</sup> *Id.* at 6–8.

<sup>18</sup> *Id.* at 5–6.

<sup>19</sup> *Id.* at 12–13, 14, 17, 23–24.

<sup>20</sup> *Id.* at 14, 17, 23–24.

<sup>21</sup> *Id.* at 12–13.

<sup>22</sup> See Alloying Elements Circumvention BPI Memorandum at Note 2.

<sup>23</sup> See Letter from Wuyang regarding “Circumvention Inquiry of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate From China: Comments on Petitioners’ Response to Supplemental Questionnaire regarding Anti-Circumvention Ruling Request” dated August 5, 2015 (“Wuyang Comments”).

<sup>24</sup> See Wuyang Comments at 4, 6.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> See Letter from Howard Smith, “Re: Certain Cut-To-Length Carbon Steel Plate (“CTL Carbon Plate”) from the People’s Republic of China (“PRC”): Anti-circumvention Ruling Request,” dated August 28, 2015.

<sup>27</sup> See Letter from Domestic Producers regarding, “Certain Cut-to-Length Carbon Steel Plate From the People’s Republic of China: Second Supplemental Response to Questions Regarding Petitioners’ Request for an Anti-Circumvention Ruling,” dated September 11, 2015 (“Second Supplemental Submission”).

<sup>28</sup> See Second Supplemental Submission at 3.

<sup>29</sup> *Id.* at 5–6.

<sup>30</sup> *Id.* at 7–8.

same manner as any other alloy.<sup>31</sup> Domestic Producers also stated that ASTM specification A36 steel would not be classifiable as alloy steel in the HTSUS due to its manganese or silicon content because this ASTM specification has a maximum range for manganese and silicon below the thresholds in note (f) of Chapter 72 of the HTSUS.<sup>32</sup> According to Domestic Producers, the application of the circumvention inquiry to ASTM specifications A36 and A572 would be easily enforced by CBP since these specifications are identified in mill test certificates and also marked on the steel itself.<sup>33</sup> However, Domestic Producers also requested that all “commodity-grade” steel plate be covered by the circumvention inquiry in case any ASTM specifications are eliminated, changed or developed in the future.<sup>34</sup>

On November 18, 2015, the Department again issued a request for information to the Domestic Producers requesting clarification of certain previously submitted evidence and additional evidence relating to their allegation.<sup>35</sup> On November 24, 2015, Domestic Producers submitted their response to the request for information.<sup>36</sup> In their response, Domestic Producers provided evidence that is business proprietary.<sup>37</sup>

On January 20, 2016, Domestic Producers submitted additional business proprietary factual support for their request for a circumvention inquiry.<sup>38</sup>

### Scope of the Order

The product covered by the order is certain cut-to-length carbon steel plate from the PRC. Included in this description is hot-rolled iron and non-alloy steel universal mill plates (*i.e.*,

flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain iron and non-alloy steel flat-rolled products not in coils, of rectangular shape, hot-rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 mm or more in thickness and of a width which exceeds 150 mm and measures at least twice the thickness. Included as subject merchandise in the order are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been “worked after rolling”)—for example, products which have been bevelled or rounded at the edges. This merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive. Specifically excluded from subject merchandise within the scope of the order is grade X-70 steel plate.

### Merchandise Subject to the Minor Alterations Antidumping Duty Circumvention Inquiry

For the reasons explained below in the “Conclusion” section of this notice, we have not initiated this circumvention inquiry on all of the products described in Domestic Producers’ Request. Rather, this circumvention inquiry covers all CTL plate from the PRC made to ASTM A36 or A572 specifications with levels of chromium or titanium above the levels identified in note (f), “Other alloy steel”, of Chapter 72 of the HTSUS. This inquiry also covers all CTL plate from the PRC made to ASTM A36 or A572 specifications which contains levels of boron above the levels identified in note (f) of Chapter 72 of the HTSUS and which has not been heat treated to meet tensile and hardness requirements

beyond commodity-grade ASTM specifications. This inquiry will cover U.S. imports of all CTL plate from the PRC.

### Initiation of Minor Alterations Antidumping Duty Circumvention Proceeding

Section 781(c)(1) of the Act provides that the class or kind of merchandise subject to an antidumping duty order shall include articles “altered in form or appearance in minor respects . . . whether or not included in the same tariff classification.” The Department notes that, while the statute is silent as to what factors to consider in determining whether alterations are properly considered “minor,” the legislative history of this provision indicates there are certain factors which should be considered before reaching a circumvention determination. In conducting a circumvention inquiry under section 781(c) of the Act, the Department has generally relied upon “such criteria as the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products.”<sup>39</sup>

### Overall Physical Characteristics

According to Domestic Producers, the CTL plate at issue is made in nearly the same manner, made to the same specifications, and has the same physical characteristics as carbon steel plate. Domestic Producers claimed that the effect of the added alloying elements is negligible.<sup>40</sup> Specifically, Domestic Producers claimed that commodity-grade carbon steel plate of ASTM specifications A36 and A572 is not heat-treated, and thus cannot achieve the hardenability of alloy steel by adding alloys.<sup>41</sup> Thus, Domestic Producers maintained that CTL plate with small amounts of alloying elements that is considered commodity-grade steel plate has the same physical characteristics as subject CTL plate.<sup>42</sup>

### Expectations of the Ultimate Users

Domestic Producers contended that the ultimate users purchasing the CTL

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.* at 12–14; *see also* Alloying Elements Circumvention BPI Memorandum at Note 3.

<sup>33</sup> *See* Second Supplemental Submission at 15.

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *See* Letter from Howard Smith, “Re: Certain Cut-To-Length Carbon Steel Plate (“CTL Carbon Plate”) from the People’s Republic of China (“PRC”): Anti-circumvention Ruling Request,” dated November 18, 2015.

<sup>36</sup> *See* Letter from Domestic Producers regarding, “Certain Cut-to-Length Carbon Steel Plate From the People’s Republic of China: Third Supplemental Response to Questions Regarding Petitioners’ Request for an Anti-Circumvention Ruling,” dated November 24, 2015 (“Third Supplemental Submission”).

<sup>37</sup> *See* Alloying Elements Circumvention BPI Memorandum at Note 4.

<sup>38</sup> *See* Letter from Domestic Producers, “Re: Certain Cut-To-Length Carbon Steel Plate (“CTL Carbon Plate”) from the People’s Republic of China (“PRC”): Request to Issue Final Ruling Or Initiate Anti-Circumvention Inquiry,” dated January 20, 2016 and Alloying Elements Circumvention BPI Memorandum at Note 5.

<sup>39</sup> *See* S. Rep. No. 71, 100th Cong., 1st Sess. 100 (1987) (“In applying this provision, the Commerce Department should apply practical measurements regarding minor alterations, so that circumvention can be dealt with effectively, even where such alterations to an article technically transform it into a differently designated article.”)

<sup>40</sup> *See* Domestic Producers’ Request at 16–17.

<sup>41</sup> *See* First Supplemental Submission at 14, 17, 23–24.

<sup>42</sup> *See* Alloying Elements Circumvention BPI Memorandum at Note 6.

plate at issue with elevated levels of alloys expect a commodity-grade, rather than a specialty alloy, product because of the way the product is represented to purchasers, and because of its price.<sup>43</sup> Also, according to Domestic Producers, information in recent administrative reviews of the *Order* indicating that no importers entered steel plate from the PRC into the United States as subject merchandise, supports the belief that the ultimate users of CTL plate are consuming plates with elevated levels of boron, chromium and titanium, in place of steel plate without elevated levels of boron, chromium and titanium.<sup>44</sup>

### Use of the Merchandise

Domestic Producers argued that the product at issue is used for the same purposes as subject merchandise.<sup>45</sup> Domestic Producers claimed that adding alloys to commodity-grade steel plate has no commercial or metallurgical purpose other than to change the tariff classification in the HTSUS.<sup>46</sup> Domestic Producers stated that the CTL plate at issue with elevated alloy levels is still classified as ASTM A36 and A572 plate, and thus is not suitable for additional uses beyond those of commodity-grade plate with these specifications.<sup>47</sup> Domestic Producers also contended that the addition of elevated levels of alloying elements are only useful when steel plate is heat treated, which has a substantial cost, and PRC producers are not heat treating the steel plates at issue.<sup>48</sup> Specifically, Domestic Producers claim that commodity-grade carbon steel plate of ASTM specifications A36 and A572 is generally not heat-treated.<sup>49</sup>

### Channels of Marketing

Domestic Producers stated that PRC producers market the CTL plate at issue in the same manner as the CTL plate without the alloying elements.<sup>50</sup> According to Domestic Producers, the CTL plate at issue and subject plate appeal to the same end users and are used for the same end uses.<sup>51</sup>

### Cost of Modification

Domestic Producers claimed that the cost of adding only small amounts of alloying elements is small when compared to the total cost of production and total value of CTL plate.<sup>52</sup> In particular, Domestic Producers noted that the Department determined in *CTL Plate from Canada* that the cost of adding alloying elements is minor relative to the total value of the merchandise.<sup>53</sup> Also, as noted above, Domestic Producers contended that alloying elements are only useful when steel plate is heat treated, which has a substantial cost; however, PRC producers are not heat treating the steel plate at issue.<sup>54</sup>

### Conclusion

Based on the information provided by Domestic Producers, the Department finds there is sufficient basis to initiate an antidumping duty circumvention inquiry, pursuant to section 781(c) of the Act, to determine whether CTL plate from the PRC made to ASTM A36 or A572 specifications with levels of chromium or titanium above the levels identified in note (f), “Other alloy steel”, of Chapter 72 of the HTSUS involves a minor alteration to subject merchandise that is so insignificant as to render the resulting merchandise (classified as “alloy” steel under the HTSUS) subject to the *Order*. We also find sufficient basis to initiate an antidumping duty circumvention inquiry, pursuant to section 781(c) of the Act, to determine whether CTL plate from the PRC made to ASTM A36 or A572 specifications which contains levels of boron above the levels identified in note (f) of Chapter 72 of the HTSUS and which has not been heat treated to meet tensile and hardness requirements beyond commodity-grade ASTM specifications involves a minor alteration to subject merchandise that is so insignificant as to render the resulting merchandise (classified as “alloy” steel under the HTSUS) subject to the *Order*.

Although Domestic Producers requested a circumvention inquiry with respect to all of the alloying elements identified in note (f), “Other alloy steel”, of Chapter 72 of the HTSUS, we limited initiation to the alloys noted above (chromium, titanium, and boron where there was no heat treatment) based on the evidence of alleged circumvention provided. Moreover, we have not described the merchandise

subject to this inquiry as steel plate marketed, priced or sold in the United States as commodity-grade carbon steel plate or made to specifications considered to be carbon steel specifications in the market because of concerns over the administrability of that language (*e.g.*, difficulties determining whether certain prices are commodity-grade carbon steel plate prices, the lack of clarity with respect to which specifications should be considered to be carbon steel specifications). Based on the evidence of alleged circumvention provided, and Domestic Producers’ statement that 80 percent of the market for commodity-grade carbon steel plate meets ASTM specifications A36 and A572, we have described the merchandise subject to this inquiry as CTL plate from the PRC made to ASTM A36 or A572 specifications. Lastly, as noted above, the Department intends to apply its circumvention ruling to all U.S. imports of CTL plate from the PRC, consistent with the recent history of this proceeding.<sup>55</sup>

Although Domestic Producers requested that the Department make a final ruling within 45 days, additional time is needed for further inquiry into Domestic Producers’ allegations. The Department intends to issue its final determination within 300 days of the date of the initiation of this antidumping duty circumvention inquiry.

The Department will not order the suspension of liquidation of entries of any of the merchandise at issue at this time. However, in accordance with 19 CFR 351.225(l)(2), if the Department issues a preliminary affirmative determination, we will then instruct CBP to suspend liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the merchandise at issue, entered, or withdrawn from warehouse for consumption, on or after the date of initiation of the inquiry.

The Department will establish a schedule for questionnaires and comments on the issues.

This notice is published in accordance with section 781(c) of the Act and 19 CFR 351.225(i).

Dated: February 10, 2016.

**Paul Piquado,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2016–03418 Filed 2–17–16; 8:45 am]

**BILLING CODE 3510-DS-P**

<sup>43</sup> See Domestic Producers’ Request at 17–19 and the Alloying Elements Circumvention BPI Memorandum at Note 7.

<sup>44</sup> See Third Supplemental Submission at 7–8.

<sup>45</sup> See Domestic Producers’ Request at 19–20.

<sup>46</sup> See Second Supplemental Submission at 7–8.

<sup>47</sup> See Domestic Producers’ Request at 19–20.

<sup>48</sup> See First Supplemental Submission at 10–12, 15–17.

<sup>49</sup> *Id.* at 14, 17, 23–24; see also Alloying Elements Circumvention BPI Memorandum at Note 8.

<sup>50</sup> See Domestic Producers’ Request at 20.

<sup>51</sup> *Id.* and Alloying Elements Circumvention BPI Memorandum at Note 9.

<sup>52</sup> See Domestic Producers’ Request at 20.

<sup>53</sup> *Id.* at 20–21.

<sup>54</sup> See First Supplemental Submission at 10–12, 15–17.

<sup>55</sup> See *Wuyang Circumvention Final Determination*, 76 FR at 50997.

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****RIN 0648-XE408****Whaling Provisions; Aboriginal Subsistence Whaling Quotas**

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

**ACTION:** Notice; notification of quota for bowhead whales.

**SUMMARY:** NMFS notifies the public of the aboriginal subsistence whaling quota for bowhead whales that it has assigned to the Alaska Eskimo Whaling Commission (AEWC), and of limitations on the use of the quota deriving from regulations of the International Whaling Commission (IWC). For 2016, the quota is 75 bowhead whales struck. This quota and other applicable limitations govern the harvest of bowhead whales by members of the AEWC.

**DATES:** Effective February 18, 2016.

**ADDRESSES:** Office for International Affairs and Seafood Inspection, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Melissa Andersen Garcia, (301) 427-8385.

**SUPPLEMENTARY INFORMATION:** Aboriginal subsistence whaling in the United States is governed by the Whaling Convention Act (WCA) (16 U.S.C. 916 *et seq.*). Under the WCA, IWC regulations shall generally become effective with respect to all persons and vessels subject to the jurisdiction of the United States, within 90 days of notification from the IWC Secretariat of an amendment to the IWC Schedule (16 U.S.C. 916k). Regulations that implement the WCA, found at 50 CFR 230.6, require the Secretary of Commerce (Secretary) to publish, at least annually, aboriginal subsistence whaling quotas and any other limitations on aboriginal subsistence whaling deriving from regulations of the IWC.

At the 64th Annual Meeting of the IWC, the Commission set catch limits for aboriginal subsistence use of bowhead whales from the Bering-Chukchi-Beaufort Seas stock. The bowhead catch limits were based on a joint request by the United States and the Russian Federation, accompanied by documentation concerning the needs of two Native groups: Alaska Eskimos and Chukotka Natives in the Russian Far East.

The IWC set a 6-year block catch limit of 336 bowhead whales landed. For each of the years 2013 through 2018, the number of bowhead whales struck may not exceed 67, except that any unused portion of a strike quota from any prior year may be carried forward. No more than 15 strikes may be added to the strike quota for any one year. At the end of the 2015 harvest, there were 15 unused strikes available for carry-forward, so the combined strike quota set by the IWC for 2016 is 82 (67 + 15).

An arrangement between the United States and the Russian Federation ensures that the total quota of bowhead whales landed and struck in 2016 will not exceed the limits set by the IWC. Under this arrangement, the Russian natives may use no more than seven strikes, and the Alaska Eskimos may use no more than 75 strikes.

Through its cooperative agreement with the AEWC, NOAA has assigned 75 strikes to the Alaska Eskimos. The AEWC will in turn allocate these strikes among the 11 villages whose cultural and subsistence needs have been documented, and will ensure that its hunters use no more than 75 strikes.

**Other Limitations**

The IWC regulations, as well as the NOAA regulation at 50 CFR 230.4(c), forbid the taking of calves or any whale accompanied by a calf.

NOAA regulations (at 50 CFR 230.4) contain a number of other prohibitions relating to aboriginal subsistence whaling, some of which are summarized here:

- Only licensed whaling captains or crew under the control of those captains may engage in whaling.
- Captains and crew must follow the provisions of the relevant cooperative agreement between NOAA and a Native American whaling organization.
- The aboriginal hunters must have adequate crew, supplies, and equipment to engage in an efficient operation.
- Crew may not receive money for participating in the hunt.
- No person may sell or offer for sale whale products from whales taken in the hunt, except for authentic articles of Native American handicrafts.
- Captains may not continue to whale after the relevant quota is taken, after the season has been closed, or if their licenses have been suspended. They may not engage in whaling in a wasteful manner.

Dated: February 11, 2016.

**John Henderschedt,**

*Director, Office for International Affairs and Seafood Inspection, National Marine Fisheries Service.*

[FR Doc. 2016-03366 Filed 2-17-16; 8:45 am]

**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****RIN 0649-XE447****Gulf of Mexico Fishery Management Council; Public Meeting**

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Gulf of Mexico Fishery Management Council will hold a meeting of its Standing and Special *Shrimp* Scientific and Statistical Committee (SSC).

**DATES:** The meeting will convene via WEBINAR on Tuesday, March 8, 2016 from 1 p.m. to 3 p.m. EST; you may register for the webinar at: <https://attendee.gotowebinar.com/register/1004643937909180674>.

After registering, you will receive a confirmation email containing information about joining the webinar.

**ADDRESSES:** *Council address:* Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348-1630.

**FOR FURTHER INFORMATION CONTACT:** Morgan Kilgour, Fishery Biologist, [morgan.kilgour@gulfcouncil.org](mailto:morgan.kilgour@gulfcouncil.org); Gulf of Mexico Fishery Management Council telephone: (813) 348-1630.

**SUPPLEMENTARY INFORMATION:****Agenda**

The Chairman will start the meeting with introductions and adoption of agenda, approval of minutes from the March 10-12, 2015 Standing, Special *Reef Fish*, Special *Shrimp*, and Special *Spiny Lobster* Scientific and Statistical Committee (SSC) meeting, and selection of an SSC representative to attend the April, 2016 Council Meeting. The SSC will review updated *Penaeid Shrimp* Stock Assessments and review an update on the Aggregate Maximum Sustainable Yield (MSY) and Optimum Yield (OY) Working Group. Lastly, the SSC will discuss other business, if any. —Meeting Adjourns—

The Agenda is subject to change, and the latest version along with other

meeting materials will be posted on the Council's file server. To access the file server, the URL is <https://public.gulfcouncil.org:5001/webman/index.cgi>, or go to the Council's Web site and click on the FTP link in the lower left of the Council Web site (<http://www.gulfcouncil.org>). The username and password are both "gulfguest." Click on the "Library Folder," then scroll down to "SSC meeting-2016-03."

The meeting will be webcast over the internet. A link to register for the webcast is available on the Council's Web site, <http://www.gulfcouncil.org>.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Dated: February 12, 2016.

**Tracy Thompson,**

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

[FR Doc. 2016-03339 Filed 2-17-16; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XE446**

#### Gulf of Mexico Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Gulf of Mexico Fishery Management Council will hold a

meeting of its Ad Hoc Red Snapper Charter Advisory Panel (AP).

**DATES:** The meeting will convene Tuesday, March 8, 2016 from 8:30 a.m. to 5 p.m., and Wednesday, March 9, 2016 from 8:30 a.m. to 12 p.m.

**ADDRESSES:** The meeting will take place at the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348-1630.

**FOR FURTHER INFORMATION CONTACT:** Dr. Ava Lasseter, Anthropologist, Gulf of Mexico Fishery Management Council; [ava.lasseter@gulfcouncil.org](mailto:ava.lasseter@gulfcouncil.org); telephone: (813) 348-1630.

#### SUPPLEMENTARY INFORMATION:

##### Agenda

The items of discussion on the agenda are as follows:

Ad Hoc Red Snapper Charter Advisory Panel Agenda, Tuesday, March 8, 2016 from 8:30 a.m. to 5 p.m., and Wednesday, March 9, 2016 from 8:30 a.m. to 12 p.m.

- I. Adoption of Agenda
  - II. Approval of May 2015 Ad Hoc Red Snapper Charter AP meeting summary
  - III. Overview of Draft Amendment 41
  - IV. Program Goals and Objectives
  - V. Recommendations to the Council on the design of a Red Snapper Management Program for Charter Vessels
  - VI. Other Business
- Meeting Adjourns—

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on the Council's file server. To access the file server, the URL is <https://public.gulfcouncil.org:5001/webman/index.cgi>, or go to the Council's Web site and click on the File Server link in the lower left of the Council Web site (<http://www.gulfcouncil.org>). The username and password are both "gulfguest." Click on the "Library Folder," then scroll down to "Ad Hoc Red Snapper Charter AP."

The meeting will be webcast over the Internet. A link to the ebcast will be available on the Council's Web site, <http://www.gulfcouncil.org>.

Although other non-emergency issues not on the agenda may come before the Advisory Panel for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Advisory Panel will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management

Act, provided the public has been notified of the Council's intent to take action to address the emergency.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Dated: February 12, 2016.

**Tracy Thompson,**

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

[FR Doc. 2016-03337 Filed 2-17-16; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XE421**

#### Atlantic Highly Migratory Species; Meeting of the Atlantic Highly Migratory Species Advisory Panel

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

**ACTION:** Notice of public meeting and webinar/conference call.

**SUMMARY:** NMFS will hold a 3-day Atlantic Highly Migratory Species (HMS) Advisory Panel (AP) meeting in March 2016. The intent of the meeting is to consider options for the conservation and management of Atlantic HMS. The meeting is open to the public.

**DATES:** The AP meeting and webinar will be held from 10:30 a.m. to 6 p.m. on Tuesday, March 29, 2016; from 8:30 a.m. to 6 p.m. on Wednesday, March 30, 2016; and from 8:30 a.m. to 12 p.m. on Thursday, March 31, 2016. There will be an introduction for new AP members at 9 a.m. on Tuesday, March 29, 2016.

**ADDRESSES:** The meeting will be held at the DoubleTree by Hilton Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20814. The meeting presentations will also be available via WebEx webinar/conference call.

On Tuesday, March 29, 2016, the conference call information is phone number 1-888-566-6157; Participant Code: 5998985; and the webinar event address is: <https://noaaevents2.webex.com/noaaevents2/onstage/g.php?MTID=ee08141a7a0cf50251a257df9d3b931fa>; event password: NOAA.

On Wednesday, March 30, 2016, the conference call information is phone

number 1-888-282-0431; Participant Code: 9825698; and the webinar event address is: <https://noaaevents2.webex.com/noaaevents2/onstage/g.php?MTID=ee29585c757454c5e48b292d7dc2fc95f>; event password: NOAA.

On Thursday, March 31, 2016, the conference call information is phone number 1-800-593-9960; Participant Code: 5039500; and the webinar event address is: <https://noaaevents2.webex.com/noaaevents2/onstage/g.php?MTID=e9dc5e094b476fc2b3621dfbe73e9cd6c>; event password: NOAA.

Participants are strongly encouraged to log/dial in fifteen minutes prior to the meeting. NMFS will show the presentations via webinar and allow public comment during identified times on the agenda.

**FOR FURTHER INFORMATION CONTACT:** Guy DuBeck or Margo Schulze-Haugen at (301) 427-8503.

**SUPPLEMENTARY INFORMATION:** The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, as amended by the Sustainable Fisheries Act, Public Law 104-297, provided for the establishment of an AP to assist in the collection and evaluation of information relevant to the development of any Fishery Management Plan (FMP) or FMP amendment for Atlantic HMS. NMFS consults with and considers the comments and views of AP members when preparing and implementing FMPs or FMP amendments for Atlantic tunas, swordfish, billfish, and sharks.

The AP has previously consulted with NMFS on: Amendment 1 to the Billfish FMP (April 1999); the HMS FMP (April 1999); Amendment 1 to the HMS FMP (December 2003); the Consolidated HMS FMP (October 2006); and Amendments 1, 2, 3, 4, 5a, 5b, 6, 7, 8, and 9 to the 2006 Consolidated HMS FMP (April and October 2008, February and September 2009, May and September 2010, April and September 2011, March and September 2012, January and September 2013, April and September 2014, March and September 2015), among other things.

The intent of this meeting is to consider alternatives for the conservation and management of all Atlantic tunas, swordfish, billfish, and shark fisheries. We anticipate discussing the upcoming Amendments 5b on dusky sharks and 10 on Essential Fish Habitat, including lemon shark aggregations off southeast Florida; reviewing implementation of Final Amendment 9 on smoothhound sharks and Final Amendment 7 on bluefin tuna management; and progress updates on the final rule to implement the

electronic bluefin tuna documentation system and the various other rulemakings. We also anticipate discussing a survey of Atlantic HMS tournaments that is in development, a request from the South Atlantic Fishery Management Council to consider management changes regarding blacknose sharks, and domestic implementation of recommendations from the 2015 meeting of the International Commission for the Conservation of Atlantic Tunas. We also intend to invite other NMFS offices to provide updates on their activities relevant to HMS fisheries such as the IUU Task Force implementation and international trade, and DeepWater Horizon Pelagic Longline Project.

Additional information on the meeting and a copy of the draft agenda will be posted prior to the meeting at: [http://www.nmfs.noaa.gov/sfa/hms/advisory\\_panels/hms\\_ap/meetings/ap\\_meetings.html](http://www.nmfs.noaa.gov/sfa/hms/advisory_panels/hms_ap/meetings/ap_meetings.html).

### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Guy DuBeck at (301) 427-8503 at least 7 days prior to the meeting.

Dated: February 11, 2016.

**Emily H. Menashes,**  
*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 2016-03272 Filed 2-17-16; 8:45 am]

**BILLING CODE 3510-22-P**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No: CFPB-2016-0007]

### Agency Information Collection Activities: Comment Request; Emergency Processing Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is proposing a new information collection titled, "Application Process for Designation of Rural Area under Federal Consumer Financial Law."

**DATES:** An emergency review has been requested in accordance with the PRA (44 U.S.C. Chapter 3507(j)). Approval by the Office of Management and Budget (OMB) has been requested by February 29, 2016. A standard PRA clearance process is also beginning. Interested

persons are invited to submit comments on or before April 18, 2016.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- **Electronic:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Mail:** Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552.

- **Hand Delivery/Courier:** Consumer Financial Protection Bureau (Attention: PRA Office), 1275 First Street NE., Washington, DC 20002.

*Please note that comments submitted after the comment period will not be accepted.* In general, all comments will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of this information collection request is available at [www.regulations.gov](http://www.regulations.gov). Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street, NW., Washington, DC 20552, (202) 435-9575, or email: [PRA@cfpb.gov](mailto:PRA@cfpb.gov). *Please do not submit comments to this mailbox.*

### SUPPLEMENTARY INFORMATION:

**Title of Collection:** Application Process for Designation of Rural Area under Federal Consumer Financial Law.  
**OMB Control Number:** 3170-XXXX.

**Type of Review:** New collection (Request for a new OMB control number).

**Affected Public:** Private sector (banks and credit unions).

**Estimated Number of Respondents:** 1.  
**Estimated Total Annual Burden Hours:** 5.

**Abstract:** On December 4, 2015, Congress passed the Helping Expand Lending Practices in Rural Communities Act of 2015 (HELP Rural Communities Act or the Act) Public Law 114-94, Title LXXXIX (2015). Section 89002 requires the Bureau to establish, within 90 days of its passage, a procedure by which persons and businesses may apply to have a geographic area designated as "rural" for the purposes of applying federal consumer protection law and certain exceptions related to areas so designated.

Due to the 90-day deadline, contained in the Act, if following standard PRA clearance procedures, the Bureau would be unable to meet this statutory

deadline. In order to meet the statutory deadline, the Bureau plans to issue the enabling procedural rule by March 3, 2016. Therefore, the Bureau is requesting emergency processing and approval of the following information collection request.

The Bureau requests OMB approval of this request by February 29, 2016. Contemporaneously with this request for emergency processing, the Bureau is also initiating standard clearance procedures by publishing a notice in the **Federal Register** allowing the public 60 days to comment on this collection of information. Accordingly, this request will also be resubmitted to OMB under standard clearance procedures.

**Request for Comments:** Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Dated: February 12, 2016.

**Darrin A. King,**

*Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.*

[FR Doc. 2016-03422 Filed 2-17-16; 8:45 am]

**BILLING CODE 4810-AM-P**

## **BUREAU OF CONSUMER FINANCIAL PROTECTION**

[Docket No: CFPB-2016-0006]

### **Agency Information Collection Activities: Submission for OMB Review; Comment Request**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection, titled, "Loan

Originator Compensation Amendment (Regulation Z)."

**DATES:** Written comments are encouraged and must be received on or before March 21, 2016 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- **Electronic:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **OMB:** Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or fax to (202) 395-5806. Mailed or faxed comments to OMB should be to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection.

*Please note that comments submitted after the comment period will not be accepted.* In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

#### **FOR FURTHER INFORMATION CONTACT:**

Documentation prepared in support of this information collection request is available at [www.reginfo.gov](http://www.reginfo.gov) (this link active on the day following publication of this notice). Select "Information Collection Review," under "Currently under review, use the dropdown menu "Select Agency" and select "Consumer Financial Protection Bureau" (recent submissions to OMB will be at the top of the list). The same documentation is also available at <http://www.regulations.gov>. Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435-9575, or email: [PRA@cfpb.gov](mailto:PRA@cfpb.gov). *Please do not submit comments to this email box.*

**SUPPLEMENTARY INFORMATION:**  
*Title of Collection:* Loan Originator Compensation Amendment (Regulation Z).  
*OMB Control Number:* 3170-0031.  
*Type of Review:* Extension without change of a currently approved collection.  
*Affected Public:* Private sector.  
*Estimated Number of Respondents:* 8,254.  
*Estimated Total Annual Burden Hours:* 94,635.  
*Abstract:* The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, was enacted to foster comparison credit

shopping and informed credit decision making by requiring accurate disclosure of the costs and terms of credit to consumers. The Dodd-Frank Act then amended TILA to include, among other things, provisions about the qualifications and compensation of mortgage loan officers, in order to ensure consumers are getting a fair deal on their loans.

**Request for Comments:** The Bureau issued a 60-day **Federal Register** notice on December 9, 2015 (80 FR 76459). Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Dated: February 11, 2016.

**Darrin A. King,**

*Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.*

[FR Doc. 2016-03424 Filed 2-17-16; 8:45 am]

**BILLING CODE 4810-AM-P**

## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

[Docket ID: DoD-2015-OS-0090]

### **Defense Personal Property Program (DP3)**

**AGENCY:** United States Transportation Command (USTRANSCOM), DoD.

**ACTION:** Notice.

**SUMMARY:** The DoD is not proceeding with the proposed Defense Personal Property Program (DP3) Household Goods Channeling Pilot Test, as set forth in the September 8, 2015 notice (80 FR 53786). We appreciate all inputs made toward providing the information necessary to reach this conclusion.



Dated: February 11, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

[FR Doc. 2016-03290 Filed 2-17-16; 8:45 am]

**BILLING CODE 5001-06-P**

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### Sunshine Act Notice

**AGENCY:** Defense Nuclear Facilities  
Safety Board.

**ACTION:** Notice of closed meeting.

**SUMMARY:** Pursuant to the provisions of the Government in the Sunshine Act (5 U.S.C. 552b), and the Defense Nuclear Facilities Safety Board's (Board) regulations implementing the Government in the Sunshine Act, notice is hereby given of the Board's closed meeting described below.

**DATES:** 3:00 p.m.–4:00 p.m., February 25, 2016.

**ADDRESSES:** Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:**

Mark Welch, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004-2901, (800) 788-4016. This is a toll-free number.

**SUPPLEMENTARY INFORMATION:** The meeting will be closed to the public. No participation from the public will be considered during the meeting.

### Status

*Closed.* During the closed meeting, the Board Members will discuss issues dealing with potential Recommendations to the Secretary of Energy. The Board is invoking the exemption to close a meeting described in 5 U.S.C. 552b(c)(3) and (9)(B) and 10 CFR 1704.4(c) and (h). The Board has determined that it is necessary to close the meeting since conducting an open meeting is likely to disclose matters that are specifically exempted from disclosure by statute, and/or be likely to significantly frustrate implementation of a proposed agency action. In this case, the deliberations will pertain to potential Board Recommendations which, under 42 U.S.C. 2286d(b) and (h)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively.

*Matters To Be Considered:* The meeting will proceed in accordance with the closed meeting agenda which is posted on the Board's public Web site

at [www.dnfsb.gov](http://www.dnfsb.gov). Technical staff may present information to the Board. The Board Members are expected to conduct deliberations regarding potential Recommendations to the Secretary of Energy.

Dated: February 12, 2016.

**Joyce L. Connery,**  
*Chairman.*

[FR Doc. 2016-03499 Filed 2-16-16; 4:15 pm]

**BILLING CODE 3670-01-P**

## DEPARTMENT OF EDUCATION

[Docket No.: ED-2016-ICCD-0020]

### Agency Information Collection Activities; Comment Request; Integrated Postsecondary Education Data System (IPEDS) 2016–2019

**AGENCY:** National Center for Education Statistics (NCES), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

**DATES:** Interested persons are invited to submit comments on or before April 18, 2016.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2016-ICCD-0020. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E-103, Washington, DC 20202-4537.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Kashka Kubzdela at [kashka.kubzdela@ed.gov](mailto:kashka.kubzdela@ed.gov).

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an

opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Integrated Postsecondary Education Data System (IPEDS) 2016–2019.

*OMB Control Number:* 1850–0582.

*Type of Review:* A revision of an existing information collection.

*Respondents/Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 77,600.

*Total Estimated Number of Annual Burden Hours:* 999,060.

*Abstract:* The National Center for Education Statistics (NCES) seeks authorization from OMB to continue the Integrated Postsecondary Education Data System (IPEDS) data collection. Current authorization expires 12/31/2016 (OMB No. 1850–0582). We are requesting a new clearance for the 2016–17, 2017–18, and 2018–19 data collections to enable us to provide consistency in our collection of postsecondary data over the next 3 years. IPEDS is a Web-based data collection system designed to collect basic data from all postsecondary institutions in the United States and the other jurisdictions. IPEDS enables NCES to report on key dimensions of postsecondary education such as enrollments, degrees and other awards earned, tuition and fees, average net price, student financial aid, graduation rates, student outcomes, revenues and expenditures, faculty salaries, and staff employed. The IPEDS Web-based data collection system was implemented in 2000–01, and it collects basic data from



approximately 7,500 postsecondary institutions in the United States and the other jurisdictions that are eligible to participate in Title IV Federal financial aid programs. All Title IV institutions are required to respond to IPEDS (Section 490 of the Higher Education Amendments of 1992 [Pub. L. 102–325]). IPEDS allows other (non-title IV) institutions to participate on a voluntary basis. About 200 elect to respond. IPEDS data are available to the public through the College Navigator and IPEDS Data Center Web sites. This clearance package includes a number of proposed changes to the data collection.

Dated: February 12, 2016.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

[FR Doc. 2016–03338 Filed 2–17–16; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### National Assessment Governing Board Quarterly Board Meeting

**AGENCY:** National Assessment Governing Board, U.S. Department of Education.

**ACTION:** Announcement of open and closed meetings.

**SUMMARY:** This notice sets forth the agenda for the March 3–5, 2016 Quarterly Meeting of the National Assessment Governing Board (hereafter referred to as Governing Board). This notice provides information to members of the public who may be interested in attending the meeting or providing written comments on the meeting. The notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act (FACA).

**DATES:** The Quarterly Board meeting will be held on the following dates:

- March 3, 2016 from 2:30 p.m. to 6:00 p.m.
- March 4, 2016 from 8:30 a.m. to 5:00 p.m.
- March 5, 2016 from 7:30 a.m. to 12:00 p.m.

**ADDRESSES:** Hilton Arlington, 950 Stafford Street, Arlington, VA 22203.

**FOR FURTHER INFORMATION CONTACT:** Munira Mwalimu, Executive Officer/ Designated Federal Official, 800 North Capitol Street NW., Suite 825, Washington, DC 20002, telephone: (202) 357–6938, fax: (202) 357–6945.

#### SUPPLEMENTARY INFORMATION:

*Statutory Authority and Function:* The National Assessment Governing

Board is established under title III—National Assessment of Educational Progress Authorization Act, Public Law 107–279. Information on the Board and its work can be found at [www.nagb.gov](http://www.nagb.gov).

The Board is established to formulate policy for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include the following: selecting subject areas to be assessed, developing assessment frameworks and specifications, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, improving the form and use of NAEP, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

#### March 3–5, 2016 Committee Meetings

The Board's standing committees will meet to conduct regularly scheduled work, based on agenda items planned for this quarterly Board meeting, and follow-up items as reported in the Board's committee meeting minutes available at <http://nagb.gov/what-we-do/board-committee-reports-and-agendas.html>.

#### Detailed Meeting Agenda: March 3–5, 2016

*March 3: Inside NAEP: Taking the NAEP Technology and Engineering Literacy Assessment:* Closed Session: 2:30 p.m.–4:00 p.m.

*March 3: Executive Committee:* Closed Session: 4:30 p.m.–5:20 p.m.; Open Session: 5:20 p.m.–6:00 p.m.

#### March 4: Full Board Meeting

*Full Board:* Open Session: 8:30 a.m.–10:00 a.m.; Closed Session: 1:00 p.m.–2:30 p.m.; Open Session 3:00 p.m.–5:00 p.m.

#### March 4: Committee Meetings

*Reporting and Dissemination Committee (R&D):* Open Session 10:15 a.m.–12:00 p.m.; Closed Session 12:05 p.m.–12:35 p.m.; Open Session 12:35 p.m.–12:45 p.m.

*Assessment Development Committee (ADC):* Open Session: 10:15 a.m.–10:50 a.m.; Closed Session: 10:50 a.m.–12:45 p.m.

*Committee on Standards, Design and Methodology (COSDAM):* Open Session: 10:15 a.m.–11:20 a.m.; Closed Session: 11:20 a.m.–12:25 p.m.; Open Session: 12:25 p.m.–12:45 p.m.

#### March 5: Full Board and Committee Meetings

*Nominations Committee:* Closed Session: 7:30 a.m.–8:15 a.m.

*Full Board:* Closed Session: 8:30 a.m.–8:50 a.m.; Open Session: 8:50 a.m.–10:45 a.m.; Closed Session: 11:00 a.m.–12:00 p.m.

On March 3, 2016, the Board will meet in closed session from 2:30 p.m.–4:00 p.m. to take the 2014 NAEP Technology and Engineering Literacy (TEL) assessment for grade 8. Board members will access secure NAEP TEL items used in the 2014 TEL assessment. This part of the meeting must be conducted in closed session because the test items are secure and have not been released to the public. Public disclosure of the secure TEL items would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

Thereafter, the Executive Committee will convene in closed session from 4:30 p.m. to 5:20 p.m., and in open session to conduct regularly scheduled work from 5:20 p.m. to 6:00 p.m. During the closed session, the Executive Committee will receive and discuss cost estimates and implications for implementing NAEP's Assessment Schedule through 2024. This meeting must be conducted in closed session because public disclosure of this information would likely have an adverse financial effect on the NAEP program by providing confidential cost details and proprietary contract costs of current contractors to the public. Discussion of this information would be likely to significantly impede implementation of a proposed agency action if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

On March 4, 2016, the Full Board will meet in open session from 8:30 a.m. to 10:00 a.m. The Board will review and approve the March 3–5, 2016 Board meeting agenda and meeting minutes from the November 2015 Quarterly Board meeting. This session will be followed by new Board member introductions and administration of the Oath of Office for new members. The Chairman will then deliver remarks on the Salzburg Global Seminar. Thereafter the Executive Director of the Governing Board, William Bushaw, will provide his report, followed by an update on the work of IES provided by Ruth Neild, Deputy Director for Policy and Research, IES. The NCES update will be provided by the Acting Commissioner of NCES, Peggy Carr. The Board will recess for committee meetings at 10:00 a.m. which are scheduled to take place from 10:15 a.m. to 12:45 p.m.

The Reporting and Dissemination (R&D) Committee will meet in open

session from 10:15 a.m. to 12:00 p.m. and in closed session from 12:05 p.m. to 12:35 p.m. and thereafter in open session from 12:35 p.m. to 12:45 p.m. During the closed session, the Committee will preview and discuss a prototype of the Web site that will host results of the 12th grade NAEP reading and mathematics assessments. The data from these assessments have not been released and will not be released until a month after the Board meeting. This session must be closed because the Web site will display secure data that have not been released to the public and members will discuss the secure data. Disclosure of the secure data would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

The Assessment Development Committee (ADC) will meet open session from 10:15 a.m. to 10:50 a.m., and in two closed sessions from 10:50 a.m. to 12:45 p.m. During the first closed session, scheduled from 10:50 a.m. to 12:00 p.m., the ADC will review secure NAEP test questions in grades 4 and 8 for the 2019 Mathematics pilot assessment. These test questions have not been released to the public. Disclosure of the secure data would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

During the second closed session scheduled from 12:00 p.m. to 12:45 p.m. ADC will receive an embargoed briefing on NAEP's transition to digital-based assessment (DBA). The briefing will include secure data from the 2015 DBA pilot in Reading and Mathematics, which have not been publicly released. The briefing will also include secure NAEP test questions in Reading and Mathematics at grades 4 and 8. This meeting is being conducted in closed session because the data have not been released to the public. Public disclosure of the secure data would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

On Friday March 4, 2016, the Committee on Standards, Design and Methodology (COSDAM) will meet in open session from 10:15 a.m. to 11:20 a.m. in closed session from 11:20 a.m. to 12:25 p.m. and in open session from 12:25 p.m. to 12:45 p.m. During the first part of the closed session (11:20 a.m. to 12:05 p.m.), COSDAM will discuss information regarding analyses of the

2015 bridge studies for paper-and-pencil and digital-based assessments, and discuss secure NAEP Reading and Mathematics data. This part of the meeting must be conducted in closed session because the analysis involves the use of secure data for the NAEP Reading and Mathematics assessments on digital-based platforms. Public disclosure of secure data would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

During the second part of the closed session from 12:05 p.m. to 12:25 p.m., COSDAM will discuss requirements for an upcoming procurement to set achievement levels on the 2017 grade 4 Writing assessment. Public disclosure of procurement sensitive data would provide an unfair advantage to potential offerors, and significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

Following the committee meetings, on March 4, the full Board will meet in closed session from 1:00 p.m. to 2:30 p.m. to receive a briefing and discuss the 2014 NAEP Technology and Engineering Literacy (TEL) Report Card for Grade 8. Results of the TEL assessment have not been released to the public. Premature disclosure of the results would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

On March 4, 2016, from 3:00 p.m. to 4:00 p.m., the Board will meet in open session to receive a briefing on STEM perspectives from the Frameworks Institute. This session will then be followed by a briefing and discussion with Hill staff on legislative matters as they pertain to education policy issues and NAEP. The March 4, 2016 session of the Board meeting will adjourn at 5:00 p.m.

On March 5, 2016, the Nominations Committee will meet in closed session from 7:30 a.m. to 8:15 a.m. to discuss the final slate of candidates for Board vacancies for terms beginning on October 1, 2016. The Nominations Committee's discussions pertain solely to internal personnel rules and practices of an agency and information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of title 5 of the United States Code.

On March 5, 2016, the full Board will meet in closed session from 8:30 a.m. to 8:50 a.m. to discuss the final slate of candidates for Board vacancies for terms beginning October 1, 2016. The Board's discussions pertain solely to internal personnel rules and practices of an agency and information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of title 5 of the United States Code.

Following this closed session, the full Board will meet in open session from 8:50 a.m. to 9:00 a.m. to take action on the slate of candidates for the 2016 Board vacancies. From 9:15 a.m. to 9:45 a.m. the Board will receive committee reports and take action on the New Trial Urban Districts for 2017 and on the TEL Release Plan for Grade 8. Thereafter, from 9:45 a.m. to 10:45 a.m. the Board will receive an update and discuss the Governing Board's Strategic Planning Initiative.

The Board will meet in closed session on March 5, 2016 from 11:00 a.m. to 12:00 p.m. to receive a briefing and discuss the 2015 NAEP Reading and Mathematics Report Cards for Grade 12. This meeting must be conducted in closed session because results of this assessment have not been released to the public. Public disclosure of test results would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b of title 5 U.S.C.

The March 5, 2016 meeting is scheduled to adjourn at 12:00 p.m.

**Access to Records of the Meeting:** Pursuant to FACA requirements, the public may also inspect the meeting materials at [www.nagb.gov](http://www.nagb.gov) on Thursday, March 4, 2016 by 7:00 a.m. ET. The official verbatim transcripts of the public meeting sessions will be available for public inspection no later than 30 calendar days following the meeting.

**Reasonable Accommodations:** The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least two weeks before the scheduled meeting date. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

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

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

**Authority:** Pub. L. 107-279, Title III—National Assessment of Educational Progress section 301.

Dated: February 11, 2016.

**William J. Bushaw,**

*Executive Director, National Assessment Governing Board, U.S. Department of Education.*

[FR Doc. 2016-03343 Filed 2-17-16; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF EDUCATION

[Docket No.: ED-2015-ICCD-0136]

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Client Assistance Program (CAP)

**AGENCY:** Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

**DATES:** Interested persons are invited to submit comments on or before March 21, 2016.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2015-ICCD-0136. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail,

commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E115, Washington, DC 20202-4537. **FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Jim Doyle, (202) 245-6630.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Client Assistance Program (CAP).

*OMB Control Number:* 1820-0520.

*Type of Review:* An extension of an existing information collection.

*Respondents/Affected Public:* Individuals or Households.

*Total Estimated Number of Annual Responses:* 56.

*Total Estimated Number of Annual Burden Hours:* 9.

*Abstract:* This form is used by states to request funds to establish and carry out Client Assistance Programs (CAP). CAP is mandated by the Rehabilitation Act of 1973, as amended (Rehabilitation

Act), to assist consumers and applicants in their relationships with projects, programs and services provided under the Rehabilitation Act including the Vocational Rehabilitation program.

Dated: February 11, 2016.

**Tomakie Washington,**

*Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

[FR Doc. 2016-03263 Filed 2-17-16; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF ENERGY

### Orders Granting Authority To Import and Export Natural Gas, To Import and Export Liquefied Natural Gas, and To Vacate Authorization During January 2016

	FE Docket Nos.
TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA.	15-109-NG
SABINE PASS LIQUEFACTION, LLC.	15-171-LNG
APPLIED LNG TECHNOLOGIES, LLC.	16-05-NG
COAHUILA ENERGY .....	15-189-NG
WHITE EAGLE TRADING, LLC.	16-04-NG
CANNAT ENERGY, INC. ....	15-184-NG
BNP PARIBAS ENERGY CANADA CORP.	15-176-NG
FREEPORT LNG DEVELOPMENT, L.P.	16-02-LNG
BNP PARIBAS ENERGY TRADING GP.	15-177-NG
MERCURIA COMMODITIES CANADA CORPORATION.	15-162-NG

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Notice of orders.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy gives notice that during January 2016, it issued orders granting authority to import and export natural gas, to import and export liquefied natural gas (LNG), and to vacate authority. These orders are summarized in the attached appendix and may be found on the FE Web site at <http://energy.gov/fe/listing-doe-fe-authorizations-orders-issued-2016>. They are also available for inspection and copying in the U.S. Department of Energy (FE-34), Division of Natural Gas Regulation, Office of Regulation and International Engagement, Office of Fossil Energy, Docket Room 3E-033, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. The Docket Room is open between the hours of 8:00 a.m. and

4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on February 10, 2016.

**John A. Anderson,**

*Director, Office of Regulation and International Engagement, Office of Oil and Natural Gas.*

#### APPENDIX

#### DOE/FE ORDERS GRANTING IMPORT/EXPORT AUTHORIZATIONS

3695-A .....	01/19/16	15-109-NG	Toyota Motor Engineering & Manufacturing North America.	Order vacating blanket authority to export natural gas to Mexico.
3767 .....	01/13/16	15-171-LNG	Sabine Pass Liquefaction, LLC .....	Order granting blanket authority to export LNG by vessel from the Sabine Pass LNG Terminal located in Cameron Parish, Louisiana.
3771 .....	01/19/16	16-05-NG	Applied LNG Technologies, LLC .....	Order granting blanket authority to export natural gas to Canada/Mexico.
3772 .....	01/19/16	15-189-NG	Coahuila Energy .....	Order granting blanket authority to export natural gas to Mexico.
3773 .....	01/19/16	16-04-NG	White Eagle Trading, LLC .....	Order granting blanket authority to export natural gas to Mexico.
3775 .....	01/19/16	15-184-NG	Cannat Energy, Inc .....	Order granting blanket authority to import natural gas from Canada.
3776 .....	01/19/16	15-176-NG	BNP Paribas Energy Canada Corp .....	Order granting blanket authority to import/export natural gas from/to Canada.
3777 .....	01/19/16	16-02-LNG	Freeport LNG Development, L.P. ....	Order granting blanket authority to import LNG from various international sources by vessel.
3778 .....	01/19/16	15-177-NG	BNP Paribas Energy Trading GP .....	Order granting blanket authority to import natural gas from Canada.
3779 .....	01/28/16	15-162-LNG	Mercuria Commodities Canada Corporation .....	Order granting long-term authority to export natural gas to Canada.

[FR Doc. 2016-03373 Filed 2-17-16; 8:45 am]

BILLING CODE 6450-01-P

#### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

#### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

#### Filings Instituting Proceedings

*Docket Numbers:* PR16-14-000.  
*Applicants:* NorthWestern Corporation.

*Description:* Tariff filing per 284.123(b)(1).: Revised Rate Schedules for Transportation and Storage Service to be effective 1/1/2016; Filing Type: 1000.

*Filed Date:* 1/27/16.  
*Accession Number:* 201601275251.  
*Comments/Protests Due:* 5 p.m. ET 2/17/16.

*Docket Numbers:* PR16-15-000.  
*Applicants:* Columbia Gas of Maryland, Inc.

*Description:* Tariff filing per 284.123(b)(1).: CMD SOC 1-28-2016 to be effective 1/1/2016; Filing Type: 980.

*Filed Date:* 1/28/16.  
*Accession Number:* 201601285120.  
*Comments/Protests Due:* 5 p.m. ET 2/18/16.

*Docket Numbers:* PR16-16-000.

*Applicants:* Public Service Company of Colorado.

*Description:* Tariff filing per 284.123(b)(1).: 20160128 PSCo SOR Eff 1-1-16 to be effective 1/1/2016; Filing Type: 980.

*Filed Date:* 1/28/16.  
*Accession Number:* 201601285136.  
*Comments/Protests Due:* 5 p.m. ET 2/18/16.

*Docket Number:* PR16-17-000.  
*Applicants:* Acadian Gas Pipeline System.

*Description:* Tariff filing per 284.123(e) + (g): SOC Update per NAESB Nomination Timeline Language Requirement/FERC Order 809 to be effective 4/1/2016; Filing Type: 1280.

*Filed Date:* 1/28/2016.  
*Accession Number:* 201601285248.  
*Comments Due:* 5 p.m. ET 2/18/16.  
*284.123(g) Protests Due:* 5 p.m. ET 3/28/16.

*Docket Number:* PR16-18-000.  
*Applicants:* Cypress Gas Pipeline, LLC.

*Description:* Tariff filing per 284.123(e) + (g): SOC Update per NAESB Nomination Timeline Language Requirement/FERC Order 809 to be effective 4/1/2016; Filing Type: 1280.

*Filed Date:* 1/28/2016.  
*Accession Number:* 201601285251.  
*Comments Due:* 5 p.m. ET 2/18/16.  
*284.123(g) Protests Due:* 5 p.m. ET 3/28/16.

*Docket Numbers:* PR16-19-000.

*Applicants:* Southern California Gas Company.

*Description:* Tariff filing per 284.123(b)(1).: Revision of Statement of Rates to be effective 1/28/2016; Filing Type: 980.

*Filed Date:* 1/29/16.  
*Accession Number:* 201601295026.  
*Comments/Protests Due:* 5 p.m. ET 2/19/16.

*Docket Number:* PR16-20-000.  
*Applicants:* Enterprise Texas Pipeline LLC.

*Description:* Tariff filing per 284.123(b) + (g): SOC Update per NAESB Nomination Timeline Language Requirement/FERC Order 809 to be effective 4/1/2016; Filing Type: 1280.

*Filed Date:* 1/29/2016.  
*Accession Number:* 201601295047.  
*Comments Due:* 5 p.m. ET 2/19/16.  
*284.123(g) Protests Due:* 5 p.m. ET 3/29/16.

*Docket Numbers:* PR16-21-000.  
*Applicants:* Jefferson Island Storage & Hub, L.L.C.

*Description:* Tariff filing per 284.123(e)/.224: JISH Revised Statement of Operating Terms and Conditions, Version 3.0.0 to be effective 4/1/2016; Filing Type: 770.

*Filed Date:* 1/29/16.  
*Accession Number:* 201601295067.  
*Comments/Protests Due:* 5 p.m. ET 2/19/16.

*Docket Numbers:* PR16-22-000.

*Applicants:* Columbia Gas of Ohio, Inc.

*Description:* Tariff filing per 284.123(b)(1)/.: COH SOC 1–29–2016 to be effective 12/31/2015; Filing Type: 980.

*Filed Date:* 1/29/16.

*Accession Number:* 201601295078.

*Comments/Protests Due:* 5 p.m. ET 2/19/16.

*Docket Number:* PR16–23–000.

*Applicants:* Enterprise Intrastate LLC.

*Description:* Tariff filing per 284.123(e) + (g): SOC Update per NAESB Nomination Timeline Language Requirement/FERC Order 809 to be effective 4/1/2016; Filing Type: 1280.

*Filed Date:* 1/29/2016.

*Accession Number:* 201601295146.

*Comments Due:* 5 p.m. ET 2/19/16.

284.123(g) Protests Due: 5 p.m. ET 3/29/16.

*Docket Numbers:* PR16–24–000.

*Applicants:* Bay Gas Storage Company, Ltd.

*Description:* Tariff filing per 284.123/.224: Bay Gas Storage Company, Ltd. FERC Order No. 809 Compliance Filing to be effective 4/1/2016; Filing Type: 790.

*Filed Date:* 1/29/16.

*Accession Number:* 201601295185.

*Comments/Protests Due:* 5 p.m. ET 2/19/16.

*Docket Numbers:* RP16–587–000.

*Applicants:* Vector Pipeline L.P.

*Description:* Section 4(d) Rate Filing: Negotiated Rate Filing—Union Gas Limited to be effective 4/1/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5021.

*Comments Due:* 5 p.m. ET 2/17/16.

*Docket Numbers:* RP16–588–000.

*Applicants:* Midcontinent Express Pipeline LLC.

*Description:* Section 4(d) Rate Filing: Clean Up Filing to be effective 3/7/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5056.

*Comments Due:* 5 p.m. ET 2/17/16.

*Docket Numbers:* RP16–589–000.

*Applicants:* Kinder Morgan Louisiana Pipeline LLC.

*Description:* Section 4(d) Rate Filing: Clean Up Filing to be effective 3/7/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5063.

*Comments Due:* 5 p.m. ET 2/17/16.

*Docket Numbers:* RP16–590–000.

*Applicants:* National Fuel Gas Supply Corporation.

*Description:* Section 4(d) Rate Filing: GT&C Section 15 Correction to be effective 10/1/2015.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5151.

*Comments Due:* 5 p.m. ET 2/17/16.

*Docket Numbers:* RP16–591–000.

*Applicants:* Monroe Gas Storage Company, LLC.

*Description:* Petition for Declaratory Order of Monroe Gas Storage Company, LLC under RP16–591. *Filed Date:* 2/5/16.

*Accession Number:* 20160205–5245.

*Comments Due:* 5 p.m. ET 2/17/16.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

#### **Filings in Existing Proceedings**

*Docket Numbers:* RP16–505–001.

*Applicants:* Portland General Electric Company.

*Description:* Compliance filing NAESB V3 Standards Compliance Filing Correction to be effective 4/1/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5150.

*Comments Due:* 5 p.m. ET 2/17/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 8, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–03310 Filed 2–17–16; 8:45 am]

**BILLING CODE 6717–01–P**

#### **DEPARTMENT OF ENERGY**

##### **Federal Energy Regulatory Commission**

**[Docket No. ER16–904–000]**

##### **Smith Creek Hydro, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization**

This is a supplemental notice in the above-referenced proceeding of Smith Creek Hydro, LLC's application for market-based rate authority, with an

accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 1, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–03326 Filed 2–17–16; 8:45 am]

**BILLING CODE 6717–01–P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. EL16–18–000]

**Conway Corporation; Notice of Filing**

Take notice that on February 10, 2016, Conway Corporation submitted a supplement to its November 19, 2015 application for proposed rate for Reactive Supply and Voltage Control.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5:00 p.m. Eastern Time on February 17, 2016.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**  
*Deputy Secretary.*

[FR Doc. 2016–03313 Filed 2–17–16; 8:45 am]

BILLING CODE 6717–01–P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. ER16–893–000]

**62SK 8ME LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization**

This is a supplemental notice in the above-referenced proceeding of 62SK 8ME LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 1, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

[FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**  
*Deputy Secretary.*

[FR Doc. 2016–03316 Filed 2–17–16; 8:45 am]

BILLING CODE 6717–01–P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. ER16–914–000]

**Axpo U.S. LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization**

This is a supplemental notice in the above-referenced proceeding of Axpo U.S. LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 1, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the

Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03327 Filed 2-17-16; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 2055-099]

#### Idaho Power Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Application Type:* Amendment to Land Management Plan.
- b. *Project No:* 2055-099.
- c. *Date Filed:* December 29, 2015.
- d. *Applicant:* Idaho Power Company.
- e. *Name of Project:* C.J. Strike Hydroelectric Project.
- f. *Location:* The project is located on the Snake and Bruneau Rivers, in Elmore and Owyhee counties, Idaho.
- g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a-825r.
- h. *Applicant Contact:* L. Lewis Wardle, Senior Biologist—Licensing Program; [lwardle@idahopower.com](mailto:lwardle@idahopower.com); (208) 388-2964.
- i. *FERC Contact:* Krista Sakallaris, (202) 502-6302, [Krista.Sakallaris@ferc.gov](mailto:Krista.Sakallaris@ferc.gov).
- j. *Deadline for filing comments, motions to intervene, and protests:* March 10, 2015.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, or recommendations using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/>

[ecomment.asp](http://www.ferc.gov/docs-filing/ecomment.asp). You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P-2055-099.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* Idaho Power Company (IPC) filed a five-year compliance report for the C.J. Strike Project's approved land management plan as well as proposed updates to the existing plan. Updates include new land-use classification maps based off previously approved changes and modifications to the use classification of private boat docks on conservation and agriculture/grazing land. IPC proposes to change the use classification of private boat docks to "conditional" in conservation and agriculture/grazing land-use areas, which are currently listed as prohibited uses. To remain consistent across projects, IPC proposes the modification due to changes in land ownership and land use patterns from open-range grazing to private/rural-residential uses in the project area, as well as at several other IPC projects. IPC states that by listing private boat docks as conditional it would review all applications to ensure the proposal does not have adverse resource effects. Additionally, all dock applications would be required to meet the IPC's existing boat dock standards and applicants would be required to obtain the required state and federal permits and consult with specified resource agencies.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502-8371. This filing may also be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in

the docket number field to access the document. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1-866-208-3676 or email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), for TTY, call (202) 502-8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03333 Filed 2-17-16; 8:45 am]

BILLING CODE 6717-01-P



**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****Notice of Commission Staff Attendance**

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission's staff will attend the following meeting related to the Midcontinent Independent System Operator, Inc. (MISO)—PJM Interconnection, L.L.C. (PJM) Joint and Common Market Initiative (Docket No. AD14-3-000):

MISO/PJM Joint Stakeholder Meeting—February 18, 2016

The above-referenced meeting will be held at: PJM Conference & Training Center, 2750 Monroe Boulevard, Audubon, PA 19403.

The above-referenced meeting is open to the public.

Further information may be found at [www.pjm.com](http://www.pjm.com).

The discussions at the meeting described above may address matters at issue in the following proceedings:

Docket Nos. ER16-533, ER16-534, Midcontinent Independent System Operator, Inc.  
Docket Nos. ER16-535, ER16-536, PJM Interconnection, L.L.C.  
Docket No. ER16-488, PJM Interconnection, L.L.C.  
Docket No. ER16-490, Midcontinent Independent System Operator, Inc.  
Docket No. EL13-88, Northern Indiana Public Service Company v. Midcontinent Independent System Operator, Inc. and PJM Interconnection, L.L.C.  
Docket No. EL11-34, Midcontinent Independent System Operator, Inc.  
Docket No. EL14-21, Southwest Power Pool, Inc. v. Midcontinent Independent System Operator, Inc.  
Docket No. EL14-30, Midcontinent Independent System Operator, Inc. v. Southwest Power Pool, Inc.  
Docket No. ER11-1844, Midwest Independent Transmission System Operator, Inc.  
Docket No. ER10-1791, Midwest Independent Transmission System Operator, Inc.  
Docket Nos. ER13-1923, ER13-1938, ER13-1943, ER13-1945, Midcontinent Independent System Operator, Inc.  
Docket Nos. ER13-1924, ER13-1926, ER13-1936, ER13-1944, ER13-1947, ER15-2200, PJM Interconnection, L.L.C.  
Docket Nos. ER13-1937, ER13-1939, Southwest Power Pool, Inc.

Docket No. ER14-1174, Southwest Power Pool, Inc.  
Docket No. ER14-1736, Midcontinent Independent System Operator, Inc.  
Docket No. ER14-2022, Midcontinent Independent System Operator, Inc.  
Docket No. ER14-2445, Midcontinent Independent System Operator, Inc.  
Docket No. ER16-56, Midcontinent Independent System Operator, Inc.  
Docket No. ER15-2613, PJM Interconnection, L.L.C.  
Docket No. ER15-2616, Midcontinent Independent System Operator, Inc.  
Docket No. EL15-99, Internal MISO Generation v. Midcontinent Independent System Operator, Inc.

For more information, contact John Taber, Office of Energy Policy and Innovation, Federal Energy Regulatory Commission at (202) 502-8394 or [John.Taber@ferc.gov](mailto:John.Taber@ferc.gov).

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03329 Filed 2-17-16; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****Combined Notice of Filings**

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

**Filings Instituting Proceedings**

*Docket Numbers:* RP16-592-000.  
*Applicants:* Columbia Gas Transmission, LLC.  
*Description:* § 4(d) Rate Filing: OTRA Mechanism Extension to be effective 3/1/2016.  
*Filed Date:* 2/8/16.  
*Accession Number:* 20160208-5042.  
*Comments Due:* 5 p.m. ET 2/22/16.  
*Docket Numbers:* RP16-593-000.  
*Applicants:* Equitrans, L.P.  
*Description:* Compliance filing Notice Regarding Non-Jurisdictional Gathering Facilities (W-4088).  
*Filed Date:* 2/8/16.  
*Accession Number:* 20160208-5044.  
*Comments Due:* 5 p.m. ET 2/22/16.  
*Docket Numbers:* RP16-594-000.  
*Applicants:* Guardian Pipeline, L.L.C.  
*Description:* § 4(d) Rate Filing: Negotiated Rate PAL Agreement—Koch Energy Serv., LLC to be effective 2/6/2016.  
*Filed Date:* 2/8/16.  
*Accession Number:* 20160208-5146.  
*Comments Due:* 5 p.m. ET 2/22/16.  
*Docket Numbers:* RP16-595-000.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* § 4(d) Rate Filing: Negotiated Rate eff 4-1-2016 for Macquarie 911328 to be effective 4/1/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209-5055.

*Comments Due:* 5 p.m. ET 2/22/16.

*Docket Numbers:* RP16-596-000.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* § 4(d) Rate Filing: Feb2016 Deletion of Expired Statements of Negotiated Rates to be effective 3/11/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209-5075.

*Comments Due:* 5 p.m. ET 2/22/16.

*Docket Numbers:* RP16-597-000.

*Applicants:* Tallgrass Interstate Gas Transmission, L.

*Description:* Compliance filing Compliance with Order 587-W to be effective 4/1/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209-5158.

*Comments Due:* 5 p.m. ET 2/22/16.

*Docket Numbers:* RP16-598-000.

*Applicants:* Rockies Express Pipeline LLC.

*Description:* Compliance filing Compliance with Order No. 587-W to be effective 4/1/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209-5161.

*Comments Due:* 5 p.m. ET 2/22/16.

*Docket Numbers:* RP16-599-000.

*Applicants:* Trailblazer Pipeline Company LLC.

*Description:* Compliance filing Order No. 587-W to be effective 4/1/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209-5199.

*Comments Due:* 5 p.m. ET 2/22/16.

*Docket Numbers:* RP16-600-000.

*Applicants:* Guardian Pipeline, L.L.C.

*Description:* § 4(d) Rate Filing:

Negotiated Rate PAL Agreements—NJR Energy & Exelon to be effective 3/1/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209-5237.

*Comments Due:* 5 p.m. ET 2/22/16.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

**Filings in Existing Proceedings**

*Docket Numbers:* RP16-323-001.

*Applicants:* Kern River Gas Transmission Company.



*Description:* Compliance filing 2016 Meter Modification Compliance to be effective 2/1/2016.

*Filed Date:* 2/9/16.

*Accession Number:* 20160209–5035.

*Comments Due:* 5 p.m. ET 2/22/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2016–03322 Filed 2–17–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP15–527–000]

#### Transcontinental Gas Pipe Line Company, LLC; Notice of Schedule for Environmental Review of the New York Bay Expansion Project

On July 8, 2015, Transcontinental Gas Pipe Line Company, LLC (Transco) filed an application in Docket No. CP15–527–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the New York Bay Expansion Project (Project), and would modify existing facilities and replace existing pipeline to provide an additional 115,000 dekatherms per day of firm transportation service to National Grid New York to meet 2017–2018 winter heating season needs.

On July 21, 2015, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission

staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

#### SCHEDULE FOR ENVIRONMENTAL REVIEW

Issuance of EA .....	April 4, 2016.
90-day Federal Authorization Decision Deadline.	July 3, 2016.

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

#### Project Description

The Project would involve the following activities at existing aboveground facilities in the specified towns and municipalities:

- Uprate Compressor Station 200 from 30,860 horsepower (hp) to 33,000 hp (East Whiteland Township, Chester, Pennsylvania);
- uprate a unit of Compressor Station 303 from 25,000 hp to 27,500 hp (Roseland Borough, Essex, New Jersey);
- add 11,000 hp of electric-driven compression to Compressor Station 207 (Old Bridge Township, Middlesex, New Jersey); and
- install various appurtenances and modifications at three meter and regulation stations in East Brandywine Township (Chester, Pennsylvania), Sayreville Borough (Middlesex, New Jersey), and Staten Island Borough (Richmond, New York).

In addition, Transco proposes to replace three segments of its 42-inch-diameter Lower New York Bay Lateral pipeline, totaling 0.25 mile, and uprate the lateral pipeline's operating pressure from 960 to 1000 pounds per square inch in Middlesex County, New Jersey.

#### Background

On October 8, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed New York Bay Expansion Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received comments from the New Jersey Department of Environmental Protection, the New Jersey State Historic Preservation Office, the Pennsylvania Department of Environmental

Protection, and two citizens. The primary issues raised by the commentors are general comments for natural gas transmission projects in each state, specific questions for Transco regarding the operation of the facilities, and concerns about possible system alternatives.

#### Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to [www.ferc.gov/docs-filing/esubscription.asp](http://www.ferc.gov/docs-filing/esubscription.asp).

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.*, CP15–527), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov). The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2016–03311 Filed 2–17–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER16–902–000]

#### Voyager Wind I, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Voyager Wind I, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 1, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FEROnlineSupport@ferc.gov](mailto:FEROnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03325 Filed 2-17-16; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER16-890-000]

#### Summer Solar LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Summer Solar LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 1, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

[FEROnlineSupport@ferc.gov](mailto:FEROnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03314 Filed 2-17-16; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EL16-17-000]

#### City of West Memphis, Arkansas; Notice of Filing

Take notice that on February 10, 2016, the City of West Memphis, Arkansas submitted a supplement to its November 19, 2015 application for proposed rate for Reactive Supply and Voltage Control.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FEROnlineSupport@ferc.gov](mailto:FEROnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on February 17, 2016.

Dated: February 10, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016-03312 Filed 2-17-16; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Schedule for Environmental Review of the White Oak Mainline Expansion Project and System Reliability Project

	Docket Nos.
Eastern Shore Natural Gas Company.	CP15-18-000 CP15-18-001 CP15-498-000

On November 21, 2014, Eastern Shore Natural Gas Company (Eastern Shore) filed an application in Docket No. CP15-18-000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities as part of the White Oak Mainline Expansion Project (White Oak Project) in Chester County, Pennsylvania, and New Castle County, Delaware. On November 18, 2015, Eastern Shore filed an amendment to its application in Docket No. CP15-18-001 to construct the Kemblesville Loop Alternative 2 along Eastern Shore's existing right-of-way. Also, on May 22, 2015, Eastern Shore filed an application in Docket No. CP15-498-000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities as part of the System Reliability Project in Kent, New Castle, and Sussex Counties, Delaware.

On December 8, 2014 and June 8, 2015, the Federal Energy Regulatory Commission (Commission or FERC) issued its respective *Notice of Application* for the White Oak Project and the System Reliability Project. On November 25, 2015, the Commission issued its *Notice of Amendment to Application* for the White Oak Project. Among other things, these notices alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the projects. This instant notice

identifies the FERC staff's planned schedule for the completion of the EA for the White Oak and System Reliability Projects. Staff is preparing a single EA for the two projects because of the proximity of the projects to each other and because the System Reliability Project assumes the prior completion of the White Oak Project, as stated in Eastern Shore's amended application.

#### SCHEDULE FOR ENVIRONMENTAL REVIEW

Issuance of EA .....	April 12, 2016.
90-day Federal Authorization Decision Deadline.	July 11, 2016.

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the projects' progress.

#### Project Descriptions

The White Oak Project consists of 3.3 miles of 16-inch-diameter looping pipeline (the Daleville Loop) and 2.1 miles of 16-inch-diameter looping pipeline (Kemblesville Loop) in Chester County, Pennsylvania, and 3,550 horsepower of additional compression at Eastern Shore's existing Delaware City Compressor Station in New Castle County, Delaware. The White Oak Project would result in incremental expansion capacity sufficient to support Eastern Shore's agreement to provide 45,000 dekatherms per day of firm transportation service to Calpine Energy Services, L.P.'s Garrison Energy Center.

The System Reliability Project consists of 2.5 miles of 16-inch-diameter looping pipeline in New Castle County; about 7.6 miles of 16-inch-diameter looping pipeline in Kent County; installation of various appurtenant underground and aboveground facilities; and an additional 1,775 horsepower of compression at Eastern Shore's existing Bridgeville Compressor Station in Sussex County, all in Delaware. According to Eastern Shore, the System Reliability Project would increase the reliability of natural gas to Eastern Shore's existing customers during high demand winter months.

#### Background

On January 22, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed White Oak Mainline Expansion Project and Request for Comments on Environmental Issues* (White Oak NOI). On July 9, 2015, the Commission issued a Supplemental White Oak NOI and opened a supplemental scoping period for the

Kemblesville Loop Alternative 2 route. On September 4, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed System Reliability Project and Request for Comments on Environmental Issues* (System Reliability NOI). The notices were sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; other interested parties; and local libraries and newspapers. In response to the White Oak NOI, the Commission received environmental comments from the U.S. Fish and Wildlife Service, the Delaware Nation, the Franklin Township Historical Commission, the National Oceanic and Atmospheric Administration, the National Park Service, the Franklin Township, the Pennsylvania Department of Conservation and Natural Resources, the Chester County Water Resources Authority, and private landowners. The primary concerns raised were regarding wetland and waterbody impacts; impacts due to forest clearing; impacts on the White Clay Creek National Wild and Scenic River; impacts on watersheds within the project area; impacts on the Kemblesville Village Historic District; impacts on bog turtle habitat; cultural resources; alternative routes, including the Kemblesville Loop Alternative Route 2; old growth forested areas along the pipeline routes; pipeline safety; and pipeline installation within proximity to residences. In response to the System Reliability NOI, the Commission received comments from the National Park Service and landowners. The National Park Service noted potential impacts on the Bridgeville Playground, which was funded through a Land and Water Conservation Fund Grant. Landowners submitted comments about public safety; effects on private property; wetlands; the 100-year floodplain; noise; vibration from trains; property values; less expensive alternatives to the project; and whether the Porter Road Loop would be necessary for system reliability.

#### Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to [www.ferc.gov/docs-filing/esubscription.asp](http://www.ferc.gov/docs-filing/esubscription.asp).

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208-FERC or on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (i.e., CP15-18 or CP15-498), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208-3676, TTY (202) 502-8659, or at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov). The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Additional information about the White Oak and System Reliability Projects can be obtained by contacting the environmental project manager, Gertrude Johnson, by telephone at (202) 502-6692 or by electronic mail at [gertrude.fernandez.johnson@ferc.gov](mailto:gertrude.fernandez.johnson@ferc.gov).

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03323 Filed 2-17-16; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10-1484-012.

*Applicants:* Shell Energy North America (US), L.P.

*Description:* Supplement to November 11, 2015 Notice of Non-Material Change in Status of Shell Energy North America (US), L.P.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5204.

*Comments Due:* 5 p.m. ET 3/2/16.

*Docket Numbers:* ER15-1332-004; ER10-2397-003; ER10-2403-005; ER10-2425-005; ER15-1020-002; ER15-1333-004.

*Applicants:* Arbuckle Mountain Wind Farm LLC, Arlington Wind Power Project LLC, Cloud County Wind Farm, LLC, Pioneer Prairie Wind Farm I, LLC, Rising Tree Wind Farm III LLC, Waverly Wind Farm LLC.

*Description:* Notice of Non-Material Change in Status of Arbuckle Mountain Wind Farm LLC, et al.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5212.

*Comments Due:* 5 p.m. ET 3/2/16.

*Docket Numbers:* ER16-711-001.

*Applicants:* Pio Pico Energy Center, LLC.

*Description:* Tariff Amendment: Amendment to MBR to be effective 3/1/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5093.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-922-000.

*Applicants:* Southern California Edison Company.

*Description:* § 205(d) Rate Filing: Amendment of LGIA, Service Agreement No. 157 to be effective 4/11/2016.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5168.

*Comments Due:* 5 p.m. ET 3/2/16.

*Docket Numbers:* ER16-923-000.

*Applicants:* Puget Sound Energy, Inc.

*Description:* § 205(d) Rate Filing: OATT EIM Changes to be effective 4/1/2012.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5196.

*Comments Due:* 5 p.m. ET 3/2/16.

*Docket Numbers:* ER16-924-000.

*Applicants:* Portland General Electric Company.

*Description:* Initial rate filing: Service Agreement Under Portland General Electric Company's OATT to be effective 3/1/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5000.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-925-000.

*Applicants:* New York Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: LGIA (SA No. 2260) between NMPC and Indeck-Corinth to be effective 11/19/2015.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5001.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-926-000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 3164 Aksamit Resource Management, LLC GIA to be effective 1/19/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5038.

*Comments Due:* 5 p.m. ET 3/3/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date.

Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 11, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03320 Filed 2-17-16; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 14677-001]

#### Clark Canyon Hydro, LLC; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original License for a Major Water Power Project at an Existing Dam, 5 Megawatts or Less.

b. *Project No.:* 14677-001.

c. *Date filed:* November 23, 2015.

d. *Applicant:* Clark Canyon Hydro, LLC.

e. *Name of Project:* Clark Canyon Dam Hydroelectric Project.

f. *Location:* On the Beaverhead River, in the Town of Dillon, Beaverhead County, Montana. The project would occupy 62.1 acres of land owned by the U.S. Bureau of Reclamation and 0.2 acres of land owned by the U.S. Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* John Gangemi, (406) 249-3972, email at [john.gangemi@erm.com](mailto:john.gangemi@erm.com).

i. *FERC Contact:* Kelly Wolcott, (202) 502-6480, email at [kelly.wolcott@ferc.gov](mailto:kelly.wolcott@ferc.gov).

j. *Deadline for filing comments, recommendations, terms and conditions, and prescriptions:* 30 days from the issuance date of this notice; reply comments are due 75 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the

Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P-14677-001.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is now ready for environmental analysis.

l. The Clark Canyon Dam Hydroelectric Project would utilize the U.S. Bureau of Reclamation's Clark Canyon Dam and outlet works including an intake structure and concrete conduit in the reservoir. The project would consist of the following new facilities: (1) A 360-foot-long, 8-foot-diameter steel penstock within the existing concrete conduit, ending in a trifurcation; (2) two 35-foot-long, 8-foot-diameter penstocks extending from the trifurcation to the powerhouse, transitioning to 6-foot-diameter before entering the powerhouse; (3) a 10-foot-long, 8-foot-diameter steel penstock leaving the trifurcation and ending in a 7-foot-diameter cone valve and reducer to control discharge into the existing outlet stilling basin; (4) a 65-foot-long, 46-foot-wide reinforced concrete powerhouse containing two vertical Francis-type turbine/generator units with a total capacity of 4.7 megawatts; (5) two 25-foot-long steel draft tubes transitioning to concrete draft tube/tailrace section; (6) a 17-foot-long, 15-foot-diameter tailrace channel connecting with the existing spillway stilling basin; (7) a 45-foot-long, 10-foot-wide aeration basin downstream of the powerhouse with three frames containing 330 diffusers; (8) a 1,100-foot-long, 4.16-kilovolt (kV) buried transmission line from the powerhouse to a substation; (9) a substation containing step-up

transformers and switchgear; (10) a 7.9-mile-long, 69-kV transmission line extending from the project substation to the Peterson Flat substation (the point of interconnection); and (11) appurtenant facilities. The estimated annual generation of the Clark Canyon Dam Project would be 15.4 gigawatt-hours. All project facilities would be located on federal lands owned by the U.S. Bureau of Reclamation and the U.S. Bureau of Land Management. The applicant proposes to operate the project as run-of-release.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No

competing applications or notices of intent may be filed in response to this notice.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: February 11, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-03335 Filed 2-17-16; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER16-915-000]

#### **Comanche Solar PV, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization**

This is a supplemental notice in the above-referenced proceeding of Comanche Solar PV, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 2, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling

link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20246.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 11, 2016.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2016-03334 Filed 2-17-16; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC16-69-000.

*Applicants:* Duke Energy Florida, LLC.

*Description:* Application for Authorization to Transfer Assets under Section 203 of the Federal Power Act of Duke Energy Florida, LLC.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5089.

*Comments Due:* 5 p.m. ET 3/2/16.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER16-524-001.

*Applicants:* Wolverine Holdings, L.P.

*Description:* Tariff Amendment: Amendment to Notice of Succession to be effective 1/1/2016.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5045.

*Comments Due:* 5 p.m. ET 3/2/16.

*Docket Numbers:* ER16-526-001.

*Applicants:* Sempra Generation, LLC.

*Description:* Tariff Amendment: Sempra Generation, LLC Amended Market-Based Rate Tariff Feb. 10, 2016 to be effective 12/31/2024.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5068.

*Comments Due:* 5 p.m. ET 3/2/16.

*Docket Numbers:* ER16-921-000.

*Applicants:* ISO New England Inc., New England Power Pool Participants Committee.

*Description:* § 205(d) Rate Filing: Revisions to Forward Reserve Market Offer Cap and Elimination of Price Netting to be effective 6/1/2016.

*Filed Date:* 2/10/16.

*Accession Number:* 20160210-5075.

*Comments Due:* 5 p.m. ET 3/2/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2016-03309 Filed 2-17-16; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #2

Take notice that the Commission received the following exempt wholesale generator filings:

*Docket Numbers:* EG16-55-000.

*Applicants:* Grant County Interconnect, LLC.

*Description:* Notice of Self-Certification of Exempt Wholesale Generator Status of Grant County Interconnect, LLC.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5149.

*Comments Due:* 5 p.m. ET 3/3/16.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER15-13-005.

*Applicants:* Transource Wisconsin, LLC.

*Description:* Compliance filing: Transource Wisconsin Compliance Filing Revision to be effective 12/1/2014.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5139.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-842-001.

*Applicants:* Kay Wind, LLC.

*Description:* Tariff Amendment: Kay Wind Amendment Filing to be effective 2/2/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5190.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-927-000.

*Applicants:* International

Transmission Company.

*Description:* § 205(d) Rate Filing: CIAC Agreement with Fortistar LLC to be effective 4/11/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5129.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-928-000.

*Applicants:* ISO New England Inc.

*Description:* ISO New England Inc. submits Forth Quarter 2015 Capital Budget Report under ER16-928.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5131.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-929-000.

*Applicants:* AES Ohio Generation, LLC.

*Description:* § 205(d) Rate Filing: Rate Schedule No. 3 to be effective 2/12/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5163.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-930-000.

*Applicants:* AES Ohio Generation, LLC.

*Description:* § 205(d) Rate Filing: FERC Rate Schedule No. 1 to be effective 2/12/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5165.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-931-000.

*Applicants:* AES Ohio Generation, LLC.

*Description:* § 205(d) Rate Filing: FERC Electric Tariff, Vol. No. 2 to be effective 2/12/2016.

*Filed Date:* 2/11/16.

*Accession Number:* 20160211-5166.

*Comments Due:* 5 p.m. ET 3/3/16.

*Docket Numbers:* ER16-932-000.

*Applicants:* Grant County Interconnect, LLC.

*Description:* Baseline eTariff Filing: Grant County Interconnect LLC Filing of Coordination Services Agreement to be effective 2/11/2016.

*Filed Date:* 2/11/16.

Accession Number: 20160211–5191.  
Comments Due: 5 p.m. ET 3/3/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 11, 2016.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2016–03321 Filed 2–17–16; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Schedule for Environmental Review of the Leach Xpress and Rayne Xpress Expansion Projects

	Docket No.
Columbia Gas Transmission, LLC.	CP15–514–000
Columbia Gulf Transmission, LLC.	CP15–539–000

On June 8, 2015, Columbia Gas Transmission, LLC (Columbia Gas) filed an application in Docket No. CP15–514–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) and 7(b) of the Natural Gas Act to construct, operate, abandon in-place, and maintain certain natural gas pipeline facilities. The proposed Leach Xpress Project, located in West Virginia, Ohio, and Pennsylvania, would provide about 1.5 million dekatherms of natural gas per day of firm transportation service to natural gas consumers served by the Columbia Gas pipeline systems.

Additionally, on July 29, 2015, Columbia Gulf Transmission, LLC (Columbia Gulf) filed an application in Docket No. CP15–539–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct, own, and

operate the proposed Rayne Xpress Expansion Project. The Rayne Express Expansion Project, located in Kentucky, would add new compression and provide about 621,000 dekatherms per day of firm transportation on Columbia Gulf's system. Together, these proposals are referred to in this notice as "the Projects."

On June 22 and August 11, 2015, respectively, the Federal Energy Regulatory Commission (FERC or Commission) issued its Notice of Application for the Leach Xpress Project and Rayne Xpress Expansion Project. Among other things, these notices alerted other agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on the request for a federal authorization within 90 days of the date of issuance of the Commission staff's final Environmental Impact Statement (EIS) for the Projects. This instant notice identifies the FERC staff's planned schedule for completion of the final EIS for the Projects.

#### SCHEDULE FOR ENVIRONMENTAL REVIEW

Issuance of Notice of Availability of the final EIS.	September 1, 2016.
90-day Federal Authorization Decision Deadline.	November 30, 2016.

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

#### Project Description

Columbia Gas plans to construct approximately 160 miles of new natural gas pipeline in West Virginia (Marshall County), Ohio (Fairfield, Hocking, Monroe, Morgan, Muskingum, Noble, Perry and Vinton Counties) and Pennsylvania (Greene County), two new compressor stations in Ohio (Noble and Jackson Counties), one new compressor station in West Virginia (Marshall County), and modify two existing compressor stations in West Virginia and Ohio.

Columbia Gulf plans to construct and operate 51,800 horsepower of new compression in two new compressor stations located in Carter, Menifee and Montgomery Counties, Kentucky, and modify the existing Means Measurement and Regulation Station in Means and Montgomery County, Kentucky.

#### Background

On October 9, 2014, the Commission staff granted Columbia Gas's request to use the FERC's Pre-filing environmental review process and assigned the Leach Xpress Project Docket No. PF14–23–000. On January 13, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Leach Xpress Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI). Additionally, on September 4, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Rayne Xpress Expansion Project and Request for Comments on Environmental Issues*.

Both NOIs were sent to federal, state, and local government agencies; elected officials; affected landowners; environmental and public interest groups; Native American tribes and regional organizations; commentors and other interested parties; and local libraries and newspapers. The primary issues raised by the commentors included federally listed bats, forested plant and animal habitat, freshwater mussel habitat, salamander habitat, potential future subsidence of mining land, and effects on public health and safety.

The U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Ohio Environmental Protection Agency, the West Virginia Department of Environmental Protection, the West Virginia Department of Natural Resources, and the Kentucky Department for Environmental Protection are cooperating agencies in the preparation of the EIS.

#### Additional Information

In order to receive notification of the issuance of the EIS and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to [www.ferc.gov/docs-filing/esubscription.asp](http://www.ferc.gov/docs-filing/esubscription.asp).

Additional information about the Projects is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" for the project you wish to access excluding the last three digits



(i.e., CP15–514, CP15–539), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov). The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: February 10, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–03324 Filed 2–17–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Western Area Power Administration

#### Pick-Sloan Missouri Basin Program—Eastern Division

**AGENCY:** Western Area Power Administration, DOE.

**ACTION:** Notice of transfer of functional control of eligible Western-Upper Great Plains Region transmission facilities to Southwest Power Pool, Inc. on October 1, 2015, and Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7 made effective on that date.

**SUMMARY:** Western Area Power Administration (Western) transferred functional control of eligible Western-Upper Great Plains Region (Western-UGP) transmission facilities to Southwest Power Pool, Inc. (SPP) on October 1, 2015. Transmission service is being provided over Western-UGP's eligible facilities under SPP's Open Access Transmission Tariff. Western-UGP costs are included in Western-UGP Formula rates for Transmission and Ancillary Services under Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7, which became effective on October 1, 2015.

**FOR FURTHER INFORMATION CONTACT:** Mr. Lloyd Linke, Vice President of Operations for Upper Great Plains Region, Upper Great Plains Region, Western Area Power Administration, 1330 41st Street, Watertown, SD, 57201; telephone: (605) 882–7500; email: [Lloyd@wapa.gov](mailto:Lloyd@wapa.gov); or Ms. Linda Cady-Hoffman, Rates Manager, Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266; telephone: (406) 255–2920; email: [cady@wapa.gov](mailto:cady@wapa.gov).

**SUPPLEMENTARY INFORMATION:** On July 27, 2015, Western published a **Federal**

**Register** Notice (80 FR 44339) providing a Notice of Final Transmission and Ancillary Services Formula Rates for Western's Pick-Sloan Missouri Basin Program-Eastern Division (P–SMBP–ED). Western explained that Western-UGP intended to transfer functional control of Western-UGP's P–SMBP–ED eligible transmission facilities located in the Upper Missouri Zone (UMZ or Zone 19) to SPP on October 1, 2015. Western announced the final transmission and ancillary services formula rates and the P–SMBP–ED transmission and ancillary services formula rates would go into effect when functional control was transferred to SPP.

The purpose of this notice is to announce that Western-UGP successfully transferred functional control of eligible transmission facilities on October 1, 2015, and Rate Schedules WAUGP–ATRR, WAUGP–AS1, WAUW–AS3, WAUW–AS4, WAUW–AS5, WAUW–AS6 and WAUW–AS7 were made effective on that date.

#### Availability of Information

Information regarding the public process for Western-UGP's formula rate adjustment process and annual recalculation is available on Western's Web site and Western-UGP's Open Access Same-Time Information System (OASIS) home page, which are located respectively at the following locations: <https://www.wapa.gov/regions/UGP/rates/Pages/rates.aspx> <http://www.oasis.com/wapa/index.html>

Dated: February 8, 2016.

**Mark A. Gabriel,**

*Administrator.*

[FR Doc. 2016–03362 Filed 2–17–16; 8:45 am]

**BILLING CODE 6450–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9942–51–OECA]**

### National Environmental Justice Advisory Council

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

**ACTION:** Request for Nominations to the National Environmental Justice Advisory Council (NEJAC).

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) invites nominations from a diverse range of qualified candidates to be considered for appointment to its National Environmental Justice Advisory Council (NEJAC). The NEJAC was chartered to provide advice regarding broad, cross-

cutting issues related to environmental justice. This notice solicits nominations to fill approximately six (6) new vacancies for terms through September 2019. To maintain the representation outlined by the charter, nominees will be selected to represent: grassroots community-based organizations (2 vacancies); non-governmental/ environmental organizations (2 vacancies); State government agencies (1 vacancy); and business and industry (1 vacancy). Vacancies are anticipated to be filled by July 2016. Sources in addition to this **Federal Register** Notice also may be utilized in the solicitation of nominees.

**DATES:** Nominations should be submitted in time to arrive no later than Friday, April 15, 2016.

**ADDRESSES:** Submit nominations electronically with the subject line NEJAC Membership 2016 to [martin.karenl@epa.gov](mailto:martin.karenl@epa.gov). You also may submit nominations by mail to: Karen L. Martin, NEJAC Project Manager, Office of Environmental Justice, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., (MC 2201A), Washington, DC 20460. Non-electronic submissions must follow the same format and contain the same information. The Office of Environmental Justice will acknowledge receipt of nominations.

#### FOR FURTHER INFORMATION CONTACT:

Matthew Tejada, Designated Federal Officer for the NEJAC, U.S. EPA; telephone (202) 564–8047; fax: (202) 564–1624.

**SUPPLEMENTARY INFORMATION:** The NEJAC is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. EPA established the NEJAC in 1993 to provide independent consensus advice to the EPA Administrator about a broad range of environmental issues related to environmental justice. The NEJAC conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations.

The Council consists of 28 members (including a Chairperson) appointed by EPA's Administrator. Members serve as non-federal stakeholders representing: six (6) from academia, two (2) from business and industry; six (6) from community based organizations; seven (7) from non-governmental/ environmental organizations; four (4) from state and local governments; and three (3) from tribal governments and indigenous organizations, of which one member serves as a liaison to the National Tribal Caucus. Members are appointed for three (3)-year terms with



the possibility of reappointment to a second term.

The NEJAC usually meets face-to-face twice a year, generally in the Spring and the Fall. Additionally, members may be asked to participate in teleconference meetings or serve on work groups to develop recommendations, advice letters, and reports to address specific policy issues. The average workload for members is approximately 5 to 8 hours per month. EPA provides reimbursement for travel and other incidental expenses associated with official government business.

**Nominations:** Any interested person and/or organization may nominate qualified individuals for membership. The EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, the agency encourages nominations of women and men of all racial and ethnic groups. All nominations will be fully considered, but applicants need to be aware of the specific representation sought as outlined in the Summary above. In addition, EPA is seeking nominees with knowledge in community sustainability, public health and health disparities, climate change adaptation, land use and equitable development, environmental sociology and social science, and environmental financing.

Other criteria used to evaluate nominees will include:

- The background and experience that would help members contribute to the diversity of perspectives on the committee (e.g., geographic, economic, social, cultural, educational background, professional affiliations, and other considerations;

- demonstrated experience with environmental justice and community sustainability issues at the national, state, or local level;
- excellent interpersonal and consensus-building skills;
- ability to volunteer time to attend meetings 2–3 times a year, participate in teleconference meetings, attend listening sessions with the Administrator or other senior-level officials, develop policy recommendations to the Administrator, and prepare reports and advice letters; and
- willingness to commit time to the committee and demonstrated ability to work constructively and effectively on committees.

**How To Submit Nominations:** Any interested person or organization may nominate qualified persons to be considered for appointment to this advisory committee. Individuals are encouraged to self-nominate. Nominations can be submitted in electronic format (preferred) following the template available at <http://www3.epa.gov/environmentaljustice/nejac/index.html#membership>. To be considered, all nominations should include:

- Current contact information for the nominee, including the nominee's name, organization (and position within that organization), current business address, email address, and daytime telephone number.
- Brief Statement describing the nominee's interest in serving on the NEJAC
- Résumé and a short biography (no more than 2 paragraphs) describing the professional and educational qualifications of the nominee, including

a list of relevant activities, and any current or previous service on advisory committees

- Letter[s] of recommendation from a third party supporting the nomination. Letter[s] should describe how the nominee's experience and knowledge will bring value to the work of the NEJAC.

Other sources, in addition to this **Federal Register** notice, may also be utilized in the solicitation of nominees. To help the EPA in evaluating the effectiveness of its outreach efforts, please tell us how you learned of this opportunity.

Dated: February 5, 2016.

**Matthew Tejada,**

*Designated Federal Officer, National Environmental Justice Advisory Council.*

[FR Doc. 2016-03405 Filed 2-17-16; 8:45 am]

**BILLING CODE 6560-50-P**

## FEDERAL COMMUNICATIONS COMMISSION

### Sunshine Act Meeting

February 17, 2016.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, February 18, 2016, which is scheduled to commence at 10:30 a.m. in Room TW-C305, at 445 12th Street SW., Washington, DC.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, February 18, 2016, which is scheduled to commence at 10:30 a.m. in Room TW-C305, at 445 12th Street SW., Washington, DC.

Item No.	Bureau	Subject
1 .....	MEDIA .....	TITLE: Promoting the Availability of Diverse and Independent Sources of Video Programming. SUMMARY: The Commission will consider a Notice of Inquiry that seeks comment on the current state of programming diversity and the principal obstacles that independent programmers face in obtaining carriage on video distribution platforms.
2 .....	MEDIA .....	TITLE: Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices (CS Docket No. 97-80). SUMMARY: The Commission plans to discuss a document that seeks comment on a framework for providing innovators, device manufacturers and app developers the information they need to develop new technologies to access video content.
3 .....	CONSUMER & GOVERNMENTAL AFFAIRS.	TITLE: Closed Captioning of Video Programming (CG Docket No. 05-231); Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking. SUMMARY: The Commission will consider a Second Report and Order that allocates responsibilities for the delivery of closed captions on video programming and the handling of captioning complaints.

\* \* \* \* \*

### Consent Agenda

The Commission will consider the following subjects listed below as a

consent agenda and these items will not be presented individually:

1 .....	ENFORCEMENT .....	TITLE: Enforcement Bureau Action. SUMMARY: The Commission will consider whether to take an enforcement action.
2 .....	ENFORCEMENT .....	TITLE: Enforcement Bureau Action. SUMMARY: The Commission will consider whether to take an enforcement action.
3 .....	ENFORCEMENT .....	TITLE: Enforcement Bureau Action. SUMMARY: The Commission will consider whether to take an enforcement action.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an email to: [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

Additional information concerning this meeting may be obtained from the Office of Media Relations, (202) 418-0500; TTY 1-888-835-5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC Live Web page at [www.fcc.gov/live](http://www.fcc.gov/live).

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services, call (703) 993-3100 or go to [www.capitolconnection.gmu.edu](http://www.capitolconnection.gmu.edu).

Federal Communications Commission.

**Gloria J. Miles,**

*Federal Register Liaison Officer, Office of the Secretary.*

[FR Doc. 2016-03502 Filed 2-16-16; 4:15 pm]

**BILLING CODE 6712-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-1177]

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork 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 April 18, 2016. 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 [PRA@fcc.gov](mailto:PRA@fcc.gov) and to [CathyWilliams@fcc.gov](mailto:CathyWilliams@fcc.gov).

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418-2918.

#### SUPPLEMENTARY INFORMATION:

*OMB Control No.:* 3060-1177.

*Title:* 47 CFR 74.800, Channel Sharing Agreement.

*Form Numbers:* Not applicable.

*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/Responses:* 100 respondents; 100 responses.

*Estimated Hours per Response:* 1 hr.

*Frequency of Response:* One time reporting requirement.

*Total Annual Burden:* 100 hours.

*Total Annual Cost:* \$54,000.

*Obligation To Respond:* Required to obtain benefits. The statutory authority for this information collection is contained in sections 1, 4(i) and (j), 7, 154(i), 301, 302, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336 and 337 of the Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Privacy Act Assessment:* No impact(s).

*Needs and Uses:* On December 18, 2015, the Commission released a Third Report and Order and Fourth Notice of Proposed Rulemaking, In the Matter of Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations, MB Docket No. 03-185, FCC 15-175. Low power television and television translator stations (collectively "LPTV stations") will be required to include certain terms in their channel sharing agreements (CSAs) and to file their CSAs with the Commission. This new requirement is provided in 47 CFR 74.800.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2016-03363 Filed 2-17-16; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-1138]

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection.

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 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 Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before April 18, 2016. 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 Nicole Ongele, FCC, via email [PRA@fcc.gov](mailto:PRA@fcc.gov) and to [Nicole.Ongele@fcc.gov](mailto:Nicole.Ongele@fcc.gov).

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Nicole Ongele at (202) 418-2991.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060-1138.

*Title:* Sections 1.49 and 1.54, Forbearance Petition Filing Requirements.

*Form Number:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents:* 11 respondents; 11 responses.

*Estimated Time per Response:* 640 hours.

*Frequency of Response:* On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

*Obligation To Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 10, 151, 154(i), 154(j), 155(c), 160, 201 and 303(r) of the Communications Act of 1934.

*Total Annual Burden:* 7,040 hours.

*Total Annual Cost:* No cost.

*Privacy Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* The Commission is not requesting respondents to submit or disclose confidential information. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* Under section 10 of the Communications Act of 1934, as amended, telecommunications carriers may petition the Commission to forbear from applying to a telecommunications carrier any statutory provision or Commission regulation. When a carrier petitions the Commission for forbearance, section 10 requires the Commission to make three determinations with regard to the need for the challenged provision or regulation. If the Commission fails to act within one year (extended by three additional months, if necessary) the petition is "deemed granted" by operation of law. These determinations require complex, fact-intensive analysis, e.g., "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." Under the new filing procedures, the Commission requires that petitions for forbearance must be "complete as filed" and explain in detail what must be included in the forbearance petition. The Commission also incorporates by reference its rule, 47 CFR 1.49, which states the Commission's standard "specifications as to pleadings and documents." Precise filing requirements are necessary because of section 10's strict time limit for Commission action. Also, commenters must be able to understand clearly the scope of the petition in order to comment on it. Finally, standard filing procedures inform petitioners precisely what the Commission expects from them in order to make the statutory determinations that the statute requires.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2016-03364 Filed 2-17-16; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Meeting

**AGENCY:** Federal Election Commission.

**DATE & TIME:** Tuesday, February 23, 2016 at 10:00 a.m. and its continuation at the conclusion of the open meeting on February 25, 2016.

**PLACE:** 999 E Street NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

**ITEMS TO BE DISCUSSED:** Compliance matters pursuant to 52 U.S.C. 30109.

Matters concerning participation in civil actions or proceeding, or arbitration.

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

\* \* \* \* \*

**PERSON TO CONTACT FOR INFORMATION:**

Judith Ingram, Press Officer, Telephone: (202) 694-1220.

**Shawn Woodhead Werth,**

*Secretary and Clerk.*

[FR Doc. 2016-03501 Filed 2-16-16; 4:15 pm]

**BILLING CODE 6715-01-P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of the agreement are available through the Commission's Web site ([www.fmc.gov](http://www.fmc.gov)) or by contacting the Office of Agreements at (202)-523-5793 or [tradeanalysis@fmc.gov](mailto:tradeanalysis@fmc.gov).

*Agreement No.:* 012390.

*Title:* Siem Car Carriers AS/Liberty Global Logistics LLC Space Charter Agreement.

*Parties:* Siem Car Carriers AS and Liberty Global Logistics LLC.

*Filing Party:* Ashley W. Craig Esq.; Venable LLP; 575 Seventh Street NW.; Washington, DC 20004.

*Synopsis:* The agreement authorizes the parties to charter space to/from each other in the trade between the U.S. on the one hand, and China, Japan, South Korea, Mexico and Germany on the other hand.

*Agreement No.:* 012391.

*Title:* Hanjin/UASC/CMA CGM/ COSCON Vessel Sharing Agreement.

*Parties:* Hanjin Shipping Co., Ltd.; United Arab Shipping Co, S.A.G.; CMA CGM S.A.; and COSCO Container Lines Company, Limited.

*Filing Party:* Joshua Stein, Esq.; Cozen O'Connor; 1200 Nineteenth St, N.W.; Washington, DC 20006.

*Synopsis:* The agreement would authorize the parties to cooperate through a combination of vessel sharing and slot charter arrangements on routes between ports in Italy, France, Spain and Malta on the one hand, and the U.S. East Coast on the other hand.

By Order of the Federal Maritime Commission.

Dated: February 12, 2016.

**Rachel E. Dickon,**  
Assistant Secretary.

[FR Doc. 2016-03378 Filed 2-17-16; 8:45 am]

BILLING CODE 6731-AA-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[60Day-16-16PJ; Docket No. ATSDR-2016-0002]

#### Proposed Data Collection Submitted for Public Comment and Recommendations

**AGENCY:** Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

**ACTION:** Notice with comment period.

**SUMMARY:** Agency for Toxic Substances and Disease Registry (ATSDR), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on "Collections Related to Synthetic Turf Fields with Crumb Rubber Infill." The purpose of the proposed studies is to evaluate and characterize the chemical composition and use of synthetic turf with crumb rubber infill and exposure potential to constituents in crumb rubber infill.

**DATES:** Written comments must be received on or before April 18, 2016.

**ADDRESSES:** You may submit comments, identified by Docket No. ATSDR-2016-0002 by any of the following methods:

- *Federal eRulemaking Portal:* Regulation.gov. Follow the instructions for submitting comments.

- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS-D74, Atlanta, Georgia 30329.

*Instructions:* All submissions received must include the agency name and

Docket Number. All relevant comments received will be posted without change to Regulations.gov, including any personal information provided. For access to the docket to read background documents or comments received, go to Regulations.gov. For this docket, ATSDR is only accepting comments on the proposed studies' data collections referenced in this notice.

**Please note:** All public comment should be submitted through the Federal eRulemaking portal (Regulations.gov) or by U.S. mail to the address listed above.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS-D74, Atlanta, Georgia 30329; phone: 404-639-7570; Email: omb@cdc.gov.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed

to review instructions; 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.

#### Proposed Project

Collections Related to Synthetic Turf Fields with Crumb Rubber Infill—New—Agency for Toxic Substances and Disease Registry (ATSDR).

#### Background and Brief Description

Currently in the United States, there are more than 12,000 synthetic turf fields in use. While the Synthetic Turf Council has set guidelines for the content of crumb rubber used as infill in synthetic turf fields, manufacturing processes result in differences among types of crumb rubber. Additionally, the chemical composition may vary highly between different processes and source materials and may vary even within granules from the same origin.

Due to the limited information, the Agency for Toxic Substances and Disease Registry (ATSDR) and the United States Environmental Protection Agency (USEPA) propose to conduct two studies to investigate the chemical composition and use of crumb rubber infill in synthetic turf and the potential for exposure to environmental constituents that may result from contact with crumb rubber infill.

Prior to study initiation, outreach and engagement efforts may be undertaken among stakeholders, including but not limited to industry representatives, state or local partners, and sports coaches. These efforts will inform the design and implementation of the proposed studies and will involve less than ten respondents per stakeholder groups. The outreach and engagement efforts will allow us to better understand the manufacturing process for synthetic turf and crumb rubber infill and allow us to obtain first-hand perspectives on activities conducted on synthetic turf leading to potential exposures. Additionally, outreach efforts will involve discussions and coordination with state partners to identify their current and future research studies on synthetic turf.

The first study, titled "Determination of Field Operating Procedures, Use Conditions, and Chemical Composition of Crumb Rubber Infill in Synthetic Turf

Fields,” will characterize field use procedures and conditions. The respondents will include facility representatives who are knowledgeable about the standard operating procedures for synthetic turf fields with crumb rubber infill. We aim to enroll an estimate of ten facilities in each of the four US census regions. The questionnaire will focus on key questions to characterize activity use patterns, field maintenance (e.g., redistribution of crumb rubber material), and other procedures and facility characteristics potentially affecting exposure to any chemicals of potential concern. Also, these facilities may be asked to supply samples from their synthetic turf fields with crumb rubber infill. The samples will be used to characterize the chemical constituents of the crumb rubber infill, including semi-volatile organic compounds (SVOC), metal content, and measurements of volatile organic compounds (VOC) and SVOC emission levels.

The second study, titled “Characterization of Exposure Potential during Activities Conducted on

Synthetic Turf with Crumb Rubber Infill,” will be the first assessment of activities conducted on synthetic turf for the purpose of characterizing potential exposure patterns. The study will include persons who use synthetic turf with crumb rubber infill (e.g., facility users) and who routinely perform activities that would result in a high level of contact to crumb rubber. This will allow for evaluation of potential high-end exposures to constituents in synthetic turf among this group of users. The respondents will be administered a detailed questionnaire on activity patterns on synthetic turf with crumb rubber infill. This instrument, along with extant videography of persons engaged in activities of interest, will be used to characterize exposure scenarios, including the nature and duration of potential exposures.

Furthermore, if time and resources allow, we will conduct a full exposure characterization sub-study among a subset of the respondents. If possible, we will use the facilities sampled in the first study to conduct activities for the full exposure characterization of facility

users. The exposure characterization sub-study will likely include but is not limited to field environment and material sampling, personal air monitoring, dermal sampling, and urine collection. It is likely that some of the collection items will not be analyzed in the current project time frame but will be archived for future analysis.

The burden hours for the research study of crumb rubber infill composition and field operating procedures is 76 hours among 40 respondents; the burden hours requested for the research study of activity levels in persons playing on synthetic turf with crumb rubber infill is 216 hours among 60 respondents. The total estimated annual time burden requested for these studies equals 292 hours. There is no cost to the respondents other than their time in the study.

#### *Estimated Annualized Burden Hours*

“Determination of Field Operating Procedures, Use Conditions, and Chemical Composition of Crumb Rubber Infill in Synthetic Turf Fields”

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)	Total burden (in hrs.)
Facilities .....	Facility Eligibility Screening .....	70	1	5/60	6
	Synthetic Turf Fields Questionnaire .....	40	1	45/60	30
	Field Sampling Collection Form .....	40	1	1	40
Total .....	.....	.....	.....	.....	76

“Characterization of Exposure Potential during Activities Conducted on Synthetic Turf with Crumb Rubber Infill”

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)	Total burden (in hrs.)
Facility Users .....	Facility User Eligibility Screening .....	75	1	5/60	6
	Facility User Questionnaire .....	60	1	30/60	30
	Full Exposure Characterization Form.	45	1	4	180
Total .....	.....	.....	.....	.....	216

**Leroy A. Richardson,**

*Chief, Information Collection Review Office,  
Office of Scientific Integrity, Office of the  
Associate Director for Science, Office of the  
Director, Centers for Disease Control and  
Prevention.*

[FR Doc. 2016-03305 Filed 2-17-16; 8:45 am]

**BILLING CODE 4163-18-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Disease Control and Prevention****[30 Day–16–1019]****Agency Forms Undergoing Paperwork Reduction Act Review**

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) 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; (b) 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; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) 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; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to [omb@cdc.gov](mailto:omb@cdc.gov). Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

Integrating Community Pharmacists and Clinical Sites for Patient-Centered HIV Care (OMB 0920–1019, expires 8/31/2018)—Revision—National Center for HIV/AIDS, Viral Hepatitis, STD, and

TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Medication Therapy Management (MTM) is a group of pharmacist provided services that is independent of, but can occur in conjunction with, provision of medication. Medication Therapy Management encompasses a broad range of professional activities and cognitive services within the licensed pharmacists' scope of practice and can include monitoring prescription filling patterns and timing of refills, checking for medication interactions, patient education, and monitoring of patient response to drug therapy.

HIV specific MTM programs have demonstrated success in improving HIV medication therapy adherence and persistence. While MTM programs have been shown to be effective in increasing medication adherence for HIV-infected persons, no MTM programs have been expanded to incorporate primary medical providers in an effort to establish patient-centered HIV care. To address this problem, CDC has entered into a public-private partnership with Walgreen Company (a.k.a. Walgreens pharmacies, a national retail pharmacy chain) to develop and implement a model of HIV care that integrates community pharmacists with primary medical providers for patient-centered HIV care. The model program will be implemented in ten sites and will provide patient-centered HIV care for approximately 1,000 persons.

The patient-centered HIV care model will include the core elements of MTM as well as additional services such as individualized medication adherence counseling, active monitoring of prescription refills and active collaboration between pharmacists and medical clinic providers to identify and resolve medication related treatment problems such as treatment effectiveness, adverse events and poor adherence. The expected outcomes of the model program are increased retention in HIV care, adherence to HIV medication therapy and viral load suppression.

On May 16, 2014 OMB approved the collection of standardized information from ten project sites over the three-year project period and one retrospective data collection during the first year of the three-year project period. The retrospective data collection will provide information about clients' baseline characteristics prior to participation in the model program which is needed to compare outcomes before and after program

implementation. On August 17, 2015, OMB approved the conduct of key informant interviews with program clinic and pharmacy staff in order to evaluate the program processes, administration of a staff communication questionnaire, and OMB approved the collection of time and cost data to be used to estimate the cost of the model program.

CDC newly requests approval to administer a staff communication questionnaire for medical providers in order to determine how and if the model program improves patient outcomes through improved communication and collaboration between patients' clinical providers and pharmacists. The staff communication questionnaire for medical providers will be administered twice to program clinic staff. The staff communication questionnaire for medical providers is different from the previously improved staff communication questionnaire; the staff communication questionnaire for medical providers will be administered to program clinic staff whereas the staff communication questionnaire will be administered to program pharmacy staff.

Pharmacy, laboratory, and medical data will be collected through abstraction of all participant clients' pharmacy and medical records. Pharmacy, laboratory and medical data are needed to monitor retention in care, adherence to therapy, viral load suppression and other health outcomes. Program specific data, such as the number of MTM elements completed per project site and time spent on program activities, will be collected by program. Qualitative data will be gathered from program staff through in-person or telephone interviews and through a questionnaire to program pharmacy staff and a separate questionnaire to program clinic staff.

The data collection will allow CDC to conduct continuous program performance monitoring which includes identification of barriers to program implementation, solutions to those barriers, and documentation of client health outcomes. Performance monitoring will allow the model program to be adjusted, as needed, in order to develop a final implementation model that is self-sustaining and which can be used to establish similar collaborations in a variety of clinical settings. Collection of cost data will allow for the cost of the program to be estimated.

There is no cost to participants other than their time. The total estimated annualized burden hours are 6,043.

## ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Clinic Data Manager .....	Project clinic characteristics form .....	10	3	30/60
Pharmacist .....	Project pharmacy characteristics form .....	10	3	30/60
Clinic Data Manager .....	*Patient Demographic Information form .....	10	100	5/60
Clinic Data Manager .....	*Initial patient information form .....	10	100	1
Clinic Data Manager .....	Quarterly patient information form .....	10	400	30/60
Pharmacist .....	Pharmacy record abstraction form .....	10	400	30/60
Key informants .....	Interviewer data collection worksheet .....	60	2	30/60
Project staff (pharmacists) .....	Staff communication questionnaire .....	30	2	30/60
Project staff (medical providers) .....	Staff communication questionnaire for medical providers.	40	2	30/60
Clinic staff .....	Clinic cost form .....	20	2	10
Pharmacy staff .....	Pharmacy cost form .....	20	2	10

**Leroy A. Richardson,**

*Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2016-03304 Filed 2-17-16; 8:45 am]

**BILLING CODE 4163-18-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Medicare & Medicaid Services****Privacy Act of 1974; Report of a New Routine Use for a CMS System of Records**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Altered System Notice, Adding a New Routine Use for a CMS System of Records.

**SUMMARY:** In accordance with the requirements of the Privacy Act of 1974 (5 U.S.C. 552a), CMS is adding a new routine use to the existing system of records titled Enrollment Data Base (EDB), System No. 09-70-0502, last modified 73 **Federal Register** 10249 (February 26, 2008), to assist with transmitting data to the Internal Revenue Service (IRS) for 10958 processing.

The new routine use will authorize CMS to disclose information maintained in the system “to the IRS for the purposes of reporting Medicare Part A enrollment information and to provide statements to the individual enrollees with respect to whom information is reported to the IRS. Disclosures made pursuant to the routine use will be coordinated through CMS’ Division of Medicare Enrollment Coordination,

Medicare Enrollment and Appeals Group, Center for Medicare.

**DATES: Effective Dates:** The new routine use described in this notice will become effective without further notice 30 days after publication of this notice in the **Federal Register**, unless comments are received that warrant revisions to this Notice. Written comments should be submitted within 30 days.

**ADDRESSES:** The public should address comments to: CMS Privacy Officer, Division of Security, Privacy Policy and Governance, Information Security and Privacy Group, Office of Enterprise Information, CMS, 7500 Security Boulevard, Baltimore, MD 21244-1870, Mailstop: N 1-24-08, Office: (410) 786-5357 or via email: [walter.stone@cms.hhs.gov](mailto:walter.stone@cms.hhs.gov). Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9:00 a.m.-3:00 p.m., Eastern Time zone.

**FOR FURTHER INFORMATION CONTACT:**

Roland Herrera, Health Insurance Specialist, Division of Medicare Enrollment Coordination, Medicare Enrollment and Appeals Group, CMS Center for Medicare, 7500 Security Boulevard, Mail Stop C2-12-16, Baltimore, MD 21244, Office phone: 410.786.0668, Facsimile: 443.380.5418, Email: [roland.herrera@cms.hhs.gov](mailto:roland.herrera@cms.hhs.gov).

**SUPPLEMENTARY INFORMATION:** CMS is required to produce reports and statements of enrollment in Medicare Part A to confirm enrollment in minimum essential coverage under Section 6055 of the Affordable Care Act. The enrollment information must be provided to the IRS for tax administration purposes to enable the IRS to properly assess tax returns filed to ensure that Medicare Part A Enrollees are not assessed a tax penalty for not beenrolled in health care coverage.

For the reason explained above, the following routine use is added to Enrollment Data Base (EDB), System No. 09-70-0502:

11. To the IRS for the purposes of reporting Medicare Part A enrollment information and to provide statements to the individual enrollees with respect to whom information is reported to the IRS.

**Celeste Dade-Vinson,**

*Health Insurance Specialist, Centers for Medicare & Medicaid Services.*

[FR Doc. 2016-03241 Filed 2-17-16; 8:45 am]

**BILLING CODE 4120-03-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Administration for Community Living****Information Collection; New Funding Formula for the State Councils on Developmental Disabilities (SCDDs) and Protection and Advocacy Systems (P&As) Located in Each State and Territory**

**AGENCY:** Administration on Intellectual and Developmental Disabilities (AIDD), Administration on Disabilities (AoD), Administration for Community Living (ACL), Department of Health and Human Services (HHS), HHS.

**ACTION:** Notice of guidance.

**SUMMARY:** The Administration on Intellectual and Developmental Disabilities (AIDD) within the Administration on Disabilities (AoD), located within the Administration for Community Living (ACL) at the United States Department of Health and Human Services (HHS), is soliciting comments from the public on the New Funding Formula for the State Councils on Developmental Disabilities (SCDDs) and Protection and Advocacy Systems (P&As) located in each State and Territory.



**DATES:** To ensure consideration comments must be received no later than March 21, 2016.

**ADDRESSES:** The revised formula is described below and a table demonstrating the effects of the revised formula on allocations to States based on the FY 2016 appropriations can be found at the Web site: [http://www.acl.gov/About\\_ACL/Allocations/DD-Act.aspx](http://www.acl.gov/About_ACL/Allocations/DD-Act.aspx). Please email comments to [AIDDformula@acl.hhs.gov](mailto:AIDDformula@acl.hhs.gov). Emailed comments are preferred, but comments may be submitted via mail to: Andrew Morris, Office of the Commissioner, Administration on Disabilities, U.S. Department of Health and Human Services, 330 C St. SW., Washington, DC 20201. Please note comments sent through the mail must be received by the close of business on the date the comment period closes or they will not be considered. Also, please note that we are only accepting comments related to the new formula and will not respond to comments on other subjects submitted through this process.

**FOR FURTHER INFORMATION CONTACT:**

Andrew Morris, Office of the Commissioner, Administration on Disabilities, 330 C St. SW., Washington, DC 20201. Telephone (202) 795-7408. Email [andrew.morris@acl.hhs.gov](mailto:andrew.morris@acl.hhs.gov). Please note the telephone number is not toll free. This document will be made available in alternative formats upon request. Written correspondence can be sent to Administration for Community Living, U.S. Department of Health and Human Services, 330 C St. SW., Washington, DC 20201.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Developmental Disabilities Assistance and Bill of Rights Act of 2000 (P.L. 106-402) (DD Act) provides, among other things, formula grants to States for the purpose of operating State Councils on Developmental Disabilities and Protection & Advocacy Systems for People with Developmental Disabilities. The DD Act provides authority and flexibility in Section 122 to AIDD to determine the formula for allocating annual grant awards using three statutory factors for determining each state's funding amount. These factors are:

1. Total population of the state/territory
2. Need for services for people with DD in the state/territory
3. Financial need of the state/territory

The current formula is out of date. For example, the current formula uses the best data points available in the 1970s/1980s for determining need for services and financial need. These data are now

outdated and severely undercount the population of individuals with developmental disabilities. The updated formula is believed to be more clear, concise, transparent, and consistent with Congress' intent to provide funds to states based on greatest need.

In addition to the formula, the DD Act prescribes minimum allotments for states with small populations and territories (Puerto Rico is not considered a territory under the DD Act). About half of the states receive a minimum allotment. The DD Act also requires adjusting (increasing) the minimum allotment amounts if certain criteria are met. After minimum allotments are met, the remaining appropriations are allocated using the formula.

Finally, the Act requires a hold-harmless for the State DD Councils that was passed as an amendment to the DD Act in 2003, P.L. 108-154. Through this hold-harmless clause, SCDD awards are based on the award amount from the previous year, FY 2000, FY 2001, or FY 2002, whichever is highest. If there are not enough funds available to fully fund all of the awards, the SCDDs then receive an equal percent reduction. It is important to note that a new formula may not immediately impact the SCDDs due to the hold harmless clause. The new formula would impact the SCDDs only when appropriations rise to such a level that all SCDDs would receive an increase in allotments above the previous fiscal year's award level.

**Methodology**

AIDD convened a workgroup of researchers, retired SCDD and P&A directors, national associations, and AIDD staff in the spring of 2015 and held four meetings over a two month period. The workgroup reviewed the three elements required for the formula and discussed each, identifying potential data sources for each element in cooperation with the HHS Assistant Secretary for Policy and Evaluation (ASPE). The workgroup discussed the strengths and challenges of the different data and based on these discussions provided recommendations to AIDD. In addition, the workgroup worked with the Grants Management Office at ACL to test the impact of different scenarios.

**Revised Formula**

Beginning in FY 2017, AIDD's State DD Councils and P&A grants will use a new formula to distribute funds after meeting statutory minimums and hold-harmless requirements:

1. *State/Territory Population (30%):* Based on July Census figures released in August of each year.

2. *Need for services (30%):* Based on a 1.58 percent prevalence rate for developmental disabilities in each State and Territory from the HHS National Health Interview Survey on Disability (NHIS-D).

In determining the need for services, the workgroup discussed using data sources such as Medicaid and the Individuals with Disabilities Education Act; concluding that these data are unreliable because each State determines program eligibility and reporting requirements differently. The prevalence rate for developmental disabilities of 1.58 percent was established by the Federal government in the early 1990s through the NHIS-D and is still the most current prevalence rate available that meets the definition of Developmental Disabilities per the DD Act.

3. *Financial need (40%):* Use a combination of poverty (20%) and unemployment rates (20%) from July of each calendar year.

The workgroup thought it was best to use a combination of a State/Territory's poverty and unemployment rates because it best reflects the economic status of a State/Territory and, thus, their financial need.

**Request for Comments**

This notice invites public comment on the new formula for the SCDD and P&A annual awards. We seek diverse perspectives including, but not limited to, that of grantees, technical assistance providers, and advocates, as well as federal agencies and for-profit and not-for-profit stakeholders. The comments will be important factors in finalizing the formula.

*Privacy Act Notification Statement:* Responses to this guidance notice are voluntary. Respondents are advised that the Government is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted. No proprietary, classified, confidential, or sensitive information should be included in your response.

Dated: February 11, 2016.

**Aaron Bishop,**  
*Commissioner, Administration on Disabilities.*

[FR Doc. 2016-03276 Filed 2-17-16; 8:45 am]

**BILLING CODE 4154-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration**

[Docket No. FDA-2012-N-0021]

**Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Substances Generally Recognized as Safe: Notification Procedure****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by March 21, 2016.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-7285, or emailed to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). All comments should be identified with the OMB control number 0910-0495. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE-14526, Silver Spring, MD 20993-0002, [PRAStaff@fda.hhs.gov](mailto:PRAStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed

collection of information to OMB for review and clearance.

**Substances Generally Recognized as Safe: Notification Procedure—21 CFR 170.36 and 570.36 (OMB Control Number 0910-0342)—Extension**

Section 409 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 348) establishes a premarket approval requirement for “food additives”; section 201(s) of the FD&C Act (21 U.S.C. 321(s)) provides an exclusion to the definition of “food additive” and thus from the premarket approval requirement, for uses of substances that are generally recognized as safe (GRAS) by qualified experts. In the **Federal Register** of April 17, 1997 (62 FR 18938) (the 1997 proposed rule), we published a proposed rule that would establish a voluntary procedure whereby manufacturers would notify us about a view of a particular use (or uses) of a substance that is not subject to the statutory premarket approval requirements based on a determination that such use is GRAS. Under an interim policy announced in the proposed rule, we invited manufacturers to submit notices of their independent determinations for review under the framework of the proposed rule during the period between issuance of the proposal and any final rule based on the proposal. The proposed regulations (proposed 21 CFR 170.36 and 21 CFR 570.36) provide a standard format for the voluntary submission of a notice.

To assist respondents in submissions to our Center for Food Safety and Applied Nutrition (CFSAN), we developed Form FDA 3667 entitled “Generally Recognized as Safe (GRAS) Notice.” The form, and elements prepared as attachments to the form, may be submitted in electronic format via the Electronic Submission Gateway (ESG), or may be submitted in paper

format, or as electronic files on physical media with paper signature page. While we do not expect Form FDA 3667 to reduce reporting time for respondents, use of the form helps to expedite our review of the information being submitted. For submissions to our Center for Veterinary Medicine (CVM), respondents may continue to send GRAS notices in letter format to the Agency, as instructed in our **Federal Register** notice of June 4, 2010 (75 FR 31800).

Presently, we have committed to issuing a final rule regarding “Substances Generally Recognized as Safe” in 2016, as part of a settlement agreement with the Center for Food Safety, which filed a lawsuit in 2014 seeking to vacate our 1997 proposed rule.

*Description of Respondents:* The respondents to this collection of information are manufacturers of substances used in food and feed.

In the **Federal Register** of September 17, 2015 (80 FR 55857), FDA published a 60-day notice requesting public comment on the proposed collection of information. We received a number of comments in support of the information collection generally. We also received one comment suggesting that the names, credentials, and affiliations of “qualified experts” associated with GRAS determinations be included on the form. We received a second comment suggesting that information submitted by manufacturers be reviewed by independent scientists. We appreciate this input. As discussed previously, rulemaking is underway that will necessitate a revision to the information collection provisions associated with our GRAS program and we continue to consider all comments.

We estimate the burden of this collection of information as follows:

**TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN<sup>1</sup>**

21 CFR Section	Form No. <sup>2</sup>	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
170.36 (CFSAN) .....	3667 <sup>3</sup> .....	40	1	40	150	6,000
570.36 (CVM) .....	N/A .....	20	1	20	150	3,000
Total .....	.....	.....	.....	.....	.....	9,000

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

<sup>2</sup> Only CFSAN uses Form FDA 3667.

<sup>3</sup> Form FDA 3667 may be submitted electronically via the ESG.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

21 CFR Section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
170.36(c)(v) (CFSAN) .....	40	1	40	15	600
570.36(c)(v) (CVM) .....	20	1	20	15	300
Total .....					900

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

For purposes of this extension request, we are retaining our 2012 estimates. The PRA analysis for the GRAS final rule will take into account any changes to the GRAS notification procedure as set forth in the final rule and we will revise the collection accordingly.

Dated: February 12, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-03330 Filed 2-17-16; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2016-N-0001]

#### Request for Nominations on Public Advisory Panels of the Medical Devices Advisory Committee

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of nonvoting industry representatives to serve on certain panels of the Medical Devices Advisory Committee (MDAC) in the Center for Devices and Radiological Health (CDRH) notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to serve on certain device Panels of the MDAC in the CDRH. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current and upcoming vacancies effective with this notice. FDA seeks to include the views of women, and men, members of all racial and ethnic groups and individuals with and without disabilities on its advisory committees and, therefore encourages nominations of appropriately qualified candidates from these groups.

**DATES:** Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating that interest to FDA by March 21, 2016, (see sections I and II for further details). Concurrently, nomination materials for prospective candidates should be sent to FDA by March 21, 2016.

**ADDRESSES:** All statements of interest from industry organizations interested in participating in the selection process of nonvoting industry representative nomination should be sent to Margaret Ames (see **FOR FURTHER INFORMATION CONTACT**). All nominations for nonvoting industry representatives may be submitted electronically by accessing the FDA Advisory Committee Membership Nomination Portal: <https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm> or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993-0002. Information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's Web site at <http://www.fda.gov/AdvisoryCommittees/default.htm>.

**FOR FURTHER INFORMATION CONTACT:** Margaret Ames, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5215, Silver Spring, MD 20993, 301-796-5960, Fax: 301-847-8505, [margaret.ames@fda.hhs.gov](mailto:margaret.ames@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** The Agency is requesting nominations for nonvoting industry representatives to certain panels identified in the following paragraphs:

#### I. Medical Devices Advisory Committee

The Committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. The panels engage in a number of activities to fulfill the functions the Federal Food, Drug, and Cosmetic Act envisions for device advisory panels. With the exception of

the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, advises the Commissioner of Food and Drugs regarding recommended classification or reclassification of devices into one of three regulatory categories; advises on any possible risks to health associated with the use of devices; advises on formulation of product development protocols; reviews premarket approval applications for medical devices; reviews guidelines and guidance documents; recommends exemption of certain devices from the application of portions of the Act; advises on the necessity to ban a device; and responds to requests from the agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner of Food and Drugs on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices. The Committee also provides recommendations to the Commissioner or designee on complexity categorization of in vitro diagnostics under the Clinical Laboratory Improvement Amendments of 1988.

#### A. Anesthesiology and Respiratory Therapy Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in anesthesiology and respiratory therapy and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### B. Ear, Nose and Throat Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational ear, nose and throat devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *C. Gastroenterology and Urology Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational gastroenterology, urology and nephrology devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *D. General and Plastic Surgery Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational general and plastic surgery devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *E. Hematology and Pathology Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational in vitro devices for use in clinical laboratory medicine including pathology, hematology, histopathology, cytotechnology and molecular biology and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *F. Medical Devices Dispute Resolution*

Provides advice to the Center Director on complex or contested scientific issues between the FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The Panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to Agency decisions or actions.

#### *G. Microbiology Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational in vitro devices for use in clinical laboratory medicine including microbiology, virology, and infectious disease and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *H. Molecular and Clinical Genetics Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational in vitro devices for use in clinical laboratory medicine including clinical and molecular genetics and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *I. Neurological Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in the neurological system and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *J. Orthopaedic and Rehabilitation Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational orthopedic and rehabilitation devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

#### *K. Radiological Devices Panel*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational diagnostics or therapeutic radiological and nuclear medicine devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

### **II. Qualifications**

Persons nominated for the device panels should be full-time employees of firms that manufacture products that would come before the panel, or consulting firms that represent manufacturers, or have similar appropriate ties to industry.

### **III. Selection Procedure**

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for a particular device panel. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

### **IV. Application Procedure**

Individuals may self nominate and/or an organization may nominate one or

more individuals to serve as a nonvoting industry representative. Contact information, a current curriculum vitae, and the name of the Committee of interest may be submitted to the FDA Advisory Committee Membership Nomination Portal (see **ADDRESSES**) within 30 days of publication of this document (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the particular device panel. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: February 11, 2016.

**Jill Hartzler Warner,**

*Associate Commissioner for Special Medical Programs.*

[FR Doc. 2016–03283 Filed 2–17–16; 8:45 am]

**BILLING CODE 4164–01–P**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Office of the Secretary**

**[Document Identifier OS–4040–0005 60D]**

### **Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request**

**AGENCY:** Electronic Government Office, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Electronic Government Office (EGOV), Department of Health and Human Services, has submitted an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. The ICR is for a 3-year extension for OMB Control Number 4040–0005. The ICR will expire on July 31, 2016. The ICR also requests categorizing the form as a common form, meaning HHS will only request approval for its own use of the form rather than aggregating the burden estimate across all Federal Agencies as was done for previous actions on this OMB control number. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

**DATES:** Comments on the ICR must be received on or before April 18, 2016.

**ADDRESSES:** Submit your comments to [ed.calimag@hhs.gov](mailto:ed.calimag@hhs.gov) or (202) 690-7569.

**FOR FURTHER INFORMATION CONTACT:** Information Collection Clearance staff, [Information.CollectionClearance@hhs.gov](mailto:Information.CollectionClearance@hhs.gov) or (202) 690-6162.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the OMB control number 4040-0005. Form is available <http://www.grants.gov> or upon request.

*Information Collection Request Title:* SF-424 Application for Federal Assistance—Individual.

*OMB No.:* 4040-0005.

*Abstract:* The SF-424 Application for Federal Assistance—Individual is a common form used by Federal grant-making agencies for individual applicants without DUNS numbers to apply for Federal financial assistance.

*Need and Proposed Use of the Information:* The SF-424 Application for Federal Assistance—The Individual common form is used by individuals not

associated with organizations to apply for Federal financial assistance in the form of grants. These forms are submitted to the Federal grant-making agencies for evaluation and review.

*Likely Respondents:* Organizations and institutions seeking grants.

*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.

HHS does not use the form; however, HHS estimates that the SF-424 Application for Federal Assistance—Individual's will take 1 hour to complete.

Once OMB approves the use of this common form, federal agencies may request OMB approval to use this common form without having to publish notices and request public comments for 60 and 30 days. Each agency must account for the burden associated with their use of the common form.

EGOV specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

#### TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
SF-424 Application for Federal Assistance—Individual .....	0	1	1	0
Total .....	0	.....	.....	0

**Terry S. Clark,**

*Asst Information Collection Clearance Officer.*

[FR Doc. 2016-03249 Filed 2-17-16; 8:45 am]

**BILLING CODE 4150-57-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; Multi-Site Randomized Controlled Clinical Trial Research Center on Alcohol's Health Effects (U10).

*Date:* March 29, 2016.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health—NIAAA, 5635 Fishers Lane, Conference Room 2098, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5365 Fishers Lane, Room 2085, Rockville, MD 20852, (301) 451-2067, [srinivar@mail.nih.gov](mailto:srinivar@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research

and Research Support Awards, National Institutes of Health, HHS)

Dated: February 11, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03240 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; Clinical Trials to Test the Effectiveness of Treatment, Preventive and Services Interventions.

*Date:* March 4, 2016.

*Time:* 11:30 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Karen Gavin-Evans, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Boulevard, Room 6153, MSC 9606, Bethesda, MD 20892, 301-451-2356, [gavinevanskm@mail.nih.gov](mailto:gavinevanskm@mail.nih.gov).

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; Mental Health Services Conflicts.

*Date:* March 9, 2016.

*Time:* 11:30 a.m. to 12:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Karen Gavin-Evans, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center, 6001 Executive Boulevard, Room 6153, MSC 9606, Bethesda, MD 20892, 301-451-2356, [gavinevanskm@mail.nih.gov](mailto:gavinevanskm@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: February 11, 2016.

**Carolyn A. Baum,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03238 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and

the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Dental and Craniofacial Research Special Emphasis Panel; Review of Applications for NIDCR Clinical Trial or Biomarker Clinical Validation Study Planning Grant (R34).

*Date:* March 11, 2016.

*Time:* 12:00 p.m. to 1:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892.

*Contact Person:* Victor Henriquez, Ph.D., Scientific Review Officer, DEA/SRB/NIDCR, 6701 Democracy Blvd., Room 668, Bethesda, MD 20892-4878, 301-451-2405, [henriqv@nidcr.nih.gov](mailto:henriqv@nidcr.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: February 11, 2016.

**David Clary,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03236 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Eye Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Eye Institute Special Emphasis Panel; NEI Research Project Grant Applications.

*Date:* March 10, 2016.

*Time:* 12:00 p.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Brian Hoshaw, Ph.D., Scientific Review Officer, National Eye Institute, National Institutes of Health, Division of Extramural Research, 5635 Fishers Lane, Suite 1300, Rockville, MD 20892, 301-451-2020, [hoshawb@mail.nih.gov](mailto:hoshawb@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: February 11, 2016.

**Natasha M. Copeland,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03235 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Environmental Health Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Environmental Health Sciences Special Emphasis Panel; Time Sensitive Exploratory/Developmental Research Award.

*Date:* February 29, 2016.

*Time:* 2:30 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* NIEHS/National Institutes of Health, Keystone Building, 530 Davis Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

*Contact Person:* Janice B. Allen, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Science, P.O. Box 12233, MD EC-30/Room 3170B, Research Triangle Park, NC 27709, 919/541-7556.

*Name of Committee:* National Institute of Environmental Health Sciences Special Emphasis Panel; R13 Superfund Associated Conference Grant Applications.

*Date:* March 1, 2016.

*Time:* 11:30 a.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* NIEHS, Keystone Building, Room 2128, 530 Davis Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

*Contact Person:* Janice B Allen, Ph.D., Scientific Review Officer Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Science, P.O. Box 12233, MD EC-30/ Room 3170 B Research Triangle Park, NC 27709, 919/541-7556.

*Name of Committee:* National Institute of Environmental Health Sciences Special Emphasis Panel; SRP Research Careers in Emerging Technologies.

*Date:* March 7, 2016.

*Time:* 11:00 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* NIEHS/National Institutes of Health, Key Stone Building, 530 Davis Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

*Contact Person:* Linda K Bass, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute Environmental Health Sciences, P.O. Box 12233, MD EC-30 Research Triangle Park, NC 27709, (919) 541-1307 [bass@niehs.nih.gov](mailto:bass@niehs.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: February 11, 2016.

**Carolyn Baum,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03239 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning

individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR 13-080: Accelerating the Pace of Drug Abuse Research Using Existing Data.

*Date:* March 2, 2016.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Kate Fothergill, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 3142, Bethesda, MD 20892, 301-435-2309, [fothergillke@mail.nih.gov](mailto:fothergillke@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR 13-080: Accelerating the Pace of Drug Abuse Research Using Existing Data: Additional Applications.

*Date:* March 2, 2016.

*Time:* 11:30 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* George Vogler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7770, Bethesda, MD 20892, (301) 237-2693, [voglergp@csr.nih.gov](mailto:voglergp@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Medical Imaging.

*Date:* March 10-11, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Dana on Mission Bay, 1710 West Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Leonid V. Tsap, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435-2507, [tsapl@csr.nih.gov](mailto:tsapl@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Brain Disorders and Related Neurosciences.

*Date:* March 10-11, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Courtyard by Marriott Chevy Chase, 5520 Wisconsin Ave., Chevy Chase, MD 20815.

*Contact Person:* Vilen A. Movsesyan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040M, MSC 7806, Bethesda, MD 20892, 301-402-7278, [movsesyanv@csr.nih.gov](mailto:movsesyanv@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small

Business: Biomedical Sensing, Measurement and Instrumentation.

*Date:* March 10, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Dana on Mission Bay, 1710 West Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Inna Gorshkova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301-435-1784, [gorshkoi@csr.nih.gov](mailto:gorshkoi@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Non-HIV Microbial Vaccines.

*Date:* March 10, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Sheraton Tampa East, 10221 Princess Palm Avenue, Tampa, FL 33610.

*Contact Person:* Andrea Keane-Myers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, Bethesda, MD 20892, 301-435-1221, [andrea.keane-myers@nih.gov](mailto:andrea.keane-myers@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Aging and Development, Auditory, Vision and Low Vision Technologies.

*Date:* March 10-11, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

*Contact Person:* Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613-2064, [leepg@csr.nih.gov](mailto:leepg@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Bioanalytical Chemistry, Biophysics, and Assay Development.

*Date:* March 10, 2016.

*Time:* 9:30 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

*Contact Person:* Vonda K Smith, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6188, MSC 7892, Bethesda, MD 20892, 301-435-1789, [smithvo@csr.nih.gov](mailto:smithvo@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cellular and Molecular Immunology.

*Date:* March 10, 2016.

*Time:* 3:00 p.m. to 5:30 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:* Tina McIntyre, Ph.D., Scientific Review Officer, Center for



Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4202, MSC 7812, Bethesda, MD 20892, 301-594-6375, [mcintyrt@csr.nih.gov](mailto:mcintyrt@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular and Surgical Devices.

*Date:* March 11, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Dana on Mission Bay, 1710 West Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892, 301.435.1049, [lij21@csr.nih.gov](mailto:lij21@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; RFA Panel: Molecular and Cellular Substrates of Complex Brain Disorders.

*Date:* March 11, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Deborah L Lewis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4183, MSC 7850, Bethesda, MD 20892, 301-408-9129, [lewisdeb@csr.nih.gov](mailto:lewisdeb@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; New R21 Applications for Microbial Diseases.

*Date:* March 11, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Sheraton Tampa East, 10221 Princess Palm Avenue, Tampa, FL 33610.

*Contact Person:* Andrea Keane-Myers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, Bethesda, MD 20892, 301-435-1221, [andrea.keane-myers@nih.gov](mailto:andrea.keane-myers@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Movement and Cognitive Impairments.

*Date:* March 11, 2016.

*Time:* 11:00 a.m. to 1:30 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:* Serena Chu, Ph.D., Scientific Review Officer, BBBP IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, 301-500-5829, [sechu@csr.nih.gov](mailto:sechu@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: February 11, 2016.

**Carolyn Baum,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03233 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Aging, Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Sensory Deficits in Osteoporotic Study.

*Date:* March 15, 2016.

*Time:* 2:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Isis S. Mikhail, DRPH, MD, MPH, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301-402-7704, [MIKHAIL@MAIL.NIH.GOV](mailto:MIKHAIL@MAIL.NIH.GOV).

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 11, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03237 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Asthma and Allergic Diseases Cooperative Research Centers (U19).

*Date:* March 15-17, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The William F. Bolger Center, Stain Glass Hall Room, 9600 Newbridge Drive, Potomac, MD 20854.

*Contact Person:* Louis A. Rosenthal, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Rm 3G42B, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC-79823, Bethesda, MD 20892-9823, (240) 669-5070, [rosenthalla@niaid.nih.gov](mailto:rosenthalla@niaid.nih.gov).

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Planning Grant (R34), Implementation Grant (R01) and Cooperative Agreement (U01).

*Date:* March 15, 2016.

*Time:* 11:00 a.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Room 4H100, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

*Contact Person:* Maryam Feili-Hariri, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 5601 Fishers Lane, Rockville, MD 20852, 240-669-5026, [haririmf@niaid.nih.gov](mailto:haririmf@niaid.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 11, 2016.

**Natasha M. Copeland,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-03234 Filed 2-17-16; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HOMELAND SECURITY****Coast Guard**

[Docket No. USCG–2016–0122]

**Merchant Mariner Medical Advisory Committee****AGENCY:** Coast Guard, Department of Homeland Security.**ACTION:** Notice of Federal Advisory Committee meeting.

**SUMMARY:** The Merchant Mariner Medical Advisory Committee and its working groups will meet to discuss matters relating to medical certification determinations for issuance of licenses, certificates of registry, merchant mariners' documents, medical standards and guidelines for the physical qualifications of operators of commercial vessels, medical examiner education, and medical research. The meetings will be open to the public. **DATES:** The Merchant Mariner Medical Advisory Committee and its working groups are scheduled to meet on Monday, March 14 and Tuesday, March 15, 2016, from 8 a.m. to 5:15 p.m. and 8 a.m. to 5 p.m. Please note that these meetings may adjourn early if the committee has completed its business.

**ADDRESSES:** The meetings will be held at the Crowley Maritime Corporation, 1st Floor Conference Room, 9487 Regency Square Blvd., Jacksonville, FL 32225 (<http://www.crowley.com>). For further information about the meeting facilities, please contact Ms. Becky Kelly at (904)727–4213.

Please be advised that all attendees are required to check-in to the visitor's booth located to the right of the main building entrance. All attendees will be required to provide a government-issued picture identification card in order to gain admittance to the building. For planning purposes, please notify the Merchant Mariner Medical Advisory Committee Alternate Designated Federal Officer of your attendance as soon as possible using the contact information provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the Alternate Designated Federal Officer as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the "Agenda" section below. Written comments for distribution to committee members

must be submitted no later than March 7, 2016, if you want the committee members to be able to review your comments before the meeting, and must be identified by docket number USCG–2016–0122. Written comments may be submitted using the Federal eRulemaking Portal: <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the Alternate Designated Federal Officer for alternate instructions.

**Instructions:** All submissions must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided. You may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005 issue of the **Federal Register** (70 FR 15086).

**Docket:** For access to the docket to read documents or comments related to this Notice, go to <http://www.regulations.gov>, insert USCG–2016–0122 in the "SEARCH" box, press Enter and then click on the item you wish to view.

A public comment period will be held on March 14, 2016, from approximately 11:30 a.m.–12 p.m. and March 15, 2016 from approximately 2:15 p.m.–2:45 p.m. Speakers are requested to limit their comments to 5 minutes. Please note that the public comment period may end before the time indicated, following the last call for comments. Additionally, public comment will be sought throughout the meeting as specific issues are discussed by the committee. Contact Lieutenant Ashley Holm as indicated below to register as a speaker.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Ashley Holm, Alternate Designated Federal Officer for the Merchant Mariner Medical Advisory Committee, 2703 Martin Luther King Jr. Ave SE., Stop (7501), telephone 202–372–1128, fax 202–372–4908 or [Ashley.e.holm@uscg.mil](mailto:Ashley.e.holm@uscg.mil).

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the *Federal Advisory Committee Act*, Title 5 United States Code Appendix. The Merchant Mariner Medical Advisory Committee Meeting is authorized by 46 United States Code 7115 and advises the Secretary on matters related to (a) medical certification determinations for issuance of licenses, certificates of registry, and merchant mariners' documents; (b) medical standards and guidelines for the physical qualifications of operators of

commercial vessels; (c) medical examiner education; and (d) medical research.

**Agenda***Day 1*

The agenda for the March 14, 2016 meeting is as follows:

- (1) Opening remarks from Crowley Maritime leadership.
- (2) Opening remarks from Coast Guard leadership.
- (3) Opening remarks from the Designated Federal Officer.
- (4) Roll call of committee members and determination of a quorum.
- (5) Review of last full committee meeting's minutes.
- (6) Introduction of new task(s).
- (7) Presentation and discussion on marine casualty investigations and data analysis (could lead to future tasking for the committee).
- (8) Public comment period.
- (9) Presentation on mariner wellness.
- (10) Working Groups addressing the following task statements may meet to deliberate–

(a) Task statement 13, Mariner Occupational Health Risk Analysis. This is a joint task statement with the Merchant Marine Personnel Advisory Committee.

(b) Task statement(s) requesting recommendations on training content for a Designated Medical Examiner program.

(c) Task statement requesting recommendations on guidance to mariners on over the counter medications, energy drinks/pills, diet aids, and dietary supplements.

(d) The Committee may receive new task statements from the Coast Guard, review the information presented on each issue, deliberate and formulate recommendations for the Department's consideration.

- (10) Adjournment of meeting.

*Day 2*

The agenda for the March 15, 2016 meeting is as follows:

- (1) Continue work on Task Statements.
- (2) Presentation from the Council on Chiropractic Education.
- (3) Public comment period.
- (4) By mid-afternoon, the Working Groups will report, and if applicable, make recommendations for the full committee to consider for presentation to the Coast Guard. The committee may vote on the working group's recommendations on this date. The public will have an opportunity to speak after each Working Group's Report before the full committee takes any action on each report.

(5) Closing remarks/plans for next meeting.

(6) Adjournment of Meeting.

Dated: February 11, 2016.

**V.B. Gifford,**

*Captain, U.S. Coast Guard, Director of Inspections and Compliance.*

[FR Doc. 2016-03348 Filed 2-17-16; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### National Protection and Programs Directorate; Cybersecurity Information Sharing Act of 2015 Interim Guidance Documents—Notice of Availability

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** Notice of availability.

**SUMMARY:** DHS is announcing the availability of Cybersecurity Information Sharing Act of 2015 Interim Guidance Documents jointly issued with the Department of Justice (DOJ) in compliance with the Act (CISA), which authorizes the voluntary sharing and receiving of cyber threat indicators and defensive measures for cybersecurity purposes, consistent with certain protections, including privacy and civil liberty protections.

**ADDRESSES:** The CISA guidance documents may be found on [www.us-cert.gov/ais](http://www.us-cert.gov/ais).

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this notice, email Matthew Shabat at [matthew.shabat@hq.dhs.gov](mailto:matthew.shabat@hq.dhs.gov) or telephone on (703) 235-5338. Questions may also be directed by mail to Matthew Shabat, 245 Murray Lane SW., Mail Stop 0610, Washington, DC 20528-0610.

**SUPPLEMENTARY INFORMATION:** The CISA requires the Secretary of DHS and the Attorney General to jointly develop and make publicly available—

- guidance to assist non-Federal entities and promote sharing of cyber threat indicators with the Federal Government;
- interim and final guidelines for the protection of privacy and civil liberties; and
- interim and final procedures related to the receipt of cyber threat indicators and defensive measures by the Government, which happen principally through the real-time DHS process, the existing DHS-operated Automated Indicator Sharing (AIS) initiative and may also occur through direct submissions to Federal agencies.

The CISA also requires the Secretary of DHS, the Attorney General, the

Director of National Intelligence, and the Secretary of Defense, to jointly develop interim procedures to facilitate and promote the sharing of cyber threat indicators and defensive measures by the Federal Government.

### Authority and Background

On December 18, 2015, the President signed into law the Consolidated Appropriations Act, 2016, Public Law 114-113, which included at Division N, Title I the Cybersecurity Information Sharing Act of 2015 (CISA). Congress designed CISA to establish a voluntary cybersecurity information sharing process that encourages public and private sector entities to share cyber threat indicators and defensive measures while protecting privacy and civil liberties. The CISA requires various Executive Branch agencies to coordinate and create, within 60 days of enactment (*i.e.*, not later than February 16, 2016), four guidance documents to facilitate this voluntary cybersecurity information sharing process. The CISA requires two of these interim documents to be made publicly available. *See generally* Public Law 114-113, Div. N, Title I secs. 103, 105).

### Overview of the 60 Day Guidance Required Under CISA

The CISA sec. 103 requires the Director of National Intelligence, the Secretary of Homeland Security, the Secretary of Defense, and the Attorney General, in consultation with the heads of designated Federal entities,<sup>1</sup> to jointly develop and issue procedures to facilitate and promote the sharing by the Federal Government of classified and unclassified cyber threat indicators, defensive measures, and other information and best practices related to mitigating cyber threats. The CISA sec. 103(b) requires these procedures to include a real-time sharing capability (namely the DHS Automated Indicator Sharing (AIS) initiative); incorporate existing Federal information sharing processes, procedures, roles, and responsibilities to the greatest extent possible; account for sharing done in error; and protect against unauthorized access to cyber threat information. Further, the procedures must account for the review of cyber threat indicators to identify personal information not related to the threat, a technical capability to remove such personal information, and a notification process to alert any U.S. person whose personal

information is improperly shared by a Federal entity.

The CISA sec. 105(a)(1) requires the Secretary of Homeland Security and the Attorney General, in consultation with the heads of designated Federal entities, to jointly develop and issue interim policies and procedures relating to the receipt of cyber threat indicators and defensive measures by the Federal Government. These internal operational procedures describe general rules applicable to DHS and other Federal agencies and the operative processes of the DHS AIS system, including the statutory requirement for Federal agencies that receive cyber threat indicators and defensive measures to share them with other appropriate agencies.

The CISA sec. 105(a)(4) requires the Secretary of Homeland Security and the Attorney General to jointly develop and make publicly available guidance to assist non-Federal entities with sharing cyber threat indicators with Federal entities. This guidance includes explanations of how non-Federal entities can identify and share cyber threat indicators and defensive measures with the Federal Government in accordance with CISA and describes the protections non-Federal entities receive under CISA for sharing cyber threat indicators and defensive measures, including targeted liability protection and other statutory protections.

Finally, CISA sec. 105(b) requires the Secretary of Homeland Security and the Attorney General, in consultation with the Department Heads and Chief Privacy and Civil Liberties Officers of the designated Federal entities, to jointly develop and make publicly available interim guidelines relating to privacy and civil liberties that govern the receipt, retention, use, and dissemination of cyber threat indicators by a Federal entity. These privacy and civil liberties guidelines are consistent with the Fair Information Practice Principles (FIPPs) set forth in Appendix A of the “National Strategy for Trusted Identities in Cyberspace,” published by the President in April 2011.

### Issuance of Agency Guidance Required Under CISA

The CISA guidance documents may be found on [www.us-cert.gov/ais](http://www.us-cert.gov/ais).

Dated: February 11, 2016.

**Andy Ozment,**

*Assistant Secretary, Department of Homeland Security.*

[FR Doc. 2016-03430 Filed 2-17-16; 8:45 am]

**BILLING CODE 9110-9P-P**

<sup>1</sup> The CISA defines *Appropriate Federal Entities* as the Departments of Commerce, Defense, Energy, Homeland Security, Justice, Treasury, and the Office of the Director of National Intelligence. *See* CISA sec. 102(3).

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

[Docket No. FR-5913-N-05]

**60-Day Notice of Proposed Information Collection: The Multifamily Project Application and Construction Prior to Initial Endorsement**

**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:* April 18, 2016.

**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](mailto: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:** Theodore K. Toon, Director, Office of Multifamily Production, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email [Theodore.K.Toon@hud.gov](mailto:Theodore.K.Toon@hud.gov) or telephone 202-402-1142. 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:* Multifamily Project Application and

Construction Prior to Initial Endorsement.

*OMB Approval Number:* 2502-0029.

*Type of Request:* Revision.

*Form Number:* HUD-92013, HUD-92013 Supp, HUD-92013-A, HUD-92013-B, HUD-92013-C, HUD-92013-D, HUD-92013-E, HUD-92264, HUD-92264-A, HUD-92273, HUD-92274, HUD-92326, HUD-92329, HUD-92331, HUD-92485, HUD-92415, HUD-92447, HUD-92452, HUD-92010, HUD-91708, HUD-2880, HUD-92466-R1, R2, R3, R4, HUD-92466 R5, HUD-92408, HUD-92466M, FM-1006, HUD-95379 and HUD-2.

*Description of the need for the information and proposed use:* The Multifamily Project Applications and Construction Prior to Initial Endorsement is being revised to include two (2) supplemental forms that outline requirements of owners that elect to benefit from the simplified rate categories. These forms will be used during the processing of an application for a FHA insured mortgage to determine the appropriate mortgage insurance premium.

*Respondents (i.e. affected public):* 1,002.

*Estimated Number of Respondents:* 1,002.

*Estimated Number of Responses:* 34,112.

*Frequency of Response:* 1.

*Average Hours per Response:* 34,112.

*Total Estimated Burden:* 351,182.

**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: February 4, 2016.

**Genger Charles,**

*Senior Policy Advisory for Housing.*

[FR Doc. 2016-03367 Filed 2-17-16; 8:45 am]

**BILLING CODE 4210-67-P**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service**

**[FWS-R1-ES-2016-N022;  
FXES11130100000-167-FF01E00000]**

**Endangered Species; Recovery Permit Applications**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for recovery permits to conduct activities with the purpose of enhancing the survival of endangered species. The Endangered Species Act of 1973, as amended (Act), prohibits certain activities with endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing such permits.

**DATES:** To ensure consideration, please send your written comments by March 21, 2016.

**ADDRESSES:** Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232-4181. Please refer to the permit number for the application when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Colleen Henson, Fish and Wildlife Biologist, at the above address, or by telephone (503-231-6131) or fax (503-231-6243).

**SUPPLEMENTARY INFORMATION:****Background**

The Act (16 U.S.C. 1531 *et seq.*) prohibits certain activities with respect to endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce)

with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

#### Applications Available for Review and Comment

We invite local, State, and Federal agencies and the public to comment on the following applications. Please refer to the permit number for the application when submitting comments.

Documents and other information submitted with these applications are available for review by request from the Program Manager for Restoration and Endangered Species Classification at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552).

#### Permit Number: TE-003483

*Applicant:* U.S. Geological Survey, Pacific Island Ecosystems Research Center, Hawaii National Park, Hawaii.

The applicant requests a permit amendment to take (capture, band, mark, measure, weigh, collect blood samples, radio-tag, release, recapture, and search for and monitor nests) Hawaiian gallinule (*Gallinula galeata sandvicensis*) on the island of Oahu, and to increase the number of radio-tagged Hawaii'i 'ākepa (*Loxops coccineus*) and Hawaii'i creeper (*Oreomystis mana*) on the island of Hawaii, in conjunction with scientific research, for the purpose of enhancing the species' survival. The permit currently covers the Laysan duck (*Anas laysanensis*), 'akiapōlā'au (*Hemignathus munroi*), 'ākeke'e (*Loxops caeruleirostris*), 'ākikiki (*Oreomystis bairdi*), puaiohi (*Myadestes palmeri*), 'alae ke'oke'o or Hawaiian Coot (*Fulica alai*), ae'o or Hawaiian Stilt (*Himantopus mexicanus knudseni*), and the 'ōpe'ape'a or Hawaiian hoary bat (*Lasiurus cinereus semotus*).

#### Permit Number: TE-012136

*Applicant:* Oregon Department of Environmental Quality, Hillsboro, Oregon.

The applicant requests a permit renewal with changes to take (capture, handle, and release) Borax Lake chub (*Gila boraxobius*) in conjunction with surveys throughout the species' range in Oregon for the purpose of enhancing its

survival. The permit currently covers the Lost River sucker (*Deltistes luxatus*) and the shortnose sucker (*Chasmistes brevirostris*).

#### Permit Number: TE-101141

*Applicant:* Washington State University, Vancouver, Washington.

The applicant requests a permit amendment to take (survey, capture, mark, and release) Fender's blue butterfly (*Icaricia icarioides fenderi*) in conjunction with scientific research in Benton, Lane, Polk, Washington, and Yamhill Counties, Oregon, for the purpose of enhancing its survival.

#### Permit Number: TE-27877B

*Applicant:* Nathan L. Haan, Seattle, Washington.

The applicant requests a permit amendment to take (captive rear adults) Taylor's checkerspot butterflies (*Euphydryas editha taylori*), in conjunction with scientific research in Thurston County, Washington, for the purpose of enhancing its survival.

#### Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: February 10, 2016.

**Stephen J. Zylstra,**

*Acting, Regional Director, Pacific Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2016-03302 Filed 2-17-16; 8:45 am]

**BILLING CODE 4333-15-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[NPS-WASO-NAGPRA-20233;  
PPWOCRADN0-PCU00RP14.R50000]

#### Notice of Intent To Repatriate Cultural Items: Mount Holyoke College Art Museum, South Hadley, MA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The Mount Holyoke College Art Museum, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, has determined that the cultural item listed in this notice meets the definition of a sacred object and object of cultural patrimony. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request to the Mount Holyoke College Art Museum. If no additional claimants come forward, transfer of control of the cultural item to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request with information in support of the claim to the Mount Holyoke College Art Museum at the address in this notice by March 21, 2016.

**ADDRESSES:** Aaron F. Miller, NAGPRA Coordinator, Mount Holyoke College Art Museum, 50 College Street, South Hadley, MA 01075, telephone (413) 538-3394, email [afmiller@mtholyoke.edu](mailto:afmiller@mtholyoke.edu).

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item under the control of the Mount Holyoke College Art Museum that meets the definition of a sacred object and an object of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural item. The National Park Service is not responsible for the determinations in this notice.

## History and Description of the Cultural Item

In 2014, one cultural item was donated to the Mount Holyoke College Art Museum by the children of J. Donald Detenber, from Westborough, MA. Detenber was a collector and dealer in Native American objects, and it is unclear when and where he acquired the object. Detenber was most active in the 1980s and 1990s and purchased from various dealers and auction houses across the country. The sacred object/object of cultural patrimony is a woven cotton sash.

This type of textile was used primarily by the bride in the traditional Hopi wedding ceremony and can be seen in various photographs from the early 20th century. As part of the ceremony, cotton was collected from various members of the community and woven by a specific group of relatives. Another known use of these sashes is the Powamu Festival, centered on the seasonal planting of beans. One aspect of the ceremonies is the imitation of Katchinas (ancestral spirits). In some cases, men would don the sash to dress as female Katchina spirits or women in general. One such female Katchina is Angwusnasomtaka (Crow Mother), who is often represented with this type of sash. Based on the above definitions and a general knowledge of these objects being used in various types of ceremonies, there is a relationship of shared group identity that can be reasonably traced between the cultural item and the Hopi Tribe of Arizona.

## Determinations Made by the Mount Holyoke College Art Museum

Officials of the Mount Holyoke College Art Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the one cultural item described above is a specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

- Pursuant to 25 U.S.C. 3001(3)(D), the one cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.

- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and object of cultural patrimony and the Hopi Tribe of Arizona.

## Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim this cultural item should submit a written request with information in support of the claim to Aaron F. Miller, NAGPRA Coordinator, Mount Holyoke College Art Museum, 50 College Street, South Hadley, MA 01075, telephone (413) 538-3394, email [afmiller@mholyoke.edu](mailto:afmiller@mholyoke.edu), by March 21, 2016. After that date, if no additional claimants have come forward, transfer of control of the sacred object and object of cultural patrimony to the Hopi Tribe of Arizona may proceed.

The Mount Holyoke College Art Museum is responsible for notifying the Hopi Tribe of Arizona that this notice has been published.

Dated: February 3, 2016.

**David Tarler,**

*Acting Manager, National NAGPRA Program.*

[FR Doc. 2016-03411 Filed 2-17-16; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[NPS-WASO-NAGPRA-20161;  
PPWOCRADNO-PCU00RP14.R50000]

### Notice of Inventory Completion: U.S. Department of Defense, Department of the Navy, Washington, DC

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of Defense, Department of the Navy (DoN) has completed an inventory of human remains, in consultation with the Aleut Corporation, representatives of the Aleut Repatriation Committee, and the Cultural Heritage Director of the Aleutian/Pribilof Islands Association, Inc., as agents for the Native Village of Atka, AK, and has determined that there is a cultural affiliation between the human remains and members of the Native Village of Atka. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the DoN. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not

identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the DoN at the address in this notice by March 21, 2016.

**ADDRESSES:** Dr. Susan S. Hughes, Archaeologist, Department of the Navy, NAVFAC NW, 1101 Tautog Circle, Silverdale, WA 98315, telephone (360) 396-0083, email [susan.s.hughes@navy.mil](mailto:susan.s.hughes@navy.mil).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the DoN. The human remains were removed from the island of Attu, AK, in the Aleutian Islands.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

### Consultation

A detailed assessment of the human remains was made by the DoN professional staff in consultation with the Aleut Corporation, the Aleut Repatriation Committee, and the Cultural Heritage Director of the Aleutian/Pribilof Islands Association, Inc., as agents for the Native Village of Atka, AK.

### History and Description of the Remains

In 1943, human remains representing, at minimum, one individual were removed from Attu Island, at the western end of the Aleutian Islands, AK. The human remains, a skull and associated mandible, came into the possession of William J. Madden II, Senior Medical Officer at the U.S. Naval Aerological Station, Attu, where they were used as an aid in the study of human skull anatomy. In a letter dated May 14, 1948, Dr. Madden states that the human remains were recovered by a civilian construction company while engaged in building a Coast Guard Station on Attu. A historic account of the Coast Guard construction of the Western Aleutian island chain (The Coast Guard at War: IV Loran Volume I Section III, Chapter 3) suggests that the skull may have come from an archeological site at Baxter Bay.

After the Battle of Attu in the spring of 1943, a U.S.C.G. LORAN Station was

built on Attu. A construction party arrived in November of 1943, and began construction of the first LORAN station at Attu on Theodore Point, south of Massacre Bay. A temporary base camp was established at Baxter Cove, 2.5 miles east of the station, the only place where equipment could be offloaded near the site. Tents, a mess hut, and a Loran transmitting equipment storage hut were erected, and a large CAT began construction of the switchback road to the ridge top site. The road became known as Hooligan Highway and was one of the engineering wonders of Attu. An account by Lt. Cmdr. Yates indicates that in the first five hundred feet of road construction at Baxter Cove, the CAT cut through an Aleutian cemetery located under a dummy gun emplacement that the Japanese had abandoned a few months earlier. The construction work turned up "human skulls and bones of prehistoric animals which had been in turn, buried deep below ivory trinkets and tons of bird and fish bones." In 1949, the LORAN Station was moved to Murder Point, closer to Massacre Bay.

The skull was transferred into the custody of the Yale University Peabody Museum in 1955 (Catalog No. ANTPA.000227), where it remained until 2014, when it was returned to the Department of the Navy, NAVFAC Northwest, to facilitate its repatriation.

The skull is represented by a nearly complete cranium and mandible belonging to a young female, aged 15 to 19 years. The dental wear, eruption and mandibular morphology are consistent with the mandible belonging with the cranium. There is damage to the ethmoid and the nasal conchae, with the inferior nasal conchae completely absent. The vomer is present but disarticulated. The sphenoid and right temporal show some postmortem damage. The zygomatic process of the right temporal is missing, as is the right mastoid; the left mastoid process is damaged but mostly present. The mandible is missing the condyles, the right mandibular angle, and its coronoid process. Most of the molars are present, but the incisors and canines were lost post-mortem.

The individual's age is based upon the unerupted third molars, unfused basal synchondrosis, and incomplete closure of the incisive suture of the palate. There is no clear evidence of chronic or acute health issues. The skull does reveal a small healed, depressed fracture located on the right parietal. The color and condition of the human remains suggests superficial interment with subsequent or partial exposure. Metric and nonmetric data support

ethnic identification as Native American/Indigenous Alaska with closest affinity to females sampled from Wales, AK (Southeastern mainland; Aronsen and Kirkham 2014). No known individuals are identified. No funerary objects are associated with the human remains.

Radiocarbon dates from archeological sites on Attu Island reveal that the island was inhabited between 100 and 2000 years ago (Lefevre et al. 2001). The Department of the Navy has determined that the human remains are affiliated with the Unangax/Aleut people because they have a long history of living on the Aleutian Islands, including the island of Attu. When the 20th century Native Village of Attu at Chichagof Harbor was occupied by the Japanese in 1942, the Native inhabitants were removed to Japan. The village was not re-occupied after the war; its remaining inhabitants settling on Atka Island, the closest settlement to Attu Island (Aleut Repatriation Commission and Cultural Heritage Director, 2002).

#### **Determinations Made by the Department of the Navy**

Officials of the Department of the Navy have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and Members of the Village of Atka, AK.

#### **Additional Requestors and Disposition**

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Susan S. Hughes, Department of the Navy NAVFAC NW, 1101 Tautog Circle, Silverdale, WA 98315, telephone (360) 396-0083, email [susan.s.hughes@navy.mil](mailto:susan.s.hughes@navy.mil), by March 21, 2016. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Native Village of Atka, AK, may proceed.

The Department of the Navy is responsible for notifying the Native Village of Atka, AK, through its agents, that this notice has been published.

Dated: January 20, 2016.

**David Tarler,**

*Acting Manager, National NAGPRA Program.*

[FR Doc. 2016-03408 Filed 2-17-16; 8:45 am]

**BILLING CODE 4312-50-P**

## **DEPARTMENT OF THE INTERIOR**

### **National Park Service**

**[NPS-WASO-NAGPRA-20127; PPWOCRADN0-PCU00RP14.R50000]**

#### **Notice of Inventory Completion: Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The Thomas Burke Memorial Washington State Museum (Burke Museum) has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and any present-day Indian tribes or Native Hawaiian organizations. Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Burke Museum. If no additional requestors come forward, transfer of control of the human remains to the Indian tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Burke Museum at the address in this notice by March 21, 2016.

**ADDRESSES:** Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195, telephone (206) 685-3849x2, [plape@uw.edu](mailto:plape@uw.edu).

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Burke Museum, University of Washington, Seattle, WA. The human remains were possibly removed from the San Juan Islands, San Juan Island County, WA.

This notice is published as part of the National Park Service's administrative



responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

#### Consultation

A detailed assessment of the human remains was made by the Burke Museum professional staff in consultation with representatives of Lummi Tribe of the Lummi Reservation; Muckleshoot Indian Tribe (previously listed as the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington); Nooksack Indian Tribe; Samish Indian Nation (previously listed as the Samish Indian Tribe, Washington); Sauk-Suiattle Indian Tribe; Snoqualmie Indian Tribe (previously listed as the Snoqualmie Tribe, Washington); Stillaguamish Tribe of Indians of Washington (previously listed as the Stillaguamish Tribe of Washington); Suquamish Indian Tribe of the Port Madison Reservation; Swinomish Indian Tribal Community (previously listed as the Swinomish Indians of the Swinomish Reservation of Washington); Tulalip Tribes of Washington (previously listed as the Tulalip Tribes of the Tulalip Reservation, Washington); and Upper Skagit Indian Tribe, (all hereafter referred to as the "The Tribes").

#### History and Description of the Remains

On an unknown date prior to 1995, human remains representing, at minimum, one individual were possibly removed from San Juan Islands, San Juan Island County, Washington. These remains were identified in 1995 while completing an inventory for NAGPRA compliance. These human remains were located in a box of material marked "Anian Island Burial 3F." The human remains were in a paper-bag marked "Burial 3". Also written on the bag in the same pencil, but crossed out, is, "SJ-1, Finds, 7/18/46." These human remains do not match any of the records for the Anian Island burial. They also do not match "Burial 3" from Arden King's 1946 excavations at 45-SJ-1 and there is no mention of burials being found on 7/18/1946 in the field documents. The condition of these human remains is consistent with other burials in shell middens from this area. Additional information provided during consultation indicated this individual was likely buried on the San Juan Islands. The Burke Museum is unable to make a cultural affiliation due to the

lack of contextual and exact location information from which the burial was removed. No known individuals were identified. No associated funerary objects are present.

#### Determinations Made by the Burke Museum

Officials of the Burke Museum have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on osteological evidence and museum collecting and accessioning history.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian tribe.
- Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains were removed is the aboriginal land of The Tribes. The Treaty of Point Elliot was signed on January 22, 1855 by representatives from The Tribes, and ceded aboriginal land included the San Juan Islands region.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to The Tribes.

#### Additional Requestors and Disposition

Representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195, telephone (206) 685-3849 x2, [plape@uw.edu](mailto:plape@uw.edu), by March 21, 2016. After that date, if no additional requestors have come forward, transfer of control of the human remains to The Tribes may proceed.

The Burke Museum is responsible for notifying The Tribes that this notice has been published.

Dated: January 15, 2016.

**David Tarler,**

*Acting Manager, National NAGPRA Program.*

[FR Doc. 2016-03412 Filed 2-17-16; 8:45 am]

**BILLING CODE 4312-50-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[NPS-WASO-NAGPRA-20115;  
PPWOCRADN0-PCU00RP14.R50000]

### Native American Graves Protection and Repatriation Review Committee; Findings and Recommendations Regarding Human Remains and Associated Funerary Objects for The Osage Nation

**AGENCY:** National Park Service, Interior.

**ACTION:** Findings and recommendations.

**SUMMARY:** The National Park Service is publishing this notice as part of its administrative responsibilities pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA or the Act). The recommendations, findings, and actions in this notice are advisory only and are not binding on any person. The Native American Graves Protection and Repatriation Review Committee (Review Committee) found that certain human remains and associated items are culturally affiliated with The Osage Nation and that the State of Missouri Department of Natural Resources, State Historic Preservation Office should determine the most appropriate claimant—The Osage Nation or the Indian tribes comprising the Sac and Fox NAGPRA Confederacy—using the criteria under section 7(a)(4) of the Act. **ADDRESSES:** The Review Committee meeting transcript containing the proceedings and Review Committee deliberation and findings are available online at [www.nps.gov/nagpra/Review](http://www.nps.gov/nagpra/Review) or from the National NAGPRA Program upon request ([NAGPRA\\_Info@nps.gov](mailto:NAGPRA_Info@nps.gov)). **SUPPLEMENTARY INFORMATION:** The recommendations, findings, and actions of the Review Committee are advisory only and not binding on any person. These advisory findings and recommendations do not necessarily represent the views of the National Park Service or Secretary of the Interior. The National Park Service and the Secretary of the Interior have not taken a position on these matters.

The Review Committee was established by Section 8 of the Act, and is an advisory body governed by the Federal Advisory Committee Act. At its November 18, 2015, public meeting in Norman, OK, the Review Committee heard a request from The Osage Nation as an affected party. The issues before the Review Committee were (1) whether the human remains and associated items from the Clarksville Mound Group (site 23PI6) are culturally affiliated with The Osage Nation; and (2) whether the

appropriate disposition of the human remains and associated items from the Clarksville Mound Group (site 23PI6) is to The Osage Nation or the Indian tribes comprising the Sac and Fox NAGPRA Confederacy.

Between 1962 and 1996, human remains representing, at minimum, 29 individuals were removed from the Clarksville Mound Group (site 23PI6) in Pike County, MO. The Clarksville Mound Group was originally recorded in 1952, and described as a group of six mounds. In 1962, the site was bulldozed in order to develop a sky-ride and tourist attraction, and five of the six mounds were destroyed. In 1995 and 1996, the City of Clarksville, the owner of the site, contacted the Missouri Department of Natural Resources, State Historic Preservation Office (SHPO) for assistance after terminating the lease to the tourist attraction. Human remains were eroding out of the damaged mound, and due to the severity of the erosion problem, the SHPO and the City of Clarksville decided to undertake excavations to remove the threatened burials. The excavations were expanded as more burials were discovered. During the excavations, human remains representing, at minimum, 22 individuals were removed from the site. The two associated funerary objects are one lot of ancylus shell beads and one Scallorn point. In 2002, additional human remains representing, at minimum, four individuals were transferred to the SHPO by a local collector who had been on the site in 1962. In 2006, additional human remains from the site representing, at minimum, three individuals were transferred to the SHPO by the University of Missouri-Columbia.

On February 21, 2013, the Sac & Fox Nation of Oklahoma, the Sac & Fox Tribe of the Mississippi in Iowa, and the Sac & Fox Nation of the Missouri in Kansas, through the Sac and Fox NAGPRA Confederacy, submitted a request for repatriation of all the human remains and associated funerary objects from the Clarksville Mound Group (site 23PI6), citing a relationship of shared group identity (cultural affiliation). On July 30, 2013, the SHPO published a Notice of Inventory Completion in the **Federal Register** (78 FR 45960–45961) for the human remains and associated funerary objects from the Clarksville Mound Group (site 23PI6) in which it determined that a shared group identity could be reasonably traced between the human remains and the Sac & Fox Nation, Oklahoma; Sac & Fox of Missouri in Kansas and Nebraska; and the Sac & Fox Tribe of the Mississippi in Iowa. On August 29, 2013, The Osage

Nation timely submitted a written request for transfer of control of the human remains and associated funerary objects removed from the Clarksville Mound Group (site 23PI6). Supporting materials submitted by The Osage Nation asserted that (1) the individuals interred at the Clarksville Mound site dated to the Late Woodland and Emergent Mississippian Period (A.D. 900–1000); (2) this period corresponds to the prehistoric occupation of Missouri by the ancestral Osage; and (3) in accordance with 43 CFR 10.2(e)(1) and 10.14(c), multiple lines of evidence support a cultural affiliation between the prehistoric inhabitants of the Clarksville Mound site and the current people of The Osage Nation. As of July 15, 2015, the SHPO had not made a decision regarding The Osage Nation's request.

In August 2015, The Osage Nation requested that the Review Committee make a finding of fact regarding the human remains and associated funerary objects removed from Clarksville Mound Group (site 23PI6) in Pike County, MO. The Designated Federal Officer for the Review Committee agreed to the request.

At its November 18, 2015 meeting, the Review Committee considered the request. The issues before the Review Committee were (1) whether the human remains and associated items from the Clarksville Mound Group (site 23PI6) are culturally affiliated with The Osage Nation; and (2) whether the appropriate disposition of human remains and associated items from the Clarksville Mound Group (site 23PI6) is to The Osage Nation or the Indian tribes comprising the Sac and Fox NAGPRA Confederacy.

**Findings of Fact:** All six Review Committee members currently appointed by the Secretary of the Interior participated in the fact finding. By a vote of five to zero (the chair did not vote), the Review Committee found that with regard to issue (1), the human remains and associated items from the Clarksville Mound Group (Site 23PI6) are culturally affiliated with The Osage Nation. Regarding issue (2), by a vote of five to zero (the chair did not vote), the Review Committee “strongly recommends that the [State of Missouri Department of Natural Resources, State Historic Preservation Officer], pursuant to the NAGPRA regulations, determine the most appropriate claimant in this case within the next six months, in consultation with The Osage Nation and the Sac and Fox NAGPRA Confederacy. If the [State of Missouri Department of Natural Resources, State Historic Preservation Officer], cannot make such

a determination within six months, the Review Committee requests that the [State of Missouri Department of Natural Resources, State Historic Preservation Officer], notify the Review Committee of the barrier to doing so.”

Dated: January 13, 2016.

**Armand Minthorn,**

*Chair, Native American Graves Protection and Repatriation Review Committee.*

[FR Doc. 2016–03407 Filed 2–17–16; 8:45 am]

**BILLING CODE 4312–50–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Mobile Electronic Devices Incorporating Haptics (Including Smartphones and Smartwatches) and Components Thereof*, DN 3120; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at EDIS,<sup>1</sup> and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at USITC.<sup>2</sup> The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at EDIS.<sup>3</sup>

<sup>1</sup> Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

<sup>2</sup> United States International Trade Commission (USITC): <http://edis.usitc.gov>.

<sup>3</sup> Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Immersion Corporation on February 11, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile electronic devices incorporating haptics (including smartphones and smartwatches) and components thereof. The complaint names as respondents Apple Inc. of Cupertino, CA; AT&T Inc. of Dallas, TX; and AT&T Mobility LLC of Atlanta, GA. The complainant requests that the Commission issue a limited exclusion order and cease and desist orders.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

- (i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;
- (ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;
- (iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number ("Docket No. 3120") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures).<sup>4</sup> Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.<sup>5</sup>

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: February 12, 2016.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2016-03344 Filed 2-17-16; 8:45 am]

**BILLING CODE 7020-02-P**

<sup>4</sup> Handbook for Electronic Filing Procedures: [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf).

<sup>5</sup> Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 14-20]

#### Hatem M. Ataya, M.D.; Decision and Order; Introduction and Procedural History

On July 23, 2014, the Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause to Hatem M. Ataya (Respondent), of Lapeer, Michigan. ALJ Ex. 1, at 1. The Show Cause Order proposed the revocation of Respondent's DEA Certificates of Registration, pursuant to which he is authorized to dispense controlled substances in schedules II through V, as a practitioner, at the registered address of 971 Baldwin Road, Lapeer, Michigan (FA2278201), and at the registered address of 3217 W. M-55 Suite B, West Branch, Michigan (BA7776353), on the ground that he has committed acts which render his registration inconsistent with the public interest.<sup>1</sup> *Id.* (citing 21 U.S.C. 824(a)(4)). The Order also proposed the denial of Respondent's applications for two additional registrations,<sup>2</sup> on the ground that "it is not consistent with the public interest . . . for [him] to be registered with the [Agency] to handle controlled substances." *Id.* (citing 21 U.S.C. 823(f)).

The Show Cause Order alleged that from 2010 through 2013, Respondent "repeatedly violated [his] obligation under federal law by prescribing controlled substances to [his] patients outside of the normal course of professional medical practice." *Id.* at 2 (citing 21 CFR 1306.04(a)). Continuing, the Order specifically alleged that Respondent's "practice of regularly prescribing controlled substances to five patients [who were identified by the initials R.E.H., J.W., R.K., R.J.H., and J.H.] despite numerous and repeated red flags of drug abuse and diversion, [his] repeated failures to take appropriate steps to monitor [his] patients' use of controlled substances, and numerous other actions [he] took in the course of treating these patients all indicate that [he] violated [his] obligations under federal law by 'prescribing [controlled substances] as much and as frequently as the patient demanded' so that '[in] practical effect, [he] acted as a large-scale "pusher" not as a physician.'" *Id.*

<sup>1</sup> The Order alleged that Respondent's registration number FA2278201 expires on June 30, 2016, and that his registration number BA7776353 expires on June 30, 2017. ALJ Ex. 1, at 1.

<sup>2</sup> The applications are for proposed registered locations in Davidson and Flint, Michigan. ALJ Ex. 1, at 1.

(quoting *U.S. v. Moore*, 423 U.S. 122, 143 (1975)). The Show Cause Order then set forth detailed allegations regarding Respondent's prescribing to each of these patients.<sup>3</sup> See *id.* at 2–6.

In addition, the Show Cause Order alleged that on March 26, 2013, Respondent was interviewed by a DEA Diversion Investigator and a local Detective. *Id.* at 6. The Show Cause Order further alleged that during the interview, Respondent made multiple false statements regarding his controlled substance prescribing practices.<sup>4</sup> *Id.* at 6–7.

Following service of the Show Cause Order, Respondent timely requested a hearing on the allegations. ALJ Ex. 2. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Administrative Law Judge (ALJ) Christopher B. McNeil, who commenced to conduct pre-hearing procedures and ordered the parties to submit their respective pre-hearing statements. GX 3. Thereafter, the parties submitted their pre-hearing and supplemental pre-hearing statements. The parties also filed various motions, the most significant of these being (given the issues raised by the Parties in their Exceptions), the Government's Motion to Exclude Respondent's Witnesses (ALJ Ex. 41).

Also, on September 29, 2014, the ALJ conducted an on-the-record conference with the Parties at which he set the initial date for the evidentiary phase of the proceeding. Tr. 1, 16–17 (Sept. 29, 2014). During the conference, the ALJ authorized the taking of testimony at either the Agency's Arlington, Virginia hearing facility or “by video-teleconferencing in the Detroit DEA Office.” *Id.* at 19. The ALJ also authorized Respondent and his counsel to appear at either the Arlington hearing facility or the “video-teleconferencing site” and “direct[ed] the Government to

make available its DEA District or Field Office for this purpose.” *Id.* at 19–20.

On November 3, 2014, the ALJ conducted a further on-the-record conference during which he reviewed the parties' proposed stipulations and ruled on the Government's Motion to Exclude Respondent's Witnesses. See generally Tr. (Nov. 3, 2014). The ALJ granted the Government's motion with respect to twelve of Respondent's proposed fact witnesses on the ground that Respondent had not identified with sufficient particularity their proposed testimony because his pre-hearing statements did “not clearly indicate each and every matter Respondent intend[ed] to introduce in opposition to the allegations.” *Id.* at 35–36; see also *id.* at 37–38. The ALJ also granted the Government's motion to exclude the testimony of Respondent's six witnesses who were to “either testify or provide testimonials . . . as to [his] character, reputation, and qualifications as a physician,” ALJ Ex. 39, at 3; stating his agreement with the Government's contention that their testimony was irrelevant and that Respondent did not proffer that “any of these witnesses plan to testify about his treatment of” the five patients. *Id.*; see also Tr. 38 (Nov. 3, 2014).

The Government also sought to exclude the testimony of Ms. Michelle Ann Richards, who, according to Respondent, would “testify that she is certified in healthcare compliance consulting, coding, and office management,” and “that she was retained by Respondent to do risk assessment audit and risk mitigation for his practice.” ALJ Ex. 39, at 3. Respondent also stated that Ms. Richards would testify that she had “provided compliance training to Respondent's staff [and] that she is continuing to monitor and implement changes to ensure [his] medical practice with all State and Federal laws.” Tr. 39. In addition to the ground that Respondent had not adequately summarized Ms. Richards' testimony, the Government also argued that the testimony should be barred because Respondent had represented that he “intend[ed] to testify that he has never been out of compliance with such laws,” and that his “‘care and treatment [of the five patients] at all times comported with reasonable and minimally accepted standards and that all prescriptions were issued for a legitimate medical purpose by a registered physician within the course of professional practice.’” ALJ Ex. 42, at 4–5 (Gov. Mot.) (quoting Resp. Pre-Hearing Statement, at 3–4 (Sept. 15, 2014)). Continuing, the Government

reasoned that under agency precedent, “‘mitigation’ evidence is not admissible unless and until the registrant fully and unequivocally accepts responsibility for the wrongful or unlawful conduct on which registration consequences are sought.” *Id.* at 5.

The ALJ granted the Government's motion, agreeing with both of the Government's arguments. Specifically, the ALJ agreed that Respondent had failed to describe Ms. Richards' testimony “with sufficient particularity” and thus had not complied with his prehearing order. Tr. 39 (Nov. 3, 2014). Also, the ALJ explained that because Respondent intended to testify that in prescribing to the five patients he had “at all times comported with reasonable and minimally accepted standards” and that all of the prescriptions were issued within the usual course of professional practice and for a legitimate medical purpose, this “compels the conclusion that Respondent does not accept responsibility for any failure to conform to the requirements of the” CSA. *Id.* at 40–41. The ALJ thus concluded that there was “no need to address whether the remedial measures that [Respondent] claims to have instituted are adequate to protect the public interest.” *Id.* at 41.

Notably, during the conference, the ALJ did not address Respondent's contention that the ALJ had misinterpreted the Agency's precedents, and that if the case law actually required him to admit to misconduct which he did not engage in, “then that precedent is inconsistent with procedural due process.” ALJ Ex. 45, at 1 (Resp.'s Response in Opposition to Govt's Mot. to Exclude Resp.'s Witnesses). Nor did the ALJ address Respondent's suggestion that he “defer” his ruling “until the hearing itself,” at which time the ALJ and the parties would be in “a better position to determine whether” he “ha[d] sufficiently titrated his contrition to permit the introduction of such testimony.” *Id.*

Finally, the Government moved to exclude the testimony of two physicians who Respondent proposed would testify on his behalf as experts. While Respondent identified some eight areas on which he “anticipated” that the experts would testify, ALJ Ex. 39, at 3–5; the Government argued that the disclosure was inadequate because “Respondent has not disclosed any conclusions that the witnesses have actually reached regarding the prescribing conduct at issue.” ALJ Ex. 42, at 6. The Government further argued that “[i]t remains a mystery if these doctors have actually reached any

<sup>3</sup> The patient-specific allegations will be set forth in discussing the evidence pertinent to each patient.

<sup>4</sup> The Show Cause Order specifically alleged that Respondent attempted to mislead investigators in an interview on March 26, 2013, when he told a DEA Diversion Investigator and a Lapeer City Detective that he was not aware of any prescription pads being stolen, that patient R.E.H.'s fraudulent practices were in the past and he was no longer a patient, that no controlled substance prescriptions are phoned in, that he attempted to taper patients off of methadone over time, that chronic pain patients must have some diagnostic finding to support their pain and are required to see a specific psychiatrist and attend physical therapy, that each chronic pain patient must sign and annually renew a pain management contract, that MAPS searches are usually run for chronic pain patients on every visit, and that he was unaware of any of his patients dying. *Id.* at 6–7. The Government alleged that Respondent's patient files and its investigation indicated that these statements and others were false. *Id.* at 7.

opinions, to which they will subscribe under oath, to support Respondent's view that his prescribing was entirely legitimate." *Id.*

The ALJ granted the Government's motion, reasoning that he could not "tell from the supplemental prehearing statement which witness will espouse each of the opinions presented in the supplemental prehearing statement" and "whether either of the witnesses has a sufficient foundation, obtained through the review of patient records, or otherwise, to express the opinions presented in the supplemental prehearing statement." Tr. 42. The ALJ also explained that he could not tell which professional standards the witnesses were relying on to reach their opinions. *Id.* at 42–43. Finally, while the ALJ noted that Respondent proposed that one of the doctors (who was also from Flint, Michigan) would testify that this area "is infested with drug-seeking addicts, who employ sophisticated tricks to deceive and frustrate the most vigilant anti-diversion efforts of healthcare providers," the ALJ reasoned that this evidence was irrelevant because Respondent "intends to establish that his prescription practice complied fully with the requirements of the" CSA. *Id.* at 43. Subsequently, the ALJ issued a Journal Entry and Order memorializing his various rulings as well as the various stipulations agreed to by the parties.

On November 17–18, 2015, the ALJ presided over the evidentiary phase of the proceeding, conducting a video-teleconference with he and the reporter being present in Arlington, Virginia, and the witnesses (including Respondent) and the parties' counsels present at the DEA Detroit, Michigan Field Division Office. *Id.* at 73–74; *id.* at 423. Notably, from the outset, the proceeding was marked by telephonic interference and interruptions of the transmission, with interruptions occurring nearly 60 times over the course of a day and half of testimony. *See id.* at 72 *et seq.*

At the hearing, the Government called four witnesses to testify, including Dr. Eugene O. Mitchell, who was accepted as an expert in pain medicine. The Government also submitted for the record an extensive amount of documentary evidence including, *inter alia*, the medical records of the five patients identified in the Show Cause Order, copies of various prescriptions issued to the patients, and copies of reports obtained from the Michigan Automated Prescription System (MAPS) showing the controlled substance prescriptions obtained and filled by each of the five patients.

Respondent testified on his own behalf. He also submitted several exhibits for the record. After the hearing, both parties submitted briefs containing their proposed findings of fact and conclusions of law.<sup>5</sup>

Thereafter, the ALJ issued his Recommended Decision (hereinafter cited as R.D.). Therein, the ALJ found that the Government's evidence with respect to Factors Two (Respondent's experience in dispensing controlled substances) and Four (compliance with applicable laws related to controlled substances) supported the conclusion that "Respondent's continued registration would be inconsistent with the public interest." R.D. 66–68.

More specifically, with respect to Factor Two, the ALJ found that "Respondent demonstrated a material lack of . . . experience regarding a prescribing source's responsibilities to resolve red flags when prescribing controlled substances for persons presenting with symptoms of chronic pain and terminate from his practice patients whose drug-seeking behavior indicates the potential for abuse or diversion (or both) of controlled substances." *Id.* at 67. And with respect to Factor Four, the ALJ found that "[a] preponderance of the evidence establishes that Respondent issued controlled substance prescriptions for the five patients identified [in the Show Cause Order], in a manner that was not in the ordinary course of professional medical practice and was not based upon legitimate medical justification." *Id.* (citing 21 CFR 1306.04(a)). The ALJ also found that Respondent violated Michigan law by post-dating controlled substance prescriptions and failing to include "the patient's full name and address" on the prescription. *Id.* at 67–68 (citing Mich. Comp. Laws §§ 333.7333(7), 338.3161(1)(a)); *see also id.* at 64 (Finding of Fact (FoF) # 3). Finally, the ALJ found that Respondent violated state and federal law by issuing prescriptions for schedule IV controlled substances which authorized more than five refills. *Id.* at 68 (citing 21 U.S.C. 829(b); Mich. Comp. Laws § 333.7333(4)); *see also id.* at 64–65 (FoF#s 3, 5).<sup>6</sup>

<sup>5</sup> These briefs will be referred to as Post-hearing Briefs.

<sup>6</sup> Noting that "the record is silent with respect to the recommendation of the . . . state licensing board," the ALJ found that this factor "neither supports nor contradicts a finding that Respondent's continued . . . registration is inconsistent with the public interest." R.D. 66. The ALJ also found that the Government had neither alleged nor provided evidence that Respondent was convicted of a federal or state offense related to the manufacture, distribution, or dispensing of controlled substances, and thus, Factor Three does

The ALJ thus concluded that "the Government has established its *prima facie* case by at least a preponderance of the evidence." *Id.* at 69. The ALJ explained that "[w]hen responding to the Government's *prima facie* case . . . Respondent has the opportunity to demonstrate that he recognizes any noncompliance with controlled substance laws and has taken steps to ensure against future noncompliance." *Id.* at 68–69. The ALJ then reasoned that under the Agency's case law, "in the absence of evidence of 'sincere[ ] remorse[ ],' a 'generalized acceptance of responsibility to the allegations' is not enough to open the hearing so as to permit evidence of remediation." *Id.* (citing Govt's Post-Hrng. Br. 48). Finding that "Respondent has not provided substantial evidence meeting this standard," the ALJ concluded that he "failed to establish a basis that would permit him to rebut the Government's *prima facie* case." *Id.* The ALJ thus recommended that I revoke Respondent registrations and deny his pending applications. *Id.*

Both parties filed Exceptions to the ALJ's Recommended Decision. Thereafter, the record was forwarded to my Office for Final Agency Action.

On review of the record, I noted that it contained no evidence as to whether Respondent is currently authorized under Michigan law to dispense controlled substances. Order at 1 (Nov. 10, 2015). Accordingly, I directed the parties to address whether Respondent currently possesses authority under Michigan law to dispense controlled substances and if Respondent does not possess such authority, to address what consequence attaches for this proceeding. *Id.*

On November 17, 2015, the Government submitted its Response. Therein, the Government noted that on July 6, 2015, the Michigan Department of Licensing and Regulatory Affairs had filed an Administrative Complaint with the Board of Medicine Disciplinary Subcommittee. Govt's Resp., at 7–8; Govt's Resp. Ex. 3, at 8–14

not support the revocation of his registrations and denial of his pending applications. *Id.* at 67.

As for Factor Five—such other conduct which may threaten public health or safety—the ALJ found that the Government had not proved the allegation that Respondent made various false statements to the Diversion Investigator and Detective. *Id.* at 68. The ALJ based his conclusion on the fact that "the written record of that interview was not present" and "the questions presented and answers given were not sufficiently established in the record so as to permit a determination of Respondent's candor during [the] interview." *Id.* Because the Government did not take exception to the ALJ's findings on the issue of Respondent's candor during the interview, I deem it unnecessary to make any findings related to the allegation.

(Administrative Complaint, *In re Ataya*, No. 43–15–137995 (Mich. Bd. of Med. July 6, 2015)). When Respondent failed to respond to the allegations of the complaint, the allegations were deemed admitted, and on October 30, 2015, the Board revoked his medical license. Gov. Resp. Ex. 3, at 2–3, 5. In his Response to my Order, Respondent states that he does not dispute that the Board has revoked his medical license and that he “no longer has any legal authority to dispense controlled substances, which, as a practical matter, he could not accomplish from the jail cell he has occupied for the past several months anyway.” Respondent’s Resp., at 1.

Having considered the record in its entirety, including the parties’ Exceptions, as well as the recent action taken by the Michigan Board of Medicine, I issue this Decision and Final Order. I agree with the ALJ that the record supports findings that Respondent ignored multiple red flags of abuse and/or diversion with respect to each of the five patients (FoF #2). I also agree that the record supports the ALJ’s factual findings specific to Respondent’s prescribing of controlled substances to each of the five patients (FOF#s 3, 4, 5, 6, and 7), as well as his legal conclusions that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in prescribing controlled substances to each of the five patients in violation of 21 CFR 1306.04(a). See R.D. at 66–67. I further agree with the ALJ that Respondent violated federal and state law when he issued prescriptions authorizing more than five refills of schedule IV controlled substances, as well as when he post-dated a prescription and failed to include the patients’ names and addresses on numerous prescriptions. Finally, I agree with the ALJ’s conclusion that the Government made out a *prima facie* case that Respondent’s registration is inconsistent with the public interest.

With respect to Respondent’s rebuttal case, for reasons explained below, I find troubling the ALJ’s handling of the issue of whether Respondent has adequately accepted responsibility for his misconduct. And as for the ALJ’s ruling barring Respondent from presenting evidence of his remedial measures, I agree with the ALJ that Respondent did not sufficiently disclose the scope of the proposed testimony. While this alone is sufficient reason to reject Respondent’s exception, the ALJ further reasoned that under the Agency’s precedent, Respondent is barred from introducing evidence of his remedial measures absent his admission to the allegations

before the Government was even required to put on its evidence. Contrary to the ALJ’s understanding, while a respondent’s failure to acknowledge his misconduct renders evidence of his remedial measures irrelevant, the Agency has never held that a respondent must admit to his misconduct prior to even being able to test the Government’s evidence at the hearing.

I reject, however, Respondent’s contention that a remand is warranted for multiple reasons. First, as explained above, I agree with the ALJ’s conclusion that Respondent did not adequately disclose the scope of the proposed testimony on the adequacy of his remedial measures. Second, even were I to credit Respondent’s admissions at the hearing and give weight to his testimony regarding the remedial measures he has undertaken, I would nonetheless find that his conduct was so egregious that the protection of the public interest warrants the revocation of his registrations and the denial of his pending applications. Finally, because of the recent action of the Michigan Board of Medicine, Respondent is precluded from being registered because he no longer holds authority under state law to dispense controlled substances, and thus evidence of his acceptance of responsibility and remedial measures is irrelevant. See 21 U.S.C. 802(21), 823(f).

### Findings of Fact

#### *Respondent’s Licensure and Registration Status*

Respondent was formerly licensed as a physician by the Michigan Board of Medicine. However, on July 6, 2015, the Bureau of Professional Licensing, acting on behalf of the Michigan Department of Professional Licensing and Regulatory Affairs, filed a complaint against Respondent. Administrative Complaint, *In re Ataya*, No. 43–15–137995 (Mich. Bd. of Med. July 6, 2015). The Department also ordered that Respondent’s medical license be summarily suspended. Order of Summary Suspension, *In re Ataya*. Thereafter, on October 30, 2015, the Board of Medicine revoked Respondent’s medical license. Final Order, *In re Ataya*.

Respondent currently holds two DEA practitioner’s registrations, pursuant to which he is authorized to dispense controlled substances in schedules II through V. GX 4, at 1–2. The first of these (BA7776353) is for the registered location of 5097 Miller Road, Flint, Michigan and does not expire until June 30, 2017. *Id.* at 1. The second (FA2278201) is for the registered

location of 971 Baldwin Road, Lapeer, Michigan and does not expire until June 30, 2016. GX 3, at 1. Respondent has also applied for two additional registrations: One at the address of 3390 N. State Road, Davison, Michigan; the other at the address of 3400 Fleckenstein, Flint, Michigan.

### The Investigation of Respondent

Respondent first came to the attention of law enforcement on January 5, 2012, when a Detective with the City of Lapeer Police Department responded to the death of R.J.H., one of the patients identified in the Show Cause Order. Tr. 90; ALJ Ex. 1, at 1–2. According to the Detective, he knew R.J.H. from his experience in law enforcement and knew him to be an abuser of both “prescription drugs [and] illegal drugs.” Tr. 93. The Detective testified that R.J.H. bore no signs of external injuries and there was no evidence that injuries had led to his death. *Id.* The police did, however, find three empty prescription vials, including a vial bearing a label for 120 methadone 10<sup>7</sup> and clonazepam (Klonopin), as well as a syringe, on a nightstand in R.J.H.’s bedroom. *Id.* The Detective subsequently obtained a report from the Michigan Automated Prescription System (MAPS) and found that both the methadone and Klonopin had been prescribed to R.J.H. by Respondent on January 3, 2012. *Id.* According to the detective, toxicology testing led to the conclusion that R.J.H. had died of an overdose. *Id.* at 95. The Detective also learned that R.J.H. had overdosed on heroin two days before and was taken to the hospital. *Id.* at 107; GX 5, at 1.

On January 22, 2012, the Detective responded to the death of J.W. Tr. 95. The authorities found two pill bottles in J.W.’s coat, as well as marijuana. *Id.* at 96, 108. One vial, which bore a label for 120 methadone, contained only nine methadone pills; however, the vial also included four Klonopin pills and two diazepam. *Id.* The second vial, which bore a label for 120 Klonopin, contained only 91 pills. *Id.* According to the Detective, J.W.’s body bore possible needle marks. *Id.* at 112.

During his investigation, the Detective determined that on January 19 (three days earlier), J.W. had obtained prescriptions from Respondent for 120 methadone 10 and 120 clonazepam 1. *Id.* at 96. According to the Detective, the investigation and toxicology test results led to the conclusion that J.W. had died of an overdose. *Id.* at 96–97.

<sup>7</sup> All numbers which follow the name of a drug refer to the dose per pill in milligrams.

During the course of his investigation, the Detective spoke with both J.W.'s mother and niece. The Detective testified that J.W.'s mother said that J.W. did not like methadone and usually sold it to buy other drugs. *Id.* at 112. According to the Detective, J.S. (J.W.'s niece) told him that J.W. had been released from jail only "a week or two prior to his death." *Id.* at 98. J.S.'s niece also told the Detective that she had contacted Respondent's office and told him that her uncle "had a problem" with controlled substances "and asked him not to prescribe any controlled substances" to her uncle. *Id.*

J.S. subsequently testified that her uncle's drug problem "was obvious" and that "[e]verybody knew." *Id.* at 125. She testified that she spoke with Respondent on the phone a couple of weeks before her uncle was released and told Respondent that her uncle "was sick and he didn't need the medications because he wasn't taking them" and "was selling them." *Id.* at 128–29. According to J.S., Respondent initially "blew [her] off." *Id.* at 129. However, when J.S. told Respondent that the police "wanted to know why [J.W.] had two prescriptions for Methadone" which he had not filled, Respondent asked for J.W.'s name, address and date of birth. *Id.* J.S. also told Respondent that J.W. had "nearly died from withdrawal" and asked Respondent not to "give him these strong medications." *Id.* While Respondent said that "he wouldn't do it anymore," *id.* at 130, as found above, Respondent subsequently issued the methadone and clonazepam prescriptions to J.W.<sup>8</sup> *Id.* at 96.

The Detective also testified regarding an investigation conducted by a subordinate into the death of R.K. on or about July 21, 2012. *Id.* at 98–100. According to the Detective, there was no evidence that R.K. had died of injuries and upon arriving at the scene, the police found a prescription vial which, according to the label, had been issued by Respondent four days earlier for 90 Xanax. *Id.* at 100. However, the vial was empty. *Id.*

The Detective also obtained a MAPS report for R.K. *Id.* The MAPS report

shows that on July 17, Respondent issued to R.K. a prescription for 90 tablets of methadone 10, which R.K. filled the next day. GX 22, at 16. The cause of R.K.'s death was a drug overdose. *Id.* at 101. According to a police report, a person with Community Mental Health stated that R.K. was known to abuse heroin, Tramadol, and other prescription medications. GX 5, at 17.

The Detective testified that because his agency did not have a lot of experience in prescription drug investigations, after R.K.'s death, he sought the assistance of DEA, and on August 13, 2012, met with a DEA Diversion Investigator (DI). Tr. 102. Two days after the meeting, the mother of another of Respondent's patients (J.L.H.) contacted the Lapeer Police and reported that she had taken her daughter to see Respondent the day before and that he had issued her prescriptions for methadone, tramadol and clonazepam. *Id.* at 102–03. However, the day after J.L.H. saw Respondent, her mother reported that she was unable to contact J.L.H. at her residence and could not get her to answer the door; she thus requested the assistance of the police. *Id.* at 103. The Detective testified that "[a] neighbor had climbed up on the roof and looked through a second story window and observed [J.L.H.] on the couch unresponsive." *Id.* A police officer entered J.L.H.'s home and found her "blue in color and unresponsive." *Id.* J.L.H. was taken to the hospital. *Id.*

Several months later, the Detective obtained a warrant to search Respondent's Lapeer office for several patient charts, and on March 26, 2013, the Lapeer Police Department, DEA, and members of the Thumb Narcotics Unit (a local multijurisdictional task force) executed the warrant. *Id.* at 104. However, the Detective and the DI decided to interview Respondent, who was at his Davidson office, prior to searching his Lapeer office. *Id.*

During the search of the Lapeer office, the Detective determined that several of the patient files that were being sought under the warrant were not at that office. *Id.* at 105. Accordingly, the Detective obtained an amended warrant, which authorized searches of Respondent's Flint and Davidson offices. *Id.* The records were subsequently seized and provided to the DI, who had them scanned. *Id.*

The Government also called the DI who worked with the Detective on the investigation. The DI testified that she obtained MAPS reports for Respondent and found that they showed that he prescribed "a lot of combinations of prescriptions for [m]ethadone,

[h]ydrocodone, and . . . [a]lprazolam" and that the patients were "getting them on a regular basis." *Id.* at 146. The DI also testified that when alprazolam is taken with methadone or hydrocodone, "it enhances the effect of the narcotic causing somewhat of a heroin-type high." *Id.* at 147. The DI further testified that she participated in the execution of the search warrant and that she assisted in the seizure of patient charts and conducted employee interviews. *Id.* at 149. According to the DI, she determined what charts to seize by reviewing MAPS data and conducting "criminal history searches to determine what patients were known to be drug seekers or had a positive criminal history." *Id.*

The DI testified that "many of the charts contained information that [showed] that the patients were not taking the controlled substances as they had been prescribed, or that they had drug addiction issues, or they were narcotic dependent, or any of a number of red flags that were indicated in the charts, and then we sent the patient charts out for expert review." *Id.* at 156–57. The DI explained that there were "instances where the patient was coming [back] before the 30-day[s] had expired, and were [sic] obtaining additional prescriptions for the same medication or," the patients were "obtaining refills of a prescription that had refills written on [it] prior to the time [that] they should have used [ ] the medication up if they were taking it as directed." *Id.* at 157.

The DI testified that the patient records included evidence that pharmacies had called Respondent raising issues of whether the patients "were doctor shopping or obtaining refills early." *Id.* at 158. The DI also testified that the files contained "reports from the State alerting [Respondent] about medication issues that they wanted him to be aware of" regarding "his prescribing of certain drugs," as well as "police reports" and "hospital reports on several patients indicating that they had a history of drug abuse or they had been admitted for a drug-related issue." *Id.* The DI testified that she provided Dr. Eugene Mitchell, Jr., with the files of the five patients at issue in this proceeding and asked him to review the files and identify examples of Respondent's issuance of controlled substance prescriptions outside of "the usual course of medical practice" and which lacked a legitimate medical purpose. *Id.* at 160. According to the DI, these specific charts were selected for review by Dr. Mitchell because "the findings in these files . . . were

<sup>8</sup> Respondent testified that he does not recall the phone conversation about which J.S. testified, explaining that he would not remember what patient the conversation involved because he has 7,500 patients. Tr. 485. He also testified that if someone calls and wants to speak to him about a patient, his assistants ask the person "to come with the patient and discuss the matter." *Id.* The ALJ did not make a finding as to whether J.S.'s testimony was credible. R.D. at 9–10. I find her testimony credible, noting that while it may be that Respondent would not recall the conversation given the large number of patients he treated, one would recall a conversation she had with a doctor about a family member.



egregious” and four of the five patients were deceased. *Id.* at 160–61.<sup>9</sup>

The DI further testified that in reviewing the patient files she found evidence of other violations of the Controlled Substance Act and DEA regulations. Tr. 172–73. These included instances in which Respondent authorized more than five refills on a prescription; instances in which he issued early refills; instances in which he failed to include a patient’s address, which is required information on a prescription; and instances in which Respondent post-dated prescriptions. *Id.* at 173–74. The DI then testified as to the following examples: (1) A Xanax prescription dated Feb. 9, 2013 issued to R.E.H. authorizing six refills (GX 8, at 23); (2) a Klonopin prescription dated August 14, 2012 issued to J.H. authorizing six refills (GX 19, at 117); and (3) a Xanax prescription dated April 10, 2012 issued to R.K. authorizing six refills (GX 17, at 49). Tr. 184–86.<sup>10</sup> The DI also discussed two examples of prescriptions which Respondent issued to Patient R.E.H. without including his address, and did so even after Respondent had received information that R.E.H., who shared the same first name as his father, had attempted to fill a methadone prescription using his father’s name and date of birth. Tr. 182–84; *see also* GX 8, at 42 (methadone and Xanax prescriptions dated April 19, 2012 with patient’s address left blank).

#### The Government Expert’s Testimony

The Government called Dr. Eugene O. Mitchell, Jr., who testified as an expert on pain management. Dr. Mitchell received a Bachelor of Science in Biochemistry in 1975 from the University of Florida and a Bachelor of Science in Medicine in 1979 from the University of Florida’s Physician’s Assistant Program. GX 25, at 1. Dr. Mitchell subsequently obtained a Doctor of Medicine in 1985 from the Wayne State University School of Medicine. *Id.* His post-doctoral training includes an internship in internal medicine and a residency in anesthesiology (both at the University of Illinois), and a fellowship in pain medicine at the University of Michigan. *Id.*

<sup>9</sup>In addition to obtaining each patient’s medical file, the DI used the MAPS data to obtain copies of the original prescriptions from the various pharmacies.

<sup>10</sup>The DI also testified regarding two methadone prescriptions Respondent issued to R.E.H. in October 2012, including one which was issued notwithstanding that R.E.H. was a week early, and on which the date of the copy in R.E.H.’s file appears to have been altered. Tr. 175–80. These prescriptions are discussed more fully in the findings regarding Respondent’s prescribing to R.E.H.

Dr. Mitchell holds a medical license issued by the State of Michigan and is board certified in both anesthesiology and pain medicine. *Id.* at 2. He is also a member of numerous professional societies including the American Academy of Pain Medicine and the American Society of Regional Anesthesia and Pain Medicine. *Id.*

Since February 2001, Dr. Mitchell has held the position of Clinical Assistant Professor in the Department of Anesthesiology, Division of Interventional Pain Medicine, at the University of Michigan Medical Center. *Id.* In this position, he lectures medical students on pain medicine and trains fellows in pain medicine as well as residents, interns, and nursing staff. *Id.* at 3, Tr. 234. He also is active in practice. *Id.* Dr. Mitchell was qualified as an expert. *Id.* at 239.

Dr. Mitchell testified “all controlled substances have the risk of significant morbidities including death from overdose,” “withdrawal from their use,” and “addiction.”<sup>11</sup> *Id.* He testified that to reduce the risks associated with the abuse and diversion of controlled substances, a physician must “be familiar with the patient’s medical history” and review the patient’s records so that the physician has “a clear understanding” of the patient’s diagnosis. *Id.* at 240. Also, the physician must review the patient’s “history of abuse” and “[a]ny issue of addictive illness,” whether it involves tobacco, alcohol, and both “licit” and “illicit” drugs. *Id.*

Dr. Mitchell further testified that there are various compliance tools that he uses to determine whether patients are abusing or diverting controlled substances. The first of these is a “medication agreement” between the physician and the patient which sets forth the “criteria that [the patient] will adhere to” while “being prescribed controlled substances.” *Id.* Dr. Mitchell testified that an essential part of the agreement is “a clause that allows the physician to ask the patient” to provide “a random body fluid sample,” whether of blood or urine, “on demand to verify what is or isn’t present in” the patient’s body. *Id.* at 241. Dr. Mitchell explained that a further compliance tool is to use the MAPS, Michigan’s controlled substance prescription monitoring program, which allows a physician to obtain a list of the controlled substance prescriptions filled by a patient in the State. *Id.*

<sup>11</sup>He also testified that the use of controlled substances presents a risk of developing both renal and hepatic disease. Tr. 239.

Dr. Mitchell also testified that in Michigan, a task force of physicians developed Guidelines for the “appropriate prescribing” of controlled substances for the treatment of pain. *Id.* at 243; GX 26. These Guidelines have been issued by both the Board of Medicine and the Board of Osteopathic Medicine & Surgery. GX 26, at 1. The Guidelines “recognize that controlled substances, including opioid analgesics, may be essential in the treatment of acute pain due to trauma or surgery and chronic pain, whether due to cancer or non-cancer origins.” *Id.* However, the Guidelines caution “that inappropriate prescribing of controlled substances, including opioid analgesics, may lead to drug diversion and abuse by individuals who seek them for other than legitimate medical use” and that “[p]hysicians should be diligent in preventing the diversion of drugs for illegitimate purposes.” *Id.* According to the Guidelines, they “are not intended to define complete or best practice, but rather to communicate what the Board considers to be within the boundaries of professional practice.” *Id.* at 2.

Dr. Mitchell then testified regarding the “typical steps taken by doctors in treating patients who suffer from chronic pain.” Tr. 247. Dr. Mitchell testified that when a new patient seeks treatment, a physician “take[s] a detailed history” and asks the patient “to bring [his/her] records” including imaging findings. Tr. 247; *see also* GX 26, at 3–4. Dr. Mitchell explained that a physician “document[s] what [his/her] chief complaint is” and why the patient is seeking “to begin care.” Tr. 247.

Dr. Mitchell testified that the “standard medical doctoring for a new patient encounter” includes a “review of [the patient’s] systems” and “[a]n appropriately detailed physical examination.” *Id.* The physician then makes a diagnosis and creates a treatment plan. *Id.* The physician also “modulates the treatment plan” in accordance with the patient’s disease process.<sup>12</sup> *Id.* at 248.

<sup>12</sup>With respect to the initial evaluation of the patient, the Michigan Guidelines state:

A complete medical history and physical examination must be conducted and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse. The medical record also should document the presence of one or more recognized medical indications for the use of a controlled substance.

GX 26, at 3. With respect to the creation of a treatment plan, the Guidelines state:

The written treatment plan should state objectives that will be used to determine treatment success, such as pain relief and improved physical

Re-emphasizing his earlier testimony, Dr. Mitchell testified that as part of the process of formulating a plan involving the long term prescribing of controlled substances, the physician reviews the medication agreement/opioid contract with the patient and explains that if the patient violates the agreement, the patient will be discharged from the practice.<sup>13</sup> *Id.* at 249. Dr. Mitchell further explained that the first time a patient presents with a red flag, regardless of whether the patient has a history of addiction, the red flag should be documented and the patient should be brought in and given the “opportunity to explain what’s going on.” *Id.* at 249–50. Dr. Mitchell explained that there is a spectrum of red flags which runs from such incidents as a patient claiming to have lost a prescription but having “no other infractions,” to a patient whose “urine screens are inappropriate” or whose MAPS report shows they are “multi sourcing.” *Id.* at 250.

Regarding the five patients identified in the Show Cause Order, Dr. Mitchell testified that he reviewed the patient files including the visit notes, MAPS reports, and copies of the prescriptions which included the pharmacy labels. *Id.* at 251. Dr. Mitchell testified that he had identified specific prescriptions which he believed were issued outside of the usual course of professional medical practice. *Id.* at 252. Dr. Mitchell further explained that he has been “practicing medicine for nearly 30 years,” and that he is “familiar with what constitutes general[ly] appropriate behavior regarding prescribing controlled substances.” *Id.*

and psychosocial function, and should indicate if any further diagnostic evaluations or other treatments are planned. After treatment begins, the physician should adjust drug therapy to the individual medical needs of each patient. Other treatment modalities or a rehabilitation program may be necessary depending on the etiology of the pain and the extent to which the pain is associated with physical and psychosocial impairment.

*Id.*

<sup>13</sup> Relevant to this testimony, the Guidelines state that:

[i]f the patient is determined to be at high risk for medication abuse or have a history of substance abuse, the physician may employ the use of a written agreement between physician and patient outlining patient responsibilities, including . . . urine/serum medication levels screening when requested; . . . number and frequency of all prescriptions, refills; and . . . reasons for which drug therapy may be discontinued (*i.e.*, violation of agreement).

GX 26, at 3. The Guidelines further advise physicians to periodically “monitor patient compliance in medication usage and related treatment plans.” *Id.* at 4.

## The Patient Specific Evidence

*R.E.H.*

### The Allegations

With respect to R.E.H., the Government alleged that from August 5, 2010 through at least March 13, 2013, Respondent repeatedly prescribed controlled substances to the patient even after Respondent knew that R.E.H. “was engaged in the abuse and/or diversion of controlled substances, as well as prescription fraud.” ALJ Ex. 1, at 2. Specifically, the Government alleged that Respondent repeatedly prescribed methadone, a schedule II narcotic controlled substance, and other controlled substances to R.E.H., notwithstanding that he presented “numerous red flags of diversion and/or abuse.” *Id.* The allegations included that:

- R.E.H. repeatedly sought early refills;
  - R.E.H. repeatedly claimed that his prescriptions were lost or stolen;
  - pharmacists repeatedly contacted Respondent’s office to report suspicious behavior by R.E.H.;
  - MAPS reports in R.E.H.’s file corroborated reports that R.E.H. and his wife were committing prescription fraud;
  - R.E.H. had been recently released from jail; and
  - hospital records in his file showed that R.E.H. was using illegal drugs.
- Id.* at 2.

The Show Cause Order also alleged that R.E.H.’s patient file and the prescriptions issued to him show that Respondent prescribed methadone on R.E.H.’s “first visit without undertaking other actions typical of medical professionals[,] such as conducting and documenting a complete medical history and physical examination, requiring that R.E.H. (a self-identified addict) sign a pain management contract or undergo a drug test, running a MAPS search on R.E.H., or creating a written treatment plan.” *Id.* at 2–3. The Show Cause Order then alleged that Respondent:

- Never subsequently required R.E.H. to sign a pain management contract;
- “repeatedly issued prescriptions to [him] with instructions to take his methadone ‘PRN’—thus directing that this self-identified addict should take this powerful opioid analgesic (properly used in scheduled dosages) on an ‘as needed’ basis”;
- issued at least one prescription on a date when R.E.H.’s patient file indicates that he did not have an appointment;
- notwithstanding that he knew that R.E.H. was attempting to fill the

prescriptions using his father’s birthdate to avoid being detected, Respondent did not take the minimal preventative step of including R.E.H.’s address on his methadone prescriptions as required by state and federal law;

- issued a prescription for Xanax to be refilled six times, in violation of state and federal law; and
- falsified records to post-date a methadone prescription in order to provide R.E.H. with an early refill in violation of state and federal law, circumventing the efforts by his staff noting that an early refill should not be issued.

*Id.* at 3.

### The Evidence

On August 5, 2010, R.E.H. made his first visit to Respondent. Tr. 254; GX 8, at 143. According to his medical record, R.E.H.’s chief complaint was back pain. Tr. 256; GX 8, at 143. R.E.H. also reported a history of abusing heroin, which is a “significant addictive illness history,” Tr. 257, as well as tobacco abuse and that he was taking methadone; however, there is no indication that Respondent determined how much methadone R.E.H. was taking, which according to Dr. Mitchell was “a critical bit of information . . . because methadone . . . is approximately five times as potent as morphine.” *Id.* at 256. Dr. Mitchell also explained that Respondent did not determine if R.E.H.’s heroin abuse, which he characterized as a “significant addictive illness history” was “currently active” and whether he had gone (or was going to rehabilitation) for it. *Id.* at 257.

Dr. Mitchell further found that Respondent’s physical examination was “very cursory for a new patient” as he did not conduct neurological and spinal examinations. *Id.* at 256. He also did not require that R.E.H. sign a medication contract, *id.* at 257–58, even though he prescribed 30 tablets of methadone 10, with a dosing instruction of TID or one tablet, to be taken three times per day. *Id.* at 255. Dr. Mitchell opined that this prescription was not issued in the usual course of medical practice. *Id.* I agree.

Even though the prescription should have lasted for ten days, R.E.H. returned to Respondent only six days later and obtained a new prescription, which was for 90 tablets of methadone, TID (three times a day). *Id.* at 258–59. Dr. Mitchell testified that this was an early refill and thus required that Respondent ask R.E.H. why he needed to refill his prescription four days early and document the reason he needed the early refill. Tr. 259–60. Dr. Mitchell thus found that the prescription was not

issued in the usual course of medical practice. *Id.* at 259. He further explained that R.E.H.'s seeking of the refill was a matter of concern because of R.E.H.'s history of drug abuse.<sup>14</sup> *Id.* at 260.

R.E.H.'s third visit occurred on September 21, 2010. Tr. 262. The progress note documents, however, that R.E.H. was "just release [sic] from jail" and that he had been in jail "15 days." GX 8, at 141; Tr. 262. The note further states that R.E.H.'s methadone dose was increased to 10 mg five times a day for two weeks, suggesting that this had occurred when he was in jail. *Id.* The note also states: "methadone x 6 months Heroin addiction." GX 8, at 141.

Respondent issued R.E.H. a prescription for 90 pills of methadone 10, TID. *Id.* While this should have provided a 30-day supply and thus lasted until October 21, R.E.H. returned to Respondent on October 13, eight days early, and obtained a new prescription for 90 tablets of methadone 10. Tr. 263–64. Dr. Mitchell testified that R.E.H. was manifesting a pattern of seeking early refills and Respondent's issuance of the prescriptions was not within the usual course of medical practice because there was "no documentation" that Respondent engaged R.E.H. "as to why this is going on." *Id.* at 265. Moreover, Respondent did not attempt to determine if R.E.H. was "even taking the medication" by demanding that he provide "a urine sample." *Id.* He also did not obtain a MAPS report. *Id.*

R.E.H. returned to Respondent on November 1, 2010. GX 8, at 139. While R.E.H. was 11 days early, Respondent issued him another prescription for 90 tablets of methadone 10 with the same dosing instruction. GX 8, at 139; Tr. 266. While R.E.H. was not early at his next visit (November 30), when he again obtained a prescription for 90 methadone 10 (one tablet TID, or three times per day), he returned to Respondent on December 23, and obtained a new prescription, which he increased to 120 tablets (TID) even though he was a week early. Tr. 266–67; GX 8, at 137–38; GX 15, at 15–16. According to Dr. Mitchell, none of the prescriptions Respondent issued in November–December 2010 were issued in the usual course of professional practice. Tr. 268. However, Respondent did not require that R.E.H. sign a pain

contract until apparently December 23, 2010.<sup>15</sup> Tr. 270–71; GX 8, at 242.

R.E.H. returned on January 4, 2011. GX 8, at 136; GX 15, at 17. Even though R.E.H. was 18 days early, and notwithstanding that the pain contract required him to use his "medicine at a rate no greater than the prescribed rate" and stated that if he used it at a greater rate, he would be "without medication for a period of time," GX 8, at 242; Respondent issued him another prescription for 90 tablets of methadone 10 with a dosing instruction of TID and PRN (take as needed). GX 8, at 136; GX 15, at 17. Dr. Mitchell testified that this prescription was not issued in the usual course of professional practice and that the usual course of professional practice would be to discharge a patient seeking a prescription two weeks early. Tr. 269. He also testified that it is not in the usual course of medical practice to prescribe methadone with a dosing instruction of PRN because the drug "has [a] very long half-life" and "takes a while . . . to enter the blood" stream, and the reason the drug is used for pain is to provide "a stable blood level" of medication. *Id.* at 274.

Respondent did not, however, discharge R.E.H., who returned on January 26, 2011. GX 8, at 135. Notwithstanding that R.E.H. was eight days early, Respondent issued him a new prescription and increased the quantity to 120 pills and the dosing to four tablets per day. GX 15, at 19–20. Dr. Mitchell testified that this prescription was also not issued within the usual course of medical practice. Tr. 270.

An entry in R.E.H.'s medical record documents that on February 15, 2011, a pharmacy called and reported that R.E.H. had tried to fill three prescriptions for 120 tablets of methadone in less than one month. GX 8, at 18. The note documented that on January 26, 2011, R.E.H. had filled one such prescription at a different pharmacy using insurance, and that on February 1, 2011, he had filled the second prescription at a second pharmacy paying cash. *Id.* Moreover, on February 15, R.E.H. had attempted to fill a third prescription at still another pharmacy but was denied, after which he took it to the pharmacy that called Respondent's office. *Id.*

Dr. Mitchell testified that "this is obviously very concerning behavior" and that a doctor acting the usual course of medical practice would summon the patient and ask for an explanation. Tr. 276–77. He further testified that it would "[a]bsolutely not" be within the

usual course of professional practice to issue a new prescription for a controlled substance in these circumstances. *Id.* at 277.

R.E.H.'s file includes a MAPS report which was obtained on the morning of February 17, 2011, two days after the Respondent's office was notified that R.E.H. had filled two prescriptions since January 26 and had attempted to fill a third. GX 8, 236. The MAPS report corroborated the pharmacy's report and showed that R.E.H. had managed to fill Respondent's January 26 prescription on both that date and on February 1, 2011 at two different pharmacies. *Id.* Of further note, various entries for these two dispensings are circled, thus indicating that someone reviewed them. *Id.* Dr. Mitchell testified that this raised "another obvious problem with [R.E.H.'s] compliance," and that given his "known history of heroin abuse . . . appropriate medical care would dictate engaging the patient in this behavior," followed by "discharging" him and urging him "to go to rehabilitation." Tr. 279.

While R.E.H. saw Respondent on both February 17 and 22, 2011, there is no evidence that Respondent even addressed R.E.H.'s drug-seeking behavior, let alone discharged him. *Id.* at 280–81; see GX 8, at 132–33. While Respondent did not prescribe methadone to R.E.H. at any of his three visits in February 2011, Tr. 281, on March 2, he issued R.E.H. a new prescription for 120 methadone 10, a 30-day supply based on the dosing instruction (QID and PRN). GX 8, at 131; GX 15, at 25. Yet only 21 days later on March 23, Respondent issued to R.E.H. another prescription for 120 methadone 10 (also QID and PRN), and only six days later on March 29, Respondent issued him a prescription for 90 more methadone 10 (TID). Tr. 282; GX 15, at 27–30.

Dr. Mitchell testified that there was no justification in R.E.H.'s chart for Respondent's issuance of prescriptions, which authorized the dispensing of a three-month supply of the drug. Tr. 283. He also testified that these prescriptions were not issued in the usual course of professional practice. *Id.*

The evidence further shows that on June 2, 2011,<sup>16</sup> Respondent issued to

<sup>14</sup> The transcript includes a question by Government's counsel which suggests that R.E.H.'s second visit occurred on October 11, 2010. See Tr. 260, at Ls 5–6. However, R.E.H.'s medical record includes a progress note for August 11, 2010 and contains no note for an October 11, 2010 visit. See GX 8, at 140–42 (progress notes for visits of Aug. 11, Sept., 21, and Oct. 13, 2010).

<sup>15</sup> The date does not, however, include the year. GX 8, at 242.

<sup>16</sup> While the Government did not ask Dr. Mitchell about the methadone prescriptions issued in April and May 2011, the pattern of early refills continued, as on April 20, 2011, Respondent issued R.E.H. a new prescription for 90 methadone 10 TID, this being eight days early (ignoring that R.E.H. had also obtained methadone on March 23). GX 15, at 31–32. Thereafter, on May 10, 2011, Respondent issued R.E.H. a prescription for 120 methadone QID, this being 10 days early. *Id.* at 33–34. Thus, the June 2 prescription was one week early.

R.E.H. a prescription for 100 tablets of methadone 10 QID. GX 15, at 37–38. This was followed by additional prescriptions for 120 tablets of methadone 10 QID on June 16, July 12, July 14, August 9, and August 23, 2011. *Id.* at 41–42, 45–46, 47–48, 51–52, 53–54. The June 16 prescription was 11 days early, and while the July 12 prescription was only four days early, as Dr. Mitchell testified, the July 14 prescription was 28 days early. Tr. 284–85. Moreover, the August 9 prescription was also early, and the August 23 prescription was 16 days early. *Id.* at 286. Yet there is no progress note for the August 23 prescription and no entry in the log used to document various activities. GX 8, at 15–20 (log entries); *id.* at 120–21 (progress notes for Aug. 9 and Sept. 13, 2011, but not Aug. 23). Dr. Mitchell testified that Respondent's issuance of the early methadone refills during the June through August period was not within the usual course of professional practice. *Id.* at 287.

R.E.H.'s patient file also includes copies of two prescriptions for 120 Vicodin ES (QID), which were dated November 17 and 22, 2011. GX 8, at 191–92. The document bearing the November 17 prescription includes the notation: "Please verify—just filled this RX on 11/17 for 30 day supply—then the follow[ing] RX was brought in 11/23/11." *Id.* at 192. The document further asked: "please call Walmart" and included the notation of "suspicious RX." *Id.*

Dr. Mitchell testified that "as a stand-alone incident it's very concerning" because "[i]t smacks of prescription forgery." Tr. 288. However, in R.E.H.'s case, it was "just another incident . . . in his history that just masked a horrible addictive illness, diversion or both." *Id.* at 288–89. Dr. Mitchell then explained that a physician's "primary concern" is the welfare of his/her patients, and a physician "need[s] to protect them from their addictive illness and document it and refer them to a" detoxification facility and not just "feed" their addiction "by continuing to write medications." *Id.* at 289.

R.E.H.'s patient file also includes a MAPS report which Respondent obtained on December 9, 2011. GX 8, at 185–90. The report showed that during the months of October and November 2011, R.E.H. had filled six prescriptions for 120 methadone 10 (with four of the prescriptions having been filled between Nov. 10 and 29) and that R.E.H. had used four different pharmacies. *Id.* at 185–86. However, R.E.H.'s patient file includes progress notes only for visits on October 10 and November 11. *Id.* at 116–119. Notably, each of the

prescriptions listed on the first page of the report has check marks and Respondent's initial/signature<sup>17</sup> is on the page, thus establishing that Respondent reviewed the document. *Id.* at 185.

Dr. Mitchell testified that the report would indicate "[g]reat concern for what's going on" to a doctor acting in the usual course of medical practice as it showed that R.E.H. was "[o]btaining hundreds of tablets of methadone." Tr. 291. The report also showed that R.E.H. had obtained other controlled substances (alprazolam and hydrocodone) from two additional pharmacies during these two months. GX 8, at 185–86. Thus, R.E.H. had used a total of six pharmacies. *Id.*; Tr. 291–92.

The evidence also showed that Respondent was prescribing methadone and other controlled substances (alprazolam and hydrocodone) to R.S.H., who was R.E.H.'s wife, and that he obtained a MAPS report on her only minutes after obtaining the MAPS report on R.E.H. GX 13, at 161–68. The MAPS report showed that between October 11, 2011 and November 28, 2011, R.S.H. filled seven prescriptions for 120 methadone 10, four prescriptions for 90 alprazolam (in either .5 or 1 mg dose), and prescriptions for 90 and 120 hydrocodone 7.5. *Id.* at 161–63. Notably, the MAPS reports listed the same address for R.S.H. and R.E.H. *Compare* GX 13, at 161; *with* GX 8, at 185.

Regarding this information, Dr. Mitchell testified that "the concerns speak[ ] for itself [sic]. There's something very troublesome and potentially life threatening going on here with multitudes of refills, repeated incidents," given "there's some indication that they're cohabiting together and have the same last name." Tr. 294–95. Dr. Mitchell then testified that it was not within the usual course of professional practice to continue writing methadone and other controlled substance prescriptions given these circumstances. *Id.* at 295. However, Respondent did not stop issuing methadone and other controlled substance prescriptions to R.E.H. after he learned of this. *Id.* at 295. Instead, on both December 21 and 22, 2011, Respondent issued R.E.H. two more prescriptions for 120 methadone 10, and he continued issuing methadone prescriptions to R.E.H. for another 15 months. GX 15, at 87–90, 155–56.

Moreover, on February 29, 2012, Respondent's office received a phone

call from a pharmacy, which reported that R.E.H. was using his father's birthdate to fill the prescriptions. GX 8, at 43. The pharmacy also reported that it had called R.E.H.'s father who stated that "he doesn't receive [sic] this script." *Id.* As Dr. Mitchell testified, this was evidence that R.E.H. was forging prescriptions. Tr. 296; *see also* 21 U.S.C. 843(a)(3) (rendering it unlawful to "knowingly or intentionally . . . acquire . . . a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge"). Asked whether it was appropriate for Respondent to continue to issue controlled substance prescriptions to R.E.H., Dr. Mitchell answered: "[a]bsolutely no." Tr. 297. Yet, on March 6, 2012, Respondent issued another prescription to R.E.H. for 120 methadone 10.<sup>18</sup> GX 15, at 107.

On July 12, 2012 (in the interim, Respondent had continued issuing prescriptions for 120 methadone 10 to R.E.H., several of which were early<sup>19</sup>), Respondent obtained another MAPS report showing the controlled substance prescriptions filled by R.E.H. GX 8, at 204–12. The report includes the handwritten notation of "was not seen on this day" in 14 separate entries for methadone prescriptions which list Respondent as the authorizing practitioner.<sup>20</sup> *See id.* at 204–09. The report also bears Respondent's signature on the first page. *Id.* at 204. Dr. Mitchell explained that these entries "typically mean[ ]" either that Respondent was issuing the prescriptions without seeing R.E.H. or that R.E.H. had stolen a prescription pad. Tr. 299. Yet Respondent issued R.E.H. still more prescriptions for 120 methadone 10 on July 24, August 15, September 18, and October 8, 2012, as well as a prescription for 60 methadone 10 on September 4; each of the last four prescriptions was early. GX 15, at 125–36.

The evidence further shows that even when Respondent's nurse noted in R.E.H.'s file that R.E.H. was seeking an early refill, Respondent nonetheless issued a post-dated prescription to him. As found above, the evidence shows that on October 8, 2012, Respondent

<sup>18</sup> There is, however, no progress note for this visit. *See* GX 8, at 113–14 (notes for visits of Mar. 22 and Feb. 28, 2012 but not for Mar. 6).

<sup>19</sup> The prescriptions were issued on March 22, April 19, May 15, June 6, and June 26. GX 15, at 109–24. Each of the prescriptions was for a 30-day supply, and thus the March 22, June 6, and June 26 prescriptions were early.

<sup>20</sup> The "was not seen on this day" notations are also written in entries for an alprazolam prescription (filled on 1/3/12) and for two hydrocodone prescriptions (filled on 12/30/11 and 11/19/11). GX 8, at 207, 209.

<sup>17</sup> This initial/signature is the same as that used on the numerous prescriptions contained in the record.

issued R.E.H. a prescription for 120 methadone 10.<sup>21</sup> GX 8, at 32. However, a progress note for an October 29, 2012 visit includes a nurse's note stating: "med refills—Ibuprophen—asked for methadone, last refill 10/8/12." *Id.* at 100. Also, a note in a log dated October 30, 2012 states: "Pt requests a refill on methadone—and last refill was 10/8/12—not time yet." *Id.* at 15. A MAPS report obtained by the Government shows that R.E.H. filled two methadone prescriptions with an issue date of October 8, 2012—one on October 8th, the other on October 30th. GX 20, at 14; *see also* GX 15, at 135–36 (Rx filled on Oct. 8); *id.* at 137–38 (Rx filled on Oct. 30). Not only was the second prescription post-dated—a violation of 21 CFR 1306.05(a) which requires that "[a]ll prescriptions for controlled substances shall be dated as of, and signed on, the day when issued"—it was also another early refill which should not have been filled. Tr. 301 (testimony of Dr. Mitchell).

On December 12, 2012, R.E.H. was admitted to a hospital after he overdosed on Seroquel. GX 8, at 158. While in the hospital, R.E.H. provided a urine drug test which was positive for cocaine. *Id.* He also was diagnosed as "polysubstance dependen[t]." *Id.* at 159. A copy of the hospital report was provided to Respondent and bears his signature. *Id.* at 158.

Dr. Mitchell testified that upon learning that R.E.H. was using cocaine, the appropriate response was to refer him to inpatient drug rehabilitation as R.E.H. "obviously" had "a life threatening illness manifested by his addicting behavior" as well as to cease prescribing controlled substances to him. Tr. 303. Asked by the Government whether there ever was a point at which Respondent should have stopped writing controlled substance prescriptions to R.E.H., Dr. Mitchell testified:

The short answer is yes. But the whole format of the care is so appalling that he never had a drug contract in the beginning and it's just one infraction after another.

So if you had started from the very beginning, the patient already told you that he has a history of heroin abuse. So if you were to make the decision to treat his . . . back pain . . . there has to be documentation.

Discussing with the patient about concerns regarding his illness, contract agreed upon and . . . random urine samples as well as MAPS surveys being pulled.

In my opinion, in this case, after the second early refill, he'd be discharged from

the practice. With the option to go to rehabilitation.

You can't just let him go off and not have some kind of aftercare. I mean—he's a very sick individual . . . regarding his addictive illness.

*Id.* at 303–04. Yet even after the December 12, 2012 hospitalization, Respondent continued to issue more methadone prescriptions to R.E.H. *See* GX 15, at 143 (Rx of 12/27/12); 145 (Rx of 1/22/13); 149 (Rx 2/19/13); 155 (Rx 3/13/13). Moreover, on February 19, 2013, Respondent issued R.E.H. a prescription for 90 Xanax with six refills.<sup>22</sup> GX 15, at 151.

Following Dr. Mitchell's testimony, Respondent testified on his own behalf. After acknowledging that he had listened to all of Dr. Mitchell's testimony, Respondent was asked by his counsel if Dr. Mitchell is "right or wrong about you ignoring the red flags about patients who are or could be abusing or diverting drugs?" Tr. 484. Respondent answered: "He's right." *Id.* Subsequently, the ALJ asked Respondent if he (the ALJ) was "correct in understanding that you've read the order to show cause?" *Id.* 535. Respondent answered: "I did." *Id.* The ALJ then asked Respondent: "Do you agree that the facts that they allege there are all true?" Respondent answered: "I did." *Id.* The ALJ followed up by asking: "Your answer was yes you do?" *Id.* Respondent answered: "Yes." *Id.*

I find (as did the ALJ) that Dr. Mitchell provided credible testimony that Respondent ignored multiple red flags that R.E.H. was abusing and diverting controlled substances and that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when he continued to prescribe methadone and other drugs in the face of the red flags. While this alone constitutes substantial evidence to support a finding that Respondent violated 21 CFR 1306.04(a) and 21 U.S.C. 841(a)(1) in prescribing to J.E.H., this conclusion is buttressed by Respondent's testimony that Dr. Mitchell was "right" when he testified that Respondent ignored multiple red flags.

J.W.

#### The Allegations

The Show Cause Order alleged that from December 23, 2010 through January 4, 2012, Respondent "repeatedly prescribed controlled substances after [he] came to know that

J.W. was engaged in the abuse and/or diversion of controlled substances." ALJ Ex. 1, at 3. Specifically, the Show Cause Order alleged that Respondent repeatedly prescribed controlled substances to J.W. notwithstanding numerous red flags of diversion and/or abuse. *Id.* These included that:

- J.W. repeatedly sought early refills;
- the Michigan Medicaid program notified Respondent that J.W. was doctor-shopping;
- a pharmacy also notified Respondent that J.W. was doctor-shopping;
- J.W. was incarcerated;
- J.W. exhibited withdrawal symptoms; and
- a MAPS report obtained by Respondent in October of 2011 showed that J.W. was engaged in a persistent pattern of doctor and pharmacy shopping.

*Id.*

The Show Cause Order also alleged that J.W.'s patient file and the prescriptions issued to him show that Respondent:

- Prescribed Adderall, a schedule II stimulant, to J.W. on his first visit without diagnosing him with Attention Deficit Disorder (ADD), and that he prescribed other controlled substances without taking actions typical of medical professionals such as conducting and documenting a complete medical history and physical examination, or creating a written treatment plan;
  - prescribed numerous controlled substances to J.W. without conducting a MAPS search "that a typical Michigan doctor would have conducted," and that such a search would have shown that J.W. was engaged in "a dangerous pattern of doctor and pharmacy shopping (through which J.W. obtained 11 monthly prescriptions for Adderall within the first six months of 2011)";
  - prescribed methadone to J.W. with a PRN (take as needed) dosing instruction "within a week of meeting him and repeatedly thereafter";
  - "never subjected J.W. to any drug tests"; and
  - "took no action to enforce the pain management contract that J.W. signed on his first visit, in which [J.W.] committed (among other things) to obtain controlled medications from only one provider (Respondent), fill them at one pharmacy, and take them at the prescribed dosages."
- Id.* at 3–4.

#### The Evidence

J.W. first saw Respondent on December 23, 2010. GX 9, at 42.

<sup>21</sup> Here again, there is no progress note for this visit. *See* GX 8, at 100–101 (progress noted for visits on Oct. 3 and 29, 2012). However, a copy of the prescription is in R.E.H.'s patient file.

<sup>22</sup> However, the pharmacy apparently caught the fact that Respondent had provided too many refills, and noted that only five refills were authorized. GX 15, at 152.

According to a nurse's notation on the progress note, J.W. was seeking treatment for pain. *Id.* Respondent prescribed to J.W. 60 tablets of Adderall 20, with a dosing instruction of BID or one tablet to be taken twice a day. GX 16, at 1. One week later, J.W. returned to Respondent, who wrote him a prescription for 90 tablets of methadone 5, with a dosing of TID and PRN. *Id.* at 3.

Dr. Mitchell testified that neither prescription was issued in the usual course of professional practice. Tr. 308. As for the Adderall prescription, Dr. Mitchell explained that the drug is "typically" prescribed to treat ADD (Attention Deficit Disorder) or ADHD (Attention Deficit Hyperactivity Disorder). *Id.* Dr. Mitchell explained that neither J.W.'s chief complaint nor history "would indicate an appropriate diagnosis for the prescribing of Adderall." *Id.* Dr. Mitchell also observed that Respondent's assessment and plan also contained "no indication of any appropriate diagnosis for" Adderall. *Id.* Reviewing the notes for the first visit, Dr. Mitchell also questioned whether Respondent had performed a physical exam, as in the space on the progress note for listing the exam findings, Respondent had scribbled "an S." GX 9, at 42. Regarding the notation, Dr. Mitchell testified that "I don't know what that signifies." *Id.* at 309. While Dr. Mitchell also noted that the margin of the progress note included a listing of various areas with boxes in which Respondent wrote either plus or minus signs, he further testified that he was "not sure what they're trying to communicate." *Id.*

Dr. Mitchell testified that it was inappropriate for Respondent to issue the methadone prescription at J.W.'s second visit. *Id.* Asked to explain why, Dr. Mitchell testified that:

There's no documentation that the patient is having any findings based on physical examination that would serve as a foundation for prescribing [me]thadone. Even though the records are reviewed, I don't see any documentation where it states the patient had previously taken [m]ethadone or was on any analgesics whatsoever.

And then there's some notation that's very hard to make out, it says something Vicodin. I can't really read it, but it's in the middle of the HPI box.

I'm not really sure what it's trying to communicate. Whether it's regarding prior Vicodin prescription or what. So it's really not legible.

*Id.* at 309–10. As he testified regarding Respondent's prescribing to R.E.H., Dr. Mitchell re-iterated that it was not appropriate to prescribe methadone for pain on a PRN basis. *Id.*

J.W.'s file includes a fax of a "Notice of Prior Authorization Determination," which Respondent received from the Michigan Medicaid program on or about January 21, 2011. GX 9, at 69. The form noted that a prior authorization request had been received and provided the name of another physician (Dr. M.) who had prescribed Adderall to J.W.; it also listed a pharmacy other than the one which J.W. had listed on the Pain Management Agreement he entered into at his first visit with Respondent. *Compare* GX 9, at 69; *with id.* at 70. As Dr. Mitchell explained, this is "evidence that . . . J.W. [wa]s multi-sourcing for amphetamine from another physician." Tr. 311. However, in the Pain Management Agreement, J.W. had agreed that he would "not attempt to obtain controlled medicine, including . . . stimulants . . . from any other doctor, provider or facility." GX 9, at 70; *see also* Tr. 312. While the Pain Management Agreement also stated that if J.W. broke the agreement, Respondent would stop prescribing controlled substances and discharge him, Respondent did not do so. *See* GX 9, at 70.

Dr. Mitchell further explained that upon learning that J.W. was obtaining Adderall from another doctor, Respondent should have engaged J.W. and obtained an explanation for why he was obtaining prescriptions from two different doctors and documented the encounter. Tr. 313. Respondent, however, did not do this. *Id.* at 314 (GX 9, at 39). Instead, he issued J.W. another prescription for 60 Adderall. Tr. 314; ALJ Ex. 50, at 2; GX 16, at 7–8. Asked whether Respondent's issuance of the prescription was within the usual course of professional practice, Dr. Mitchell answered "no" and added that "[t]he whole beginning for the prescriptions of Adderall were not issued in the course of legitimate methods of practice." Tr. 314–15.

On February 16, 2011 (22 days later), J.W. again saw Respondent. GX 9, at 38. Respondent wrote J.W. a new prescription for 60 Adderall even though he was eight days early. Tr. 315. Respondent also wrote J.W. a prescription for 120 methadone 10. GX 16, at 11.

However, only two days later (Feb. 18), Respondent's office received a phone call from a pharmacy reporting that insurance would not cover J.W.'s methadone prescriptions and that he was seeing Dr. M. who was prescribing Suboxone to him—Dr. M. being the same doctor listed as the medical provider on the prior authorization request form Respondent had received from the Michigan Medicaid program.

*Compare* GX 9, at 4; *with id.* at 69. Thus, J.W. was simultaneously obtaining prescriptions for both methadone and Suboxone, which according to Dr. Mitchell "is not done." Tr. 316.

Dr. Mitchell testified that in response to this information, the appropriate course would be to discharge the patient and recommend that he go to inpatient drug rehabilitation. *Id.* at 316. Dr. Mitchell testified that he would "have called the other physician" to tell him/her that J.W. was engaged in "potentially . . . life threatening" behavior. *Id.* Yet there is no evidence in J.W.'s file that Respondent did this. *Id.*

On both March 16 and April 6, 2011, Respondent wrote J.W. additional prescriptions for 60 Adderall. GX 16, at 21–22; *id.* at 25–26. According to Dr. Mitchell, J.W. was a week early when he received the April 6 prescription.<sup>23</sup> Tr. 317. Dr. Mitchell explained that J.W.'s early refills and doctor shopping was "a continued obvious flag to the physician that there's something going on here that can potentially put the patient's life at risk." *Id.*

The evidence also shows that in the first six months of 2011, Respondent wrote J.W. six prescriptions for 60 Adderall.<sup>24</sup> GX 21, at 19–25. Dr. Mitchell testified that these prescriptions were not issued in the usual course of professional practice. Tr. 317–18.

The evidence further shows that Respondent issued to J.W. prescriptions for 60 Adderall 30 (BID) and 120 Klonopin (QID) on both July 6 and 26. GX 16, at 41–52. According to Dr. Mitchell, both of the July 26 prescriptions were "approximately a week early" (actually, they were 10 days early), and there was no justification in the patient file for issuing the prescription when Respondent did. Tr. 318.

On October 25, 2011, Respondent received a fax from the Medical Department of the Lapeer County Jail. The fax stated that J.W. was an inmate and requested information as to his prescriptions and diagnosis. GX 9, at 47. Respondent reported that J.W. was on methadone for chronic pain and Adderall for EDS and ADD. *Id.* at 47.

The same day, Respondent obtained a MAPS report on J.W. GX 9, at 48–51; 79–83. The report showed that J.W. was still obtaining controlled substance prescriptions for Suboxone and Adderall from Dr. M., while also

<sup>23</sup> Actually, he was nine days early.

<sup>24</sup> While Dr. Mitchell testified that 10 prescriptions were issued to J.W. in this period, three of them were issued by Dr. M., the other by a Dr. R. GX 21, at 19–25.

obtaining prescriptions for methadone, hydrocodone and Adderall from Respondent. *See id.* As found above, while J.W. was incarcerated, his niece contacted Respondent and told him that J.W. had “nearly died from withdrawal” and that he was selling his medications; she also asked him to stop prescribing controlled substances to J.W. Tr. 128–29. Dr. Mitchell explained that under these circumstances, he would confront the patient regarding whatever the family reported and “let the patient react and respond.” Tr. 323.

J.W. did not see Respondent again until December 21, 2011. GX 9, at 25. Regarding the progress note for the visit, Dr. Mitchell testified that “the physical exam is really nothing, it says awake and stable.” Tr. 324. As for J.W.’s chief complaint, Dr. Mitchell testified that Respondent’s writing was illegible. *Id.*; *see also* GX 9, at 25. Respondent did not issue any prescriptions to J.W. on this day.<sup>25</sup> ALJ Ex 50, at 3.

J.W. returned on January 4, 2012. On the progress note, Respondent lined through a box next to the words stating “substance abuse +, reviewed w/ patie[nt].” GX 9, at 24. However, the progress note is otherwise illegible. *See id.* Also, Respondent resumed prescribing controlled substances to J.W., issuing him prescriptions for 30 tablets of Valium 10 mg and 120 tablets of Tylenol with Codeine No. 4. ALJ Ex 50, at 3.

On January 19, 2012, J.W. made his final visit to Respondent and obtained a prescription for 120 tablets of methadone 10 with a dosing instruction of QID and PRN. Tr. 325; GX 16, at 59–60. Asked whether the prescription was issued in the usual course of professional practice, Dr. Mitchell answered “no.” Tr. 325. Asked “why not,” Dr. Mitchell explained: “[w]ell again, the same basis. Where is the justification, based on the patient[s] clinical complaints, a detailed examination, a clear diagnosis that [m]ethadone was justified.” *Id.* As for at what point during his treatment of J.W. Respondent should have refused to prescribe controlled substance and discharged him, Dr. Mitchell answered:

Again, it would be early on with the early refills. The behavior that is an obvious flag by the patient for addiction illness. Which he has a history of. History of drug abuse is documented in the chart.

*Id.* at 326.

As found above, Respondent testified that he had listened to all of Dr. Mitchell’s testimony. Respondent was

then asked by his counsel if Dr. Mitchell is “right or wrong about you ignoring the red flags about patients who are or could be abusing or diverting drugs?” Tr. 484. Respondent answered: “He’s right.” *Id.*

Based on Dr. Mitchell’s credible testimony, I find that the controlled substance prescriptions Respondent provided to J.W. lacked a legitimate medical purpose and were issued outside of the usual course of professional practice and violated the CSA. 21 CFR 1306.04(a); 21 U.S.C. 841(a)(1). This finding is buttressed by Respondent’s admission that Dr. Mitchell was correct in his criticism that he ignored red flags.

#### R.K.

#### The Allegations

The Show Cause Order alleged that from January 27, 2011 through July 17, 2012, Respondent repeatedly prescribed controlled substances to R.K. after Respondent knew that R.K. was engaged in the abuse and/or diversion of controlled substances. ALJ Ex. 1, at 4. The Show Cause Order specifically alleged that Respondent repeatedly prescribed to R.K. controlled substances despite the numerous red flags of diversion and/or abuse R.K. presented. *Id.* These included that:

- R.K. repeatedly sought early refills;
- Respondent was notified by the Michigan Department of Community Health Drug Utilization Review that R.K. was doctor shopping;
- a pharmacist contacted [his] office reporting suspicious conduct by R.K.; and
- two consecutive drug tests on April 10, 2012 and May 8, 2012 showed that R.K. was not taking the methadone that Respondent had prescribed to him.

*Id.*

The Show Cause Order also alleged that R.K.’s patient file and the prescriptions issued to him show that Respondent:

- Prescribed controlled substances to R.K. on his first visit without taking actions typical of medical professionals, such as conducting and documenting a complete medical history and physical examination, or creating a written treatment plan;
- never required R.K. to sign a pain management contract or ran a MAPS report on him;
- engaged in a pattern of issuing Xanax prescriptions to R.K. on a near monthly basis that authorized multiple refills, and that while the dosing instructions directed R.K. to take 690 tablets in the 10-month period preceding his death, the prescriptions

allowed R.K. to obtain up to 2,250 tablets of Xanax;

- issued a prescription for Xanax to be refilled six times, in violation of state and federal law; and
- stopped testing R.K. to determine if he was taking the methadone Respondent prescribed after R.K. tested negative on two consecutive monthly drug tests.

*Id.* at 4–5.

#### The Evidence

At the beginning of the Government’s examination of Dr. Mitchell about Respondent’s prescribing to R.K., the ALJ raised his “concern about evidence that becomes cumulative at some point in a preceding [sic].”<sup>26</sup> Tr. 326. The Government thus did not ask Dr. Mitchell about the prescriptions Respondent issued to R.K. from his first visit (January 27, 2011), through and

<sup>26</sup> According to the ALJ, “[t]hat can happen in two ways in this particular preceding [sic]. And one way is that you [the Government] present evidence of many patients and the other way is to present evidence of many forms of failure to treat in a manner that’s required in the ordinary course of medical practice.” Tr. 326–27. Continuing, the ALJ explained that:

So far I’ve heard more than one instance. In fact, multiple instances of prescribing [m]ethadone on a PRN basis, which the witness has told me is inconsistent with medical practice.

Not having a complete medical history, not having a physical examination noted in the file, not writing a treatment plan, diagnosing controlled substances without sufficient support in the medical record through objected[sic] testing, imagining [sic] or other data, prescribing controlled substances prematurely before the expiration of the prior prescription, concurrent prescriptions from more than one prescribing source, filling those prescriptions in more than one pharmacy, failure to properly utilize the MAPS data in the record, failure to discharge and failure to enforce the pain medication treatment plan and contract.

*Id.* The ALJ then announced that “[t]o the extent that proposed testimony is redundant in these fields, I will be sensitive to an objection that the evidence does not have an informative role and becomes less useful to me as it is cumulative at that point.” *Id.* The ALJ thus directed the Government to “tailor your questions appropriately” and advised Respondent’s counsel that “I will be listening to you for your concern as well.” *Id.* at 328.

Contrary to the ALJ’s understanding, the Government was entitled to put on evidence regarding each and every allegation it had raised in the Order to Show Cause and its pre-hearing statements. That the Government had previously shown that Respondent failed to obtain a complete history and conduct an adequate physical exam, or that he failed to address red flags such as repeated early refill requests or ignored evidence of doctor shopping and the use of multiple pharmacies, etc., with respect to patients R.E.H. and J.W., does not render evidence as to whether he acted in the same manner with respect to the other three patients redundant. Furthermore, notwithstanding that evidence of a single act of diversion can, in appropriate circumstances, support an order of revocation, it is for the Government to decide, in the exercise of its prosecutorial discretion, on the number of patients (and prescriptions) that are necessary to prove its case.

<sup>25</sup> However, on October 18, 2011, J.W. had filled an Adderall prescription which Respondent had written for him on the same day. GX 16, at 57–58.



including R.K.'s visit of October 4, 2011. See *id.* at 330–36; GX 10, at 52–65.

On October 20, 2011, Respondent issued R.K. a prescription for 60 tablets of Xanax .5 mg, with a dosing instruction of BID or PRN. ALJ Ex. 50, at 3; Tr. 330. The prescription authorized three refills, ALJ Ex. 50, at 3; and based on the dosing instruction, the prescription provided R.K. with a four-month supply of the drug. However, Dr. Mitchell testified that there was nothing in the progress note for this visit which justified providing R.K. with a four-month supply of the drug. Tr. 330.

Yet, not even six weeks later on November 29, 2011, Respondent issued R.K. an additional prescription for 60 Xanax .5 mg (BID or PRN), with three refills. ALJ Ex. 50, at 3; Tr. 330. Here again, Dr. Mitchell testified that there was no medical justification in the visit's progress note for providing R.K. with another four-month supply of Xanax. Tr. 330–31.

On January 17, 2012, Respondent provided R.K. with another prescription for 60 Xanax (BID and PRN), with three refills. ALJ Ex. 50, at 3. Moreover, Respondent increased the strength of the drug to 1 mg. *Id.* While this prescription alone again provided R.K. with a four-month supply, on February 15, 2012, Respondent provided R.K. with another prescription for 60 Xanax 1 (BID and PRN) with three refills. *Id.*

On April 10, 2012, Respondent provided R.K. with another prescription for Xanax 1, increasing the quantity to 90 tablets and the dosing to TID (and PRN). *Id.* Moreover, Respondent authorized six refills, this being a separate violation of the Controlled Substances Act, which, with respect to a schedule IV drug, prohibits refilling a prescription “more than five times” unless the practitioner renews the prescription. See 21 U.S.C. 829(b).

Notwithstanding the numerous refills R.K. had remaining on both the February 15 and April 10 prescriptions (not to mention the supply R.K. had likely obtained from the earlier prescriptions), Respondent provided him with new prescriptions for 90 Xanax 1 (TID or PRN) on May 8 and May 30, 2012. ALJ Ex. 50, at 4. While these two prescriptions did not authorize any refills, on June 21, 2012, Respondent provided R.K. with another prescription for 90 Xanax 1 (TID or PRN), which authorized three refills. *Id.* Finally, at R.K.'s last visit, Respondent provided him with another prescription for 90 Xanax 1 (TID or PRN). *Id.*

According to Dr. Mitchell, from October 20, 2011 through July 17, 2012, R.K. “obtained 1950 tablets of alprazolam,” an amount far in excess

(by more than 1,000 pills) of what was necessary based on Respondent's dosing instructions.<sup>27</sup> Tr. 331. Dr. Mitchell further testified that Respondent pattern of issuing multi-month prescriptions on top of one another is “not a customary, legitimate medical practice behavior.” *Id.* at 332.

The Government also questioned Dr. Mitchell about Respondent's prescribing of methadone to R.K. On March 13, 2012, Respondent first prescribed 90 methadone 5 mg (TID + PRN), a 30-day supply, to R.K. GX 17, at 45–46. However, on April 10, 2012, R.K. tested negative for methadone. GX 10, at 31. A note in the entry states: “ran out week ago.” *Id.*

Regarding this incident, Dr. Mitchell testified that “[i]f a patient was truly taking [m]ethadone . . . and they abruptly ran out, they would go through significant medical withdrawal.” Tr. 333. Dr. Mitchell further explained that a physician “would engage the patient, are you taking, what's the problem here? Find out why the chaotic pattern in your lab results, when you are prescribing the medication for them and give them a chance to respond.” *Id.* Dr. Mitchell also stated that even if he believed in giving the benefit of the doubt to the patient he would still ask the patient why the patient “never bothered to contact” him and would also express his “concern[ ] about what's going on with [the patient's] behavior.” *Id.* at 334.

At the April 10 visit, Respondent issued R.K. a new prescription for 90 methadone 10 mg (TID), which was double the strength of what he had previously prescribed. GX 17, at 47–48. Moreover, while Respondent subjected R.K. to another drug test during his next visit (May 8, 2012), R.K. again tested negative for methadone claiming that he had run out several days earlier.<sup>28</sup> GX 10, at 31. Yet here again, Respondent issued R.K. a new prescription for 90 methadone 10 TID. GX 17, at 51–52.

Dr. Mitchell testified that “[t]here is no legitimate foundation for” the prescription. Tr. 335. And when asked what the appropriate response was to R.K.'s having provided a second negative urine test for methadone, Dr. Mitchell answered: “[d]ischarge.” *Id.*

On May 30, 2012, R.K. again saw Respondent, who provided him with a

new prescription for 90 methadone 10. GX 10, at 6, 43; GX 17, at 55–56.

Notwithstanding that R.K. had provided negative urine samples on his two previous visits, there is no evidence that Respondent required R.K. to provide a new urine sample. Tr. 335. And while Respondent put a slash mark through the box next to the entry “Substance Abuse +, reviewed w/patient,” GX 10, at 43; as Dr. Mitchell explained: “There's no detail, it's just merely a swipe of the pen.” Tr. 336. Continuing, Dr. Mitchell noted that there is “[n]o documentation of, I discussed with the patient two negative urines samples, so forth and so . . . my plan was so forth and so on.” *Id.*

Asked by the Government whether there was ever a point when Respondent should have discharged R.K., Dr. Mitchell answered “[y]es.” *Id.* While Dr. Mitchell explained that he would give the patient the benefit of the doubt, after the second negative urine test, “he would definitely be discharged.” *Id.* Dr. Mitchell further agreed that every controlled substance prescription Respondent issued to R.K.'s after the second negative urine test was issued outside of the usual course of professional practice. *Id.* at 336–37.

During cross examination, Dr. Mitchell agreed that by referring R.K. to a physical therapist to treat the patient's back pain, Respondent was employing a multifaceted treatment plan. *Id.* at 446. However, Dr. Mitchell found that there was no medical evidence to support Respondent's prescribing of methadone, and there was no evidence that Respondent ever tested R.K. to determine if he was using the medication as prescribed. *Id.* at 335.

Based on the above, I find that all of the controlled substance prescriptions issued by Respondent to R.K. on and after October 20, 2011 lacked a legitimate medical purpose and were issued outside of the usual course of professional practice. 21 CFR 1306.04(a).

R.J.H.

#### The Allegations

The Show Cause Order alleged that from March 10, 2011 through November 30, 2011, Respondent repeatedly prescribed controlled substances to R.J.H. after he knew that R.J.H. was engaged in the abuse and/or diversion of controlled substances. *Id.* at 5. Specifically, the Government alleged that Respondent prescribed controlled substances to R.J.H., notwithstanding numerous red flags of diversion and/or abuse, including:

<sup>27</sup> A review of the MAPS data suggests that the actual figure was 1890 tablets, as one dispensing which occurred on January 15, 2012 is listed twice. GX 22, at 11. Either way, the amount of alprazolam R.K. was able to obtain based on Respondent's prescriptions far exceeded what was necessary based on the dosing instructions.

<sup>28</sup> The actual notation in R.K. drug screening record states: “last pill Saturday.” GX 10, at 31. In May 2012, May 8 was a Tuesday.

- R.J.H. repeatedly sought early refills;
- R.J.H. repeatedly reported lost or stolen prescriptions;
- another patient reported that R.J.H. was selling his prescription of methadone and taking his girlfriend's prescription as his own; and
- R.J.H. was requesting controlled substances by name.

*Id.* at 5.

The Government also alleged that R.J.H.'s patient file and the prescriptions issued to him show that Respondent:

- Prescribed controlled substances to R.J.H. on his initial visit without taking actions typical of medical professionals such as conducting and documenting a complete medical history and physical examination, requiring that R.J.H. (a self-identified addict) sign a pain management contract or submit to a drug test, running a MAPS search on R.J.H., and creating a written treatment plan, which was periodically re-evaluated;
- never subjected R.J.H. to drug tests;
- never ran a MAPS report on R.J.H.;
- never required R.J.H. to sign a pain management agreement; and
- repeatedly prescribed methadone to R.J.H. to be taken "PRN."

*Id.* at 5.

### The Evidence

The Government's presentation with respect to R.J.H. focused primarily on the manner in which Respondent escalated the amount of methadone he prescribed and ignored various red flags. R.J.H. first saw Respondent on March 10, 2011, at which time Respondent documented that R.J.H. had a history of narcotic abuse. GX 11, at 3, 57; *see also* Tr. 341. At the visit, Respondent issued to R.J.H. a prescription for 30 tablets of methadone 5 to be taken twice a day, providing a 15-day supply. GX 18, at 1–2; ALJ Ex. 50, at 4. Thereafter, on a March 24, 2011, Respondent issued to R.J.H. a prescription for 90 tablets of methadone TID, providing a 30-day supply, and on April 5, 2011, he issued to R.J.H. a prescription for 40 tablets of methadone 10 (QID and PRN). GX 18, at 5–6, 9–10; ALJ Ex. 50, at 4. Moreover, on April 19, 2011, Respondent issued to R.J.H. a prescription for 120 tablets of Methadone 10 (QID and PRN). GX 18, at 11–12; ALJ Ex. 50, at 4. Thus, between the March 10 and April 19 prescriptions, Respondent had quadrupled R.J.H.'s daily methadone dose from 10 to 40 milligrams.

Dr. Mitchell testified that this was "a significant escalation in" the total "24 hour dose" of R.J.H.'s methadone

regimen. Tr. 338. Dr. Mitchell further explained there was "no" justification for Respondent's having quadrupled R.J.H.'s daily dose. *Id.*

Progress notes in R.J.H.'s file show that R.J.H. had appointments with Respondent on both May 18 and May 26, 2011. GX 11, at 52–53. Moreover, on May 17, 2011, Respondent wrote R.J.H. a new prescription for 120 tablets of methadone 10 QID and PRN, and on May 26, 2011, he wrote R.J.H. another prescription for 120 tablets of methadone 10 (QID and PRN). GX 18, at 15–16, 19–20. Attempting to interpret Respondent's handwriting on the May 26 progress note, Dr. Mitchell thought that R.J.H. had reported "that the prescription was stolen," Tr. 339, and according to a notation on the May 26 prescription, R.J.H. told the pharmacist that "he was beat[en] up and his meds were stolen." GX 18, at 20. A further notation on the prescription states: "Early refill Ok'd by Dr. Ataya Police Report on file. Per Christina @Dr. Ataya's." *Id.*

Dr. Mitchell testified that when a patient claims that his medication has been stolen, "there needs to be some action on the patient's part." Tr. 339. According Dr. Mitchell, "part of the opioid contract [is] that if medications are stolen, you have to make a police report." *Id.* There is, however, no police report in R.J.H.'s file. *See generally* GX 11. Nor is there an opioid contract. *See also generally id.*; Tr. 341.

On June 8, R.J.H. again saw Respondent. GX 11, at 51. A nurse's note on the progress note states: "meds (stolen)." *Id.* Dr. Mitchell testified that the appropriate response to this information would be to discharge the patient. Tr. 340–41. Dr. Mitchell subsequently explained that the point at which Respondent should have discharged R.J.H. was "after the second report of medications being stolen" without verification "of that event happening." *Id.* at 342. Dr. Mitchell further noted that while Respondent documented that R.J.H. "has a history of narcotic abuse," there is no evidence that Respondent required him to sign a pain management contract. *Id.* at 341. Dr. Mitchell also found no evidence that Respondent conducted any drug tests on R.J.H. and there were no MAPS reports in R.J.H.'s file. *Id.* at 341–42.

The evidence also shows that on June 7, 2011, an employee of Respondent documented that he/she "was told by another patient that [R.J.H.] was selling his prescription of methadone, and taking his girlfriend's prescription as his own." GX 11, at 9. While Respondent did not prescribe

methadone to R.J.H. at the June 8 visit,<sup>29</sup> on June 15, 2011, he issued R.J.H. another prescription for 60 tablets of methadone 5 to be taken twice a day or PRN. GX 18, at 21–24.

While this prescription should have lasted R.J.H. for 30 days, only six days later on June 21, 2011, Respondent issued to R.J.H. a prescription for 60 tablets of methadone 10, thereby doubling the daily dose. *Id.* at 25–26. Thus, this refill was early by 24 days.

Moreover, Respondent continued to provide R.J.H. with additional early refills. Specifically, only 15 days later on July 6, Respondent issued to R.J.H. a prescription for 60 methadone 10 (BID/PRN). *Id.* at 27–28. Even ignoring the June 15 prescription, this refill was early by 15 days.

Only 13 days later on July 19, 2011, Respondent issued to R.J.H. a prescription for 120 of methadone 10 (QID, or four times a day), thereby doubling the daily dose and quantity. *Id.* at 29–30. And on August 11, 2011, he issued to R.J.H. another prescription for 120 tablets of methadone 10 to be taken four times a day or PRN. *Id.* at 31–32. Even ignoring the prescriptions prior to July 19, this prescription was still one week early.<sup>30</sup>

As Dr. Mitchell testified, there was no justification for Respondent's rapid escalation of R.J.H.'s daily dose. Also, Respondent ignored red flags such as R.J.H.'s claim on two occasions that his prescription had been stolen, the report that he was selling his methadone and using his girlfriend's, and R.J.H.'s repeated seeking of early refills, some of which were weeks early. Moreover, while Respondent knew that R.J.H. had a history of narcotic abuse he did not require him to sign a pain contract, never conducted a drug test on him, and never obtained a MAPS report. Based on the above, I find that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when prescribed methadone to R.J.H. 21 CFR 1306.04(a).

J.H.

### The Allegations

The Show Cause Order alleged that from June 10, 2010 through August 12, 2012, Respondent repeatedly prescribed controlled substances to J.H. even after he knew that she was engaged in the

<sup>29</sup> Rather, he prescribed 30 tablets of Tylenol with Codeine No. 3 ("Tylenol 3").

<sup>30</sup> Thereafter, Respondent issued additional methadone prescriptions to R.J.H. on an approximately monthly basis up until January 3, 2012, the same day he overdosed on heroin and was hospitalized. GX 23, at 6–8. As found above, R.J.H. died of an overdose on or about January 5, 2012. GX 5, at 1.

abuse and/or diversion of controlled substances. ALJ Ex. 1, at 5. Specifically, the Government alleged that Respondent repeatedly prescribed controlled substances to her notwithstanding numerous red flags of diversion and/or abuse, including that:

- J.H. repeatedly sought early refills;
- J.H. requested controlled medications by name;
- J.H. was in frequent contact with Respondent's office regarding her pain medications;
- J.H. tested negative for controlled substances that Respondent had prescribed to her;
- Respondent diagnosed J.H. as narcotic dependent;
- hospital records in Respondent's file show that J.H. tested positive for illegal drugs; and
- J.H. exhibited symptoms of withdrawal.

*Id.* at 5–6.

The Show Cause Order also alleged that J.H.'s patient files and the prescriptions Respondent issued to her show that he:

- Issued controlled substance prescriptions to J.H. on her initial visit without taking actions typical of medical professionals such as conducting and documenting a complete medical history and physical examination, and creating a written treatment plan;
  - diagnosed J.H. as being narcotic dependent but took no actions such as referring her to rehabilitation or a specialist, or even minimal precautionary steps such as requiring her to sign a pain management contract, subjecting her to comprehensive drug tests, or even running MAPS reports on her, and that MAPS reports would have shown that she was engaged in doctor and pharmacy shopping;
  - prescribed two different benzodiazepines—Klonopin and Xanax—to J.H. even after she reported that she would not be using Xanax but using Klonopin instead;
  - repeatedly prescribed methadone to J.H. to be taken “PRN”; and
  - prescribed Adderall to J.H. without any basis for doing so, continued to prescribe Adderall after drug tests showed that she was not taking the drug, stopped conducting drug tests to determine if J.H. was taking the Adderall he prescribed, and only stopped prescribing the drug when the Michigan Medicaid program asked him to substantiate his prescriptions.
- Id.* at 6.

### The Evidence

The progress note for J.H.'s November 10, 2010 visit shows that on that date,

Respondent diagnosed J.H. as “narcotic dependent.” GX 12, at 125; Tr. 343. While Dr. Mitchell stated that he did not know if Respondent was “trying to indicate a history of abuse by that statement or he wasn't familiar with the definitions of addiction versus dependence,” he explained that the decision to start a patient on methadone “depends on the history you gleaned from the patient and what the old medical records showed,” because “you're essentially becoming their addictionologist and beginning treatment for them.” *Id.* at 346. However, according to Dr. Mitchell, when a physician determines that a patient is narcotic dependent, it is not appropriate to prescribe methadone without requiring the patient to sign an opioid agreement, conduct drug tests, and obtain a prescription monitoring program report. *Id.* at 346–47.

There is, however, no evidence that Respondent required J.H. to enter an opioid agreement. Tr. 347; *see also* GX 12 (J.H.'s patient file). Moreover, while Respondent did eventually obtain a MAPS report, he did not do so until November 30, 2012, more than two years after he diagnosed her as narcotic dependent.<sup>31</sup> *See* GX 12, at 8–13.

The evidence shows that on November 26, 2010, Respondent issued to J.H. a prescription for 90 methadone 5 (TID), a 30-day supply. GX 19, at 21–22. Yet, according to J.H.'s file, on December 1, 2010, she was suffering from narcotic withdrawal. Tr. 349. Dr. Mitchell testified that when confronted with this situation, the appropriate response of a physician acting within the bounds of professional practice is to send the patient “to the hospital.” *Id.* When then asked if it was an appropriate response to continue to issue controlled substance medication to the patient, Dr. Mitchell testified “absolutely not.”<sup>32</sup> *Id.* at 349–50. At this

<sup>31</sup> The report shows prescriptions beginning only on August 31, 2011. GX 12, at 8–13. The report shows several instances in which J.H. obtained small amounts of hydrocodone and acetaminophen with codeine from a dentist in the May 2012 time period, and a further prescription for a small amount of hydrocodone from another dentist on September 14, 2011. GX 12, at 8, 13. However, every other prescription listed in this report was issued by Respondent.

Of note, the Government also submitted a MAPS report it obtained showing J.H.'s prescriptions from January 8, 2010 through February 2013. However, the questioning regarding the MAPS reports was interrupted by telephonic interference seven times and is not clear what the precise questions were and which of the MAPS reports the Government was referring to in its questions. Tr. 348–49.

<sup>32</sup> A DEA regulation, however, expressly authorizes a physician to administer (but not prescribe) a “narcotic drug[ ] to a person for the purpose of relieving acute withdrawal symptoms when necessary while arrangements are being made

point, the ALJ declared the line of questioning “redundant” and no further clarification was obtained as to whether Dr. Mitchell was referring to prescribing or administering. Yet the evidence shows that Respondent continued to prescribe methadone and other controlled substances to her. GX 24.

The evidence further shows that on September 8, 2010, J.H. called Respondent's office “and stated that she stopped Xanax<sup>33</sup> and went back to Klonopin b/c she didn't like the way it made her feel.” GX 12, at 7. Respondent provided J.H. with prescriptions for 60 clonazepam on September 15, October 13, November 10, and a prescription for 30 tablets on November 30, 2010. GX 24, at 5–8.

However, on December 1, 2010, he issued J.H. a prescription for 60 alprazolam 1.<sup>34</sup> *Id.* at 8. Moreover, only one week later on December 8, Respondent issued J.H. a prescription for 90 clonazepam. *Id.* While on January 4, 2011, Respondent issued her another prescription for 90 clonazepam, on January 13, he issued her a prescription for 30 alprazolam 1. *Id.* In the ensuing months, Respondent continued to provide J.H. with both clonazepam and alprazolam prescriptions, even though both drugs are benzodiazepines.<sup>35</sup> According to Dr. Mitchell, there was “[n]o” medical reason for Respondent to prescribe both drugs after J.H. stated that she did not like how the alprazolam made her feel. Tr. 351.

The evidence also shows that on August 3, 2011, Respondent issued J.H.

for referral for treatment.” 21 CFR 1306.07(b). This is so even when the physician “is not specifically registered to conduct a narcotic treatment program.” *Id.* However, the physician may not administer “more than one day's medication” at a time and may not do this for “more than three days.” *Id.*

<sup>33</sup> Respondent had prescribed 30 alprazolam .25 mg to J.H. on August 31, 2010. GX 24, at 4.

<sup>34</sup> J.H. filled the Nov. 30 clonazepam prescription and the December 1 alprazolam prescription on the days they were they were issued.

<sup>35</sup> The evidence shows that during 2011, Respondent issued J.H. prescriptions for 90 clonazepam on Feb. 2, Mar. 1, April 5, May 3, June 1, June 28, July 26, August 25 (with three refills which were filled on Sept. 21, Oct. 15, and Nov. 10), and Dec. 13. GX 24, at 9–12. During 2011, he also issued J.H. prescriptions for 90 alprazolam 1 on Mar. 15, for 30 alprazolam .5 on April 20, and for 30 alprazolam .25 on June 21. *Id.* at 9–11.

During 2012, Respondent issued J.H. a prescription for 90 clonazepam on Jan. 5, with three refills that were filled on Feb. 1, Feb. 19, and Mar. 10; a prescription for 90 clonazepam on Mar. 28; a prescription for 120 clonazepam on April 25, with three refills, two of which were filled on May 15 and June 6; a second prescription for 120 clonazepam on April 25, which was filled on July 4; and two prescriptions for 90 clonazepam on August 14, one of which was filled the same date, the other being filled on December 8. *Id.* at 14–17. Respondent also issued her a prescription for 15 alprazolam .5 on May 22, 2012. *Id.* at 15–16.

a prescription for 30 Adderall 10, with a dosing instruction to take one tablet daily. GX 19, at 71–72. However, at J.H.'s August 31, 2011 appointment, J.H. tested negative for the drug; a note on the drug screening results sheet states: "last Adderall 2 days ago." GX 12, at 61. Respondent, however, issued her a new prescription for 30 Adderall 10 at the visit. GX 19, at 77–78.

Dr. Mitchell testified that J.H.'s clean urine tests raised the same concerns (*i.e.*, that the patient was either abusing or diverting the drug to others) as he testified to when asked about the significance of a negative test for methadone. Tr. 352. He also testified that Respondent's issuance of a new Adderall prescription after the negative test result raised the same concern that the prescription was "outside the typical practice of medicine." *Id.*

Finally, the Government questioned Dr. Mitchell as to whether there was a point at which Respondent should have stopped prescribing controlled substances to J.H. *Id.* at 355. According to Dr. Mitchell, "in the face of [J.H.'s] history of drug abuse . . . [a]fter the second negative urine that would be a [sic] unavoidable, irrevocable sign to discharge her from the practice." *Id.* However, while the Patient Drug Screening Results form states that J.H. was negative for amphetamine on October 11, 2011 and includes the notation "Ran out 8 days ago," GX 12, at 61; on the date of this test, Respondent had last issued her an Adderall prescription on August 31, 2011, and that prescription provided her with a 30-day supply.<sup>36</sup> As there is no evidence as to how long amphetamines would still be present in a patient's urine after the last use, no weight can be given to this testimony. What is notable, however, is that over the entire course of Respondent's prescribing to J.H., which lasted from June 10, 2010 through August 12, 2012, Respondent conducted only three urine tests, with the last one being done on November 15, 2011. GX 12, at 61.

Notwithstanding that no weight can be given to Dr. Mitchell's testimony regarding the October 11, 2011 drug tests, I find that the evidence otherwise supports a finding that Respondent provided J.H. with controlled substance prescriptions which lacked a legitimate

medical purpose and were issued outside of the usual course of professional practice. 21 CFR 1306.04(a). As the evidence shows, while Respondent knew that J.H. was dependent on narcotics, he: (1) Did not require her to sign an opioid agreement; (2) did not obtain a MAPS report on her until two years after he determined that she was dependent; (3) conducted only three drug tests over the course of the 26 months that he prescribed to her; (4), did not refer her to treatment when she was suffering from withdrawal even though he had given her a 30-day methadone prescription only five days earlier and continued to prescribe methadone to her; and (5) repeatedly prescribed both alprazolam and clonazepam to her, even after she had told him that she did not like the way the Xanax (alprazolam) made her feel.

Concluding its direct examination, the Government asked Dr. Mitchell: "Of the prescriptions that we have discussed today, are there any that you've found to be legitimate, issued for [a] legitimate purpose or within the usual practice of medicine?" Tr. 356. Dr. Mitchell answered: "Not for the controlled substances." *Id.*

#### Respondent's Testimony

Respondent testified on his own behalf. According to Respondent, he graduated from medical school in Damascus, Syria in 1993, and after moving to the United States, he did an internal medicine residency which he completed in 2002. Tr. 469. Thereafter, Respondent started practicing at nursing homes and assisted living facilities and also worked as an urgent care and ER physician. *Id.*; see also RX J. Respondent did this until 2009 when he purchased a "very small practice" of 120 patients in Davidson, Michigan from a retired physician. Tr. 470. Respondent testified that in the meantime he studied hospice and palliative medicine and became board certified in 2012. *Id.* at 469. On some date which Respondent did not specify, Respondent also began working at a medical practice in Lapeer, Michigan, which had 150 patients. *Id.* at 471.

According to Respondent, when he started his internal medicine practice, he "did not expect this influx of chronic pain patient[s], and . . . was not planning to have a clinic for chronic pain patients." *Id.* at 482. While addressing the DI's testimony regarding the statements he made in the 2013 interview, Respondent offered various statements regarding the "general" "way" in which he practices medicine. *Id.* at 484. Specifically, he testified that in 2011 and 2012, "we start to do it [*i.e.*,

obtain MAPS reports] more often, but definitely not in every visit." *Id.* at 482. He further asserted that "we do referral [of] patients for diagnostic, for another specialty, depends on their need." *Id.* He also asserted that he attempts to control his patients' symptoms, while "try[ing] to taper them off the medication, if possible, while they are getting another treatment like the physical therapy or going to the pain management, some going to counseling." *Id.* at 484.

As found above, Respondent acknowledged that he had "listened to all of" Dr. Mitchell's testimony. *Id.* Respondent then testified that Dr. Mitchell was "right" about his having ignored the red flags that the five patients were diverting or abusing drugs. *Id.*

Respondent further testified that he had reviewed multiple online Continuing Medical Education courses,<sup>37</sup> and that the week before the hearing, he attended a three-day "course about prescribing medication and dealing with the addicted patients." *Id.* at 486, 495. He also stated that he was referring his patients who have chronic pain to "pain management." *Id.* at 496. However, he then testified that it takes six to twelve weeks for a patient to obtain an appointment with pain management in the Lapeer, Michigan area and that in the meantime, he has "to continue the patient's treatment." <sup>38</sup> *Id.*

Respondent further asserted that "[s]ince the interview on the show cause, it came to [his] attention some wrong way in doing and dealing with patients" and he "went back and review[ed] what he's been doing and inquire[d]." *Id.* at 495. He also testified that he had invested in electronic medical records because with three offices, it was a "major problem . . . following the patients." *Id.* He also

<sup>37</sup> However, it is unclear the extent to which these courses actually addressed the prescribing of controlled substances and the monitoring of patients for abuse and diversion. While Respondent also testified that he has subscribed to Audio Digest, a CME program which provides lessons on a CD with a questionnaire, he then acknowledged that this program "[h]as nothing to do with" his prescribing practices and involves "medical education in general internal medicine." Tr. 504–05.

<sup>38</sup> Following his testimony regarding his referring his chronic pain patients to pain management, Respondent's counsel asked him if he had also employed "some outside help to do criminal background checks of [his] existing patients, look at your current policies and procedures as they relate to pharmaceuticals that," at which point the transmission cut out. Tr. 497–98. When, however, the transmission was re-established, Respondent's counsel asked only: "Did you make any efforts to hire outside consultants to come and make some recommendations regarding your office?" *Id.* at 498.

<sup>36</sup> According to the ALJ, the parties stipulated that Respondent issued a prescription for 60 Adderall 10 on October 1, 2011. ALJ Ex. 50, at 5. However, the patient file does not contain a prescription for this date (as opposed to October 11, 2011) and the MAPS report which the Government obtained does not list any Adderall/amphetamine prescription as having been issued between August 31 and October 11, 2011. GX 24, at 12–13.

hired a consultancy to review his practice's policies and procedures which met with his employees and discussed issues such as "communicat[ing] with the patients, keeping their records, follow[ing] their records, referring the patients, and talking to the families and patients." <sup>39</sup> *Id.* at 499. Finally, Respondent bought a safe. *Id.*

On cross-examination, Respondent further asserted that after being served with the Show Cause Order, he started doing more frequent drug screening "to identify any problematic patients." *Id.* at 512. However, he also explained that "before we tried to do drug screening but it was very expensive for the patient because [it was] not covered" by a local insurance plan. *Id.* Moreover, he offered no further detail as to how frequent the screenings were.

Asked whether, in the period 2010–2012, he believed that doctors should not prescribe controlled substances to patients who are abusing or diverting them, Respondent testified: "If it is a proof they are abusing or diverting, yes." *Id.* at 520. Asked to explain what he meant by proof of abuse and diversion, Respondent answered:

Well, counseling the patient in the room and talking to them about their pain and their using their pain medication and the way, and what is their answer, for me I will take whatever the patient tell me.

If they said no, they are not abusing the medication, they are not diverting the medication, and I am entitled to treat their symptoms and make sure they are not going in withdrawal and take care of the patient.

*Id.* at 521. Asked whether he believed this today as much as he did in the 2010–2012 period, Respondent answered: "[y]es." *Id.*

The Government then asked Respondent whether he "believe[s] that doctors should detect when patients are abusing or diverting controlled substances?" *Id.* Respondent's counsel objected, on the ground that it was outside the scope of his direct examination and the ALJ sustained the objection.<sup>40</sup> *Id.* at 522. So too, when the Government asked Respondent if "[d]octors should respond to red flags of abuse and diversion of controlled substances," Tr. 526, Respondent

objected, and the ALJ sustained the objection. *Id.*

Next, the Government asked Respondent: "[w]hat are the signs for abuse and diversion of controlled substances?" *Id.* Respondent's counsel objected. After the ALJ overruled the objection, Respondent testified: "[w]hat do you mean diversion exactly?" *Id.* This prompted the ALJ to instruct Respondent that "if you don't know how to answer the question, just tell me that you don't know." *Id.* Respondent answered: "I do not." *Id.*

The Government then asked Respondent what signs he looks for to see if a patient is abusing medication. *Id.* at 527–28. Respondent answered:

Well, if they're using, now a patient if he is taking the pain medication and they have extra pain and taking medication, extra pill or extra two, this is a view that what you intend that it is abusing, well, it's still a pain medication they are using to control their symptoms. I don't understand what exactly what answer you want for that.

I'm telling you exactly what I think. If the patient using the pain medication instructed to control their pain medication, now if they come earlier to take medication that's if they have a chronic problem and they need it, somebody can call them abusing, some people calling them they are controlling their pain symptoms.

*Id.*

After again admitting that he "did not pay attention too much to this [sic] signs with the red flags and things," *id.*, Respondent asserted that in determining whether patients are abusing controlled substances, "[w]e do the drug screen" and "[w]e run a MAP with the electronic medical records if they are taking the medication the right way and taking the other alternative medications." *Id.* at 529. Asked by the ALJ how he is now treating pain management patients, Respondent explained that if patients "ask for more medication or [to] change to a specific medication and . . . looking in the drugs screen, if they are utilizing the medication." *Id.* After apparently more telephonic interference, Respondent added that when patients ask for an early refill or a different medication or to increase their pain medication, "to confirm we'll do the drug screen and we'll run the MAP." *Id.* at 531.<sup>41</sup>

After confirming that Respondent was adhering to his earlier testimony that Dr. Mitchell was correct that he had ignored red flags of abuse and diversion, the

Government asked Respondent whether he also agreed with Dr. Mitchell's testimony that he had "issued prescriptions outside of the usual course of practice or for nonlegitimate medical purposes?" *Id.* at 534. Respondent's counsel objected, asserting that "[w]e've said everything Dr. Mitchell has said about prescribing in the face of red flags is correct." *Id.* at 535. The ALJ did not, however, rule on the objection. *See id.* Instead, the ALJ asked Respondent if he had read the Show Cause Order, and after Respondent acknowledged that he had, the ALJ asked if he "agree[d] that the facts that they allege there are all true?" *Id.* Respondent answered "[y]es." *Id.*<sup>42</sup>

## Discussion

As noted above, both parties filed exceptions to the ALJ's Recommended Decision. Having reviewed their briefs, I conclude that some of their exceptions are best addressed prior to discussing whether the Government is entitled to prevail under the public interest standard. These include Respondent's contention that the ALJ committed prejudicial error when he barred him from cross-examining the Diversion Investigator regarding the use of confidential informants. *See Resp. Exceptions*, at 9–12. As for the Government, it argues that the ALJ erred when he allowed Respondent to present his case by VTC. Gov. Exceptions, at 3–9.

## Respondent's Exception to the ALJ's Ruling Limiting Cross-Examination

As found above, at the hearing, a DEA Diversion Investigator testified regarding the investigation she

<sup>42</sup> Subsequently, during a colloquy with the ALJ as to whether it could cross-examine Respondent regarding the specific prescriptions discussed by Dr. Mitchell and whether he agreed with Dr. Mitchell's testimony that the prescriptions "were issued illegitimately and outside of the usual course," the Government observed that Respondent was shaking his head; the Government thus argued "that there is some ambiguity as to whether or not he's really admitting that he has actually issued those unlawfully." Tr. 538–39. The ALJ explained: "[n]ot according to my record" and that he had seen "the shaking of the head." *Id.* at 539. The record does not, however, reflect the manner in which Respondent shook his head, and notwithstanding the tenor of the Government's statement, I am not free to speculate as to whether Respondent was disputing or acknowledging that he acted unlawfully.

Notably, in his Post-Hearing Brief, Respondent states that Dr. Mitchell's testimony establishes that he "wrote a substantial number of prescriptions . . . without a legitimate medical purpose and/or in the usual course of a practitioner's professional practice and/or in the face of paradigmatic 'red flags' of diversion or abuse such as repeated requests for early refills, facially-evident documentation of doctor shopping, and testing results inconsistent with use of the prescribed controlled substances." *Resp. Post-Hrgng Br.* at 12.

<sup>39</sup> This, however, did not occur until mid-September 2014. Tr. 509.

<sup>40</sup> When the Government attempted to re-ask the question, Respondent's counsel again objected on the ground that because Respondent has testified that Dr. Mitchell was correct in his criticism of his practice, "how much stronger can we say that we adopt Dr. Mitchell's testimony as to us ignoring those red flags and prescribing in the face of those." Tr. 524. The ALJ against sustained the objection.

<sup>41</sup> The Government then asked Respondent what steps "a doctor should and could take in response to any signs that a patient is abusing their controlled substance medications?" *Id.* at 531–32. The ALJ sustained Respondent's objection stating that he had "a record of that." *Id.* at 532.

conducted of Respondent's prescribing practices. On cross-examination, Respondent's counsel attempted to question the DI about two undercover agents who, according to the proffer, went to Respondent, and while posing as patients, attempted to entice him to prescribe controlled substances in exchange for cash. Tr. 222. The Government objected to this line of questioning, arguing that the evidence "was not offered as part of the basis for the order to show cause." *Id.*

In response to the objection, Respondent argued that the Agency "is required to consider not just the evidence that [the Government] brought in on the direct, but evidence that we can bring out on cross examination." *Id.* Respondent then proffered that Respondent told the undercover agents that "he would not" prescribe to them. *Id.* Respondent argues that this "is exculpatory" because Respondent "had no idea who he was talking to" and this evidence "would be very relevant to [assessing] his state of mind." *Id.* at 222–23.

The ALJ sustained the objection, on the ground that Respondent had failed to disclose in advance of the hearing that he "wanted to cover this subject." *Id.* at 223. Continuing, the ALJ explained that "[i]f you knew about these things, and you wanted me to consider them, then you had a duty and the opportunity to come forward and tell me. And I saw nothing like that in your pre-hearing statements, or that of prior counsel." *Id.* at 223–24.

Respondent then argued that his counsel had not had "the time that the Government had to prepare" for the hearing and that there was no prejudice to the Government, because "these are their witnesses." *Id.* at 224–25. The ALJ rejected the contention, explaining that "you had knowledge of this undercover operation. If you wanted to bring it to my attention, you clearly had it for a while." *Id.* at 226.<sup>43</sup>

Even assuming that the Government's direct examination of the DI as to what steps she took in investigating Respondent opened the door to this line of inquiry, the ALJ did not abuse his discretion in sustaining the Government's objection. *See Gunderson v. Department of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) (applying abuse of discretion standard in reviewing ALJ's exclusion of evidence); *Walter A. Yoder*

*& Sons, Inc. v. NLRB*, 754 F.2d 531, 534 (4th Cir. 1985) (applying abuse of discretion standard in reviewing ALJ's decision to limit cross-examination). Moreover, the warrant return listed the actual names (as well as the undercover names) of both undercover officers. Thus, Respondent had ample opportunity to present this evidence either through calling the undercover officers to testify or by introducing any documentation he placed in their respective patient files regarding the incidents. *See Randall L. Wolff*, 77 FR 5106, 5120 n.23 (2012).

To be sure, DEA has recognized that in some instances, evidence of "prior good acts" can refute evidence that a registrant knowingly or intentionally diverted controlled substances. *See Jayam Krishna-Iyer*, 74 FR 459, 462 n.6 (2009). Here, however, the Government put forward extensive evidence to show that Respondent acted with the requisite knowledge to support the conclusion that he lacked a legitimate medical purpose and acted outside of the usual course of professional practice and thereby violated the CSA on some 100 occasions when he prescribed to the five patients. *See* 21 CFR 1306.04(a); *see also* 21 U.S.C. 841(a)(1). Moreover, even if Respondent's testimony regarding Dr. Mitchell's criticism of his prescribing practices was ambiguous as to whether he was also admitting that he violated 21 CFR 1306.04(a), his post-hearing brief has resolved the issue.

Accordingly, even if I had found that the ALJ abused his discretion in not permitting Respondent to cross-examine the DI about the two undercover visits, I would still conclude that this does not rise to the level of prejudicial error. *See Gunderson*, 601 F.3d at 1021 ("An error is prejudicial only 'if it can be reasonably concluded that with . . . such evidence, there would have been a contrary result.'" (quoting *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998)); *see also Air Canada v. Department of Trans.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998) ("As incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error.") (citing 5 U.S.C. 706).

In his Exceptions, Respondent further notes that the ALJ "frames this issue as one 'regarding arguably exculpatory evidence that has been withheld by the Government.'" Exceptions, at 9 (citing R.D. at 60–62). He then states that he adopts and incorporates by reference the ALJ's view, and requests that I consider it as a separate argument.

Therein, the ALJ noted that the Agency has not adopted "[t]he rule from *Brady v. Maryland*," 373 U.S. 83, 87

(1963), which requires the prosecution in a criminal case to disclose material exculpatory evidence to the defendant. R.D. at 61. Citing *MacKay v. DEA*, 664 F.3d 808, 819 (10th Cir. 2011), the ALJ correctly noted that "even if *Brady* did apply in this case, the excluded evidence would have no outcome [sic] on my final recommendation." R.D. at 62. The ALJ nonetheless proceeded to discuss several cases in which other ALJs had either: (1) Ordered the Government to review its files for exculpatory evidence, or (2) suggested that DEA should provide for disclosure of exculpatory evidence because three other federal agencies provide for such disclosure. *Id.* The ALJ noted that the Agency has held that there is "an ongoing duty to ensure that material evidence and argument made to a factfinder is not knowingly contradicted by other material evidence in the Government's possession, but not otherwise disclosed." *Id.* (quoting *Randall L. Wolff*, 77 FR 5106, 5124 (2012)). However, based on an earlier case in which the Agency held that an ALJ did not have authority to require the Government to "disclose any exculpatory information in its possession when such information is timely requested by a respondent," *see Nicholas A. Sychak*, 65 FR 75959, 75960–61 (2000), the ALJ opined "that the DEA's view of releasing exculpatory evidence is 'just trust me.'" R.D. at 62.

Unacknowledged by the ALJ is that several federal appeals courts have held that *Brady* does not apply to administrative proceedings. *See Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985); *NLRB v. Nueva Eng. Inc.*, 761 F.2d 961, 969 (4th Cir. 1985). *Cf. Echostar Comm. Corp. v. FCC*, 292 F.3d 749, 755–56 (D.C. Cir. 2002) (rejecting litigant's claim that "the Agency's decision to deny it discovery . . . denied it due process"); *Silverman v. CFTC*, 549 F.2d 28, 33 (7th Cir. 1977) ("There is no basic constitutional right to pretrial discovery in administrative proceedings.") (citations omitted).

Instead, this Agency follows the holding of *McClelland v. Andrus*, 606 F.2d 1278 (D.C. Cir. 1979). Therein, the D.C. Circuit held that "discovery must be granted [in an administrative proceeding] if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." *Id.* at 1285–86; *see also Margy Temponeras*, 77 FR 45675, 45676 n.4 (2012); *Beau Boshers*, 76 FR 19401, 19403–04 (2011). However, "the party seeking discovery must rely on more than speculation and must show that the evidence is relevant, material, and that the denial of access to the [evidence] is prejudicial." *Boshers*,

<sup>43</sup> The record shows that Respondent became aware that two undercover officers had visited Respondent from the return of the state search warrant which listed the two officers' files as being among the items seized. Resp. Ex. A, at 7. However, the return was executed on March 27, 2013, *id.* at 6; which was well in advance of the hearing.

76 FR at 19403 (citing *Echostar*, 292 F.3d at 756; *Silverman v. CFTC*, 549 F.2d 28, 34 (7th Cir. 1977)). As explained previously, while evidence that Respondent refused to prescribe controlled substances to the undercover officers is relevant and material in assessing his experience as a dispenser of controlled substances, in light of his concession that he knowingly diverted controlled substances some 100 times to the five patients, he cannot show prejudice.<sup>44</sup> I thus reject the exception.<sup>45</sup>

## Discussion

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to “dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . *has committed such acts* as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.” 21 U.S.C. 824(a)(4) (emphasis added). With respect to a practitioner, the Act requires the consideration of the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant’s experience in dispensing . . . controlled substances.

(3) The applicant’s conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

*Id.* 823(f).<sup>46</sup>

<sup>44</sup> It is noted that Respondent requested that the ALJ provide him with a copy of the Agency’s investigative files on him; the ALJ correctly held that he had no power to compel the Agency to provide Respondent with its investigative files. ALJ Ex. 3, at 5.

<sup>45</sup> I have considered the Government’s Exception regarding the ALJ’s decision to allow Respondent to present his case by Video Teleconferencing technology. While I acknowledge that technical difficulties caused a number of interruptions during the hearing in this matter, the record nonetheless contains overwhelming evidence supporting my Decision and Order.

<sup>46</sup> Section 304(a) also provides that a registration to “dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has had his State license or registration suspended, revoked, or denied by competent state authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances.” 21 U.S.C. 824(a)(3). Likewise, the CSA defines “[t]he term ‘practitioner’ [to] mean[ ] a physician . . . licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to distribute,

“[T]hese factors are . . . considered in the disjunctive.” *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). It is well settled that I “may rely on any one or a combination of factors, and may give each factor the weight [I] deem[ ] appropriate in determining whether a registration should be revoked.” *Id.*; see also *MacKay v. DEA*, 664 F.3d 808, 816 (10th Cir. 2011); *Volkman v. DEA*, 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie v. DEA*, 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I “need not make explicit findings as to each one.” *MacKay*, 664 F.3d at 816 (quoting *Volkman*, 567 F.3d at 222 (quoting *Hoxie*, 419 F.3d at 482)).<sup>47</sup>

The Government has the burden of proving, by a preponderance of the evidence, that the requirements for revocation or suspension pursuant to 21 U.S.C. 824(a) are met. 21 CFR 1301.44(e). However, “once the [G]overnment establishes a *prima facie* case showing a practitioner has committed acts which render his registration inconsistent with the public interest, the burden shifts to the practitioner to show why his continued registration would be consistent with the public interest.” *MacKay*, 664 F.3d at 817 (citing *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008) (citing cases)).

In this matter, the Government’s evidence focused on factors two, four, and five. Having reviewed the record in its entirety and having considered all of the factors, I find that the Government’s evidence with respect to factors two and four satisfies its *prima facie* burden of showing that Respondent has committed acts “which render his registration . . . inconsistent with the public interest.” 21 U.S.C. 824(a)(4).

dispense, [or] administer . . . a controlled substance in the course of professional practice.” 21 U.S.C. 802(21). See also *id.* § 823(f) (“The Attorney General shall register practitioners . . . to dispense . . . controlled substances in schedule II, III, IV, or V . . . if the applicant is authorized to dispense controlled substances under the laws of the State in which he practices.”).

<sup>47</sup> In short, this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant’s misconduct. *Jayam Krishna-Iyer*, 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay*, 664 F.3d at 821.

## Factors Two and Four—Respondent’s Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is not “effective” unless it is “issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 CFR 1306.04(a). Continuing, the regulation provides that “an order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. 829] and . . . the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.” *Id.*

As the Supreme Court has explained, “the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.” *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (citing *United States v. Moore*, 423 U.S. 122, 135, 143 (1975)).

Both this Agency and the federal courts have held that establishing a violation of the prescription requirement “requires proof that the practitioner’s conduct went ‘beyond the bounds of any legitimate medical practice, including that which would constitute civil negligence.’” *Laurence T. McKinney*, 73 FR 43260, 43266 (2008) (quoting *United States v. McIver*, 470 F.3d 550, 559 (4th Cir. 2006)). See also *United States v. Feingold*, 454 F.3d 1001, 1010 (9th Cir. 2006) (“[T]he *Moore* Court based its decision not merely on the fact that the doctor had committed malpractice, or even intentional malpractice, but rather on the fact that his actions completely betrayed any semblance of legitimate medical treatment.”).

Thus, in *Moore*, the Supreme Court reinstated the conviction of a physician under 21 U.S.C. 841(a)(1) and what is now 21 CFR 1306.04(a) for prescribing controlled substances outside of the usual course of professional practice. 423 U.S. at 139–43. The Court explained:

The evidence presented at trial was sufficient for the jury to find that respondent’s conduct exceeded the bounds of “professional practice.” As detailed above, he gave inadequate physical examinations or none at all. He ignored the results of the tests



he did make. He did not give methadone at the clinic and took no precautions against its misuse and diversion. He did not regulate the dosage at all, prescribing as much and as frequently as the patients demanded. . . . In practical effect, he acted as a large scale “pusher”—not as a physician.

*Id.* at 142–43.

Under the CSA, it is fundamental that a practitioner must establish a bona fide doctor-patient relationship in order to act “in the usual course of . . . professional practice” and to issue a prescription for a “legitimate medical purpose.” *See, e.g., Moore*, 423 U.S. at 142–43; *United States v. Lovern*, 590 F.3d 1095, 1100–01 (10th Cir. 2009); *United States v. Smith*, 573 F.3d 639, 657 (8th Cir. 2009); *Jack A. Danton*, 76 FR 60900, 60904 (2011) (finding violations of 21 CFR 1306.04(a) “where a physician has utterly failed to comply with multiple requirements of state law for evaluating her patients and determining whether controlled substances are medically indicated and thus has ‘‘completely betrayed any semblance of legitimate medical treatment’’”) (quoting *McKinney*, 73 FR at 43266 (quoting *Feingold*, 454 F.3d at 1010)).

However, while the Government frequently relies on a physician’s failure to establish a bona-fide doctor-patient relationship to prove a violation of 21 CFR 1306.04(a), no “specific set of facts ha[s] to be present in order to find that a physician stepped outside of his role and issued prescriptions without a legitimate medical purpose.” *United States v. McKay*, 715 F.3d 807, 823 (10th Cir. 2013). Thus, as the Tenth Circuit explained, the question is whether sufficient evidence “exist[s] for a fact finder to affirmatively determine that the physician issued the drugs for an improper purpose.” *Id.*

As found above, Dr. Mitchell offered extensive and uncontested testimony that included identifying specific acts and omissions by Respondent, which support the conclusion that Respondent acted outside of the usual course of professional practice and without a legitimate medical purpose when he prescribed controlled substances to each of the five patients. He also opined that none of the prescriptions he discussed complied with 21 CFR 1306.04(a). Tr. 356.

In his post-hearing brief, Respondent states that Dr. Mitchell’s testimony establishes that he “wrote a substantial number of prescriptions . . . without a legitimate medical purpose and/or in the usual course of a practitioner’s professional practice and/or in the face of paradigmatic ‘red flags’ of diversion or abuse such as repeated requests for

early refills, facially-evident documentation of doctor shopping, and testing results inconsistent with use of the prescribed controlled substances.” Resp. Proposed Recommended Rulings, Findings of Fact and Conclusions of Law, at 12. Respondent, however, also attempts to portray himself as a soft touch, suggesting that it is “culturally ingrained” that he could “not say no” to patients, and that he prescribed “with some naivety and perhaps even full-blown gullibility,” which was “laid bare when the size of his practice grew exponentially faster than he and his staff” were capable of managing. Respondent’s Post-Hrng. Submission, at 1–2. *See also id.* (“These proceedings have also opened [his] eyes to the fact that his knowledge and experience as a medical practitioner contained gaps that proved easy to exploit.”).

The ALJ embraced this argument. *See* R.D. at 43 (quoting Resp. Post-Hrng. Submission, at 2) (Respondent’s “lack of knowledge, experience, and familiarity with accepted protocols for prescribing controlled substances, combined with some naivety and perhaps full-blown gullibility, where laid bare when the size of his practice great exponentially faster. . . .”); *see also id.* at 43–44 (“Here, it appeared [Respondent] became a very popular weak link used by those seeking to circumvent [controlled substance prescribing] protocols.”). The ALJ also stated his agreement “with the proposition appearing in [his] post-hearing brief that ‘his practice did not consist of a ‘pill mill’” and that *however misguided*, he was nevertheless *treating* his patients, not merely processing their prescriptions in furtherance of a larger criminal enterprise.” R.D. 47 (quoting Resp. Prop. Recommended Rulings, etc., at 12) (first emphasis added; second emphasis in original). *See also id.* at 44 (“I found no evidence to suggest the failures in his practice were the results of avarice or greed . . .”).

Contrary to the ALJ’s understanding, the Government was not required to prove that Respondent was motivated by avarice or greed to establish a violation of 21 CFR 1306.04(a) and 21 U.S.C. 841(a)(1). Nor did the ALJ reconcile the inconsistency between his findings that that Respondent violated 21 CFR 1306.04(a) with respect to each of the patients—findings which establish that he knowingly diverted drugs—with his embrace of Respondent’s claim that he was merely naïve and gullible. Indeed, Respondent offered no testimony to support the claims made in his brief that he prescribed out of naivety or gullibility,

or that his inability to say no was “culturally ingrained.”

As for the ALJ’s embrace of Respondent’s claim that he was not running a pill mill and was treating his patients, to be sure, there is some evidence that Respondent referred patients for MRIs, a sleep study, and alternative treatments such as a chiropractor and physical therapy. However, the overwhelming weight of the evidence shows that Respondent issued the prescriptions knowing that the patients were either abusing or diverting the drugs.

With respect to R.E.H., Dr. Mitchell found Respondent’s initial evaluation to be inadequate based on Respondent’s failure to adequately develop his substance abuse history and how much methadone he was currently taking. He further found that Respondent did not perform an adequate physical examination. He therefore concluded that Respondent acted outside of the usual course of professional practice in issuing the initial methadone prescriptions. Based on this testimony, I find that Respondent did not establish a bona fide doctor-patient relationship and I further conclude that at no point in the course of his treatment of R.E.H. did Respondent do so.

Dr. Mitchell further described a plethora of instances in which Respondent provided R.E.H. with early refills and failed to document that he had engaged R.E.H. as to why he needed the early refills. Dr. Mitchell pointed out that Respondent failed to enforce his medication contract which required R.E.H. to use his medicine only at the prescribed rate. He also pointed out that Respondent continued to prescribe without obtaining urine samples, and only rarely obtained a MAPS report. Moreover, even when he did obtain and review a MAPS report, the MAPS report showed that R.E.H. had filled the same prescriptions at different pharmacies, and yet Respondent failed to even address R.E.H.’s behavior and continued to prescribe methadone to him. So too, Respondent was notified on multiple occasions that R.E.H. was trying to fill multiple prescriptions and presenting forged prescriptions, and yet did nothing to address this obvious drug-seeking behavior and continued to prescribe to him. Finally, even after he received a report that R.E.H. had tested positive for cocaine and was diagnosed as polysubstance dependent, he continued to prescribe to R.E.H. In short, given the numerous times that R.E.H. sought early refills, coupled with the information Respondent obtained from MAPS reports, pharmacies and the hospital, Respondent cannot credibly

argue that he was merely gullible or naïve. Rather, Respondent knowingly diverted controlled substances to R.E.H.

The same holds true with respect to Respondent's prescribings to J.W. Here too, Dr. Mitchell testified that there was no clinical basis to diagnose J.W. with a condition that would support prescribing both Adderall and methadone. He also testified that it was inappropriate to prescribe methadone on a PRN basis. Moreover, Respondent ignored evidence that J.W. was obtaining Adderall from another physician, in violation of the medication contract, as well as that J.W. was obtaining Suboxone from the other physician. J.W. also sought early refills on multiple occasions, yet Respondent continued to prescribe to him.

Also, the same day that Respondent was informed that J.W. was in the county jail, Respondent obtained a MAPS report which showed that J.W. had continued to obtain controlled substances for Suboxone and Adderall from another doctor at the same time he was obtaining prescriptions from Respondent. Moreover, Respondent was notified by J.W.'s niece that her uncle was selling his medications. Yet notwithstanding this information, after J.W. was released from jail, Respondent eventually resumed prescribing controlled substances to him. Here again, the evidence amply refutes the contention that Respondent was merely gullible or naïve.

With respect to R.K., the evidence showed that Respondent issued multiple prescriptions for Xanax, which frequently authorized multiple refills, resulting in R.K. obtaining, in a nine-month period, approximately 1,000 pills more than were necessary based on Respondent's dosing instructions. Given that R.K.'s chart contained copies of the prescriptions, Respondent cannot credibly argue that he was duped by R.K. into issuing the excessive prescriptions. Also, while Respondent prescribed methadone to R.K., on two occasions, R.K. tested negative for the drug, stating after the first test that he had run out a week earlier, and after the second, stating that he had run out several days earlier. Yet there was no documentation that R.K. had undergone withdrawal, this being a clear indication that R.K. was diverting the drug. Respondent continued to prescribe the drug to R.K. (going so far as to double the strength after the first negative test) and did not subject him to any more drug tests after the second test. The evidence thus shows that Respondent was willfully blind to what R.K. was doing with the drugs. Moreover, Dr. Mitchell testified that there was no

medical evidence to support the methadone prescriptions. Here again, the evidence amply refutes the contention that Respondent issued the prescriptions because he was gullible or naïve.

Respondent knew that R.J.H. had a history of drug abuse. Yet over the course of just six weeks, Respondent quadrupled R.J.H.'s daily dosage of methadone with no medical justification. Moreover, within three months of R.J.H.'s seeing Respondent, R.J.H. had twice claimed that his prescriptions were stolen, and the day before the second such incident, Respondent's office had been told by another patient that R.J.H. was selling his prescription and using his girlfriend's medication. Yet Respondent issued him another prescription and continued to prescribe methadone to him, even though R.J.H. sought early refills. Here again, the evidence refutes Respondent's contention that he issued the prescriptions because he was gullible or naïve.

So too, the evidence with respect to J.H. refutes Respondent's claim that he was gullible or naïve. Here the evidence shows that only five days after Respondent issued her a prescription for a 30-day supply of methadone, she was suffering from narcotic withdrawal. Yet, instead of sending her for treatment, Respondent continuing prescribing controlled substances to her. Moreover, over the course of his treatment of J.H., on multiple occasions, Respondent prescribed either alprazolam or clonazepam to her, both being benzodiazepines, even though he had recently prescribed the other drug to her. Also, even after J.H. reported that she did not like how alprazolam made her feel, he still issued her more prescriptions for the drug. So too, even after J.H. tested negative for Adderall, he issued her a new prescription for the drug. Finally, over the course of the 26 months Respondent treated her, he only drug tested her three times, with all three tests occurring in a three-month period. I thus conclude that Respondent knew or was willfully blind to the fact that J.H. was either abusing or diverting her drugs to others.

In addition to his issuance of numerous unlawful prescriptions, Respondent also violated federal law by writing a methadone prescription for R.E.H. which he dated as having been issued on November 8, 2012, when he likely issued it on October 30, 2012. Notably, the evidence shows that on October 8, 2012, Respondent issued R.E.H. a methadone prescription, which R.E.H. filled the same day. GX 15, at 135–36. The evidence also shows that

on October 30, R.E.H. was seeking more methadone and his medical record states that it was not time yet and includes a copy of a prescription bearing an issue date of November 8, 2012. GX 8, at 15; *id.* at 31. The evidence further shows that a second prescription with an issue date of October 8, 2012 (which appears to have been altered) was filled on October 30, 2012. GX 15, at 137–38; GX 20, at 14. Moreover, there are no notes corresponding to a visit by R.E.H. on November 8, 2012, and the MAPS data contains no entry for a methadone prescription with an issue date of November 8, 2012. *See* GX 8, at 15; *id.* at 99–100; *see also* GX 20.

Under a DEA regulation, “[a]ll prescriptions for controlled substances shall be dated as of, and signed on, the day when issued.” 21 CFR 1306.05(a). Based on Respondent's failure to address the DI's testimony regarding this prescription and there being no evidence that R.E.H. saw Respondent on November 8, 2012, I find that Respondent violated this regulation when he post-dated the prescription.<sup>48</sup>

The evidence also shows that Respondent repeatedly failed to include the patients' addresses on their prescriptions. *See, e.g.,* GX 8, at 21, 23, 27–38, 40–42, 52, 54–57, 64, 233, 240, 248–49, 253–54 (Pt. R.E.H.); *see also* GX 9, at 5–6, 45, 54, 57–59, 61–63, 68 (Pt. J.W.). This too is a violation of 21 CFR 1306.05(a).

Finally, the evidence shows that on several occasions, Respondent issued prescriptions that authorized six refills. GX 8, at 23 (Xanax Rx issued to R.E.H.); GX 17, at 49 (Xanax Rx issued to R.K.); GX 19, at 117 (Klonopin Rx issued to J.H.). Respondent violated DEA regulations when he issued the prescriptions because, with respect to schedule III and IV controlled substances, a prescription may not “refilled more than five times.” 21 CFR 1306.22(a).

Accordingly, I find that the Government's evidence with respect to Factors Two and Four conclusively establishes that Respondent has committed such acts as to render his registrations “inconsistent with the public interest.” 21 U.S.C. 824(a)(4); *see also id.* § 823(f). I further conclude that his misconduct is especially egregious and supports the revocation of his

<sup>48</sup> Even if it was R.E.H. who altered the date to “10/08/12,” if Respondent's intent was to provide R.E.H. with a prescription that he could not fill until November 8, then he should have written on the prescription “the earliest date on which a pharmacy” could fill it. 21 CFR 1306.12(b)(ii). In any event, Respondent was still required to date the prescription as of the date he issued it.

existing registrations and the denial of his pending applications.

Moreover, while the Government put on no evidence as to Factor One—the recommendation of the state licensing board—in response to my November 10, 2015 order, the Parties have acknowledged that on October 30, 2015, the Michigan Board of Medicine revoked Respondent's medical license and that he is longer legally authorized to dispense controlled substances in the State in which he is registered and seeks additional registrations.<sup>49</sup>

### Sanction

Under Agency precedent, where, as here, “the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must ‘‘present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.’’’ *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson*, 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller*, 53 FR 21931, 21932 (1988))). “Moreover, because ‘past performance is the best predictor of future performance,’ *ALRA Labs, Inc. v. DEA*, 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.” *Medicine Shoppe*, 73 FR at 387; *see also Jackson*, 72 FR at 23853; *John H. Kennedy*, 71 FR 35705, 35709 (2006); *Prince George Daniels*, 60 FR 62884, 62887 (1995). *See also Hoxie v. DEA*, 419 F.3d at 483 (“admitting fault” is “properly considered[ed]” by DEA to be an “important factor[ ]” in the public interest determination).<sup>50</sup>

<sup>49</sup> No evidence was presented regarding Factor Three—Respondent's conviction record for offenses related to the manufacture, distribution or dispensing of controlled substances. However, the Agency has held that the absence of a conviction is not dispositive of the public interest inquiry. *Dewey C. MacKay*, 75 FR 49956, 49973 (2010), *pet. for rev. denied*, *MacKay v. DEA*, 664 F.3d 808 (10th Cir. 2011). As for Factor Five, as explained above, the Government did not take exception to the ALJ's findings regarding the allegation that Respondent made various false statements in the interview.

<sup>50</sup> However, while a registrant must accept responsibility and demonstrate that he will not engage in future misconduct in order to establish that his/her continued registration is consistent with the public interest, DEA has repeatedly held these are not the only factors that are relevant in determining the appropriate sanction. *See, e.g., Joseph Gaudio*, 74 FR 10083, 10094 (2009); *Southwood Pharmaceuticals, Inc.*, 72 FR 36487, 36504 (2007). Obviously, the egregiousness and extent of a registrant's misconduct are significant factors in determining the appropriate sanction. *See*

The ALJ found that Respondent “failed to take the full and unconditional acceptance of responsibility required by” the Agency's case law. R.D. at 55. As support for this conclusion, the ALJ noted that during his cross-examination of Dr. Mitchell, Respondent “challenged multiple aspects of the Government's evidence regarding [his] treatment of the patients that were fundamental to the Government's case against him.” *Id.* The ALJ also found that “Respondent's repeated and persistent pre-hearing assertions that his prescription practice was within the usual course of medical practice stand as compelling evidence that [he] had not accepted responsibility for his actions under the high standard established by the” Agency. *Id.* Thus, the ALJ declined to credit Respondent's testimony that he did not dispute Dr. Mitchell's criticism of his prescribing practices with respect to the five patients, notwithstanding that he characterized Respondent's testimony as “unequivocally stat[ing]” as much. *Id.* The ALJ did not, however, reconcile his finding with his statement during the hearing that “right now I have fairly compelling evidence that [Respondent] has accepted responsibility, even though he didn't tell me he did so or he was going to do so in his prehearing statement.” Tr. 491. Moreover, as discussed previously, because Respondent did not provide notice in his pre-hearing statements that he intended to admit to the truth of the Government's allegations, the ALJ granted the Government's motion to bar him from introducing evidence of his remedial measures.<sup>51</sup>

*Jacobo Dreszer*, 76 FR 19386, 19387–88 (2011) (explaining that a respondent can “argue that even though the Government has made out a *prima facie* case, his conduct was not so egregious as to warrant revocation”); *Paul H. Volkman*, 73 FR 30630, 30644 (2008); *see also Paul Weir Battershell*, 76 FR 44359, 44369 (2011) (imposing six-month suspension, noting that the evidence was not limited to security and recordkeeping violations found at first inspection and “manifested a disturbing pattern of indifference on the part of [r]espondent to his obligations as a registrant”); *Gregory D. Owens*, 74 FR 36751, 36757 n.22 (2009).

The Agency has also held that “[n]either *Jackson*, nor any other agency decision, holds . . . that the Agency cannot consider the deterrent value of a sanction in deciding whether a registration should be [suspended or] revoked.” *Gaudio*, 74 FR at 10094 (quoting *Southwood*, 72 FR at 36504); *see also Robert Raymond Reppy*, 76 FR 61154, 61158 (2011); *Michael S. Moore*, 76 FR 45867, 45868 (2011). This is so, both with respect to the respondent in a particular case and the community of registrants. *See Gaudio*, 74 FR at 10095 (quoting *Southwood*, 71 FR at 36503). *Cf. McCarthy v. SEC*, 406 F.3d 179, 188–89 (2d Cir. 2005) (upholding SEC's express adoptions of “deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions”).

<sup>51</sup> As found above, Respondent did offer extensive testimony of his remedial measures. However,

Respondent takes exception to the ALJ's finding that he did not accept responsibility for his misconduct. Resp. Exceptions, at 2–9. He argues that the ALJ misapplied Agency precedent, “in effect penaliz[ing] him for his failure to immediately confess wrongdoing in response to naked allegations.” *Id.* at 4–5 n.11. Alternatively, he argues that:

[i]f the applicable precedent really provides that the gateway to presentation of mitigation evidence requires [him to] demonstrate penitence in the form of “accepting responsibility for” conduct in which he did not engage . . . and/or to admit to counterfactual matters, *e.g.*, that some of the prescriptions at issue were written outside of a legitimate[] physician patient relationship, then that precedent is inconsistent with procedural due process.

*Id.* at 4; *see also id.* at 5 n.11 (“to the extent that the Agency concludes the [ALJ's] application was proper, however, the precedent is inconsistent with procedural due process”). Respondent thus seeks “a functional remand to allow the parties to fully develop [his] remediation evidence and to allow” for the consideration of “that evidence in assessing the appropriate sanction.” *Id.* at 9.

While I find some of Respondent's arguments well taken, I reject his exception. As for the ALJ's pre-hearing ruling barring Respondent from eliciting the testimony of Ms. Richards, (who would have testified regarding a risk assessment audit and the training she provided to Respondent's staff), in his Recommended Decision, the ALJ asserted that he would have allowed Ms. Richards to testify if Respondent had “informed the Government in its prehearing statements that he acknowledged the noncompliance of his prescription practice.” R.D. at 60. However, while not mentioned in the Recommended Decision, the ALJ granted the Government's motion based also on Respondent's failure to describe Ms. Richard's testimony “with sufficient particularity.” Tr. 39 (Nov. 3, 2014). This was an independent and adequate ground to bar her testimony, and yet, Respondent does not challenge the ALJ's ruling on this basis.

Had the ALJ's ruling barring Ms. Richard's testimony been based solely on Respondent's failure to state in his pre-hearing statements that he was acknowledging his misconduct, I would agree with Respondent. Contrary to the ALJ's understanding, although the Agency has held that proof of remedial measures is rendered irrelevant where a respondent fails to accept responsibility

Respondent was barred from introducing testimony by a third party on the issue.

for his knowing or intentional misconduct, none of the cases cited by the Government or the ALJ have held that a respondent, as a condition of being able to offer evidence of his remedial measures, is required to admit to the allegations before he even has the opportunity to challenge the Government's evidence and the Agency has never held as much. Indeed, while the Agency frequently places dispositive weight on a respondent's failure to fully acknowledge his misconduct, in each of the cases cited by the ALJ, the Agency discussed the respondent's failure to acknowledge his/her/its misconduct only after discussing the evidence put forward by the Government and determining which allegations had been proved. *See, e.g., Joe Morgan*, 78 FR 61961, 61963 (2013) ("where the Government has proved that a respondent has knowingly or intentionally diverted controlled substances, a registrant's acceptance of responsibility is an essential showing for rebutting the Government's *prima facie* case") (emphasis added); *Medicine Shoppe-Jonesborough*, 73 FR at 387.

Notwithstanding that the Government provided, in its prehearing statements, notice of the evidence it intended to rely on in supporting the allegations of the Show Cause Order, Respondent was entitled to challenge the reliability of that evidence at the hearing and to show that the allegations were untrue. However, I decline to decide the question of whether it was consistent with principles of due process to require Respondent, as a condition of being able to subsequently present evidence of his remedial measures, to admit to his misconduct before it had even been proven on the record.<sup>52</sup> Notably, while Respondent suggests that if the ALJ's reading of the Agency's precedent was correct—as explained above, it was not—"the precedent is inconsistent with procedural due process," and the ALJ reasoned that Respondent's "concern regarding due process is not wholly unfounded," R.D. at 56, neither Respondent nor the ALJ offered anything more than these conclusory assertions. Moreover, as explained previously, the ALJ's original ruling barring Respondent from putting on Ms. Richard's testimony was also supported

by the independent basis that Respondent failed to adequately disclose the nature of her proposed testimony with sufficient particularity.<sup>53</sup>

<sup>53</sup> In his Exceptions, Respondent "incorporates as if fully set out herein the [ALJ's] additional observations as to recent Agency precedent's misapplication of *Hoxie v. DEA*, 419 F.3d 477 (6th Cir. 2005)." Resp. Exceptions, at 4 n.11 (citing R.D. at 58). According to the ALJ, the Agency has been misreading the Sixth Circuit's *Hoxie* decision because "while admitting fault is an important factor, it is not the *sole* factor." R.D. 58. The ALJ criticized the Agency's decisions in two cases, which he viewed as being "representative of the coercive pressure to either fully accept responsibility or contest all possible allegations." R.D. 56 (discussing *Jeri Hassman, M.D.*, 75 FR 8194 (2010), and *George Mathew, M.D.*, 75 FR 66138 (2010)). According to the ALJ, his discussion was "intended to present the argument that the DEA is holding registrants to an unfair standard. Although accepting responsibility for one's actions is an important factor to consider once the Government proves its *prima facie* case, there is much more to determining what constitutes the public interest than this one criterion." R.D. at 58. However, the ALJ then noted that in Respondent's case, "the outcome would arguably not be different if [he] had been allowed to present additional rehabilitation witnesses. His admitted misconduct while treating patients and his lackluster efforts of rehabilitation require that result." R.D. 58–59.

I respectfully disagree with the ALJ's assertion that the Agency "is holding registrants to an unfair standard." On the contrary, given the harm to public safety caused by the diversion of controlled substances, the Agency's policy of requiring those respondents, who have been shown to have engaged in knowing or intentional misconduct to acknowledge their misconduct, is fully within the Agency's discretion. *Hoxie* is not to the contrary. As the Tenth Circuit explained in *MacKay*, a case which received barely a mention by the ALJ:

When faced with evidence that a doctor has a history of distributing controlled substances unlawfully, it is reasonable for the . . . Administrator to consider whether that doctor will change his or her behavior in the future. And that consideration is vital to whether [his] continued registration is in the public interest. Without Dr. MacKay's testimony, the . . . Administrator had no evidence that Dr. MacKay recognized the extent of his misconduct and was prepared to remedy his prescribing practices.

664 F.3d at 820. Absent evidence that a registrant acknowledges his misconduct in intentionally or knowingly diverting controlled substances, there is no basis to conclude that the registrant is prepared to remedy his prescribing practices and allowing the registrant to maintain his registration "is inconsistent with the public interest." 21 U.S.C. 824(a)(4). As for the ALJ's further contention that there is "more to determining what constitute the public interest than this one criterion," R.D. 58, the Agency considers other factors including the egregiousness of the proven misconduct. Thus, in cases of less egregious misconduct, the Agency has frequently imposed sanctions less than a denial or revocation notwithstanding that a respondent failed to fully acknowledge his misconduct. However, the intentional or knowing diversion of controlled substances strikes at the CSA's core purpose of preventing drug abuse and diversion.

As for the ALJ's reliance on *Hassman* and *Mathew*, neither of these cases supports his assertion that the Agency is imposing an unfair standard on registrants. As for *Hassman*, the ALJ's characterization of the Agency's decision as having "found that the respondent had issued several prescriptions not for a legitimate medical purpose for several of her patients," R.D. at 56, is a gross

Nor was Respondent the only party displeased with the ALJ's ruling on the issue of the adequacy of his acceptance of responsibility. Indeed, the Government argues that the ALJ obstructed its cross-examination of Respondent on this very issue. Gov. Exceptions, at 9–18. The Government sets forth various instances in which the ALJ precluded it from conducting a meaningful inquiry into the sincerity of Respondent's acceptance of responsibility and the scope of his present understanding of lawfully appropriate prescribing practices. *See id.* at 10–11; 17–18.

The Government further points to various incongruities in the ALJ's decision, including his conclusion that Respondent "failed to take the full and unconditional acceptance of responsibility," while later in the same paragraph, finding that Respondent "unequivocally stated that he did not dispute the evidence brought against him." Gov. Exceptions, at 12 (quoting R.D. 55). To similar effect, the Government argues that notwithstanding the various instances in which the ALJ cut off its cross-examination of Respondent, the ALJ later explained that he could not evaluate Respondent's contention that he should be able to continue to prescribe controlled substances subject to various restrictions, "without first providing the Government a full and fair opportunity to first thoroughly test the depth of [Respondent's] acknowledgment of noncompliance." Gov. Exceptions, at 12 (quoting R.D. 63).

The Government also argues that "[t]he ALJ's decisions make it difficult for the Administrator to know if Respondent would have 'acknowledged' that his conduct violated the law' at hearing." Gov.

understatement of the Agency's findings in the case, which established that the respondent had issued hundreds of unlawful prescriptions to some 15 patients, and continued to deny material facts even when there was conclusive proof to the contrary. *See, e.g., 75 FR at 8200–237*. And his reliance on *Mathew* is especially remarkable given that Dr. Mathew was implicated in prescribing controlled substances for two separate internet prescribing rings and did not testify in the proceeding.

Of further note, while both physicians sought judicial review of the respective agency decision, in each case, the Court of Appeals denied their petitions in an unpublished decision. *See Hassman v. DEA*, 515 Fed. App'x. 667 (9th Cir. 2013) (Holding that "[n]one of her proffered statements amount to an admission of wrongdoing; they are nothing more than further denials and claims that she was the unwitting victim of cunning patients. While Hassman offered some evidence of corrective measures, the DEA was entitled to give greater weight to the evidence indicating that Hassman has not learned from or improved upon her past misconduct."); *Mathew v. DEA*, 472 Fed Appx. 453 (9th Cir. 2012).

<sup>52</sup> The constitutional question presented by this scenario can be avoided by waiting until the hearing itself and moving to bar or strike the testimony and evidence of remedial measures when the Respondent fails to acknowledge the misconduct proven by the Government. However, where, as here, a respondent fails to provide an adequate disclosure of its proposed evidence of its remedial measures, the Government can still move to bar the admission of the evidence prior to the hearing.

Exceptions, at 13 (citing *Morgan*, 78 FR 61961, 61980 (2013)). I agree, and while Respondent bore the burden of production on the issue, given the ALJ's on-the-record statement that "right now I have fairly compelling evidence that [Respondent] has accepted responsibility, even though he didn't tell me he did so or he was going to do so in his prehearing statement," Tr. 491, it was not unreasonable for Respondent's counsel to conclude that it was not necessary to further develop the record on this issue.<sup>54</sup>

I conclude, however, that a remand is unwarranted for multiple reasons. As explained above, *see supra* n.53, while a registrant must accept responsibility and demonstrate that he will not engage in future misconduct in order to establish that his/her continued registration is consistent with the public interest, the Agency has repeatedly held that it is entitled to consider the egregiousness and extent of a registrant's misconduct in determining the appropriate sanction. *See Dreszer*, 76 FR at 19387–88; *Volkman*, 73 FR at 30644. Indeed, while proceedings under 21 U.S.C. 823 and 824 are remedial in nature, there are cases in which, notwithstanding a finding that a registrant has credibly accepted responsibility, the misconduct is so egregious and extensive that the protection of the public interest nonetheless warrants the revocation of a registration or the denial of an application. *See Fred Samimi*, 79 FR 18698, 18714 (2014) (denying recommendation to grant restricted registration, explaining that "even assuming . . . that Respondent has credibly accepted responsibility for his misconduct, this is a case where actions speak louder than words").

Here, the evidence shows that Respondent is an egregious violator of the CSA in that he ignored countless red flags presented by the patients that they were either abusing or diverting (or both) the controlled substances he prescribed for them. And with respect to Patients J.H. and R.E.H., the evidence shows that this went on for several years. Given the egregiousness of his misconduct, the Agency's interest in protecting the public by both preventing him from being able to dispense controlled substances as well as by deterring misconduct by others is substantial. I thus conclude that

continuing Respondent's existing registrations and granting his applications for the additional registrations would be "inconsistent with the public interest." 21 U.S.C. 823(f), 824(a)(4).

There is further reason to conclude that a remand is unwarranted. As found above, the State of Michigan has now revoked Respondent's medical license, thus rendering him without authority to dispense controlled substances in the State in which he holds his registrations and seeks the additional registrations. Thus, Respondent no longer meets the CSA's prerequisite for obtaining and maintaining a registration. *See* 21 U.S.C. 802(21) (defining "the term 'practitioner' [to] mean[ ] a . . . physician . . . or other person licensed, registered or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice"); *see also id.* § 823(f) ("The Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.").

Thus, pursuant to 21 U.S.C. 824(a)(3), the Attorney General is also authorized to suspend or revoke a registration issued under section 823, "upon a finding that the registrant . . . has had his State license or registration suspended [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances." Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the Act, DEA has long held that the revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices medicine. *See James L. Hooper*, 76 FR 71371 (2011), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); *see also Maynard v. DEA*, 117 Fed. Appx. 941, 945 (5th Cir. 2004); *Sheran Arden Yeates, M.D.*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988).

The Government nonetheless argues that because this issue was "never raised in the Order to Show Cause," a decision on this ground "could arguably upend basic protections afforded to DEA registrants and would surely diminish the perceived fairness of the . . . administrative process." Govt's Resp. to Admin. Order, at 11. The Government

acknowledges that it "is certainly empowered to issue an Order to Show Cause (or an Amended Order to Show Cause) alleging this factual basis and legal ground for revocation or denial" and to submit evidence. *Id.* However, it then contends that to impose a sanction "based on events that occurred outside of the administrative litigation process . . . runs up against 'one of the fundamental tenets of Due Process,'" this being that the "'Agency must provide a Respondent with notice of those acts which the Agency intends to rely on in seeking . . . revocation . . . so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action.'" *Id.* at 11–12. (quoting *Farmacia Yani*, 80 FR 29053, 29059 (2015)).

For his part, Respondent does not dispute that the Michigan Board has revoked his medical license and that he "no longer has any legal authority to dispense controlled substances." Respondent's Resp. to Admin. Order, at 1. However, he then states that as a procedural matter, he agrees with the Government that "simply skipping ahead to a 21 U.S.C. 824(a)(3) revocation that the parties never litigated would likely be inconsistent with due process." *Id.* at 4. Respondent acknowledges that "it might well be within the Administrator's purview . . . to invite the Government to issue an Amended Order to Show Cause seeking revocation [under section] 824(a)(3) grounds because of [his] loss of his license." *Id.* at 4–5.

I reject both parties' contention that I cannot rely on Respondent's loss of his state authority absent the Government's submission of an amended show cause order. Because the possession of state authority is a prerequisite for obtaining a registration and for maintaining a registration, the issue can be raised *sua sponte* even at this stage of the proceeding.<sup>55</sup> Indeed, under the Government's position, had I rejected the Government's case, I would be required to grant Respondent's applications even though he does not meet a statutory requirement for obtaining a registration.

Notably, the Government's position is fundamentally inconsistent with the position it has taken in numerous cases where it has issued an Order to Show Cause based on public interest grounds only to subsequently move for summary disposition upon learning that the

<sup>54</sup> While Respondent's counsel raised numerous objections to the Government's attempts to cross-examine him as to the sincerity of his acceptance of responsibility, Respondent's counsel was obliged to zealously defend his client. Thus, the state of the record is primarily attributable to the ALJ's undue limitation of the Government's cross-examination.

<sup>55</sup> Under the Administrative Procedure Act (APA), an agency "may take official notice of facts at any stage in a proceeding—even in the final decision." U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979).

applicable state board had taken action which rendered the practitioner without state authority. *See, e.g., Morgan*, 78 FR at 61973–74 (upholding ALJ's granting of government motion for summary disposition based on physician's loss of state authority which occurred post-hearing and holding that due process did not require amending the show cause order; motion for summary disposition provided adequate notice); *Roy E. Berkowitz*, 74 FR 36758, 36759–60 (2009) (rejecting argument that revocation based on loss of state authority was improper based on board action not alleged in the Show Cause Order; "The rules governing DEA hearings do not require the formality of amending a show cause order to comply with the evidence. The Government's failure to file an amended Show Cause Order alleging that Respondent's state CDS license had expired does not render the proceeding fundamentally unfair."). *See also Kamal Tiwari, et al.*, 76 FR 71604 (2011); *Silviu Ziscovici*, 76 FR 71370 (2011); *Deanwood Pharmacy*, 68 FR 41662 (2003); *Michael D. Jackson*, 68 FR 24760; *Robert P. Doughton*, 65 FR 30614 (2000); *Michael G. Dolin*, 65 FR 5661 (2000).

Here, by virtue of my order directing the parties to address the issues of: (1) Whether Respondent currently possesses authority to dispense controlled substances, and (2) if Respondent does not possess such authority, what consequence attaches for this proceeding, Respondent was provided with a meaningful opportunity to show that he retains his state authority. Of consequence, Respondent does not dispute that he no longer holds authority to dispense controlled substances under Michigan law, this being the only material fact that must be adjudicated in determining whether Respondent's registrations can be revoked and his applications denied under 21 U.S.C. 823(f) and 824(a)(3) as well as the Agency's precedent. That there are no dispositive legal arguments to preclude my reliance on this basis as an additional ground to revoke Respondent's registrations and to deny his applications is not the result of constitutionally inadequate notice. Rather, it is the result of the statute itself, which makes the possession of state authority mandatory for obtaining and maintaining a registration and renders irrelevant the issues of acceptance of responsibility and the adequacy of remedial measures. Accordingly, I will order that Respondent's registrations be revoked and that his pending applications be denied.

## Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a) and 28 CFR 0.100(b), I order that DEA Certificates of Registration BA7776353 and FA2278201 issued to Hatem M. Ataya, M.D., be, and they hereby are, revoked. Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that all pending applications submitted by Hatem M. Ataya, M.D. be, and they hereby are, denied. This Order is effective immediately.<sup>56</sup>

Dated: February 10, 2016.

**Chuck Rosenberg,**

*Acting Administrator.*

[FR Doc. 2016–03359 Filed 2–17–16; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. DEA–392]

#### Manufacturer of Controlled Substances Registration: Mallinckrodt, LLC

**ACTION:** Notice of registration.

**SUMMARY:** Mallinckrodt, LLC applied to be registered as a manufacturer of certain basic classes of controlled substances. The Drug Enforcement Administration (DEA) grants Mallinckrodt, LLC registration as a manufacturer of those controlled substances.

**SUPPLEMENTARY INFORMATION:** By notice dated September 16, 2015, and published in the **Federal Register** on September 23, 2015, 80 FR 57388, Mallinckrodt, LLC, 3600 North Second Street, Saint Louis, Missouri 63147 applied to be registered as a manufacturer of certain basic classes of controlled substances. No comments or objections were submitted for this notice.

The DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Mallinckrodt, LLC to manufacture the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. The DEA investigated the company's maintenance of effective controls against diversion by inspecting and testing the company's physical security systems, verifying the

company's compliance with state and local laws, and reviewing the company's background and history.

Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above-named company is granted registration as a bulk manufacturer of the following basic classes of controlled substances:

Controlled substance	Schedule
Gamma Hydroxybutyric Acid (2010).	I
Tetrahydrocannabinols (7370) .....	I
Codeine-N-oxide (9053) .....	I
Dihydromorphine (9145) .....	I
Difenoxin (9168) .....	I
Morphine-N-oxide (9307) .....	I
Normorphine (9313) .....	I
Norlevorphanol (9634) .....	I
Acetyl Fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide) (9821).	I
Amphetamine (1100) .....	II
Methamphetamine (1105) .....	II
Lisdexamfetamine (1205) .....	II
Methylphenidate (1724) .....	II
Nabilone (7379) .....	II
4-Anilino-N-phenethyl-4-piperidine (ANPP) (8333).	II
Codeine (9050) .....	II
Dihydrocodeine (9120) .....	II
Oxycodone (9143) .....	II
Hydromorphone (9150) .....	II
Diphenoxylate (9170) .....	II
Ecgonine (9180) .....	II
Hydrocodone (9193) .....	II
Levorphanol (9220) .....	II
Meperidine (9230) .....	II
Methadone (9250) .....	II
Methadone intermediate (9254) ...	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300) .....	II
Oripavine (9330) .....	II
Thebaine (9333) .....	II
Opium tincture (9630) .....	II
Opium, powdered (9639) .....	II
Oxymorphone (9652) .....	II
Noroxymorphone (9668) .....	II
Alfentanil (9737) .....	II
Remifentanil (9739) .....	II
Sufentanil (9740) .....	II
Tapentadol (9780) .....	II
Fentanyl (9801) .....	II

The company plans to manufacture bulk active pharmaceutical ingredients (API) for distribution to its customers.

Dated: February 10, 2016.

**Louis J. Milione,**

*Deputy Assistant Administrator.*

[FR Doc. 2016–03357 Filed 2–17–16; 8:45 am]

**BILLING CODE 4410–09–P**

<sup>56</sup> Based on the extensive findings of egregious misconduct by Respondent, I conclude that the public interest necessitates that this Order be effective immediately.

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

[Docket No. DEA-392]

**Bulk Manufacturer of Controlled Substances Application: Cedarburg Pharmaceuticals, Inc.****ACTION:** Notice of application.

**DATES:** Registered bulk manufacturers of the affected basic class, and applicants therefore, may file written comments on or objections to the issuance of the proposed registration in accordance with 21 CFR 1301.33(a) on or before April 18, 2016.

**ADDRESSES:** Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/ODW, 8701 Morrisette Drive, Springfield, Virginia 22152.

**SUPPLEMENTARY INFORMATION:** The Attorney General has delegated her authority under the Controlled Substances Act to the Administrator of the Drug Enforcement Administration (DEA), 28 CFR 0.100(b). Authority to exercise all necessary functions with respect to the promulgation and implementation of 21 CFR part 1301, incident to the registration of manufacturers, distributors, dispensers, importers, and exporters of controlled substances (other than final orders in connection with suspension, denial, or revocation of registration) has been redelegated to the Deputy Assistant Administrator of the DEA Office of Diversion Control ("Deputy Assistant Administrator") pursuant to section 7 of 28 CFR part 0, appendix to subpart R.

In accordance with 21 CFR 1301.33(a), this is notice that on November 4, 2015, Cedarburg Pharmaceuticals, Inc., 870 Badger Circle, Grafton, Wisconsin 53024 applied to be registered as a bulk manufacturer of nabilone (7379), a basic class of controlled substance listed in schedule II.

The company plans to manufacture bulk active pharmaceutical ingredients (API) for distribution to its customers.

Dated: February 10, 2016.

**Louis J. Milione,**  
*Deputy Assistant Administrator.*

[FR Doc. 2016-03350 Filed 2-17-16; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

[Docket No. DEA-392]

**Manufacturer of Controlled Substances Registration: Euticals, Inc.****ACTION:** Notice of registration.

**SUMMARY:** Euticals, Inc. applied to be registered as a manufacturer of certain basic classes of controlled substances. The Drug Enforcement Administration (DEA) grants Euticals, Inc. registration as a manufacturer of those controlled substances.

**SUPPLEMENTARY INFORMATION:** By notice dated September 16, 2015, and published in the **Federal Register** on September 23, 2015, 80 FR 57391, Euticals, Inc., 2460 W. Bennett Street, Springfield, Missouri 65807-1229 applied to be registered as a manufacturer of certain basic classes of controlled substances. No comments or objections were submitted for this notice.

The DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Euticals, Inc. to manufacture the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. The DEA investigated the company's maintenance of effective controls against diversion by inspecting and testing the company's physical security systems, verifying the company's compliance with state and local laws, and reviewing the company's background and history.

Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above-named company is granted registration as a bulk manufacturer of the following basic classes of controlled substances:

Controlled substance	Schedule
Gamma Hydroxybutyric Acid (2010).	I
Amphetamine (1100) .....	II
Lisdexamfetamine (1205) .....	II
Methylphenidate (1724) .....	II
Phenylacetone (8501) .....	II
Methadone (9250) .....	II
Methadone intermediate (9254) ...	II
Oripavine (9330) .....	II
Tapentadol (9780) .....	II

The company plans to manufacture the listed controlled substances in bulk for distribution and sale to its customers.

In reference to oripavine (9330), the company plans to acquire the listed

controlled substance in bulk from a domestic source in order to manufacture other controlled substances in bulk for distribution to its customers.

Dated: February 10, 2016.

**Louis J. Milione,**  
*Deputy Assistant Administrator.*

[FR Doc. 2016-03355 Filed 2-17-16; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

[Docket No. DEA-392]

**Importer of Controlled Substances Registration: Catalent Pharma Solutions, LLC****ACTION:** Notice of registration.

**SUMMARY:** Catalent Pharma Solutions, LLC applied to be registered as an importer of a certain basic class of controlled substance. The Drug Enforcement Administration (DEA) grants Catalent Pharma Solutions, LLC registration as an importer of this controlled substance.

**SUPPLEMENTARY INFORMATION:** By notice dated August 21, 2015, and published in the **Federal Register** on August 31, 2015, 80 FR 52510, Catalent Pharma Solutions, LLC, 3031 Red Lion Road, Philadelphia, Pennsylvania 19114 applied to be registered as an importer of a certain basic class of controlled substance. No comments or objections were submitted for this notice.

The DEA has considered the factors in 21 U.S.C. 823, 952(a) and 958(a) and determined that the registration of Catalent Pharma Solutions, LLC to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. The DEA investigated the company's maintenance of effective controls against diversion by inspecting and testing the company's physical security systems, verifying the company's compliance with state and local laws, and reviewing the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above-named company is granted registration as an importer of hydromorphone (9150), a basic class of controlled substance listed in schedule II.

The company plans to import the above listed controlled substance for a clinical trial study. Approval of permit applications will occur only when the



registrant's business activity is consistent with what is authorized under to 21 U.S.C. 952(a)(2). Authorization will not extend to the import of FDA approved or non-approved finished dosage forms for commercial sale.

Dated: February 10, 2016.

**Louis J. Milione,**

*Deputy Assistant Administrator.*

[FR Doc. 2016-03358 Filed 2-17-16; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. DEA-392]

**Importer of Controlled Substances  
Registration: Sigma Aldrich  
International GMBH-Sigma Aldrich Co.  
LLC**

**ACTION:** Notice of registration.

**SUMMARY:** Sigma Aldrich International GMBH-Sigma Aldrich Co. LLC applied to be registered as an importer of a basic class of controlled substance. The Drug Enforcement Administration (DEA) grants Sigma Aldrich International GMBH-Sigma Aldrich Co. LLC registration as an importer of this controlled substance.

**SUPPLEMENTARY INFORMATION:** By notice dated October 13, 2015, and published in the **Federal Register** on October 21, 2015, 80 FR 63839, Sigma Aldrich International GMBH-Sigma Aldrich Co. LLC, 3500 Dekalb Street, Saint Louis, Missouri 63118 applied to be registered as an importer of a certain basic class of controlled substance. No comments or objections were submitted for this notice.

The DEA has considered the factors in 21 U.S.C. 823, 952(a) and 958(a) and determined that the registration of Sigma Aldrich International GMBH-Sigma Aldrich Co. LLC, to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. The DEA investigated the company's maintenance of effective controls against diversion by inspecting and testing the company's physical security systems, verifying the company's compliance with state and local laws, and reviewing the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above-named company is granted registration as an

importer of butylone (7541), a basic class of controlled substance listed in schedule I.

The company plans to import the above listed controlled substance for analytical research and testing of equipment. This authorization does not extend to the import of a finished FDA approved or non-approved dosage form for commercial sale.

Dated: February 10, 2016.

**Louis J. Milione,**

*Deputy Assistant Administrator.*

[FR Doc. 2016-03353 Filed 2-17-16; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 15-1]

**Arvinder Singh, M.D.; Decision and  
Order**

On October 16, 2014, the Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause to Arvinder Singh, M.D. (Respondent), of Clifton Park, New York. ALJ Ex. 1. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner on three grounds.

First, the Show Cause Order alleged that on August 4, 2003, Respondent, following a jury trial, was convicted on 16 counts of health care fraud in violation of 18 U.S.C. 1347, one count of conspiracy to distribute controlled substances in violation of 21 U.S.C. 846, and 24 counts of unlawful distribution of controlled substances in violations of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. *Id.* at 1-2. (citing 21 U.S.C. 824(a)(2)).

Second, the Show Cause Order alleged that Respondent's convictions for violating the Controlled Substances Act "were based on a scheme in which [he] left pre-signed but otherwise blank prescriptions for [his] nursing staff to fill in and issue Schedule II controlled substances prescriptions to patients when neither [he] nor any other physician saw the patient at the time such prescriptions were issued." *Id.* at 2. The Show Cause Order alleged that Respondent's scheme also violated 21 CFR 1306.04(a) and 1306.05(a), and that this conduct constituted acts inconsistent with the public interest. *Id.* (citing 21 U.S.C. 824(a)(4) and 823(f)).

Third, the Show Cause Order alleged that on May 8, 2004, the U.S. Department of Health and Human Services (HHS) excluded Respondent from participation in federal health care

programs for a period of 15 years based on his convictions for Health Care Fraud and for violating the Controlled Substances Act. *Id.* The Government further alleged that because "the amount of the financial loss" was in excess of \$5,000; the time period of Respondent's illegal activity exceeded more than one year; and Respondent had been convicted of the CSA violations; HHS imposed a 15-year exclusion, which was three times the minimum exclusion period. *Id.* (citing 21 U.S.C. 824(a)(5)).

Following service of the Show Cause Order, Respondent requested a hearing on the allegations. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Chief Administrative Law Judge (hereinafter, CALJ) John J. Mulrooney, II. Following pre-hearing procedures, the CALJ conducted a hearing at which both parties introduced documentary evidence and called witnesses to testify. Thereafter, both parties submitted briefs containing their proposed findings of fact, conclusions of law, and arguments regarding the ultimate disposition of this matter.

On February 10, 2015, the CALJ issued his Recommended Decision. Therein, the CALJ found that the Government had established a *prima facie* case to deny Respondent's application for registration as a practitioner on multiple grounds.<sup>1</sup> R.D. at 37.

These included that Respondent had been convicted of twenty-four counts of

<sup>1</sup> Pursuant to 21 U.S.C. 823(f), "[t]he Attorney General may deny an application for [a practitioner's] registration . . . if [she] determines that the issuance of such registration . . . would be inconsistent with the public interest." In making this determination, section 823(f) directs the Agency to consider the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

*Id.* § 823(f).

"These factors are . . . considered in the disjunctive." *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). I "may rely on any one or a combination of factors[,] and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked. *Id.*; see also *MacKay v. DEA*, 664 F.3d 808, 816 (10th Cir. 2011); *Volkman v. DEA*, 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie v. DEA*, 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I "need not make explicit findings as to each one." *MacKay*, 664 F.3d at 816 (quoting *Volkman*, 567 F.3d at 222 (quoting *Hoxie*, 419 F.3d at 482)).

violating 21 U.S.C. 841(a)(1) in that he unlawfully caused and aided and abetted the illegal distribution of schedule II controlled substances by providing pre-signed but otherwise blank prescriptions to nurses who worked for him, who filled in the prescriptions with the name of the patient, the name of the drug, the quantity and dosing instructions, and provided the prescriptions to the patients, notwithstanding that the nurses were not legally authorized to dispense controlled substance prescriptions and Respondent did not see the patients. R.D. at 32–33. As discussed in the Recommended Decision, this conduct implicated three of the public interest factors and supports the conclusion that granting Respondent's application "would be inconsistent with the public interest." 21 U.S.C. 823(f); *see also* R.D. at 32–37;<sup>2</sup> 21 CFR 1306.05(a) ("All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use, and the name, address and registration number of the practitioner.").

In addition to the above, the evidence also shows that Respondent "has been excluded . . . from participation in" federal health care programs pursuant to the mandatory exclusion provisions of 42 U.S.C. 1320a–7(a). *See* 21 U.S.C. 824(a)(5) ("[a] registration pursuant to section 823 of this title to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42").<sup>3</sup> More

specifically, the evidence shows that on May 28, 2004, the Office of Inspector General, Department of Health and Human Services, excluded Respondent "from participat[ing] in the Medicare, Medicaid, and *all* Federal health care programs . . . for a minimum period of 15 years." GX 6. The exclusion was based on Respondent's convictions "of criminal offense[s] related to": (1) "the delivery of an item or service under the Medicare program"; (2) "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or any act or omission in a health care program operated or financed by any Federal, State, or local government agency"; and (3) "the unlawful manufacture, distribution, prescription or dispensing of a controlled substance." *Id.* (citing 42 U.S.C. 1320a–7(a)(1), (3), (4)). As the ALJ found, these convictions fall within the mandatory exclusion provisions of 42 U.S.C. 1320a–7(a).

Turning to whether Respondent had produced sufficient evidence to rebut the Government's *prima facie* case, the CALJ found that "Respondent continues to dispute the nature of the criminal charges and their severity." R.D. 38. The CALJ further found that "instead of accepting responsibility for the crimes for which he was convicted, he has emphasized isolated excerpts from orders and transcripts where he perceives he has been 'exonerated,' and/or occasions when DEA or the state licensing agency 'had no problems' with him." *Id.* (citations omitted). Continuing, the CALJ explained that "[t]he Respondent has not accepted responsibility for his actions, persuasively expressed remorse for his conduct, or presented evidence that could reasonably support a finding that the Administrator should entrust him with a registration." *Id.*

The CALJ also found that Respondent's misconduct was egregious and "mitigates persuasively in favor of denial of his application." *Id.* at 39. On the other hand, because Respondent's misconduct "ended nearly fifteen years earlier" and he "has paid his debt to society," the CALJ found that granting his application would not "adversely

license had been revoked, holding that section 823(f) "must logically give the Administrator the authority to deny a registration if the practitioner is not authorized by the State to dispense controlled substances. . . . To hold otherwise would mean that all applications would have to be granted only to be revoked the next day under 21 U.S.C. 824(a)(3). This [A]gency has consistently held that where a registration can be revoked under section 824, it can, *a fortiori*, be denied under section 823.").

impact compliance expectations on the regulated community in a significant way," and thus, the Agency's interest in "general deterrence should not, standing alone, constitute an insurmountable impediment to granting" his application. *Id.*

However, the CALJ then found that "[t]he issue of specific deterrence . . . is a dramatically different issue." *Id.* The CALJ explained that "virtually every documentary, testimonial, and argumentative contribution made by the Respondent in these proceedings makes it overwhelmingly clear that he does not believe he was mistaken in any way." *Id.* The CALJ thus concluded that "until . . . Respondent can convincingly show he accepts the authority of the law and those bodies charged with enforcing it and regulating his activities, granting him a DEA registration will gravely endanger the public." *Id.* at 40. The CALJ thus recommended that Respondent's application be denied. *Id.*

Respondent filed Exceptions to the Recommended Decision and the Government filed a response to Respondent's Exceptions. Thereafter, the record was forwarded to my Office for Final Agency Action.

Having considered the record in its entirety (including Respondent's Exceptions), I adopt the CALJ's findings of fact and conclusions of law to the extent they are discussed herein. Because I agree with the CALJ's ultimate findings that: (1) Multiple grounds exist to deny Respondent's application, (2) Respondent has failed to adequately acknowledge his misconduct, (3) Respondent's misconduct was egregious, and (4) the Agency's interest in specific deterrence supports the denial of his application, I will adopt the CALJ's recommendation that I deny Respondent's application. A discussion of Respondent's Exceptions follows.

Invoking *Gonzales v. Oregon*, 546 U.S. 243 (2006), Respondent's first contention is that "the [A]gency has relied on factors which Congress has not intended it to consider." Exceptions, at 1. Fleshing out his argument, Respondent contends that during the hearing, "[t]he Government has not shown a single case of [d]iversion." *Id.* at 2. He argues that the Government "failed to even scratch the surface of the case where it is apparent that billing issues were criminalized through the use of [the] CSA despite no evidence of [d]iversion or [p]ublic [s]afety [i]ssues, by creating a [sic] interpretive rule, as in *Gonzales*" and that "Congress does not allow DEA to use its policing power to regulate Medical Practices or make its own rules to prosecute doctors." *Id.*

<sup>2</sup> *See* R.D. at 32–33 (discussing application of factor three—"the applicant's conviction record under Federal . . . laws relating to the . . . distribution[ ] or dispensing of controlled substances."); *id.* at 33–36 (discussing application of factor two—"the applicant's experience in dispensing . . . controlled substances"—and factor four—"compliance with applicable laws . . . related to controlled substances").

<sup>3</sup> Notwithstanding that 21 U.S.C. 824(a)(5) addresses the Agency's authority to suspend or revoke a registration upon a finding that a registrant has been excluded from participation in federal health care programs under the mandatory exclusion provisions of 42 U.S.C. 1320a–7(a), DEA "has consistently held that where a registration can be revoked under section 824, it can, *a fortiori*, be denied under section 823 since the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next." *Kwan Bo Jin*, 77 FR 35021, 35021 n.2 (2012) (quoting *Serling Drug Co. v. Detroit Prescription Wholesaler, Inc.*, 40 FR 11918, 11919 (1975)). *See also John R. Amato*, 40 FR 22852 (1975) (Denying application where practitioner's state

*Gonzales*, however, offers no comfort to Respondent because here, the Government's case is based on his convictions for aiding and abetting violations of a duly enacted statute—21 U.S.C. 841(a)(1).<sup>4</sup> Moreover, while most prosecutions under 21 U.S.C. 841(a)(1) are based on allegations of drug dealing, the statute encompasses any knowing or intentional distribution or dispensing of a controlled substance, “[e]xcept as authorized by” the Controlled Substances Act. 21 U.S.C. 841(a)(1). As the Court of Appeals explained in affirming his convictions:

[n]urses are not authorized by law to write [Schedule II controlled substance] prescriptions, which must be written in triplicate by licensed physicians only.<sup>5</sup> [Respondent] developed a scheme that enabled nurses to see patients alone, to issue prescriptions for Schedule II [c]ontrolled [s]ubstances, and to bill for such services. He and the other physicians would pre-sign the triplicate forms and provide them to non-physician personnel to use during patient visits. These employees, although not trained or legally authorized to do so, filled in all the required prescription information—drug type, dosage, and quantity—and provided the prescriptions to the patients.

*United States v. Singh*, 390 F.3d 168, 176 (2d Cir. 2004). Indeed, the Court of Appeals noted that “[d]ata extracted from Singh’s office records revealed that the nurses issued prescriptions for at least 76,000 tablets of Schedule II Controlled Substances when Singh was not present in the Practice suite.” *Id.*

Contrary to Respondent’s contention, the Government was not required to show that any of the drugs obtained through these prescriptions were diverted. *See* Exceptions, at 2. As the Supreme Court recognized in *Gonzales*, one of the purposes of the CSA’s prescription regulation (21 CFR

1306.04(a)) is to “ensure[ ] patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse.” 546 U.S. at 274. Respondent’s nurses lacked the necessary training in medicine to properly supervise his patients and to determine whether additional prescriptions were warranted. Thus, by providing his nurses with pre-signed and otherwise blank prescriptions, Respondent’s conduct created a substantial risk that the drugs would be diverted and abused. Moreover, as Respondent did not see the patients on those occasions when his nurses provided the prescriptions to the patients, he has no idea whether any of the drugs were abused or diverted. Yet, as the CALJ found, Respondent still does not understand this. R.D. 37–38.

Respondent also argues “that billing issues were criminalized through the use of [the] CSA despite no evidence of Diversion or Public Safety Issues.” Exceptions, at 2. However, in affirming his convictions for health care fraud, *see* 18 U.S.C. 1347, the Second Circuit reviewed the sufficiency of the evidence presented at trial and found that there were numerous instances in which Respondent billed for office visits as if he had seen the patients when, in fact, the patients were seen only by his nurses. *See Singh*, 390 F.3d at 187–89. Not only are Respondent’s convictions *res judicata*, the crime of health care fraud does not require proof of either diversion or public safety issues. *See* 18 U.S.C. 1347(a).

Respondent further argues that the CALJ ignored substantial evidence in concluding that he failed to acknowledge his misconduct. Exceptions, at 3. Respondent argues that:

I admitted right from the start in 1999 that I made the mistake of leaving Pre-Signed Prescriptions for legitimate patients of the practice with treatment plan spelled [out] in the chart, and not for Diversion. I never tried to trivialize it. . . . I admitted to the truth. The Agency wants me to admit Diversion (drug trafficking) when there was none. *Id.*

My review of the record finds no instance of the Agency attempting to elicit from Respondent an admission that he engaged in drug trafficking. What the record does show, however, is that Respondent still fails to acknowledge the risk of diversion created by his practice of providing pre-signed but otherwise blank prescriptions to his nurses and authorizing them to issue the

prescriptions to the patients he did not see.<sup>6</sup>

Moreover, at the hearing, Respondent continued to dispute the extent of his misconduct in pre-signing prescriptions. Respondent testified that he engaged in this practice only after November 25, 1997, when another physician suddenly left his practice, and “I left a few, you know, eight or 10 prescriptions pre[-]signed without any patient name.” Tr. 250. The CALJ then asked Respondent: “So your testimony is that there were—in the entire practice that you had there were only eight to 10 times that you pre[-]signed prescriptions?” *Id.* Respondent answered: “That’s right, Your Honor.” *Id.*

The CALJ again asked: “And that’s your testimony under oath?” *Id.* at 250–51. Respondent answered: “Yes, that’s my testimony under oath. And all other prescriptions nurses handed were pre[-]filled and then handed to the patient. Even if I was not there they can give that because after that we learned our lesson. We cannot do this.” *Id.* at 251.

After Respondent asserted that the difference between pre-signed and pre-filled prescriptions was that the former did not have a patient’s name, the CALJ again asked: “So . . . it’s your recollection that there were only eight to 10 times that this occurred?” *Id.*

<sup>6</sup> At one point, Respondent testified “that there was no medical safety issue. And, yes, as you [the CALJ] now present it to me—and I apologize for that. This prescription could have been diverted, yes. There is no doubt about that.” Tr. 269. However, on further questioning by the CALJ as to whether pre-signing the prescriptions was a safety issue, Respondent testified: “No. Safety, I also—no, I didn’t mean no safety issue with blank prescription, no, not at all.” *Id.* Respondent then explained that “[t]here was no public safety [issue] in the sense that there was no issue that patient could be harmed. I was thinking entirely differently.” *Id.*

The CALJ then asked: “[s]o there was no safety issue with some patient who you didn’t know was going to get the prescription, with whatever drugs that were written on it that you didn’t know. . . . there was no way in your view that any of those patients could be harmed?” Tr. 269–70. Respondent answered: “They were following my previous protocol.” *Id.* at 270.

Later, the CALJ asked: “[s]he [the Nurse] was exercising her judgment for patients that you didn’t know for medications that you had no idea because you signed them?” *Id.* at 278. Respondent answered: “I knew the patients Your Honor. I knew the patients were coming in.” *Id.* In response, the CALJ asked: “Back to that again?” *Id.* Respondent answered: “No. I get back, yes, Your Honor. I apologize. I fully agree that, yes, it could be a great hazard. It could have been a great hazard.” *Id.*

In response, the CALJ stated: “I know those are your words, but they’re not very convincing the way that you say it. I must say that your tenor, it’s not very convincing that you think that.” *Id.* I find no reason to reject the CALJ’s assessment of Respondent’s demeanor and the credibility of his testimony. *See Universal Camera*, 340 U.S. at 496.

<sup>4</sup> In discussing Respondent’s conviction record for the unlawful distribution of controlled substances under factor three, the Recommended Decision refers to 18 U.S.C. 841(a)(1) in several places. *See* R.D. 32. The correct provision is 21 U.S.C. 841(a)(1).

<sup>5</sup> The CSA leaves to state law the determination of the classes of health care providers that are authorized to prescribe controlled substances. *See* 21 U.S.C. 823(f) (“The Attorney General shall register [a] practitioner[ ] . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.”); *id.* § 802(21) (“The term ‘practitioner’ means a physician, dentist, veterinarian . . . or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to dispense . . . a controlled substance in the course of professional practice. . . .”). *See also* 21 CFR 1306.03(a) (“A prescription for a controlled substance may be issued only by an individual practitioner who is . . . [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession and . . . [e]ither registered or exempted from registration . . . .”).

Respondent answered: “That’s correct, Your Honor.” *Id.* Following up, the CALJ asked: “there were only eight to 10 total pre[-]signed prescriptions that you ever made in your life?” *Id.* After Respondent ascertained that the CALJ meant that the prescriptions had been signed but otherwise “left blank,” Respondent answered “[y]es.” *Id.* 252.

The evidence further shows that on December 2, 1997, Investigators from the New York State Bureau of Controlled Substances went to his office at Albany Memorial Hospital and found six blank pre-signed prescriptions in the possession of his nurse. RX 12, at 2. At the hearing, Respondent testified that “[a]fter the investigation, we stopped doing that.”<sup>7</sup> Tr. 398. Yet later in his testimony, Respondent testified that this practice continued until some unspecified date in February 1998, when he hired another doctor for the practice, *id.* at 405–6, before returning to his original story and asserting that he had provided pre-signed prescriptions only on December 2, 1997 and had “stopped that right away” after the State’s Investigator had come to his office. *Id.* at 411–12.

Respondent, however, was convicted of twenty-four counts of causing an act to be done and aiding and abetting the unlawful distribution of schedule II controlled substances based on his having provided pre-signed but otherwise blank prescriptions to his employees. *See* GX 2, at 21–24 (Superseding Indictment); GX 5, at 1 (District Court’s Judgment). Moreover, Respondent was convicted of having committed this offense beginning as early as November 25, 1996, and was convicted of nineteen such offenses before November 25, 1997, the date on which his physician-employee quit the practice. *See* GX 2, at 21–24; GX 5, at 1.

As for his testimony that he stopped providing pre-signed prescriptions after becoming aware of the investigation, Respondent was convicted of having committed the offense on five occasions in January 1998, more than a month after he became aware of the investigation. *See* GX 2, at 23–24; GX 5, at 1. Moreover, the Court of Appeals found that on July 27, 1999—nearly 18 months after the visit by the State Investigator—federal agents executed

search warrants at Respondent’s offices in Albany and Port Chester, as well as his home, and found still more pre-signed prescriptions. *See* 390 F.3d at 178.

Likewise, with respect to his convictions for health care fraud, Respondent asserted that there were only 15 or 20 times when he billed an office visit as if he had seen the patient when the patient had only been seen by a nurse. *Id.* at 254. While Respondent admitted that “the billing mistake was actually a big mistake” and “was stupid of me,” *id.* at 255, here too, he attempted to minimize his misconduct asserting, in essence, that he was confused because “in some states . . . if [the] doctor has set a plan, the nurse can do it as to this doctor’s plan, [and the visit] can be billed under [the] doctor.” *Id.* at 257. Unexplained is why, if Respondent had overbilled only 15 to 20 times, the District Court ordered him to pay more than \$227,000 in restitution to approximately 250 payees.<sup>8</sup> *See* GX 5, at 7–13. The amount of the restitution he was ordered to pay likewise refutes his assertion that the overbilling was not motivated by money. *See* Tr. 262 (Respondent’s testimony denying that the overbilling was financially motivated).

Finally, Respondent argues that the CALJ improperly ignored the State’s recommendation; he also provides a laundry list of exhibits that he believes the CALJ ignored. As for the decision of the Peer Committee of the New York State Department of Education Committee in the Professions, the State has not made a recommendation to the Agency as to whether to grant a new registration to Respondent. While the State’s decision to issue Respondent a new medical license establishes that he again holds authority under state law to dispense controlled substances and thereby satisfies the CSA’s prerequisite for obtaining a practitioner’s registration, this “Agency has long held that ‘the Controlled Substances Act requires that the Administrator . . .

make an independent determination [from that made by state officials] as to whether the granting of controlled substance privileges would be in the public interest.’” *David A. Ruben*, 78 FR 38363, 38379 n.35 (2013) (quoting *Mortimer Levin*, 57 FR 8680, 8681 (1992)).

Notably, under New York law, “an applicant . . . does not have to admit past wrongdoing the applicant does not believe he committed . . . in order to be readmitted to his profession.” GX 9F, at 12 (citation omitted). To be sure, in exercising its sovereign power to regulate the medical profession, the State of New York may follow this policy. *See Ruben*, 78FR at 38837 n.53. However, DEA is charged with protecting the public interest, *see* 21 U.S.C. 823(f), and based on the threat to public health and safety caused by intentional and knowing misconduct involving controlled substances, it is fully within DEA’s authority to require an applicant for registration to acknowledge the full extent of his misconduct which has been proven on the record of the proceeding. *See MacKay v. DEA*, 664 F.3d 808, 821 (10th Cir. 2011) (discussing *Jayam Krishna-Iyer*, 74 FR 459, 462 (2009)). And while both *MacKay* and *Krishna-Iyer* involved practitioners who engaged in intentional diversion (*i.e.*, drug trafficking), the same consideration applies here, where, even though there is no evidence that the drugs the patients obtained using the pre-signed prescriptions were diverted, Respondent engaged in intentional or knowing misconduct which created a substantial risk of diversion.

Thus, while Respondent has put forward evidence of his remedial measures, his continued refusal to acknowledge the full scope of his criminal conduct precludes a finding that his registration would be consistent with the public interest. *See* R.D. at 37–38. Indeed, in his post-hearing brief, Respondent goes so far as to characterize his convictions for violating 21 U.S.C. 841(a)(1) as “technical convictions.” Resp. Post-Hrng. Br., at 12. They were not.

Moreover, as I have previously explained, the record contains no support for Respondent’s assertion (Exceptions at 4) that he was required to admit to having issued prescriptions outside of the usual course of professional practice and for other than a legitimate medical purpose (*i.e.*, drug trafficking). *See* 21 CFR 1306.04(a). What he was required to acknowledge was the full scope of his criminal behavior and the risk of diversion it created, which, as established by his

<sup>7</sup> According to the Investigator’s Report, Respondent’s wife was present at his Albany office and “called his attorney, who showed up at the office within minutes” but “would not allow the [Investigator] to make photocopies of those blanks on” that date. RX 12, at 2. (The pre-signed prescriptions were, however, surrendered several days later. *Id.*) I therefore find that Respondent was aware of the investigation on December 2, 1997.

<sup>8</sup> Of further note, the Court of Appeals also rejected Respondent’s challenge to his convictions for health care fraud, explaining that his “contention that the billing codes and rules were sufficiently ambiguous to preclude a finding of fraudulent intent on his part is belied by the evidence. There are in fact no ambiguities in the billing requirements.” 390 F.3d at 187. *See also id.* at 187–88 (“Nor could a rational jury find ambiguities sufficient to negate fraudulent intent . . . in the Medicare rules that allow billing for services performed by registered nurses when those services are ‘incident to’ a physician’s services. The requirements for ‘incident to’ billing are that the physician must be present in the office suite and available to provide assistance. This requirement is plain enough, and there is ample proof that Singh did not comply with it.”).

convictions and the Second Circuit's opinion, went on for a far longer period and to a far greater extent than he was willing to acknowledge during this proceeding.

Accordingly, I find the CALJ's conclusion that Respondent has not accepted responsibility for his misconduct to be fully supported by the record and that he has not put forward sufficient evidence "that could reasonably support a finding that" he can be entrusted with a registration. R.D. at 38. Because I also agree with the CALJ's finding that Respondent's misconduct was egregious and that he still "does not believe he was mistaken in any way," I also agree that these factors support the denial of his application. *See id.* at 39. I therefore adopt the CALJ's recommendation that I deny Respondent's application.

#### Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Arvinder Singh, M.D., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, denied. This Order is effective immediately.

Dated: February 10, 2016.

**Chuck Rosenberg,**

*Acting Administrator.*

[FR Doc. 2016-03361 Filed 2-17-16; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Notice of Availability of Funds and Funding Opportunity Announcement for: Summer Jobs and Beyond: Career Pathways for Youth (CPY)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Funding Opportunity Announcement (FOA).

*Funding Opportunity Number:* FOA-ETA-16-08.

**SUMMARY:** The Employment and Training Administration (ETA), U.S. Department of Labor, announces the availability of up to \$20,000,000 in grant funds authorized by section 169(c) of the Workforce Innovation and Opportunity Act (WIOA), Public Law 113-128, Dislocated Worker Demonstration Projects, and the Consolidated Appropriation Act of 2016, Public Law 114-113 for the pilot grant program, Summer Jobs and Beyond: Career Pathways for Youth (CPY). ETA plans to award

approximately 10-11 grants of approximately \$2,000,000 each to Local Workforce Development Boards (LWDB). This program is designed to provide employment-related services to eligible youth who are new entrants to the workforce, including those with limited current or past work experience.

The program will provide youth with work experience opportunities, including summer and year-round part-time job opportunities for in-school youth and employment and work experience opportunities throughout the year for out-of-school youth, and exposure to career pathways in in-demand job sectors. The grants will require partnerships between LWDBs and local summer employment programs, employers, Local Education Agencies (LEAs), and re-engagement centers. Other community partners may provide services to eligible youth that assist in the development of work experience and entry into career pathways.

The complete FOA and any subsequent FOA amendments in connection with this solicitation are described in further detail on ETA's Web site at <http://www.doleta.gov/grants/> or <http://www.grants.gov>. The Web sites provide application information, eligibility requirements, review and selection procedures, and other program requirements governing this solicitation.

**DATES:** The closing date for receipt of applications under this Announcement is March 25, 2016. We must receive applications no later than 4:00:00 p.m. Eastern Time.

**FOR FURTHER INFORMATION CONTACT:** Janice Sheelor, Grants Management Specialist, Office of Grants Management, at (202) 693-3538. Applicants should email all technical questions to [sheelor.janice@dol.gov](mailto:sheelor.janice@dol.gov) and reference the Funding Opportunity Number listed in this notice.

The Grant Officer for this FOA is Latifa Jeter.

Signed February 9, 2016 in Washington, DC.

**Eric D. Luetkenhaus,**

*Grant Officer/Division Chief, Employment and Training Administration.*

[FR Doc. 2016-03336 Filed 2-17-16; 8:45 am]

**BILLING CODE 4510-FT-P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Representative Fee Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, "Representative Fee Request," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 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 March 21, 2016.

**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=201508-1240-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201508-1240-002) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto: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-OWCP, 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](mailto: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](mailto:DOL_PRA_PUBLIC@dol.gov).

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** An attorney or other representative may

represent an individual filing for compensation benefits with the OWCP. The representative is entitled to request a fee for services under the Federal Employees' Compensation Act and under the Longshore and Harbor Workers' Compensation Act; however, the OWCP must approve the fee before the representative can make any demand for payment. This ICR sets forth the criteria for the information the respondent must present in order to have the fee approved by the OWCP. The information collection does not impose a particular form or format for the application, provided all required information is presented. The Federal Employees' Compensation Act and Longshore and Harbor Workers' Compensation Act authorize this information collection. *See* 5 U.S.C. 8127 and 33 U.S.C. 928.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240-0049.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 11, 2015 (80 FR 54804).

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 Control Number 1240-0049. 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-OWCP.

*Title of Collection:* Representative Fee Request.

*OMB Control Number:* 1240-0049.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 9,307.

*Total Estimated Number of Responses:* 9,307.

*Total Estimated Annual Time Burden:* 4,654 hours.

*Total Estimated Annual Other Costs Burden:* \$8,609.

Dated: February 9, 2016.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2016-03426 Filed 2-17-16; 8:45 am]

**BILLING CODE 4510-CR-P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for Employment Information

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, "Request for Employment Information" to the Office of Management and Budget (OMB) for review and approval for continued use, without change, 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 March 21, 2016.

**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=201507-1240-003](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201507-1240-003) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto: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-OWCP, 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](mailto: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](mailto:DOL_PRA_PUBLIC@dol.gov).

#### FOR FURTHER INFORMATION CONTACT:

Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend approval under the PRA for the Request for Employment Information, Form CA-1027, information collection used to collect data about a claimant's private sector employment. The OWCP uses the information to determine continued eligibility for benefits under the Federal Employees' Compensation Act (FECA). FECA section 4(b) authorizes this information collection. *See* 5 U.S.C. 8106(b).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this

information collection under Control Number 1240-0047.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 24, 2015 (80 FR 51322).

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 Control Number 1240-0047. 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-OWCP.

*Title of Collection:* Request for Employment Information.

*OMB Control Number:* 1240-0047.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 154.

*Total Estimated Number of Responses:* 154.

*Total Estimated Annual Time Burden:* 39 hours.

*Total Estimated Annual Other Costs Burden:* \$74.

Dated: February 8, 2016.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2016-03428 Filed 2-17-16; 8:45 am]

**BILLING CODE 4510-CH-P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

[Docket No OSHA-2015-0014]

#### Maritime Advisory Committee for Occupational Safety and Health (MACOSH)

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice of MACOSH Membership.

**SUMMARY:** On April 29, 2015, the Secretary of Labor announced the renewal of the Maritime Advisory Committee for Occupational Safety and Health (MACOSH). The MACOSH charter was signed on April 30, 2015, and will expire after two years on April 30, 2017. On January 20, 2016, Secretary Perez selected 15 members and a Special Agency Liaison to serve on the Committee. The Committee is diverse and balanced, both in terms of segments of the maritime industry represented (e.g., shipyard employment, longshoring, marine terminal, and commercial fishing industries), and in the views and interests represented by the members.

#### FOR FURTHER INFORMATION CONTACT:

*For press inquiries:* Frank Meilinger, OSHA's Office of Communications, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-1725; email *Meilinger.Francis2@dol.gov*.

*For general information about MACOSH:* Ms. Amy Wangdahl, Director, Office of Maritime and Agriculture, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-2066; email *Wangdahl.amy@dol.gov*.

**SUPPLEMENTARY INFORMATION:** MACOSH will contribute to OSHA's performance of its duties under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*). Authority to establish this Committee is at Sections 6(b)(1) and 7(b) of the OSH Act, Section 41 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), Secretary of Labor's Order 1-2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR part 1912. The Committee will advise OSHA

on matters relevant to the safety and health of employees in the maritime industry. This includes advice on maritime issues that will result in more effective enforcement, training, and outreach programs, and streamlined regulatory efforts. The maritime industry includes shipyard employment, longshoring, marine terminal, and commercial fishing industries. The Committee will function solely as an advisory body in compliance with the provisions of the FACA and OSHA's regulations covering advisory committees (29 CFR part 1912).

#### Background

The maritime industry has historically experienced a high incidence of work-related fatalities, injuries, and illnesses. OSHA targeted this industry for special attention due to that experience. This targeting included development of guidance or outreach materials specific to the industry, rulemakings to update requirements, and other activities. MACOSH will advise the Secretary through the Assistant Secretary of Labor for Occupational Safety and Health on matters relevant to the safety and health of employees in the maritime industry. The Committee's advice will result in more effective enforcement, training and outreach programs, and streamlined regulatory efforts.

#### Appointment of Committee Members

OSHA received nominations of highly qualified individuals in response to the Agency's request for nominations (80 FR 31620, June 3, 2015). The Secretary selected to serve on the Committee individuals who have broad experience relevant to the issues to be examined by the Committee. The MACOSH members are:

Robert Fiore, International Longshoremen's Association;  
Ed Ferris, International Longshore and Warehouse Union;  
James A. Reid, International Association of Machinists and Aerospace Workers;  
Matthew Layman, United States Coast Guard;  
Miriam Bolaffi, United States Navy;  
David Turner, Ceres Terminals, Incorporated;  
Gunther Hooch, Signal Administration;  
Larry Liberatore, American Society of Safety Engineers;  
James Rone, Washington State Department of Labor and Industries;  
Chelsea Woodward, U.S. Department of Health and Human Services;  
National Institute of Occupational Safety and Health;



Robert Godinez, International Brotherhood of Boilermakers—Iron Ship Builders;  
 Donald V. Raffo, General Dynamics Corp.;  
 Solomon Egbe, Ports America Chesapeake;  
 Amy Sly Liu, Marine Chemist Association; and  
 James R. Thornton, American Industrial Hygiene Association.  
 The Special Agency Liaison to MACOSH is:  
 Leonard Howie, Director, Office of Workers' Compensation Programs.

#### Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice pursuant to Sections 6(b)(1), and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)(1), 656(b)), the Federal Advisory Committee Act (5 U.S.C. App. 2), Section 41 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), Secretary of Labor's Order 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR part 1912.

Signed at Washington, DC, on February 12, 2016.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2016–03377 Filed 2–17–16; 8:45 am]

**BILLING CODE 4510–26–P**

#### NATIONAL SCIENCE FOUNDATION

##### National Science Board; Sunshine Act Meetings; Notice

The National Science Board's *ad hoc* Task Force on NEON Performance and Plans, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a meeting for the transaction of National Science Board business, as follows:

**DATE AND TIME:** Wednesday, February 17, 2016 from 8:30 p.m.–9:30 p.m. EST.

**SUBJECT MATTER:** Task Force Chair's opening remarks; approval of minutes of the closed January 28, 2016 meeting; Task Force Chair's update; and Discussion.

**STATUS:** Closed.

This meeting will be held by teleconference originating at the

National Science Board Office, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

Please refer to the National Science Board Web site ([www.nsf.gov/nsb](http://www.nsf.gov/nsb)) for information or schedule updates, or contact: Elise Lipkowitz ([elipcowi@nsf.gov](mailto:elipcowi@nsf.gov)), National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

**Ann Bushmiller,**

*NSB Senior Legal Counsel.*

[FR Doc. 2016–03425 Filed 2–16–16; 11:15 am]

**BILLING CODE 7555–01–P**

#### NUCLEAR REGULATORY COMMISSION

[NRC–2011–0011]

##### Criteria and Design Features for Inspection of Water-Control Structures Associated With Nuclear Power Plants

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Regulatory Guide; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 2 of Regulatory Guide (RG) 1.127, “Criteria and Design Features for Inspection of Water-Control Structures Associated With Nuclear Power Plants.” This RG describes a method that the staff of the NRC considers acceptable for designing water-control structures (e.g., dams, slopes, canals, reservoirs, and associated conveyance facilities) such that periodic inspections may be performed. In addition, this guide describes an acceptable inspection and monitoring program for water-control structures. Water-control structures include those used in the emergency cooling water system and those relied upon for flood protection.

**DATES:** Revision 2 to RG 1.127 is available on February 18, 2016.

**ADDRESSES:** Please refer to Docket ID NRC–2011–0011 when contacting the NRC about the availability of information regarding this document. You may obtain publically-available information related to this document using the following methods:

- Federal Rulemaking Web site: Go to <http://www.regulations.gov> and search for Docket ID NRC–2011–0011. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- NRC's Agencywide Documents Access and Management System

(ADAMS): You may obtain publicly-available documents online in the ADAMS Public Document 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](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 2 of RG 1.127, is available in ADAMS under Accession No. ML15107A412. The regulatory analysis may be found in ADAMS under Accession No. ML093060317.

- 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.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

#### FOR FURTHER INFORMATION CONTACT:

Robert Pettis, Office of Nuclear Reactor Regulation, telephone: 301–415–3214, email: [Robert.Pettis@nrc.gov](mailto:Robert.Pettis@nrc.gov), Kenneth Karwoski, Office of Nuclear Reactor Regulation, telephone: 301–415–2752, email: [Kenneth.Karwoski@nrc.gov](mailto:Kenneth.Karwoski@nrc.gov), or Mark Orr, Office of Nuclear Regulatory Research, telephone: 301–415–6003, email: [Mark.Orr@nrc.gov](mailto:Mark.Orr@nrc.gov). All are on the staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

The NRC is issuing a revision to an existing guide in the NRC's “Regulatory Guide” series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the NRC staff uses in evaluating specific issues or postulated events, and data that the NRC staff needs in its review of applications for permits and licenses.

Revision 2 of RG 1.127 was issued with a temporary identification as Draft Regulatory Guide, DG–1245. The RG is being updated to provide licensees and applicants with the most current guidance and to help ensure that applicants and licensees are able to demonstrate compliance with the applicable regulations.

## II. Additional Information

DG-1245 was published in the **Federal Register** on January 23, 2015 (80 FR 3661) for a 60-day public comment period. The public comment period closed on March 24, 2015. Public comments on DG-1245 and the staff responses to the public comments are available under ADAMS Accession No. ML15107A414.

## III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

## IV. Backfitting and Issue Finality

This RG does not constitute backfitting as defined in section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR) (the Backfit Rule), and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants.” This RG provides guidance on one possible means for meeting NRC’s regulatory requirements for developing appropriate Inservice Inspection Programs (ISI) and surveillance programs for dams, slopes, canals, and other water-control structures associated with emergency cooling and flood protection water systems as required by General Design Criterion 45, “Inspection of Cooling Water System,” of Appendix A, “General Design Criteria for Nuclear Power Plants,” to 10 CFR part 50, “Domestic Licensing of Production and Utilization Facilities.”

Existing licensees and applicants for standard design certifications will not be required to comply with the new positions set forth in this RG, unless the licensee or standard design certification applicant seeks a voluntary change to its licensing basis with respect to ISI or surveillance programs for water-control structures, and where the NRC determines that the safety review must include consideration of the ISI or surveillance program. Further information on the staff’s use of the RG is contained in the RG under Section D. Implementation.

Dated at Rockville, Maryland, this 11th day of February, 2016.

For the Nuclear Regulatory Commission.

**Thomas H. Boyce,**

*Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2016–03346 Filed 2–17–16; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on March 2, 2016, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

**Tuesday, March 2, 2016—1:00 p.m. Until 5:00 p.m.**

The Subcommittee will review the Fermi Unit 2 License Renewal Application. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, DTE Electric Company, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or Email: [Kent.Howard@nrc.gov](mailto:Kent.Howard@nrc.gov)) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2015 (80 FR 63846).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/acrs>. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO.

Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: February 3, 2016.

**Mark L. Banks,**

*Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2016–03370 Filed 2–17–16; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Radiation Protection and Nuclear Materials; Notice of Meeting

The ACRS Subcommittee on Radiation Protection and Nuclear Materials will hold a meeting on March 2, 2016, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

**Tuesday, March 2, 2016—8:30 a.m. Until 12:00 p.m.**

The Subcommittee will review draft NUREG/CR–7209, “A Compendium of Spent Fuel Transportation Package Response Analyses to Severe Fire Accident Scenarios.” The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher Brown (Telephone 301–415–7111 or Email: [Christopher.Brown@nrc.gov](mailto:Christopher.Brown@nrc.gov)) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one

electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2015 (80 FR 63846).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/acrs>. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240-888-9835) to be escorted to the meeting room.

Dated: February 4, 2016.

**Mark L. Banks,**

*Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2016-03371 Filed 2-17-16; 8:45 am]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Reliability and PRA

#### Notice of Meeting

The ACRS Subcommittee on Reliability and PRA will hold a meeting on March 1, 2016, Room T-2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of portions that may be closed to protect information that is proprietary pursuant to 5 U.S.C. 552b(c)(4). The agenda for the subject meeting shall be as follows:

*Tuesday, March 1, 2016—8:30 a.m. Until 2:00 p.m.*

The Subcommittee will discuss the progress of the NRC staff's Level 3 Probabilistic Risk Assessment (PRA) Project. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), John Lai (Telephone 301-415-5197 or Email: [John.Lai@nrc.gov](mailto:John.Lai@nrc.gov)) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 1, 2015 (80 FR 63846).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/acrs>. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, Maryland. After registering with security, please contact Mr. Theron Brown (Telephone 240-888-9835) to be escorted to the meeting room.

Dated: February 4, 2016.

**Mark L. Banks,**

*Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2016-03369 Filed 2-17-16; 8:45 am]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

[Docket No. No. 40-6563; NRC-2016-0032]

### Mallinckrodt, LLC

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License termination; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is providing public notice of the termination of Source Materials License No. STB-401. The NRC has terminated the license of the decommissioned Mallinckrodt facility in St. Louis, Missouri and has approved the site for unrestricted release.

**DATES:** Notice of termination of Source Materials License No. STB-401 issued on February 18, 2016.

**ADDRESSES:** Please refer to Docket ID NRC-2016-0032 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0032. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "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](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced (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:**

Karen Pinkston, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; telephone: 301-415-3650, email: [Karen.Pinkston@nrc.gov](mailto:Karen.Pinkston@nrc.gov).

**SUPPLEMENTARY INFORMATION:** The NRC has terminated License No. STB-401, held by Mallinckrodt LLC (Mallinckrodt), for a site in St. Louis, Missouri and has approved the site for unrestricted release.

In 1961, Mallinckrodt received License No. STB-401 to extract columbium and tantalum from natural ores and tin slags. In July 1993, the NRC amended Mallinckrodt's license to a possession only license for the purpose of decommissioning and license termination. The contamination at the site was due to licensed activities consisted of natural uranium, natural thorium, and their associated progeny. The Mallinckrodt site is a 43 acre site subdivided into ten areas called Plants. The former Columbium-Tantalum (C-T) process areas included 21 support buildings on approximately 4.2 acres, primarily located within Plant 5, but also in portions of Plants 1, 3, 6, 7, and 8.

In addition to the C-T activities conducted under License No. STB-401, the Mallinckrodt site was previously used for Manhattan Engineer District/Atomic Energy Commission (MED/AEC) activities. The U.S. Army Corps of Engineers (USACE) is responsible for remediating these portions of the site under the Formerly Utilized Sites Remedial Action Program (FUSRAP).

Mallinckrodt decommissioned the C-T project areas of the site in two phases. In Phase I, Mallinckrodt decommissioned the buildings and equipment to the extent necessary to meet the NRC's guidelines for unrestricted release in § 20.1402 of title 10 of the *Code of Federal Regulations* (10 CFR). Phase I of the decommissioning project was completed in February 2007 (ADAMS Accession No. ML070530675).

Following Phase I decommissioning, the C-T areas remaining for remediation were limited to the soil, pavement, and sewers in Plant 5, as well as portions of Plant 6 and 7. Mallinckrodt's Phase II Decommissioning Plan (DP) (ADAMS Accession Nos. ML083150652 and ML101620140) described Mallinckrodt's plan for decommissioning the remainder of the C-T project areas to meet the criteria for unrestricted release, though the remediation of portions of Plants 6 and 7 was not included in the DP and was addressed separately, as is

described below. The NRC approved Mallinckrodt's Phase II DP on July 1, 2010 (ADAMS Accession No. ML091960063).

Plants 6 and 7 contained residual contamination from both licensed activities and MED/AEC activities. The MED/AEC activities in Plants 6 and 7 resulted in contamination in buildings and soil in these plants. Additionally, in Plant 6, approximately 300 cubic yards of unreacted ore (URO) generated as part of the C-T process was buried in 10 trenches in 1972 and 1973. Plant 7 contained sewers, a grit chamber, and two wastewater neutralization basins that were used to support C-T operations.

Mallinckrodt and the USACE entered into two agreements to delineate remediation responsibilities in Plants 6 and 7. Mallinckrodt's responsibilities included the removal of the buried URO in Plant 6 and the removal of the grit chamber in Plant 7. On February 9, 2015, USACE provided Mallinckrodt with a letter acknowledging that Mallinckrodt had completed the removal of the URO and grit chambers and stating that the USACE was proceeding with remediation of these areas under FUSRAP (ADAMS Accession No. ML15090A705).

Mallinckrodt's Phase II DP requested that the NRC terminate its license in accordance with 10 CFR 20.1402 without accounting for MED/AEC contamination in demonstrating compliance with the dose limits in § 20.1402. In its approval of the Phase II DP, the NRC exempted the MED/AEC material from consideration in demonstrating compliance with license termination requirements (ADAMS Accession No. ML091960087). The basis for granting the exemption was: (1) Mallinckrodt will meet 25 mrem/year unrestricted release criteria for C-T process areas; and (2) unlicensed MED/AEC material is being remediated to the NRC's unrestricted release standards of 25 mrem/year by USACE. The dose from the residual radioactivity at the site is primarily from the direct radiation pathway, therefore the NRC concluded that an individual would not simultaneously receive a dose from both areas. The staff, therefore, concluded that it is reasonable to terminate License STB-401 after Mallinckrodt completes decommissioning activities in the C-T process areas and demonstrates that the C-T process areas at the site meet the NRC's unrestricted release criteria.

This finding is based in part on USACE's commitment to remediate the site under FUSRAP. At the time, Mallinckrodt and USACE had reached an agreement regarding delineation of

responsibility for remediating Plant 6, but had not yet agreed on the delineation of responsibility for Plant 7. Therefore, the exemption was conditioned on Mallinckrodt and USACE reaching a delineation agreement for Plant 7 before decommissioning was complete. Mallinckrodt and USACE entered into a delineation agreement for Plant 7 on October 31, 2014 (cover letter available at ADAMS Accession No. ML15041A076).

Mallinckrodt performed remediation of the C-T project areas based on their Phase II DP, conducted a Final Status Survey (FSS) and provided the NRC with a Final Status Survey Report (FSSR) documenting the residual radioactivity remaining on site for which Mallinckrodt was responsible (ADAMS Accession No. ML14177A180). Mallinckrodt subsequently provided additional information in response to the NRC's requests for additional information (ADAMS Accession Nos. ML14339A278, ML15177A051, and ML15334A417). On February 12, 2015, Mallinckrodt submitted a license amendment application requesting the use of the dose assessment approach, as well as the derived concentration guideline level (DCGL) approach (ADAMS Accession No. ML15063A404). The NRC approved this license amendment request on February 4, 2016 (ADAMS Accession No. ML15286A174).

The NRC has now completed its review of the FSSR and associated documents according to NUREG-1757, "Consolidated Decommissioning Guidance," and guidance in the Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) (NUREG 1575). The NRC staff has concluded that the FSS design and data collected were adequate to characterize the residual radioactivity in the portions of the Mallinckrodt site where NRC regulated activities took place. The NRC staff also concluded that the data analysis and dose assessments performed are appropriate and that the projected dose from residual radioactivity in these areas is less than the 25 mrem/year dose criterion in 10 CFR 20.1402. For these reasons, the NRC staff has determined that Mallinckrodt has demonstrated that the site will meet the radiological criteria for license termination described in 10 CFR part 20 subpart E and the exemption granted by the NRC in its approval of the Phase II DP. Therefore, Source Materials License No. STB-401 has been terminated.

Dated at Rockville, Maryland, this 9th day of February 2016.

For the Nuclear Regulatory Commission.

**Michael A. Norato,**

*Chief, Materials Decommissioning Branch  
Division of Decommissioning, Uranium  
Recovery, and Waste Programs, Office of  
Nuclear Material Safety and Safeguards.*

[FR Doc. 2016-03419 Filed 2-17-16; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52-025 and 52-026; ASLBP  
No. 16-944-01-LA-BD01]

**Atomic Safety and Licensing Board;  
Before Administrative Judges: Ronald  
M. Spritzer, Chairman; Nicholas G.  
Trikouros; Dr. James F. Jackson; in  
the Matter of Southern Nuclear  
Operating Company, Inc.; (Vogtle  
Electric Generating Plant, Units 3 and  
4)**

February 10, 2016.

### Order

(Scheduling Oral Argument)

Before the Board is a petition to intervene and request for a hearing, filed by Blue Ridge Environmental Defense League and its chapter Concerned Citizens of Shell Bluff (collectively Petitioner).<sup>1</sup> Oral argument on contention admissibility will be held on Tuesday, March 15, 2016, beginning at 10:00 a.m. EDT. This argument will take place at the U.S. Bankruptcy Court, Federal Justice Center, Plaza Building, 600 James Brown Boulevard (formerly 9th Street), Augusta, GA 30901.

### Instructions

On or before Friday, March 11, 2016, the Petitioner, the Licensee, and the NRC Staff must each provide the names of their representatives by email to the Board and the service list. Only designated representatives will be permitted to present oral argument. Each counsel or other representative for each participant in this proceeding who has not already done so must file and serve a notice of appearance on or before March 11, 2016, containing all of the information required by 10 CFR § 2.314(b).

The primary purpose of this oral argument is for the Board to ask questions and receive answers concerning contention admissibility issues presented by the pleadings. As to each contention, the Petitioner shall have 15 minutes to present an

introductory argument, and the NRC Staff and the Licensee shall each have 10 minutes as well. The Petitioner may reserve up to 5 minutes of its allotted time for rebuttal. No other rebuttal will be permitted.

In general, the participants should not repeat arguments already presented in their written filings, but should focus on responding to the Board's questions. The argument is not an evidentiary hearing, and the participants therefore should not attempt to introduce evidence during the argument. The participants should advise the Board and the other participants no later than March 8, 2016 if they plan to refer to any type of visual aid during the argument. No material that is not already cited in the record before the Board should be used as a visual aid.

### Public Attendance

The public is welcome to attend the argument, but space is limited within the courtroom. Additionally, only the parties' designated representatives will be permitted to participate in the argument. Neither signs nor any manner of demonstration will be permitted in the courtroom. Those people wishing to attend the oral argument in person should contact the Board's law clerk, Cooper Strickland, at 301-415-5880 or [Cooper.Strickland@nrc.gov](mailto:Cooper.Strickland@nrc.gov), no later than Wednesday, March 9, 2016 to provide their names for security purposes. All persons participating in person must present a valid photo ID and should arrive at least fifteen minutes early so as to allow sufficient time to pass through security screening. Furthermore, cell phones are not permitted in the Federal Justice Center.

### Transcript Availability

Sometime after March 15, 2016, a transcript of the oral argument will be available for public inspection electronically on the NRC's Electronic Hearing Docket (EHD). EHD is accessible from the NRC Web site at <https://adams.nrc.gov/ehd>. For additional information regarding the EHD please see <http://www.nrc.gov/about-nrc/regulatory/adjudicatory.html#ehd>. Persons who do not have access to the internet or who encounter problems in accessing the documents located on the NRC's Web site may contact the NRC Public Document Room reference staff by email to [pdr@nrc.gov](mailto:pdr@nrc.gov) or by telephone at (800) 397-4209 or (301) 415-4737. Reference staff are available Monday through Friday between 8:00 a.m. and 4:00 p.m. ET, except federal holidays. For additional information regarding the NRC Public

Document Room please see <http://www.nrc.gov/reading-rm/pdr.html>.

It is so ordered.

Rockville, Maryland February 10, 2016.

For The Atomic Safety and Licensing Board.

**Ronald M. Spritzer,**

*Chairman, Administrative Judge.*

[FR Doc. 2016-03372 Filed 2-17-16; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-309, and 72-1015; NRC-2016-0028]

**Independent Spent Fuel Storage  
Installation, Maine Yankee Atomic  
Power Company**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Exemption; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption in response to a September 1, 2015, request from Maine Yankee Atomic Power Company, (MYAPC or licensee) from the requirement to comply with the terms, conditions, and specifications regarding the method of compliance defined in Amendment 5 of the NAC International (NAC)-UMS System Certificate of Compliance (CoC) No. 1015, Appendix A "Technical Specifications for NAC-UMS System", Technical Specifications (TS) A.5.4 "Surveillance After an Off-Normal, Accident, or Natural Phenomena Event" at the Maine Yankee (MY) Independent Spent Fuel Storage Installation (ISFSI). The exemption request seeks a modification of TS A.5.4 inspection requirements for the inlet and outlet vents following off-normal, accident, and natural phenomena events.

**ADDRESSES:** Please refer to Docket ID NRC-2016-0028 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- Federal Rulemaking Web site: Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0028. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- NRC's Agencywide Documents Access and Management System (ADAMS): You may obtain publicly

<sup>1</sup> Amended Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff (Dec. 23, 2015).

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](mailto: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:** John Goshen, Office of Nuclear Material Safety and Safeguards, telephone: 301-415-6933, email: [John.Goshen@nrc.gov](mailto:John.Goshen@nrc.gov); U.S. Nuclear Regulatory Commission, Washington, DC 20555.

#### SUPPLEMENTARY INFORMATION:

### I. Background

The licensee is the holder of Facility Operating License No. DPR 36 which authorizes operation of MY located near Wiscasset, Maine, pursuant to part 50 of title 10 of the *Code of Federal Regulations* (10 CFR). The facility is in decommissioned status. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the NRC now or hereafter in effect.

Under Subpart K of 10 CFR part 72, a general license has been issued for the storage of spent fuel in an ISFSI at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50. Maine Yankee Atomic Power Company is licensed to operate a nuclear power reactor under 10 CFR part 50, and authorized under the 10 CFR part 72 general license to store spent fuel at the MY ISFSI. Under the terms of the general license, MY stores spent fuel using Amendment No. 5 of the NAC-UMS CoC No. 1015.

### II. Request/Action

The licensee requests an exemption from 10 CFR 72.212(b)(3), 10 CFR 72.212(b)(5)(i), and 10 CFR 72.214 for the MY ISFSI.

- Section 72.212(b)(3) requires that a general licensee use casks that conform to the terms, conditions, and specifications of a CoC or amended CoC listed in § 72.214. The NAC-UMS CoC No. 1015 is listed in 10 CFR 72.214.

- Section 72.212(b)(5)(i) requires, in relevant part, that a general licensee demonstrate a loaded cask will conform to the terms, conditions, and specifications of a CoC for a cask listed in § 72.214.

- Section 72.214 lists casks which are approved for storage of spent fuel under conditions specified in their CoCs, including CoC 1015 and Amendment No. 5.

The licensee, as a 10 CFR 72 general licensee, is required to use the NAC-UMS System according to the TS of the NAC-UMS System CoC No. 1015. Amendment No. 5 of the NAC-UMS CoC No. 1015, Appendix A, "Technical Specifications for the NAC-UMS System." Technical specification A 5.4, "Surveillance After an Off-Normal, Accident, or Natural Phenomena Event" requires that a general licensee undertake a visual surveillance of the NAC-UMS casks within 4 hours after the occurrence of an off-normal, accident or natural phenomena event in the area of the ISFSI. This NAC-UMS cask inspection is part of the general licensee's surveillance response to verify that all the CONCRETE CASK inlets and outlets are not blocked or obstructed. The NAC-UMS TS A 5.4 also requires that at least one-half of the inlets and outlets on each CONCRETE CASK be cleared of blockage or debris within 24 hours to restore air circulation.

The licensee seeks the NRC's authorization to use NAC-UMS TS A 3.1.6 as an alternative to the visual surveillance method specified in NAC-UMS TS A 5.4. Technical Specification A 3.1.6 permits *either* visual surveillance of the inlets and outlets screens or temperature monitoring of each cask to establish the operability of the Concrete Cask Heat Removal System for each NAC-UMS cask and to show that the limiting conditions for operation under 3.1.6 are met. Technical Specification A 3.1.6 establishes ongoing requirements that MY must comply with during all phases of the cask storage operations, not only after an unusual event in the area of the ISFSI. In effect, TS A 3.1.6 provides continuous temperature monitoring or visual verification of all NAC-UMS No. 1015 casks.

The proposed alternative for implementing TS A 5.4 provides that Surveillance Requirement (SR) 3.1.6.1 is required to be performed following off-normal, accident or natural phenomena events. The NAC-UMS SYSTEMS in use at an ISFSI shall be inspected in accordance with SR 3.1.6.1 within 4 hours after the occurrence of an off-normal, accident or natural phenomena

event in the area of the ISFSI to confirm operability of the CONCRETE CASK Heat Removal System for each NAC-UMS System. If a CONCRETE CASK Heat Removal System(s) for one or more NAC-UMS Systems is determined to be inoperable, Condition A of TS A 3.1.6 shall be entered and the Required Actions and associated Completion Times met, including the immediate assurance of adequate heat removal to prevent exceeding short-term temperature limits for each affected cask.

The NAC-UMS Final Safety Analysis Report (FSAR) supports the use of either method defined in SR 3.1.6.1 to establish operability to comply with NAC-UMS TS A 3.1.6 or NAC-UMS TS A 5.4. Section 11.1.2.2 of the FSAR states, "Blockage of Half of the Air Inlets would be detected by the daily concrete cask operability inspection, which is performed either by the outlet air temperature measurements or by visual inspection of the inlet and outlet screens for blockage and integrity."

### III. Discussion

Under 10 CFR 72.7, the Commission may, upon application by any interested person or upon its own initiative, grant an exemption from the requirements of 10 CFR part 72, the exemption is authorized by law, will not endanger life or property or the common defense and security and is otherwise in the public interest. As explained below, the proposed exemption is lawful, will not endanger life or property, or the common defense and security, and is otherwise in the public interest.

#### *The Exemption Is Authorized by Law*

The exemption would permit the licensee to use either of the inspection methods permitted by NAC-UMS TS A 3.1.6 as an alternative to the single surveillance method in NAC-UMS TS A 5.4. The licensee would conduct a surveillance response within 4 hours after the occurrence of an off-normal, accident, or natural phenomena event, as required by NAC-UMS TS A 5.4, but would be permitted to use either temperature monitoring or visual inspection to ensure the Concrete Cask Heat Removal Systems are within the limiting conditions for operation. The exemption is limited to off-normal, accident, or natural phenomena events, specifically major snow or icing events (snow/ice events that have the potential to or that exceed blockage of greater than one-half of the inlet or outlet vents).

The licensee requested an exemption from the provisions in 10 CFR part 72 that requires the licensee to comply

with the terms, conditions, and specifications of the CoC for the approved cask model that it uses. Section 72.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 72. Issuance of this exemption is consistent with the Atomic Energy Act of 1954, as amended, and is not inconsistent with NRC regulations or other applicable laws.

*The Exemption Is Consistent With the Common Defense and Security*

The requested exemption would allow the licensee to use the SR, conditions, required actions, and completion times defined in NAC-UMS TS A 3.1.6 as an alternative to the single-method surveillance response in NAC-UMS TS A 5.4. TS A 3.1.6 permits either visual inspection of the inlet and outlet screens or temperature monitoring to establish the operability of the Concrete Cask Heat Removal System for each NAC-UMS System and to comply with the limiting conditions for operation for TS A 3.1.6. Surveillance requirement 3.1.6.1 permits temperature monitoring or visual inspection of the inlet and outlet screens to be utilized to establish the operability of the Concrete Cask Heat Removal System for each NAC-UMS System to meet Limiting Condition for Operation 3.1.6. In the event the applicable acceptance criterion of SR 3.1.6.1 is not met, Required Action A.1 requires the licensee to immediately ensure adequate heat removal to prevent exceeding short-term temperature limits for each affected cask.

The NRC staff reviewed the licensee's request and finds allowing the use of either visual surveillance of the inlet and outlet screens or temperature monitoring of the inlets and outlets within 4 hours of the occurrence of off-normal, accident, or natural phenomena events, when limited to major snow and icing events, does not compromise safety. The exemption still requires the licensee to perform SR 3.1.6.1 to establish the operability of the Concrete Cask Heat Removal Systems every 24 hours via temperature monitoring or visual inspection of the inlet and outlet screens. In addition, the exemption provides no additional time to complete the required surveillance of the inlets and outlets screens in accordance with TS A 5.4. The use of either method will ensure that adequate air flows past the storage canisters and that heat transfer occurs. For these reasons, the NRC staff found the same level of safety is obtained by using either of the TS A 3.1.6 methods to comply with NAC-UMS TS A 5.4 during limited types off-

normal, accident, or natural phenomena.

The NRC staff has determined that the thermal, structural, criticality, retrievability, and radiation protection requirements of 10 CFR part 72 and the offsite dose limits of 10 CFR part 20 will be maintained. For these reasons, the NRC staff finds the same level of safety is obtained by using either of the TS A 3.1.6 methods to comply with NAC-UMS TS A 5.4. Therefore, the NRC concludes that the exemption will not endanger life or property or the common defense and security.

*The Exemption Presents No Undue Risk to Public Health and Safety*

As described in the application, exempting the licensee from visual surveillance of cask inlet and outlet vents within 4 hours of a major snowstorm would allow the licensee to prioritize more effectively important storm-related activities at the MY site. Snow and ice blockage of the inlet and outlet vents is unusual. Moreover, snow and ice blockages are identified reliably by temperature monitoring of individual casks. The NRC staff recognizes there is a risk to the safety of workers responsible for clearing snow and ice from cask pads during extreme winter conditions when visual surveillance of casks must be undertaken within 4 hours. The NRC staff finds this risk to workers can be reduced by using SR 3.1.6.1 to establish the operability of the Concrete Cask Heat Removal Systems via temperature monitoring or visual inspection of the inlet and outlet screens. In addition, the limiting conditions for operation of the NAC-UMS System require the Concrete Cask Heat Removal System for each cask to be operable during storage operation thus ensuring public health and safety are not reduced.

Therefore, the NRC staff finds that allowing the licensee to use the SR, conditions, required actions, and completion times defined in NAC-UMS TS A 3.1.6 as an alternative method to the single-method surveillance response in NAC-UMS TS A 5.4 would reduce worker safety risks to plant workers involved in snow removal. Therefore, granting the exemption is otherwise in the public interest.

*Environmental Considerations*

The NRC staff evaluated whether there would be significant environmental impacts associated with the issuance of the requested exemption. The NRC staff determined the proposed action fits a category of actions that do not require an environmental assessment or

environmental impact statement. The exemption meets the categorical exclusion requirements of 10 CFR 51.22(c)(25)(i)–(vi).

Granting an exemption from the requirements of 10 CFR 72.212(b)(3), 10 CFR 72.212(b)(5)(i), and 10 CFR 72.214 for the MY ISFSI involves the inspection and surveillance requirements associated with TS A 5.4. A categorical exclusion for inspection and SRs is provided under 10 CFR 51.22(c)(25)(vi)(C), if the criteria in 10 CFR 51.22(c)(25)(i)–(v) are also satisfied.

The granting of the exemption: (i) Would not involve a significant hazards consideration because it does not reduce a margin of safety, create a new or different kind of accident not previously evaluated, or significantly increase the probability or consequences of an unevaluated accident; (ii) would not create a significant change in the types or significant increase in the amounts of any effluents that may be released offsite because the exemption does not change or produce additional avenues of effluent release; (iii) would not significantly increase individual or cumulative public or occupational radiation exposure because the exemption does not introduce new or increased radiological hazards; (iv) would not result in significant construction impacts because the exemption would not involve construction or other ground disturbing activities, nor change the footprint of the existing ISFSI; (v) would not significantly increase the potential for or consequences from radiological accidents because the exemption requires a surveillance method that ensures the heat removal system of casks is maintained within the limiting conditions for operation; and (vi) the request seeks exemption from inspection or surveillance requirements, specifically, the single-method SR in NAC-UMS TS A 5.4 may be substituted with the SR, conditions, required actions, and completion times defined in NAC-UMS TS A 3.1.6.

In its review of the exemption request, the NRC staff determined the proposed exemption meets the eligibility criterion for categorical exclusion in 10 CFR 51.22(c)(25). Therefore, there are no significant radiological environmental impacts associated with the proposed action.

**IV. Conclusion**

The NRC has determined that, under 10 CFR 72.7, the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the NRC



grants MYAPC an exemption from the requirements in 10 CFR 72.212(b)(3), 10 CFR 72.212(b)(5)(i), 10 CFR 72.214, and to TS A.5.4 for the NAC-UMS System CoC No. 1015 storage casks at the MY ISFSI. The exemption authorizes the licensee to use the surveillance requirement, conditions, required actions, and completion times defined in NAC-UMS TS A 3.1.6 to comply with NAC-UMS TS A 5.4 after off-normal, accident, or natural phenomena events, but is specifically limited to major snow or icing events.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 4th day of February, 2016.

For the Nuclear Regulatory Commission.

**Steve Ruffin,**

*Acting Chief, Spent Fuel Licensing Branch,  
Division of Spent Fuel Management, Office  
of Nuclear Material Safety and Safeguards.*

[FR Doc. 2016-03413 Filed 2-17-16; 8:45 am]

**BILLING CODE 7590-01-P**

## OVERSEAS PRIVATE INVESTMENT CORPORATION

[OPIC-258, OMB 3420-xxxx]

### Submission for OMB Review; Comments Request

**AGENCY:** Overseas Private Investment Corporation (OPIC).

**ACTION:** Notice and request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the agency is creating a new information collection for OMB review and approval and requests public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of OPIC's burden estimate; the quality, practical utility, and clarity of the information to be collected; and ways to minimize reporting the burden, including automated collected techniques and uses of other forms of technology.

**DATES:** Comments must be received within sixty (60) calendar days of publication of this Notice.

**ADDRESSES:** Mail all comments and requests for copies of the subject form to OPIC's Agency Submitting Officer: James Bobbitt, Overseas Private Investment Corporation, 1100 New York Avenue NW., Washington, DC 20527. See **SUPPLEMENTARY INFORMATION** for other information about filing.

**FOR FURTHER INFORMATION CONTACT:** OPIC Agency Submitting Officer: James Bobbitt, (202)336-8558.

**SUPPLEMENTARY INFORMATION:** All mailed comments and requests for copies of the subject form should include form number [OPIC-258] on both the envelope and in the subject line of the letter. Electronic comments and requests for copies of the subject form may be sent to [James.Bobbitt@opic.gov](mailto:James.Bobbitt@opic.gov), subject line [OPIC-258].

### SUMMARY FORM UNDER REVIEW

*Type of Request:* New information collection.

*Title:* Customer Satisfaction Survey.

*Form Number:* OPIC-258.

*Frequency of Use:* One per investor per project per year.

*Type of Respondents:* Business, other institutions, individuals.

*Standard Industrial Classification Codes:* All.

*Description of Affected Public:* U.S. companies or citizens with significant involvement in OPIC projects.

*Reporting Hours:* 558\*0.333 = 186 hours.

*Number of Responses:* 558 per year, based on OPIC's portfolio as of 9/30/2015.

*Federal Cost:* \$9,694.

*Authority for Information Collection:* Sections 231 and 239(d) of the Foreign Assistance Act of 1961, as amended.

*Abstract (Needs and Uses):* The Customer Satisfaction Survey is the survey tool used by OPIC to assess the overall working experience of clients and partners doing business with OPIC. It is used to collect data and suggestions to improve customer services to provide debt financing, insurance and investment funds for overseas businesses. OPIC's mandate is to catalyze private capital for sustainable economic development, to advance U.S. foreign policy and development goals abroad.

Dated: February 11, 2016.

**Nichole Skoyles,**

*Administrative Counsel, Department of Legal Affairs.*

[FR Doc. 2016-03420 Filed 2-17-16; 8:45 am]

**BILLING CODE 3210-01-P**

## POSTAL REGULATORY COMMISSION

[Docket No. CP2015-43; Order No. 3068]

### New Postal Product

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing concerning an amendment to Priority Mail Contract

113 negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* February 19, 2016.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

### SUPPLEMENTARY INFORMATION:

#### Table of Contents

- I. Introduction
- II. Notice of Filings
- III. Ordering Paragraphs

#### I. Introduction

On February 10, 2016, the Postal Service filed notice that it has agreed to an amendment to the existing Priority Mail Contract 113 negotiated service agreement approved in this docket.<sup>1</sup> In support of its Notice, the Postal Service includes a redacted copy of the amendment as Attachment A (Amendment). The Postal Service asserts that the supporting financial documentation and financial certification it initially provided remain applicable. Notice at 1.

The Postal Service also filed the unredacted Amendment under seal. The Postal Service seeks to incorporate by reference the Application for Non-Public Treatment originally filed in this docket for the protection of information that it has filed under seal. *Id.*

The Amendment adds an alternative provision for the adjustment of prices in subsequent contract years. Amendment at 1. The Postal Service intends for the Amendment to become effective 1 business day after the date that the Commission completes its review of the Notice. Notice at 1. The Postal Service asserts that the Amendment will not materially affect the cost coverage of Priority Mail Contract 113. *Id.*

#### II. Notice of Filings

The Commission invites comments on whether the changes presented in the Postal Service's Notice are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39

<sup>1</sup> Notice of United States Postal Service of Amendment to Priority Mail Contract 113, with Portions Filed Under Seal, February 10, 2016 (Notice).

CFR part 3020, subpart B. Comments are due no later than February 19, 2016. The public portions of these filings can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Kenneth R. Moeller to represent the interests of the general public (Public Representative) in this docket.

### III. Ordering Paragraphs

*It is ordered:*

1. The Commission reopens Docket No. CP2015-43 for consideration of matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, the Commission appoints Kenneth R. Moeller to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments are due no later than February 19, 2016.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Stacy L. Ruble,**

*Secretary.*

[FR Doc. 2016-03281 Filed 2-17-16; 8:45 am]

**BILLING CODE 7710-FW-P**

## RAILROAD RETIREMENT BOARD

### Agency Forms Submitted for OMB Review, Request for Comments

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding three Information Collection Requests (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collections of information to determine (1) the practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of the information that is the

subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to the RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if the RRB and OIRA receive them within 30 days of the publication date.

1. *Title and purpose of information collection:* Application for Survivor Insurance Annuities; OMB 3220-0030.

Under Section 2(d) of the Railroad Retirement Act (RRA), monthly survivor annuities are payable to surviving widow(er)s, parents, unmarried children, and in certain cases, divorced spouses, mothers (fathers), remarried widow(er)s, and grandchildren of deceased railroad employees if there are no qualified survivors of the employee immediately eligible for an annuity. The requirements relating to the annuities are prescribed in 20 CFR 216, 217, 218, and 219.

To collect the information needed to help determine an applicant's entitlement to, and the amount of, a survivor annuity the RRB uses Forms AA-17, *Application for Widow(er)'s Annuity*; AA-17b, *Applications for Determination of Widow(er)'s Disability*; AA-18, *Application for Mother's/ Father's and Child's Annuity*; AA-19, *Application for Child's Annuity*; AA-19a, *Application for Determination of Child's Disability*; AA-20, *Application for Parent's Annuity*, and electronic Forms AA-17cert, *Application Summary and Certification*, and AA-17sum, *Application Summary*.

The AA-17 application process obtains information from an applicant about their marital history, work history, benefits from other government agencies, and Medicare entitlement for a survivor annuity. An RRB representative interviews the applicant either at a field office (preferred), an itinerant point, or by telephone. During the interview, the RRB representative enters the information obtained into an on-line information system. Upon completion of the interview, the on-line information system generates a summary of the information that was

provided on either Form AA-17cert, *Application Summary and Certification*, or Form AA-17sum, *Application Summary*, for the applicant to review and approve. Form AA-17cert documents approval using the traditional pen and ink "wet" signature, and Form AA-17sum, documents approval using the alternative signature method called Attestation. When the RRB representative is unable to contact the applicant in person or by telephone, for example, the applicant lives in another country, a manual version of Form AA-17 is used.

One response is requested of each respondent. Completion of the forms is required to obtain a benefit.

*Previous Requests for Comments:* The RRB has already published the initial 60-day notice (80 FR 75140 on December 1, 2015) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

### Information Collection Request (ICR)

*Title:* Application for Survivor Insurance Annuities.

*OMB Control Number:* 3220-0030.

*Form(s) submitted:* AA-17, AA-17b, AA-17cert, AA-17sum, AA-18, AA-19, AA-19a, and AA-20.

*Type of request:* Revision of a currently approved collection.

*Affected public:* Individuals or Households.

*Abstract:* Under Section 2(d) of the Railroad Retirement Act, monthly survivor annuities are payable to surviving widow(er)s, parents, unmarried children, and in certain cases, divorced wives (husbands), mothers (fathers), remarried widow(er)s and grandchildren of deceased railroad employees. The collection obtains information needed by the RRB to determine entitlement to and the amount of the annuity applied for.

*Changes proposed:* The RRB proposes to remove the manual version of Forms AA-17, AA-18, AA-19 and AA-20 from the information collection due to receiving less than 10 responses annually. No changes are proposed to Forms AA-17b and AA-19a.

*The burden estimate for the ICR is as follows:*

Form number	Annual responses	Time (minutes)	Burden (hours)
AA-17 Application Process:			
AA-17cert .....	900	20	300
AA-17sum .....	2,100	19	665
AA-17b:			
(With assistance) .....	250	40	167
(Without assistance) .....	20	50	17
AA-19a:			

Form number	Annual responses	Time (minutes)	Burden (hours)
(Without assistance) .....	200	45	150
(Without assistance) .....	15	65	16
Total .....	3,485	.....	1,315

**2. Title and purpose of information collection:** Application for Spouse Annuity Under the Railroad Retirement Act; OMB 3220-0042.

Section 2(c) of the Railroad Retirement Act (RRA), provides for the payment of annuities to spouses of railroad retirement annuitants who meet the requirements under the RRA. The age requirements for a spouse annuity depend on the employee's age, date of retirement, and years of railroad service. The requirements relating to the annuities are prescribed in 20 CFR 216, 218, 219, 232, 234, and 295.

To collect the information needed to help determine an applicant's entitlement to, and the amount of, a spouse annuity the RRB uses Form AA-3, *Application for Spouse/Divorced Spouse Annuity*, and electronic Forms AA-3cert, *Application Summary and Certification*, and AA-3sum, *Application Summary*.

The AA-3 application process gathers information from an applicant about their marital history, work history, benefits from other government agencies, railroad pensions and Medicare entitlement for a spouse annuity. An RRB representative

interviews the applicant either at a field office (preferred), an itinerant point, or by telephone. During the interview, the RRB representative enters the information obtained into an on-line information system. Upon completion of the interview, the on-line information system generates a summary of the information that was provided on either Form AA-3cert, *Application Summary and Certification*, or Form AA-3sum, *Application Summary*, for the applicant to review and approve. Form AA-3cert documents approval using the traditional pen and ink "wet" signature, and Form AA-3sum documents approval using the alternative signature method called Attestation. When the RRB representative is unable to contact the applicant in person or by telephone, for example, the applicant lives in another country, a manual version of Form AA-3 is used.

One response is requested of each respondent. Completion of the forms is required to obtain a benefit.

**Previous Requests for Comments:** The RRB has already published the initial 60-day notice (80 FR 75141 on December 1, 2015) required by 44 U.S.C.

3506(c)(2). That request elicited no comments.

#### Information Collection Request (ICR)

**Title:** Application for Spouse Annuity Under the Railroad Retirement Act.

**OMB Control Number:** 3220-0042.

**Form(s) submitted:** AA-3, AA-3cert, and AA-3sum.

**Type of request:** Revision of a currently approved collection.

**Affected public:** Individuals or Households.

**Abstract:** The Railroad Retirement Act provides for the payment of annuities to spouses of railroad retirement annuitants who meet the requirements under the Act. The application obtains information supporting the claim for benefits based on being a spouse of an annuitant. The information is used for determining entitlement to and amount of the annuity applied for.

**Changes proposed:** The RRB proposes to remove the manual version of Form AA-3, from the information collection due to receiving less than 10 responses annually.

**The burden estimate for the ICR is as follows:**

Form number	Annual responses	Time (minutes)	Burden (hours)
AA-3 online process:			
AA-3cert (with assistance) .....	4,700	30	2,350
AA-3sum (with assistance) .....	7,000	29	3,383
Total .....	11,700	.....	5,733

**3. Title and Purpose of information collection:** Request for Medicare Payment; OMB 3220-0131.

Under Section 7(d) of the Railroad Retirement Act, the RRB administers the Medicare program for persons covered by the railroad retirement system. The collection obtains the information needed by Palmetto GBA, the Medicare carrier for railroad retirement beneficiaries, to pay claims for payments under Part B of the Medicare program. Authority for collecting the information is prescribed in 42 CFR 424.32.

The RRB currently utilizes Forms G-740S, Patient's Request for Medicare Payment, along with Centers for Medicare & Medicaid Services Form

CMS-1500, to secure the information necessary to pay Part B Medicare Claims. One response is completed for each claim. Completion is required to obtain a benefit.

**Previous Requests for Comments:** The RRB has already published the initial 60-day notice (80 FR 72998 on November 23, 2015) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

#### Information Collection Request (ICR)

**Title:** Request for Medicare Payment.

**OMB Control Number:** 3220-0131.

**Form(s) submitted:** G-740S, CMS-1500.

**Type of request:** Extension without change of a currently approved collection.

**Affected public:** Individuals or Households.

**Abstract:** The RRB administers the Medicare program for persons covered by the Railroad Retirement System. The collection obtains the information needed by Palmetto GBA, the RRB's carrier, to pay claims for services covered under Part B of the program.

**Changes proposed:** The RRB proposes no changes to RRB Form G-740S.

**The burden estimate for the ICR is as follows:**

Estimated annual number of respondents: See Justification (Item No. 12).

Total annual responses: 1.

Total annual reporting hours: 1.

*Additional Information or Comments:*

Copies of the forms and supporting documents can be obtained from Dana Hickman at (312) 751-4981 or [Dana.Hickman@RRB.GOV](mailto:Dana.Hickman@RRB.GOV).

Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611-2092 or [Charles.Mierzwa@RRB.GOV](mailto:Charles.Mierzwa@RRB.GOV) and to the OMB Desk Officer for the RRB, Fax: 202-395-6974, Email address: [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov).

**Charles Mierzwa,**

*Chief of Information Resources Management.*

[FR Doc. 2016-03328 Filed 2-17-16; 8:45 am]

BILLING CODE 7905-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77123; File No. 4-533]

**Joint Industry Plan; Notice of Filing of Amendment No. 3 to the National Market System Plan for the Selection and Reservation of Securities Symbols Submitted by Financial Industry Regulatory Authority, Inc., BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange, LLC, NYSE MKT, LLC, and NYSE Arca, Inc.**

February 11, 2016.

On August 24, 2015, Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the following parties to the National Market System Plan for the Selection and Reservation of Securities Symbols (the "Plan"): BATS Exchange, Inc. ("BATS"), BOX Options Exchange, LLC ("BOX"), Chicago Board Options Exchange, Incorporated ("CBOE"), Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc. ("EDGA"), EDGX Exchange, Inc. ("EDGX"), FINRA, International Securities Exchange, LLC ("ISE"), NASDAQ OMX BX, Inc. ("BX"), NASDAQ OMX PHLX, Inc. ("Phlx"), The Nasdaq Stock Market LLC ("Nasdaq"), National Stock Exchange, Inc. ("NSX"), New York Stock Exchange, LLC ("NYSE"), NYSE MKT, LLC ("NYSE MKT"), and NYSE Arca, Inc. ("NYSE Arca") (collectively with FINRA, the "Parties"), filed with the

Securities and Exchange Commission ("Commission"), pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 608 thereunder,<sup>2</sup> a proposal to amend the Plan.<sup>3</sup> The proposal represents the third substantive amendment to the Plan ("Amendment") and reflects changes unanimously approved by the Parties.<sup>4</sup> The Amendment to the Plan proposes to revise Section IV(d) of the Plan (Reuse of a Symbol) to provide that, where a Party ceases to use a symbol, such party may elect to release the symbol and that such symbol may not be reused to identify a new security (other than the security that has been trading under such symbol) within 90 calendar days from the last day of its use to identify

<sup>1</sup> 15 U.S.C. 78k-1.

<sup>2</sup> 17 CFR 242.608.

<sup>3</sup> The Plan provides an orderly process for Parties to reserve available ticker symbols for equity securities. Specifically, each party to the Plan may reserve a set number of 1-, 2-, or 3-character symbols and a set number of 4- or 5-character symbols. In the case of 1-, 2-, or 3-character symbols, each party may reserve up to 20 symbols perpetually (*i.e.*, without a time limit on the reservation) as "List A reservations," and 1,500 symbols for 24 months (*i.e.*, with a 24-month expiration on the reservation) as "List B reservations." Each party also may reserve the same number of symbols on a separate "List A" and a separate "List B" for 4- or 5-character symbols.

<sup>4</sup> On November 6, 2008, the Commission approved the Symbolology Plan that was originally proposed by the CHX, Nasdaq, FINRA, NSX, and Phlx, subject to certain changes. *See* Securities Exchange Act Release No. 58904, 73 FR 67218 (November 13, 2008) (File No. 4-533). On November 18, 2008, the ISE, and on December 22, 2008, NYSE, NYSE Arca, NYSE MKT (f/k/a "NYSE Alternext US, LLC") and CBOE, and on December 24, 2008, NASDAQ OMX BX, filed amendments to join the Plan, which amendments became immediately effective upon filing. *See* Securities Exchange Act Release No. 59024 (November 26, 2008), 73 FR 74538 (December 8, 2008) (File No. 4-533) (ISE filing to join the Plan); Securities Exchange Act Release No. 59162 (December 24, 2008), 74 FR 132 (January 2, 2009) (File No. 4-533) (NYSE, NYSE Arca, NYSE Alternext US LLC and CBOE filing to join the Plan); and Securities Exchange Act Release No. 59187 (December 30, 2008), 74 FR 729 (January 7, 2009) (File No. 4-533) (NASDAQ OMX BX filing to join the Plan). On January 5, 2009 and March 6, 2009, the Parties amended the plan to modify certain effective dates in the Plan, which amendments became immediately effective upon filing. *See* Securities Exchange Act Release No. 59225 (January 9, 2009), 73 FR 3117 (January 16, 2009) (File No. 4-533) (Amendment No. 1); and Securities Exchange Act Release No. 59574 (March 13, 2009), 74 FR 11981 (March 20, 2009) (File No. 4-533) (Amendment No. 2). On September 30, 2009, BATS, on July 7, 2010, EDGA and EDGX, and on May 7, 2012, BOX, filed amendments to join the Plan, which amendments became immediately effective upon filing. *See* Securities Exchange Act Release No. 60856 (October 21, 2009), 74 FR 55276 (October 27, 2009) (File No. 4-533) (BATS filing to join the Plan); Securities Exchange Act Release No. 62573 (July 26, 2010), 75 FR 45682 (August 3, 2010) (File No. 4-533) (EDGA and EDGX filing to join the Plan); and Securities Exchange Act Release No. 66957 (May 10, 2012), 77 FR 28904 (May 16, 2012) (File No. 4-533) (BOX filing to join the Plan).

the old security, without the consent of the Party that released the symbol. In addition, a Party may not reuse (or consent to the reuse of) a symbol to identify a new security unless such Party reasonably determines that such use would not cause investor confusion. The Commission is publishing this notice to solicit comments from interested persons on the Amendment to the Plan.<sup>5</sup>

### I. Description and Purpose of the Amendment

The Plan was created to enhance the effectiveness and efficiency of the national market system and to provide for fair competition between the self-regulatory organizations ("SROs") by establishing a uniform system for the selection and reservation of securities symbols. The Plan, among other things, sets forth the process for securing perpetual and limited-time reservations, the use of a waiting list, the right to reuse a symbol and the ability to request the release of a symbol.

Under Section IV(d) of the current Plan, if a Party ceases to use a symbol, such Party automatically has that symbol reserved for a period of 24 months, notwithstanding any other limits on the number of reserved symbols specified in the Plan.<sup>6</sup> However, in the event that the Party ceasing to use the symbol neither: (1) Places the symbol on its List A, or (2) uses the symbol within 24 months, the symbol is released for use pursuant to Section IV(b)(5) (Non-Use or Release of Symbols Within Time Period). In such cases, the symbol may be reused by a different Party to identify a new security in accordance with the procedures set forth in the Plan. Section IV(d) of the Plan provides that a symbol may not be reused by a Party to identify a new security unless the Party reasonably determines that such use would not cause investor confusion. Thus, even where a Party releases a symbol for reuse, such symbol may not be reused to identify a new security if such use would cause investor confusion in the judgment of the party seeking to reuse the symbol.

The Parties are amending Section IV(d) of the Plan to clarify that, if a Party ceases use of a symbol, such Party may elect to release the symbol pursuant to paragraph (b)(5) of the Plan. If a Party does not release the symbol, such

<sup>5</sup> 17 CFR 242.608(b)(1).

<sup>6</sup> Except that, pursuant to paragraph (f) of Section IV (Portability of Symbols in Use), if a new SRO lists a security or product that previously was listed on another SRO, the new SRO has the right to that symbol unless, in its discretion, it consents to the symbol being retained by the former SRO.

symbol shall automatically be reserved for such Party for 24 months, as further described in the Plan. The proposed amendments further clarify that, if the Party does not place the symbol on List A or use the symbol within 24 months, the symbol shall be released for use pursuant to subparagraph (b)(5).

The amendment also proposes a new requirement. Specifically, that where a symbol has become available for reuse by a new Party (e.g., where a Party releases a symbol), such symbol may not be reused to identify a new security (other than the security that has been trading under such symbol) within 90 calendar days from the last day of its use to identify the old security, without the consent of the Party that released the symbol pursuant to paragraph (b)(5) of Section IV. Thus, even where a symbol is not reserved for the Party most recently using the symbol, the amended Plan would continue to provide for a fair and orderly approach with regard to the reuse of the symbol.

For example, the amendment would address situations where a Party had been using symbol WXYZ for a period of years to identify the security of a particular company and, following the dissolution of the company, symbol WXYZ is released by the Party that had been using it. Under the current Plan, the Party using WXYZ to identify the security of the dissolved company would have that symbol reserved for a period of 24 months, and, at any time within this 24-month period, pursuant to Section IV(b)(6) (Request for Release of a Symbol), any other Party may have requested the voluntary release of the symbol for reuse. The amendment to the Plan retains this same basic framework, but also explicitly addresses circumstances in which a Party does not reserve the symbol but elects to release the symbol pursuant to paragraph (b)(5), in which case the symbol becomes immediately available to be reused by another Party to identify a different security. Under the amendment to the Plan, at any time within 90 calendar days from the last day of its use to identify the old security, such symbol may not be reused to identify a new security unless the Party seeking to reuse the symbol obtains the consent of the Party that most recently released the symbol. The Party most recently releasing the symbol must reasonably determine that reuse would not cause investor confusion prior to providing its consent.

As is the case today, at no time may a Party reuse a symbol unless the Party seeking the reuse also reasonably determines that such use would not cause investor confusion. In making a

reasonable determination as to whether the reuse of a symbol would cause investor confusion, Parties would consider factors such as the level of recent activity in the old security, including trading frequency, volume and the number of market maker quotes.

The Amendment also contains several technical and ministerial amendments. First, the Plan is being amended to update NSX's principal place of business from its former address of 440 South LaSalle Street, Suite 2600, Chicago, IL 60605 to its new address of 101 Hudson Street, Suite 1200, Jersey City, NJ 07302. This Amendment also reflects a name change by one of the Parties. Specifically, the "NYSE Alternext US LLC" is now called "NYSE MKT LLC." Finally, the Parties also are amending the Plan to update the principal place of business for both EDGA and EDGX from its former address at 545 Washington Blvd., Jersey City, NJ 07310 to 8050 Marshall Drive, Lenexa, KS 66214.

The Parties believe that the Amendment provides for a fair and orderly approach that would be applied consistently by all Parties to facilitate investor protection, does not disparately affect any single Party, and thus, does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

## II. Implementation of Plan Amendment

The Parties will implement the Amendment upon Commission approval.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Amendment 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](mailto:rule-comments@sec.gov). Please include File Number 4-533 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 4-533. 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 Plan that are filed with the Commission, and all written communications relating to the Plan 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 Parties' principal offices. 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 4-533, and should be submitted on or before March 10, 2016.

By the Commission.

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-03275 Filed 2-17-16; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77118; File No. SR-NYSEARCA-2016-04]

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Co-Location Services Offered by the Exchange To Include a Means for Co-Located Users To Receive the NASDAQ TotalView Ultra Market Data Feed Through a Wireless Connection and Reflect Changes to the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services and the Options Fee Schedule**

February 11, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 2, 2016, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change**

The Exchange proposes to change the co-location services offered by the Exchange to include a means for co-located Users to receive the NASDAQ TotalView Ultra (FGPA) market data feed through a wireless connection. In addition, the proposed rule change reflects changes to the NYSE Arca Options Fee Schedule (the “Options Fee Schedule”) and, through its wholly owned subsidiary NYSE Arca Equities, Inc. (“NYSE Arca Equities”), the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the “Equities Fee Schedule” and, together with the Options Fee Schedule, the “Fee Schedules”) related to the proposed service. The proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

### **II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

#### **A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

##### **1. Purpose**

The Exchange proposes to change the co-location<sup>4</sup> services—offered by the

Exchange to include a means for Users<sup>5</sup> to receive the NASDAQ TotalView Ultra (FGPA) market data feed through a wireless connection. In addition, the proposed rule change reflects changes to the Fee Schedules related to the proposed service.

The Commission has approved the Exchange’s proposed rule change to provide a wireless connection to five market data feeds from third party markets.<sup>6</sup> The Exchange now proposes to add to the Fee Schedules a sixth market data feed, NASDAQ TotalView Ultra (FGPA) (“TotalView Ultra” and, together with the previously filed five market data feeds, the “Third Party Data”).

As with the previously approved connectivity to Third Party Data through the wireless connection, the Exchange would utilize a network vendor to provide a wireless connection to TotalView Ultra through wireless connections from an Exchange access center to its data center in Mahwah, New Jersey, through a series of towers equipped with wireless equipment. To receive TotalView Ultra, the User would enter into a contract with NASDAQ, which would charge the User the applicable market data fees for TotalView Ultra. The Exchange would charge the User fees for the wireless connection to TotalView Ultra.<sup>7</sup>

For each wireless connection to TotalView Ultra, a User would be charged a \$5,000 non-recurring initial charge and a monthly recurring charge (“MRC”) of \$11,000. The Exchange proposes to revise the Fee Schedules to reflect fees related to the connection to TotalView Ultra.

As with the previously approved wireless connections to Third Party Data, if a User purchased two wireless connections, it would pay two non-recurring initial charges, and the wireless connection would include the use of one port for connectivity to Third

Party Data.<sup>8</sup> Also as with the previously approved wireless connections to Third Party Data, the Exchange proposes to waive the first month’s MRC, to allow Users to test the receipt of TotalView Ultra for a month before incurring any MRCs.

The Exchange proposes to offer the wireless connection to provide Users with an alternative means of connectivity to TotalView Ultra. Currently, Users can receive TotalView Ultra from wireless networks offered by third party vendors.<sup>9</sup> Users may also receive connections to TotalView Ultra through other methods, including, for example, from another User, through a telecommunications provider, or over the internet protocol (“IP”) network.<sup>10</sup>

The wireless connection to the Third Party Data is expected to be available in January 2016, and no later than March 1, 2016. The Exchange will announce the date that the wireless connection to the Third Party Data will be available through a customer notice.

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User’s customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;<sup>11</sup> and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects

<sup>8</sup> A User only requires one port to connect to the Third Party Data, irrespective of how many of the wireless connections it orders. It may, however, purchase additional ports. See Wireless Approval Release, at 81641.

<sup>9</sup> Currently, at least four third party vendors offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center.

<sup>10</sup> The IP network is a local area network available in the data center. See Securities Exchange Act Release No. 74219 (February 6, 2015), 80 FR 7899 (February 12, 2015) (SR–NYSEArca–2015–03) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

<sup>11</sup> As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange’s trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange’s trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (“Commission”) in 2010. See Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100). The Exchange operates a data center in Mahwah, New Jersey (the “data center”) from which it provides co-location services to Users.

<sup>5</sup> For purposes of the Exchange’s co-location services, a “User” means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates New York Stock Exchange LLC and NYSE MKT LLC. See Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

<sup>6</sup> See Securities Exchange Act Release No. 76749 (December 23, 2015), 80 FR 81640 (December 30, 2015) (SR–NYSEArca–2015–99) (“Wireless Approval Release”).

<sup>7</sup> A User would only receive TotalView Ultra if it had entered into a contract with NASDAQ.

only to the Exchange or to the Exchange and one or both of its affiliates.<sup>12</sup>

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>14</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed service is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the wireless connection to TotalView Ultra would provide Users with an alternative means of connectivity to TotalView Ultra. Users that do not opt to utilize the Exchange's proposed wireless connections would still be able to obtain TotalView Ultra through other methods, including, for example, from wireless networks offered by third party vendors, another User, through a telecommunications provider, or over the IP network. Users that opt to use wireless connections to TotalView Ultra would receive the TotalView Ultra that is available to all Users, as all market participants that contract with NASDAQ for TotalView Ultra may receive it.

The Exchange believes that this removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because it would provide Users with choices with respect

to the form and optimal latency of the connectivity they use to receive TotalView Ultra, allowing a User that opts to receive TotalView Ultra to select the connectivity and number of ports that better suit its needs, helping it tailor its data center operations to the requirements of its business operations.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>15</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will result in fees being charged only to Users that voluntarily select to receive the corresponding services and because those services will be available to all Users. Furthermore, the Exchange believes that the services and fees proposed herein are not unfairly discriminatory and are equitably allocated because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (*i.e.*, the same products and services are available to all Users). All Users that voluntarily select wireless connections to TotalView Ultra would be charged the same amount for the same services and would have their first month MRC for wireless connections waived.

Overall, the Exchange believes that the proposed change is reasonable because the Exchange proposes to offer wireless connection to TotalView Ultra described herein as a convenience to Users, but in doing so would incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and monitoring, support and maintenance of such services. The costs associated with the wireless connections are incrementally higher than fiber optics-based solutions due to the expense of the wireless equipment, cost of installation and testing and ongoing maintenance of the network. The Exchange believes that it is reasonable that a User that has already purchased wireless connections to other Third Party Data would be charged a non-recurring charge when it purchases a wireless connection to TotalView Ultra, because the Exchange would incur certain costs in installing the wireless connection to TotalView Ultra

irrespective of whether the User had existing wireless connections to Third Party Data. Such costs related to initial installation include, in particular, costs related to personnel required for initial installation and testing. The costs associated with installing wireless connections are incrementally higher than those associated with installing fiber optics-based solutions.

The Exchange believes that the proposed pricing for the wireless connection to TotalView Ultra is reasonable because it allows Users to select the TotalView Ultra connectivity option that better suits their needs. The fees also reflect the benefit received by Users in terms of lower latency over the fiber optics option. The Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow Users to test the receipt of the feed for a month before incurring any monthly recurring fees and may act as an incentive to Users to connect to TotalView Ultra.

Moreover, the fees are equity [*sic*] allocated and not unfairly discriminatory because the wireless connection to TotalView Ultra would provide Users with an alternative means of connectivity to TotalView Ultra. Users that do not opt to utilize the Exchange's proposed wireless connections would still be able to obtain TotalView Ultra through other methods, including, for example, from wireless networks offered by third party vendors, another User, through a telecommunications provider, or over the IP network. Users that opt to use wireless connections to TotalView Ultra would receive the TotalView Ultra that is available to all Users, as all market participants that contract with NASDAQ for TotalView Ultra may receive it.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

<sup>12</sup> See SR-NYSEArca-2013-80, *supra* note 5 at 50459. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2015-01 and SR-NYSEMKT-2015-02.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>15</sup> 15 U.S.C. 78f(b)(4).



### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>16</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users).

The Exchange believes that allowing Users to receive TotalView Ultra through a wireless connection will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such access will satisfy User demand for additional options for connectivity to TotalView Ultra. Currently, Users can receive TotalView Ultra from wireless networks offered by third party vendors. Based on the information available to it, the Exchange believes that its proposed wireless connection would provide data at the same or similar speed and at the same or similar cost as the other wireless networks. Accordingly, the proposed wireless connection to TotalView Ultra would provide Users with an additional wireless connectivity option, thereby enhancing competition.

The Exchange notes that the proposed wireless connection to TotalView Ultra would compete not just with other wireless connections to TotalView Ultra, but also with fiber optic network connections to TotalView Ultra, which may be more attractive to some Users as they are more reliable and less susceptible to weather conditions. Users that do not opt to utilize wireless connections would be able to obtain TotalView Ultra through other methods, including, for example, from another User, through a telecommunications provider, or over the IP network. In this way, the proposed changes would enhance competition by helping Users tailor their connectivity to TotalView Ultra to the needs of their business operations by allowing them to select the form and optimal latency of the connectivity they use to receive TotalView Ultra that best suits their needs, helping them tailor their data center operations to the requirements of their business operations.

The proposed wireless connection to TotalView Ultra would traverse wireless connections through a series of towers equipped with wireless equipment, including a pole on the grounds of the

data center. The proposed wireless network would have exclusive rights to operate wireless equipment on the data center pole. The Exchange will not sell rights to third parties to operate wireless equipment on the pole, due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together. In addition to space issues, there are contractual restrictions on the use of the roof that the Exchange has determined would not be met if it offered space on the roof for third party wireless equipment. Moreover, access to the pole or roof is not required for third parties to establish wireless networks that can compete with the Exchange's proposed service, as witnessed by the existing wireless networks currently serving Users. Based on the information available to it, the Exchange believes that its proposed wireless connection to TotalView Ultra would provide data at the same or similar speed, and at the same or similar cost, as its proposed wireless connection [*sic*], thereby enhancing competition.<sup>17</sup>

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> Because the proposed rule change does not: (i) Significantly affect the protection of

investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>20</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>21</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEARCA-2016-04 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 No. SR-NYSEARCA-2016-04. 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

<sup>17</sup> The Exchange notes that the distance of a wireless network provider's wireless equipment from the User is only one factor in determining overall latency. Other factors include the number of repeaters in the route, the number of switches the data has to travel through, and the millimeter wave and switch technology used.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6).

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>16</sup> 15 U.S.C. 78f(b)(8).

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 office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEARCA-2016-04, and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2016-03270 Filed 2-17-16; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77117; File No. SR-NYSEARCA-2016-08]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Adopt NYSE Arca Equities Rule 8.900 To Permit Listing and Trading of Managed Portfolio Shares and To Permit Listing and Trading of Shares of Fifteen Issues of the Precidian ETFs Trust

February 11, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on January 27, 2016, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission") the proposed rule

change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a new NYSE Arca Equities Rule 8.900 to permit it to list and trade Managed Portfolio Shares, which are shares of actively managed exchange-traded funds ("ETFs") for which the portfolio is disclosed in accordance with standard mutual fund disclosure rules. In addition, the Exchange proposes to list and trade shares of the following under proposed NYSE Arca Equities Rule 8.900: Precidian U.S. Managed Volatility Fund; Precidian Strategic Value; Precidian Large Cap Value; Precidian Focused Dividend Strategy; Precidian U.S. Large Cap Growth; Precidian U.S. Core Equity; Precidian U.S. Mid Cap Growth; Precidian Total Return; Precidian High Dividend Yield; Precidian Small Cap Dividend Value; Precidian Multi-factor Small Cap Core; Precidian Multi-factor Small Cap Growth; Precidian Large Cap Core Plus 130/30; Precidian Mid Cap Core Plus 130/30; and Precidian Small Cap Core Plus 130/30. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to add new NYSE Arca Equities Rule 8.900 for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges ("UTP"), of Managed

Portfolio Shares, which are securities issued by an actively managed open-end investment management company.<sup>3</sup> The Exchange also proposes to amend NYSE Arca Equities Rule 7.34 (Trading Sessions) to reference securities described in proposed NYSE Arca Equities Rule 8.900 in Rule 7.34(a)(3)(A) relating to securities traded in the Core Trading Session.

In addition to the above-mentioned proposed rule changes, the Exchange proposes to list and trade shares ("Shares") of the following under proposed NYSE Arca Equities Rule 8.900: Precidian U.S. Managed Volatility Fund; Precidian Strategic Value; Precidian Large Cap Value; Precidian Focused Dividend Strategy; Precidian U.S. Large Cap Growth; Precidian U.S. Core Equity; Precidian U.S. Mid Cap Growth; Precidian Total Return; Precidian High Dividend Yield; Precidian Small Cap Dividend Value; Precidian Multi-factor Small Cap Core; Precidian Multi-factor Small Cap Growth; Precidian Large Cap Core Plus 130/30; Precidian Mid Cap Core Plus 130/30; and Precidian Small Cap Core Plus 130/30 (each, a "Fund" and, collectively, the "Funds").

##### Proposed Listing Rules

Proposed Rule 8.900 (a) provides that the Corporation will consider for trading, whether by listing or pursuant to UTP, Managed Portfolio Shares that meet the criteria of Rule 8.900.

Proposed Rule 8.900 (b) provides that Rule 8.900 is applicable only to Managed Portfolio Shares and that, except to the extent inconsistent with Rule 8.900, or unless the context otherwise requires, the rules and procedures of the Corporation's Board of Directors shall be applicable to the trading on the Corporation of such securities. Proposed Rule 8.900 (b) provides further that Managed Portfolio Shares are included within the definition of "security" or "securities" as such terms are used in the Rules of the Corporation.

Proposed Definitions. Proposed Rule 8.900(c)(1) defines the term "Managed

<sup>3</sup> A Managed Portfolio 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) ("Index ETFs"), 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.

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Portfolio Share” as a security that (a) is issued by a registered investment company (“Investment Company”) organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; and (b) when aggregated in a number of shares equal to a Redemption Unit or multiples thereof, may be redeemed at the request of an Authorized Participant (as defined in the Investment Company’s Form N-1A filed with the SEC), which Authorized Participant will be paid through a confidential account established for its benefit a portfolio of securities and/or cash with a value equal to the next determined net asset value (“NAV”).

Proposed Rule 8.900(c)(2) defines the term “Verified Intraday Indicative Value (“VIIV”) as the estimated indicative value of a Managed Portfolio Share based on all of the issuer’s holdings as of the close of business on the prior business day, priced and disseminated in one second intervals, and subject to validation by a pricing verification agent of the Investment Company that is responsible for comparing multiple independent pricing sources to establish the accuracy of the VIIV.

Proposed Rule 8.900(c)(3) defines the term “Redemption Unit” as a specified number of Managed Portfolio Shares.

Proposed Rule 8.900(c)(4) defines the term “Reporting Authority” in respect of a particular series of Managed Portfolio Shares as a reporting service designated by the issuer and acceptable to the Corporation or by the exchange that lists a particular series of Managed Portfolio Shares (if the Corporation is trading such series pursuant to UTP) as the official source for calculating and reporting information relating to such series, including, but not limited to, the VIIV, NAV, or other information relating to the issuance, redemption or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

Proposed Rule 8.900(d) sets forth initial and continued listing criteria applicable to Managed Portfolio Shares. Proposed Rule 8.900(d)(1)(A) provides that, for each series of Managed Portfolio Shares, the Corporation will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading on the Corporation. In addition, proposed Rule 8.900(d)(1)(B) provides that the Corporation will obtain a representation

from the issuer of each series of Managed Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time.<sup>4</sup>

Proposed Rule 8.900(d)(2) provides that each series of Managed Portfolio Shares will be listed and traded subject to application of the following continued listing criteria. Proposed Rule 8.900(d)(2)(A) provides that the VIIV for Managed Portfolio Shares will be widely disseminated by one or more major market data vendors every second during the Exchange’s Core Trading Session (as defined in NYSE Arca Equities Rule 7.34).

Proposed Rule 8.900(d)(2)(B) provides that the Corporation will consider the suspension of trading in or removal from listing of a series of Managed Portfolio Shares under any of the following circumstances: (i) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of Managed Portfolio Shares for 30 or more consecutive trading days; (ii) if the value of the VIIV is no longer calculated or made available to all market participants at the same time; (iii) if the Investment Company issuing the Managed Portfolio Shares has failed to file any filings required by the Commission or if the Corporation is aware that the Investment Company is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the Investment Company with respect to the series of Managed Portfolio Shares; or (iv) if such other event shall occur or condition exists which, in the opinion of the Corporation, makes further dealings on the Corporation inadvisable.

Proposed Rule 8.900(d)(2)(C) provides that, upon notification to the Corporation by the Investment Company or its agent that (i) the prices from the multiple independent pricing sources to be validated by the Investment Company’s pricing verification agent differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV, or (ii) that the VIIV of a

series of Managed Portfolio Shares is not being priced and disseminated in one-second intervals, as required, the Corporation shall halt trading in the Managed Portfolio Shares as soon as practicable. Such halt in trading shall continue until the Investment Company or its agent notifies the Corporation that the prices from the independent pricing sources no longer differ by more than 25 basis points for 60 seconds or that the VIIV is being priced and disseminated as required. The Investment Company or its agent shall be responsible for monitoring that the VIIV is being priced and disseminated as required and whether the prices to be validated from multiple independent pricing sources differ by more than 25 basis points for 60 seconds. With respect to series of Managed Portfolio Shares trading on the Corporation pursuant to unlisted trading privileges, if a temporary interruption occurs in the pricing or dissemination of the applicable Verified Intraday Indicative Value and the listing market halts trading in such series, the Corporation, upon notification by the listing market of such halt due to such temporary interruption, will halt trading in such series. In addition, if the Exchange becomes aware that the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants.

Proposed Rule 8.900(d)(2)(D) provides that, upon termination of an Investment Company, the Corporation requires that Managed Portfolio Shares issued in connection with such entity be removed from Corporation listing.

Proposed Rule 8.900(d)(2)(E) provides that voting rights shall be as set forth in the applicable Investment Company prospectus.

Proposed Rule 8.900(e), which relates to limitation of Corporation liability, provides that neither the Corporation, the Reporting Authority, nor any agent of the Corporation shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current portfolio value; the VIIV; the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Managed Portfolio Shares; the amount of any dividend equivalent payment or cash distribution to holders of Managed Portfolio Shares; NAV; or other information relating to the purchase, redemption, or trading of Managed Portfolio Shares, resulting from any negligent act or omission by

<sup>4</sup> NYSE Arca Equities Rule 7.34(a)(5) (“Trading Halts of Derivative Securities Products Listed on the NYSE Arca Marketplace”) provides that, with respect to Derivative Securities Products listed on the NYSE Arca Marketplace for which a net asset value is disseminated, if the Exchange becomes aware that the net asset value is not being disseminated to all market participants at the same time, it will halt trading in the affected Derivative Securities Product on the NYSE Arca Marketplace until such time as the net asset value is available to all market participants.

the Corporation, the Reporting Authority or any agent of the Corporation, or any act, condition, or cause beyond the reasonable control of the Corporation, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission, or delay in the reports of transactions in one or more underlying securities.

Proposed Commentary .01 to NYSE Arca Equities Rule 8.900 provides that the Corporation will file separate proposals under Section 19(b) of the Act before the listing and trading of Managed Portfolio Shares. Proposed Commentary .02 to NYSE Arca Equities Rule 8.900 provides that transactions in Managed Portfolio Shares will occur only during the Core Trading Session as specified in NYSE Arca Equities Rule 7.34(a)(3)(A).

Proposed Commentary .03 to NYSE Arca Equities Rule 8.900 provides that the Exchange will implement written surveillance procedures for Managed Portfolio Shares.

Proposed Commentary .04 to NYSE Arca Equities Rule 8.900 provides that Authorized Participants (as defined in the Investment Company's Form N-1A filed with the SEC) or non-Authorized Participant market makers redeeming Managed Portfolio Shares will sign an agreement with an agent ("Trusted Agent") to establish a confidential account for the benefit of such Authorized Participant or non-Authorized Participant market maker that will receive all consideration from the issuer in a redemption. A Trusted Agent may not disclose the consideration received in a redemption except as required by law or as provided in the Investment Company's Form N-1A, as applicable.

Proposed Commentary .05 to NYSE Arca Equities Rule 8.900 provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is affiliated with a broker-dealer, or if any Trusted Agent is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser or Trusted Agent will erect a "fire wall" between the investment adviser or Trusted Agent and (i) personnel of the broker-dealer or broker-dealer affiliate, as applicable, or (ii) the Authorized Participant or non-Authorized Participant market maker, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company portfolio. Personnel who

make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio.

#### Other Rules

The Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(3)(A) to add securities described in NYSE Arca Equities Rule 8.900 to the securities for which the Core Trading Session shall conclude at 1:15:00 p.m. (Pacific Time) unless otherwise determined by the Corporation.<sup>5</sup>

#### Key Features of Managed Portfolio Shares

While funds issuing Managed Portfolio Shares will be actively-managed and, to that extent, will be similar to Managed Fund Shares, Managed Portfolio Shares differ from Managed Fund Shares in the following important respects. First, in contrast to Managed Fund Shares, which are actively-managed funds listed and traded under NYSE Arca Equities Rule 8.600<sup>6</sup> and for which a "Disclosed Portfolio" is required to be disseminated at least once daily,<sup>7</sup> the portfolio for an issue of Managed Portfolio Shares will be disclosed quarterly in accordance with normal disclosure requirements otherwise applicable to open-end investment companies registered under the 1940 Act.<sup>8</sup> Second, in connection

<sup>5</sup> The Exchange will propose applicable NYSE Arca Equities listing fees for Managed Portfolio Shares in the NYSE Arca Equities Schedule of Fees and Charges via a separate proposed rule change.

<sup>6</sup> The Commission has previously approved listing and trading on the Exchange of a number of issues of Managed Fund Shares under Rule 8.600. See, e.g., Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR-NYSEArca-2008-31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR-NYSEArca2009-55) (order approving listing of Dent Tactical ETF); 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR-NYSEArca-2010-79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR-NYSEArca-2010-118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF).

<sup>7</sup> NYSE Arca Equities Rule 8.600(c)(2) defines the term "Disclosed Portfolio" as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day. NYSE Arca Equities Rule 8.600(d)(2)(B)(i) requires that the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

<sup>8</sup> A mutual fund is required to file with the Commission its complete portfolio schedules for the

with the redemption of shares in "Redemption Unit" size (as described below), the delivery of any portfolio securities in kind will generally be effected through a "Confidential Account" (as described below) for the benefit of the redeeming "Authorized Participant" (as described below in "Creation and Redemption of Shares") without disclosing the identity of such securities to the Authorized Participant.

For each series of Managed Portfolio Shares, an estimated value—the VIIV—that reflects an estimated intraday value of a fund's portfolio will be disseminated. With respect to the Funds, the VIIV will be based upon all of a Fund's holdings as of the close of the prior business day and will be widely disseminated by one or more major market data vendors every second during the Exchange's Core Trading Session (normally, 9:30 a.m. to 4:00 p.m., Eastern Time ("E.T.")). The dissemination of the VIIV will allow investors to determine the estimated intra-day value of the underlying portfolio of a series of Managed Portfolio Shares on a daily basis and will provide a close estimate of that value throughout the trading day. The VIIV should not be viewed as a "real-time" update of the NAV per Share of each Fund because the VIIV may not be calculated in the same manner as the NAV, which will be computed once a day, generally at the end of the business day. Unlike the VIIV, which will be based on consolidated midpoint of the bid ask spread, the NAV per Share will be based on the closing price on the primary market for each portfolio security. If there is no closing price for a particular portfolio security, such as when it the subject of a trading halt, a Fund will use fair value pricing. That fair value pricing will be carried over to the next day's VIIV until the first trade in that stock is reported unless the "Adviser" (defined below) deems a particular portfolio security to be illiquid and/or the available ongoing pricing information unlikely to be reliable. In such case, that fact will be immediately disclosed on each Fund's Web site, including the identity and weighting of that security in a Fund's portfolio, and the impact of that security on VIIV calculation, including the fair

second and fourth fiscal quarters on Form N-SAR under the 1940 Act, and is required to file its complete portfolio schedules for the first and third fiscal quarters on Form N-Q under the 1940 Act, within 60 days of the end of the quarter. Form N-Q requires funds to file the same schedules of investments that are required in annual and semi-annual reports to shareholders. These forms are available to the public on the Commission's Web site at [www.sec.gov](http://www.sec.gov).

value price for that security being used for the calculation of that day's VIIV.

The Exchange, after consulting with various Lead Market Makers that trade exchange-traded funds ("ETFs") on the Exchange, believes that market makers will be able to make efficient and liquid markets priced near the VIIV as long as a VIIV is disseminated every second, market makers have knowledge of a Fund's means of achieving its investment objective even without daily disclosure of a Fund's underlying portfolio, and market makers are permitted to engage in "Bona Fide Arbitrage", as described below. The Exchange believes that market makers will employ Bona Fide Arbitrage in addition to risk-management techniques such as "statistical arbitrage", which is currently used throughout the financial services industry, to make efficient markets in exchange-traded products.<sup>9</sup> This ability should permit market makers to make efficient markets in an issue of Managed Portfolio Shares without knowledge of a Fund's underlying portfolio.

To enable market makers to engage in Bona Fide Arbitrage, on each "Business Day" (as defined below), before commencement of trading in Shares on the Exchange, the Funds will provide to a "Trusted Agent" (as described below) of each Authorized Participant or "Non-Authorized Participant Market Maker"<sup>10</sup> the identities and quantities of portfolio securities that will form the basis for a Fund's calculation of NAV per Share at the end of the Business Day, as well as the names and quantities of the instruments comprising a "Creation Basket" and the estimated "Balancing Amount" (if any) (as described below), for that day. This information will permit Authorized Participants to purchase "Creation Units" through an in-kind transaction with a Fund, as described below.

<sup>9</sup> Statistical arbitrage enables a trader to construct an accurate proxy for another instrument, allowing it to hedge the other instrument or buy or sell the instrument when it is cheap or expensive in relation to the proxy. Statistical analysis permits traders to discover correlations based purely on trading data without regard to other fundamental drivers. These correlations are a function of differentials, over time, between one instrument or group of instruments and one or more other instruments. Once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging proxy has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period making correction where warranted.

<sup>10</sup> A Non-Authorized Participant Market Maker is a market participant that makes a market in Shares, but is not an Authorized Participant.

In addition, Authorized Participants will be able to instruct the Trusted Agent to buy or sell portfolio securities during the day and thereby engage in Bona Fide Arbitrage throughout the trading day. For example, if an Authorized Participant believes that Shares of a Fund are trading at a price that is higher than the value of its underlying portfolio based on the VIIV, the Authorized Participant may sell Shares short and instruct the Trusted Agent to buy portfolio securities for its Confidential Account. When the market price of a Fund's Shares falls in line with the value of the portfolio, the Authorized Participant can then close out its positions in both the Shares and the portfolio securities. The Authorized Participant's purchase of the portfolio securities into its Confidential Account, combined with the sale of Shares, may also create downward pressure on the price of Shares and/or upward pressure on the price of the portfolio securities, bringing the market price of Shares and the value of a Fund's portfolio securities closer together. Similarly, an Authorized Participant could buy Shares and instruct the Trusted Agent to sell the underlying portfolio securities from its Confidential Account in an attempt to profit when a Fund's Shares are trading at a discount to its portfolio. The Authorized Participant's purchase of a Fund's Shares in the secondary market, combined with the sale of the portfolio securities from its Confidential Account, may also create upward pressure on the price of Shares and/or downward pressure on the price of portfolio securities, driving the market price of Shares and the value of a Fund's portfolio securities closer together. The Adviser represents that it understands that, other than the confidential nature of the account, this process is identical to how many Authorized Participants currently arbitrage existing traditional ETFs.

Because other market participants can also engage in arbitrage activity without using the creation or redemption processes described above, the Confidential Account structure will be made available to any Non-Authorized Participant Market Maker that is willing to establish a Confidential Account. In that case, if a market participant believes that a Fund is overvalued relative to its underlying assets, the market participant may sell short Shares and instruct its Trusted Agent to buy portfolio securities in its Confidential Account, wait for the trading prices to move toward parity, and then close out the positions in both the Shares and the portfolio securities to realize a profit

from the relative movement of their trading prices. Similarly, a market participant could buy Shares and instruct the Trusted Agent to sell the underlying portfolio securities in an attempt to profit when a Fund's Shares are trading at a discount to a Fund's underlying or reference assets. Any investor that is willing to transact through a broker-dealer that has established a Confidential Account with a Trusted Agent will have the same opportunity to engage in arbitrage activity. As discussed above, the trading of a Fund's Shares and the Fund's portfolio securities may bring the prices of a Fund's Shares and its portfolio assets closer together through market pressure. This type of arbitrage is referred to herein as "Bona Fide Arbitrage."

The Exchange understands that traders use statistical analysis to derive correlations between different sets of instruments to identify opportunities to buy or sell one set of instruments when it is mispriced relative to the others. For Managed Portfolio Shares, market makers, in addition to employing Bona Fide Arbitrage, may use the knowledge of a Fund's means of achieving its investment objective, as described in the applicable Fund registration statement, to construct a hedging proxy for a Fund to manage a market maker's quoting risk in connection with trading Fund Shares. Market makers can then conduct statistical arbitrage between their hedging proxy (for example, the Russell 1000 Index) and Shares of a Fund, buying and selling one against the other over the course of the trading day. They will evaluate how their proxy performed in comparison to the price of a Fund's Shares, and use that analysis as well as knowledge of risk metrics, such as volatility and turnover, to enhance their proxy calculation to make it a more efficient hedge.

Market makers not intending to utilize Bona Fide Arbitrage, have indicated to the Exchange that, after the first few days of trading, there will be sufficient data to run a statistical analysis which will lead to spreads being tightened substantially around the VIIV. This is similar to certain other existing exchange traded products (for example, ETFs that invest in foreign securities that do not trade during U. S. trading hours), in which spreads may be generally wider in the early days of trading and then narrow as market makers gain more confidence in their real-time hedges.

#### Description of the Funds and the Trust

The Shares of each Fund will be issued by Precidian ETFs Trust

("Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>11</sup> The investment adviser to the Trust will be Precidian Funds LLC (the "Adviser"). Foreside Fund Services, LLC ("Distributor") will serve as the distributor of the Fund's Shares.

As noted above, proposed Commentary .05 to NYSE Arca Equities Rule 8.900 provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is affiliated with a broker-dealer, or if any Trusted Agent is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser or Trusted Agent will erect a "fire wall" between the investment adviser or Trusted Agent and (i) personnel of the broker-dealer or broker-dealer affiliate, as applicable, or (ii) the Authorized Participant or non-Authorized Participant market maker, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company portfolio. Personnel who make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio.<sup>12</sup> In addition, proposed

<sup>11</sup> The Trust will be registered under the 1940 Act. On September 21, 2015, the Trust filed a registration statement on Form N-1A under the Securities Act of 1933 (the "1933 Act") (15 U.S.C. 77a), and under the 1940 Act relating to the Funds (File Nos. 333-171987 and 811-22524) (the "Registration Statement"). The Trust filed an Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812-14116), dated July 18, 2013 ("Exemptive Application"). The Shares will not be listed on the Exchange until an order ("Exemptive Order") under the 1940 Act has been issued by the Commission with respect to the Exemptive Application. Investments made by the Funds will comply with the conditions set forth in the Exemptive Order. The description of the operation of the Trust and the Funds herein is based, in part, on the Registration Statement and the Exemptive Application.

<sup>12</sup> An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Adviser and its related personnel will be subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and

Commentary .05 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. Proposed Commentary .05 to Rule 8.900 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .05 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not registered as a broker-dealer or affiliated with a broker-dealer.

In the event (a) the Adviser or any sub-adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer, or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The portfolio for each Fund will consist of U.S.-listed securities and shares issued by other U.S.-listed ETFs.<sup>13</sup> All exchange-listed equity securities in which the Funds will invest will be listed and traded on U.S. national securities exchanges.

#### Description of the Funds

##### Precidian U.S. Managed Volatility Fund

The Precidian U.S. Managed Volatility Fund will typically invest primarily in securities of U.S. companies of all capitalization ranges.

procedures reasonably designed to prevent violations, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>13</sup> For purposes of this filing, ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depository Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs in which a Fund will invest all will be listed and traded on national securities exchanges. While the Funds may invest in inverse ETFs, the Funds will not invest in leveraged (e.g., 2X, -2X, 3X or -3X)ETFs.

These securities may include common stocks, preferred stocks, ETFs and warrants. The Fund will seek to achieve an absolute return of the broad U.S. equity markets, but with a lower absolute volatility.

##### Precidian Strategic Value

The Fund will pursue its investment objective by investing primarily in high dividend yielding common stocks with dividend growth potential. The Fund's security selection process involves screening and prioritizing stocks based on appropriate quantitative statistics. Those companies that rank as highly attractive in the screening process are closely scrutinized for inclusion in the portfolio using bottom-up fundamental proprietary research.

##### Precidian Large Cap Value

The Fund will invest primarily in large-capitalization companies, seeking consistent long-term performance. The Fund will follow a traditional value-oriented investment philosophy using a research-intensive approach.

##### Precidian Focused Dividend Strategy

The Fund will seek total return (including capital appreciation and current income) by employing a "buy and hold" strategy involving the periodic selection of high dividend yielding common stocks from the universe of Russell 3000 stocks.

##### Precidian U.S. Large Cap Growth

The Fund will seek long-term capital growth. The Fund will seek to achieve its investment objective by investing primarily in equities or groups of equities that the Adviser believes will provide higher returns than the Russell 1000 Growth Index.

##### Precidian U.S. Core Equity

The Fund will seek high total return. The Fund will seek to achieve its investment objective by investing primarily in equities or groups of equities that the Adviser believes will provide higher returns than the S&P 500 Index.

##### Precidian U.S. Mid Cap Growth

The Fund will invest primarily in common stocks of mid-cap companies with market capitalizations similar to those within the universe of the Russell Mid-Cap Growth Index. The Fund will seek companies that have a history of or the potential to achieve above-average growth.

##### Precidian Total Return

The Fund will seek total return, consisting of capital appreciation and

current income. The Fund will invest primarily in large, dividend-yielding companies selected by a quantitative total return formula.

#### Precidian High Dividend Yield

The Fund will seek to track a benchmark that provides broad exposure to U.S. companies that are dedicated to consistently paying larger-than-average dividends.

#### Precidian Small Cap Dividend Value

The Fund will seek long-term capital appreciation and current income through investments in small cap companies that the Fund believes are undervalued and typically pay a dividend. Such companies generally will have a market capitalization below \$3.5 billion at the time of purchase.

#### Precidian Multi-Factor Small Cap Core

The Fund's investment objective will be to provide long-term capital appreciation by investing primarily in a diversified portfolio of small cap equity securities that possess both value and growth characteristics.

#### Precidian Multi-Factor Small Cap Growth

The Fund's investment objective will be to provide long-term cap appreciation by primarily investing in a diversified portfolio of small cap equity securities.

#### Precidian Large Cap Core Plus 130/30

The Fund will invest primarily in securities of large-capitalization companies with characteristics similar to those comprising the Russell 1000. The Fund will take long positions in securities that will likely appreciate more rapidly in rising markets and short positions in those that will likely decline faster in declining markets.

#### Precidian Mid Cap Core Plus 130/30

The Fund will invest primarily in equity securities of mid-cap companies with market capitalizations equal to those within the universe of the Russell Mid Cap Index. The Fund will take long positions in securities that will likely appreciate more rapidly in rising markets and short positions in those that will likely decline faster in declining markets.

#### Precidian Small Cap Core Plus 130/30

The Fund will invest primarily in equity securities of small-cap companies with market capitalizations equal to those within the universe of the Russell Small Cap Index. The Fund will take long positions in securities that will likely appreciate more rapidly in rising

markets and short positions in those that will likely decline faster in declining markets.

#### Other Investments

While each Fund, under normal market conditions, will invest primarily in U.S.-listed securities, as described above, each Fund may invest its remaining assets in other securities and financial instruments, as described below.

According to the Registration Statement, each Fund may enter into repurchase agreements. A repurchase agreement is an instrument under which the purchaser (*i.e.*, a Fund) acquires the security and the seller agrees, at the time of the sale, to repurchase the security at a mutually agreed upon time and price, thereby determining the yield during the purchaser's holding period. Repurchase agreements may be construed to be collateralized loans by the purchaser to the seller secured by the securities transferred to the purchaser.

Each Fund may enter into reverse repurchase agreements, which involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date and interest payment and have the characteristics of borrowing. Generally, the effect of such transactions is that the Fund can recover all or most of the cash invested in the portfolio securities involved during the term of the reverse repurchase agreement, while in many cases the Fund is able to keep some of the interest income associated with those securities.

Each Fund may invest a portion of its assets in cash or cash equivalents.<sup>14</sup>

Each Fund may invest in the securities of other investment companies (including money market funds) to the extent allowed by law.

#### Investment Restrictions

A Fund may not, with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. government, its

agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer (and for purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective depository receipt).<sup>15</sup>

A Fund may not invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments in securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, or shares of investment companies. A Fund will not invest 25% or more of its total assets in any investment company that so concentrates.<sup>16</sup>

Each Fund may invest up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment),<sup>17</sup> consistent with Commission guidance. Each Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of a Fund's net assets are invested in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.<sup>18</sup>

<sup>15</sup> The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

<sup>16</sup> See Form N-1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. See, e.g., Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

<sup>17</sup> In reaching liquidity decisions, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

<sup>18</sup> The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. See Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. See also, Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20,

<sup>14</sup> For purposes of this filing, cash equivalents include short-term instruments (instruments with maturities of less than 3 months) of the following types: (i) U.S. Government securities, including bills, notes and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. Government agencies or instrumentalities; (ii) certificates of deposit issued against funds deposited in a bank or savings and loan association; (iii) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (iv) repurchase agreements and reverse repurchase agreements; (v) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (vi) commercial paper, which are short-term unsecured promissory notes; and (vii) money market funds.



According to the Registration Statement, each Fund will seek to qualify for treatment as a Regulated Investment Company ("RIC") under the Internal Revenue Code.<sup>19</sup>

The Shares of each Fund will conform to the initial and continued listing criteria under proposed Rule 8.900. The Funds will not invest in options, futures, forwards or swaps.

Each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While a Fund may invest in inverse ETFs, a Fund will not invest in leveraged (*e.g.*, 2X, -2X, 3X or -3X) ETFs.

The Funds will not invest in non-U.S.-listed securities.

#### Creations and Redemptions of Shares

In connection with the creation and redemption of Creation Units (defined below), the delivery or receipt of any portfolio securities in-kind will be required to be effected through a confidential brokerage account (*i.e.*, a Confidential Account) with a Trusted Agent, which will be a bank or broker-dealer such as JP Morgan Chase, State Street Bank and Trust, or Bank of New York Mellon, for the benefit of an Authorized Participant.<sup>20</sup> An Authorized Participant will generally be a Depository Trust Company ("DTC") Participant that has executed a "Participant Agreement" with the Distributor with respect to the creation and redemption of Creation Units and formed a Confidential Account for its benefit in accordance with the terms of the Participant Agreement. For purposes of creations or redemptions, all transactions will be effected through that Confidential Account, for the benefit of the Authorized Participant without disclosing the identity of such securities to the Authorized Participant. Each Trusted Agent will be given, before the commencement of trading each Business Day (defined below), both the holdings of a Fund and their relative weightings for that day. This information will permit an Authorized

Participant, or other market participant that has established a Confidential Account with a Trusted Agent, to instruct the Trusted Agent to buy and sell positions in the portfolio securities to permit Bona Fide Arbitrage, as defined above.

Shares of each Fund will be issued in Creation Units of 25,000 or more Shares. The Funds will offer and sell Creation Units through the Distributor on a continuous basis at the NAV per Share next determined after receipt of an order in proper form. The NAV per Share of each Fund will be determined as of the close of regular trading on the New York Stock Exchange ("NYSE") on each day that the NYSE is open. A "Business Day" is defined as any day that the Trust is open for business. The Funds will sell and redeem Creation Units only on Business Days. Applicants anticipate that the initial price of a Share will range from \$20 to \$30, and that the price of a Creation Unit initial will range from \$1,000,000 to \$5,000,000.<sup>21</sup>

In order to keep costs low and permit each Fund to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash under the limited circumstances described in the Registration Statement, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments ("Deposit Instruments"), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments ("Redemption Instruments").<sup>22</sup> On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the "Creation Basket."<sup>23</sup>

<sup>21</sup> The Adviser represents that the Funds intend to engage in share splits and reverse splits in order to keep the price of Shares generally within this range. By keeping the price of a Share in this range, it will dampen the impact of volatility in the prices of the underlying portfolio securities in a Fund, which has the effect of making it almost impossible to determine, based on changes in market prices, what securities are being held in a Fund's portfolio.

<sup>22</sup> The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the 1933 Act.

<sup>23</sup> In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in-kind basis, whether for a given day or a given

As noted above, each Authorized Participant will be required to establish a Confidential Account with a Trusted Agent and transact with each Fund through that Confidential Account.<sup>24</sup> Therefore, before the commencement of trading on each Business Day, the Trusted Agent of each Authorized Participant will be provided, on a confidential basis, with a list of the names and quantities of the instruments comprising a Creation Basket, as well as the estimated Balancing Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. The instruments and cash that the purchaser is required to deliver in exchange for the Creation Units it is purchasing are referred to as the "Portfolio Deposit."

#### Placement of Purchase Orders

Each Fund will issue Shares through the Distributor on a continuous basis at NAV. The Exchange represents that the issuance of Shares will operate in a manner substantially similar to that of other ETFs.

Each Fund will issue Shares only at the NAV per Share next determined after an order in proper form is received. The Trust will sell and redeem Shares on each such day and will not suspend the right of redemption or postpone the date of payment or satisfaction upon redemption for more than seven days, other than as provided by Section 22(d) of the 1940 Act.

Shares may be purchased from a Fund by an Authorized Participant for its own account or for the benefit of a customer. The Distributor will furnish acknowledgements to those placing such orders that the orders have been accepted, but the Distributor may reject any order which is not submitted in proper form, as described in a Fund's prospectus or Statement of Additional Information ("SAI"). Purchases of Shares will be settled in-kind or cash for an amount equal to the applicable NAV per Share purchased plus applicable "Transaction Fees", as discussed below.

The NAV of each Fund is expected to be determined once each Business Day at a time determined by the Trust's

order, the key consideration will be the benefit that would accrue to a Fund and its investors. The Adviser represents that the Funds do not currently anticipate the need to sell or redeem Creation Units entirely on a cash basis.

<sup>24</sup> The Adviser represents that transacting through a Confidential Account is similar to transacting through a broker-dealer account, except that the Trusted Agent will be bound to keep the names and weights of the portfolio securities confidential.

1992) (Revisions of Guidelines to Form N-1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. See Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a-7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

<sup>19</sup> 26 U.S.C. 851.

<sup>20</sup> In the event that a Trusted Agent is a bank, the bank will be required to have an affiliated broker-dealer to accommodate the execution of hedging transactions on behalf of the holder of a Confidential Account.

Board of Directors ("Board"), currently anticipated to be as of the close of the regular trading session on the NYSE (ordinarily 4:00 p.m. E.T.) (the "Valuation Time"). Each Fund will establish a cut-off time ("Order Cut-Off Time") for purchase orders in proper form. To initiate a purchase of Shares, an Authorized Participant must submit to the Distributor an irrevocable order to purchase such Shares after the most recent prior Valuation Time but not later than the Order Cut-Off Time. The Order Cut-Off Time for a Fund may be its Valuation Time, or may be prior to the Valuation Time if the Board determines that an earlier Order Cut-Off Time for purchase of Shares is necessary and is in the best interests of Fund shareholders.

All orders to purchase Creation Units must be received by the Distributor no later than the scheduled closing time of the regular trading session on the NYSE (ordinarily 4:00 p.m. E.T.) ("Order Cut-Off Time") in each case on the date such order is placed ("Transmittal Date") in order for the purchaser to receive the NAV per Share determined on the Transmittal Date. In the case of custom orders, the order must be received by the Distributor, no later than 3:00 p.m. E.T., or such earlier time as may be designated by the Funds and disclosed to Authorized Participants.<sup>25</sup> The Distributor will maintain a record of Creation Unit purchases and will send out confirmations of such purchases.<sup>26</sup>

#### Transaction Fees

The Trust may impose purchase or redemption transaction fees ("Transaction Fees") in connection with the purchase or redemption of Shares from the Funds. The exact amounts of any such Transaction Fees will be determined by the Adviser but will not exceed 2%. The purpose of the Transaction Fees is to protect the continuing shareholders against possible dilutive transactional expenses, including operational processing and brokerage costs, associated with establishing and liquidating portfolio positions, including short positions, in connection with the purchase and redemption of Shares.

#### Purchases of Shares—Secondary Market

Only Authorized Participants and their customers will be able to acquire

Shares at NAV directly from a Fund through the Distributor. The required payment must be transferred in the manner set forth in a Fund's SAI by the specified time on the third DTC settlement day following the day it is transmitted (the "Transmittal Date"). These investors and others will also be able to purchase Shares in secondary market transactions at prevailing market prices. Each Fund will reserve the right to reject any purchase order at any time.

#### Redemption

Beneficial Owners may sell their Shares in the secondary market. Alternatively, investors that own enough Shares to constitute a Redemption Unit (currently, 25,000 Shares) or multiples thereof may redeem those Shares through the Distributor, which will act as the Trust's representative for redemption. The size of a Redemption Unit will be subject to change. Redemption orders for Redemption Units or multiples thereof must be placed by or through an Authorized Participant.

#### Authorized Participant Redemption

The Shares may be redeemed to a Fund in Redemption Unit size or multiples thereof as described below. Redemption orders of Redemption Units must be placed by or through an Authorized Participant ("AP Redemption Order"). Each Fund will establish an Order Cut-Off Time for redemption orders of Redemption Units in proper form. Redemption Units of the Fund will be redeemable at their NAV per Share next determined after receipt of a request for redemption by the Trust in the manner specified below before the Order Cut-Off Time. To initiate an AP Redemption Order, an Authorized Participant must submit to the Distributor an irrevocable order to redeem such Redemption Unit after the most recent prior Valuation Time but not later than the Order Cut-Off Time. The Order Cut-Off Time for a Fund may be its Valuation Time, or may be prior to the Valuation Time if the Board determines that an earlier Order Cut-Off Time for redemption of Redemption Units is necessary and is in the best interests of Fund shareholders.

Consistent with the provisions of Section 22(e) of the 1940 Act and Rule 22e-2 thereunder, the right to redeem will not be suspended, nor payment upon redemption delayed, except for: (1) Any period during which the NYSE is closed other than customary weekend and holiday closings, (2) any period during which trading on the NYSE is restricted, (3) any period during which an emergency exists as a result of which

disposal by a Fund of securities owned by it is not reasonably practicable or it is not reasonably practicable for a Fund to determine its NAV, and (4) for such other periods as the Commission may by order permit for the protection of shareholders.

Redemptions will occur primarily in-kind, although redemption payments may also be made partly or wholly in cash.<sup>27</sup> The Participant Agreement signed by each Authorized Participant will require establishment of a Confidential Account to receive distributions of securities in-kind upon redemption.<sup>28</sup> Each Authorized Participant will be required to appoint a Trusted Agent of its Confidential Account in order to facilitate orderly processing of redemptions. While a Fund will generally distribute securities in-kind, the Adviser may determine from time to time that it is not in a Fund's best interests to distribute securities in-kind, but rather to sell securities and/or distribute cash. For example, the Adviser may distribute cash to facilitate orderly portfolio management in connection with rebalancing or transitioning a portfolio in line with its investment objective, or if there is substantially more creation than redemption activity during the period immediately preceding a redemption request, or as necessary or appropriate in accordance with applicable laws and regulations. In this manner, a Fund can use in-kind redemptions to reduce the unrealized capital gains that may, at times, exist in a Fund by distributing low cost lots of each security that a Fund needs to dispose of to maintain its desired portfolio exposures. Shareholders of a Fund would benefit from the in-kind redemptions through the reduction of the unrealized capital gains in a Fund that would otherwise have to be realized and, eventually, distributed to shareholders.

The redemption basket will consist of the same securities for all Authorized Participants on any given day subject to the Adviser's ability to make minor

<sup>27</sup> It is anticipated that any portion of a Fund's NAV attributable to appreciated short positions will be paid in cash, as securities sold short are not susceptible to in-kind settlement. The value of other positions not susceptible to in-kind settlement may also be paid in cash.

<sup>28</sup> The terms of each Confidential Account will be set forth as an exhibit to the applicable Participant Agreement, which will be signed by each Authorized Participant. The terms of the Confidential Account will provide that the trust be formed under applicable state laws; the Custodian may act as Trusted Agent of the Confidential Account; and the Trusted Agent will be paid by the Authorized Participant a fee negotiated directly between the Authorized Participants and the Trusted Agent(s).

<sup>25</sup> A "custom order" is any purchase or redemption of Shares made in whole or in part on a cash basis, as provided in the Registration Statement.

<sup>26</sup> A Trusted Agent will provide information related to creations and redemption of Creation Units to the Financial Industry Regulatory Authority ("FINRA") upon request.

adjustments to address odd lots, fractional shares, tradeable sizes or other situations.

After receipt of a Redemption Order, a Fund's custodian ("Custodian") will typically deliver securities to the Confidential Account on a pro rata basis (which securities are determined by the Adviser) with a value approximately equal to the value of the Shares.<sup>29</sup> tendered for redemption at the Cut-Off time. The Custodian will make delivery of the securities by appropriate entries on its books and records transferring ownership of the securities to the Authorized Participant's Confidential Account, subject to delivery of the Shares redeemed. The Trusted Agent of the Confidential Account will in turn liquidate, hedge or otherwise manage the securities based on instructions from the Authorized Participant.<sup>30</sup> If the Trusted Agent is instructed to sell all securities received at the close on the redemption date, the Trusted Agent will pay the liquidation proceeds net of expenses plus or minus any cash balancing amount to the Authorized Participant through DTC.<sup>31</sup> The redemption securities that the Confidential Account receives is expected to mirror the portfolio holdings of a Fund pro rata. To the extent a Fund distributes portfolio securities through an in-kind distribution to more than one Confidential Account for the benefit of that account's Authorized Participant, each Fund expects to distribute a pro rata portion of the portfolio securities selected for distribution to each redeeming Authorized Participant.

If the Authorized Participant would receive a security that it is restricted from receiving, a Fund will deliver cash equal to the value of that security.

To address odd lots, fractional shares, tradeable sizes or other situations where

dividing securities is not practical or possible, the Adviser may make minor adjustments to the pro rata portion of portfolio securities selected for distribution to each redeeming Authorized Participant on such Business Day.

The Trust will accept a Redemption Order in proper form. A Redemption Order is subject to acceptance by the Trust and must be preceded or accompanied by an irrevocable commitment to deliver the requisite number of Shares. At the time of settlement, an Authorized Participant will initiate a delivery of the Shares versus subsequent payment against the proceeds, if any, of the sale of portfolio securities distributed to the applicable Confidential Account plus or minus any cash balancing amounts, and less the expenses of liquidation.

#### Net Asset Value

The NAV per Share of a Fund will be computed by dividing the value of the net assets of a Fund (*i.e.*, the value of its total assets less total liabilities) by the total number of Shares of a Fund outstanding, rounded to the nearest cent. Expenses and fees, including, without limitation, the management, administration and distribution fees, will be accrued daily and taken into account for purposes of determining NAV. Interest and investment income on the Trust's assets accrue daily and will be included in the Fund's total assets. The NAV per Share for a Fund will be calculated by a Fund's administrator ("Administrator") and determined as of the close of the regular trading session on the NYSE (ordinarily 4:00 p.m., E.T.) on each day that the NYSE is open.

Shares of exchange-listed equity securities will be valued at market value, which will generally be determined using the last reported official closing or last trading price on the exchange or market on which the securities are primarily traded at the time of valuation. Repurchase and reverse repurchase agreements will be valued based on price quotations or other equivalent indications of value provided by a third-party pricing service. Money market funds will be valued based on price quotations or other equivalent indications of value provided by a third-party pricing service. Cash equivalents will generally be valued on the basis of independent pricing services or quotes obtained from brokers and dealers.

When last sale prices and market quotations are not readily available, are deemed unreliable or do not reflect material events occurring between the

close of local markets and the time of valuation, investments will be valued using fair value pricing as determined in good faith by the Adviser under procedures established by and under the general supervision and responsibility of the Trust's Board of Trustees. Investments that may be valued using fair value pricing include, but are not limited to: (1) Securities that are not actively traded; (2) securities of an issuer that becomes bankrupt or enters into a restructuring; and (3) securities whose trading has been halted or suspended.

The frequency with which each Fund's investments will be valued using fair value pricing will primarily be a function of the types of securities and other assets in which the respective Fund will invest pursuant to its investment objective, strategies and limitations. If the Funds invest in open-end management investment companies registered under the 1940 Act (other than ETFs), they may rely on the NAVs of those companies to value the shares they hold of them.

Valuing the Funds' investments using fair value pricing involves the consideration of a number of subjective factors and thus the prices for those investments may differ from current market valuations. Accordingly, fair value pricing could result in a difference between the prices used to calculate NAV and the prices used to determine a Fund's VIIV, which could result in the market prices for Shares deviating from NAV. In cases where the fair value price of the security is materially different from the pricing data provided by the independent pricing sources and the Adviser determined that the ongoing pricing information is not likely to be reliable, the fair value will be used for calculation of the VIIV, and a Fund's Custodian will be instructed to disclose the identity and weight of the fair valued securities, as well as the fair value price being used for the security.

#### Availability of Information

The Funds' Web site ([www.precidianfunds.com](http://www.precidianfunds.com)), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for each Fund that may be downloaded. The Funds' Web site will include additional quantitative information updated on a daily basis, including, for each Fund, (1) daily trading volume, the prior Business Day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/

<sup>29</sup> If the NAV of the Shares redeemed differs from the value of the securities delivered to the applicable Confidential Account, the Fund will pay a cash balancing amount to compensate for the difference between the value of the securities delivered and the NAV.

<sup>30</sup> An Authorized Participant will issue execution instructions to the Trusted Agent and be responsible for all associated profit or losses. Like a traditional ETF, the Authorized Participant has the ability to sell the basket securities at any point during normal trading hours.

<sup>31</sup> Under applicable provisions of the Internal Revenue Code, the Authorized Participant is expected to be deemed a "substantial owner" of the Confidential Account because it receives distributions from the Confidential Account. As a result, all income, gain or loss realized by the Confidential Account will be directly attributed to the Authorized Participant. In a redemption, the Authorized Participant will have a basis in the distributed securities equal to the fair market value at the time of the distribution and any gain or loss realized on the sale of those Shares will be taxable income to the Authorized Participant.

Ask Price”),<sup>32</sup> and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The Web site and information will be publicly available at no charge.

As noted above, a mutual fund is required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N-SAR under the 1940 Act, and is required to file its complete portfolio schedules for the first and third fiscal quarters on Form N-Q under the 1940 Act, within 60 days of the end of the quarter. Form N-Q requires funds to file the same schedules of investments that are required in annual and semi-annual reports to shareholders. The Trust’s SAI and each Fund’s shareholder reports will be available free upon request from the Trust. These documents and forms may be viewed on-screen or downloaded from the Commission’s Web site at [www.sec.gov](http://www.sec.gov).

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services. Information regarding the previous day’s closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Updated price information for U.S. exchange-listed equity securities is available through major market data vendors or securities exchanges trading such securities. The intraday, closing and settlement prices of money market funds, repurchase agreements, reverse repurchase agreements and cash equivalents will be readily available from published or other public sources, or major market data vendors such as Bloomberg and Thomson Reuters. The NAV of any investment company security investment will be readily available on the Web site of the relevant investment company and from major market data vendors. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (“CTA”) high-speed line. In addition, the VIIV, as defined in NYSE Arca Equities Rule 8.900(c)(3) and as described further below, will be widely disseminated by one or more major

market data vendors at least every second during the Exchange’s Core Trading Session.

#### Dissemination of the Verified Intraday Indicative Value

The VIIV, which is approximate value of each Fund’s investments on a per Share basis, will be disseminated every second during the Exchange’s Core Trading Session. The VIIV should not be viewed as a “real-time” update of NAV because the VIIV may not be calculated in the same manner as NAV, which is computed once per day.

The Exchange will disseminate the VIIV for each Fund in one-second intervals during the Core Trading Session, through the facilities of the CTA. The VIIV is essentially an intraday NAV calculation every second during the Core Trading Session. Each Fund will adopt procedures governing the calculation of the VIIV and will bear responsibility for the accuracy of its calculation. Pursuant to those procedures, the VIIV will include all accrued income and expenses of a Fund and will assure that any extraordinary expenses, booked during the day, that would be taken into account in calculating a Fund’s NAV for that day are also taken into account in calculating the VIIV. For purposes of the VIIV, securities held by a Fund will be valued throughout the day based on the mid-point between the disseminated current national best bid and offer. The Adviser represents that, by utilizing the mid-point pricing for purposes of VIIV calculation, stale prices are eliminated and more accurate representation of the real time value of the underlying securities is provided to the market. Specifically, quotations based on the mid-point of bid/ask spreads more accurately reflect current market sentiment by providing real time information on where market participants are willing to buy or sell securities at that point in time. Using quotations rather than last sale information addresses concerns regarding the staleness of pricing information of less actively traded securities. Because quotations are updated more frequently than last sale information especially for inactive securities, the VIIV will be based on more current and accurate information. The use of quotations will also dampen the impact of any momentary spikes in the price of a portfolio security.

Each Fund will utilize two independent pricing sources to provide two independent sources of pricing information. Each Fund will also utilize a “Pricing Verification Agent” and establish a computer-based protocol that

will permit the Pricing Verification Agent to continuously compare the two data streams from the independent pricing agents sources on a real time basis.<sup>33</sup> A single VIIV will be disseminated publicly for each Fund; however, the Pricing Verification Agent will continuously compare the public VIIV against a non-public alternative intra-day indicative value to which the Pricing Verification Agent has access. If it becomes apparent that there is a material discrepancy between the two data streams, the Exchange will be notified and have the ability to halt trading in a Fund until the discrepancy is resolved. Each Fund’s Board will review the procedures used to calculate the VIIV and maintain its accuracy as appropriate, but not less than annually. The specific methodology for calculating the VIIV will be disclosed on each Fund’s Web site.

#### Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Funds.<sup>34</sup> Trading in Shares of the Funds will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) If the VIIV applicable to a Fund’s Shares is not being disseminated as required; (2) the extent to which trading is not occurring in the securities and/or the financial instruments comprising the holdings of a Fund; or (3) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.900(d)(2)(C), which sets forth circumstances under which Shares of the Funds will be halted.

#### Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange’s existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace only during the Core Trading Session in accordance with NYSE Arca Equities Rule 7.34(a)(3)(A). As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (“MPV”) for

<sup>32</sup> The Bid/Ask Price of a Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of a Fund’s NAV. The records relating to Bid/Ask Prices will be retained by each Fund and its service providers.

<sup>33</sup> A Fund’s Custodian will provide, on a daily basis, the constituent basket file comprised of all securities plus any cash to the independent pricing agent(s) for purposes of pricing.

<sup>34</sup> See NYSE Arca Equities Rule 7.12.

quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.900. The Exchange represents that, for initial and/or continued listing, each Fund will be in compliance with Rule 10A-3 under the Act,<sup>35</sup> as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares of each Fund that the NAV per Share of each Fund will be calculated daily and will be made available to all market participants at the same time.

#### Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by regulatory staff of the Exchange or the FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>36</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, will communicate as needed regarding trading in the Shares, underlying stocks and ETFs with other markets and other entities that are members of the Intermarket Surveillance Group ("ISG"), and FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, may obtain trading information regarding trading such securities from such markets and other entities. In

addition, the Exchange may obtain information regarding trading in the Shares, underlying stocks and ETFs from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>37</sup>

The Funds' Adviser will make available daily to FINRA and the Exchange the portfolio holdings of each Fund in order to facilitate the performance of the surveillances referred to above.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

#### Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit ("ETP") Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares; (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the VIIV is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Funds are subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m., E.T. each trading day.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>38</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>39</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market

system, and, in general, to protect investors and the public interest.

The Exchange believes that proposed Rule 8.900 is designed to prevent fraudulent and manipulative acts and practices in that the proposed rules relating to listing and trading of Managed Portfolio Shares provide specific initial and continued listing criteria required to be met by such securities. Proposed Rule 8.900(d) sets forth initial and continued listing criteria applicable to Managed Portfolio Shares. Proposed Rule 8.900(d)(1) provides that, for each series of Managed Portfolio Shares, the Corporation will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading. In addition, the Corporation will obtain a representation from the issuer of each series of Managed Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time. Proposed Rule 8.900(d)(2) provides that each series of Managed Portfolio Shares will be listed and traded subject to application of the specified continued listing criteria, as described above. Proposed Rule 8.900(d)(2)(A) provides that the VIIV for Managed Portfolio Shares will be widely disseminated by one or more major market data vendors every second during the Exchange's Core Trading Session. Proposed Rule 8.900(d)(2)(C) provides that, upon notification to the Corporation by the Investment Company or its agent that (i) the prices from the multiple independent pricing sources to be validated by the Investment Company's pricing verification agent differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV, or (ii) that the VIIV of a series of Managed Portfolio Shares is not being priced and disseminated in one-second intervals, as required, the Corporation shall halt trading in the Managed Portfolio Shares as soon as practicable. Such halt in trading shall continue until the Investment Company or its agent notifies the Corporation that the prices from the independent pricing sources no longer differ by more than 25 basis points for 60 seconds or that the VIIV is being priced and disseminated as required. Proposed Commentary .05 to NYSE Arca Equities Rule 8.900 provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is affiliated with a broker-dealer, or if any Trusted Agent is registered as a broker-dealer or is affiliated with a broker-dealer, such

<sup>35</sup> See 17 CFR 240.10A-3.

<sup>36</sup> FINRA surveils certain trading activity on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

<sup>37</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org).

<sup>38</sup> 15 U.S.C. 78f(b).

<sup>39</sup> 15 U.S.C. 78f(b)(5).

investment adviser or Trusted Agent will erect a “fire wall” between the investment adviser or Trusted Agent and (i) personnel of the broker-dealer or broker-dealer affiliate, as applicable, or (ii) the Authorized Participant or non-Authorized Participant market maker, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company portfolio. Personnel who make decisions on the Investment Company’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio Personnel who make decisions on the Investment Company’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio.

With respect to the proposed listing and trading of Shares of the Funds, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.900. Price information for the exchange-listed equity securities held by the Funds will be available through major market data vendors or securities exchanges listing and trading such securities. All exchange-listed equity securities held by the Funds will be listed on national securities exchanges. The listing and trading of such securities is subject to rules of the exchanges on which they are listed and traded, as approved by the Commission. The Funds will primarily hold U.S.-listed securities or ETFs. Further, the Funds will not invest in options, futures or swaps. A Fund’s investments will be consistent with its respective investment objective and will not be used to enhance leverage. The Funds will not invest in non-U.S.-listed securities. FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, will communicate as needed regarding trading in the Shares and underlying stocks and ETFs with other markets and other entities that are members of the ISG, and FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, underlying stocks

and ETFs from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. A Trusted Agent will provide information related to creations and redemption of Creation Units to FINRA upon request. The Funds’ Adviser will make available daily to FINRA and the Exchange the portfolio holdings of each Fund in order to facilitate the performance of the surveillances referred to above.

The Exchange, after consulting with various Lead Market Makers that trade ETFs on the Exchange, believes that market makers will be able to make efficient and liquid markets priced near the VIIV as long as an accurate VIIV is disseminated every second, market makers have knowledge of a fund’s means of achieving its investment objective even without daily disclosure of a fund’s underlying portfolio, and are able to engage in Bona Fide Arbitrage. The Exchange believes that market makers will employ risk-management techniques such as Bona Fide Arbitrage in addition to “statistical arbitrage”, which is currently used throughout the financial services industry, to make efficient markets in exchange traded products.<sup>40</sup> This ability should permit market makers to make efficient markets in shares without knowledge of a fund’s underlying portfolio.

The Exchange understands that traders, in addition to employing Bona Fide Arbitrage, use statistical analysis to derive correlations between different sets of instruments to identify opportunities to buy or sell one set of instruments when it is mispriced relative to the others. For Managed Portfolio Shares, market makers utilizing statistical arbitrage use the knowledge of a fund’s means of achieving its investment objective, as described in the applicable fund registration statement, to construct a hedging proxy for a fund to manage a market maker’s quoting risk in connection with trading fund shares. Market makers will then conduct statistical arbitrage between their hedging proxy (for example, the Russell 1000 Index) and shares of a fund, buying and selling one against the other over the course of the trading day. Eventually, at the end of each day, they will evaluate how their proxy performed in comparison to the price of a fund’s shares, and use that analysis as well as knowledge of risk metrics, such as volatility and turnover, to enhance their proxy calculation to make it a more efficient hedge.

<sup>40</sup> See note 9, *supra*.

Market makers who anticipate employing statistical arbitrage more often than Bona Fide Arbitrage, have indicated to the Exchange that, after the first few days of trading, there will be sufficient data to run a statistical analysis which will lead to spreads being tightened substantially around VIIV. This is similar to certain other existing exchange traded products (for example, ETFs that invest in foreign securities that do not trade during U. S. trading hours), in which spreads may be generally wider in the early days of trading and then narrow as market makers gain more confidence in their real-time hedges.

The Lead Market Makers also indicated that, as with some other new exchange-traded products, spreads may be generally wider in the early days of trading and would tend to narrow as market makers gain more confidence in the accuracy of their hedges and their ability to adjust these hedges in real-time relative to the published VIIV and gain an understanding of the applicable market risk metrics such as volatility and turnover, and as natural buyers and sellers enter the market. Other relevant factors cited by Lead Market Makers were that a fund’s investment objectives are clearly disclosed in the applicable prospectus, the existence of quarterly portfolio disclosure, the capacity to engage in Bona Fide Arbitrage and the ability to create shares in creation unit size.

The Commission’s concept release regarding “Actively Managed Exchange-Traded Funds” highlighted several issues that could impact the Commission’s willingness to authorize the operation of an actively-managed ETF, including whether effective arbitrage of the ETF shares exists.<sup>41</sup> The Concept Release identifies the transparency of a fund’s portfolio and the liquidity of the securities in a fund’s portfolio as central to effective arbitrage. With respect to the Funds, the Funds’ use of U.S.-listed securities and the ability of market makers to engage in Bona Fide Arbitrage provide adequate liquidity as well as the ability to engage in riskless arbitrage. Additionally, certain existing ETFs with portfolios of foreign securities have shown their ability to trade efficiently in the secondary market at approximately their NAV even though they do not provide opportunities for riskless arbitrage transactions during much of the trading day.<sup>42</sup> Such ETFs have been shown to

<sup>41</sup> See Investment Company Act Release No. 25258 (November 8, 2001) (the “Concept Release”).

<sup>42</sup> The Adviser represents that the mechanics of arbitrage and hedging differ. Prior Rule 10a-1 and

have pricing characteristics very similar to ETFs that can be arbitrated in this manner. For example, index-based ETFs containing securities that trade during different trading hours than the ETF, such as ETFs that hold Asian stocks, have demonstrated efficient pricing characteristics notwithstanding the inability of market professionals to engage in “riskless arbitrage” with respect to the underlying portfolio for most, or even all, of the U.S. trading day when Asian markets are closed. Pricing for shares of such ETFs is efficient because market professionals are still able to hedge their positions with offsetting, correlated positions in derivative instruments during the entire trading day.

The real-time dissemination of a fund’s VIIV, the ability for market makers to engage is riskless arbitrage through the Bona Fide Arbitrage mechanism, together with the right of Authorized Participants to create and redeem each day at the NAV, will be sufficient for market participants to value and trade shares in a manner that will not lead to significant deviations between the shares’ Bid/Ask Price and NAV.

The pricing efficiency with respect to trading a series of Managed Portfolio Shares will generally rest on the ability of market participants to arbitrage between the shares and a fund’s portfolio, in addition to the ability of market participants to assess a fund’s underlying value accurately enough throughout the trading day in order to hedge positions in shares effectively. Professional traders not employing Bona Fide Arbitrage can buy shares that they perceive to be trading at a price less than that which will be available at a subsequent time, and sell shares they perceive to be trading at a price higher than that which will be available at a subsequent time. It is expected that, as part of their normal day-to-day trading activity, market makers assigned to shares by the Exchange, off-exchange market makers, firms that specialize in electronic trading, hedge funds and other professionals specializing in short-term, non-fundamental trading

strategies will assume the risk of being “long” or “short” shares through such trading and will hedge such risk wholly or partly by simultaneously taking positions in correlated assets<sup>43</sup> or by netting the exposure against other, offsetting trading positions—much as such firms do with existing ETFs and other equities. Disclosure of a fund’s investment objective and principal investment strategies in its prospectus and SAI, along with the dissemination of the VIIV every second, should permit professional investors to engage easily in this type of hedging activity.<sup>44</sup>

With respect to trading of Shares of the Funds, the ability of market participants to buy and sell Shares at prices near the VIIV is dependent upon their assessment that the VIIV is a reliable, indicative real-time value for a Fund’s underlying holdings. Market participants are expected to accept the VIIV as a reliable, indicative real-time

<sup>43</sup> Price correlation trading is used throughout the financial industry. It is used to discover both trading opportunities to be exploited, such as currency pairs and statistical arbitrage, as well as for risk mitigation such as dispersion trading and beta hedging. These correlations are a function of differentials, over time, between one or multiple securities pricing. Once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging basket has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period, making corrections where warranted.

<sup>44</sup> With respect to trading in Shares of the Funds, market participants would manage risk in a variety of ways. In addition to Bona Fide Arbitrage, it is expected that market participants will be able to determine how to trade Shares at levels approximating the VIIV without taking undue risk by gaining experience with how various market factors (e.g., general market movements, sensitivity of the VIIV to intraday movements in interest rates or commodity prices, etc.) affect VIIV, and by finding hedges for their long or short positions in Shares using instruments correlated with such factors. The Adviser expects that market participants will initially determine the VIIV’s correlation to a major large capitalization equity benchmark with active derivative contracts, such as the Russell 1000 Index, and the degree of sensitivity of the VIIV to changes in that benchmark. For example, using hypothetical numbers for illustrative purposes, market participants should be able to determine quickly that price movements in the Russell 1000 Index predict movements in a Fund’s VIIV 95% of the time (an acceptably high correlation) but that the VIIV generally moves approximately half as much as the Russell 1000 Index with each price movement. This information is sufficient for market participants to construct a reasonable hedge—buy or sell an amount of futures, swaps or ETFs that track the Russell 1000 equal to half the opposite exposure taken with respect to Shares. Market participants will also continuously compare the intraday performance of their hedge to a Fund’s VIIV. If the intraday performance of the hedge is correlated with the VIIV to the expected degree, market participants will feel comfortable that they are appropriately hedged and can rely on the VIIV as appropriately indicative of a Fund’s performance.

value because (1) the VIIV will be calculated and disseminated based on a Fund’s actual portfolio holdings, (2) the securities in which the Funds plan to invest are generally highly liquid and actively traded and therefore generally have accurate real time pricing available, and (3) market participants will have a daily opportunity to evaluate whether the VIIV at or near the close of trading is indeed predictive of the actual NAV.

The real-time dissemination of a Fund’s VIIV, the ability for market makers to engage is riskless arbitrage through the Bona Fide Arbitrage mechanism, together with the ability of Authorized Participants to create and redeem each day at the NAV, will be crucial for market participants to value and trade Shares in a manner that will not lead to significant deviations between the Shares’ Bid/Ask Price and NAV.<sup>45</sup>

In a typical index-based ETF, it is standard for Authorized Participants to know what securities must be delivered in a creation or will be received in a redemption. For Managed Portfolio Shares, however, Authorized Participants do not need to know the securities comprising the portfolio of a Fund since creations and redemptions are handled through the Confidential Account mechanism. The Adviser represents that the in-kind creations and redemptions through a Confidential Account will preserve the integrity of the active investment strategy and eliminate the potential for “free riding” or “front-running”, while still providing investors with the advantages of the ETF structure.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of an issue of Managed Portfolio Shares that the NAV per share of a fund will be calculated daily and that the NAV and will be made available to all market participants at the same time. Investors can also obtain a fund’s SAI, shareholder reports, and its Form N–CSR and Form N–SAR. A fund’s SAI and shareholder reports will be available free upon request from the applicable fund, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission’s Web site. In addition, with respect to

<sup>45</sup> The statements in the Statutory Basis section of this filing relating to pricing efficiency, arbitrage, and activities of market participants, including market makers and Authorized Participants, are based on representations by the Adviser and review by the Exchange.

Regulation T under the Act both describe arbitrage as either buying and selling the same security in two different markets or buying and selling two different securities, one of which is convertible into the other. This is also known as a “riskless arbitrage” transaction in that the transaction is risk free since it generally consists of buying an asset at one price and simultaneously selling that same asset at a higher price, thereby generating a profit on the difference. Hedging, on the other hand, involves managing risk by purchasing or selling a security or instrument that will track or offset the value of another security or instrument. Arbitrage and hedging are both used to manage risk; however, they involve different trading strategies.



the Funds, a large amount of information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares will be available via the CTA high-speed line. Information regarding the intra-day value of the Shares of a Fund, which is the VIIV as defined in proposed NYSE Arca Equities Rule 8.900(c)(3), will be widely disseminated every second throughout the Exchange's Core Trading Session by one or more major market data vendors. The Web site for the Funds will include a form of the prospectus for the Funds that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.900(d)(2)(C), which sets forth circumstances under which Shares of the Funds will be halted. In addition, as noted above, investors will have ready access to the VIIV, and quotation and last sale information for the Shares. The Shares will conform to the initial and continued listing criteria under proposed Rule 8.900. The Funds will not invest in options, futures, forwards or swaps. Each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While a Fund may invest in inverse ETFs, a Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs. The Funds will not invest in non-U.S. listed securities.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing

agreement. In addition, as noted above, investors will have ready access to information regarding the VIIV and quotation and last sale information for the Shares.

#### *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 Exchange believes the proposed rule change would permit listing and trading of another type of actively-managed ETF that has characteristics different from existing actively-managed and index ETFs, and would introduce additional competition among various ETF products to the benefit of investors.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2016-08 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-NYSEArca-2016-08. 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 Section, 100 F Street NE., Washington, DC 20549 on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the Exchange's principal office. 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-2016-08 and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>46</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-03269 Filed 2-17-16; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Investment Company Act Release No. 31995; File No. 812-14574]**

### **PowerShares Exchange-Traded Self-Indexed Fund Trust, et al.; Notice of Application**

February 11, 2016.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c-1 under the Act, under

<sup>46</sup> 17 CFR 200.30-3(a)(12).

sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

**Summary of Application:** Applicants request an order that would permit (a) series of certain open-end management investment companies to issue shares ("Shares") redeemable in large aggregations only ("Creation Units"); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value ("NAV"); (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Creation Units for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

**Applicants:** PowerShares Exchange-Traded Self-Indexed Fund Trust (the "Trust"), Invesco PowerShares Capital Management LLC ("IPCM"), and Invesco Distributors, Inc. ("IDI").

**Filing Dates:** The application was filed on October 30, 2015, and amended on November 24, 2015, and January 6, 2016. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

**Hearing or Notification of Hearing:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 7, 2016, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090; Applicants: the Trust and IPCM, 3500 Lacey Road, Downers Grove, IL 60515;

IDI, 11 Greenway Plaza, Suite 1000, Houston, TX 77046.

**FOR FURTHER INFORMATION CONTACT:**

Christine Y. Greenlees, Senior Counsel at (202) 551-6879, or Dalia Osman Blass, Assistant Director, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

**Applicants' Representations**

1. The Trust is a statutory trust organized under the laws of the State of Delaware and will be registered with the Commission as an open-end management investment company that offers multiple series.

2. IPCM will be the investment adviser to the Initial Self-Indexing Fund (defined below). IPCM is, and any other Adviser (defined below) will be, registered as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). The Adviser may enter into sub-advisory agreements with one or more investment advisers to act as sub-advisers to particular Self-Indexing Funds (each, a "Sub-Adviser"). Any Sub-Adviser will either be registered under the Advisers Act or will not be required to register thereunder.

3. The Trust will enter into a distribution agreement with one or more distributors. Each distributor for a Self-Indexing Fund (defined below) will be a broker-dealer ("Broker") registered under the Securities Exchange Act of 1934 ("Exchange Act") and will act as distributor and principal underwriter ("Distributor") of one or more of the Self-Indexing Funds. IDI, a broker-dealer registered under the Exchange Act, is a wholly-owned subsidiary of Invesco Ltd. and will act as the initial Distributor and principal underwriter of the Self-Indexing Funds. No Distributor is or will be affiliated with any Exchange (defined below).

4. Applicants request that the order apply to a new series, the PowerShares Quantitative U.S. Equity Portfolio ("Initial Self-Indexing Fund"), and any additional series of the Trust, that may be created in the future ("Future Self-Indexing Funds"), each of which will operate as an exchange traded fund ("ETF") and will track a specified Affiliated Index (as defined below) comprised of domestic and/or foreign

equity and/or fixed income securities (each, an "Underlying Index"). Any Future Self-Indexing Fund will (a) be advised by IPCM or an entity controlling, controlled by, or under common control with IPCM (each, an "Adviser") and (b) comply with the terms and conditions of the application. The Initial Self-Indexing Fund and Future Self-Indexing Funds, together, are the "Self-Indexing Funds."<sup>1</sup>

5. Each Self-Indexing Fund will hold certain securities, currencies, other assets and other investment positions ("Portfolio Holdings") selected to correspond generally to the performance of its Underlying Index. Certain of the Self-Indexing Funds will be based on Underlying Indexes that will be comprised of equity and/or fixed income securities issued by one or more of the following categories of issuers: (i) Domestic issuers and (ii) non-domestic issuers meeting the requirements for trading in U.S. markets. Other Self-Indexing Funds will be based on Underlying Indexes that will be comprised of foreign and domestic, or solely foreign, equity and/or fixed income securities ("Foreign Self-Indexing Funds").

6. Applicants represent that each Self-Indexing Fund will invest at least 80% of its assets (excluding securities lending collateral) in the component securities of its respective Underlying Index ("Component Securities") and TBA Transactions<sup>2</sup>, and in the case of Foreign Self-Indexing Funds, Component Securities and Depositary Receipts<sup>3</sup> representing Component

<sup>1</sup> All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the order. A Fund of Funds (as defined below) may rely on the order only to invest in Self-Indexing Funds and not in any other registered investment company.

<sup>2</sup> A "to-be-announced transaction" or "TBA Transaction" is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to settlement date.

<sup>3</sup> Depositary receipts representing foreign securities ("Depositary Receipts") include American Depositary Receipts and Global Depositary Receipts. The Self-Indexing Funds may invest in Depositary Receipts representing foreign securities in which they seek to invest. Depositary Receipts are typically issued by a financial institution (a "depositary bank") and evidence ownership interests in a security or a pool of securities that have been deposited with the depositary bank. A Self-Indexing Fund will not invest in any Depositary Receipts that the Adviser or any Sub-Adviser deems to be illiquid or for which pricing information is not readily available. No affiliated person of a Self-Indexing Fund, the Adviser or any Sub-Adviser will serve as the

Securities. Each Self-Indexing Fund may also invest up to 20% of its assets in certain index futures, options, options on index futures, swap contracts or other derivatives, as related to its respective Underlying Index and its Component Securities, cash and cash equivalents, other investment companies, as well as in securities and other instruments not included in its Underlying Index but which the Adviser believes will help the Self-Indexing Fund track its Underlying Index. A Self-Indexing Fund may also engage in short sales in accordance with its investment objective.

7. A Self-Indexing Fund will utilize either a replication or representative sampling strategy to track its Underlying Index. A Self-Indexing Fund using a replication strategy will invest in the Component Securities of its Underlying Index in the same approximate proportions as in such Underlying Index. A Self-Indexing Fund using a representative sampling strategy will hold some, but not necessarily all, of the Component Securities of its Underlying Index. Applicants state that a Self-Indexing Fund using a representative sampling strategy will not be expected to track the performance of its Underlying Index with the same degree of accuracy as would an investment vehicle that invested in every Component Security of the Underlying Index with the same weighting as the Underlying Index. Applicants expect that each Self-Indexing Fund will have an annual tracking error relative to the performance of its Underlying Index of less than 5%.

8. The Self-Indexing Funds will be entitled to use their Underlying Indexes pursuant to either a licensing agreement with the Affiliated Index Provider (defined below) or a sub-licensing arrangement with the Adviser, which has or will have a licensing agreement with such Affiliated Index Provider.<sup>4</sup> An affiliated person, as defined in section 2(a)(3) of the Act (an "Affiliated Person"), or an affiliated person of an Affiliated Person (a "Second-Tier Affiliate"), of the Trust or a Self-Indexing Fund, of an Adviser, of any Sub-Adviser to or promoter of a Self-Indexing Fund, or of the Distributor (each, an "Affiliated Index Provider")<sup>5</sup>

depository bank for any Depositary Receipts held by a Self-Indexing Fund.

<sup>4</sup> The licenses for the Self-Indexing Funds will specifically state that the Affiliated Index Provider (or in case of a sub-licensing agreement, the Adviser) must provide the use of the Underlying Indexes and related intellectual property at no cost to the Trust and the Self-Indexing Funds.

<sup>5</sup> In the event that an Adviser or Sub-Adviser serves as the Affiliated Index Provider for a Self-

will serve as the Index Provider to each Self-Indexing Fund. An Affiliated Index Provider will create a proprietary, rules-based methodology to create Underlying Indexes (each an "Affiliated Index").<sup>6</sup>

9. Applicants recognize that the Self-Indexing Funds could raise concerns regarding the ability of the Affiliated Index Provider to manipulate the Underlying Index to the benefit or detriment of a Self-Indexing Fund. Applicants further recognize the potential for conflicts that may arise with respect to the personal trading activity of personnel of the Affiliated Index Provider who have knowledge of changes to an Underlying Index prior to the time that information is publicly disseminated.

10. Applicants propose that each day that the Trust, the NYSE and the national securities exchange (as defined in section 2(a)(26) of the Act) (an "Exchange") on which the Self-Indexing Fund's Shares are primarily listed ("Listing Exchange") are open for business, including any day that a Self-Indexing Fund is required to be open under section 22(e) of the Act (a "Business Day"), each Self-Indexing Fund will post on its Web site, before commencement of trading of Shares on the Exchange, the identities and quantities of the Portfolio Holdings that will form the basis for the Self-Indexing Fund's calculation of its NAV at the end of the Business Day.<sup>7</sup> Applicants believe that requiring the Self-Indexing Funds to maintain full portfolio transparency

Indexing Fund, the terms "Affiliated Index Provider" or "Index Provider," with respect to that Self-Indexing Fund, will be limited to the employees of the applicable Adviser or Sub-Adviser that are responsible for creating, compiling and maintaining the relevant Underlying Index.

<sup>6</sup> The Affiliated Indexes may be made available to registered investment companies, as well as separately managed accounts of institutional investors and privately offered funds that are not deemed to be "investment companies" in reliance on section 3(c)(1) or 3(c)(7) of the Act for which the Adviser acts as adviser or subadviser ("Affiliated Accounts") as well as other such registered investment companies, separately managed accounts and privately offered funds for which it does not act either as adviser or subadviser ("Unaffiliated Accounts"). The Affiliated Accounts and the Unaffiliated Accounts, like the Self-Indexing Funds, would seek to track the performance of one or more Underlying Index(es) by investing in the constituents of such Underlying Indexes or a representative sample of such constituents of the Underlying Index. Consistent with the relief requested from section 17(a), the Affiliated Accounts will not engage in Creation Unit transactions with a Self-Indexing Fund.

<sup>7</sup> Under accounting procedures followed by each Self-Indexing Fund, trades made on the prior Business Day ("T") will be booked and reflected in NAV on the current Business Day (T+1). Accordingly, the Self-Indexing Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

will provide an additional effective mechanism for addressing any such potential conflicts of interest.

11. In addition, applicants do not believe the potential for conflicts of interest raised by the Adviser's use of the Underlying Indexes in connection with the management of Self-Indexing Funds and the Affiliated Accounts will be substantially different from the potential conflicts presented by an adviser managing two or more registered funds. Both the Act and the Advisers Act contain various protections to address conflicts of interest where an adviser is managing two or more registered funds and these protections will also help address these conflicts with respect to the Self-Indexing Funds.

12. Each Adviser and any Sub-Adviser has adopted or will adopt, pursuant to rule 206(4)-7 under the Advisers Act, written policies and procedures designed to prevent violations of the Advisers Act and the rules thereunder. These include policies and procedures designed to minimize potential conflicts of interest among the Self-Indexing Funds and the Affiliated Accounts, such as cross trading policies, as well as those designed to ensure the equitable allocation of portfolio transactions and brokerage commissions. In addition, IPCM has adopted policies and procedures as required under section 204A of the Advisers Act, which are reasonably designed in light of the nature of its business to prevent the misuse, in violation of the Advisers Act or the Exchange Act or the rules thereunder, of material non-public information by the IPCM or associated persons ("Inside Information Policy"). Any other Adviser and/or Sub-Adviser will be required to adopt and maintain a similar Inside Information Policy. In accordance with the Code of Ethics<sup>8</sup> and Inside Information Policy of each Adviser and Sub-Adviser, personnel of those entities with knowledge about the composition of a Portfolio Deposit<sup>9</sup> will be prohibited from disclosing such information to any other person, except as authorized in the course of their employment, until such information is made public. In addition, an Index Provider will not provide any information relating to changes to an

<sup>8</sup> IPCM has also adopted (and any other Adviser has adopted or will adopt) a code of ethics pursuant to rule 17j-1 under the Act and rule 204A-1 under the Advisers Act, which contains provisions reasonably necessary to prevent Access Persons (as defined in rule 17j-1) from engaging in any conduct prohibited in rule 17j-1 ("Code of Ethics").

<sup>9</sup> The instruments and cash that the purchaser is required to deliver in exchange for the Creation Units it is purchasing is referred to as the "Portfolio Deposit."

Underlying Index's methodology for the inclusion of component securities, the inclusion or exclusion of specific component securities, or methodology for the calculation or the return of component securities, in advance of a public announcement of such changes by the Index Provider. The Adviser will also include under Item 10.C. of Part 2 of its Form ADV a discussion of its relationship to any Affiliated Index Provider and any material conflicts of interest resulting therefrom, regardless of whether the Affiliated Index Provider is a type of affiliate specified in Item 10.

13. To the extent the Self-Indexing Funds transact with an Affiliated Person of an Adviser or Sub-Adviser, such transactions will comply with the Act, the rules thereunder and the terms and conditions of the requested order. In this regard, each Self-Indexing Fund's board of directors or trustees ("Board") will periodically review the Self-Indexing Fund's use of an Affiliated Index Provider. Subject to the approval of the Self-Indexing Fund's Board, the Adviser, Affiliated Persons of the Adviser ("Adviser Affiliates") and Affiliated Persons of any Sub-Adviser ("Sub-Adviser Affiliates") may be authorized to provide custody, fund accounting and administration and transfer agency services to the Self-Indexing Funds. Any services provided by the Adviser, Adviser Affiliates, Sub-Adviser and Sub-Adviser Affiliates will be performed in accordance with the provisions of the Act, the rules under the Act and any relevant guidelines from the staff of the Commission.

14. The Shares of each Self-Indexing Fund will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments ("Deposit Instruments"), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments ("Redemption Instruments").<sup>10</sup> On any given Business Day, the names and quantities of the instruments that constitute the Deposit

Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, unless the Self-Indexing Fund is Rebalancing (as defined below). In addition, the Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Self-Indexing Fund's portfolio (including cash positions)<sup>11</sup> except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;<sup>12</sup> (c) TBA Transactions, short positions, derivatives and other positions that cannot be transferred in kind<sup>13</sup> will be excluded from the Deposit Instruments and the Redemption Instruments;<sup>14</sup> (d) to the extent the Self-Indexing Fund determines, on a given Business Day, to use a representative sampling of the Self-Indexing Fund's portfolio;<sup>15</sup> or (e) for temporary periods, to effect changes in the Self-Indexing Fund's portfolio as a result of the rebalancing of its Underlying Index (any such change, a "Rebalancing"). If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Deposit Instruments or Redemption Instruments exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the "Cash Amount").

15. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount; (b) if, on a given Business Day, the Self-Indexing Fund announces before the open of trading

that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, the Self-Indexing Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash;<sup>16</sup> (d) if, on a given Business Day, the Self-Indexing Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC or DTC (defined below); or (ii) in the case of Foreign Self-Indexing Funds holding non-U.S. investments, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if the Self-Indexing Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign Self-Indexing Fund holding non-U.S. investments would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.<sup>17</sup>

16. Creation Units will consist of specified large aggregations of Shares, e.g., at least 25,000 Shares, and it is expected that the initial price of a Creation Unit will range from \$1 million to \$10 million. All orders to purchase Creation Units must be placed with the

<sup>10</sup> The Self-Indexing Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 ("Securities Act"). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Self-Indexing Funds will comply with the conditions of rule 144A.

<sup>11</sup> The portfolio used for this purpose will be the same portfolio used to calculate the Self-Indexing Fund's NAV for the Business Day.

<sup>12</sup> A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

<sup>13</sup> This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Self-Indexing Fund does not intend to seek such consents.

<sup>14</sup> Because these instruments will be excluded from the Deposit Instruments and the Redemption Instruments, their value will be reflected in the determination of the Cash Amount (as defined below).

<sup>15</sup> A Self-Indexing Fund may only use sampling for this purpose if the sample: (i) Is designed to generate performance that is highly correlated to the performance of the Self-Indexing Fund's portfolio; (ii) consists entirely of instruments that are already included in the Self-Indexing Fund's portfolio; and (iii) is the same for all Authorized Participants (as defined below) on a given Business Day.

<sup>16</sup> In determining whether a particular Self-Indexing Fund will sell or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Self-Indexing Fund and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution than Share purchasers because of the Adviser's size, experience and potentially stronger relationships in the fixed income markets. Purchases of Creation Units either on an all cash basis or in-kind are expected to be neutral to the Self-Indexing Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax consequences for the remaining Self-Indexing Fund shareholders that would not occur with an in-kind redemption. As a result, tax consideration may warrant in-kind redemptions.

<sup>17</sup> A "custom order" is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

Distributor by or through an "Authorized Participant" which is either (1) a "Participating Party," *i.e.*, a broker-dealer or other participant in the Continuous Net Settlement System of the NSCC, a clearing agency registered with the Commission, or (2) a participant in The Depository Trust Company ("DTC") ("DTC Participant"), which, in either case, has signed a participant agreement with the Distributor. The Distributor will be responsible for transmitting the orders to the Self-Indexing Funds and will furnish to those placing such orders confirmation that the orders have been accepted, but applicants state that the Distributor may reject any order which is not submitted in proper form.

17. Each Business Day, before the open of trading on the Listing Exchange, each Self-Indexing Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Deposit Instruments and the Redemption Instruments, as well as the estimated Cash Amount (if any), for that day. The list of Deposit Instruments and Redemption Instruments will apply until a new list is announced on the following Business Day, and there will be no intra-day changes to the list except to correct errors in the published list. Each Listing Exchange or other major market data provider will disseminate, every 15 seconds during regular Exchange trading hours, through the facilities of the Consolidated Tape Association or other widely disseminated means, an amount for each Self-Indexing Fund stated on a per individual Share basis representing the sum of (i) the estimated Cash Amount and (ii) the current value of the Deposit Instruments.

18. Transaction expenses, including operational processing and brokerage costs, will be incurred by a Self-Indexing Fund when investors purchase or redeem Creation Units in-kind and such costs have the potential to dilute the interests of the Self-Indexing Fund's existing shareholders. Each Self-Indexing Fund will impose purchase or redemption transaction fees ("Transaction Fees") in connection with effecting such purchases or redemptions of Creation Units. In all cases, such Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities. Since the Transaction Fees are intended to defray the transaction expenses as well as to prevent possible shareholder dilution resulting from the purchase or redemption of Creation Units, the Transaction Fees will be borne only by

such purchasers or redeemers.<sup>18</sup> The Distributor will be responsible for delivering the Self-Indexing Fund's prospectus to those persons acquiring Shares in Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the applicable Self-Indexing Fund to implement the delivery of its Shares.

19. Shares of each Self-Indexing Fund will be listed and traded individually on an Exchange. It is expected that one or more member firms of an Exchange will be designated to act as a market maker (each, a "Market Maker") and maintain a market for Shares trading on the Exchange. Prices of Shares trading on an Exchange will be based on the current bid/offer market. Transactions involving the sale of Shares on an Exchange will be subject to customary brokerage commissions and charges.

20. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Market Makers, acting in their roles to provide a fair and orderly secondary market for the Shares, may from time to time find it appropriate to purchase or redeem Creation Units. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.<sup>19</sup> The price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

21. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from the Self-Indexing Fund, or tender such Shares for redemption to the Self-Indexing Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed through an Authorized Participant. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Units.

<sup>18</sup> Where a Self-Indexing Fund permits an in-kind purchaser to substitute cash-in-lieu of depositing one or more of the requisite Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Instruments.

<sup>19</sup> Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or the DTC Participants.

22. Neither the Trust nor any Self-Indexing Fund will be advertised or marketed or otherwise held out as a traditional open-end investment company or a "mutual fund." Instead, each Self-Indexing Fund will be marketed as an "ETF." All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on an Exchange, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and will disclose that the owners of Shares may acquire those Shares from the Self-Indexing Fund or tender such Shares for redemption to the Self-Indexing Fund in Creation Units only. The Self-Indexing Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

### Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c-1 under the Act, under section 12(d)(1)(j) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(j) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

**Sections 5(a)(1) and 2(a)(32) of the Act**

3. Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer.

Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer’s current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Self-Indexing Funds to register as open-end management investment companies and issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Self-Indexing Fund. Applicants further state that because Creation Units may always be purchased and redeemed at NAV, the price of Shares on the secondary market should not vary materially from NAV.

**Section 22(d) of the Act and Rule 22c-1 Under the Act**

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through an underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in a Self-Indexing Fund’s prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or

preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve a Self-Indexing Fund as a party and will not result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

**Section 22(e)**

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for Foreign Self-Indexing Funds will be contingent not only on the settlement cycle of the United States market, but also on current delivery cycles in local markets for the underlying foreign securities held by a Foreign Self-Indexing Fund. Applicants state that the delivery cycles currently practicable for transferring Redemption Instruments to redeeming investors, coupled with local market holiday schedules, may require a delivery process of up to fourteen (14) calendar days. Accordingly, with respect to Foreign Self-Indexing Funds only, applicants hereby request relief under section 6(c) from the requirement imposed by section 22(e) to allow Foreign Self-Indexing Funds to pay redemption proceeds within fourteen (14) calendar days following the tender of Creation Units for redemption.<sup>20</sup>

<sup>20</sup> Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations applicants may otherwise have

8. Applicants believe that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants propose that allowing redemption payments for Creation Units of a Foreign Self-Indexing Fund to be made within fourteen calendar days would not be inconsistent with the spirit and intent of section 22(e). Applicants suggest that a redemption payment occurring within fourteen calendar days following a redemption request would adequately afford investor protection.

9. Applicants are not seeking relief from section 22(e) with respect to Foreign Self-Indexing Funds that do not effect creations and redemptions of Creation Units in-kind.

**Section 12(d)(1)**

10. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from knowingly selling the investment company’s shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company’s voting stock, or if the sale will cause more than 10% of the acquired company’s voting stock to be owned by investment companies generally.

11. Applicants request an exemption to permit registered management investment companies and unit investment trusts (“UITs”) that are not advised or sponsored by the Adviser and are not part of the same “group of investment companies,” as defined in section 12(d)(1)(G)(ii) of the Act as the Self-Indexing Funds (such management investment companies are referred to as “Investing Management Companies,” such UITs are referred to as “Investing Trusts,” and Investing Management Companies and Investing Trusts are collectively referred to as “Funds of Funds”), to acquire Shares beyond the limits of section 12(d)(1)(A) of the Act; and the Self-Indexing Funds, and any principal underwriter for the Self-

under rule 15c6-1 under the Exchange Act requiring that most securities transactions be settled within three business days of the trade date.

Indexing Funds, and/or any Broker registered under the Exchange Act, to sell Shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act.

12. Each Investing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the "Fund of Funds Adviser") and may be sub-advised by investment advisers within the meaning of section 2(a)(20)(B) of the Act (each a "Fund of Funds Sub-Adviser"). Any investment adviser to an Investing Management Company will be registered under the Advisers Act. Each Investing Trust will be sponsored by a sponsor ("Sponsor").

13. Applicants submit that the proposed conditions to the requested relief adequately address the concerns underlying the limits in sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees and overly complex fund structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

14. Applicants believe that neither a Fund of Funds nor a Fund of Funds Affiliate would be able to exert undue influence over a Self-Indexing Fund.<sup>21</sup> To limit the control that a Fund of Funds may have over a Self-Indexing Fund, applicants propose a condition prohibiting a Fund of Funds Adviser or Sponsor, any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Fund of Funds Adviser or Sponsor, or any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor ("Fund of Funds Advisory Group") from controlling (individually or in the aggregate) a Self-Indexing Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Fund of Funds Sub-Adviser, any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser, and any investment company or issuer that would be an

investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Fund of Funds Sub-Adviser or any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser ("Fund of Funds Sub-Advisory Group").

15. Applicants propose other conditions to limit the potential for undue influence over the Self-Indexing Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Self-Indexing Fund) will cause a Self-Indexing Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate ("Affiliated Underwriting"). An "Underwriting Affiliate" is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, employee or Sponsor of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser or Fund of Funds Sub-Adviser, employee or Sponsor is an affiliated person (except that any person whose relationship to the Self-Indexing Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

16. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not "interested persons" within the meaning of section 2(a)(19) of the Act ("disinterested directors or trustees"), will find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Self-Indexing Fund in which the Investing Management Company may invest. In addition, under condition B.5., a Fund of Funds Adviser, or a Fund of Funds' trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Self-Indexing Fund under rule 12b-1 under the Act) received from a Self-Indexing Fund by the Fund of Funds Adviser, trustee or Sponsor or an affiliated person of the Fund of Funds Adviser, trustee or Sponsor, other than any advisory fees paid to the Fund of Funds

Adviser, trustee or Sponsor or its affiliated person by a Self-Indexing Fund, in connection with the investment by the Fund of Funds in the Self-Indexing Fund. Applicants state that any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.<sup>22</sup>

17. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Self-Indexing Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Self-Indexing Fund to purchase shares of other investment companies for short-term cash management purposes. To ensure a Fund of Funds is aware of the terms and conditions of the requested order, the Fund of Funds will enter into an agreement with the Self-Indexing Fund ("FOF Participation Agreement"). The FOF Participation Agreement will include an acknowledgement from the Fund of Funds that it may rely on the order only to invest in the Self-Indexing Funds and not in any other investment company.

18. Applicants also note that a Self-Indexing Fund may choose to reject a direct purchase of Shares in Creation Units by a Fund of Funds. To the extent that a Fund of Funds purchases Shares in the secondary market, a Self-Indexing Fund would still retain its ability to reject any initial investment by a Fund of Funds in excess of the limits of section 12(d)(1)(A) by declining to enter into a FOF Participation Agreement with the Fund of Funds.

#### Sections 17(a)(1) and (2) of the Act

19. Sections 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines "affiliated person" of another person to include (a) any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to

<sup>21</sup> A "Fund of Funds Affiliate" is a Fund of Funds Adviser, Fund of Funds Sub-Adviser, Sponsor, promoter, and principal underwriter of a Fund of Funds, and any person controlling, controlled by, or under common control with any of those entities. A "Self-Indexing Fund Affiliate" is an investment adviser, promoter, or principal underwriter of a Self-Indexing Fund and any person controlling, controlled by or under common control with any of these entities.

<sup>22</sup> Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.



vote by the other person, and (c) any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act defines “control” as the power to exercise a controlling influence over the management or policies of a company, and provides that a control relationship will be presumed where one person owns more than 25% of a company’s voting securities. The Self-Indexing Funds may be deemed to be controlled by the Adviser or an entity controlling, controlled by or under common control with the Adviser and hence affiliated persons of each other. In addition, the Self-Indexing Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by an Adviser or an entity controlling, controlled by or under common control with an Adviser (an “Affiliated Fund”). Any investor, including Market Makers, owning 5% or holding in excess of 25% of the Trust or such Self-Indexing Funds, may be deemed affiliated persons of the Trust or such Self-Indexing Funds. In addition, an investor could own 5% or more, or in excess of 25% of the outstanding shares of one or more Affiliated Funds making that investor a Second-Tier Affiliate of the Self-Indexing Funds.

20. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act pursuant to sections 6(c) and 17(b) of the Act to permit persons that are Affiliated Persons of the Self-Indexing Funds, or Second-Tier Affiliates of the Self-Indexing Funds, solely by virtue of one or more of the following: (a) Holding 5% or more, or in excess of 25%, of the outstanding Shares of one or more Self-Indexing Funds; (b) an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds, to effectuate purchases and redemptions “in-kind.”

21. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making “in-kind” purchases or “in-kind” redemptions of Shares of a Self-Indexing Fund in Creation Units. Both the deposit procedures for “in-kind” purchases of Creation Units and the redemption procedures for “in-kind” redemptions of Creation Units will be effected in exactly the same manner for all purchases and redemptions, regardless of size or number. There will be no discrimination between purchasers or redeemers. Deposit Instruments and Redemption Instruments for each Self-Indexing Fund will be valued in the identical manner

as those Portfolio Holdings currently held by such Self-Indexing Fund and the valuation of the Deposit Instruments and Redemption Instruments will be made in an identical manner regardless of the identity of the purchaser or redeemer. Applicants do not believe that “in-kind” purchases and redemptions will result in abusive self-dealing or overreaching, but rather assert that such procedures will be implemented consistently with each Self-Indexing Fund’s objectives and with the general purposes of the Act. Applicants believe that “in-kind” purchases and redemptions will be made on terms reasonable to applicants and any affiliated persons because they will be valued pursuant to verifiable objective standards. The method of valuing Portfolio Holdings held by a Self-Indexing Fund is identical to that used for calculating “in-kind” purchase or redemption values and therefore creates no opportunity for affiliated persons or Second-Tier Affiliates of applicants to effect a transaction detrimental to the other holders of Shares of that Self-Indexing Fund. Similarly, applicants submit that, by using the same standards for valuing Portfolio Holdings held by a Self-Indexing Fund as are used for calculating “in-kind” redemptions or purchases, the Self-Indexing Fund will ensure that its NAV will not be adversely affected by such securities transactions. Applicants also note that the ability to take deposits and make redemptions “in-kind” will help each Self-Indexing Fund to track closely its Underlying Index and therefore aid in achieving the Self-Indexing Fund’s objectives.

22. Applicants also seek relief under sections 6(c) and 17(b) from section 17(a) to permit a Self-Indexing Fund that is an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds to sell its Shares to and redeem its Shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.<sup>23</sup> Applicants state

<sup>23</sup> Although applicants believe that most Funds of Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Self-Indexing Fund, a Fund of Funds might seek to transact in Creation Units directly with a Self-Indexing Fund that is an affiliated person of a Fund of Funds. To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between a Fund of Funds and a Self-Indexing Fund, relief from section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Self-Indexing Fund to a Fund of Funds and redemptions of those Shares. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to,

that the terms of the transactions are fair and reasonable and do not involve overreaching. Applicants note that any consideration paid by a Fund of Funds for the purchase or redemption of Shares directly from a Self-Indexing Fund will be based on the NAV of the Self-Indexing Fund.<sup>24</sup> Applicants believe that any proposed transactions directly between the Self-Indexing Funds and Funds of Funds will be consistent with the policies of each Fund of Funds. The purchase of Creation Units by a Fund of Funds directly from a Self-Indexing Fund will be accomplished in accordance with the investment restrictions of any such Fund of Funds and will be consistent with the investment policies set forth in the Fund of Funds’ registration statement. Applicants also state that the proposed transactions are consistent with the general purposes of the Act and are appropriate in the public interest.

### Applicants’ Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

#### A. ETF Relief

1. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of affiliated index-based ETFs.

2. As long as a Self-Indexing Fund operates in reliance on the requested order, the Shares of such Self-Indexing Fund will be listed on an Exchange.

3. Neither the Trust nor any Self-Indexing Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Self-Indexing Fund and tender those Shares for redemption to a Self-Indexing Fund in Creation Units only.

transactions where a Self-Indexing Fund could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

<sup>24</sup> Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of Shares of a Self-Indexing Fund or (b) an affiliated person of a Self-Indexing Fund, or an affiliated person of such person, for the sale by the Self-Indexing Fund of its Shares to a Fund of Funds, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

4. The Web site, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Self-Indexing Fund, the prior Business Day's NAV and the market closing price or the midpoint of the bid/ask spread at the time of the calculation of such NAV ("Bid/Ask Price"), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

5. Each Self-Indexing Fund will post on the Web site on each Business Day, before commencement of trading of Shares on the Exchange, the Self-Indexing Fund's Portfolio Holdings.

6. No Adviser or any Sub-Adviser to a Self-Indexing Fund, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Self-Indexing Fund) to acquire any Deposit Instrument for the Self-Indexing Fund through a transaction in which the Self-Indexing Fund could not engage directly.

#### *B. Section 12(d)(1) Relief*

1. The members of a Fund of Funds' Advisory Group will not control (individually or in the aggregate) a Self-Indexing Fund within the meaning of section 2(a)(9) of the Act. The members of a Fund of Funds' Sub-Advisory Group will not control (individually or in the aggregate) a Self-Indexing Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Self-Indexing Fund, the Fund of Funds' Advisory Group or the Fund of Funds' Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Self-Indexing Fund, it will vote its Shares of the Self-Indexing Fund in the same proportion as the vote of all other holders of the Self-Indexing Fund's Shares. This condition does not apply to the Fund of Funds' Sub-Advisory Group with respect to a Self-Indexing Fund for which the Fund of Funds' Sub-Adviser or a person controlling, controlled by or under common control with the Fund of Funds' Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in a Self-Indexing Fund to influence the terms of any services or transactions between the Fund of Funds or Fund of Funds Affiliate and the Self-Indexing Fund or a Self-Indexing Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company,

including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Fund of Funds Adviser and Fund of Funds Sub-Adviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or a Fund of Funds Affiliate from a Self-Indexing Fund or Self-Indexing Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of a Self-Indexing Fund exceeds the limits in section 12(d)(1)(A)(i) of the Act, the Board of the Self-Indexing Fund, including a majority of the directors or trustees who are not "interested persons" within the meaning of section 2(a)(19) of the Act ("non-interested Board members"), will determine that any consideration paid by the Self-Indexing Fund to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Self-Indexing Fund; (ii) is within the range of consideration that the Self-Indexing Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Self-Indexing Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Self-Indexing Fund under rule 12b-1 under the Act) received from a Self-Indexing Fund by the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, or an affiliated person of the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, other than any advisory fees paid to the Fund of Funds Adviser, trustee or Sponsor of an Investing Trust, or its affiliated person by the Self-Indexing Fund in connection with the investment by the Fund of Funds in the Self-Indexing Fund. Any Fund of Funds Sub-Adviser will waive fees otherwise payable to the Fund of Funds Sub-Adviser, directly or indirectly, by the Investing Management

Company in an amount at least equal to any compensation received from a Self-Indexing Fund by the Fund of Funds Sub-Adviser, or an affiliated person of the Fund of Funds Sub-Adviser, other than any advisory fees paid to the Fund of Funds Sub-Adviser or its affiliated person by the Self-Indexing Fund in connection with the investment by the Investing Management Company in the Self-Indexing Fund made at the direction of the Fund of Funds Sub-Adviser. In the event that the Fund of Funds Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Self-Indexing Fund) will cause a Self-Indexing Fund to purchase a security in any Affiliated Underwriting.

7. The Board of a Self-Indexing Fund, including a majority of the non-interested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Self-Indexing Fund in an Affiliated Underwriting, once an investment by a Fund of Funds in the securities of the Self-Indexing Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Self-Indexing Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Self-Indexing Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Self-Indexing Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Self-Indexing Fund.

8. Each Self-Indexing Fund will maintain and preserve permanently in

an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Self-Indexing Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Self-Indexing Fund in excess of the limit in section 12(d)(1)(A), a Fund of Funds and the Trust will execute a FOF Participation Agreement stating without limitation that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Self-Indexing Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Self-Indexing Fund of the investment. At such time, the Fund of Funds will also transmit to the Self-Indexing Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Self-Indexing Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Self-Indexing Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Self-Indexing Fund in which the Investing Management Company may invest. These findings and their basis will be fully recorded in the minute

books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Self-Indexing Fund will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent the Self-Indexing Fund acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Self-Indexing Fund to acquire securities of one or more investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016-03301 Filed 2-17-16; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77111; File No. SR-NYSEARCA-2016-29]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the Arca Options Deep Market Data Product

February 11, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on February 4, 2016, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the Arca Options Deep market data product. The proposed rule change is available on the Exchange's Web site at

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

[www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to modify the Arca Options Deep market data product.

The Exchange currently offers the following real-time options market data feeds: "Arca Options Top," "Arca Options Deep," and "Arca Options Complex" (the "Arca Options Products"). "Arca Options Top" is a single market data product that combines last sale data, best bids and offers ("BBO"), order imbalance information and series status and underlying status messages (collectively called security status messages). "Arca Options Deep" is also a single market data product that provides subscribers NYSE Arca Options quotes and orders at the first three price levels in each series on a real-time basis. "Arca Options Complex," also a single market data product, provides subscribers NYSE Arca Options quote and trade information (including orders/quotes, requests for responses, and trades) for the complex order book on a real-time basis.<sup>4</sup>

The Exchange charges a single fee for Arca Options Top and subscribers of Arca Options Top receive all three data feeds described above. The Exchange charges a separate fee for Arca Options Complex for subscribers that seek to obtain this data feed on a standalone basis.<sup>5</sup>

<sup>4</sup> See Rule 6.62(e), which defines complex orders.

<sup>5</sup> See Securities Exchange Act Release No. 68005 (Oct. 9, 2012), 77 FR 63362 (Oct. 16, 2012) (SR-NYSEARCA-2012-106) (establishing fees for certain proprietary options market data products). See also Securities Exchange Act Release Nos. 69523 (May 6, 2013), 78 FR 27452 (May 10, 2013) (SR-NYSEARCA-2013-41) (establishing a schedule of

The Exchange proposes to modify the Arca Options Deep data feed. As proposed, Arca Options Deep will also include security status messages, the same data that is currently provided as part of Arca Options Top. The proposed modification to the Arca Options Deep data feed will allow subscribers who currently obtain depth of market data to also receive security status messages in a single data feed. Currently, these subscribers are required to process two data feeds to get the depth of market data and security status information. Offering a data product that combines, in one market data product, depth of market data and security status messages would provide greater efficiencies and better sequencing for vendors and subscribers that currently choose to integrate the data after receiving it from the Exchange. As with Arca Options Top, Arca Options Deep would provide depth of market and series status information on a real-time basis as reported to the Options Price Reporting Authority ("OPRA") and disseminated on a consolidated basis under the OPRA Plan.<sup>6</sup>

The Arca Options Products would continue to be distributed in their current format, to maintain the format of the Arca Options Products with that of other market data products offered by the Exchange.

The Exchange does not propose to make any changes to the fees. The single fee charged for the Arca Options

Product that comprise [sic] the Arca Options Top, Arca Options Deep and Arca Options Complex would continue to apply. The separate fee that now applies to Arca Options Complex, would likewise continue to apply to the Arca Options Complex market data product.<sup>7</sup>

Each of the Arca Options Products would continue to be offered through the Exchange's Liquidity Center Network ("LCN"), a local area network in the Exchange's Mahwah, New Jersey data center that is available to users of the Exchange's co-location services. The Exchange would also continue to offer the products through the Exchange's Secure Financial Transaction Infrastructure ("SFTI") network, through which all other users and member organizations access the Exchange's trading and execution systems and other proprietary market data products.

The Exchange will announce the date that the Arca Options Deep market data product will begin to include security status messages through a NYSE Market Data Notice.

The proposed change is not intended to address any issues other than those described herein, and the Exchange is not aware of any problems that vendors or subscribers would have in complying with the proposed change.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>8</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5)<sup>9</sup> of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The Exchange also believes this proposal is consistent with Section 6(b)(5) of the Act because it protects investors and the public interest and promotes just and equitable principles of trade by providing investors with improved options for receiving market

data. The proposed rule changes would benefit investors by facilitating their prompt access to the additional real-time information contained in a modified Arca Options Deep market data product.

In particular, the Exchange believes that combining depth of market data with security status messages in the Arca Options Deep product is reasonable because it would provide greater efficiencies for vendors and subscribers that currently choose to integrate the data after receiving it from the Exchange. In addition, the change to the Arca Options Deep product reflects the interests and needs of subscribers and vendors who will no longer have to subscribe to multiple data feeds to obtain the information they want. The Exchange believes the proposed changes are reasonable because they would provide vendors and subscribers with higher quality market data products.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to consumers of such data. It was believed that this authority would expand the amount of data available to users and consumers of such data and also spur innovation and competition for the provision of market data. The Exchange believes that the options data product changes proposed herein are precisely the sort of market data product evolutions that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>10</sup>

By removing "unnecessary regulatory restrictions" on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history.

The Exchange further notes that the existence of alternatives to the Exchange's products, including real-

NYSE Arca Options proprietary market data fees); 69554 (May 10, 2013), 78 FR 28917 (May 16, 2013) (SR-NYSEArca-2013-47) (establishing non-display usage fees and amending the professional end-user fees); 71933 (April 11, 2014), 79 FR 21821 (April 17, 2014) (SR-NYSEArca-2014-34) (amending the professional user fees); 73010 (Sept. 5, 2014), 79 FR 54307 (Sept. 11, 2014) (SR-NYSEArca-2014-94) (amending fees for non-display use); 73588 (Nov. 13, 2014), 79 FR 68922 (Nov. 19, 2014) (SR-NYSEArca-2014-129) (establishing fees for the complex order book feed); and 76023 (September 29, 2015), 80 FR 60208 (October 5, 2015) (modifying certain proprietary options data products).

<sup>6</sup> The OPRA Plan is a national market system plan approved by the Securities and Exchange Commission ("Commission") pursuant to Section 11A of the Securities Exchange Act of 1934 (the "Act") and Rule 608 thereunder (formerly Rule 11Aa3-2). See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.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. Section 5.2(c) of the OPRA Plan also permits OPRA Plan participants to disseminate unconsolidated market information to certain of their members under certain circumstances. The manner in which the Exchange proposes to disseminate the products would comply with Section 5.2(c) of the OPRA Plan, pursuant to which the Exchange may not disseminate the products "on any more timely basis than the same information is furnished to the OPRA System for inclusion in OPRA's consolidated dissemination of Options Information."

<sup>7</sup> The Exchange has not attached an Exhibit 5 with this proposed rule change because the Exchange is not proposing to make any fee changes associated with the proposed modification to the Arca Options Deep market data product.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange is not unreasonably discriminatory because vendors and subscribers can elect these alternatives.

The proposed options data products will help to protect a free and open market by providing additional data to the marketplace and give investors greater choices. In addition, the proposal would not permit unfair discrimination because the products will be available to all of the Exchange's customers and broker-dealers through both the LCN and SFTI.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>11</sup> 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 market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities (such as internalizing broker-dealers and various forms of alternative trading systems, including dark pools and electronic communication networks), in a vigorously competitive market. It is common for market participants to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup> Because the

proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>14</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>15</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the operative delay is consistent with investor protection and the public interest because the proposal would allow the Exchange to offer currently available market data in a streamlined format that would enhance the quality of market data available to investors and would enable investors to better monitor trading activity on the Exchange. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>16</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>17</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>16</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78s(b)(2)(B).

### **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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEARCA-2016-29 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-NYSEARCA-2016-29. 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-NYSEARCA-2016-29 and should be submitted on or before March 10, 2016.

<sup>11</sup> 15 U.S.C. 78f(b)(8).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2016-03267 Filed 2-17-16; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77112; File No. SR-OCC-2015-02]

### Self-Regulatory Organizations; The Options Clearing Corporation; Order Setting Aside Action by Delegated Authority, Approving Proposed Rule Change Concerning the Options Clearing Corporation's Capital Plan and Denying Motions

February 11, 2016.

#### I. Introduction

The Options Clearing Corporation ("OCC") is a clearing agency registered with the Securities and Exchange Commission ("Commission") and is the only clearing agency for standardized U.S. options listed on U.S. national securities exchanges. Today, listed options are traded on twelve national securities exchanges: five national securities exchanges that are equal owners of OCC ("Stockholder Exchanges")<sup>1</sup> and seven national securities exchanges that have no ownership stake in OCC ("Non-Stockholder Exchanges").<sup>2</sup> OCC also serves other markets, including those trading commodity futures, commodity options, and security futures,<sup>3</sup> the securities lending market and the OTC options market. In each of these markets, OCC provides clearing members<sup>4</sup> with central counterparty

("CCP") clearing services and performs critical functions in the clearance and settlement process.<sup>5</sup> OCC's services increase the efficiency and speed of options trading and settlement as well as reduce members' operational expenses and counterparty credit risk.

OCC's role as the CCP for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement, and its failure or service disruption could have cumulative negative effects on the U.S. options and futures markets, financial institutions, and the broader financial system. As such, OCC was designated by the Financial Stability Oversight Council as a systemically important financial market utility ("SIFMU") in 2012.<sup>6</sup>

In the context of a number of developments in the financial markets, OCC's Board of Directors ("Board") decided that OCC was significantly undercapitalized, and, in response, proposed and implemented an expedited plan to substantially increase OCC's capitalization (the "Capital Plan"), and, given OCC's critical clearing functions and its systemic importance, the Commission agrees that having OCC increase its capitalization is appropriate and in the public interest.<sup>7</sup>

#### Procedural Background

OCC filed the Capital Plan as an advance notice, SR-OCC-2014-813,

<sup>5</sup> For instance, OCC provides CCP services for OTC options, and for two securities lending market structures, OCC's OTC Stock Loan Program and AQS, an automated marketplace for securities lending and borrowing operated by Automated Equity Finance Markets, Inc. OCC currently participates in cross-margin programs with the CME and ICE and offers an internal cross-margin program for products regulated by the SEC and CFTC. See OCC's Web site, OCC Fact Sheet (available at: <http://www.optionsclearing.com/components/docs/about/occ-factsheet.pdf>), "What is OCC?" (available at: <http://www.optionsclearing.com/about/corporate-information/what-is-occ.jsp>.) and OCC's Web site, "Cross Margin Programs" (available at: <http://www.optionsclearing.com/clearing/clearing-services/cross-margin.jsp>).

<sup>6</sup> See Financial Stability Oversight Council ("FSOC") 2012 Annual Report, Appendix A, (available at <http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Appendix%20A%20Designation%20of%20Systemically%20Important%20Market%20Utilities.pdf>).

<sup>7</sup> According to OCC, as of December 31, 2013, at the time it developed the Capital Plan, OCC had total shareholders' equity of about \$25 million, which represents approximately 6 weeks of operating expenses. Based on internal operational risk scenarios and loss modeling, OCC quantified its operational risk at \$226 million and pension risk at \$21 million. According to OCC, as of August 31, 2015, in the absence of the \$150 million capital contribution made pursuant to the Capital Plan, OCC's adjusted shareholder equity would be about \$149 million and OCC's total capital resources would be less than \$150 million. See Notice at 5172-73; OCC's Written Statement in Support of Affirming March 6, 2015 Order Approving Capital Plan (October 7, 2015) ("OCC Support Statement").

under Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Payment, Clearing and Settlement Supervision Act")<sup>8</sup> on December 29, 2014. OCC filed the proposed rule change implementing the Capital Plan, SR-OCC-2015-02, with the Commission pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")<sup>9</sup> and Rule 19b-4 thereunder<sup>10</sup> on January 14, 2015. The proposed rule change was published for comment in the **Federal Register** on January 30, 2015.<sup>11</sup> The Commission received seventeen comment letters on OCC's proposal from twelve commenters, including OCC.<sup>12</sup>

<sup>8</sup> 12 U.S.C. 5465(e)(1). On February 26, 2015, the Commission issued a notice of no objection to the advance notice filing. See Exchange Act Release No. 74387 (February 26, 2015), 80 FR 12215 (March 6, 2015) (SR-OCC-2014-813).

<sup>9</sup> 15 U.S.C. 78s(b)(1).

<sup>10</sup> 17 CFR 240.19b-4.

<sup>11</sup> See Notice.

<sup>12</sup> See Letter from Eric Swanson, General Counsel & Secretary, BATS Global Markets, Inc. ("BATS") (February 19, 2015) ("BATS Letter I"); Letter from Tony McCormick, Chief Executive Officer, BOX Options Exchange, ("BOX") (February 19, 2015) ("BOX Letter I"); Letter from Howard L. Kramer on behalf of Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, Susquehanna Investment Group, and Wolverine Trading (February 20, 2015) ("MM Letter"); Letter from Ellen Greene, Managing Director, Financial Services Operations, SIFMA (February 20, 2015) ("SIFMA Letter"); Letter from James E. Brown, General Counsel, OCC (February 23, 2015) (responding to BATS Letter and BOX Letter) ("OCC Letter I"); Letter from James E. Brown, General Counsel, OCC (February 23, 2015) (responding to MM Letter) ("OCC Letter II"); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchange, LLC, ("MIAX") (February 24, 2015) ("MIAX Letter I"); Letter from James E. Brown, General Counsel, OCC (February 24, 2015) (responding to SIFMA Letter) ("OCC Letter III"); Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc., ("KCG") (February 26, 2015) ("KCG Letter I"); Letter from Eric Swanson, General Counsel and Secretary, BATS (February 27, 2015) ("BATS Letter II"); Letter from John A. McCarthy, General Counsel, KCG (February 27, 2015) ("KCG Letter II"); Letter from Richard J. McDonald, Chief Regulatory Counsel, Susquehanna International Group, LLP, ("SIG") (February 27, 2015) ("SIG Letter I"); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, MIAX (March 1, 2015) ("MIAX Letter II"); Letter from James E. Brown, General Counsel, OCC (March 2, 2015) ("OCC Letter IV"); Letter from Eric Swanson, General Counsel and Secretary, BATS (March 3, 2015) ("BATS Letter III"); and Letter from Tony McCormick, Chief Executive Officer, BOX (March 3, 2015) ("BOX Letter II"); Letter from Brian Sopinsky, General Counsel, SIG (March 4, 2015) ("SIG Letter II"). Since the proposal was filed as both an advance notice and proposed rule change, the Commission considered all comments received on the proposal, regardless of whether the comments were submitted to the proposed rule change or advance notice file. See comments on the advance notice (File No. SR-OCC-2014-813), <http://www.sec.gov/comments/sr-occ-2014-813/occ2014813.shtml> and comments on the proposed rule change (File No. SR-OCC-2015-02), <http://www.sec.gov/comments/sr-occ-2015-02/occ201502.shtml>. In its evaluation of the proposed

<sup>18</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> The Stockholder Exchanges are: Chicago Board Options Exchange, Incorporated; International Securities Exchange, LLC; NASDAQ OMX PHLX, LLC; NYSE MKT LLC; and NYSE Arca, Inc. See Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR-OCC-2015-02) ("Notice").

<sup>2</sup> Under OCC's By-Laws, exchanges other than Stockholder Exchanges may participate in OCC's services subject to meeting certain qualifications. See OCC By-Laws, Article VIIB (Non-Equity Exchanges).

<sup>3</sup> OCC also is registered with the Commodity Futures Trading Commission as a derivatives clearing organization regulated to provide clearing services for four futures exchanges.

<sup>4</sup> OCC has over 100 members which include large domestic and international broker-dealers and futures commission merchants. See OCC's 2014 Annual Report (available at: [http://www.optionsclearing.com/components/docs/about/annual-reports/occ\\_2014\\_annual\\_report.pdf](http://www.optionsclearing.com/components/docs/about/annual-reports/occ_2014_annual_report.pdf)), and OCC's Web site, "What is OCC?" (available at: <https://www.optionsclearing.com/about/corporate-information/what-is-occ.jsp>).

The Commission issued an order on March 6, 2015, through delegated authority, approving the proposal (“Delegated Order”).<sup>13</sup>

The Delegated Order describes the elements of the proposed Capital Plan, OCC’s financial condition, and the basis for OCC’s projected capital requirement. The Delegated Order also discusses and responds to the comments received on the proposed Capital Plan. The Delegated Order makes findings that the Capital Plan is consistent with Exchange Act Sections 17A(b)(3)(A), 17A(b)(3)(F), 17A(b)(3)(D) and 17A(b)(3)(I).<sup>14</sup>

In response to the Delegated Order, BATS, BOX, KCG, MIA, and SIG (collectively “Petitioners”) filed notices of intention to petition for review of the Delegated Order, the first of which was filed on March 12, 2015.<sup>15</sup> The Commission received five petitions for review of the Delegated Order (collectively “Petitions for Review” or “Petitions”) from the Petitioners between March 16 and March 20, 2015.<sup>16</sup> The filing of the first notice of intention to petition for review on March 12, 2015 automatically stayed the Delegated Order pursuant to Rule 431(e) of the Commission’s Rules of Practice.<sup>17</sup> OCC filed a motion to lift the automatic stay on April 2, 2015.<sup>18</sup> The Petitioners filed responses opposing lifting the stay, and OCC filed a reply brief supporting its motion to lift the stay.<sup>19</sup>

The Commission issued two orders on September 10, 2015. The first order

rule change, the Commission assessed whether the proposal was consistent with the requirements of the Exchange Act and the applicable rules and regulations thereunder.

<sup>13</sup> Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) (SR–OCC–2015–02).

<sup>14</sup> See 15 U.S.C. 78q–1(b)(3)(A); 15 U.S.C. 78q–1(b)(3)(F); 15 U.S.C. 78q–1(b)(3)(D); 15 U.S.C. 78q–1(b)(3)(I).

<sup>15</sup> See Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, MIA (March 12, 2015); Letter from Lisa J. Fall, President, BOX (March 13, 2015); Letter from Eric Swanson, General Counsel and Secretary, BATS (March 13, 2015); Letter from Brian Sopinsky, General Counsel, SIG (March 13, 2015); Letter from John A. McCarthy, General Counsel, KCG (March 13, 2015).

<sup>16</sup> See BATS Petition for Review (March 16, 2015) (“BATS Petition”); BOX Petition for Review (March 20, 2015) (“BOX Petition”); KCG Petition for Review (March 20, 2015) (“KCG Petition”); MIA Petition for Review (March 20, 2015) (“MIA Petition”); SIG Petition for Review (March 20, 2015) (“SIG Petition”).

<sup>17</sup> 17 CFR 201.431(e).

<sup>18</sup> OCC Motion to Lift Stay (April 2, 2015) (“OCC Stay Motion”).

<sup>19</sup> BATS, BOX, MIA, Response to OCC’s Motion to Lift the Stay (April 8, 2015) (“BATS Response”); KCG Response to OCC’s Motion to Lift the Stay (April 9, 2015) (“KCG Response”); SIG Opposition to OCC’s Motion to Lift the Stay (April 9, 2015) (“SIG Response”); OCC’s Reply Brief in Support of its Motion to Lift the Stay (April 13, 2015) (“OCC Stay Brief”).

granted the Petitions for Review and scheduled the filing of statements either in support of or against the Delegated Order (“Review Order”).<sup>20</sup> The second order lifted the automatic stay (“Stay Order”).<sup>21</sup> Shortly thereafter, on September 15, 2015, Petitioners filed a motion to reinstitute the automatic stay.<sup>22</sup> OCC filed an opposition to the Reinstitution Motion on September 22, 2015,<sup>23</sup> and Petitioners filed a memorandum in further support of the Reinstitution Motion on September 25, 2015.<sup>24</sup> On December 22, 2015, in response to OCC’s announcement of the declaration of refunds, dividends, and fee reduction pursuant to the Capital Plan, a commenter filed a letter further advocating for reinstitution of the automatic stay.<sup>25</sup> On February 5, 2016, Petitioners filed a motion to expedite the Commission’s ruling on the pending Reinstitution Motion.<sup>26</sup> The Reinstitution Motion, Expedition Motion, various other motions, and the comments thereto are discussed in Section IV below.

#### Summary of Findings

The Commission’s Rules of Practice set forth procedures for reviewing actions made pursuant to delegated authority. Pursuant to Rule 431(a) of the Rules of Practice, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the action made pursuant to delegated authority.<sup>27</sup> Here, the Commission is setting aside the Delegated Order and conducting a *de novo* review of, and giving careful consideration to, the entire record, which includes: OCC’s proposal, all comments received in response to the Notice, the Petitions for Review,

<sup>20</sup> Exchange Act Release No. 75885 (September 10, 2015), 80 FR 55700 (September 16, 2015).

<sup>21</sup> Exchange Act Release No. 75886 (September 10, 2015), 80 FR 55668 (September 16, 2015).

<sup>22</sup> BATS, BOX, KCG, MIA, SIG Motion to Reinstitution Automatic Stay (September 15, 2015) (“Reinstitution Motion”).

<sup>23</sup> OCC Brief in Opposition to Motion to Reinstitution Automatic Stay (September 22, 2015) (“OCC Reinstitution Response”).

<sup>24</sup> Memorandum in Further Support of Motion to Reinstitution Automatic Stay (on behalf of BATS, BOX, MIA, and SIG) (September 25, 2015) (“Memo in Further Support of Reinstitution”).

<sup>25</sup> Letter from Joseph C. Lombard, Murphy & McGonigle, on behalf of SIG (and together with the Petitioners) (December 22, 2015) (“SIG Letter III”). On February 2, 2016, SIG requested a telephone call to inquire about the status of the Reinstitution Motion. See Email from Stephen J. Crimmins, on behalf of SIG, to Brent J. Fields on February 2, 2016 (“SIG Email”).

<sup>26</sup> See BATS, BOX, KCG, MIA, SIG Motion to Expedite the Commission’s Ruling on the Pending Motion to Reinstitution the Automatic Stay (February 5, 2016) (“Expedition Motion”).

<sup>27</sup> 17 CFR 201.431(a).

comments received in response to the Review Order, all motions filed, and OCC’s responses thereto.

In conducting its *de novo* review, the Commission looks to Section 19(b)(2)(C) of the Exchange Act,<sup>28</sup> which directs the Commission to approve a proposed rule change of a self-regulatory organization if the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such self-regulatory organization. After carefully considering the entire record, for the reasons discussed throughout this order, the Commission finds that OCC’s proposed rule change is consistent with the Exchange Act requirements, including Exchange Act Sections 17A(b)(3)(A), 17A(b)(3)(D), 17A(b)(3)(F), and 17A(b)(3)(I),<sup>29</sup> and the rules and regulations thereunder, that are applicable to OCC.<sup>30</sup> Accordingly, the Commission is approving the proposed rule change implementing the Capital Plan. In approving this proposed rule change, the Commission also has considered the impact of the Capital Plan on efficiency, competition, and capital formation under Section 3(f) of the Exchange Act.<sup>31</sup>

#### II. Description of the Proposal<sup>32</sup>

OCC proposes to amend its rules to implement the Capital Plan.<sup>33</sup> According to OCC, the Capital Plan is designed to support OCC’s functions and continuity of its operations as a SIFMU. As proposed by OCC, the Capital Plan is designed to address business, operational, and pension risks. It is not designed to address counterparty risk, on-balance sheet credit risk, or market risk, all of which

<sup>28</sup> 15 U.S.C. 78s(b)(2)(C).

<sup>29</sup> 15 U.S.C. 78q–1(b)(3)(A); 15 U.S.C. 78q–1(b)(3)(F); 15 U.S.C. 78q–1(b)(3)(D); 15 U.S.C. 78q–1(b)(3)(I).

<sup>30</sup> As the Commission notes in the Notice, OCC states this proposal’s purpose is (in part) to facilitate compliance with proposed Commission rules on standards for covered clearing agencies (Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29508 (May 22, 2014) (S7–03–14)) and address Principle 15 of the Principles for Financial Market Infrastructures (“PFMIs”) (international standards for financial market intermediaries). Because the proposed Commission rules are pending, the Commission has evaluated this proposed rule change under the Exchange Act and the rules currently in force thereunder.

<sup>31</sup> See 15 U.S.C. 78c(f).

<sup>32</sup> See Notice at 5171–78, unless otherwise noted.

<sup>33</sup> To implement the Capital Plan, OCC’s proposed rule change included: (i) Establishing policies on fees, refunds, and dividends (described further below); (ii) amending its By-Laws; (iii) amending its Restated Certificate of Incorporation; and (iv) amending its Stockholders Agreement.



are addressed through margin, clearing fund deposits, and other means.

OCC represents that it reviewed a range of risk scenarios and modeled potential losses arising from business, operational, and pension risks, and based on those results, it was appropriate to significantly increase its capital. After evaluating alternate sources of capital funding, including increasing fees or suspending refunds to clearing members, the Board approved the proposed Capital Plan.<sup>34</sup>

Under the Capital Plan, OCC annually will determine a target capital requirement ("Target Capital Requirement"). To meet the initial Target Capital Requirement, the Stockholder Exchanges provided capital to OCC ("Capital Contribution") and entered into an agreement ("Replenishment Capital Agreement") to provide additional replenishment capital ("Replenishment Capital") under certain circumstances. In return, the Stockholder Exchanges are eligible to receive dividends from OCC ("Dividend Policy"). Additionally, OCC will set its fees annually to cover its estimated operating expenses plus a "Business Risk Buffer" ("Fee Policy"). Finally, clearing members will be eligible to receive refunds annually, under certain circumstances ("Refund Policy").

#### A. Target Capital Requirement

The Target Capital Requirement consists of: (i) A "Baseline Capital Requirement" plus (ii) a "Target Capital Buffer." The Baseline Capital Requirement is equal to the greatest of: (i) Six months budgeted operating expenses for the following year; (ii) the maximum cost of the recovery scenario from OCC's recovery and wind-down plan; or (iii) the cost to OCC of winding down operations as set forth in its recovery and wind-down plan. The Target Capital Buffer is linked to plausible loss scenarios from business, operational, and pension risks and is designed to provide a significant capital cushion to offset potential business losses.<sup>35</sup>

#### B. Capital Contribution and Replenishment Capital Agreement

Under the Capital Plan, OCC requires the Stockholder Exchanges to provide a Capital Contribution pursuant to their Class B Common Stock on a *pro rata* basis. At the time of the January 14,

2015 filing, OCC proposed the Capital Contribution to be \$150 million, and the Stockholder Exchanges have since contributed that amount to OCC pursuant to the Capital Plan.<sup>36</sup>

The Capital Contribution is supported by a Replenishment Capital Agreement, under which the Stockholder Exchanges have committed to provide Replenishment Capital if OCC's total shareholders' equity falls below a certain threshold. Specifically, if OCC's shareholders' equity falls below a "Hard Trigger" as described below, the Stockholder Exchanges are obligated to provide a committed amount of Replenishment Capital on a *pro rata* basis. The provision of Replenishment Capital is capped at the excess of: (i) The lesser of either the Baseline Capital Requirement at the time of relevant funding or \$200 million,<sup>37</sup> minus (ii) outstanding Replenishment Capital (collectively, the "Cap").<sup>38</sup> In exchange for any Replenishment Capital made under the Replenishment Capital Agreement, the OCC will issue the Stockholder Exchanges a new class of OCC common stock ("Class C Common Stock"). The Capital Plan also has a "Soft Trigger," which would alert OCC that it should re-evaluate the sufficiency of its capitalization.

As mentioned above, OCC has identified two triggers concerning the shareholders' equity that would require action by OCC: (i) A "Soft Trigger," a warning sign that OCC's capitalization has fallen to a level that requires action to prevent it from falling to unacceptable levels, and (ii) a "Hard Trigger," a sign that corrective action must be taken in the form of a mandatory Replenishment Capital call.

The Hard Trigger is reached when OCC's shareholders' equity falls below 125% of the Baseline Capital Requirement.<sup>39</sup> Upon such occurrence, the Board will determine whether to attempt a recovery or a wind-down of

OCC's operations,<sup>40</sup> or a sale or similar transaction, subject in each case to any necessary stockholder consent.<sup>41</sup> OCC believes that the Hard Trigger would occur only as the result of a significant, unexpected event.

The Soft Trigger is reached when OCC's shareholders' equity falls below the sum of: (i) The Baseline Capital Requirement and (ii) 75% of the Target Capital Buffer.<sup>42</sup> Upon such occurrence, OCC's senior management and the Board will evaluate options to restore the shareholders' equity to the Target Capital Requirement, including, but not limited to, through increasing fees and/or decreasing expenses.

In addition, the Board will review the Replenishment Capital Agreement on an annual basis. While the Replenishment Capital amount will increase as the Baseline Capital Requirement increases, if the Baseline Capital Requirement approaches or exceeds \$200 million, the Board will review and revise the Capital Plan, as needed, to address potential future needs for Replenishment Capital higher than the \$200 million cap. OCC also represents that its management will monitor OCC's shareholders' equity to identify additional triggers or reduced capital levels that may require action.

#### C. Fee Policy, Refund Policy, and Dividend Policy

Under the Capital Plan, OCC will also implement a Fee Policy, Refund Policy, and Dividend Policy designed to maintain OCC's shareholders' equity above the Baseline Capital Requirement. Changes to the Fee Policy, Refund Policy, and Dividend Policy will require the affirmative vote of two-thirds of the directors then in office and unanimous approval by the holders of OCC's outstanding Class B Common Stock.<sup>43</sup> Any such changes also will be subject

<sup>40</sup> If the Board decides to wind-down OCC's operations, then OCC will access Replenishment Capital in the amount the Board determines is sufficient to fund the wind-down, subject to the Cap. If the Board decides to attempt a recovery of OCC's capital and business, then OCC will access Replenishment Capital in the amount sufficient to return shareholders' equity to \$20 million above the Hard Trigger, subject to the Cap.

<sup>41</sup> Article IV of OCC's Certificate of Amendment of Certificate of Incorporation requires the approval of a majority of the issued and outstanding shares of each series of Class B Common Stock, voting separately as a series, to authorize or consent to the sale, lease, or exchange of all or substantially all of the property and assets of the Corporation, or to authorize or consent to the dissolution of the corporation.

<sup>42</sup> For 2015, the Soft Trigger would be reached if OCC's shareholders' equity fell below \$227.5 million.

<sup>43</sup> The Stockholder Exchanges are the sole holders of the Class B common stock and have each made Capital Contributions to OCC in respect of their equal ownership of Class B common stock, which entitles them to receive dividends, if declared.

<sup>34</sup> See OCC Support Statement.

<sup>35</sup> OCC has determined that its current appropriate "Target Capital Requirement" is \$247 million, reflecting a "Baseline Capital Requirement" of \$117 million, which is equal to six-month projected operating expenses, plus a "Target Capital Buffer" of \$130 million.

<sup>36</sup> See OCC Support Statement.

<sup>37</sup> According to OCC, the \$200 million takes into account projected growth in the Baseline Capital Requirement for the foreseeable future and OCC estimated that the Baseline Capital Requirement would not exceed \$200 million before 2022.

<sup>38</sup> For example, if the Baseline Capital Requirement is greater than \$200 million, then the Replenishment Capital that could be accessed by OCC would be capped at \$200 million minus any outstanding Replenishment Capital. Therefore, if there is no outstanding Replenishment Capital, OCC could access up to \$200 million. If on the other hand, the Baseline Capital Requirement is \$100 million, then OCC could access Replenishment Capital up to \$100 million minus any Replenishment Capital outstanding.

<sup>39</sup> For 2015, the Hard Trigger would be reached if OCC's shareholders' equity fell below \$146.25 million.

to the filing requirements of Section 19(b) of the Exchange Act and the rules and regulations thereunder.

### 1. Fee Policy

Under the Fee Policy, OCC will set fees at a level that will cover OCC's estimated operating expenses plus a "Business Risk Buffer." According to OCC, the purpose of the Business Risk Buffer is to ensure that OCC accumulates sufficient funds to cover unexpected fluctuations in operating expenses, business capital needs, and regulatory capital requirements. Specifically, in setting fees each year, OCC will calculate an annual revenue target based on a forward twelve months expense forecast divided by the difference between one and the Business Risk Buffer of 25% (*i.e.*, OCC will divide the expense forecast by 0.75). OCC believes that establishing the Business Risk Buffer at 25% will allow OCC to manage unexpected fluctuations in expenses or revenue.<sup>44</sup>

OCC notes that the 25% Business Risk Buffer will be lower than OCC's historical 10-year average buffer of 31%. OCC represents that the lower buffer will permit it to charge lower fees to market participants, and thus become less reliant on refunds to clearing members to return any excess fees paid.<sup>45</sup> In addition, by capitalizing OCC through shareholders' equity (*i.e.*, the Capital Contribution), OCC represents that it is positioned to charge lower fees that are more closely tied to its projected operating expenses, rather than annually generating a larger surplus to address business, operational, and pension risks.<sup>46</sup> OCC states that the Business Risk Buffer will remain at 25% as long as OCC's shareholders' equity remains above the Target Capital Requirement. OCC represents that it will

review its fee schedule on a quarterly basis to manage revenues as close to the 25% Business Risk Buffer as possible, and, if the fee schedule needs to be changed to achieve the 25% Business Risk Buffer, OCC would file a proposed rule change with the Commission.

### 2. Refund Policy

Under the Refund Policy, except at a time when Replenishment Capital is outstanding, OCC will declare a refund to clearing members in December of each year using the formula set out in the Refund Policy. Specifically, the refund will equal 50% of the excess of: (i) Pre-tax income for the year in which the refund is declared over (ii) the sum of the following: (x) The amount of pre-tax income after the refund necessary to produce after-tax income for such year sufficient to maintain shareholders' equity at the Target Capital Requirement for the following year, and (y) the amount of pre-tax income after the refund necessary to fund any additional reserves or additional surplus not already included in the Target Capital Requirement.

The Refund Policy states that OCC will declare refunds, if any, in December of each year, and such refunds would be paid in the following year after OCC issues its audited financial statements, provided that: (i) The payment does not result in a total shareholders' equity falling below the Target Capital Requirement and (ii) the payment is otherwise permitted by Delaware law, federal laws, and regulations.<sup>47</sup>

OCC will not make refund payments while Replenishment Capital is outstanding and will resume refunds after the Replenishment Capital is repaid in full and the Target Capital Requirement is restored. However, OCC will not resume paying refunds and will recalculate how refunds are made if, for more than 24 months: (i) Replenishment Capital remains outstanding or (ii) the Target Capital Requirement is not restored.

### 3. Dividend Policy

Under the Dividend Policy, OCC will pay dividends to Stockholder Exchanges as consideration for their Capital Contribution and commitment to provide Replenishment Capital under the Replenishment Capital Agreement. OCC will declare dividends, if any, in December of each year, and such dividends would be paid in the following year after OCC issues its

audited financial statements, provided that: (i) The payment does not result in total shareholders' equity falling below the Target Capital Requirement and (ii) the payment is otherwise permitted by Delaware law, federal laws, and regulations.

Pursuant to the Dividend Policy, except at a time when Replenishment Capital is outstanding, OCC will declare a dividend on its Class B Common Stock in December of each year in aggregate equal to the excess of: (i) After-tax income for the year, after application of the Refund Policy<sup>48</sup> over (ii) the sum of: (A) The amount required to be retained in order to maintain total shareholders' equity at the Target Capital Requirement for the following year, plus (B) the amount of any additional reserves or additional surplus not already included in the Target Capital Requirement.<sup>49</sup>

Similar to the Refund Policy, if Replenishment Capital is outstanding, OCC will not pay dividends. OCC will resume dividends after the Replenishment Capital is repaid in full and the Target Capital Requirement is restored through the accumulation of retained earnings. However, OCC will not resume paying dividends and will recalculate how dividends are made if, for more than 24 months: (i) Replenishment Capital remains outstanding or (ii) the Target Capital Requirement is not restored. Moreover, the formulas for determining the refunds and dividends treat refunds as tax-deductible, and dividends are not tax-deductible. In the event that refunds are not tax-deductible, OCC represents that it will amend the Refund Policy and Dividend Policy to restore the relative economic benefits between the recipients of the refunds and the Stockholder Exchanges to what the Capital Plan currently provides.

## III. Summary of the Comments and Discussion

### A. Statutory Standards

Exchange Act Section 19(b)(2)(C) directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds the change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.<sup>50</sup> In particular, the Commission addresses the following provisions of the

<sup>44</sup> For example, fees could generate less revenue than expected if trading volume decreases. According to OCC, because OCC's clearing fee schedules typically reflect different rates for different categories of transactions, fee projections will include projections of relative volume in each category. Therefore, the clearing fee schedule will be set to achieve the annual revenue target through a blended or average rate per contract, multiplied by total projected contract volume.

<sup>45</sup> OCC stated that the Capital Plan would allow OCC to refund approximately \$40 million from 2014 fees to clearing members and to reduce fees in an amount to be determined by the Board. See Notice at 5174. OCC issued a press release announcing the declaration of a refund, dividend, and fee reduction, pursuant to the Capital Plan on December 17, 2015. See OCC Press Release, "OCC Declares Clearing Member Refund and Dividend for 2015 and Reduction of Fees under Approved Capital Plan." (available at: [http://www.optionsclearing.com/about/newsroom/releases/2015/12\\_17.jsp](http://www.optionsclearing.com/about/newsroom/releases/2015/12_17.jsp) ("OCC Press Release").

<sup>46</sup> OCC has announced it intended to lower fees by about 19% pursuant to the Capital Plan. See OCC Press Release.

<sup>47</sup> OCC announced for 2016, that it will pay a previously declared 2014 refund of \$33.3 million, a 2015 refund of \$39 million, and special refund of \$72 million. See OCC Press Release.

<sup>48</sup> If the Refund Policy has been eliminated, the refunds shall be deemed to be \$0.

<sup>49</sup> OCC issued a press release announcing the declaration of an approximate \$17 million dividend for 2015 pursuant to the Capital Plan. See OCC Press Release.

<sup>50</sup> 15 U.S.C. 78s(b)(2)(C).

Exchange Act in its review of this proposed rule change:

- Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the rules of a registered clearing agency be designed to protect investors and the public interest.<sup>51</sup>
- Section 17A(b)(3)(I) of the Exchange Act requires, in part, that the rules of a registered clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.<sup>52</sup>
- Section 17A(b)(3)(D) of the Exchange Act requires, in part, that the rules of a registered clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.<sup>53</sup>
- Section 17A(b)(3)(A) of the Exchange Act requires, in part, that a registered clearing agency be so organized and have the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and to safeguard securities and funds in its custody or control or for which it is responsible.<sup>54</sup>
- Section 3(f) of the Exchange Act requires, in part, that whenever pursuant to the Exchange Act the Commission is engaged in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission must also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.<sup>55</sup>

#### *B. Comments Received and Commission Response*

The discussion below summarizes the comments received regarding OCC's proposed Capital Plan and provides OCC's responses and the Commission's evaluation of the proposal in accordance with the applicable Exchange Act requirements.

#### *1. Investor Protection and Public Interest in Exchange Act Section 17A(b)(3)(F) and Burden on Competition in Exchange Act Section 17A(b)(3)(I)*

Commenters argue that the Capital Plan is inconsistent with Exchange Act Sections 17A(b)(3)(F) and 17A(b)(3)(I),<sup>56</sup> which require that the rules of a registered clearing agency, *i.e.*, OCC, are

designed to protect investors and the public interest and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Broadly, commenters argue that the Capital Plan is contrary to the protection of investors and the public interest, and imposes unnecessary and inappropriate burdens on competition, because: (i) The Dividend Policy would unfairly subsidize Stockholder Exchanges at the expense of the Non-Stockholder Exchanges, (ii) the Capital Plan would raise transaction costs by increasing fees and reducing refunds to pay dividends to the Stockholder Exchanges, and (iii) the Dividend Policy would pay Stockholder Exchanges an excessive rate of return. Commenters also assert that the Capital Plan imposes an inappropriate burden on competition, inconsistent with Exchange Act Section 17A(b)(3)(I),<sup>57</sup> because OCC's Target Capital Requirement is inflated, or in the alternative, OCC is already sufficiently capitalized, thus rendering the Capital Plan unnecessary. Finally, commenters argue that the Capital Plan imposes an inappropriate burden on competition because OCC did not consider less costly alternative capital raising initiatives.

The Commission discusses each of these comments and OCC's responses below. After considering the entire record, and for reasons discussed below, the Commission finds that the Capital Plan is consistent with Exchange Act Sections 17A(b)(3)(F) and 17A(b)(3)(I).<sup>58</sup>

(i) Commenters Argue That the Dividend Policy Fails To Protect Investors and the Public Interest and Imposes a Burden on Competition Not Necessary or Appropriate in Furtherance of the Act

Commenters argue that the Dividend Policy is inconsistent with Sections 17A(b)(3)(F) and 17A(b)(3)(I) of the Exchange Act,<sup>59</sup> because it enables the Stockholder Exchanges to monetize OCC's clearing monopoly and changes OCC from a low-cost public utility to a for-profit enterprise by paying dividends to the Stockholder Exchanges.<sup>60</sup> Commenters also assert

that because only Stockholder Exchanges are eligible to receive dividend payments, and any such dividend payments are tantamount to a subsidy from OCC, the Dividend Policy harms the competitive balance between Stockholder Exchanges and Non-Stockholder Exchanges.<sup>61</sup> In the commenters' view, Stockholder Exchanges will be able to use the dividend "subsidy" to lower their options exchange operating costs and thus compete more effectively to provide trading and execution services than the Non-Stockholder Exchanges, which would not receive any such subsidy.<sup>62</sup>

OCC responds that the Dividend Policy is an integral part of the Capital Plan and is necessary to protect OCC against business, operational, and pension risks. OCC refutes the statement that the Capital Plan would turn OCC into a for-profit enterprise for the sole benefit of the Stockholder Exchanges.<sup>63</sup> OCC states the purpose of the Capital Plan is to ensure sufficient capital to cover business, operational, and pension risks, and further argues that the plan as a whole works to limit returns to the Stockholder Exchanges to an appropriate level and lower clearing fees for all market participants.<sup>64</sup> OCC also counters that the Capital Plan does not unfairly advantage Stockholder Exchanges as the obligations of the Stockholder and Non-Stockholder Exchanges are not identical. OCC maintains that commenters do not appropriately consider that the Stockholder Exchanges incur financial obligations under the Capital Plan by providing Capital Contributions and committing to provide Replenishment Capital, and therefore face the substantial risk of losing both contributions.<sup>65</sup> OCC further states that the competitive balance between and among the options exchanges, including between the Stockholder Exchanges and the Non-Stockholder Exchanges, is far more complex than portrayed by the commenters, and that any dividend payments received by Stockholder Exchanges under the Dividend Policy would not have a meaningful impact on competition.<sup>66</sup> Moreover, OCC argues

<sup>51</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>52</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>53</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>54</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>55</sup> 15 U.S.C. 78c(f).

<sup>56</sup> 15 U.S.C. 78q-1(b)(3)(F) and (I).

<sup>57</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>58</sup> 15 U.S.C. 78q-1(b)(3)(F) and (I).

<sup>59</sup> *Id.*

<sup>60</sup> SIG Statement in Opposition to the Order Approving OCC's Capital Plan (October 7, 2015) ("SIG Opposition Statement"). This commenter also argues that the Dividend Policy fosters rewards, *i.e.*, larger dividends paid to Stockholder Exchanges, thereby incenting the Board to approve inflated operating costs and larger budgets, which increases transaction costs. The Commission discusses this aspect of the comment regarding cost increases below in Section B(1)(ii).

<sup>61</sup> See, e.g., BATS Letter I and Letter II; BOX Letter I; MIAA Letter II; BATS, BOX, and MIAA Statement in Opposition to the Action Made by Delegated Authority (October 7, 2015) ("BATS Opposition Statement"); KCG Statement in Opposition to the Order (October 7, 2015) ("KCG Opposition Statement").

<sup>62</sup> *Id.*

<sup>63</sup> OCC Support Statement; OCC Letter II; OCC Stay Brief.

<sup>64</sup> OCC Letter I; OCC Support Statement.

<sup>65</sup> See OCC Support Statement.

<sup>66</sup> *Id.*

the commenters artificially inflate the so-called “subsidy” effect by making erroneous assumptions that any dividend received would be devoted exclusively to subsidizing a segment of the products listed by the Stockholder Exchanges (and offsetting the cost of those listings).<sup>67</sup> OCC also states that the commenters’ analysis does not appropriately address the other ways the Stockholder Exchanges and Non-Stockholder Exchanges compete.<sup>68</sup>

(ii) Commenters Argue That the Capital Plan Raises Transaction Costs and Imposes a Burden on Competition Not Necessary or Appropriate in Furtherance of the Act

Commenters also argue that the Capital Plan is inconsistent with Sections 17A(b)(3)(F) and 17A(b)(3)(I) of the Exchange Act<sup>69</sup>, because it raises transaction costs.<sup>70</sup> Commenters allege that the Dividend Policy creates incentives for OCC to increase its operating expenses, and in turn, charge higher clearing fees because higher clearing fees will lead to higher dividend payments.<sup>71</sup> Commenters state that these higher fees harm the Non-Stockholder Exchanges and are particularly detrimental to the public interest and investor protection because clearing members and customers collectively pay 95% of OCC operating expenses through clearing fees.<sup>72</sup> Commenters argue that the Refund Policy does not protect investors or promote the public interest, because it reduces the percentage of excess net income refunded to clearing members from 100% to 50%. Commenters state that this reduction in refunds will lead to increased transaction costs through wider quoted spreads.<sup>73</sup> Finally, commenters argue that the increased transaction costs impose a burden on competition not necessary or appropriate.

OCC refutes commenters’ assertion that the Dividend Policy creates incentives for OCC to increase its

operating expenses or its fees as a means to pay higher dividends to Stockholder Exchanges.<sup>74</sup> OCC explains that the operation of the Capital Plan, in its totality, places limits on these purported incentives. OCC notes that commenters ignore the fact that higher operating expenses lead to a higher Target Capital Requirement, which would require additional capital contributions to be withheld from funds that would otherwise be used to pay dividends and refunds and therefore, would have the effect of reducing the rate of return to the Stockholder Exchanges.<sup>75</sup> OCC further explains that the Capital Plan incorporates a lower Business Risk Buffer, *i.e.*, 25%, than the historical average buffer of 31%. Because this buffer is used to set the clearing fee schedules, it will provide members with a lower fee structure.<sup>76</sup> In addition, because the Capital Plan uses shareholders’ equity as capital to offset potential business, operational, and pension risks, OCC states that it would become less dependent on clearing fees to manage these risks.<sup>77</sup> OCC also states that commenters’ concerns regarding future fee increases are speculative.<sup>78</sup>

(iii) Commenters Argue That the Dividend Rate Under the Capital Plan is Excessive and Inconsistent With the Protection of Investors and the Public Interest and Imposes a Burden on Competition Not Necessary or Appropriate in Furtherance of the Act

Commenters assert that the rate of return the Stockholder Exchanges will receive for providing the Capital Contribution and committing to provide Replenishment Capital under the Dividend Policy is excessive, and is therefore inconsistent with Sections 17A(b)(3)(F) and 17A(b)(3)(I) of the Exchange Act.<sup>79</sup> Specifically, the commenters argue that OCC is a monopoly, and as such, its risk of capital impairment is low, such that the imputed rate of return to the Stockholder Exchanges is excessive.<sup>80</sup>

OCC responds that its status as the sole registered clearing agency in the options market does not mean that the Capital Contribution by the Stockholder Exchanges is a risk-free investment.<sup>81</sup> As noted above, the Capital Plan is designed to support OCC’s operations in the event of substantial losses from potential business, operational, and pension risks—these risks are not mitigated by OCC’s status as the sole clearing agency in the listed options space.<sup>82</sup> OCC also responds that the potential rate of return is not excessive and notes that the Capital Plan, including the Dividend Policy, was developed after an extensive and detailed deliberative process.<sup>83</sup> OCC adds that the Board relied on advice received from external advisers to help ascertain whether the potential rate of return to Stockholder Exchanges was reasonable in light of the nature of the capital commitments and the additional risks inherent in their contributions.<sup>84</sup> OCC further argues that the elements of the Capital Plan (the Fee Policy, Refund Policy, and Dividend Policy) are designed to provide appropriate limits on any dividend paid pursuant to the Dividend Policy.<sup>85</sup>

(iv) Commenters Argue That OCC Was Sufficiently Capitalized Without the Capital Plan

Commenters argue that the Capital Plan is inconsistent with 17A(b)(3)(I) of the Exchange Act<sup>86</sup> because OCC’s Target Capital Requirement is inflated, and as a result, the Capital Plan imposes an unnecessary and inappropriate burden on competition.<sup>87</sup> Commenters argue in the alternative that, even if the Target Capital Requirement is not inflated, there is no need for the Capital Plan<sup>88</sup> because OCC is sufficiently capitalized through the accumulation of fees since the publication of the Notice.<sup>89</sup> In the commenters’ view, the accumulation of retained earnings has placed OCC within reach of its proposed capital levels and may even leave OCC

<sup>67</sup> See *id.*

<sup>68</sup> *Id.* OCC notes that both Stockholder and Non-Stockholder Exchanges have pricing power from many sources, and all of these sources have more impact than the dividend on these exchanges’ ability to compete. See *id.* at 19–20 (arguing that pricing power derives from many factors, and stating that “the revenue per contract variation among exchanges and among products, which [commenters] themselves note, suggests that the Stockholder Exchanges are not competing on the basis of price alone”).

<sup>69</sup> 15 U.S.C. 78q–1(b)(3)(F) and (I).

<sup>70</sup> See MM Letter; KCG Petition; SIG Petition; SIG Opposition Statement.

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., KCG Opposition Statement; SIG Opposition Statement.

<sup>73</sup> See SIG Petition; SIG Opposition Statement.

<sup>74</sup> OCC Letter II; OCC Stay Brief.

<sup>75</sup> *Id.*

<sup>76</sup> OCC Support Statement.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 15 U.S.C. 78q–1(b)(3)(F) and (I). Commenters separately describe the dividend rate as unconscionable, exorbitant, and above market rate. Commenters estimate that the dividend payments will result in a rate of return for the Stockholder Exchanges’ investment of additional capital of upwards of 20% to 30% but state that the true amount is not known to them. See BATS Letter I; BATS Letter II; MIAIX Letter I; KCG Opposition Statement; SIG Opposition Statement.

<sup>80</sup> See BATS Letter II; Peak6 Capital Management Statement in Opposition to the Order (October 7, 2015) (“Peak6 Opposition Statement”); SIG Opposition Statement.

<sup>81</sup> See OCC Support Statement.

<sup>82</sup> See Notice. See also OCC Support Statement.

<sup>83</sup> See OCC Support Statement.

<sup>84</sup> OCC engaged an outside consulting firm to develop capital needs and targets and a financial advisor to provide analysis on dividend returns. Outside counsel also provided advice on governance matters. See OCC Letter I; OCC Letter IV; OCC Support Statement.

<sup>85</sup> See OCC Letter I.

<sup>86</sup> 15 U.S.C. 78q–1(b)(3)(I).

<sup>87</sup> See SIG Opposition; Reinstitution Motion.

<sup>88</sup> See KCG Opposition Statement; PEAK6 Opposition Statement; SIG Opposition Statement.

<sup>89</sup> See KCG Opposition; SIG Opposition.

with a surplus, which renders the Capital Plan wholly unnecessary.<sup>90</sup>

OCC counters that the Target Capital Requirement is the product of extensive analysis and takes into account a broad set of factors to cover plausible loss scenarios from business, operational, and pension risks.<sup>91</sup> OCC notes that commenters, in deeming OCC adequately capitalized, do not provide a methodology for ascertaining a Target Capital Requirement, nor do they provide with sufficient granularity or specificity the risks that would be covered (and those that would be excluded) with their proposed lower Target Capital Requirement.<sup>92</sup> OCC notes its financial resources, such as margin and the clearing fund deposits, and not its capital, protect it against counterparty risk and on-balance sheet credit and market risk. In addition, OCC states that the commenters incorrectly included in their estimate of its current capital reserve capital refunds owed by OCC to clearing members and excess over expenses that would be subject to taxes if they were retained by OCC.<sup>93</sup>

OCC also disagrees that it has accumulated sufficient funds from clearing fees since the Capital Plan was proposed to render the Capital Plan unnecessary. OCC takes issue with commenters' calculations because, despite claiming the Capital Plan as being unnecessary, commenters included the contributions already made pursuant to the Plan in their calculations.<sup>94</sup> In absence of the Capital Plan, OCC notes that its capital resources would be less than \$150 million, which is less than both: (i) Half of the \$364 million in capital resources available to it under the Capital Plan; and (ii) the \$247 million Target Capital Requirement.<sup>95</sup>

#### (v) Commenters Argue That OCC Failed To Properly Consider Alternative Sources of Raising Capital

Finally, commenters argue that the Capital Plan is inconsistent with Section 17A(b)(3)(I) of the Exchange Act<sup>96</sup> because OCC's Board failed to consider alternative and less costly ways to raise capital, including having OCC raise capital by accumulating retained earnings through some combination of fees and reduced rebates,<sup>97</sup> raise capital

from existing Stockholder Exchanges at a lower rate of return,<sup>98</sup> raise capital from Non-Stockholder Exchanges, clearing members or third party investors at a lower rate of return,<sup>99</sup> and raise capital through other instruments, such as perpetual preferred stock.<sup>100</sup> Commenters suggested that the failure of the Board to pursue these alternative sources of capital renders the Capital Plan inconsistent with Section 17A(b)(3)(I) of the Exchange Act<sup>101</sup> because it imposes unnecessary and inappropriate burdens on competition.<sup>102</sup>

OCC counters that the Board evaluated all viable and potential alternatives.<sup>103</sup> Specifically, OCC notes that the Board considered potential alternatives and, after a thorough deliberation, voted in favor of the Capital Plan because it allowed OCC to increase its capital almost instantaneously (*i.e.*, the Capital Contribution was paid immediately) and provided the benefit of Replenishment Capital.<sup>104</sup> In addition to immediately

earnings, commenters proposed an alternative of an escrow, or Payer Asset Approach, where OCC could accumulate retained earnings and place them in escrow. *See* MM Letter; SIG Petition. These commenters argue that by placing the fee revenue (which would be retained earnings if held by OCC) in escrow to cover business, operational, and pension risks, those monies would not be considered an asset of the Stockholder Exchanges and subject to tax and OCC could return excess from the escrow to investors through refunds or lower fees.

<sup>98</sup> *See* MM Letter. Another commenter states that the Chicago Board Options Exchange offered to provide OCC with a capital infusion at a lower annual rate over a certain period of time that is more favorable than the Capital Plan, which contemplates paying the Stockholder Exchanges dividends in perpetuity. *See* SIG Opposition Statement.

<sup>99</sup> *See, e.g.*, BATS Letter I; BATS Letter II.

<sup>100</sup> *See* BOX Letter I.

<sup>101</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>102</sup> *See, e.g.*, SIG Petition; BATS Letter I.

<sup>103</sup> *See* OCC Letter II (noting that it was not clear how an escrow fund that is not an asset of OCC would satisfy the Commission's proposed rule requirement concerning liquid net assets funded by equity); OCC Support Statement (noting that accumulating fees would require "\$593 million in pre-tax clearing fees" from members). In addition, OCC states that its Board considered CBOE's proposal, but did not find it viable in meeting its capital needs because CBOE's proposed contribution would have been in the form of a loan, and thus would be debt, and was not fully developed. *See* October 15, 2015 Declaration of Craig S. Donohue ("Donohue Declaration"). OCC also states that it considered issuing capital stock to clearing members and Non-Stockholder Exchanges and issuing perpetual preferred shares to outside institutional investors. *See* OCC Letter I; OCC Letter II.

<sup>104</sup> *See* OCC Letter II (noting the importance of OCC's continuity and need for capital to withstand an event arising from business, operational and pension risks and the Board's concern with timeliness; based on these considerations, the Board considered alternate plans as taking too long to accumulate sufficient capital); *also see* OCC

increasing OCC's Capital, OCC's Board determined that the Capital Plan was superior to other alternatives when it took into account factors such as liquidity, the timeliness and certainty of obtaining capital, and applicable taxes.<sup>105</sup>

#### (vi) Commission Findings

##### a. Capital Plan Is Consistent With Exchange Act Section 17A(b)(3)(F)

The Commission has considered the comments described above and finds that the Capital Plan is consistent with Exchange Act Section 17A(b)(3)(F).

After reviewing the Dividend Policy in conjunction with the other elements of the Capital Plan, the Commission does not believe that the Dividend Policy, or the Capital Plan as a whole, changes OCC's essential role as a market utility. Instead, the Capital Plan is designed to enhance OCC's capitalization rather than to enable the Stockholder Exchanges to monetize OCC's clearing monopoly. This enhanced capitalization is designed to allow OCC to continue its essential role by raising sufficient capital to cover business, operational, and pension risks. The Board determined that the historical practice of solely using fees, with annual refunds, to cover operating expenses and manage risks did not allow OCC to reach adequate capitalization.<sup>106</sup> Under the Refund Policy, OCC will continue its practice of refunding a significant percentage of excess clearing fees to clearing members, thus preserving that aspect of OCC's industry "utility" function. And the components of the Capital Plan—the Fee Policy, Refund Policy, and Dividend Policy—are designed to set the dividends to be paid to the Stockholder Exchanges at a level that the Board, with the assistance of independent outside financial experts, has determined to be reasonable for the cost and risks associated with the Stockholder Exchanges' contributed and committed capital. As pointed out by OCC, the plan as a whole works to avoid unnecessarily and unreasonably high operating expenses, maintain the Target Capital

Support Statement (noting that raising capital through fee increases does not provide the immediate access to additional capital that the Replenishment Capital commitment provides under the Capital Plan).

<sup>105</sup> *Id.*

<sup>106</sup> Historically, the Stockholder Exchanges have contributed only minimal capital to OCC. The Board determined that to obtain substantial Capital Contributions and Replenishment Capital from the Stockholder Exchanges is the best alternative, which cannot be accomplished without modification of the past practice of not providing dividends to Stockholder Exchanges owners of OCC. *See* Notice at 5173–75.

<sup>90</sup> *See* SIG Letter III.

<sup>91</sup> *See* Notice; OCC Support Statement.

<sup>92</sup> *See* OCC Support Statement.

<sup>93</sup> *Id.*

<sup>94</sup> *See* OCC Support Statement.

<sup>95</sup> *See* OCC Support Statement.

<sup>96</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>97</sup> *See, e.g.*, MM Letter; SIFMA Letter; SIG Opposition Statement. In support of the alternative of raising capital through accumulative retained

Requirement at an appropriate level and set a reasonable dividend, each as determined by the Board. An increase in operating expenses would lead to an increase in the Target Capital Requirement, and therefore, could have the effect of reducing the rate of return in dividends.<sup>107</sup>

The Commission does not believe that the Capital Plan operates to increase fees, inflate operating expenses or drive up transaction costs in a manner inconsistent with the protection of investors or the public interest. The Commission notes that commenters' arguments ignore that the Capital Plan incorporates a lower Business Risk Buffer, which allows generally lower fees.<sup>108</sup> The Capital Plan provides OCC with sufficient shareholders' equity to substantially cover the potential costs related to OCC's business, operational, and pension risks, thus reducing the need for OCC's Board to budget for those risks when estimating the projected forward 12-month operating expenses (a key component of the formula for setting fees under the Fee Policy). Therefore, the Commission believes that clearing members and customers will benefit from the proposed Capital Plan because it will allow OCC to continue to provide clearing services at expected lower fees. In addition, there will be tax implications associated with retained earnings and dividend payments, which in turn affects refunds and the dividend rate under the Capital Plan. OCC therefore would be motivated to take applicable taxes into consideration in setting new fee schedules or declaring dividends or refunds. At the very least, the Commission does not believe that it is inevitable that the Capital Plan will lead to higher fees as the commenters assert.

<sup>107</sup> See OCC Letter II. The rate of return would be dependent on many factors, including clearing fees, which would be subject to the rule filing requirements of Section 19(b)(1) of the Exchange Act. The Commission also notes that OCC's status as the only registered clearing agency for listed options is not relevant in assessing the appropriate dividend rate under the Capital Plan, which is designed to address business, operational, and pension risks.

<sup>108</sup> In fact, OCC stated that it expected that the Capital Contributions from the Stockholder Exchanges will enable it to provide a significant refund of 2014 fees. OCC further expected that its current clearing fees will be reduced significantly based on the Business Risk Buffer of 25% beginning in 2015 with refunds restored, and that these lower fees will continue for the foreseeable future. See Notice at 5175. As described above, OCC declared a refund of 2014 fees and a 19% fee reduction. In addition, OCC also announced a special refund that represents the excess of 2015 pre-tax income over OCC's target revenue based on achievement of the 25% Business Risk Buffer. See OCC Press Release.

For the reasons provided above, the Commission does not believe that the potential dividend rate, the Dividend Policy, or the Capital Plan, is inconsistent with investor protection or the public interest. On the contrary, the Capital Plan will support the critical functions and continued operations of OCC, particularly during times when its capital position is impaired, and is, therefore, consistent with the protection of investors and the public interest under Exchange Act Section 17A(b)(3)(F).<sup>109</sup>

#### b. Capital Plan Is Consistent With Exchange Act Section 17A(b)(3)(I)

After considering the comments described above, the Commission finds that the Capital Plan does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and is therefore consistent with Exchange Act Section 17A(b)(3)(I).<sup>110</sup>

The Commission notes that Exchange Act Section 17A(b)(3)(I)<sup>111</sup> does not require the Commission to make a finding that OCC chose the option that imposes the least possible burden on competition. Rather, the Exchange Act requires that the Commission find that the Capital Plan does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, which involves balancing the competitive effects of the proposed rule change against all other relevant considerations under the Exchange Act.<sup>112</sup>

The Commission has considered all the comments, OCC's responses and alternate plans for raising capital described by commenters. As an initial matter, the Commission does not believe that the Dividend Policy, or the Capital Plan as a whole, creates a subsidy that unfairly advantages Stockholder Exchanges. The Commission notes that any potential dividends declared under the Dividend Policy are intended to be consideration for the Stockholder Exchanges' contribution or commitment to capital and compensation for their opportunity cost and risk of loss associated with such contribution and commitment.<sup>113</sup> Further, the

Commission notes that the operation of the Capital Plan does not require dividends to be paid in any year, and under certain circumstances such as when Replenishment Capital is outstanding, OCC would not pay dividends. The Commission believes that various components of the Capital Plan operate to set reasonable dividends for the cost and risks associated with the Stockholder Exchanges' contributed and committed capital. Thus, the Commission does not believe that the Capital Plan imposes any costs that could be viewed as imposing a burden on competition not necessary or appropriate under the Exchange Act.

Similarly, the Commission does not believe that the Target Capital Requirement imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission notes that the Target Capital Requirement is designed to provide adequate capitalization, thereby substantially enhancing OCC's ability as a SIFMU to sustain non-default losses arising from business, operational, and pension risks. After reviewing the process used by OCC to establish the Target Capital Requirement, the Commission believes that the Target Capital Requirement is appropriately designed to capture identified and foreseeable business risks. OCC represents that it used various measures and took a methodical and reasoned approach to establish the Target Capital Requirement and the Commission does not believe that the Target Capital Requirement is or will be set at an unreasonable level.

Moreover, commenters have not explained how alternatives to the Dividend Policy or the Target Capital Requirement would be effective in promoting the significant interest under the Exchange Act in having a well-capitalized OCC to allow prompt clearance and settlement. A well-capitalized OCC provides support for

used for other purposes. Thus, each Stockholder Exchange has forgone the opportunity to deploy or invest that capital. Additionally, if OCC's capital were to fall below the "Hard Trigger," meaning that the initial Capital Contribution was lost, the Stockholder Exchanges would be required to provide Replenishment Capital, which, as discussed above, would likely be part of a recovery plan or otherwise in furtherance of winding down OCC's business. In such situations, the Stockholder Exchanges would be committing additional capital without any expectation that such capital will ever be repaid. See OCC Support Statement. Non-Stockholder Exchanges are in a different position than the Stockholder Exchanges in that they are not obligated to provide a Capital Contribution or commit to provide Replenishment Capital, and therefore do not bear the costs and risks of the financial obligations attendant with the Capital Contribution and Replenishment Capital.

<sup>109</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>110</sup> *Id.*

<sup>111</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>112</sup> *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1105 (D.C. Cir. 1978) (noting that to the extent that the legislative history provides any guidance to the Commission in taking competitive concerns into consideration in its deliberations on the national clearing system, it merely requires the SEC to "balance" those concerns against all others that are relevant under the statute).

<sup>113</sup> Each Stockholder Exchange has contributed \$30 million to OCC, which is capital that cannot be

the continued orderly operations of OCC and benefits clearing members, market participants and the options markets broadly. The Commission therefore finds that even if the dividends paid under the Dividend Policy or future costs incurred under the Target Capital Requirement or Capital Plan as a whole, as they are currently designed impose a burden on competition, that burden is necessary or appropriate in furtherance of the purposes of the Act.

The Commission further notes that whether OCC would accumulate sufficient capital to reach the Target Capital Requirement through the accrual of fees was unknown at the time OCC proposed the Capital Plan. OCC's Board considered this alternative and determined that accumulation of clearing fees would take several years to achieve the Target Capital Requirement.<sup>114</sup> The Capital Plan immediately addressed the risk of a significant event impairing OCC's capital, even though such an event has not in fact occurred.<sup>115</sup>

Finally, the existence of alternative ways for OCC to raise capital does not render the Capital Plan inconsistent with the Exchange Act. The Commission notes that the Board considered various alternative ways to raise capital and that the Board determined that the Capital Plan was in the best interests of OCC because it was designed to provide immediate access to capital through the Capital Contribution and was supported by the agreement to provide Replenishment Capital.<sup>116</sup> In addition, in evaluating the relative competitive effects of the Capital Plan and alternative sources of capital, the Commission reiterates that it does not

believe that the Capital Plan will necessarily lead to increased fees or transaction costs. Accordingly, the Commission finds the burdens imposed by the Capital Plan, if any, are necessary or appropriate in furtherance of the purposes of the Exchange Act.

For reasons stated above, the Commission finds that the Capital Plan is consistent with Exchange Act Section 17A(b)(3)(I).<sup>117</sup>

## 2. Capital Plan Provides for an Equitable Allocation of Reasonable Dues, Fees, and Other Charges Among the Participants

Commenters assert that the Capital Plan is inconsistent with Exchange Act Section 17A(b)(3)(D)<sup>118</sup> because it would result in unreasonable fees and cause an inequitable allocation of future clearing fees.<sup>119</sup> Commenters argue that the Capital Plan does not provide for the equitable allocation of reasonable dues, fees, and other charges among its participants because the fees unfairly discriminate against Non-Stockholder Exchanges, are potentially excessive, or present conflicts.<sup>120</sup> Commenters argue that the Capital Plan unfairly discriminates against the Non-Stockholder Exchanges because whereas all exchanges contribute equally to fees, only the Stockholder Exchanges are eligible to receive dividend payments.<sup>121</sup>

Commenters question whether the Board can fairly guide OCC on budget efficiencies in setting the fees.<sup>122</sup> Commenters also argue that the rule filing process for fee changes, which requires submission to the Commission, public comment, and Commission review fails to adequately protect investors against dues, fees, or other charges that are not reasonable because, at the time of filing, there is no way to

calculate whether a fee change will later result in excess dividends.<sup>123</sup>

As more fully discussed above, OCC counters that there is no unfair discrimination or inequitable allocation of fees because the parties' obligations are different, as only the Stockholder Exchanges face substantial risk of loss from their capital contributions, and commit to Replenishment Capital.<sup>124</sup> OCC also argues that in addition to the fee change rule filing process, the Commission could summarily act to suspend any such fee if necessary or appropriate in furtherance of the purposes of the Exchange Act.<sup>125</sup>

The Commission finds that the Capital Plan is consistent with Exchange Act Section 17A(b)(3)(D).<sup>126</sup> Exchange Act Section 17A(b)(3)(D) provides that the rules of a clearing agency must provide for equitable allocation of fees among its participants and for reasonable fees and charges. With respect to equitable allocation, the Capital Plan as a whole, and the Fee Policy in particular, do not change the way that the fees are allocated among clearing members, and fees for similarly-situated market participants are equitable. While Stockholder Exchanges may receive dividends, nothing in the Exchange Act precludes OCC from paying dividends to the Stockholder Exchanges, who have made substantial contributions to improve OCC's capital base. Although end of year refunds to clearing members will be reduced by 50% to allocate money to pay for dividends, those dividends are compensation for the financial risks and obligations incurred by the Stockholder Exchanges under the Capital Plan and all clearing members share in refunds.

With respect to the reasonableness of fees, the Commission does not believe that the Capital Plan as a whole and the Fee Policy in particular, results in unreasonable dues, fees, and other charges. After setting its annual Target Capital Requirement, the Fee Policy requires OCC to set fees at levels to ensure that it can cover operational expenses, business and regulatory capital needs, and maintain shareholder equity. Reductions to, and the quarterly review of, the Business Risk Buffer will enable OCC to charge lower fees and make reductions as appropriate to manage revenue as close to its target as possible. These changes are designed to give market participants the benefit of lower upfront transaction costs,

<sup>114</sup> See OCC Support Statement (noting that, under the current fee schedule, it would take until mid-2017 to organically accumulate \$364 million in capital. As a result, OCC concluded that organic accumulation of capital through fee increases was not a durable solution to its substantial capital needs).

<sup>115</sup> Petitioners' comments, when contending OCC was close to achieving its Target Capital Requirement of \$247 million, did not acknowledge or accept that the total resource requirement under the Capital Plan was \$364 million, including the Replenishment Capital commitment of \$117 million. See SIG Support Statement and KCG Support Statement. OCC also stated that, as of August 31, 2015, without the \$150 million Capital Contribution under the Capital Plan, OCC's adjusted shareholders' equity would be approximately \$149 million or less than half of the \$364 million in total capital resources available under the Capital Plan, and significantly less than the \$247 million Target Capital Requirement. See OCC Support Statement.

<sup>116</sup> The Commission also notes that the Board determined that the Capital Plan contains certain aspects and features that the alternatives would not be able to achieve (such as characterization of the net liquid assets raised by OCC as equity instead of debt).

<sup>117</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>118</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>119</sup> See SIG Petition; MM Letter; KCG Opposition Statement; BATS Opposition Statement.

<sup>120</sup> See SIG Petition; MM Letter; BATS Petition; KCG Opposition Statement.

<sup>121</sup> See BATS Petition.

<sup>122</sup> See SIG Opposition Statement (questioning whether the Board would be able to ensure that budgets are not inflated and that no more revenues than needed are collected, because Stockholder Exchanges would be conflicted and would unduly influence Board votes to approve larger budgets that would enrich themselves via dividend payments). See also MM Letter at 13 (arguing "If the SEC allows the five owners to monetize OCC in this fashion, the conflicts of interest will diminish the prospect that OCC will perform efficiently to keep transaction fees low and operating expenses under control. . . . Given the potential of the dividend to increase with the size of OCC's budget, we are concerned where transaction fees may go in the future.")

<sup>123</sup> See BATS Petition; BATS Opposition Statement; KCG Opposition Statement.

<sup>124</sup> See OCC Support Statement.

<sup>125</sup> See OCC Stay Brief.

<sup>126</sup> 15 U.S.C. 78q-1(b)(3)(D).



especially those customer end users who do not receive passed through refunds from the clearing member.<sup>127</sup>

In addition, any future fee change or increase will be subject to the rule filing requirements under Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. The Commission believes that these filing requirements provide appropriate protection against future fee increases despite commenters' assertions to the contrary. The Exchange Act rule filing requirements for fee changes provide an opportunity for public comment<sup>128</sup> and an opportunity for the Commission to review the change, summarily suspend it and institute proceedings to ultimately approve or disapprove the change,<sup>129</sup> as applicable, to ensure an SRO's rules meet regulatory requirements. The Commission believes that various components of the Capital Plan, including the Dividend Policy, Refund Policy and Fee Policy, operate to maintain fees and dividend payments, if any, at appropriate levels based on the Target Capital Requirement established for the year, Business Risk Buffer, and other considerations, such as applicable taxes and OCC's industry utility role to provide refunds. The Commission's review of any future filings by OCC on its new fee schedule will determine whether the future fee changes are consistent with the applicable Exchange Act requirements, taking into account all relevant facts in addition to the Fee Policy under the Capital Plan.

The Commission therefore, disagrees with commenters' assertions that the fee filings will not adequately protect investors against dues, fees, or other charges that are not reasonable.

For the reasons discussed above, the Commission finds that the Capital Plan is consistent with the Exchange Act Section 17A(b)(3)(D)<sup>130</sup> because it provides for the equitable allocation of reasonable dues, fees, and other charges among its participants.

### 3. Facilitating Prompt and Accurate Settlement and Safeguarding of Securities and Funds Under Exchange Act Section 17A(b)(3)(A)

Section 17A(b)(3)(A) of the Exchange Act<sup>131</sup> requires that a registered clearing agency be so organized and have the capacity to be able to facilitate the prompt and accurate settlement of securities transactions and to safeguard securities and funds in its custody or

control or for which it is responsible. Commenters<sup>132</sup> acknowledged OCC's fundamental need to raise additional capital to support OCC's operations.<sup>133</sup>

OCC asserts that the Capital Plan is structured to provide OCC with sufficient capital (at a lower fee structure for market participants) to fund unpredictable business, operational, and pension events that might impair capital.<sup>134</sup> OCC noted that in the absence of the Capital Plan, clearing members' funds would be put at risk should OCC be unable to withstand an adverse capital event.<sup>135</sup> Additionally, OCC asserts that the Capital Plan is structured to replenish capital during an adverse capital event, thereby ensuring OCC's business continuity.<sup>136</sup>

Taking these comments into account, the Commission finds that the Capital Plan is consistent with Exchange Act Section 17A(b)(3)(A). The Capital Plan supports OCC's business continuity (thereby facilitating the integrity of the clearing agency and its functions) by raising additional capital and obtaining a commitment from the Stockholder Exchanges to provide potential Replenishment Capital should it become necessary. In this manner, the Capital Plan ensures that OCC, especially during a significant event that impairs its capital, would have the capacity to facilitate and promote the prompt and accurate settlement of securities transactions and to safeguard securities and funds in its custody or control or for which it is responsible. Accordingly, the Commission finds that the Capital Plan is consistent with Exchange Act Section 17A(b)(3)(A).

### 4. Commission's Consideration of SRO Rules' Promotion of Efficiency, Competition and Capital Formation Under Exchange Act Section 3(f)

Section 3(f) of the Exchange Act<sup>137</sup> directs that the Commission, when it is reviewing a rule of a self-regulatory organization, must consider whether such rule promotes efficiency, competition, and capital formation. Commenters argue that the Commission should not approve the Capital Plan because the Capital Plan introduces inefficiencies through costs, including tax liabilities, and imposes burdens on

competition.<sup>138</sup> One commenter argues that the Capital Plan is inefficient from a tax perspective because the dividend payments to Stockholder Exchanges subject a significant portion of OCC's profits to taxes, which is an inefficient use of industry funds.<sup>139</sup> In response, OCC noted that the Board considered the alternative of raising capital through accumulating pre-tax clearing fee revenues to a certain amount in after-tax net equity, but concluded that the Capital Plan was superior because it would increase certainty of OCC's compliance with PFMI and Commission's proposed Rule 17Ad-22(e)(15) in a timely way.<sup>140</sup>

The Commission has considered whether the Capital Plan promotes efficiency, competition, and capital formation, and discusses efficiency and capital formation below. The Commission has discussed the impact of the Capital Plan on competition in Section III.B.1 above.

With respect to the promotion of efficiency, the Commission first notes that under the Capital Plan, OCC has both immediate and ongoing access to cash to meet its Target Capital Requirement. From a timing standpoint, the Capital Plan is more immediate and expedient than several of the alternatives, such as raising capital from Non-Stockholder Exchanges, clearing members or third-parties, each of which would have necessitated governance changes over a period of time. Similarly, raising capital through the accumulation of fees was forecasted by OCC to take several years and would be subject to clearing volume volatility risks.

Second, the Capital Plan efficiently allocates costs for operational risk management among market participants. Having the Stockholder Exchanges bear the business, operational, and pension risks up front by making Capital Contributions and committing to Replenishment Capital in exchange for future dividend payments in cents them, as owners of OCC, to prudently manage and minimize these risks, to avoid the loss of their capital contributions.

Third, on an ongoing basis, OCC intends to use clearing fees to maintain the Target Capital Requirement. This aspect of the Capital Plan apportions the costs of the Capital Plan to the clearing firms in relation to their clearing activity. Thus, the Capital Plan seeks to align the costs and benefits to clearing firms in accordance with their level of clearing activity. The Commission has

<sup>127</sup> See Notice at 5175.

<sup>128</sup> 15 U.S.C. 78s(b)(1).

<sup>129</sup> 15 U.S.C. 78s(b)(3).

<sup>130</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>131</sup> 15 U.S.C. 78q-1(b)(3)(A).

<sup>132</sup> No commenters to the Notice raised specific concerns that the Capital Plan was inconsistent with Exchange Act Section 17A(b)(3)(A).

<sup>133</sup> See BATS Letter I at 2; BOX Letter I at 1; KCG Letter I at 2; SIG Letter I at 2.

<sup>134</sup> See OCC Letter I; OCC Stay Brief.

<sup>135</sup> See OCC Support Statement.

<sup>136</sup> See OCC Stay Brief; Notice at 5176.

<sup>137</sup> 15 U.S.C. 78q-1(b)(3)(f).

<sup>138</sup> BATS Opposition Statement; BOX Petition for Review; KCG Petition for Review.

<sup>139</sup> See SIG Opposition Statement.

<sup>140</sup> See OCC Support Statement.

considered that, under the Capital Plan, OCC expects to continue to pay refunds to clearing members from a portion of OCC's net income. This feature would preserve some of the key attributes of OCC's business model as a market utility.

The Commission recognizes that, as commenters note, OCC will fund the cost of raising of capital by paying dividends, when eligible, to the Stockholder Exchanges. However, the Commission observes that other methods of raising capital similarly would incur costs to OCC and its participants. For example, raising capital through retained earnings involves costs related to applicable taxes as well as additional time to accumulate sufficient capital, during which time OCC will be exposed to business, operational and pension risks without sufficient capital to protect itself.<sup>141</sup> Similarly, raising capital through other instruments such as issuance of perpetual preferred shares or common stock to Non-Stockholder Exchanges, clearing members or third-party investors, involves costs related to the transaction itself (e.g. underwriting), dividend payments, and applicable taxes. And, unlike the Replenishment Capital provided under the Capital Plan, such instruments would not provide readily available capital during a critical event, wind-down or recovery period.

The Commission also has considered whether the Capital Plan promotes efficiency from the tax perspective. The Commission notes that similar tax consequences would exist if OCC had chosen to raise equity by issuing common stock or preferred stock to Non-Stockholder Exchanges, clearing members or third-party investors, because in each of these cases, OCC anticipates paying dividends to these parties in exchange for their investments, which will be subject to withholding tax prior to making dividend payments. Moreover, tax consequences are only one aspect of a consideration of efficiency in these circumstances.

The Commission also has considered whether the Capital Plan will promote capital formation. As discussed throughout this order, the Capital Plan is designed to enable OCC to withstand business, operational, and pension risks

that may significantly affect OCC's ability to provide prompt clearance and settlement services. It also provides an incentive for OCC to prudently manage its risks by allocating these risks between Stockholder Exchanges and clearing participants. As OCC is the only clearing agency for listed standardized options in the U.S., it plays a crucial role in financial stability. A well-functioning equity options market provides an infrastructure necessary for trading both equity options and other equity investment products, which are used by companies and businesses to raise capital. The Commission believes that an adequately capitalized OCC should promote market confidence in OCC's ability to continuously serve the options market, which in turn facilitates prompt clearance and settlement of options transactions and promotes capital formation.

#### 5. Other Issues Raised by Commenters

Commenters also raise certain procedural concerns with respect to the Capital Plan. Specifically, commenters argue that the process OCC underwent to approve the Capital Plan failed to comply with its own rules.<sup>142</sup> Commenters also argue that the Capital Plan should not have been approved under delegated authority and the Delegated Order failed to fulfill the Commission's obligation to engage in "reasoned decision-making" under the Administrative Procedure Act ("APA").<sup>143</sup> The Commission considers and discusses each of these comments below.

#### (i) Compliance With Self-Regulatory Organization's Own Rules as Required Under Exchange Act Section 19(g)(1)

Section 19(g)(1) of the Exchange Act<sup>144</sup> requires, in part, that every self-regulatory organization shall comply with its own rules. Form 19b-4 requires each SRO to complete all actions required to be taken under its constitution, articles of incorporation, by-laws, rules or corresponding instruments prior to filing a proposed rule change. Several commenters argue that OCC failed to comply with its By-Laws and such failure might have adversely affected the quality of the

Board's deliberations and the validity of its ultimate approval of the Capital Plan.

Commenters argue that OCC failed to abide by Article XI of its By-Laws,<sup>145</sup> when it approved the Capital Plan with three instead of five public directors on the Board.<sup>146</sup> Commenters also assert that OCC violated its Code of Conduct (including its Conflict of Interest Policy).<sup>147</sup> Commenters argue that directors representing the Stockholder Exchanges should have been recused from the Board's vote and their failure to do so invalidates the vote and the Board's approval of the Capital Plan.<sup>148</sup> Commenters also argue that OCC violated its Interpretation and Policy .01 (to Article VIIB of its By-Laws), which requires OCC to notify Non-Stockholder Exchanges regarding matters of competitive significance as determined by the Executive Chairman to afford them an opportunity to make presentations to the Board, because OCC failed to notify Non-Stockholder Exchanges of the Capital Plan, which in commenters' view, carries significant competitive effect on Non-Stockholder Exchanges.<sup>149</sup>

OCC responds that the Board was not prevented from approving the Capital Plan because of Board vacancies.<sup>150</sup> OCC stated that the Capital Plan's approval was in accordance with its By-Laws. OCC further maintains that the Board's vote approving the Capital Plan was consistent with Delaware law and that neither its own By-Laws nor Delaware law requires a director to recuse himself or herself when directors on both sides of a question have

<sup>145</sup> Article XI, Section I of OCC's By-Laws provides that OCC's By-Laws may be amended at any time by the Board upon the affirmative vote of two-thirds of the directors then in office (but not less than a majority of the number of directors).

<sup>146</sup> See BATS Letter II; MIAx Letter II; BOX Petition; BATS Petition; MIAx Petition; see also SIG Opposition Statement (arguing that Stockholder Exchanges exercised control over the approval process and improperly exercised their veto power, or threatened to exercise their veto power, in a manner that prevented OCC from considering any plans that involved equity participation, even if such proposals may have been less costly).

<sup>147</sup> See BATS Petition; BOX Petition. See also OCC Code of Conduct for OCC Directors, which provides that a director shall disclose any actual, potential or apparent conflict of interest in a matter to be acted on by the Board to the Executive Chairman and OCC's General Counsel prior to the discussion or presentation of the matter, where possible in advance of the meeting, and shall be recused if requested by the Chair of the meeting.

<sup>148</sup> See BATS Letter II; MIAx Letter II; SIG Letter I; SIG Letter II; BATS Opposition Statement (stating that the five directors representing the Shareholder Exchanges did not recuse themselves despite their conflict of interest due to their financial motivations for approving the Capital Plan).

<sup>149</sup> BATS Opposition Statement; MIAx Petition; SIG Petition; BATS Letter III; BOX Letter II.

<sup>150</sup> OCC Motion to Lift Stay; OCC Support Statement.

<sup>141</sup> OCC represents that, in considering alternatives, OCC's Board determined that the Capital Plan was financially superior to accumulating capital through fees, which would have required nearly \$593 million in pre-tax clearing fees in order to grow \$364 million in after-tax net equity. In addition, OCC estimated at the time such amount would take until mid-2017 to achieve. See OCC Support Statement.

<sup>142</sup> See, e.g., BATS Letter II; MIAx Letter II; BOX Petition; BATS Petition; MIAx Petition.

<sup>143</sup> See e.g., SIG Opposition Statement (stating that the case *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) and the APA, 5 U.S.C. 551 *et seq.*, obligate the Commission to engage in "reasoned decision-making").

<sup>144</sup> 15 U.S.C. 78s(g)(1).

potential conflicts but have fully disclosed those conflicts to the Board.<sup>151</sup> With respect to the comment of failure to notify Non-Stockholder Exchanges of the Capital Plan, OCC responds that it did not violate its own By-Laws because there were no material competitive consequences resulting from the Capital Plan that would have triggered prior notice to or an opportunity for the Non-Stockholder Exchanges to make presentations. In OCC's view, the Capital Plan does not alter the manner in which Non-Stockholder Exchanges receive clearing services.<sup>152</sup>

The Commission notes that the standard for approving a proposed rule change of a self-regulatory organization is that the proposed rule change is consistent with the requirements of the Exchange Act, and rules and regulations thereunder.<sup>153</sup> While the Commission will not approve a proposed rule change of a self-regulatory organization before the self-regulatory organization has completed all action required to be taken under its constitution, articles of incorporation, by-laws, rules or corresponding instruments,<sup>154</sup> OCC represented that it did so here, working through its internal governance process and obtaining its Board's approval of the Capital Plan in accordance with its By-Laws prior to filing the proposed rule change. OCC also represents that the Capital Plan received approval from twelve directors, thus satisfying the requirement of two-thirds approval by directors then in office in accordance with its By-Laws.<sup>155</sup> Nor do commenters challenge OCC's representations that it engaged in that process. Rather, they raise separate questions as to whether the Board nonetheless failed to comply with its responsibilities under relevant corporate governance principles. Such questions are not appropriately

addressed by the Commission in the context of reviewing this rule filing.

(ii) Delegated Authority and Commission's Reasoned Analysis

The Commission has delegated to the Director of the Division of Trading and Markets the authority to "publish notices of proposed rule changes filed by self-regulatory organizations and to approve such proposed rule changes."<sup>156</sup> Although commenters raise no legal authority to challenge the use of delegated authority, they state that the Capital Plan raises significant issues of policy that are more appropriate for Commission review.<sup>157</sup> Because the Commission is setting aside the Delegated Order, and issuing this Order, this issue is moot.

Commenters also argue that the Delegated Order failed to fulfill its obligation to engage in "reasoned decision-making," or failed to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.<sup>158</sup> The Commission does not address these comments because it is itself engaging in a *de novo* review, which includes the appropriate inquiry and analysis as directed by the Exchange Act.

#### IV. Other Motions and Filings

As discussed above, shortly after the issuance of the Review Order and Stay Order, Petitioners filed the Reinstitution Motion on September 15, 2015, requesting that the Commission reinstitute the automatic stay.<sup>159</sup> OCC filed the OCC Reinstitution Response on September 22, 2015 and commenters filed the Memo in Further Support on September 25, 2015.<sup>160</sup>

<sup>156</sup> See 17 CFR 200.30–3(a)(12).

<sup>157</sup> See BATS Letter II; BATS Petition; BOX Petition; KCG Letter I; KCG Petition; MIAx Petition; SIG Letter I; SIG Petition.

<sup>158</sup> See SIG Opposition Statement (citing *NetCoalition*, 615 F.3d 525 to argue that the process by which an administrative agency reaches a result must be logical and rational and the Court's task is to ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made" when evaluating whether the agency action is arbitrary or capricious under Section 706(2)(A) of the APA, 5 U.S.C. 706(2)(A)).

<sup>159</sup> See Reinstitution Motion; see also Expedition Motion (arguing, *inter alia*, that the dividend payments, refund and fee reduction would be impracticable to claw back, such dividend payments and refund are likely imminent, and the Commission should expedite its ruling on the Reinstitution Motion).

<sup>160</sup> See OCC Reinstitution Response; Memo in Further Support of Reinstitution; see also SIG Letter III (arguing, *inter alia*, that OCC's December 2015 declaration of a refund and dividend further supports the argument that the Commission should reinstitute the automatic stay).

On October 7, 2015, BATS, BOX, KCG, MIAx and SIG filed a motion ("Evidentiary Motion") pursuant to Rule 452 of the Rules of Practice.<sup>161</sup> Rule 452 provides that a motion for leave to adduce additional evidence must show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Rule 452<sup>162</sup> further states that if the Commission determines to accept additional evidence, it may, among other things, remand or refer the proceeding to a hearing officer for the taking of additional evidence as appropriate. The Evidentiary Motion requests that the Commission refer its review of the Capital Plan to a hearing officer to conduct an evidentiary hearing and to allow for discovery in advance of any such hearing.<sup>163</sup>

Additionally, one commenter filed a motion on October 7, 2015, requesting that the Commission order an oral argument pursuant to Rule 451<sup>164</sup> of the Rules of Practice.<sup>165</sup> The commenter argues that oral argument should be granted because such argument would significantly aid the Commission's decisional process in reviewing the Delegated Order given that the Capital Plan involves intense factual and legal disputes and the voluminous briefing and submissions this commenter and other petitioners have submitted to

<sup>161</sup> Motion for an Order Referring this Matter to a Hearing Officer and Directing Discovery in Advance of Hearing and Supporting Brief (October 7, 2015) ("Evidentiary Motion") (citing 17 CFR 201.452, which provides, *inter alia*, that the Commission may allow the submission of additional evidence and may remand or refer the proceeding to a hearing officer to take additional evidence as appropriate).

<sup>162</sup> 17 CFR 201.452.

<sup>163</sup> BATS, BOX, KCG, MIAx, and SIG filed this motion. See Evidentiary Motion. See also Memorandum in Support of Motion for an Order (1) Referring This Matter to a Hearing Officer for the Taking of Additional Evidence, and (2) Directing Discovery in Advance of the Hearing (October 7, 2015) ("Evidentiary Memo in Support"); SIG Letter III (arguing, *inter alia*, that OCC's December 2015 declaration of a refund and dividend further supports the argument that the Commission should grant the Evidentiary Motion).

<sup>164</sup> 17 CFR 201.451.

<sup>165</sup> See Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan (October 10, 2015) ("Oral Argument Motion") (citing 17 CFR 201.451, which provides, in part, that the Commission may order an oral argument if it determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument). See also Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan (October 10, 2015) ("Oral Argument Memo in Support").

<sup>151</sup> OCC Motion to Lift Stay; OCC Support Statement.

<sup>152</sup> OCC Motion to Lift Stay; OCC Stay Brief.

<sup>153</sup> See Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

<sup>154</sup> See General Instruction to Form 19b–4, Item E.

<sup>155</sup> According to OCC, eighteen directors were in office at the time the Capital Plan was approved by the Board and sixteen directors were present at the meeting when the vote approving the Capital Plan took place, which constituted a quorum. See OCC's By-Laws Article III, Section 13. Further, OCC's Code of Conduct does not on its face require interested Board members to recuse themselves, but rather to immediately bring to the attention of the Executive Chairman and the General Counsel any matters that may involve conflicts of interest or be reasonably perceived by others to raise questions about potential conflicts. See Code of Conduct for OCC Directors. The record further indicates that material facts regarding the directors' interests were disclosed and known to the Board prior to the vote on the Capital Plan. See OCC Support Statement.

address these complex factual and legal disputes.<sup>166</sup>

OCC filed a brief in opposition to the Evidentiary Motion on October 15, 2015, arguing that the commenters failed to demonstrate that the legal requirements for granting the motion are satisfied and prompt affirmance of the Capital Plan is necessary for OCC to be prudently capitalized at a level appropriate for a SIFMU.<sup>167</sup> OCC also filed a Brief in Opposition to Motion for Oral Argument on October 15, 2015, arguing the motion for an oral argument should be denied as it is unnecessary because all interested parties have had multiple opportunities to submit evidence and arguments to the Commission, and that oral argument would only serve to unduly delay resolution of the Commission's review of the Delegated Order.<sup>168</sup>

The Commission received a reply memorandum in further support of the commenter's motion for oral argument on October 20, 2015.<sup>169</sup> On the same day, commenters also filed a reply in further support of its Evidentiary Motion.<sup>170</sup>

The Commission has considered these motions, including OCC's oppositions and the movants' reply memoranda. For the reasons discussed below, these motions are denied.

#### A. Reinstitution Motion

Commenters filed the Reinstitution Motion, requesting that the Commission

reinstitute the automatic stay on the ground that there is no compelling reason to implement the Capital Plan because OCC's current capital level is approaching the Target Capital Requirement and will soon exceed that amount and it would be extremely impracticable to reverse the implementation of the Capital Plan if the Delegated Order were subsequently reversed.<sup>171</sup> These commenters reiterated their arguments following OCC's announcement of its declaration of refunds, dividends, and fee reduction pursuant to the Capital Plan and requested the Commission to expedite its ruling on the Reinstitution Motion.<sup>172</sup>

OCC responds that the Reinstitution Motion restated issues that had already been argued at length, considered and denied by the Commission and the Petitioners have not shown any manifest error, change in law or other recognized basis for the Commission to reconsider the Stay Order.<sup>173</sup> OCC further argues that the Petitioners failed to provide any other valid basis for the Commission to overturn the Stay Order, which was based on a finding that there is a compelling public interest in strengthening OCC's capitalization and for the stay to be lifted.<sup>174</sup>

Because the Commission by this Order is engaging in a substantive review and approving the Capital Plan directly, the Reinstitution Motion and Expedition Motion are hereby moot.

#### B. Evidentiary Motion

Rule 452 governs the allowance of the submission of additional evidence.<sup>175</sup> Specifically, Rule 452 of the Commission's Rules of Practice describes discretionary standards by which the Commission may allow additional evidence, noting that motions for allowing the submission of additional evidence must: (i) Show with particularity that the requested evidence is material, and (ii) that reasonable grounds existed for the failure to adduce this evidence previously.<sup>176</sup>

In the Evidentiary Motion, the commenters request that the Commission: (i) Refer this matter to a hearing officer, and (ii) direct discovery in advance of the hearing.<sup>177</sup> They argue

that the current record before the Commission is insufficient for the Commission to find that the Capital Plan is consistent with the requirements of the Exchange Act under Exchange Act Section 19(b)(2)(C)(i).<sup>178</sup>

Commenters rely on *NetCoalition v. SEC*<sup>179</sup> to suggest that the Commission needs to supplement the factual record.<sup>180</sup> Commenters also rely on *Chamber of Commerce of U.S. v. SEC*<sup>181</sup> and the case's emphasis on consideration of alternatives.<sup>182</sup> Specifically, commenters note that the Delegated Order fails to mention multiple alternative capital raising plans that commenters proposed, including the CBOE proposal.<sup>183</sup>

Additionally, commenters question whether OCC's Board approval process operated in a manner consistent with the public interest and seeks additional evidence about that approval process.<sup>184</sup>

Commenters also argue that OCC will effectively achieve its Target Capital Requirement within six months without implementing the Capital Plan.<sup>185</sup> Due to an alleged lack of data and supposed "opacity in the record concerning OCC's current and projected capital levels," commenters assert that discovery and an evidentiary hearing are necessary and that the replenishment capital calculation needs to be supported factually.<sup>186</sup>

OCC responds to these comments by noting that the commenters fail to meet

<sup>166</sup> See Evidentiary Motion (also arguing that, if the evidentiary hearing takes place and discovery is conducted in advance of the hearing, oral argument addressing the discovery, evidence adduced at the evidentiary hearing, evidentiary findings and their significance would be invaluable to the Commission's review). See also Evidentiary Memo in Support.

<sup>167</sup> See OCC's Brief in Opposition to Motion for Referral to Hearing Officer and Discovery ("OCC Evidentiary Hearing Opposition"). Specifically, OCC argues that Petitioners failed to show, with particularity, that the additional evidence sought to introduce is material and that they had reasonable grounds for failure to adduce the evidence previously, and merely raised a number of so-called "open issues" and "unanswered questions" while they have had opportunities to develop the record in the prior proceeding. See OCC Evidentiary Hearing Opposition.

<sup>168</sup> OCC Brief in Opposition to Motion for Oral Argument (October 15, 2015) ("OCC Oral Argument Motion").

<sup>169</sup> SIG filed this motion. Reply Memorandum in Further Support of Motion for Oral Argument in Connection with the Commission Review of the Staff's Order Approving OCC's Capital Plan (October 20, 2015) ("Oral Argument Memo in Further Support").

<sup>170</sup> Reply Memorandum in Further Support of Petitioners' Motion for an Order (1) Referring this Matter to a Hearing Officer for the Taking of Additional Evidence, And (2) Directing Discovery in Advance of the Hearing (October 20, 2015) ("Evidentiary Memo in Further Support"); see also SIG Letter III.

<sup>171</sup> See Reinstitution Motion.

<sup>172</sup> See Expedition Motion; see also SIG Letter III.

<sup>173</sup> See OCC Reinstitution Response.

<sup>174</sup> See *id.*

<sup>175</sup> See 17 CFR 201.451.

<sup>176</sup> 17 CFR 201.451. Commenters also cited the Commission's Rules of Practice, Rule 100(c) as authority for the Commission to authorize pre-hearing discovery. See 17 CFR 201.100(c).

<sup>177</sup> See Evidentiary Motion; see also Memorandum in Support and Evidentiary Memo in Further Support.

<sup>178</sup> See Evidentiary Memo in Support (citing 17 CFR 201.100(c) as providing that the Commission "may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is necessary"); (noting that factual record is not developed adequately regarding: (i) Exchange Act Section 17A(b)(3)(D); (ii) Exchange Act Section 17A(b)(3)(F); and (iii) Exchange Act Section 17A(b)(3)(J)). See also 15 U.S.C. 78s(b)(2)(C)(i).

<sup>179</sup> *NetCoalition v. SEC*, 615 F.3d 525.

<sup>180</sup> See Evidentiary Memo in Support (arguing that the Commission should refer the Delegated Order to an administrative law judge so that the law judge can consider a fully developed record).

<sup>181</sup> 412 F.3d 133 (D.C. Cir. 2005).

<sup>182</sup> Evidentiary Memo in Support.

<sup>183</sup> See Evidentiary Memo in Support; Evidentiary Memo in Further Support (arguing that, under *Chamber of Commerce*, the Commission must explore alternatives; specifically, that the Commission must consider "facially reasonable alternatives" raised by a party, or provide reasons for not doing so).

<sup>184</sup> See Evidentiary Memo in Support (citing Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126, 71140 (December 8, 2004)) ("The Commission believes that independent directors must be provided with the opportunity to discuss any important matters regarding the exchange or association in a frank and open manner, free from the presence of management. Therefore, the Commission proposed that the independent directors of the exchange's or association's board meet regularly in executive session").

<sup>185</sup> See Evidentiary Memo in Support.

<sup>186</sup> See Evidentiary Memo in Further Support.

the Rule 452 standards; specifically: (i) That the motion fails to identify any material evidence with particularity, and (ii) that the motion fails to provide a reasonable basis to explain the commenters' failure to obtain the requested information earlier.<sup>187</sup>

OCC states that, instead of identifying material evidence with particularity, commenters provided a sweeping list of discovery requests without an attempt to articulate why this information is material.<sup>188</sup> Specifically, OCC notes that the motion raises three types of inquiries, each of which fails to meet the Rule 452 materiality standard: (i) Inquiries into alternatives; (ii) inquiries into the Board's process for approval of the Capital Plan; and (iii) inquiries into OCC's Target Capital Requirements.<sup>189</sup> OCC further notes that Rule 452 requires a motion for leave to adduce additional evidence to "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."<sup>190</sup>

The Commission has determined that the information the Evidentiary Motion seeks to discover is not material to its review of the Capital Plan for purposes of determining whether the Capital Plan is consistent with the Exchange Act. The Evidentiary Motion requests information regarding: (i) Whether OCC considered less expensive alternatives to the Capital Plan; (ii) whether OCC's Board approval process was designed to serve the Stockholder Exchanges rather than the public interest; and (iii) whether OCC will achieve its Target Capital Requirement within six months without the Capital Plan's implementation. As discussed above, the existence of alternatives to the Capital Plan does not render the Capital Plan inconsistent with the Exchange Act, and the record fully establishes that OCC considered other alternatives to the Capital Plan. Additionally, the record indicates that OCC engaged in the required process to approve the Capital Plan, and questions regarding whether that process complied with relevant corporate governance principles are not appropriately addressed by the Commission in the context of reviewing this rule filing. Finally, the Commission notes that whether OCC would accumulate sufficient capital to reach the Target Capital Requirement was unknown at the time OCC proposed the

Capital Plan and commenters' after-the-fact assertions about OCC capital levels include capital contributions made pursuant to the Capital Plan. The record also shows that the Capital Plan provides for the immediate infusion of capital and a commitment to provide Replenishment Capital, which OCC states could not be achieved in the same manner by other means.<sup>191</sup>

The Commission has evaluated the record and, for reasons discussed above, finds that the Capital Plan is consistent with the Exchange Act requirements, and rules and regulations thereunder, applicable to OCC, and the Commission finds that the introduction of additional information is not necessary. Consequently, under Rule 452, the Commission denies the Evidentiary Motion.

### C. Oral Argument Motion

Rule 451<sup>192</sup> of the Commission's Rules of Practice provides that the Commission may order oral argument if the Commission determines that the presentation of the facts and the legal arguments in the briefs and record and decisional process would be significantly aided by oral argument.

A commenter states that an oral argument is proper under Rule 451.<sup>193</sup> Specifically, the commenter contends that an oral argument would allow the Commission to resolve the factual disputes regarding: (i) OCC's proposed capital target assumptions; (ii) OCC's actual financial condition; (iii) OCC's Board approval process; and (iv) the availability of alternative plans.<sup>194</sup> The commenter argues that, even if the Commission denies the other discovery motion,<sup>195</sup> an oral argument would still

allow the Commission to address multiple factual issues that remain in dispute in the current record.<sup>196</sup>

The commenter further argues that OCC has failed to show the negative impact of an oral argument.<sup>197</sup> Specifically, the commenter states that OCC does not identify any harm that could result from any delay associated with the scheduling of an oral argument.<sup>198</sup> The commenter also notes that oral argument would allow the Commission to satisfy concerns under the APA.<sup>199</sup> Finally, the commenter states that OCC's recent submissions reflect the need to supplement an evolving record.<sup>200</sup>

OCC responds that the commenter's motion does not satisfy the requirements of Rule 451, stating that the Commission has routinely denied oral argument when the issues raised can be determined by the record and papers filed by the parties.<sup>201</sup> OCC also notes that the motion does not demonstrate any facts or legal standards that the Commission cannot consider adequately on the written submissions.<sup>202</sup> Further, OCC argues that the Commission should deny the motion for oral argument because: (i) Commenters already had multiple opportunities to submit arguments and information; and (ii) oral argument would unduly delay resolution of the Commission's review.<sup>203</sup>

Pursuant to the Rules of Practice, the Commission considers matters properly before it on the basis of the papers filed by the parties without oral argument unless it determines that the presentation of facts and legal arguments in the briefs and record and

Additional Evidence, and (2) Directing Discovery in Advance of the Hearing (October 7, 2015); see also Memorandum in Support of Motion for an Order (1) Referring This Matter to a Hearing Officer for the Taking of Additional Evidence, and (2) Directing Discovery in Advance of the Hearing (October 7, 2015).

<sup>196</sup> See Oral Argument Memo in Support.

<sup>197</sup> See Oral Argument Memo in Further Support.

<sup>198</sup> See Oral Argument Memo in Further Support.

<sup>199</sup> See Oral Argument Reply Memo (noting that oral argument would allow a fuller explanation of the Capital Plan's issues necessary to satisfy the APA's requirement for "reasoned decision-making").

<sup>200</sup> See Oral Argument Reply Memo (suggesting that OCC's recent submission of an affidavit by its Executive Chairman reflects information that was not previously discussed, and therefore, unaddressed by commenters).

<sup>201</sup> See OCC Oral Argument Opposition Brief (October 15, 2015) ("OCC Oral Argument Opposition") (citing *In the Matter of D.E. Wine Inv., Inc., et al.*, File No. 3-8535, Exchange Act Release No. 43929 (Feb. 6, 2001); and *In the Matter of the Application of Cleantech Innovations, Inc.*, File No. 3-14640, Exchange Act Release No. 69968, at 17 n.67 (July 11, 2013)).

<sup>202</sup> See OCC Oral Argument Opposition.

<sup>203</sup> See OCC Oral Argument Opposition.

<sup>187</sup> See OCC's Brief in Opposition to Motion for Referral to Hearing Officer and Discovery (October 15, 2015) ("OCC Evidentiary Hearing Opposition").

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See *id.* (citing 17 CFR 201.452).

<sup>191</sup> See OCC Letter II and OCC Support Statement.

<sup>192</sup> 17 CFR 201.451 (stating that the Commission "on its own motion or the motion of a party or any other aggrieved person entitled to Commission review, may order oral argument with respect to any matter . . . [t]he Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral arguments unless the Commission determines that the presentation of the facts and the legal arguments in the briefs and record and decisional process would be significantly aided by oral argument").

<sup>193</sup> See Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan (October 7, 2015) ("Oral Argument Motion"); Memorandum in Support of Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan (October 7, 2015) ("Oral Argument Memo in Support"); see also Reply Memorandum in Further Support of Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan (October 21, 2015) ("Oral Argument Reply Memo").

<sup>194</sup> See Oral Argument Memo in Support.

<sup>195</sup> See Motion for an Order (1) Referring This Matter to a Hearing Officer for the Taking of

the decisional process would be significantly aided by oral argument.<sup>204</sup> The Commission notes the record is extensive, and contains significant amounts of data and information related to the Capital Plan. As a result, the Commission does not believe that either the presentation of facts and legal arguments in the briefs and record or the decisional process would be significantly aided by oral argument. Accordingly, the Commission denies the Oral Argument Motion.

## V. Conclusion

It is therefore ordered that the earlier action taken by delegated authority, Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) is set aside and pursuant to section 19(b)(2) of the Exchange Act SR-OCC-2015-02 is approved. All pending motions in this matter are hereby denied.

For the reasons stated above, it is hereby:

*Ordered* that the earlier action taken by delegated authority, Securities Exchange Act Release No. 74452 (March 6, 2015), 80 FR 13058 (March 12, 2015) is hereby set aside; and

*It is further ordered* that SR-OCC-2015-02 is hereby approved pursuant to section 19(b)(2) of the Exchange Act; and

*It is further ordered* that the Motion to Reinstitute Automatic Stay is *denied as moot*; and

*It is further ordered* that the Motion to Expedite the Commission's Ruling on the Pending Motion to Reinstitute the Automatic Stay is *denied as moot*; and

*It is further ordered* that the Motion for an Order (1) Referring this Matter to a Hearing Officer for the Taking of Additional Evidence, And (2) Directing Discovery in Advance of the Hearing is *denied*; and

*It is further ordered* that the Motion for Oral Argument in Connection with the Commission's Review of the Staff's Order Approving OCC's Capital Plan and Supporting Brief is *denied*.

By the Commission.

**Brent J. Fields,**  
Secretary.

[FR Doc. 2016-03265 Filed 2-17-16; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77121; File No. SR-Phlx-2016-22]

### Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Rule 505 and Rule 506

February 11, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on February 5, 2016, NASDAQ PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the 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 is filing with the Commission a proposal to delete Rule 505 (Allocation, Reallocation and Transfer of Issues) and update Rule 506 (Allocation Application).<sup>3</sup>

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxphlx.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.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> References to rules are to Phlx rules unless otherwise noted.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to update its rules to delete Rule 505 (Allocation, Reallocation and Transfer of Issues) and update Rule 506 (Allocation Application).

Rules 505 and 506 were approved more than three decades ago,<sup>4</sup> at which time Exchange options trading was strictly on-floor open outcry through specialists. Exchange options trading developed into a robust hybrid system that is currently largely electronic and off-floor<sup>5</sup> but continues to have on-floor specialists<sup>6</sup> and open outcry trading. The Exchange is now consolidating its Rules 505 and 506.<sup>7</sup> Having found that some of the concepts in Rule 505 are obsolete and that others belong in Rule 506, the Exchange is deleting Rule 505. Simultaneously, the Exchange is updating Rule 506 to make it more easily readable and to transfer certain concepts from Rule 505 to Rule 506. These changes are described below.

##### Deletion of Rule 505

The Exchange has concluded that with the placement of certain concepts from Rule 505 into Rule 506, Rule 505 is no longer needed. The Exchange believes that it is desirable to discuss the process of allocation or reallocation application, allocation, reallocation, and transfer in one rule, namely Rule 506. Moreover, "leasing" is not practiced on the Exchange and obsolete language in Rule 505 in respect of leasing is no longer needed.<sup>8</sup> The Exchange proposes to therefore delete Rule 505, and to update and clarify Rule 506 to be more descriptive and to add several concepts from deleted Rule 505.

##### Updating of Rule 506

First, Rule 506 is updated to make it clear to the reader that the rule applies to the process of allocation application

<sup>4</sup> See, e.g., Securities Exchange Act Release No. 37019 (August 17, 1982), 47 FR 37019 (August 24, 1982) (SR-Phlx-81-1) (approval order).

<sup>5</sup> Electronic traders include market makers that are streaming quote traders ("SQTs"), remote streaming quote traders ("RSQTs"), and off-floor specialists ("Remote Specialists"). See Rules 1014(b)(ii)(A), 1014(b)(ii)(B), and 1020.

<sup>6</sup> Remote Specialists do not have a physical presence on the floor of the Exchange. Rule 1020.

<sup>7</sup> While the vast majority of options rules are found in Rule 1000 and higher of the Exchange's rule book, some older options-related rules, such as Rules 505 and 506, are in the Exchange's rule book below Rule 1000.

<sup>8</sup> "Leasing" is the now-obsolete practice or one specialist leasing, or renting, an allocated issue to another specialist.

<sup>204</sup> See 17 CFR 201.451.

as well as allocation, reallocation, and transfer. Specifically, the title to Rule 506 is expanded to state “Allocation Application, Allocation, Reallocation, and Transfer”. This will allow the reader to more easily understand what Rule 506 is about.

Second, the Exchange is adding language to indicate that applications may be regarding reallocation. Section (b) of Rule 506 is expanded to state that an allocation or reallocation application shall be submitted to the Exchange’s staff in writing. Each allocation or reallocation application will continue to include, at a minimum, the name and background of the head specialist and assistant specialist(s) (except that a Remote Specialist need not include an assistant specialist), the unit’s experience and capitalization demonstrating an ability to trade the particular options class sought, and any other reasons why the unit believes it should be assigned or allocated the security.<sup>9</sup>

Third, section (c) of Rule 506 states that allocation decisions and automatic allocations<sup>10</sup> shall be communicated in writing to Exchange members. The Exchange proposes to add into section (c) language to state that reallocation or transfer decisions, like allocation decisions and automatic allocations, shall be communicated in writing to Exchange members.

Fourth, the Exchange is transferring the “Registrant” concept from deleted Rule 505 to section (d) of Rule 506 indicating in whose names an options class needs to be registered; and indicating that Registrant will act as specialist for a period of at least one year (known as “minimum specialist period”). Specifically, the Exchange proposes to add to section (d) the following language:

Upon allocation, reallocation, or transfer of an options class, the options class must be registered in either the name of the specialist unit, or jointly in the name of the unit and the specialist

(“Registrant”). Each Registrant must be an Exchange member and an approved specialist. The Registrant shall act as specialist for the options class for at least one year (“minimum specialist period”); unless some other period is defined by the Exchange pursuant to this rule. After expiration of the minimum specialist period, the Exchange may re-allocate the options class.

In transferring the “Registrant” concept from deleted Rule 505, the Exchange does not state that the options class can be registered solely in the name of an individual acting as specialist since this is not the current practice. Rather, the Exchange proposes to state that the options class must be registered in either the name of the specialist unit, or jointly in the name of the unit and the specialist.

Commensurate with other changes and the language of Rule 506, the Exchange is also proposing to state in Rule 506(d) that once the specialist unit is allocated, reallocated, or transferred an options class,<sup>11</sup> such specialist unit will notify the Exchange in writing regarding any material change in the application for any assigned options class.<sup>12</sup>

Fifth, the Exchange is transferring from Commentary .01 of deleted Rule 505 to new Commentary.03 of Rule 506 the concept that the Exchange may establish a period of less than one year for Registrant to act as a specialist in an options class (known as “alternate specialist period”). This allows the Exchange to establish a period of time that is less than one year, which is shorter than the minimum specialist period. During the alternate specialist period established by the Exchange the Registrant must act as specialist in an allocated options class. If the Exchange decides to establish an alternate specialist period, it will communicate such period in solicitation applications. Also, after the alternate or minimum specialist period the Exchange may re-allocate an options class. Specifically, the Exchange proposes to state in Commentary .03:

#### .03 Alternate Specialist Period.

The Exchange may establish that a Registrant shall act as a specialist in an allocated options class for a shorter period defined by the Exchange that is

less than one year (“alternate specialist period”). If the Exchange establishes an alternate specialist period, it will communicate such period in solicitation applications (notices) pursuant to Rule 506. After expiration of the alternate specialist period, the Exchange may re-allocate the options class.

The Exchange believes that these non-controversial changes to consolidate Rules 505 and 506 and to update and modernize Rule 506 as discussed will make remaining Rule 506 clearer and easier to use.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>14</sup> in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by deleting Rule 505 and updating Rule 506 and thereby consolidating the rules as discussed.

The Exchange believes that the rule change will promote just and equitable principles of trade by making the rules clearer and easier to use. The Exchange is proposing to get rid of an older rule, specifically Rule 505, and to consolidate certain concepts from Rule 505 into remaining Rule 506. By doing so the Exchange is deleting obsolete language in Rule 505 regarding options classes that are subject to a lease, as leasing is not practiced on the Exchange. The Exchange is clarifying that Rule 506 will deal with allocation, reallocation, and transfer and that allocation, reallocation, or transfer decisions and automatic allocations will be communicated in writing to Exchange members. The Exchange proposes to transfer from deleted Rule 505 to Rule 506 the Registrant concept indicating that an options class must be registered in either the name of the specialist unit, or jointly in the name of the unit and the specialist; and indicating that Registrant will act as specialist for a one year minimum specialist period. The Exchange proposes to state in Rule 506 that the Exchange can establish an alternate specialist period that is shorter than the minimum specialist period, and that such alternate specialist period will be communicated in solicitation applications. The Exchange will also update language in Rule 506 for clarity and readability (e.g., “specialist unit” and “options class”).

The Exchange believes that the proposed non-controversial change to consolidate Rules 505 and 506 and to

<sup>9</sup> The ability of the Exchange to require that the application include other information is continued. Rule 506(b). The Exchange is removing from section (b) antiquated language regarding system acceptance/execution levels and guarantees, as these are not currently used and are therefore obsolete. The language was used with allocation and transfers at a time when there was a lack of uniformity regarding execution levels, as opposed to standardization now (e.g., 1-up, 10-up). Rule 506(b).

<sup>10</sup> Automatic allocations are discussed in Supplementary Material .02 to Rule 506. The Exchange proposes to add “Automatic” in front of the current title “Allocation of Options on Related Securities” so that the title is more descriptive. The Exchange also proposes to rename “Supplementary Material” to “Commentary” to conform with the general naming convention for rules.

<sup>11</sup> The term “specialist unit” is used for uniformity and readability in section Rule 506(a) and elsewhere in the rule (e.g., sections (d), (e), Commentary .01 (renamed from Supplementary Material .01 to better follow the naming convention)). Similarly, “issue” is proposed to be changed to “options class”.

<sup>12</sup> The Exchange proposes to also remove obsolete language regarding system acceptance/execution levels from Rule 506(d).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).



update and modernize Rule 506 will make Rule 506 clearer and easier to use to the benefit of market participants.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. While the Exchange does not believe that the proposed non-controversial change is a burden on competition, or is competitive in nature, the Exchange believes that clearer, updated rules are always beneficial to market participants.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)<sup>15</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>16</sup> in that it effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

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.

### **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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2016-22 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2016-22. 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 office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2016-22, and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016-03274 Filed 2-17-16; 8:45 am]

**BILLING CODE 8011-01-P**

### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-77110; File No. SR-NYSEMKT-2016-23]

#### **Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the Amex Options Deep Market Data Product**

February 11, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on February 4, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to modify the Amex Options Deep market data product. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### *A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

##### **1. Purpose**

The Exchange proposes to modify the Amex Options Deep market data product.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR § 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>17</sup> 17 CFR 200.30-3(a)(12).

The Exchange currently offers the following real-time options market data feeds: “Amex Options Top,” “Amex Options Deep,” and “Amex Options Complex” (the “Amex Options Products”). “Amex Options Top” is a single market data product that combines last sale data, best bids and offers (“BBO”), order imbalance information and series status and underlying status messages (collectively called security status messages). “Amex Options Deep” is also a single market data product that provides subscribers NYSE Amex Options quotes and orders at the first three price levels in each series on a real-time basis. “Amex Options Complex,” also a single market data product, provides subscribers NYSE Amex Options quote and trade information (including orders/quotes, requests for responses, and trades) for the complex order book on a real-time basis.<sup>4</sup>

The Exchange charges a single fee for Amex Options Top and subscribers of Amex Options Top receive all three data feeds described above. The Exchange charges a separate fee for Amex Options Complex for subscribers that seek to obtain this data feed on a standalone basis.<sup>5</sup>

The Exchange proposes to modify the Amex Options Deep data feed. As proposed, Amex Options Deep will also include security status messages, the same data that is currently provided as part of Amex Options Top. The proposed modification to the Amex Options Deep data feed will allow subscribers who currently obtain depth of market data to also receive security status messages in a single data feed. Currently, these subscribers are required to process two data feeds to get the depth of market data and security status information. Offering a data product that combines, in one market data product, depth of market data and

security status messages would provide greater efficiencies and better sequencing for vendors and subscribers that currently choose to integrate the data after receiving it from the Exchange. As with Amex Options Top, Amex Options Deep would provide depth of market and series status information on a real-time basis as reported to the Options Price Reporting Authority (“OPRA”) and disseminated on a consolidated basis under the OPRA Plan.<sup>6</sup>

The Amex Options Products would continue to be distributed in their current format, to maintain the format of the Amex Options Products with that of other market data products offered by the Exchange.

The Exchange does not propose to make any changes to the fees. The single fee charged for the Amex Options Product that comprise [sic] the Amex Options Top, Amex Options Deep and Amex Options Complex would continue to apply. The separate fee that now applies to Amex Options Complex, would likewise continue to apply to the Amex Options Complex market data product.<sup>7</sup>

Each of the Amex Options Products would continue to be offered through the Exchange’s Liquidity Center Network (“LCN”), a local area network in the Exchange’s Mahwah, New Jersey data center that is available to users of the Exchange’s co-location services. The Exchange would also continue to offer the products through the Exchange’s Secure Financial Transaction Infrastructure (“SFTI”) network, through which all other users and member organizations access the Exchange’s trading and execution

systems and other proprietary market data products.

The Exchange will announce the date that the Amex Options Deep market data product will begin to include security status messages through a NYSE Market Data Notice.

The proposed change is not intended to address any issues other than those described herein, and the Exchange is not aware of any problems that vendors or subscribers would have in complying with the proposed change.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>8</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5)<sup>9</sup> of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The Exchange also believes this proposal is consistent with Section 6(b)(5) of the Act because it protects investors and the public interest and promotes just and equitable principles of trade by providing investors with improved options for receiving market data. The proposed rule changes would benefit investors by facilitating their prompt access to the additional real-time information contained in a modified Amex Options Deep market data product.

In particular, the Exchange believes that combining depth of market data with security status messages in the Amex Options Deep product is reasonable because it would provide greater efficiencies for vendors and subscribers that currently choose to integrate the data after receiving it from the Exchange. In addition, the change to the Amex Options Deep product reflects the interests and needs of subscribers and vendors who will no longer have to subscribe to multiple data feeds to obtain the information they want. The Exchange believes the proposed changes are reasonable because they would provide vendors and subscribers with higher quality market data products.

In adopting Regulation NMS, the Commission granted self-regulatory

<sup>4</sup> See Rule 900.3NY(e), which defines complex orders.

<sup>5</sup> See Securities Exchange Act Release No. 68004 (Oct. 9, 2012), 77 FR 62582 (Oct. 15, 2012) (SR–NYSEMKT–2012–49) (establishing fees for certain proprietary options market data products). See also Securities Exchange Act Release Nos. 69524 (May 6, 2013), 78 FR 27459 (May 10, 2013) (SR–NYSEMKT–2013–35) (establishing a schedule of NYSE Amex Options proprietary market data fees); 69553 (May 10, 2013), 78 FR 28926 (May 16, 2013) (SR–NYSEMKT–2013–40) (establishing non-display usage fees and amending the professional end-user fees); 71934 (April 11, 2014), 79 FR 21818 (April 17, 2014) (SR–NYSEMKT–2014–30) (amending the professional user fees); 73008 (Sept. 5, 2014), 79 FR 65325 (Sept. 11, 2014) (SR–NYSEMKT–2014–73) (amending fees for non-display use); and 73589 (Nov. 13, 2014), 79 FR 68933 (Nov. 19, 2014) (SR–NYSEMKT–2014–94) (establishing fees for the complex order book feed); and 76022 (September 29, 2015), 80 FR 60201 (October 5, 2015) (modifying certain proprietary options data products).

<sup>6</sup> The OPRA Plan is a national market system plan approved by the Securities and Exchange Commission (“Commission”) pursuant to Section 11A of the Securities Exchange Act of 1934 (the “Act”) and Rule 608 thereunder (formerly Rule 11Aa3–2). See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.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. Section 5.2(c) of the OPRA Plan also permits OPRA Plan participants to disseminate unconsolidated market information to certain of their members under certain circumstances. The manner in which the Exchange proposes to disseminate the products would comply with Section 5.2(c) of the OPRA Plan, pursuant to which the Exchange may not disseminate the products “on any more timely basis than the same information is furnished to the OPRA System for inclusion in OPRA’s consolidated dissemination of Options Information.”

<sup>7</sup> The Exchange has not attached an Exhibit 5 with this proposed rule change because the Exchange is not proposing to make any fee changes associated with the proposed modification to the Amex Options Deep market data product.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

organizations and broker-dealers increased authority and flexibility to offer new and unique market data to consumers of such data. It was believed that this authority would expand the amount of data available to users and consumers of such data and also spur innovation and competition for the provision of market data. The Exchange believes that the options data product changes proposed herein are precisely the sort of market data product evolutions that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>10</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history.

The Exchange further notes that the existence of alternatives to the Exchange's products, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, ensures that the Exchange is not unreasonably discriminatory because vendors and subscribers can elect these alternatives.

The proposed options data products will help to protect a free and open market by providing additional data to the marketplace and give investors greater choices. In addition, the proposal would not permit unfair discrimination because the products will be available to all of the Exchange's customers and broker-dealers through both the LCN and SFTI.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>11</sup> 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 market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities (such as internalizing broker-dealers and various forms of alternative trading systems, including dark pools and electronic communication networks), in a vigorously competitive market. It is common for market participants to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>14</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>15</sup> the Commission may designate a shorter time if such

action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the operative delay is consistent with investor protection and the public interest because the proposal would allow the Exchange to offer currently available market data in a streamlined format that would enhance the quality of market data available to investors and would enable investors to better monitor trading activity on the Exchange. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>16</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>17</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-23 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-NYSEMKT-2016-23. 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

<sup>16</sup>For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup>15 U.S.C. 78s(b)(2)(B).

<sup>12</sup>15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup>17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

<sup>14</sup>17 CFR 240.19b-4(f)(6).

<sup>15</sup>17 CFR 240.19b-4(f)(6)(iii).

<sup>10</sup>See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>11</sup>15 U.S.C. 78f(b)(8).

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-NYSEMKT-2016-23 and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2016-03266 Filed 2-17-16; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77119; File No. SR-NYSE-2016-01]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Co-Location Services Offered by the Exchange To Include a Means for Co-located Users To Receive the NASDAQ TotalView Ultra Market Data Feed Through a Wireless Connection and Reflect Changes to the Exchange Price List

February 11, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February

2, 2016, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to change the co-location services offered by the Exchange to include a means for co-located Users to receive the NASDAQ TotalView Ultra (FGPA) market data feed through a wireless connection. In addition, the proposed rule change reflects changes to the Exchange's Price List related to the proposed service. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to change the co-location<sup>4</sup> services offered by the Exchange to include a means for Users<sup>5</sup>

<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission ("Commission") in 2010. See Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR-NYSE-2010-56). The Exchange operates a data center in Mahwah, New Jersey (the "data center") from which it provides co-location services to Users.

<sup>5</sup> For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40). As

to have access to the NASDAQ TotalView Ultra (FGPA) market data feed through a wireless connection. In addition, the proposed rule change reflects changes to the Exchange's Price List related to the proposed service.

The Commission has approved the Exchange's proposed rule change to provide a wireless connection to five market data feeds from third party markets.<sup>6</sup> The Exchange now proposes to add to its Price List a sixth market data feed, NASDAQ TotalView Ultra (FGPA) ("TotalView Ultra" and, together with the previously filed five market data feeds, the "Third Party Data").

As with the previously approved connectivity to Third Party Data through the wireless connection, the Exchange would utilize a network vendor to provide a wireless connection to TotalView Ultra through wireless connections from an Exchange access center to its data center in Mahwah, New Jersey, through a series of towers equipped with wireless equipment. To receive TotalView Ultra, the User would enter into a contract with NASDAQ, which would charge the User the applicable market data fees for TotalView Ultra. The Exchange would charge the User fees for the wireless connection to TotalView Ultra.<sup>7</sup>

For each wireless connection to TotalView Ultra, a User would be charged a \$5,000 non-recurring initial charge and a monthly recurring charge ("MRC") of \$11,000. The Exchange proposes to revise its Price List to reflect fees related to the connection to TotalView Ultra.

As with the previously approved wireless connections to Third Party Data, if a User purchased two wireless connections, it would pay two non-recurring initial charges, and the wireless connection would include the use of one port for connectivity to Third Party Data.<sup>8</sup> Also as with the previously approved wireless connections to Third Party Data, the Exchange proposes to

specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC and NYSE Arca, Inc. See Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR-NYSE-2013-59).

<sup>6</sup> See Securities Exchange Act Release No. 76748 (December 23, 2015), 80 FR 81609 (December 30, 2015) (SR-NYSE-2015-52) ("Wireless Approval Release").

<sup>7</sup> A User would only receive TotalView Ultra if it had entered into a contract with NASDAQ.

<sup>8</sup> A User only requires one port to connect to the Third Party Data, irrespective of how many of the wireless connections it orders. It may, however, purchase additional ports. See Wireless Approval Release, at 81610.

<sup>18</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

waive the first month's MRC, to allow Users to test the receipt of TotalView Ultra for a month before incurring any MRCs.

The Exchange proposes to offer the wireless connection to provide Users with an alternative means of connectivity to TotalView Ultra. Currently, Users can receive TotalView Ultra from wireless networks offered by third party vendors.<sup>9</sup> Users may also receive connections to TotalView Ultra through other methods, including, for example, from another User, through a telecommunications provider, or over the internet protocol ("IP") network.<sup>10</sup>

The wireless connection to the Third Party Data is expected to be available in January 2016, and no later than March 1, 2016. The Exchange will announce the date that the wireless connection to the Third Party Data will be available through a customer notice.

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.*, a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;<sup>11</sup> and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.<sup>12</sup>

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or

related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>14</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed service is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the wireless connection to TotalView Ultra would provide Users with an alternative means of connectivity to TotalView Ultra. Users that do not opt to utilize the Exchange's proposed wireless connections would still be able to obtain TotalView Ultra through other methods, including, for example, from wireless networks offered by third party vendors, another User, through a telecommunications provider, or over the IP network. Users that opt to use wireless connections to TotalView Ultra would receive the TotalView Ultra that is available to all Users, as all market participants that contract with NASDAQ for TotalView Ultra may receive it.

The Exchange believes that this removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because it would provide Users with choices with respect to the form and optimal latency of the connectivity they use to receive TotalView Ultra, allowing a User that opts to receive TotalView Ultra to select the connectivity and number of ports that better suit its needs, helping it tailor its data center operations to the requirements of its business operations.

The Exchange also believes that the proposed rule change is consistent with

Section 6(b)(4) of the Act,<sup>15</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will result in fees being charged only to Users that voluntarily select to receive the corresponding services and because those services will be available to all Users. Furthermore, the Exchange believes that the services and fees proposed herein are not unfairly discriminatory and are equitably allocated because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (*i.e.*, the same products and services are available to all Users). All Users that voluntarily select wireless connections to TotalView Ultra would be charged the same amount for the same services and would have their first month MRC for wireless connections waived.

Overall, the Exchange believes that the proposed change is reasonable because the Exchange proposes to offer the wireless connection to TotalView Ultra described herein as a convenience to Users, but in doing so would incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and monitoring, support and maintenance of such services. The costs associated with the wireless connections are incrementally higher than fiber optics-based solutions due to the expense of the wireless equipment, cost of installation and testing and ongoing maintenance of the network. The Exchange believes that it is reasonable that a User that has already purchased wireless connections to other Third Party Data would be charged a non-recurring charge when it purchases a wireless connection to TotalView Ultra, because the Exchange would incur certain costs in installing the wireless connection to TotalView Ultra irrespective of whether the User had existing wireless connections to Third Party Data. Such costs related to initial installation include, in particular, costs related to personnel required for initial installation and testing. The costs associated with installing wireless connections are incrementally higher than those associated with installing fiber optics-based solutions.

<sup>9</sup> Currently, at least four third party vendors offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center.

<sup>10</sup> The IP network is a local area network available in the data center. See Securities Exchange Act Release No. 74222 (February 6, 2015), 80 FR 7888 (February 12, 2015) (SR-NYSE-2015-05) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

<sup>11</sup> As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

<sup>12</sup> See SR-NYSE-2013-59, *supra* note 5 at 51766. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSEMKT-2016-02 and SR-NYSEArca-2016-04.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>15</sup> 15 U.S.C. 78f(b)(4).

The Exchange believes that the proposed pricing for the wireless connection to TotalView Ultra is reasonable because it allows Users to select the TotalView Ultra connectivity option that better suits their needs. The fees also reflect the benefit received by Users in terms of lower latency over the fiber optics option. The Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow Users to test the receipt of the feed for a month before incurring any monthly recurring fees and may act as an incentive to Users to connect to TotalView Ultra.

Moreover, the fees are equity [sic] allocated and not unfairly discriminatory because the wireless connection to TotalView Ultra would provide Users with an alternative means of connectivity to TotalView Ultra. Users that do not opt to utilize the Exchange's proposed wireless connections would still be able to obtain TotalView Ultra through other methods, including, for example, from wireless networks offered by third party vendors, another User, through a telecommunications provider, or over the IP network. Users that opt to use wireless connections to TotalView Ultra would receive the TotalView Ultra that is available to all Users, as all market participants that contract with NASDAQ for TotalView Ultra may receive it.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>16</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the

same products and services are available to all Users).

The Exchange believes that allowing Users to receive TotalView Ultra through a wireless connection will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such access will satisfy User demand for additional options for connectivity to TotalView Ultra. Currently, Users can receive TotalView Ultra from wireless networks offered by third party vendors. Based on the information available to it, the Exchange believes that its proposed wireless connection would provide data at the same or similar speed and at the same or similar cost as the other wireless networks. Accordingly, the proposed wireless connection to TotalView Ultra would provide Users with an additional wireless connectivity option, thereby enhancing competition.

The Exchange notes that the proposed wireless connection to TotalView Ultra would compete not just with other wireless connections to TotalView Ultra, but also with fiber optic network connections to TotalView Ultra, which may be more attractive to some Users as they are more reliable and less susceptible to weather conditions. Users that do not opt to utilize wireless connections would be able to obtain TotalView Ultra through other methods, including, for example, from another User, through a telecommunications provider, or over the IP network. In this way, the proposed changes would enhance competition by helping Users tailor their connectivity to TotalView Ultra to the needs of their business operations by allowing them to select the form and optimal latency of the connectivity they use to receive TotalView Ultra that best suits their needs, helping them tailor their data center operations to the requirements of their business operations.

The proposed wireless connection to TotalView Ultra would traverse wireless connections through a series of towers equipped with wireless equipment, including a pole on the grounds of the data center. The proposed wireless network would have exclusive rights to operate wireless equipment on the data center pole. The Exchange will not sell rights to third parties to operate wireless equipment on the pole, due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together. In addition to space issues, there are contractual restrictions on the use of the roof that the Exchange has determined would not be met if it offered space on the roof for third party wireless

equipment. Moreover, access to the pole or roof is not required for third parties to establish wireless networks that can compete with the Exchange's proposed service, as witnessed by the existing wireless networks currently serving Users. Based on the information available to it, the Exchange believes that its proposed wireless connection to TotalView Ultra would provide data at the same or similar speed, and at the same or similar cost, as its proposed wireless connection [sic], thereby enhancing competition.<sup>17</sup>

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

<sup>17</sup> The Exchange notes that the distance of a wireless network provider's wireless equipment from the User is only one factor in determining overall latency. Other factors include the number of repeaters in the route, the number of switches the data has to travel through, and the millimeter wave and switch technology used.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>16</sup> 15 U.S.C. 78f(b)(8).

A proposed rule change filed under Rule 19b-4(f)(6)<sup>20</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>21</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSE-2016-01 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 No. SR-NYSE-2016-01. 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 office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSE-2016-01, and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

Robert W. Errett,  
Deputy Secretary.

[FR Doc. 2016-03271 Filed 2-17-16; 8:45 am]

BILLING CODE 8011-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77120; File No. SR-NYSEMKT-2016-02]

#### **Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Co-location Services Offered by the Exchange To Include a Means for Co-located Users To Receive the NASDAQ TotalView Ultra Market Data Feed Through a Wireless Connection and Reflect Changes to the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule**

February 11, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on February 2, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

The Exchange proposes to change the co-location services offered by the Exchange to include a means for co-located Users to receive the NASDAQ TotalView Ultra (FGPA) market data feed through a wireless connection. In addition, the proposed rule change reflects changes to the NYSE MKT Equities Price List ("Price List") and the NYSE Amex Options Fee Schedule ("Fee Schedule") related to the proposed service. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

##### **1. Purpose**

The Exchange proposes to change the co-location<sup>4</sup> services offered by the Exchange to include a means for Users<sup>5</sup> to have access to the NASDAQ TotalView Ultra (FGPA) market data

<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission ("Commission") in 2010. See Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR-NYSEAmex-2010-80). The Exchange operates a data center in Mahwah, New Jersey (the "data center") from which it provides co-location services to Users.

<sup>5</sup> For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR-NYSEMKT-2015-67). As specified in the Price List and Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC and NYSE Arca, Inc. See Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR-NYSEMKT-2013-67).

<sup>20</sup> 17 CFR 240.19b-4(f)(6).

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.



feed through a wireless connection. In addition, the proposed rule change reflects changes to the Price List and Fee Schedule related to the proposed service.

The Commission has approved the Exchange's proposed rule change to provide a wireless connection to five market data feeds from third party markets.<sup>6</sup> The Exchange now proposes to add to its Price List and Fee Schedule a sixth market data feed, NASDAQ TotalView Ultra (FGPA) ("TotalView Ultra" and, together with the previously filed five market data feeds, the "Third Party Data").

As with the previously approved connectivity to Third Party Data through the wireless connection, the Exchange would utilize a network vendor to provide a wireless connection to TotalView Ultra through wireless connections from an Exchange access center to its data center in Mahwah, New Jersey, through a series of towers equipped with wireless equipment. To receive TotalView Ultra, the User would enter into a contract with NASDAQ, which would charge the User the applicable market data fees for TotalView Ultra. The Exchange would charge the User fees for the wireless connection to TotalView Ultra.<sup>7</sup>

For each wireless connection to TotalView Ultra, a User would be charged a \$5,000 non-recurring initial charge and a monthly recurring charge ("MRC") of \$11,000. The Exchange proposes to revise its Price List and Fee Schedule to reflect fees related to the connection to TotalView Ultra.

As with the previously approved wireless connections to Third Party Data, if a User purchased two wireless connections, it would pay two non-recurring initial charges, and the wireless connection would include the use of one port for connectivity to Third Party Data.<sup>8</sup> Also as with the previously approved wireless connections to Third Party Data, the Exchange proposes to waive the first month's MRC, to allow Users to test the receipt of TotalView Ultra for a month before incurring any MRCs.

The Exchange proposes to offer the wireless connection to provide Users with an alternative means of connectivity to TotalView Ultra.

Currently, Users can receive TotalView Ultra from wireless networks offered by third party vendors.<sup>9</sup> Users may also receive connections to TotalView Ultra through other methods, including, for example, from another User, through a telecommunications provider, or over the internet protocol ("IP") network.<sup>10</sup>

The wireless connection to the Third Party Data is expected to be available in January 2016, and no later than March 1, 2016. The Exchange will announce the date that the wireless connection to the Third Party Data will be available through a customer notice.

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;<sup>11</sup> and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.<sup>12</sup>

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

<sup>9</sup> Currently, at least four third party vendors offer Users wireless network connections using wireless equipment installed on towers and buildings near the data center.

<sup>10</sup> The IP network is a local area network available in the data center. See Securities Exchange Act Release No. 74220 (February 6, 2015), 80 FR 7894 (February 12, 2015) (SR-NYSEMKT-2015-08) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

<sup>11</sup> As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

<sup>12</sup> See SR-NYSEMKT-2013-67, *supra* note 5 at 50471. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2015-01 and SR-NYSEArca-2015-04.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>14</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed service is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the wireless connection to TotalView Ultra would provide Users with an alternative means of connectivity to TotalView Ultra. Users that do not opt to utilize the Exchange's proposed wireless connections would still be able to obtain TotalView Ultra through other methods, including, for example, from wireless networks offered by third party vendors, another User, through a telecommunications provider, or over the IP network. Users that opt to use wireless connections to TotalView Ultra would receive the TotalView Ultra that is available to all Users, as all market participants that contract with NASDAQ for TotalView Ultra may receive it.

The Exchange believes that this removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because it would provide Users with choices with respect to the form and optimal latency of the connectivity they use to receive TotalView Ultra, allowing a User that opts to receive TotalView Ultra to select the connectivity and number of ports that better suit its needs, helping it tailor its data center operations to the requirements of its business operations.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>15</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>15</sup> 15 U.S.C. 78f(b)(4).

<sup>6</sup> See Securities Exchange Act Release No. 76750 (December 23, 2015), 80 FR 81648 (December 30, 2015) (SR-NYSEMKT-2015-85) ("Wireless Approval Release").

<sup>7</sup> A User would only receive TotalView Ultra if it had entered into a contract with NASDAQ.

<sup>8</sup> A User only requires one port to connect to the Third Party Data, irrespective of how many of the wireless connections it orders. It may, however, purchase additional ports. See Wireless Approval Release, at 81649.

members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will result in fees being charged only to Users that voluntarily select to receive the corresponding services and because those services will be available to all Users. Furthermore, the Exchange believes that the services and fees proposed herein are not unfairly discriminatory and are equitably allocated because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (*i.e.*, the same products and services are available to all Users). All Users that voluntarily select wireless connections to TotalView Ultra would be charged the same amount for the same services and would have their first month MRC for wireless connections waived.

Overall, the Exchange believes that the proposed change is reasonable because the Exchange proposes to offer the wireless connection to TotalView Ultra described herein as a convenience to Users, but in doing so would incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and monitoring, support and maintenance of such services. The costs associated with the wireless connections are incrementally higher than fiber optics-based solutions due to the expense of the wireless equipment, cost of installation and testing and ongoing maintenance of the network. The Exchange believes that it is reasonable that a User that has already purchased wireless connections to other Third Party Data would be charged a non-recurring charge when it purchases a wireless connection to TotalView Ultra, because the Exchange would incur certain costs in installing the wireless connection to TotalView Ultra irrespective of whether the User had existing wireless connections to Third Party Data. Such costs related to initial installation include, in particular, costs related to personnel required for initial installation and testing. The costs associated with installing wireless connections are incrementally higher than those associated with installing fiber optics-based solutions.

The Exchange believes that the proposed pricing for the wireless connection to TotalView Ultra is reasonable because it allows Users to select the TotalView Ultra connectivity option that better suits their needs. The

fees also reflect the benefit received by Users in terms of lower latency over the fiber optics option. The Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow Users to test the receipt of the feed for a month before incurring any monthly recurring fees and may act as an incentive to Users to connect to TotalView Ultra.

Moreover, the fees are equity [*sic*] allocated and not unfairly discriminatory because the wireless connection to TotalView Ultra would provide Users with an alternative means of connectivity to TotalView Ultra. Users that do not opt to utilize the Exchange's proposed wireless connections would still be able to obtain TotalView Ultra through other methods, including, for example, from wireless networks offered by third party vendors, another User, through a telecommunications provider, or over the IP network. Users that opt to use wireless connections to TotalView Ultra would receive the TotalView Ultra that is available to all Users, as all market participants that contract with NASDAQ for TotalView Ultra may receive it.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>16</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users).

The Exchange believes that allowing Users to receive TotalView Ultra through a wireless connection will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act

because such access will satisfy User demand for additional options for connectivity to TotalView Ultra. Currently, Users can receive TotalView Ultra from wireless networks offered by third party vendors. Based on the information available to it, the Exchange believes that its proposed wireless connection would provide data at the same or similar speed and at the same or similar cost as the other wireless networks. Accordingly, the proposed wireless connection to TotalView Ultra would provide Users with an additional wireless connectivity option, thereby enhancing competition.

The Exchange notes that the proposed wireless connection to TotalView Ultra would compete not just with other wireless connections to TotalView Ultra, but also with fiber optic network connections to TotalView Ultra, which may be more attractive to some Users as they are more reliable and less susceptible to weather conditions. Users that do not opt to utilize wireless connections would be able to obtain TotalView Ultra through other methods, including, for example, from another User, through a telecommunications provider, or over the IP network. In this way, the proposed changes would enhance competition by helping Users tailor their connectivity to TotalView Ultra to the needs of their business operations by allowing them to select the form and optimal latency of the connectivity they use to receive TotalView Ultra that best suits their needs, helping them tailor their data center operations to the requirements of their business operations.

The proposed wireless connection to TotalView Ultra would traverse wireless connections through a series of towers equipped with wireless equipment, including a pole on the grounds of the data center. The proposed wireless network would have exclusive rights to operate wireless equipment on the data center pole. The Exchange will not sell rights to third parties to operate wireless equipment on the pole, due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together. In addition to space issues, there are contractual restrictions on the use of the roof that the Exchange has determined would not be met if it offered space on the roof for third party wireless equipment. Moreover, access to the pole or roof is not required for third parties to establish wireless networks that can compete with the Exchange's proposed service, as witnessed by the existing wireless networks currently serving Users. Based on the information available to it, the Exchange believes

<sup>16</sup> 15 U.S.C. 78f(b)(8).

that its proposed wireless connection to TotalView Ultra would provide data at the same or similar speed, and at the same or similar cost, as its proposed wireless connection [sic], thereby enhancing competition.<sup>17</sup>

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>20</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>21</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

<sup>17</sup> The Exchange notes that the distance of a wireless network provider's wireless equipment from the User is only one factor in determining overall latency. Other factors include the number of repeaters in the route, the number of switches the data has to travel through, and the millimeter wave and switch technology used.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6).

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii).

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEMKT-2016-02 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 No. SR-NYSEMKT-2016-02. 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

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEMKT-2016-02, and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-03264 Filed 2-17-16; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-77116; File No. SR-NASDAQ-2016-012]**

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NOM Rules at Chapter XV, Section 2**

February 11, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on January 28, 2016, The NASDAQ Stock Market LLC ("Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Chapter XV, entitled "Options Pricing," at Section 2, which governs pricing for Exchange members using the NASDAQ Options Market ("NOM"), the Exchange's facility for executing and routing standardized equity and index options.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2016.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaq.cchwallstreet.com>, at

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

the principal office of the Exchange, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The Exchange proposes certain amendments to the NOM transaction fees set forth at Chapter XV, Section 2 for executing and routing standardized equity and index options under the Penny Pilot Options program. The Exchange desires to continue to offer an incentive to NOM Participants to add an even greater amount of liquidity to NOM. Specifically, the Exchange proposes to continue to incentivize Participants by continuing to offer the opportunity to reduce the NOM Market Maker<sup>3</sup> and Non-NOM Market Maker<sup>4</sup> Penny Pilot Options Fees for Removing Liquidity from \$0.50 to \$0.48 per contract, provided the Participant adds 1.30% of Customer,<sup>5</sup> Professional,<sup>6</sup>

Firm,<sup>7</sup> Broker-Dealer<sup>8</sup> or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.<sup>9</sup>

The Exchange is removing the current date range, January 11, 2016 through January 26 [sic], 2016, so the Exchange may continue to offer this incentive going forward. For purposes of clarity, the Exchange proposes to add rule text to make clear that Participants that add 1.30% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in either Penny Pilot Options and/or Non-Penny Pilot Options may qualify for the incentive. Also, the Exchange proposes to clarify that the 1.30% applies to *total industry customer equity and ETF option ADV contracts per day in a month*. While the Exchange believes that there is no confusion among market participants as to the qualifying volume for this incentive, the Exchange proposes to add this rule text language for clarity.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>10</sup> in general, and with Section 6(b)(4) and 6(b)(5) of the Act,<sup>11</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Attracting order flow to the Exchange benefits all Participants who have the opportunity to interact with this order flow.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities

markets. Further, "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ." <sup>12</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets and this proposal is consistent with those views in that it is a price cut driven by competition.

The Exchange's proposal to continue to incentivize Participants to send order flow to NOM by offering the opportunity to reduce the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity from \$0.50 to \$0.48 per contract, provided the Participant qualifies for the incentive,<sup>13</sup> is reasonable because the Exchange believes NOM will continue to attract a greater amount of order flow by offering this discounted rate. The Exchange believes that this additional fee reduction for Non-NOM Market Makers and NOM Market Makers should further incentivize Participants to add liquidity in Penny Pilot Options on NOM to obtain the discounted rate going forward.

The Exchange's proposal to continue to incentivize Participants to send order flow to NOM by offering the opportunity to reduce the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity from \$0.50 to \$0.48 per contract, provided the Participant qualifies for the incentive,<sup>14</sup> is equitable and not unfairly discriminatory for the reasons which follow. NOM Market Makers have obligations to the market and regulatory requirements, which normally do not apply to other market participants.<sup>15</sup> A NOM Market Maker

<sup>3</sup> The term "NOM Market Maker" is 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.

<sup>4</sup> The term "Non-NOM Market Maker" is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

<sup>5</sup> The term "Customer" or ("C") applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation 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)).

<sup>6</sup> The term "Professional" or ("P") 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.

<sup>7</sup> The term "Firm" or ("F") applies to any transaction that is identified by a Participant for clearing in the Firm range at The Options Clearing Corporation.

<sup>8</sup> The term "Broker-Dealer" or ("B") applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

<sup>9</sup> The term "Common Ownership" shall mean Participants under 75% common ownership or control. Common Ownership shall apply to all pricing in Chapter XV, Section 2 for which a volume threshold or volume percentage is required to obtain the pricing.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>12</sup> *Id.* [sic] at 539 (quoting Securities Exchange [sic] Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) at 73 FR at 74782-74783).

<sup>13</sup> Participants are required to add 1.30% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant must be (i) both the buyer and seller or (ii) the Participant must remove liquidity from another Participant under Common Ownership.

<sup>14</sup> *Id.*

<sup>15</sup> Pursuant to Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in

has the obligation, for example, to make continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a [sic] course of dealings. The proposed differentiation as between NOM Market Makers and other market participants recognizes the differing contributions made to the trading environment on the Exchange by NOM Market Makers. For the above reasons, the Exchange believes that NOM Market Makers are entitled to discounted fees, provided they qualify for the discount. The Exchange believes it is equitable and not unfairly discriminatory to offer the fee discount to Non-NOM Market Makers because the Exchange is offering Participants flexibility in the manner in which they are submitting their orders. Non-NOM Market Makers have obligations on other exchanges to qualify as a market maker. Also, the Exchange believes that market makers not registered on NOM will be encouraged to send orders to NOM as an away market maker (Non-NOM Market Maker) with this incentive. Because the incentive is being offered to both market makers registered on NOM and those not registered on NOM, the Exchange believes that the proposal is equitable and not unfairly discriminatory because it encourages market makers to direct liquidity to NOM to the benefit of all Participants. This proposal recognizes the overall contributions made by market makers to a listed options market.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to only offer the fee reduction to NOM Market Makers and Non-NOM Market Makers because the Exchange is offering this \$0.02 per contract fee discount to the Penny Pilot Options Fees for Removing Liquidity to continue to incentivize NOM Participants to select NOM as a venue to send Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker order flow. Participants may send either Penny or Non-Penny Pilot Options to qualify for the discount.

The Exchange believes that it is reasonable, equitable and not unfairly

discriminatory to permit NOM Participants with 75 percent common ownership to aggregate their volume for purposes of obtaining the fee discount because certain NOM Participants chose to segregate their businesses into different legal entities for purposes of conducting business. The Exchange believes that these NOM Participants should be treated as one entity for purposes of qualifying for the discounted Fee for Removing Liquidity in Penny Pilot Options, as long as there is at least 75% Common Ownership or control among the NOM Participants. The Exchange also believes that it is reasonable, equitable and not unfairly discriminatory to offer a \$0.02 per contract reduced Penny Pilot Option Fee for Removing Liquidity to Non-NOM Market Makers and NOM Market Makers for transactions in which the same NOM Participant or a NOM Participant under Common Ownership is the buyer and the seller. NOM Participants that chose to segregate their businesses into different legal entities should still be afforded the opportunity to receive the discount as if they were the same NOM Participant on both sides of the transaction.

It is important to note that NOM Participants are unaware at the time the order is entered of the identity of the contra-party. Because contra-parties are anonymous, the Exchange believes that NOM Participants would aggressively pursue order flow in order to receive the benefit of the reduction. NOM Participants would only receive the incentive if they interact with their own order flow, recognizing Common Ownership where applicable. Offering the additional fee reduction is reasonable, equitable and not unfairly discriminatory because Participants would be entitled to receive the fee reduction only when the Participant is both the buyer and seller. By way of example, if a NOM Participant that is assigned the firm code <sup>16</sup> "ABC" by the Exchange posted an order utilizing its Customer order router, and the order was removed by an ABC NOM Market Maker order, the NOM Participant would receive the \$0.02 per contract fee reduction for that trade (\$0.50 to \$0.48 per contract). The Exchange proposes to utilize the Exchange assigned firm code to determine which NOM Participant executed an order and to apply the fee reduction to the Non-NOM Market Maker or NOM Market Maker Penny Pilot Option Fee for Removing Liquidity if the same NOM Participant was the

buyer and the seller to a transaction.<sup>17</sup> This concept is not novel. Today NASDAQ OMX PHLX LLC ("Phlx") assesses a Firm Floor Options Transaction Charge based on which side of the transaction the member represents as well [sic] whether the same member or its affiliates under Common Ownership was represented.<sup>18</sup>

Finally, the Exchange's proposal to count all order flow (Penny and Non-Penny Pilot Options) toward the 1.30% requisite volume, except for NOM Market Maker order flow is reasonable, equitable and not unfairly discriminatory because NOM Market Makers are entitled to rebates today similar to Customers and Professionals. Customer volume is important because it continues to attract liquidity to the Exchange, which benefits all market participants. Further, with respect to Professional liquidity, the Exchange initially established Professional pricing in order to "... bring additional revenue to the Exchange."<sup>19</sup> The Exchange noted in the Professional Filing that it believes "... that the increased revenue from the proposal would assist the Exchange to recoup fixed costs."<sup>20</sup> Further, the Exchange noted in that filing that it believes that establishing separate pricing for a Professional, which ranges between that of a Customer and market maker,

<sup>17</sup> In this example, the same Participant that added and removed the order would be entitled to the fee reduction because the NOM Participant was the buyer and seller on the transaction.

<sup>18</sup> The Firm Floor Options Transaction Charges will be waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges). The Firm Floor Options Transaction Charges will be waived for the buy side of a transaction if the same member or its affiliates under Common Ownership represents both sides of a Firm transaction when such members are trading in their own proprietary account. In addition, the Broker-Dealer Floor Options Transaction Charge (including Cabinet Options Transaction Charges) will be waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members would otherwise incur this charge for trading in their own proprietary account contra to a Customer ("BD-Customer Facilitation"), if the member's BD-Customer Facilitation average daily volume (including both FLEX and non-FLEX transactions) exceeds 10,000 contracts per day in a given month. See Phlx's Pricing Schedule.

<sup>19</sup> See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066) ("Professional Filing"). In this filing, the Exchange addressed the perceived favorable pricing of Professionals who were assessed fees and paid rebates like a Customer prior to the filing. The Exchange noted in that filing that a Professional, unlike a retail Customer, has access to sophisticated trading systems that contain functionality not available to retail Customers.

<sup>20</sup> See Professional Filing.

registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. See Chapter VII, Section 5.

<sup>16</sup> Each NOM Participant is assigned a firm code by the Exchange.

accomplishes this objective.<sup>21</sup> The Exchange offers NOM Market Makers rebates in acknowledgment of the obligations<sup>22</sup> these Participants bear in the market. The Exchange believes that it is not necessary to count NOM Market Maker volume toward the volume to qualify for the fee reduction because that volume is counted toward the qualifiers for the NOM Market Maker rebates.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the continuation of the proposed amendments to NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity do not impose an undue burden on inter-market competition because the Exchange's execution services are completely voluntary and subject to extensive competition.

The Exchange's proposal to incentivize Participants by continuing to offer the opportunity to reduce the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity from \$0.50 to \$0.48 per contract, provided the Participant adds 1.30% of Customer, Professional, Firm, Broker-Dealer or

Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month *and* the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership does not create an undue burden on intra-market competition because NOM Market Makers have obligations to the market and regulatory requirements, which normally do not apply to other market participants.<sup>23</sup> Offering the fee discount to Non-NOM Market Makers provides Participants with flexibility in the manner in which they are submitting their orders. Non-NOM Market Makers have obligations on other exchanges to qualify as a market maker. Also, the Exchange believes that market makers not registered on NOM will be encouraged to send orders to NOM as an away market maker (Non-NOM Market Maker) with this incentive. Because the incentive is being offered to both market makers registered on NOM and those not registered on NOM, the Exchange believes that the proposal does not impose an undue burden on intra-market competition because it encourages market makers to direct liquidity to NOM to the benefit of all Participants.

The Exchange believes that permitting NOM Participants with 75 percent common ownership to aggregate their volume for purposes of obtaining the fee discount does not create an undue burden on intra-market competition because certain NOM Participants chose to segregate their businesses into different legal entities for purposes of conducting business. NOM Participants that chose to segregate their businesses into different legal entities should still be afforded the opportunity to receive the discount as if they were the same NOM Participant on both sides of the transaction.

Participants would be entitled to receive the fee reduction when the Participant is both the buyer and seller and therefore this qualifier does not create an undue burden on intra-market competition. NOM Participants are unaware at the time the order is entered of the identity of the contra-party, therefore, since contra-parties are anonymous, the Exchange believes that NOM Participants would aggressively pursue order flow in order to receive the benefit of the reduction, to the benefit of all Participants.

The Exchange's proposal to continue to count all order flow toward the

1.30% requisite volume, except for NOM Market Maker order flow does not impose an undue burden on intra-market competition because the Exchange believes it is not necessary to count NOM Market Maker volume in qualifying for the fee discount as that volume is counted toward qualifying for NOM Market Maker rebates.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>24</sup>

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.

### **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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-012 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-2016-012. 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

<sup>21</sup> See Professional Filing. The Exchange also in [sic] the Professional Filing that it believes the role of the retail Customer in the marketplace is distinct from that of the Professional and the Exchange's fee proposal at that time accounted for this distinction by pricing each market participant according to their roles and obligations.

<sup>22</sup> See note 15.

<sup>23</sup> See note 15.

<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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 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-2016-012, and should be submitted on or before March 10, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016-03268 Filed 2-17-16; 8:45 am]

**BILLING CODE 8011-01-P**

## **SOCIAL SECURITY ADMINISTRATION**

**[Docket No: SSA-2016-0003]**

### **Agency Information Collection Activities: Proposed Request and Comment Request**

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104-13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers. (OMB)

Office of Management and Budget,  
Attn: Desk Officer for SSA, Fax:  
202-395-6974, Email address:  
[OIRA\\_Submission@omb.eop.gov](mailto: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](mailto:OR.Reports.Clearance@ssa.gov),

Or you may submit your comments online through [www.regulations.gov](http://www.regulations.gov), referencing Docket ID Number [SSA-2016-0003].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than April 18, 2016. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Request to be Selected as a Payee—20 CFR 404.2010-404.2055, 416.601-416.665-0960-0014. SSA requires an individual applying to be a representative payee for a Social Security beneficiary or Supplemental Security Income (SSI) recipient to complete Form SSA-11-BK. SSA obtains information from applicant payees regarding their relationship to the beneficiary; personal qualifications; concern for the beneficiary's well-being; and intended use of benefits if appointed as payee. The respondents are individuals; private sector businesses and institutions; and State and local government institutions and agencies applying to become representative payees.

Type of Request: Revision of an OMB approved information collection.

*Individuals and Households (90%):*

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Representative Payee System (RPS) .....	1,438,200	1	11	263,670
Paper Version .....	91,800	1	11	16,830
Total .....	1,530,000	.....	.....	280,500

#### *Private Sector (9%):*

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Representative Payee System (RPS) .....	149,940	1	11	27,489
Paper Version .....	3,060	1	11	561
Total .....	153,000	.....	.....	28,050

#### *State/Local/Tribal Government (1%):*

<sup>25</sup> 17 CFR 200.30-3(a)(12).



Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Representative Payee System (RPS) .....	16,660	1	11	3,054
Paper Version .....	340	1	11	62
Total .....	17,000	.....	.....	3,116
Grand Total .....	1,700,000	.....	.....	311,666

2. Application for Benefits Under the Italy-U.S. International Social Security Agreement—20 CFR 404.1925—0960—0445. As per the November 1, 1978 agreement between the United States and Italian Social Security agencies, residents of Italy filing an application for U.S. Social Security benefits directly

with one of the Italian Social Security agencies must complete Form SSA–2528. SSA uses Form SSA–2528 to establish age, relationship, citizenship, marriage, death, military service, or to evaluate a family bible or other family record when determining eligibility for benefits. The Italian Social Security

agencies assist applicants in completing Form SSA–2528, and then forward the application to SSA for processing. The respondents are individuals living in Italy who wish to file for U.S. Social Security benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–2528 .....	300	1	20	100

3. Child Care Dropout Questionnaire—20 CFR 404.211(e)(4)—0960—0474. If individuals applying for Title II disability benefits care for their own or their spouse's children under age 3, and have no steady earnings

during the time they care for those children, they may exclude that period of care from the disability computation period. We call this the child-care dropout exclusion. SSA uses the information from Form SSA–4162 to

determine if an individual qualifies for this exclusion. Respondents are applicants for Title II disability benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–4162 .....	2,000	1	5	167

4. Certification of Contents of Document(s) or Record(s)—20 CFR 404.715—0960—0689. SSA established procedures for individuals to provide the evidence necessary to establish their rights to Social Security benefits. Examples of such evidence categories include age, relationship, citizenship, marriage, death, and military service.

Form SSA–704 allows SSA employees; State record custodians; and other custodians of evidentiary documents to certify and record information from original documents and records under their custodial ownership to establish these types of evidence. SSA uses Form SSA–704 in situations where individuals cannot produce the original

evidentiary documentation required to establish benefits eligibility. The respondents are State record custodians and other custodians of evidentiary documents.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–704 .....	176	1	10	29

5. Supplemental Security Income Wage Reporting (Telephone and Mobile)—20 CFR 416.701–732—0960—0715. SSA requires SSI recipients to report changes which could affect their eligibility for, and the amount of, their SSI payments, such as changes in income, resources, and living

arrangements. SSA's SSI Telephone Wage Reporting (SSITWR) and SSI Mobile Wage Reporting (SSIMWR) enable SSI recipients to meet these requirements via an automated mechanism to report their monthly wages by telephone and mobile application, instead of contacting their

local field offices. The SSITWR allows callers to report their wages by speaking their responses through voice recognition technology, or by keying in responses using a telephone key pad. The SSIMWR allows recipients to report their wages through the mobile wage reporting application on their

smartphone, SSITWR and SSIMWR systems collect the same information and send it to SSA over secure channels. To ensure the security of the information provided, SSITWR and

SSIMWR ask respondents to provide information SSA can compare against our records for authentication purposes. Once the system authenticates the identity of the respondents, they can

report their wage data. The respondents are SSI recipients, deemors, or their representative payees.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Training/Instruction* .....	79,000	1	35	46,083
SSITWR .....	37,000	12	5	37,000
SSIMWR .....	42,000	12	3	25,200
Total .....	79,000	.....	.....	108,283

\* The same 79,000 respondents complete the training as well as one modality of collection, therefore the actual total number of respondents remains 79,000.

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 March 21, 2016. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov*.

1. Application for Widow's or Widower's Insurance Benefits—20 CFR 404.335–404.338, & 404.603–0960–0004. Section 2029(e) and 202(f) of the Social Security Act (Act) set forth the requirements for entitlement to widow(er)'s benefits, including the requirements to file an application. For SSA to make a formal determination for entitlement to widow(er)'s benefits, we use the Form SSA–10–BK to determine whether an applicant meets the

statutory and regulatory conditions for entitlement to widow(er)'s Title II benefits. SSA employees interview individuals applying for benefits either face-to-face or via telephone and enter the information on the paper form or into the Modernized Claims System (MCS). The respondents are applicants for widow(er)'s benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–10–BK paper version .....	2,045	1	15	511
SSA–10–BK MCS version .....	453,509	1	14	105,819
Totals .....	455,554	.....	.....	106,330

2. Employer Verification of Records for Children Under Age Seven—20 CFR 404.801–404.803, 404.821–404.822–0960–0505. SSA discovered as many as 70 percent of the wage reports we receive for children under age seven are actually the earnings of someone other

than the child. To ensure we credit the correct person with the reported earnings, SSA verifies wage reports for children under age seven with the children's employers before posting to the earnings record. SSA uses Form SSA–L3231–C1, Request for Employer

Information, for this purpose. The respondents are employers who report earnings for children under age seven.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–L3231–C1 .....	20,000	1	10	3,333

3. Wage Reports and Pension Information—20 CFR 422.122(b)—0960–0547. Pension plan administrators annually file plan information with the Internal Revenue Service, which then forwards the information to SSA. SSA maintains and organizes this information by plan number, plan participant's name, and Social Security number. Under section 1131(a) of the

Act, pension plan participants are entitled to request this information from SSA. The Wage Reports and Pension Information regulation, under 20 CFR 422.122(b) of the Code of Federal Regulations, stipulates that before SSA disseminates this information, the requestor must first submit a written request with identifying information to

SSA. The respondents are requestors of pension plan information.

This is a correction notice: SSA published the incorrect burden, information for this collection at 80 FR 75484, on 12/2/15. We are correcting this error here.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Requests for pension plan information .....	580	1	30	290

Dated: February 12, 2016.

**Naomi R. Sipple,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 2016-03380 Filed 2-17-16; 8:45 am]

**BILLING CODE 4191-02-P**

## DEPARTMENT OF STATE

[Public Notice: 9449]

### U.S. Advisory Commission on Public Diplomacy; Notice of Meeting

The U.S. Advisory Commission on Public Diplomacy will hold a public meeting from 10:00 a.m. until 11:30 a.m., Tuesday, March 8, 2016 in Room 106 of the Dirksen Senate Office Building, at the corner of First Street and Constitution Ave. NE., Washington, DC 20002.

The meeting's topic will be "Reassessing Global Countering Violent Extremism Strategy" and will feature the head of the new Global Engagement Center at the U.S. Department of State. Other representatives from the State Department will be in attendance.

This meeting is open to the public, members and staff of Congress, the State Department, Defense Department, the media, and other governmental and non-governmental organizations. To attend and make any requests for reasonable accommodation, email [pdcommission@state.gov](mailto:pdcommission@state.gov) by 5 p.m. on Thursday, March 3, 2016. Please arrive for the meeting by 9:45 a.m. to allow for a prompt meeting start.

The United States Advisory Commission on Public Diplomacy appraises U.S. Government activities intended to understand, inform, and influence foreign publics. The Advisory Commission may conduct studies, inquiries, and meetings, as it deems necessary. It may assemble and disseminate information and issue reports and other publications, subject to the approval of the Chairperson, in consultation with the Executive Director. The Advisory Commission may undertake foreign travel in pursuit of its studies and coordinate, sponsor, or oversee projects, studies, events, or other activities that it deems desirable and necessary in fulfilling its functions.

The Commission consists of seven members appointed by the President, by

and with the advice and consent of the Senate. The members of the Commission represent the public interest and are selected from a cross section of educational, communications, cultural, scientific, technical, public service, labor, business, and professional backgrounds. Not more than four members are from any one political party. The President designates a member to chair the Commission.

The current members of the Commission are: Mr. William Hybl of Colorado, Chairman; Ambassador Lyndon Olson of Texas, Vice Chairman; Mr. Sim Farar of California, Vice Chairman; Ambassador Penne Korth-Peacock of Texas; Ms. Lezlee Westine of Virginia; and Anne Terman Wedner of Illinois. One seat on the Commission is currently vacant.

To request further information about the meeting or the U.S. Advisory Commission on Public Diplomacy, you may contact its Executive Director, Katherine Brown, at [BrownKA4@state.gov](mailto:BrownKA4@state.gov).

Dated: February 4, 2016.

**Katherine Brown,**

*Executive Director, Department of State.*

[FR Doc. 2016-03374 Filed 2-17-16; 8:45 am]

**BILLING CODE 4710-45-P**

## DEPARTMENT OF STATE

### Delegation of Authority 250-1: Further Assignment of Functions Under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (the "Act") to Other Departments and Agencies of the Executive Branch

**AGENCY:** Department of State.

**ACTION:** Further assignment of functions.

**SUMMARY:** The Act specifically granted the President certain authorities and assigned the President certain functions related to agreements covered by the Act's provisions. In Executive Order No. 13701, the President assigned certain of these functions to the Secretary of State and provided guidance for performing those functions, including the further assignment of functions to officers of any other department or agency within the Executive Branch. This notice informs the public of the Secretary of State's further assignment of certain functions. This notice does not create

any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

**DATES:** These actions were effective on the signature date.

#### FOR FURTHER INFORMATION CONTACT:

Tiffany Prather, [PratherTA@state.gov](mailto:PratherTA@state.gov); Tel: (202) 647-4548.

#### SUPPLEMENTARY INFORMATION:

##### Further Assignment of Functions

Pursuant to section 1(c)(i) of Executive Order No. 13701, the Secretary of State hereby, as set forth below, further assigns certain functions of the Secretary of State under the Order. Departments and agencies shall carry out those functions in a manner that is supportive of agreements subject to the Act.

The functions of the President under section 102(c)(2) of the Act with respect to establishing consultative mechanisms assigned to the Secretary of State are further assigned to the United States Trade Representative, and shall be carried out jointly by the Secretary of State and the United States Trade Representative. Such consultative mechanisms are those established through trade agreements subject to the Act. This further assignment is without prejudice to the Secretary of State's responsibility for coordinating the operation of such mechanisms and obtaining the advice and assistance of any other agency as necessary and appropriate.

Dated: February 11, 2016.

**John Kerry,**

*Secretary of State.*

[FR Doc. 2016-03376 Filed 2-17-16; 8:45 am]

**BILLING CODE 4710-09-P**

## SURFACE TRANSPORTATION BOARD

[Docket No. EP 290 (Sub-No. 4)]

### Railroad Cost Recovery Procedures—Productivity Adjustment

**AGENCY:** Surface Transportation Board.

**ACTION:** Proposed Railroad Cost Recovery Procedures Productivity Adjustment.

**SUMMARY:** In a decision served on February 12, 2016, we proposed to adopt 1.014 (1.4% per year) as the measure of average change in railroad productivity for the 2010–2014 (five-year) averaging period. This value represents an increase of 0.7% from the average for the 2009–2013 period. The Board's February 12, 2016 decision in this proceeding stated that comments may be filed addressing any perceived data and computational errors in the Board's calculation. It also stated that, if there were no further action taken by the Board, the proposed productivity adjustment would become effective on March 1, 2016.

**DATES:** The productivity adjustment is effective March 1, 2016. Comments are due by February 24, 2016.

**ADDRESSES:** Send comments (an original and 10 copies) referring to Docket No. EP 290 (Sub-No. 4) to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

**FOR FURTHER INFORMATION CONTACT:** Michael Smith, (202) 245–0322. Federal Information Relay Service (FIRS) for the hearing impaired, (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Board's decision, which is available on our Web site at <http://www.stb.dot.gov>. Copies of the decision may be purchased by contacting the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0236. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

Decided: February 12, 2016

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

**Tia Delano,**

*Clearance Clerk.*

[FR Doc. 2016–03347 Filed 2–17–16; 8:45 am]

**BILLING CODE 4915–01–P**

## **SURFACE TRANSPORTATION BOARD**

[Docket No. AB 55 (Sub-No. 753X)]

### **CSX Transportation, Inc.— Discontinuance of Service Exemption—in Harlan County, KY**

CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 1.6-mile rail line on its Southern Region, Huntington Division, CV Subdivision, Engineering Appalachian Division, also known as the Merna Spur from milepost 0MV 248.5 to milepost 0MV 250.1, in Harlan

County, Ky. (the Line). The Line traverses United States Postal Service Zip Code 40818, and includes the station of Creech (FSAC 43739/OPSL 20395) at milepost 0MV 250.

CSXT has certified that: (1) No local traffic has moved over the Line for at least two years; (2) because the Line is not a through line, no overhead traffic has operated, and, therefore, none needs to be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line is pending either with the Surface Transportation Board or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will become effective on March 19, 2016, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2) <sup>1</sup> must be filed by February 29, 2016.<sup>2</sup> Petitions to reopen must be filed by March 9, 2016, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

<sup>1</sup> Each OFA must be accompanied by the filing fee, which is currently set at \$1,600. See 49 CFR 1002.2(f)(25).

<sup>2</sup> Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require an environmental review.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available on our Web site at “[WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).”

Decided: February 12, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Brendetta S. Jones,**

*Clearance Clerk.*

[FR Doc. 2016–03356 Filed 2–17–16; 8:45 am]

**BILLING CODE 4915–01–P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

#### **Notice of Final Federal Agency Actions on Proposed Highway in California**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

**SUMMARY:** The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to a proposed highway project, Centennial Corridor Project on State Route 58 from Cottonwood Road to Interstate 5 and State Route 99 from Wilson Road to Gilmore Avenue in the County of Kern, State of California. Those actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to U.S.C. § 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before July 18, 2016. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** Jennifer H. Taylor, Office Chief, California Department of Transportation District 6, 855 M Street, Suite 200, Fresno, CA 93721, during normal business hours from 8:00 a.m. to 5:00 p.m., Telephone number (888) 404–6375, email: [Jennifer.taylor@dot.ca.gov](mailto:Jennifer.taylor@dot.ca.gov).

**SUPPLEMENTARY INFORMATION:** Effective July 1, 2007, the FHWA assigned, and the Caltrans assumed environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that Caltrans has taken final agency

actions subject to U.S.C § 139(l)(1) by issuing licenses, permits, and approvals for the Centennial Corridor Project in the State of California.

Caltrans, in cooperation with the City of Bakersfield, proposes to construct a freeway on a new alignment for State Route 58 and make improvements to the existing State Route 99. The new alignment for State Route 58 will provide a continuous route along State Route 58 from Cottonwood Road (post mile R55.6) on existing State Route 58 (East), east of State Route 99 to Interstate 5 (post mile T31.7). Improvements to State Route 99 from Wilson Road (post mile 21.2) to Gilmore Avenue (post mile 26.2) will also be required for the connection with State Route 58. The project is intended to provide route continuity and associated traffic congestion relief. The Federal ID number for the Centennial Corridor Project is NCIIP 5109 (106).

The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on December 4, 2015, in the Record of Decision (ROD) issued on February 8, 2016, and in other documents in the FHWA project records. The FEIS, ROD and other project records are available by contacting Caltrans at the address provided above. The Caltrans FEIS and ROD can be viewed and downloaded from the project Web site at: <http://dot.ca.gov/dist6/environmental/projects/centennial/EnvironmentalDocuments.html> or viewed at public

libraries in the project area. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Section 4(f) of the U.S. Department of Transportation Act of 1966 [49 U.S.C. 303].

4. Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Clean Water Act 33 U.S.C. 1251–1387.

7. Farmland Protection Policy Act [7 U.S.C. 4201–4209 and its regulations].

8. E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(l)(1)

Issued on: February 11, 2016.

**Gary Sweeten,**

*North Team Leader, Project Delivery, Federal Highway Administration, Sacramento, California.*

[FR Doc. 2016–03306 Filed 2–17–16; 8:45 am]

**BILLING CODE 4910-RY-P**

## DEPARTMENT OF THE TREASURY

### Community Development Financial Institutions Fund

#### Community Development Financial Institutions Program (CDFI Program) FY 2016 Funding Round

*Funding Opportunity Title:* Notice of Funds Availability (NOFA) inviting Applications for Financial Assistance (FA) awards or Technical Assistance (TA) grants under the Community Development Financial Institutions Program (CDFI Program) fiscal year (FY) 2016 Funding Round.

*Announcement Type:* Announcement of funding opportunity.

*Funding Opportunity Number:* CDFI–2016–FATA.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 21.020.

**KEY DATES:**

TABLE 1—FY 2016 CDFI PROGRAM FUNDING ROUND CRITICAL DEADLINES FOR APPLICANTS

Description	Deadline	Time (eastern daylight time—EDT)	Submission method
CDFI Certification Applications .....	March 18, 2016 .....	5:00 p.m. EDT .....	Award Management Information System (AMIS).
SF424 (Application for Federal Assistance).	March 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Grants.gov.
Last day to contact CDFI Program staff ...	April 15, 2016 .....	5:00 p.m. EDT .....	CDFI Fund Helpdesk: 202–653–0421 or <a href="mailto:cdfihelp@cfdi.treas.gov">cdfihelp@cfdi.treas.gov</a> .
CDFI Program Application for Financial Assistance (FA) or Technical Assistance (TA).	April 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Awards Management Information System (AMIS).

*Executive Summary:* Through the CDFI Program, the CDFI Fund provides (i) FA awards of up to \$2 million to Certified Community Development Financial Institutions (CDFIs) to build their financial capacity to lend to their Target Markets, and (ii) TA grants of up to \$125,000 to build Certified, Certifiable, and Emerging CDFIs' organizational capacity to serve their Target Markets. All awards provided

through this NOFA are subject to funding availability.

#### I. Program Description

*A. History:* The CDFI Fund was established by the Riegle Community Development Banking and Financial Institutions Act of 1994 to promote economic revitalization and community development through investment in and assistance to CDFIs. Since its creation in

1994, the CDFI Fund has awarded over \$2 billion to CDFIs, community development organizations, and financial institutions through the Community Development Financial Institutions Program (CDFI Program), the Native American CDFI Assistance Program (NACA Program), the Bank Enterprise Award Program (BEA Program), the Capital Magnet Fund, and the Financial Education and Counseling

Pilot Program. In addition, the CDFI Fund has allocated more than \$43 billion in tax credit allocation authority through the New Markets Tax Credit Program (NMTC Program) and has obligated \$852 million in bond guarantees to Eligible CDFIs through the CDFI Bond Guarantee Program.

**B. Priorities:** Through the CDFI Program's FA awards and TA grants, the CDFI Fund invests in and builds the capacity of for-profit and non-profit community based lending organizations known as Community Development Financial Institutions, or CDFIs. These organizations, Certified as CDFIs by the CDFI Fund, serve rural and urban low-income people and communities across the nation that lack adequate access to affordable financial products and services.

**C. Authorizing Statutes and Regulations:** The CDFI Program is authorized by the Riegle Community Development Banking and Financial Institutions Act of 1994 (Pub. L. 103–325, 12 U.S.C. 4701 *et seq.*). The regulations governing the CDFI Program are found at 12 CFR parts 1805 and 1815

(the Regulations) and set forth evaluation criteria and other program requirements. The CDFI Fund encourages Applicants to review the Regulations, this NOFA, the Application, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200; 78 FR 78590) (Uniform Administrative Requirements) for a complete understanding of the program. Capitalized terms in this NOFA are defined in the authorizing statute, the Regulations, this NOFA, the Application, or the Uniform Administrative Requirements. Details regarding Application content requirements are found in the Application and related materials.

**D. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200):** The Uniform Administrative Requirements codifies financial, administrative, procurement, and program management standards that Federal award agencies must follow. When evaluating award

applications, awarding agencies must evaluate the risks to the program posed by each applicant, and each applicant's merits and eligibility. These requirements are designed to ensure that applicants for Federal assistance receive a fair and consistent review prior to an award decision. This review will assess items such as the Applicant's financial stability, quality of management systems, history of performance, and single audit findings. In addition, the Uniform Administrative Requirements include guidance on audit requirements and other award compliance requirements for award Recipients.

**E. Funding limitations:** The CDFI Fund reserves the right to fund, in whole or in part, any, all, or none of the Applications submitted in response to this NOFA.

## II. Federal Award Information

### A. Funding Availability:

**1. FY 2016 Funding Round:** The CDFI Fund expects to award, through this NOFA, approximately \$175 million as indicated in the following table:

TABLE 2—FY 2016 FUNDING ROUND ANTICIPATED CATEGORY AMOUNTS

Funding categories (see definition in Table 7)	Estimated total amount to be awarded (millions)	Award amount		Estimated number of awards	Average amount awarded in FY 2015
		Minimum	Maximum		
FA: Category I/Small and/or Emerging CDFI Assistance (SECA) .....	\$19	\$100,000	\$700,000	36	\$521,300
FA: Category II/Core .....	130	100,000	2,000,000	87	1,486,400
TA .....	4	10,000	125,000	33	121,500
Healthy Food Financing Initiative—Financial Assistance (HFFI-FA) * .....	22	500,000	5,000,000	11	2,000,000
<b>Total</b> .....	<b>175</b>	.....	.....	<b>167</b>	.....

\* HFFI-FA appropriation will be allocated in one competitive round between the NACA and CDFI Program NOFAs.

The CDFI Fund reserves the right to award more or less than the amounts cited above in each category, based upon available funding and other factors, as appropriate.

**2. Funding Availability for the FY 2016 Funding Round:** Funds for the FY 2016 Funding Round were appropriated in the Consolidated Appropriations Act, 2016 (Pub. L. 114–113).

**3. Anticipated Start Date and Period of Performance:** The CDFI Fund anticipates the period of performance for the FY 2016 Funding Round will begin in late September 2016. Specifically, the period of performance for TA grants begins with the date of the notice of the award and includes an award Recipient's two full consecutive fiscal years after the date of the notice of the award, during which the Recipient must meet the performance

goals set forth in the Assistance Agreement. The period of performance for FA awards includes an award Recipient's three full consecutive fiscal years after the date of the notice of the award, during which time the Recipient must meet its performance goals.

**B. Types of Awards:** Through the CDFI Program, the CDFI Fund provides two types of awards: Financial Assistance (FA) and Technical Assistance (TA) awards. *An Applicant may submit an Application for a TA grant or an FA award, but not both.*

**1. FA Awards:** FA awards can be in the form of loans, grants, Equity Investments, deposits and credit union shares. The form of the FA award is based on the form of the matching funds that the Applicant includes in its Application, unless Congress waives the matching funds requirement. Matching

funds are required for FA awards, must be from non-Federal sources, and cannot have been used as matching funds for any other Federal award. The CDFI Fund reserves the right, in its sole discretion, to provide an FA award in an amount other than that which the Applicant requests; however, the award amount will not exceed the Applicant's award request as stated in its Application.

**2. Healthy Food Financing Initiative—Financial Assistance (HFFI-FA) Awards:** HFFI-FA awards will be provided as a supplement to FA awards; therefore, only those Applicants that have been selected to receive an FA award through the CDFI Program FY 2016 Funding Round will be eligible to receive an HFFI-FA award. HFFI-FA awards can be in the form of loans, grants, Equity Investments, deposits and

credit union shares. The form of the HFFI-FA award is based on the form of the matching funds that the Applicant includes in its Application, unless Congress waives the matching funds requirement. Matching funds are required for HFFI-FA awards, must be from non-Federal sources, and cannot have been used as matching funds for any other Federal award. The CDFI Fund reserves the right, in its sole discretion, to provide an HFFI-FA award in an amount other than that which the Applicant requests; however, the award amount will not exceed the

Applicant's award request as stated in its Application.

3. *TA Grants:* TA is provided in the form of grants. The CDFI Fund reserves the right, in its sole discretion, to provide a TA grant in an amount other than which the Applicant requests; however, the TA grant amount will not exceed the Applicant's request as stated in its Application and the applicable budget chart.

*C. Eligible Activities:*

1. *FA Awards:*

FA and HFFI-FA award funds can be expended for activities in the following

five categories: (i) Financial Products; (ii) Financial Services; (iii) Loan Loss Reserves; (iv) Development Services; and (v) Capital Reserves. FA awards can only be used for direct costs associated with an eligible activity; no indirect expenses are allowed. Up to 15 percent of the FA award can be used for Direct Administrative Expenses associated with an eligible FA activity. For purposes of this NOFA, the five eligible activity categories are defined as follows:

TABLE 3—FA AND HFFI-FA ELIGIBLE ACTIVITY CATEGORIES

FA eligible activity	FA eligible activity definition	Eligible CDFI institution types
i. Financial Products .....	FA expended as loans, Equity Investments and similar financing activities (as determined by the CDFI Fund) including the purchase of loans originated by certified CDFIs and the provision of loan guarantees; in the case of CDFI Intermediaries, Financial Products may also include loans to CDFIs and/or emerging CDFIs and deposits in Insured Credit Union CDFIs, emerging Insured Credit Union CDFIs, and/or State-Insured Credit Union CDFIs.	All.
ii. Financial Services .....	FA expended for providing checking, savings accounts, check cashing, money orders, certified checks, automated teller machines, deposit taking, safe deposit box services, and other similar services.	Insured Depository Institutions only.
iii. Loan Loss Reserves .....	FA set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable made in the Applicant's Target Market, or for related purposes that the CDFI Fund deems appropriate.	All.
iv. Development Services .....	FA expended for activities undertaken by a CDFI, its Affiliate or contractor that promote community development and shall prepare or assist current or potential borrowers or investees to use the CDFI's Financial Products or Financial Services. For example, such activities include, financial or credit counseling; homeownership counseling; and business planning and management assistance.	All.
v. Capital Reserves .....	FA set aside as reserves to support the Applicant's ability to leverage other capital, for such purposes as increasing its net assets or serving the financing needs of its Target Market, or for related purposes as the CDFI Fund deems appropriate.	Insured Depository Institutions only.

2. *TA Grants:*

TA grant funds can be expended for the following seven eligible activity categories: (i) Compensation—personal services; (ii) Compensation—fringe

benefits; (iii) Professional Service Costs; (iv) Travel Costs; (v) Training and Education Costs; (vi) Equipment and other capital expenditures; and (vii) Supplies. Each of the eligible activity

categories will not be authorized for indirect costs and an associated indirect cost rate. For purposes of this NOFA, the seven eligible activity categories are defined as follows:

TABLE 4—TA ELIGIBLE ACTIVITY CATEGORIES

(i) Compensation—personal services .....	TA paid to cover salaries of the Applicant's personnel that are paid currently or accrued by the Applicant for work performed directly related to carrying out the purpose of the TA grant (including activities related to becoming certified as a CDFI), subject to the applicable provisions of the Uniform Administrative Requirements.
(ii) Compensation—fringe benefits .....	TA paid to cover costs of the Applicant's personnel employment (other than the employees' salaries income) in proportion to the salary charged to the TA grant, to the extent that such payments are made under formally established and consistently applied organizational policies, subject to the applicable provisions of the Uniform Administrative Requirements.



TABLE 4—TA ELIGIBLE ACTIVITY CATEGORIES—Continued

(iii) Professional service costs .....	TA used to pay for professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the Recipient, subject to the applicable provisions of the Uniform Administrative Requirements. Payment for a consultant's services may not exceed the daily equivalent of the current maximum rate paid to an Executive Schedule Level IV Federal employee.
(iv) Travel costs .....	TA used to pay expenses for transportation, lodging, subsistence, and related items incurred by the Applicant's personnel who are on travel status on business related to the TA grant, subject to the applicable provisions of the Uniform Administrative Requirements.
(v) Training and education costs .....	TA used to pay the cost of training and education provided for employee development, subject to the applicable provisions of the Uniform Administrative Requirements.
(vi) Equipment .....	TA used to pay for tangible personal property, having a useful life of more than one year and a per-unit acquisition cost of at least \$5,000 and subject to the applicable provisions of the Uniform Administrative Requirements. Examples include office equipment, furnishings, and information technology equipment and systems.
(vii) Supplies .....	TA used to pay for tangible personal property with a per unit acquisition of less than \$5,000 and subject to the applicable provisions of the Uniform Administrative Requirements.

**III. Eligibility Information**

*A. Eligible Applicants:* For the purposes of this NOFA, the following tables set forth the eligibility criteria to be in contention to receive an award

from the CDFI Fund, along with certain definitions of terms. There are four categories of Applicant eligibility criteria: (1) CDFI certification criteria (Table 5); (2) requirements that apply to

all Applicants (Table 6); (3) requirements that apply to TA Applicants (Table 7); and (4) requirements that apply to FA Applicants (Table 8).

TABLE 5—CDFI CERTIFICATION CRITERIA DEFINITIONS

Certified CDFI .....	<ul style="list-style-type: none"> <li>• An entity that the CDFI Fund has officially notified that it meets all CDFI certification requirements.</li> </ul>
Certifiable CDFI (FA Applicants) .....	<ul style="list-style-type: none"> <li>• An entity that has submitted a CDFI Certification Application to the CDFI Fund demonstrating that it meets the CDFI certification requirements but which has not yet been officially certified. (See Table 11 for application submission deadlines.)</li> <li>• The CDFI Fund will not enter into an Assistance Agreement or make an FA award payment unless and until an Applicant is a Certified CDFI.</li> </ul>
Emerging CDFI (TA Applicants) .....	<ul style="list-style-type: none"> <li>• A non-Certified entity that has not submitted a CDFI Certification Application but demonstrates to the CDFI Fund in its Application that it has an acceptable plan to meet certification requirements by the end of its period of performance, or another date that the CDFI Fund selects.</li> <li>• An Emerging CDFI that has prior award(s) will be held to the CDFI certification performance goal and measure(s) stated in its prior Assistance Agreement(s).</li> <li>• Emerging CDFIs may only apply for TA grants; they are not eligible to apply for FA awards.</li> <li>• Each Emerging CDFI selected to receive a TA grant will be required to become a Certified CDFI by a date specified in the Assistance Agreement.</li> </ul>

TABLE 6—ELIGIBILITY REQUIREMENTS FOR ALL APPLICANTS

Applicant .....	<ul style="list-style-type: none"> <li>• Only the entity that will carry out the proposed award activities can apply for an award (e.g., the intended award Recipient).</li> <li>• The information in the Application should only reflect the activities of the Applicant, including the presentation of financial and portfolio information. Do not include financial or portfolio information from parent companies, Affiliates, or Subsidiaries in the Application unless it relates to the provision of Development Services.</li> <li>• An Applicant that applies on behalf of another organization will be rejected without further consideration, except for Depository Institution Holding Companies (see below).</li> </ul>
Application type and submission overview through Grants.gov and Awards Management Information System (AMIS).	<ul style="list-style-type: none"> <li>• Applicants must submit the required application documents listed in Table 10.</li> <li>• The CDFI Fund will only accept Applications that use the official application templates provided on the Grants.gov and AMIS websites. Applications submitted with alternative or altered templates will not be considered.</li> <li>• Applicants have a two-step process that requires the submission of application documents on two separate deadlines and locations: (1) Grants.gov and (2) AMIS. <ul style="list-style-type: none"> <li>○ Grants.gov: Applicants must submit the OMB SF-424, Application for Federal Assistance.</li> <li>○ AMIS: Applicants must submit all other required application materials.</li> <li>○ All Applicants must register in the Grants.gov and AMIS systems to successfully submit an application. The CDFI Fund strongly encourages applicants to register early as possible.</li> </ul> </li> <li>• Grants.gov and the SF-424: <ul style="list-style-type: none"> <li>○ The SF-424 must be submitted in Grants.gov on or before March 18, 2016, the deadline listed in Table 1 and Table 11. Applicants are strongly encouraged to submit their SF-424 as early as possible in the Grants.gov portal.</li> <li>○ The deadline for the Grants.gov submission is before the AMIS deadline.</li> </ul> </li> </ul>

TABLE 6—ELIGIBILITY REQUIREMENTS FOR ALL APPLICANTS—Continued

	<ul style="list-style-type: none"> <li>○ If the SF-424 is not accepted by Grants.gov by the deadline, the CDFI Fund will not review any material submitted in AMIS and the application will be deemed ineligible.</li> <li>● AMIS: <ul style="list-style-type: none"> <li>○ AMIS is a new enterprise-wide information technology system that is replacing the myCDFI Fund portal and which will be used to submit and store organization and application information with the CDFI Fund.</li> <li>○ Applicants are only allowed one submission in AMIS.</li> <li>○ Only the Authorized Representative or Application Point of Contact can submit the Application in AMIS.</li> <li>○ All other required application materials must be submitted in AMIS on or before the deadline specified in Tables 1 and 11.</li> </ul> </li> </ul>
Employer Identification Number (EIN) .....	<ul style="list-style-type: none"> <li>● Applicants must have a unique EIN assigned by the IRS.</li> <li>● The CDFI Fund will reject an Application submitted with the EIN of a parent or Affiliate organization.</li> </ul>
DUNS number .....	<ul style="list-style-type: none"> <li>● Pursuant to OMB guidance (68 FR 38402), an Applicant must apply using its unique DUNS number in Grants.gov.</li> <li>● The CDFI Fund will reject an Application submitted with the DUNS number of a parent or Affiliate organization.</li> </ul>
Awards Management Information System (AMIS).	<ul style="list-style-type: none"> <li>● Each Applicant must register as an organization in AMIS and submit all required application materials through the AMIS portal.</li> <li>● The Authorized Representative and/or Application point of contact must be included as “users” in the Applicant’s AMIS account.</li> <li>● An Applicant that fails to properly register and update its AMIS account may miss important communication from the CDFI Fund or not be able to successfully submit an Application.</li> </ul>
501(c)(4) status .....	<ul style="list-style-type: none"> <li>● Pursuant to 2 U.S.C. 1611, a 501(c)(4) any organization that engages in lobbying activities is not eligible for the receipt of a CDFI or NACA Program award.</li> </ul>
Compliance with Federal civil rights requirements.	<ul style="list-style-type: none"> <li>● An Applicant may not be eligible to receive an award if proceedings have been instituted against it in, by, or before any court, governmental agency, or administrative body, and a final determination within the last three years indicates the Applicant has violated any of the following laws: Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C.2000d); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975, (42 U.S.C. 6101–6107), and Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency.</li> </ul>
Depository Institution Holding Company Applicant.	<ul style="list-style-type: none"> <li>● In the case where a CDFI Depository Institution Holding Company Applicant intends to carry out the activities of an award through its CDFI Subsidiary Insured Depository Institution, the Application must be submitted by the CDFI Depository Institution Holding Company and reflect the activities and financial performance of the CDFI Subsidiary Insured Depository Institution.</li> <li>● Authorized representatives of both the Depository Institution Holding Company and the CDFI Subsidiary Insured Depository Institution must certify that the information included in the Application represents that of the CDFI Subsidiary Insured Depository Institution and that the award funds will be used to support the CDFI Subsidiary Insured Depository Institution for the eligible activities outlined in the Application.</li> </ul>
Insured CDFI—Insured Credit Union and Insured Depository Institution.	<ul style="list-style-type: none"> <li>● To be eligible for an award, each Insured Depository Institution Applicant must have a CAMELS/CAMEL (rating for banks and credit unions, respectively), by its Federal regulator of at least “4.”</li> <li>● Organizations with CAMELS/CAMEL ratings of “5” will not be eligible for awards.</li> </ul>
Use of award .....	<ul style="list-style-type: none"> <li>● All awards made through this NOFA must be used to support the Applicant’s activities in at least one of the FA or TA Eligible Activity Categories (see Section II.C).</li> <li>● Awards cannot be used to support the activities of, or otherwise be passed through, transferred, or co-awarded to, third-party entities, whether Affiliates, Subsidiaries, or others (except Depository Institution Holding Company Applicants.)</li> </ul>
Requested award amount for eligible activities ..	<ul style="list-style-type: none"> <li>● An Applicant must state its requested award amount and proposed eligible activities in the “Award Request Table” of the Purpose section of the Application.</li> <li>● An Applicant that does not fully complete the “Award Request Table” of the Purpose Application section in the AMIS website will not be allowed to submit an Application.</li> </ul>
Pending resolution of noncompliance .....	<ul style="list-style-type: none"> <li>● The CDFI Fund will consider an Application submitted by an Applicant that has pending noncompliance issues if the CDFI Fund has not yet made a final determination as to whether the Applicant is in default of any of its previously executed award agreement(s).</li> </ul>
Default or Noncompliance status .....	<ul style="list-style-type: none"> <li>● The CDFI Fund will not consider an Application submitted by an Applicant that has been notified by the CDFI Fund in writing that it is in default of a previously executed award agreement under any CDFI Fund program, at the time of the Application deadline, unless otherwise indicated by the CDFI Fund in writing. The CDFI Fund will not consider an Application submitted by an Applicant that has been notified by the CDFI Fund in writing that it is noncompliant with an FY 2015 award agreement, or with agreements for fiscal years thereafter, under any CDFI Fund program, at the time of the Application deadline, unless otherwise indicated by the CDFI Fund in writing.</li> <li>● The CDFI Fund will not consider any Applicant that has defaulted on a CDFI Program loan within five years of the Application deadline.</li> </ul>
Undisbursed award funds and calculations (general).	<ul style="list-style-type: none"> <li>● An Applicant that has funds from a prior award that have not been disbursed, as defined in (a)—(d) below, as of the Application deadline will not be eligible for an award. <ul style="list-style-type: none"> <li>(a) The CDFI Fund will include the combined undisbursed award funds of the Applicant and its Affiliates.</li> </ul> </li> </ul>

TABLE 6—ELIGIBILITY REQUIREMENTS FOR ALL APPLICANTS—Continued

	<p>(b) Balances on undisbursed award funds cannot exceed five percent of the combined BEA Program awards made to the Applicant in FYs 2012, 2013, and 2014.</p> <p>(c) Balances on undisbursed award funds cannot exceed five percent of the combined CDFI/NACA Program awards made to the Applicant in FYs 2012, 2013, and 2014.</p> <p>(d) The undisbursed award funds calculation does not include award funds for: (i) Which the Recipient has submitted a full and complete disbursement request before the Application deadline; (ii) an award that has been terminated or de-obligated; or (iii) an award that does not have a fully executed award agreement; and (iv) the tax credit allocation authority made available through the NMTC Program.</p>
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TABLE 7—ELIGIBILITY REQUIREMENTS FOR TA APPLICANTS

CDFI certification status	<p>(1) Emerging CDFIs (see definitions in Table 5), or</p> <p>(2) Certifiable or Certified CDFIs (see Table 5) that meet the following criteria:</p> <p>(1) Have total assets* as of the end of the Applicant's most recent fiscal year end in the following amounts:</p> <ul style="list-style-type: none"> <li>• Insured Depository Institutions and Depository Institution Holding Companies: up to \$250 million</li> <li>• Insured Credit Unions: up to \$10 million</li> <li>• Venture capital funds: up to \$10 million</li> <li>• Other CDFIs: up to \$5 million</li> </ul> <p>OR</p> <p>(2) Have begun operations** on or after January 1, 2012.</p> <p>*“Total assets” is defined as the Total Assets of Fiscal Year End Date stated in the Applicant's AMIS account and verified by internally prepared financial statements and/or audits.</p> <p>**“Have begun operations” is defined as the financing activity start date indicated in the Applicant's AMIS account.</p>
Matching funds .....	<ul style="list-style-type: none"> <li>• Matching funds documentation is not required for TA awards.</li> </ul>
Limitation on Awards ....	<ul style="list-style-type: none"> <li>• An Emerging CDFI will be allowed to receive no more than three TA awards as an uncertified CDFI.</li> </ul>

TABLE 8—ELIGIBILITY REQUIREMENTS FOR FA APPLICANTS

CDFI certification status	<ul style="list-style-type: none"> <li>• Each FA Applicant must be a Certified CDFI prior to the announcement of award decisions.</li> <li>• An Applicant that is in a cure period to remedy CDFI recertification deficiencies at the time of award announcements will not be eligible for an FA award under this NOFA.</li> </ul>
Matching funds documentation.	<ul style="list-style-type: none"> <li>• All Applicants must submit acceptable documentation that they have received or will receive matching funds. Applications that do not submit acceptable matching funds documentation will not be evaluated.</li> <li>• Awards will be limited to no more than two times the amount of In-Hand or Committed matching funds documentation provided at the time of Application.</li> <li>• Awards will be obligated in like form to the matching funds provided at time of Application. See Table 9. Matching Funds “Determination of Award Form” for additional guidance.</li> <li>• Award payments from the CDFI Fund will require eligible dollar-for-dollar In-Hand matching funds for the total payment amount. Recipients will not receive a payment until 100 percent of their matching funds are In-Hand.</li> <li>• The first payment is the estimated amount of award that the Recipient will use for eligible FA activities in the first 12 months after the award.</li> </ul>
\$5 Million funding cap ..	<ul style="list-style-type: none"> <li>• The CDFI Fund will reduce and de-obligate the remaining balance of any Award that does not demonstrate full dollar-for-dollar matching funds equal to the announced award amount by the end of the Matching Funds Window.</li> <li>• The CDFI Fund is prohibited from obligating more than \$5 million in CDFI and NACA Program awards, in the aggregate, to any one organization and its Subsidiaries and Affiliates during any three-year period.</li> <li>• For purposes of this NOFA, the CDFI Fund will include CDFI and NACA Program final awards in the cap calculation that were provided to an Applicant (and/or its Subsidiaries or Affiliates) under the FY 2014, and 2015 funding rounds, as well as the requested FY 2016 award, excluding HFFI-FA awards. The CDFI Fund will make the FY 2016 funding round award announcements after September 23, 2016.</li> </ul>
FA Category I (SECA)	<ul style="list-style-type: none"> <li>• To be an eligible SECA Applicant, an Applicant must meet the following criteria: <ul style="list-style-type: none"> <li>(1) Be a Certified or Certifiable CDFI;</li> <li>(2) Request \$700,000 or less in FA funds; AND EITHER</li> <li>(3) Have total assets* as of the end of the Applicant's most recent fiscal year end in the following amounts: <ul style="list-style-type: none"> <li>• Insured Depository Institutions and Depository Institution Holding Companies: up to \$250 million.</li> <li>• Insured Credit Unions: Up to \$10 million.</li> <li>• Venture capital funds: Up to \$10 million.</li> <li>• Other CDFIs: Up to \$5 million OR</li> </ul> </li> <li>(4) Have begun operations** on or after January 1, 2012.</li> </ul> </li> </ul> <p>*“Total assets” is defined as the Total Assets of Fiscal Year End Date stated in the Applicant's AMIS account and verified by internally prepared financial statements and/or audits.</p> <p>**“Have begun operations” is defined as the financing activity start date indicated in the Applicant's AMIS account.</p>
FA Category II (Core) ..	<ul style="list-style-type: none"> <li>• A Core Applicant must be either a Certified or Certifiable CDFI as defined in Table 5.</li> <li>• An Applicant that meets the SECA requirements stated above, that requests more than \$700,000 in award funds is categorized as an FA Category II (Core) Applicant, regardless of its total assets and/or years in operation.</li> </ul>
HFFI-FA .....	<ul style="list-style-type: none"> <li>• All HFFI-FA Applicants must: <ul style="list-style-type: none"> <li>○ Apply for an FA award;</li> <li>○ Meet all FA award eligibility requirements; and</li> <li>○ Complete and submit a CDFI/NACA Program Financial Assistance Application along with the HFFI-FA Narrative Application section at the time of Application;</li> </ul> </li> </ul>

TABLE 8—ELIGIBILITY REQUIREMENTS FOR FA APPLICANTS—Continued

	<ul style="list-style-type: none"> <li>○ Provide an HFFI-FA award request amount in the “Award Request Table” of the Purpose section in the Application.</li> </ul>
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*B. Matching Funds Requirements:* In order to receive an FA award, an Applicant must provide documentation of eligible dollar-for-dollar matching funds. The CDFI Fund will review matching funds documentation prior to award payment and will pay funds

based upon eligible In-Hand matching funds (see Table 9 for the definition of In-Hand). The CDFI Fund encourages Applicants to review the Regulations at 12 CFR 1805.500, the Uniform Administrative Requirements, and the matching funds guidance materials

available on the CDFI Fund’s Web site. Table 9 provides a summary of the matching funds requirements; additional details are set forth in the Application materials.

TABLE 9—MATCHING FUNDS REQUIREMENTS

Matching funds requirements by application type.	<p>The following Applicants must provide documentation of acceptable matching funds:</p> <ul style="list-style-type: none"> <li>• Category I/SECA FA Applicants (upon request)*;</li> <li>• Category II/Core FA Applicants; and</li> <li>• HFFI-FA Applicants. (upon request)*</li> </ul> <p>TA Applicants are not required to provide matching funds.</p> <p>*The matching funds requirement for HFFI-FA and SECA FA applicants was waived in the appropriations bill for FY 2016. HFFI-FA and SECA FA applicants are not required to submit matching funds for their award requests at the time of application.</p>
Amount of required match.	Applicants must submit supporting documentation of eligible, In-Hand, dollar-for-dollar, non-Federal matching funds for every FA award dollar to be paid by the CDFI Fund. If awarded, Applicants that did not demonstrate 100% In-Hand matching funds at the time of Application may experience a longer payment timeline.
Determination of award form.	<p>FA awards will be made in comparable form and value to the eligible In-Hand and/or Committed matching funds documentation submitted by the Applicant.</p> <ul style="list-style-type: none"> <li>• For example, if an FA Applicant provides documentation of eligible loan matching funds for \$200,000 and \$400,000 of its matching funds in the form of grant, the CDFI Fund will obligate \$200,000 of the FA award as a loan and \$400,000 as a grant.</li> <li>• After awards have been announced, Award Recipients may request the CDFI Fund’s permission to change the form of their award from loan to grant (by producing eligible grant matching funds), but will only be eligible to receive a grant equal to the federal credit subsidy amount associated with the original loan. Applicants will also experience delays in payments if requested award form changes are approved by the CDFI Fund.</li> </ul>
Matching Funds Window definition.	<ul style="list-style-type: none"> <li>• The Applicant must receive eligible In-Hand matching funds between January 1, 2014 and January 15, 2017.</li> <li>• An award Recipient must provide the CDFI Fund with all documentation demonstrating the receipt of In-Hand matching funds by January 31, 2017.</li> </ul>
Matching funds and form of award.	<ul style="list-style-type: none"> <li>• Recipients will be approved for a maximum award size of two times the total amount of eligible In-Hand and/or Committed matching funds documentation included in the Application, so long as they do not exceed the award amount limit.</li> <li>• The form of the matching funds documented in the Application determines the form of the award.</li> </ul>
In-Hand matching funds definition.	<ul style="list-style-type: none"> <li>• Matching funds are eligible and In-Hand when the Applicant receives payment for the matching funds and includes acceptable documentation in the Application, showing the source, form (e.g., grant, loan, deposit, and Equity Investment), amount of the matching funds, and the date the funds came into physical possession of the applicant.</li> <li>• The following documentation, depending on the type of award being requested, must be included in the Application: <ul style="list-style-type: none"> <li>• Loan—the loan agreement and/or promissory note;</li> <li>• grant—the grant letter or agreement for all grants of \$100,000 or more;</li> <li>• Equity Investment—the stock certificate and shareholder agreement;</li> <li>• retained earnings—audits or call reports from regulating entity; and</li> <li>• third party in-kind contribution—evidence of receipt of contribution and valuation; AND</li> <li>• clearly legible documentation that demonstrates actual receipt of the matching funds including the date of the transaction and the amount, such as a copy of a check or a wire transfer statement.</li> </ul> </li> <li>• Grants under \$100,000 only require the source name, amount, date of receipt, and source contact information. Documentation of this information should be available if audited.</li> </ul>
Committed matching funds definition.	<ul style="list-style-type: none"> <li>• Matching funds are Committed when the Applicant has entered into or received a legally binding commitment from the matching funds source showing the matching funds will be disbursed to the Applicant at a future date.</li> <li>• The Applicant must provide the CDFI Fund acceptable written documentation showing the source, form, and amount of the Committed matching funds (including, in the case of a loan, the terms thereof), as well as the anticipated payment date of the Committed funds.</li> </ul>
Limitations on matching funds.	<ul style="list-style-type: none"> <li>• Matching funds must be from non-Federal sources.</li> <li>• Applicants cannot proffer matching funds that were accepted as matching funds for a prior FA award under the CDFI Program, NACA Program, or under another Federal grant or award program.</li> <li>• Matching funds must comply with Regulations at 12 CFR 1805.500 et seq.</li> <li>• Matching funds must be attributable to at least one of the five eligible FA activities (see Section II.C).</li> </ul>
Rights of the CDFI Fund.	<ul style="list-style-type: none"> <li>• The CDFI Fund reserves the right to contact the matching funds source to discuss the matching funds and the documentation that the Applicant provided.</li> <li>• The CDFI Fund may grant an extension of the Matching Funds Window (defined in Table 9), on a case-by-case basis, if the CDFI Fund deems it appropriate.</li> <li>• The CDFI Fund reserves the right to rescind all or a portion of an FA award and re-allocate the rescinded award amount to other qualified Applicant(s), if an award Recipient fails to obtain In-Hand 100 percent of the required Matching Funds during the Matching Funds Window.</li> </ul>

TABLE 9—MATCHING FUNDS REQUIREMENTS—Continued

Matching funds in the form of third-party in-kind contributions.	<ul style="list-style-type: none"> <li>• Third party in-kind contributions are the value of non-cash contributions (i.e., property or services) provided by non-Federal third parties.</li> <li>• Third party in-kind contributions will be considered to be in the form of a grant for matching funds purposes.</li> <li>• Third party in-kind contributions may be in the form of real property, equipment, supplies, and other expendable property, and the value of goods and services directly benefiting the eligible activities.</li> <li>• For third-party in-kind contributions, the fair market value of goods and services must be documented.</li> <li>• Applicants will be responsible for documenting the value of all in-kind contributions as described in the Uniform Administrative Requirements.</li> </ul>
Matching funds in the form of a loan.	<ul style="list-style-type: none"> <li>• An FA award made in the form of a loan will have the following standardized terms: <ul style="list-style-type: none"> <li>• A 13-year term with semi-annual interest-only payments due in years 1 through 10, and fully amortizing payments due each year in years 11 through 13; and</li> <li>• A fixed interest rate of 2.2 percent, which was calculated by the CDFI Fund based on the U.S. Department of the Treasury's 10-year Treasury note.</li> </ul> </li> <li>• The Applicant's matching funds loan(s) must: <ol style="list-style-type: none"> <li>i. have a minimum of a 3-year term. Loans presented as matching funds with less than a 3-year term will not qualify as eligible match; and</li> <li>ii. not be from a Federal source.</li> </ol> </li> </ul>
Severe Constraints Waiver.	<ul style="list-style-type: none"> <li>• Not more than 25 percent of the total funds available for obligation under this funding round may be matched under the Severe Constraints Waiver.</li> <li>• In the case of an Applicant demonstrating severe constraints on available sources of matching funds, the CDFI Fund, in its sole discretion, may permit such Applicant to comply with the matching funds requirements by reducing such requirements by up to 50 percent.</li> <li>• In order to be considered eligible for a Severe Constraints Waiver, an Applicant must meet all of the SECA eligibility criteria described in Table 8 and follow the instructions in the Application materials.</li> </ul>
Ineligible matching funds.	<ul style="list-style-type: none"> <li>• If the CDFI Fund determines that any portion of the Applicant's matching funds is ineligible, the CDFI Fund will permit the Applicant to offer documentation of alternative matching funds as a substitute for the ineligible matching funds.</li> <li>• In such instances: <ol style="list-style-type: none"> <li>i. the Applicant must provide acceptable alternative matching funds documentation within the period of time specified by the CDFI Fund, and</li> <li>ii. the alternative matching funds documentation will not increase the total amount of FA requested.</li> </ol> </li> </ul>
Use of matching funds from a prior CDFI Program Recipient.	<p>If an Applicant offers matching funds documentation from an organization that was a prior Recipient under the CDFI Program, the Applicant must be able to prove to the CDFI Fund's satisfaction that such funds do not consist, in whole or in part, of CDFI Program funds or other Federal funds.</p>
Matching funds in the form of retained earnings.	<ul style="list-style-type: none"> <li>• Retained earnings are eligible for use as matching funds when the CDFI Fund calculates an amount equal to: <ol style="list-style-type: none"> <li>i. The increase in retained earnings that occurred over any one of the Applicant's fiscal years within the Matching Funds Window, adjusted to remove revenue and expenses derived from Federal sources and matching funds previously used for an award; or</li> <li>ii. the annual average of such increases that occurred over any three consecutive fiscal years of the Applicant with at least one of the fiscal years occurring within the Matching Funds Window, adjusted to remove revenue and expenses derived from Federal sources and matching funds previously used for an award; or</li> <li>iii. any combination of (i) and (ii) above that does not include matching funds previously used for an award.</li> </ol> </li> <li>• Retained earnings will be matched with an FA award in the form of a grant or an Equity Investment.</li> </ul>
Special rule for Insured Credit Unions and Insured Depository Institutions.	<ul style="list-style-type: none"> <li>• An Insured Credit Union's and Insured Depository Institution's retained earnings are eligible for use as matching funds when the CDFI Fund calculates an amount equal to: <ol style="list-style-type: none"> <li>i. The increase in retained earnings that occurred over any one of the Applicant's fiscal years within the Matching Funds Window, adjusted to remove revenue from Federal sources and matching funds previously used for an award; or</li> <li>ii. the annual average of such increases that occurred over any three consecutive fiscal years of the Applicant with at least one of the fiscal years occurring within the Matching Funds Window, adjusted to remove revenue and expenses derived from Federal sources and matching funds previously used for an award; or</li> <li>iii. the entire retained earnings that have been accumulated since the inception of the Applicant, as provided in the Regulations.</li> </ol> </li> <li>• If option (iii) is used for Insured Credit Unions, the Applicant must increase its member and/or non-member shares and/or total loans outstanding by an amount equal to the amount of retained earnings committed as matching funds. <ul style="list-style-type: none"> <li>• This increase will be measured on a quarterly basis from March 31, 2016, and must occur by the end of the Recipient's Year 1 of Performance Period, as set forth in its Assistance Agreement, and will be based on amounts reported in the Applicant's National Credit Union Administration (NCUA) form 5300 Call Report.</li> <li>• The CDFI Fund will assess the likelihood of this increase during the Application review process.</li> <li>• An award will not be made to any Applicant that has not demonstrated in the relevant NCUA form 5300 Call Reports that it has increased shares and/or total loans outstanding by at least 25 percent of the requested FA award amount between December 31, 2014, and December 31, 2015.</li> <li>• The matching funds are not In-Hand until the Recipient has increased its member and/or non-member shares, deposits and/or total loans outstanding within the time period specified.</li> </ul> </li> <li>• If option (iii) is used for Insured Depository Institutions or Depository Institution Holding Companies, the Applicant or its Subsidiary Insured Depository Institution (in the case of a Depository Institution Holding Company) must increase deposits and/or total loans outstanding by an amount equal to the amount of retained earnings committed as matching funds. Please note that Depository Institution Holding Company Applicants must use the call reports of the CDFI Subsidiary Insured Depository Institution that the requested FA award will support. <ul style="list-style-type: none"> <li>• This increase will be measured on a quarterly basis from March 31, 2016, and must occur by the end of the Recipient's Year 1 of Performance Period, as set forth in its Assistance Agreement, and will be based on amounts reported in the Bank Call Report.</li> <li>• The CDFI Fund will assess the likelihood of this increase during the Application review process.</li> </ul> </li> </ul>

TABLE 9—MATCHING FUNDS REQUIREMENTS—Continued

	<ul style="list-style-type: none"> <li>• An award will not be made to any Applicant that has not demonstrated in the relevant call reports that it has increased deposits and/or total loans outstanding by at least 25 percent of the requested FA award amount between December 31, 2014, and December 31, 2015.</li> <li>• The matching funds are not In-Hand until the Recipient has increased its deposits and/or total loans outstanding within the time period specified.</li> <li>• All regulated Applicants utilizing the part (iii) Since Inception rule should refer to the Retained Earnings Guidance document on the Grants.gov and CDFI Fund websites.</li> </ul>
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#### IV. Application and Submission Information

*A. Address to Request an Application Package:* Application materials can be found on Grants.gov and the CDFI Fund's Web site at [www.cdfifund.gov/cdfi](http://www.cdfifund.gov/cdfi). Applicants may request a paper version of any Application material by contacting the CDFI Fund Help Desk at [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov).

#### *B. Content and Form of Application Submission:*

All Applications must be prepared using the English language and calculations must be made in U.S. dollars. The following table lists the required Application documents for the FY 2016 Funding Round. The CDFI Fund reserves the right to request and review other pertinent or public information that has not been

specifically requested in this NOFA or the Application. Information submitted by the Applicant that the CDFI Fund has not specifically requested will not be reviewed or considered as part of the Application. Information submitted must accurately reflect the Applicant's activities. Financial, portfolio, and activity information provided in the Application should only include the Applicant's activities.

TABLE 10—REQUIRED APPLICATION DOCUMENTS

Application documents	Applicant type	Submission format
SF-424 .....	All Applicants .....	Fillable PDF in Grants.gov.
CDFI Program Application Components: .....	All Applicants .....	AMIS.
<ul style="list-style-type: none"> <li>• Funding Application Detail Related Lists:</li> <li>• Application Financial Data <ul style="list-style-type: none"> <li>○ Financials and Portfolio</li> <li>○ Impacts</li> <li>○ Application Activities Levels</li> <li>○ Funders (Historic Only) *</li> </ul> </li> <li>• Matching Funds Used (FA Core Only).</li> <li>• Customer Snapshot Table.</li> <li>• Key Personnel.</li> <li>• Policies.</li> <li>• Product Design.</li> <li>• Narratives.</li> </ul>	* Funders is excluded for Insured Depository Institutions, TA Applicants, and NACA TA Applicants.	
HFFI-FA Application Components: .....	HFFI-FA Applicants .....	AMIS.
<ul style="list-style-type: none"> <li>• Funding Application Detail</li> <li>• Narratives</li> </ul>	—Must create new funding application.	
ATTACHMENTS TO THE APPLICATION: Add to "Related Attachments" related list in application.		
Matching Funds Documentation .....	FA Core Applicants .....	PDF or Excel (Retained Earnings Calculator only) in AMIS.
Policies and Procedures .....	FA Applicants .....	PDF in AMIS.
Key Staff Resumes .....	All Applicants .....	PDF or Word document in AMIS.
Organizational Chart .....	All Applicants .....	PDF in AMIS.
Audited Financial Statements .....	FA Applicants: Loan funds and other non-Insured Depository Institutions.	PDF in AMIS.
Management Letters .....	FA Applicants: Loan funds and other non-Insured Depository Institutions, TA Applicants: If available.	PDF in AMIS.
Unaudited Financial Statements (if Audited Financial Statements are not available).	TA Applicants: Loan funds and other non-Insured Depository Institutions.	PDF in AMIS.
Call Reports .....	FA and TA Applicants: Insured Depository Institutions only.	PDF in AMIS.
Current Year to Date—December 31, 2015, Unaudited Financial Statements.	FA and TA Applicants: Loan funds and other non-Insured Depository Institutions.	PDF in AMIS.
Additional Documents As Applicable: Community Partnership Agreement 501(c)(4) Questionnaire Explanation Environmental Review Form Explanation.	All Applicants, if applicable .....	PDF or Word document in AMIS.

**C. Application Submission:** The CDFI Fund has a two-step process that requires the submission of application documents on separate deadlines and locations. The SF-424 must be submitted through Grants.gov and all other application documents through the AMIS portal. The CDFI Fund will not accept Applications via email, mail, facsimile, or other forms of communication, except in extremely rare circumstances that have been pre-approved by the CDFI Fund. Applicants are only required to submit the OMB SF-424, Application for Federal Assistance form in Grants.gov as all other application information (listed in Table 10) will be submitted through AMIS. The deadline for submitting the SF 424 is 30 days after the publication of the NOFA. All other application information must be submitted in AMIS and only the Authorized Representative or Application Point of Contact can submit the application.

Applicants are encouraged to submit the SF-424 as early as possible through Grants.gov to provide time to resolve any submission problems. Applicants should contact Grants.gov directly with

questions related to the registration or submission process as the CDFI Fund does not maintain the Grants.gov system.

The CDFI Fund strongly encourages Applicants to start the Grants.gov registration process as soon as possible (refer to the following link: <http://www.grants.gov/web/grants/register.html>) as it may take several weeks to complete. An Applicant that has previously registered with Grants.gov must verify that its registration is current and active.

**D. Dun & Bradstreet Universal Numbering System (DUNS):** Pursuant to the Uniform Administrative Requirements, each Applicant must provide as part of its Application submission, a Dun and Bradstreet Universal Numbering System (DUNS) number. Applicants without a DUNS number will not be able to register and submit an Application in the Grants.gov system. Please allow sufficient time for Dun & Bradstreet to respond to inquiries and/or requests for DUNS numbers.

**E. System for Award Management (SAM):** Any entity applying for Federal grants or other forms of Federal financial assistance through Grants.gov

must be registered in SAM before submitting its Application. The SAM registration process can take several weeks to complete. Applicants that have previously completed the SAM registration process must verify that their SAM accounts are current and active. Each Applicant must continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an Application under consideration by a Federal awarding agency. The CDFI Fund will not consider any Applicant that fails to properly register or activate its SAM account and, as a result, is unable to submit its Application by the Application deadline. Applicants must contact SAM directly with questions related to registration or SAM account changes as the CDFI Fund does not maintain this system. For more information about SAM, please visit <https://www.sam.gov>.

**F. Submission Dates and Times:**

**1. Submission Deadlines:** The following table provides the critical deadlines for the FY 2016 Funding Round.

TABLE 11—FY 2016 FUNDING ROUND CRITICAL DEADLINES FOR APPLICANTS

Description	Deadline	Time (EDT)	Submission method
CDFI Certification Applications .....	March 18, 2016 .....	5:00 p.m. EDT .....	Award Management Information System (AMIS).
SF424 (Application for Federal Assistance) ....	March 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Grants.gov.
Last day to contact CDFI Program staff .....	April 15, 2016 .....	5:00 p.m. EDT .....	CDFI Fund Helpdesk: 202-653-0421 or <a href="mailto:cdfihelp@cdfi.treas.gov">cdfihelp@cdfi.treas.gov</a> .
CDFI Program Application for Financial Assistance (FA) or Technical Assistance (TA).	April 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Awards Management Information System (AMIS).

**2. Confirmation of Application Submission in Grants.gov and AMIS:** Applicants are required to submit the OMB SF-424, Application for Federal Assistance through the Grants.gov system and must submit all other required application materials through the AMIS Web site. Application materials submitted through both systems are due by the application deadlines. Applicants must submit the SF-424 on an earlier deadline from the other required application materials in AMIS. If the SF-424 is not successfully accepted by Grants.gov by the deadline, the CDFI Fund will not review any of the material submitted in AMIS and the Application will be deemed ineligible.

**(a) Grants.gov Submission Information:** Each Applicant will receive an email from Grants.gov immediately after submitting the SF-424 confirming that the submission has entered the Grants.gov system. This email will contain a tracking number for

the submitted SF-424. Within 48 hours, the Applicant will receive a second email, which will indicate if the submitted SF-424 was either successfully validated or rejected with errors. However, Applicants should not rely on the email notification from Grants.gov to confirm that their SF-424 was validated. Applicants are strongly encouraged to use the tracking number provided in the first email to closely monitor the status of their SF-424 by contacting the helpdesk at Grants.gov directly. The Application material submitted in AMIS is not officially accepted by the CDFI Fund until Grants.gov has validated the SF-424.

**(b) Award Management Information System (AMIS) Submission Information:** AMIS is a web-based portal where Applicants will directly enter their application information and add required attachments listed in Table 10. AMIS will verify that the Applicant provided the minimum information

required to submit an Application. Applicants are responsible for the quality and accuracy of the information and attachments included in the Application submitted in AMIS. The CDFI Fund strongly encourages the Applicant to allow sufficient time to confirm the Application content, review the material submitted, and remedy any issues prior to the Application deadline. Only the Authorized Representative or the application Point of Contact can submit the Application. Applicants can only submit one Application. Upon submission, the Application will be locked and cannot be resubmitted, edited, or modified in any way. The CDFI Fund will not unlock or allow multiple Applications submissions.

**4. Late Submission:** The CDFI Fund will not accept an Application submitted after the Application deadline except where the submission delay was a direct result of a Federal government administrative or



technological error. In such case, the Applicant must submit a written request for acceptance of late Application submission and include documentation of the error no later than two business days after the Application deadline. The CDFI Fund will not respond to request for acceptance of late Application submissions after that time period. Applicants must submit late Application submission requests to the CDFI Helpdesk at [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov) with a subject line of "Late Application Submission Request."

**G. Funding Restrictions:** FA, HFFI-FA and TA awards are limited by the following:

**1. FA awards:**

(a) An award Recipient shall use FA funds only for the eligible activities described in Section II. Award Description (C)(1) of this NOFA and its Assistance Agreement.

(b) A Recipient may not distribute FA funds to an Affiliate, Subsidiary, or any other entity, without the CDFI Fund's prior written approval.

(c) FA funds shall only be paid to the Recipient.

(d) The CDFI Fund, in its sole discretion, may pay FA funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

**2. HFFI-FA awards:**

(a) An award Recipient shall use HFFI-FA funds only for the eligible activities described in Section II. Award Description (C) (1) of this NOFA and its Assistance Agreement.

(b) A Recipient may not distribute HFFI-FA funds to an Affiliate, Subsidiary, or any other entity, without the CDFI Fund's prior written approval.

(c) HFFI-FA funds shall only be paid to the Recipient.

(d) The CDFI Fund, in its sole discretion, may pay HFFI-FA funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

**3. TA grants:**

(a) An award Recipient shall use TA funds only for the eligible activities described in Section II. Award Description (C) (2) of this NOFA and its Assistance Agreement.

(b) A Recipient may not distribute TA funds to an Affiliate, Subsidiary or any other entity, without the CDFI Fund's prior written consent.

(c) TA funds shall only be paid to the Recipient.

(d) The CDFI Fund, in its sole discretion, may pay TA funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

**V. Application Review Information**

**1. Criteria:** If the Applicant has submitted a complete and eligible

Application, the CDFI Fund will conduct a substantive review in accordance with the criteria and procedures described in the Regulations, this NOFA, the Application guidance, and the Uniform Administrative Requirements. The CDFI Fund reserves the right to contact the Applicant by telephone, email, or mail for the sole purpose of clarifying or confirming Application information. If contacted, the Applicant must respond within the time period communicated by the CDFI Fund or run the risk that its Application will be rejected.

**(a) Application Scoring and Award Selection (FA, HFFI-FA, and TA):** The CDFI Fund will evaluate each Application using the FA and TA Application Scoring Criteria described in the Application. An Applicant must receive a minimum 60 percent of the total score for the FA, HFFI-FA, and TA components in order to be considered for an award. An Applicant that is an Emerging CDFI will be rated, among other elements, on its plan to meet the requirements of a Certified CDFI within two years of the beginning of the period of performance (or if the Applicant is a prior TA Recipient, by the date specified in its previous Assistance Agreement).

The CDFI Fund will score each part as indicated in Tables 12 and 13.

**TABLE 12—FA & TA APPLICATION SCORING CRITERIA**

FA & TA narrative sections	FA Applicants (points)	TA Applicants (points)
Executive Summary .....	Not Scored	Not Scored
Purpose/Proposal .....	10	15
Products .....	10	10
Policies .....	10	10
People .....	10	15
Partnerships .....	10	5
Performance .....	40	30
Projections .....	10	15
Total Points .....	100	100

**TABLE 13—HFFI-FA APPLICATION SCORING CRITERIA**

HFFI-FA Narrative sections	HFFI-FA Applicants
HFFI Target Market Profile .....	4
Healthy Food Financial Products .....	5
Healthy Food Development Services .....	2
Projected HFFI-FA Activities .....	7
HFFI Track Record, Management Capacity for Providing Healthy Food Financing, Healthy Food Financing Outcomes .....	7
Total Points .....	25

**2. Review and Selection Process.** All Applications will be initially evaluated by external non-Federal reviewers who

are selected based on criteria that includes: A professional background in community and economic development

finance; experience reviewing financial statements of all CDFI institution types; and experience performing

underwriting of community and economic development projects. Reviewers must complete the CDFI Fund's conflict of interest process and be approved by the CDFI Fund. The CDFI Fund's application reader conflict of interest policy is located on the CDFI Fund's Web site.

TA Applications will be evaluated by one external reviewer; FA and HFFI-FA Applications will be evaluated by three external reviewers. All Applications will be reviewed in accordance with reviewer evaluation materials. Applications will be ranked based on Application scores, from highest to lowest. In the case of tied scores, Applicants will be ranked first according to each Performance score, then the Purpose section. TA Applicants, Category I, Category II, and HFFI-FA Applicants will be grouped and ranked separately.

3. *Programmatic and Financial Risk Analysis.* The CDFI Fund conducts three additional levels of due diligence for Applications that are in scoring contention for an award. This due diligence includes an analysis of programmatic and financial risk factors including, but not limited to: Financial stability; quality of management systems and ability to meet award management standards; history of performance in managing Federal awards (including timeliness of reporting and compliance); reports and findings from audits; and the Applicant's ability to effectively implement Federal requirements. Award amounts may be reduced as a result of this analysis. In addition, for FA awards, the CDFI Fund may reduce awards sizes from requested amounts based on certain variables, including an Applicant's loan disbursement activity, total portfolio outstanding, and similar factors. Lastly, the CDFI Fund may consider geographic diversity of Applicants when making its funding decisions.

4. *Insured Depository Institutions:* The CDFI Fund will consider safety and soundness information from the Appropriate Federal or State Banking Agency. If the Applicant is a CDFI Depository Institution Holding Company, the CDFI Fund will consider information provided by the Appropriate Federal or State Banking Agencies about both the CDFI Depository Institution Holding Company and the CDFI Certified Insured Depository Institution that will expend and carry out the award. If the Appropriate Federal Banking Agency or Appropriate State Agency identifies safety and soundness concerns, the CDFI Fund will assess whether the concerns cause or will cause the

Applicant to be incapable of undertaking the activities for which funding has been requested.

5. *Non-Regulated Institutions:* In accordance with the CDFI Program's authorizing statute and regulations, the CDFI Fund must ensure, to the maximum extent practicable, that recipients that are non-regulated CDFIs are financially and managerially sound and maintain appropriate internal controls (12 U.S.C. 4707(f)(1)(A) and 12 CFR 1805.800(b)). Further, the CDFI Fund must determine that an Applicant's capacity to operate as a CDFI will not be dependent upon assistance from the CDFI Fund for continued viability (12 U.S.C. 4704(b)(2)(A)). If it is determined the Applicant is incapable of meeting these requirements, the CDFI Fund reserves the right to deem the Applicant ineligible or terminate the award.

6. *Anticipated Award Announcement:* The CDFI Fund anticipates making CDFI Program award announcements after September 23, 2016 and before September 30, 2016.

7. *Application Rejection:* The CDFI Fund reserves the right to reject an Application if information (including administrative error) comes to the CDFI Fund's attention that either: Adversely affects an Applicant's eligibility for an award; adversely affects the Recipient's certification as a CDFI (to the extent that the award is conditional upon CDFI certification); adversely affects the CDFI Fund's evaluation or scoring of an Application; or indicates fraud or mismanagement on the Applicant's part. If the CDFI Fund determines any portion of the Application is incorrect in a material respect, the CDFI Fund reserves the right, in its sole discretion, to reject the Application. The CDFI Fund reserves the right to change its eligibility and evaluation criteria and procedures, if the CDFI Fund deems it appropriate. If the changes materially affect the CDFI Fund's award decisions, the CDFI Fund will provide information about the changes through its Web site. The CDFI Fund's award decisions are final and there is no right to appeal the decisions.

## VI. Federal Award Administration Information

A. *Award Notification:* Each successful Applicant will receive an email "notice of award" notification from the CDFI Fund stating that its Application has been approved for an award. Each Applicant not selected for an award will receive an email stating that a debriefing notice has been provided in its AMIS account.

B. *Assistance Agreement:* Each Applicant selected to receive an award must enter into an Assistance Agreement with the CDFI Fund in order to receive a payment(s). The Assistance Agreement will set forth the award's terms and conditions, including but not be limited to the: (i) Award amount; (ii) award type; (iii) award uses; (iv) eligible use of funds; (v) performance goals and measures; and (vi) reporting requirements. FA Assistance Agreements have three-year periods of performance; TA Assistance Agreements have two-year periods of performance.

1. *Certificate of Good Standing:* All FA and TA Recipients that are not Insured Depository Institutions will be required to provide the CDFI Fund with a certificate of good standing from the secretary of state for the Recipient's State of incorporation prior to closing. This certificate can often be acquired online on the secretary of state Web site for the Recipient's State of incorporation and must generally be dated within 270 days before the date the Recipient executes the Assistance Agreement. Due to potential backlogs in State government offices, Applicants are advised to submit requests for certificates of good standing no later than 60 days after they submit their Applications.

2. *Closing:* Pursuant to the Assistance Agreement, there will be an initial closing at which point the Assistance Agreement and related documents will be properly executed and delivered, and an initial payment of FA or TA may be made. FA Recipients that are subject to the matching funds requirement will not receive a payment until 100 percent of their matching funds are In-Hand. The first payment is the estimated amount of award that the Recipient states in its Application that it will use for eligible FA or TA activities in the first 12 months after the award.

The CDFI Fund will minimize the time between the Recipient incurring costs for eligible activities and award payment based on what is administratively feasible. The advanced payments for eligible activities will occur no more than one year in advance of the Recipient incurring costs for the eligible activities. Following the initial closing, there may be subsequent closings involving additional award payments. Any documents in addition to the Assistance Agreement that are connected with such subsequent closings and payments shall be properly executed and timely delivered by the Recipient to the CDFI Fund.

3. *Requirements Prior to Entering into an Assistance Agreement:* If, prior to entering into an Assistance Agreement,

information (including administrative error) comes to the CDFI Fund's attention that: Adversely affects the Recipient's eligibility for an award; adversely affects the Recipient's certification as a CDFI (to the extent that the award is conditional upon CDFI certification); adversely affects the CDFI Fund's evaluation of the Application; indicates that the Recipient is not in compliance with any requirement listed

the Uniform Administrative Requirements; or indicates fraud or mismanagement on the Recipient's part, the CDFI Fund may, in its discretion and without advance notice to the Recipient, terminate the award or take such other actions as it deems appropriate. The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Recipient fails to return the Assistance Agreement,

signed by the authorized representative of the Recipient, and/or provide the CDFI Fund with any other requested documentation, within the CDFI Fund's deadlines.

In addition, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Assistance Agreement and the award made under this NOFA pending the criteria described in the following table:

TABLE 14—REQUIREMENTS PRIOR TO EXECUTING AN ASSISTANCE AGREEMENT

Requirement	Criteria
Failure to meet reporting requirements .....	<ul style="list-style-type: none"> <li>• If a Recipient received a prior award under any CDFI Fund program and is not current with the reporting requirements in the previously executed agreement(s), the CDFI Fund can delay entering into an Assistance Agreement or disbursing an award until reporting requirements are met.</li> <li>• If such a Recipient is unable to meet the requirement within the timeframe specified, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> <li>• The automated systems the CDFI Fund uses only acknowledge a report's receipt, not a determination of meeting reporting requirements.</li> </ul>
Failure to maintain CDFI Certification .....	<ul style="list-style-type: none"> <li>• An FA Recipient must be a Certified CDFI prior to entering into an Assistance Agreement.</li> <li>• If an FA Recipient fails to maintain CDFI Certification, the CDFI Fund will terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> </ul>
Pending resolution of noncompliance .....	<ul style="list-style-type: none"> <li>• The CDFI Fund will delay entering into an Assistance Agreement with a Recipient that has pending noncompliance issues if the CDFI Fund has not yet made a final determination as to whether the Recipient is in default of its previously executed award agreement(s).</li> <li>• If the Recipient is unable to satisfactorily resolve the compliance issues, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> </ul>
Default or Noncompliance status .....	If, at any time prior to entering into an Assistance Agreement, the CDFI Fund determines that an Recipient is in default of a previously executed agreement with the CDFI Fund and the Recipient has been provided written notification of such determination, the CDFI Fund can delay entering into an Assistance Agreement, until the Recipient has cured the default by taking actions the CDFI Fund has specified within the specified timeframe. Further, if, at any time prior to entering into an Assistance Agreement, the CDFI Fund determines that an Recipient is noncompliant with an FY 2015 or later award agreement with the CDFI Fund and the Recipient has been provided written notification of such determination, the CDFI Fund can delay entering into an Assistance Agreement, until the Recipient has cured the non-compliance by taking actions the CDFI Fund has specified within the specified timeframe. If the Recipient is unable to meet the cure requirement within the specified timeframe, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.
Final Default and sanctions .....	If the CDFI Fund has found the Recipient in final default of a prior executed agreement and provided notification of sanctions, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA within the time period specified in such notification.
Compliance with Federal civil rights requirements.	If prior to entering into an Assistance Agreement under this NOFA, the Recipient receives a final determination, made within the last three years, in any proceeding instituted against the Recipient in, by, or before any court, governmental, or administrative body or agency, declaring that the Recipient has violated the following laws: Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C.2000d); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975, (42 U.S.C. 6101–6107), and Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, the CDFI Fund will terminate and rescind the Assistance Agreement and the award made under this NOFA.
Do Not Pay .....	<ul style="list-style-type: none"> <li>• The Do Not Pay Business Center was developed to support Federal agencies in their efforts to reduce the number of improper payments made through programs funded by the Federal government.</li> <li>• The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Recipient is identified as an ineligible recipient on the Do Not Pay database.</li> </ul>
Safety and soundness .....	<ul style="list-style-type: none"> <li>• If it is determined the Recipient is or will be incapable of meeting its award obligations, the CDFI Fund will deem the Recipient to be ineligible or require it to improve safety and soundness conditions prior to entering into an Assistance Agreement.</li> </ul>

### C. Reporting

1. *Reporting requirements:* On an annual basis for the period of

performance, the CDFI Fund may collect information from each Recipient

including, but not limited to, an Annual Report with the following components:

TABLE 15—ANNUAL REPORTING REQUIREMENTS

Financial Report (Financial Statements and Related Auditor's and Accountant's Review Reports, if applicable). Single Audit (if applicable) (or similar report).	The Financial Report will be reviewed by the CDFI Fund to determine the Recipient's financial and managerial soundness.
Institution Level Report (ILR).	If a Recipient is required to complete a Single Audit Report, it should be submitted to the Federal Audit Clearinghouse (see 2 CFR subpart F—Audit Requirements in the Uniform Administrative Requirements). For-profit Recipients will be required to complete and submit a similar report directly to the CDFI Fund. The ILR is a report used to collect compliance and performance data from CDFI Fund award Recipients. The ILR is submitted through the Community Investment Impact System (CIIS) and captures organizational information, financial position, lending and investing activities, community development outputs, and development services.
Transaction Level Report (TLR).	The TLR is a report used to collect compliance and performance data from CDFI Fund award Recipients. The TLR is submitted through the CIIS and captures data on each individual loan and investment in the award Recipient's portfolio. <ul style="list-style-type: none"> <li>For CDFI Depository Institution Holding Company award Recipients, the TLR captures data on the individual loans and investments by its CDFI Subsidiary Insured Depository Institution's portfolio.</li> <li>TLR is not required for TA Recipients.</li> </ul>
Federal Financial Report/OMB Standard Form 425.	If the Recipient receives a TA award, it must submit the Federal Financial Report/OMB Standard Form 425 via AMIS.
Uses of Funds Report .. Shareholders Report ....	If the Recipient receives an FA or TA award, it must submit the Uses of Funds Report via AMIS. If the Assistance is in the form of an Equity Investment, the Recipient must submit shareholder information to the CDFI Fund showing the class, series, and number of shares and valuation of capital stock held or to be held by each shareholder. The Shareholder Report must be submitted for as long as the CDFI Fund is an equity holder.

Each Recipient is responsible for the timely and complete submission of the Annual Reporting requirements. The CDFI Fund reserves the right to contact the Recipient and additional entities or signatories to the Assistance Agreement to request additional information and documentation. The CDFI Fund will use such information to monitor each Recipient's compliance with the requirements in the Assistance Agreement and to assess the impact of the CDFI Program. The CDFI Fund reserves the right, in its sole discretion, to modify these reporting requirements, including increasing the scope and frequency of reporting, if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after notice to Recipients.

**2. Financial Management and Accounting:** The CDFI Fund will require

Recipients to maintain financial management and accounting systems that comply with Federal statutes, regulations, and the terms and conditions of the Federal award. These systems must be sufficient to permit the preparation of reports required by general and program specific terms and conditions, including the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award.

The cost principles used by Recipients must be consistent with Federal cost principles and support the accumulation of costs as required by the principles, and must provide for adequate documentation to support costs charged to the CDFI Program award. In addition, the CDFI Fund will require Recipients to: Maintain effective

internal controls; comply with applicable statutes, regulations, and the Assistance Agreement; evaluate and monitor compliance; take action when not in compliance; and safeguard personally identifiable information.

## VII. Agency Contacts

A. The CDFI Fund will respond to questions concerning this NOFA and the Application between the hours of 9:00 a.m. and 5:00 p.m. Eastern Daylight Savings Time, starting on the date that the NOFA is published through the date listed in Table 1 and Table 11. The CDFI Fund will post on its Web site responses to reoccurring questions received about this Application. Other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's Web site at <http://www.cdfifund.gov>. Table 16 lists CDFI Fund contact information:

TABLE 16—CONTACT INFORMATION

Type of question	Telephone number (not toll free)	Email addresses
CDFI Program .....	202-653-0421, option 1 .....	<a href="mailto:cdfihelp@cdfi.treas.gov">cdfihelp@cdfi.treas.gov</a> .
Certification, Compliance Monitoring, and Evaluation .....	202-653-0423 .....	<a href="mailto:ccme@cdfi.treas.gov">ccme@cdfi.treas.gov</a> .
AMIS—IT Help Desk .....	202-653-0422 .....	<a href="mailto:AMIS@cdfi.treas.gov">AMIS@cdfi.treas.gov</a> .

**B. Information Technology Support:** For IT Assistance, submit an AMIS Service Request (Record Type of "General Inquiry"). In the Service Request form, select the appropriate program, then select "AMIS Technical Problem" as the Type. People who have visual or mobility impairments that

prevent them from using the CDFI Fund's Web site should call (202) 653-0422 for assistance (this is not a toll free number).

**C. Communication with the CDFI Fund:** The CDFI Fund will use contact information in AMIS to communicate with Applicants and Recipients. It is

imperative, therefore, that Applicants, Recipients, Subsidiaries, Affiliates, and signatories maintain accurate contact information in their accounts. This includes information such as contact names (especially for the authorized representative) listed in this NOFA's application materials, email addresses,

fax and phone numbers, and office locations.

**D. Civil Rights and Diversity:** Any person who is eligible to receive benefits or services from CDFI Fund or Recipients under any of its programs is entitled to those benefits or services without being subject to prohibited discrimination. The Department of the Treasury's Office of Civil Rights and Diversity enforces various Federal statutes and regulations that prohibit discrimination in financially assisted and conducted programs and activities of the CDFI Fund. If a person believes that s/he has been subjected to discrimination and/or reprisal because of membership in a protected group, s/he may file a complaint with: Associate Chief Human Capital Officer, Office of Civil Rights, and Diversity, 1500 Pennsylvania Ave. NW., Washington, DC 20220 or (202) 622-1160 (not a toll-free number).

#### VIII. Other Information

**A. Paperwork Reduction Act:** Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor a collection of information,

and an individual is not required to respond to a collection of information, unless it displays a valid OMB control number. If applicable, the CDFI Fund may inform Applicants that they do not need to provide certain Application information otherwise required. Pursuant to the Paperwork Reduction Act, the CDFI Program, and NACA Program Application has been assigned the following control number: 1559-0021.

**B. Application Information Sessions:** The CDFI Fund may conduct webinars or host information sessions for organizations that are considering applying to, or are interested in learning about, the CDFI Fund's programs. For further information, please visit the CDFI Fund's Web site at <http://www.cdfifund.gov>.

**Authority:** 12 U.S.C. 4701, et seq; 12 CFR parts 1805 and 1815; 2 CFR part 200.

**Mary Ann Donovan,**

*Director, Community Development Financial Institutions Fund.*

[FR Doc. 2016-03221 Filed 2-17-16; 8:45 am]

**BILLING CODE 4810-70-P**

## DEPARTMENT OF THE TREASURY

### Community Development Financial Institutions Fund

#### Native American CDFI Assistance Program (NACA Program) FY 2016 Funding Round

**Funding Opportunity Title:** Notice of Funds Availability (NOFA) inviting Applications for Financial Assistance (FA) awards or Technical Assistance (TA) grants under the Native American CDFI Assistance Program (NACA Program) FY 2016 Funding Round.

**Announcement Type:** Announcement of funding opportunity.

**Funding Opportunity Number:** CDFI-2016-NACA.

**Catalog of Federal Domestic Assistance (CFDA) Number:** 21.020.

**KEY DATES:**

TABLE 1—FY 2016 NACA PROGRAM FUNDING ROUND CRITICAL DEADLINES FOR APPLICANTS

Description	Deadline	Time (eastern daylight time—EDT)	Submission method
CDFI Certification Applications .....	March 18, 2016 .....	5:00 p.m. EDT .....	Award Management Information System (AMIS).
SF424 (Application for Federal Assistance).	March 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Grants.gov.
Last day to contact NACA Program staff ..	April 15, 2016 .....	5:00 p.m. EDT .....	CDFI Fund Helpdesk: 202-653-0421 or <a href="mailto:cdfihelp@cdfi.treas.gov">cdfihelp@cdfi.treas.gov</a> .
NACA Program Application for Financial Assistance (FA) or Technical Assistance (TA).	April 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Grants.gov and Awards Management Information System (AMIS).

**Executive Summary:** Through the NACA Program, the CDFI Fund provides (i) FA awards of up to \$1 million to Certified Community Development Financial Institutions (CDFIs) serving Native American, Alaska Native, or Native Hawaiian populations or Native American areas defined as Federally-designated reservations, Hawaiian homelands, Alaska Native Villages and U.S. Census Bureau-designated Tribal Statistical Areas (collectively, "Native Communities") to build their financial capacity to lend to their Target Markets, and (ii) TA grants of up to \$150,000 to build Certified, Certifiable, and Emerging CDFIs' organizational capacity to serve their Target Markets and Sponsoring Entities ability to create Certified CDFIs that serve Native Communities. All awards provided

through this NOFA are subject to funding availability.

#### I. Program Description

**A. History:** The CDFI Fund was established by the Riegle Community Development Banking and Financial Institutions Act of 1994 to promote economic revitalization and community development through investment in and assistance to CDFIs. Since its creation in 1994, the CDFI Fund has awarded over \$2 billion to CDFIs, community development organizations, and financial institutions through the Community Development Financial Institutions Program (CDFI Program), the Native American CDFI Assistance Program (NACA Program), the Bank Enterprise Award Program (BEA Program), the Capital Magnet Fund, and the Financial Education and Counseling Pilot Program. In addition, the CDFI

Fund has allocated more than \$43 billion in tax credit allocation authority through the New Markets Tax Credit Program (NMTC Program) and has obligated \$852 million in bond guarantees to Eligible CDFIs through the CDFI Bond Guarantee Program.

**B. Priorities:** Through the NACA Program's FA awards and TA grants, the CDFI Fund invests in and builds the capacity of for-profit and non-profit community based lending organizations known as Community Development Financial Institutions, or CDFIs. These organizations, Certified as CDFIs by the CDFI Fund, serve Native Communities.

**C. Program Regulations:** The regulations governing the CDFI Program are found at 12 CFR parts 1805 and 1815 (the Regulations), and are used by the CDFI Fund to govern, in general, the NACA Program, setting forth evaluation criteria and other program requirements.

The CDFI Fund encourages Applicants to review the Regulations, this NOFA, the Application, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200; 78 FR 78590) (Uniform Administrative Requirements) for a complete understanding of the NACA Program. Capitalized terms in this NOFA are defined in the Regulations, this NOFA, the Application, or the Uniform Administrative Requirements. Details regarding Application content requirements are found in the Application and related materials.

**D. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200):** The Uniform Administrative Requirements codifies financial, administrative, procurement,

and program management standards that Federal award agencies must follow. When evaluating award applications, awarding agencies must evaluate the risks to the program posed by each applicant, and each applicant's merits and eligibility. These requirements are designed to ensure that applicants for Federal assistance receive a fair and consistent review prior to an award decision. This review will assess items such as the Applicant's financial stability, quality of management systems, history of performance, and single audit findings. In addition, the Uniform Administrative Requirements includes guidance on audit requirements and other award compliance requirements for award Recipients.

**E. Funding limitations:** The CDFI Fund reserves the right to fund, in

whole or in part, any, all, or none of the Applications submitted in response to this NOFA. The CDFI Fund also reserves the right to reallocate funds from the amount that is anticipated to be available through this NOFA to other CDFI Fund initiatives that are designed to benefit Native American, Native Hawaiian, and Alaskan Native communities, particularly if the CDFI Fund determines that the number of awards made through this NOFA is fewer than projected.

## II. Federal Award Information

### A. Funding Availability:

**1. FY 2016 Funding Round:** The CDFI Fund expects to award, through this NOFA, approximately \$15.5 million as indicated in the following table:

TABLE 2—FY 2016 FUNDING ROUND ANTICIPATED CATEGORY AMOUNTS

Funding categories (see definition in Table 7)	Estimated total amount to be awarded (millions)	Award amount		Estimated number of awards	Average amount awarded in FY 2015
		Minimum	Maximum		
FA .....	\$12.5	\$100,000	\$1,000,000	21	\$606,000
TA .....	3	10,000	150,000	21	143,000
Total .....	15.5	.....	.....	40	.....
Healthy Food Financing Initiative—Financial Assistance (HFFI-FA) * .....	22	500,000	5,000,000	11	2,000,000

\* HFFI-FA appropriation will be allocated in one competitive round between the NACA and CDFI Program NOFAs.

The CDFI Fund reserves the right to award more or less than the amounts cited above in each category, based upon available funding and other factors, as appropriate.

**2. Funding Availability for the FY 2016 Funding Round:** Funds for the FY 2016 Funding Round were appropriated in the Consolidated Appropriations Act, 2016 (Pub. L. 114–113).

**3. Anticipated Start Date and Period of Performance:** The CDFI Fund anticipates the period of performance for the FY 2016 Funding Round will begin in September 2016. Specifically, the period of performance for TA grants begins with the date of the notice of the award and includes either (i) an Emerging or Certified CDFI award Recipient's two full consecutive fiscal years after the date of the notice of the award or (ii) a Sponsoring Entity award Recipient's four full consecutive fiscal years after the date of the notice of the award, during which the Recipient must meet the performance goals set forth in the Assistance Agreement. The period of performance for FA awards includes an award Recipient's three full consecutive fiscal years after the date of the notice of the award, during which time the

Recipient must meet its performance goals.

**B. Types of Awards:** Through the NACA Program, the CDFI Fund provides two types of awards: Financial Assistance (FA) and Technical Assistance (TA) awards. *An Applicant may submit an Application for a TA grant or an FA award, but not both.*

**1. FA Awards:** FA awards can be in the form of loans, grants, Equity Investments, deposits and credit union shares. The form of the FA award is based on the form of the matching funds that the Applicant includes in its Application, unless Congress waives the matching funds requirement. Matching funds are required for FA awards, must be from non-Federal sources, and cannot have been used as matching funds for any other Federal award. The CDFI Fund reserves the right, in its sole discretion, to provide an FA award in an amount other than that which the Applicant requests; however, the award amount will not exceed the Applicant's award request as stated in its Application.

**2. Healthy Food Financing Initiative—Financial Assistance (HFFI-FA) Awards:** HFFI-FA awards will be

provided as a supplement to FA awards; therefore, only those Applicants that have been selected to receive an FA award through the NACA Program FY 2016 Funding Round will be eligible to receive an HFFI-FA award. HFFI-FA awards can be in the form of loans, grants, Equity Investments, deposits and credit union shares. The form of the HFFI-FA award is based on the form of the matching funds that the Applicant includes in its Application, unless Congress waives the matching funds requirement. Matching funds are required for HFFI-FA awards, must be from non-Federal sources, and cannot have been used as matching funds for any other Federal award. The CDFI Fund reserves the right, in its sole discretion, to provide an HFFI-FA award in an amount other than that which the Applicant requests; however, the award amount will not exceed the Applicant's award request as stated in its Application.

**3. TA Grants:** TA is provided in the form of grants. The CDFI Fund reserves the right, in its sole discretion, to provide a TA grant in an amount other than which the Applicant requests; however, the TA grant amount will not

exceed the Applicant's request as stated in its Application and the applicable budget chart.

*C. Eligible Activities:*

*1. FA Awards:*

FA and HFFI-FA award funds can be expended for activities in the following

five categories: (i) Financial Products; (ii) Financial Services; (iii) Loan Loss Reserves; (iv) Development Services; and (v) Capital Reserves. FA awards can only be used for direct costs associated with an eligible activity; no indirect expenses are allowed. Up to 15 percent

of the FA award can be used for Direct Administrative Expenses associated with an eligible FA activity. For purposes of this NOFA, the five eligible activity categories are defined as follows:

TABLE 3—FA AND HFFI-FA ELIGIBLE ACTIVITY CATEGORIES

FA eligible activity	FA eligible activity definition	Eligible CDFI institution types
i. Financial Products .....	FA expended as loans, Equity Investments and similar financing activities (as determined by the CDFI Fund) including the purchase of loans originated by certified CDFIs and the provision of loan guarantees; in the case of CDFI Intermediaries, Financial Products may also include loans to CDFIs and/or emerging CDFIs and deposits in Insured Credit Union CDFIs, emerging Insured Credit Union CDFIs, and/or State-Insured Credit Union CDFIs.	All.
ii. Financial Services .....	FA expended for providing checking, savings accounts, check cashing, money orders, certified checks, automated teller machines, deposit taking, safe deposit box services, and other similar services.	Insured Depository Institutions only.
iii. Loan Loss Reserves .....	FA set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable made in the Applicant's Target Market, or for related purposes that the CDFI Fund deems appropriate.	All.
iv. Development Services .....	FA expended for activities undertaken by a CDFI, its Affiliate or contractor that promote community development and shall prepare or assist current or potential borrowers or investees to use the CDFI's Financial Products or Financial Services. For example, such activities include, financial or credit counseling; home ownership counseling; and business planning and management assistance.	All.
v. Capital Reserves .....	FA set aside as reserves to support the Applicant's ability to leverage other capital, for such purposes as increasing its net assets or serving the financing needs of its Target Market, or for related purposes as the CDFI Fund deems appropriate.	Insured Depository Institutions only.

*2. TA Grants:*

TA grant funds can be expended for the following seven eligible activity categories: (i) Compensation—personal services; (ii) Compensation—fringe

benefits; (iii) Professional Service Costs; (iv) Travel Costs; (v) Training and Education Costs; (vi) Equipment and other capital expenditures; and (vii) Supplies. Each of the eligible activity

categories will not be authorized for indirect costs and an associated indirect cost rate. For purposes of this NOFA, the seven eligible activity categories are defined as follows:

TABLE 4—TA ELIGIBLE ACTIVITY CATEGORIES

(i) Compensation—personal services .....	TA paid to cover salaries of the Applicant's personnel that are paid currently or accrued by the Applicant for work performed directly related to carrying out the purpose of the TA grant (including activities related to becoming certified as a CDFI), subject to the applicable provisions of the Uniform Administrative Requirements.
(ii) Compensation—fringe benefits .....	TA paid to cover costs of the Applicant's personnel employment (other than the employees' salaries income) in proportion to the salary charged to the TA grant, to the extent that such payments are made under formally established and consistently applied organizational policies, subject to the applicable provisions of the Uniform Administrative Requirements.
(iii) Professional service costs .....	TA used to pay for professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the Recipient, subject to the applicable provisions of the Uniform Administrative Requirements. Payment for a consultant's services may not exceed the daily equivalent of the current maximum rate paid to an Executive Schedule Level IV Federal employee.
(iv) Travel costs .....	TA used to pay expenses for transportation, lodging, subsistence, and related items incurred by the Applicant's personnel who are on travel status on business related to the TA grant, subject to the applicable provisions of the Uniform Administrative Requirements.
(v) Training and education costs .....	TA used to pay the cost of training and education provided for employee development, subject to the applicable provisions of the Uniform Administrative Requirements.



TABLE 4—TA ELIGIBLE ACTIVITY CATEGORIES—Continued

(vi) Equipment .....	TA used to pay for tangible personal property, having a useful life of more than one year and a per-unit acquisition cost of at least \$5,000 and subject to the applicable provisions of the Uniform Administrative Requirements. Examples include office equipment, furnishings, and information technology equipment and systems.
(vii) Supplies .....	TA used to pay for tangible personal property with a per unit acquisition of less than \$5,000 and subject to the applicable provisions of the Uniform Administrative Requirements.

**III. Eligibility Information**

*A. Eligible Applicants:* For the purposes of this NOFA, the following tables set forth the eligibility criteria to

receive an award from the CDFI Fund, along with certain definitions of terms. There are four categories of Applicant eligibility criteria: (1) CDFI certification criteria (Table 5); (2) requirements that

apply to all Applicants (Table 6); (3) requirements that apply to TA Applicants (Table 7); and (4) requirements that apply to FA Applicants (Table 8).

TABLE 5—CDFI CERTIFICATION CRITERIA DEFINITIONS

Certified CDFI .....	<ul style="list-style-type: none"> <li>• An entity that the CDFI Fund has officially notified that it meets all CDFI certification requirements.</li> </ul>
Certifiable CDFI .....	<ul style="list-style-type: none"> <li>• An entity that has submitted a CDFI Certification Application to the CDFI Fund demonstrating that it meets the CDFI certification requirements but which has not yet been officially certified.</li> <li>• The CDFI Fund will not enter into an Assistance Agreement or make an FA award payment unless and until an Applicant is a Certified CDFI.</li> </ul>
Emerging CDFI .....	<ul style="list-style-type: none"> <li>• A non-Certified entity that has not submitted a CDFI Certification Application but demonstrates to the CDFI Fund that it has an acceptable plan to meet certification requirements by the end of its period of performance, or another date that the CDFI Fund selects.</li> <li>• An Emerging CDFI that has prior award(s) will be held to the CDFI certification performance goal and measure(s) stated in its prior Assistance Agreement(s).</li> <li>• Emerging CDFIs may only apply for TA grants; they are not eligible to apply for FA awards.</li> <li>• Each Emerging CDFI selected to receive a TA grant will be required to become a Certified CDFI by a date specified in the Assistance Agreement.</li> </ul>
Sponsoring Entity .....	<ul style="list-style-type: none"> <li>• Sponsoring Entities include any legal organization that primarily serves Native Community with “primary” meaning, at least 50 percent of its activities are directed toward the Native Community.</li> <li>• An eligible organization that proposes to create a separate legal organization that will become a Certified CDFI serving Native Communities.</li> <li>• Sponsoring Entities may only apply for TA grants; they are not eligible to apply for FA awards.</li> <li>• Each Sponsoring Entity selected to receive a TA grant will be required to create and certify an Emerging CDFI by the dates specified in the Assistance Agreement.</li> </ul>
Definition of Native Other Targeted Population as Target Market.	<p>The CDFI Fund uses the following definitions, set forth in the Office of Management and Budget (OMB) Notice, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity (October 30, 1997), as amended and supplemented:</p> <p>(a) American Indian, Native American, or Alaska Native: A person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment; and</p> <p>(b) Native Hawaiian (living in Hawaii): A person having origins in any of the original peoples of Hawaii.</p>

TABLE 6—ELIGIBILITY REQUIREMENTS FOR ALL APPLICANTS

Applicant .....	<ul style="list-style-type: none"> <li>• Only the entity that will carry out the proposed award activities can apply for an award (<i>e.g.</i>, the intended award Recipient).</li> <li>• The information in the Application should only reflect the activities of the Applicant, including the presentation of financial and portfolio information. Do not include financial or portfolio information from parent companies, Affiliates, or Subsidiaries in the Application unless it relates to the provision of Development Services.</li> <li>• An Applicant that applies on behalf of another organization will be rejected without further consideration, except for Depository Institution Holding Companies (see below).</li> </ul>
Application type and submission overview through Grants.gov and Awards Management Information System (AMIS).	<ul style="list-style-type: none"> <li>• Applicants must submit the required application documents listed in Table 10.</li> <li>• The CDFI Fund will only accept Applications that use the official application templates provided on the Grants.gov and AMIS Web sites. Applications submitted with alternative or altered templates will not be considered.</li> <li>• Applicants have a two-step process that requires the submission of application documents on two separate deadlines and locations: 1) Grants.gov and 2) AMIS. <ul style="list-style-type: none"> <li>○ Grants.gov: Applicants must submit the OMB SF-424, Application for Federal Assistance.</li> <li>○ AMIS: Applicants must submit all other required application materials.</li> <li>○ All Applicants must register in the Grants.gov and AMIS systems to successfully submit an application. The CDFI Fund strongly encourages applicants to register early as possible.</li> </ul> </li> </ul>

TABLE 6—ELIGIBILITY REQUIREMENTS FOR ALL APPLICANTS—Continued

	<ul style="list-style-type: none"> <li>• Grants.gov and the SF-424: <ul style="list-style-type: none"> <li>○ The SF-424 must be submitted in Grants.gov on or before March 18, 2016, the deadline listed in Table 1 and Table 11. Applicants are strongly encouraged to submit their SF-424 as early as possible in the Grants.gov portal.</li> <li>○ The deadline for the Grants.gov submission is before the AMIS deadline.</li> <li>○ If the SF-424 is not accepted by Grants.gov by the deadline, the CDFI Fund will not review any material submitted in AMIS and the application will be deemed ineligible.</li> </ul> </li> <li>• AMIS: <ul style="list-style-type: none"> <li>○ AMIS is a new enterprise-wide information technology system that is replacing the myCDFI Fund portal and which will be used to submit and store organization and application information with the CDFI Fund.</li> <li>○ Applicants are only allowed one submission in AMIS.</li> <li>○ Only the Authorized Representative or Application Point of Contact can submit the Application in AMIS.</li> <li>○ All other required application materials must be submitted in AMIS on or before the deadline specified in Tables 1 and 11.</li> </ul> </li> </ul>
Employer Identification Number (EIN) .....	<ul style="list-style-type: none"> <li>• Applicants must have a unique EIN assigned by the IRS.</li> </ul>
DUNS number .....	<ul style="list-style-type: none"> <li>• The CDFI Fund will reject an Application submitted with the EIN of a parent or Affiliate organization.</li> <li>• Pursuant to OMB guidance (68 FR 38402), an Applicant must apply using its unique DUNS number in Grants.gov.</li> <li>• The CDFI Fund will reject an Application submitted with the DUNS number of a parent or Affiliate organization.</li> </ul>
Awards Management Information System (AMIS).	<ul style="list-style-type: none"> <li>• Each Applicant must register as an organization in AMIS and submit all required application materials through this portal.</li> <li>• The Authorized Representative and/or Application point of contact must be included as “users” in the Applicant’s AMIS account.</li> <li>• An Applicant that fails to properly register and update its AMIS account may miss important communication from the CDFI Fund or not be able to successfully submit an Application.</li> </ul>
501 (c)(4) status .....	<ul style="list-style-type: none"> <li>• Pursuant to 2 U.S.C. 1611, a 501 (c)(4) any organization that engages in lobbying activities is not eligible for the receipt of a NACA Program award.</li> </ul>
Compliance with Federal civil rights requirements.	<ul style="list-style-type: none"> <li>• An Applicant may not be eligible to receive an award if proceedings have been instituted against it in, by, or before any court, governmental agency, or administrative body, and a final determination within the last three years indicates the Applicant has violated any of the following laws: Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975, (42 U.S.C. 6101–6107), and Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency.</li> </ul>
Depository Institution Holding Company Applicant.	<ul style="list-style-type: none"> <li>• In the case where a CDFI Depository Institution Holding Company Applicant intends to carry out the activities of an award through its CDFI Subsidiary Insured Depository Institution, the Application must be submitted by the CDFI Depository Institution Holding Company and reflect the consolidated activities and financial performance of the CDFI Subsidiary Insured Depository Institution.</li> <li>• Authorized representatives of both the Depository Institution Holding Company and the CDFI Subsidiary Insured Depository Institution must certify that the information included in the Application represents that of the CDFI Subsidiary Insured Depository Institution and that the award funds will be used to support the CDFI Subsidiary Insured Depository Institution for the eligible activities outlined in the Application.</li> </ul>
Insured CDFI—Insured Credit Union and Insured Depository Institution.	<ul style="list-style-type: none"> <li>• To be eligible for an award, each Insured Depository Institution Applicant must have a CAMELS/CAMEL (rating for banks and credit unions, respectively), by its Federal regulator of at least “4.”</li> </ul>
Use of award .....	<ul style="list-style-type: none"> <li>• Organizations with CAMELS/CAMEL ratings of “5” will not be eligible for awards.</li> <li>• All awards made through this NOFA must be used to support the Applicant’s activities in at least one of the FA or TA Eligible Activity Categories (see Section II.C).</li> <li>• Awards cannot be used to support the activities of, or otherwise be passed through, transferred, or co-awarded to, third-party entities, whether Affiliates, Subsidiaries, or others (except Depository Institution Holding Company Applicants.)</li> </ul>
Requested award amount for eligible activities ..	<ul style="list-style-type: none"> <li>• An Applicant must state its requested award amount and proposed eligible activities in the “Award Request Table” of the Purpose section of the Application.</li> <li>• An Applicant that does not fully complete the “Award Request Table” of the Purpose Application section in the AMIS Web site will not be allowed to submit an Application.</li> </ul>
Pending resolution of noncompliance .....	<ul style="list-style-type: none"> <li>• The CDFI Fund will consider an Application submitted by an Applicant that has pending noncompliance issues if the CDFI Fund has not yet made a final determination as to whether the Applicant is in default of any of its previously executed award agreement(s).</li> </ul>
Default or Noncompliance status .....	<ul style="list-style-type: none"> <li>• The CDFI Fund will not consider an Application submitted by an Applicant that has been notified by the CDFI Fund in writing that it is in default of a previously executed award agreement under any CDFI Fund program, at the time of the Application deadline, unless otherwise indicated by the CDFI Fund in writing. The CDFI Fund will not consider an Application submitted by an Applicant that has been notified by the CDFI Fund in writing that it is noncompliant with an FY 2015 agreement, or with agreements for fiscal years thereafter, under any CDFI Fund program, at the time of the Application deadline, unless otherwise indicated by the CDFI Fund in writing.</li> <li>• The CDFI Fund will not consider any Applicant that has defaulted on a CDFI Program loan within five years of the Application deadline.</li> </ul>

TABLE 6—ELIGIBILITY REQUIREMENTS FOR ALL APPLICANTS—Continued

Undisbursed award funds and calculations (general).	<ul style="list-style-type: none"> <li>An Applicant that has funds from a prior award that have not been disbursed, as defined in (a)–(d) below, as of the Application deadline will not be eligible for an award. <ul style="list-style-type: none"> <li>(a) The CDFI Fund will include the combined undisbursed award funds of the Applicant and its Affiliates.</li> <li>(b) Balances on undisbursed award funds cannot exceed five percent of the combined BEA Program awards made to the Applicant in FYs 2012, 2013, and 2014.</li> <li>(c) Balances on undisbursed award funds cannot exceed five percent of the combined CDFI/NACA Program awards made to the Applicant in FYs 2012, 2013, and 2014.</li> <li>(d) The undisbursed award funds calculation does not include award funds for: (i) Which the Recipient has submitted a full and complete disbursement request before the Application deadline; (ii) an award that has been terminated or de-obligated; or (iii) an award that does not have a fully executed award agreement; and (iv) the tax credit allocation authority made available through the NMTC Program.</li> </ul> </li> </ul>
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TABLE 7—ELIGIBILITY REQUIREMENTS FOR TA APPLICANTS

CDFI certification status .....	<ul style="list-style-type: none"> <li>Certified, Certifiable, Emerging CDFIs, or Sponsoring Entities (see definitions in Table 5).</li> </ul>
Matching funds .....	<ul style="list-style-type: none"> <li>Matching funds documentation is not required for TA awards.</li> </ul>
Limitation on Awards .....	<ul style="list-style-type: none"> <li>An Emerging CDFI serving Native Communities will be allowed to receive no more than three TA awards as an uncertified CDFI.</li> <li>A Sponsoring Entity is only eligible to apply for an award if (i) it does not have an active prior award or (ii) the certification goal in its active award's Assistance Agreement has been satisfied and it proposes to create another CDFI that will serve one or more Native Communities.</li> </ul>
Target Market .....	<ul style="list-style-type: none"> <li>TA Applicants must demonstrate that the Certified, Certifiable, Emerging CDFI, or the CDFI to be created by the Sponsoring Entity will primarily serve one or more Native Community as its Target Market.</li> </ul>

TABLE 8—ELIGIBILITY REQUIREMENTS FOR FA APPLICANTS

CDFI certification status .....	<ul style="list-style-type: none"> <li>Each FA Applicant must be a Certified CDFI prior to the announcement of award decisions.</li> <li>An Applicant that is in a cure period to remedy CDFI recertification deficiencies at the time of award announcements will not be eligible for an FA award under this NOFA.</li> </ul>
Activities in Native Communities .....	<ul style="list-style-type: none"> <li>For consideration under this NOFA, each FA Applicant must: <ul style="list-style-type: none"> <li>Demonstrate that at least 50 percent of its past activities were in one or more Native Communities; and</li> <li>describe how it will target its lending/investing activities to one or more Native Communities.</li> </ul> </li> </ul>
Target Market .....	<ul style="list-style-type: none"> <li>For consideration under this NOFA, an FA Applicant's certification Target Market must have one or more of the following characteristics: <ul style="list-style-type: none"> <li>For qualifying with an <i>investment area</i> Target Market, the Applicant must demonstrate that the investment area approved for certification is <i>also</i> a geographic area of Federally-designated reservations, Hawaiian homelands, Alaska Native Villages and U.S. Census Bureau designated Tribal Statistical Areas; and/or</li> <li>For qualifying with an <i>Other Targeted Population (OTP)</i> Target Market, the applicant's Target Market approved for certification must be an OTP of Native Americans or American Indians, including Alaska Natives living in Alaska and Native Hawaiians living in Hawaii.</li> </ul> </li> <li>Any FA Applicant whose certification Target Market does not meet either of the conditions above will not be eligible for an FA award under this NOFA.</li> </ul>
Community Partnership .....	<ul style="list-style-type: none"> <li>All FA Applicants must demonstrate strong Community Partnerships with Native Communities.</li> </ul>
Matching funds documentation .....	<ul style="list-style-type: none"> <li>All Applicants must submit acceptable documentation that they have received or will receive matching funds. Applications that do not submit acceptable matching funds documentation will not be evaluated.</li> <li>Awards will be limited to no more than two times the amount of In-Hand or Committed matching funds documentation provided at the time of Application.</li> <li>Awards will be obligated in like form to the matching funds provided at time of Application. See Table 9. Matching Funds "Determination of Award Form" for additional guidance.</li> <li>Award payments from the CDFI Fund will require eligible dollar-for-dollar In-Hand matching funds for the total payment amount. Recipients will not receive a payment until 100 percent of their matching funds are In-Hand.</li> <li>The first payment is the estimated amount of award that the Recipient will use for eligible FA activities in the first 12 months after the award.</li> <li>The CDFI Fund will reduce and de-obligate the remaining balance of any Award that does not demonstrate full dollar-for-dollar matching funds equal to the announced award amount by the end of the Matching Funds Window.</li> </ul>
\$5 Million funding cap .....	<ul style="list-style-type: none"> <li>The CDFI Fund is prohibited from obligating more than \$5 million in CDFI and NACA Program awards, in the aggregate, to any one organization and its Subsidiaries and Affiliates during any three-year period.</li> </ul>

TABLE 8—ELIGIBILITY REQUIREMENTS FOR FA APPLICANTS—Continued

HFFI-FA .....	<ul style="list-style-type: none"> <li>For purposes of this NOFA, the CDFI Fund will include CDFI and NACA Program final awards in the cap calculation that were provided to an Applicant (and/or its Subsidiaries or Affiliates) under the FY 2014, and 2015 funding rounds, as well as the requested FY 2016 award, excluding HFFI-FA awards. The CDFI Fund will make the FY 2016 funding round award announcements after September 23, 2016.</li> <li>All HFFI-FA Applicants must: <ul style="list-style-type: none"> <li>Apply for an NACA FA award;</li> <li>Meet all NACA FA award eligibility requirements; and</li> <li>Complete and submit a NACA Program Financial Assistance Application along with the HFFI-FA Application</li> <li>Provide a HFFI-FA award request amount in the “Award Request Table” of the Purpose section in the Application.</li> </ul> </li> </ul>
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*B. Matching Funds Requirements:* In order to receive an FA award, an Applicant must provide documentation of eligible dollar-for-dollar matching funds. The CDFI Fund will review matching funds documentation prior to award payment and will pay funds

based upon eligible In-Hand matching funds (see Table 9 for the definition of In-Hand). The CDFI Fund encourages Applicants to review the Regulations at 12 CFR 1805.500, the Uniform Administrative Requirements, and the matching funds guidance materials,

which is available on the CDFI Fund's Web site and Grants.gov. Table 9 provides a summary of the matching funds requirements; additional details are set forth in the Application materials.

TABLE 9—MATCHING FUNDS REQUIREMENTS

Matching funds requirements by application type .....	<p>The following Applicants must provide documentation of acceptable matching funds:</p> <ul style="list-style-type: none"> <li>NACA FA Applicants (upon request)*;</li> <li>HFFI-FA Applicants. (upon request) *</li> </ul> <p>TA Applicants are not required to provide matching funds.</p> <p>*The matching funds requirement for HFFI-FA and NACA FA applicants was waived in the appropriations bill for FY 2016. HFFI-FA and NACA FA applicants are not required to submit matching funds for their award requests at the time of application.</p>
Amount of required match .....	Applicants must submit supporting documentation of eligible, In-Hand, dollar-for-dollar, non-Federal matching funds for every FA award dollar to be paid by the CDFI Fund. If awarded, Applicants that did not demonstrate 100% In-Hand matching funds at the time of Application may experience a longer payment timeline.
Determination of award form .....	<p>FA awards will be made in comparable form and value to the eligible In-Hand or Committed matching funds documentation submitted by the Applicant.</p> <ul style="list-style-type: none"> <li>For example, if an FA Applicant provides documentation of eligible loan matching funds for \$200,000 and \$400,000 of its matching funds in the form of grant, the CDFI Fund will obligate \$200,000 of the FA award as a loan and \$400,000 as a grant.</li> <li>After awards have been announced, Award Recipients may request the CDFI Fund's permission to change the form of their award from loan to grant (by producing eligible grant matching funds), but will only be eligible to receive a grant equal to the federal credit subsidy amount associated with the original loan. Applicants will also experience delays in payments if requested award form changes are approved by the CDFI Fund.</li> </ul>
Matching Funds Window definition .....	<ul style="list-style-type: none"> <li>The Applicant must receive eligible In-Hand matching funds between January 1, 2014 and January 15, 2017.</li> <li>An award Recipient must provide the CDFI Fund with all documentation demonstrating the receipt of In-Hand matching funds by January 31, 2017.</li> </ul>
Matching funds and form of award .....	<ul style="list-style-type: none"> <li>Recipients will be approved for a maximum award size of two times the total amount of eligible In-Hand and/or Committed matching funds documentation included in the Application, so long as they do not exceed the award amount limit.</li> <li>The form of the matching funds documented in the Application determines the form of the award.</li> </ul>
In-Hand matching funds definition .....	<ul style="list-style-type: none"> <li>Matching funds are eligible and In-Hand when the Applicant receives payment for the matching funds and includes acceptable documentation in the Application, showing the source, form (e.g., grant, loan, deposit, and Equity Investment), amount of the matching funds, and the date the funds came into physical possession of the applicant.</li> <li>The following documentation, depending on the type of award being requested, must be included in the Application: <ul style="list-style-type: none"> <li>Loan—the loan agreement and/or promissory note;</li> <li>grant—the grant letter or agreement for all grants of \$100,000 or more;</li> <li>Equity Investment—the stock certificate and shareholder agreement;</li> <li>retained earnings—audits or call reports from regulating entity; and</li> <li>third party in-kind contribution—evidence of receipt of contribution and valuation; AND</li> <li>clearly legible documentation that demonstrates actual receipt of the matching funds including the date of the transaction and the amount, such as a copy of a check or a wire transfer statement.</li> </ul> </li> <li>Grants under \$100,000 only require the source name, amount, date of receipt, and source contact information. Documentation of this information should be available if audited.</li> </ul>

TABLE 9—MATCHING FUNDS REQUIREMENTS—Continued

Committed matching funds definition .....	<ul style="list-style-type: none"> <li>• Matching funds are Committed when the Applicant has entered into or received a legally binding commitment from the matching funds source showing the matching funds will be disbursed to the Applicant at a future date.</li> <li>• The Applicant must provide the CDFI Fund acceptable written documentation showing the source, form, and amount of the Committed matching funds (including, in the case of a loan, the terms thereof), as well as the anticipated payment date of the Committed funds.</li> </ul>
Limitations on matching funds .....	<ul style="list-style-type: none"> <li>• Matching funds must be from non-Federal sources.</li> <li>• Applicants cannot proffer matching funds that were accepted as matching funds for a prior FA award under the CDFI Program, NACA Program, or under another Federal grant or award program.</li> <li>• Matching funds must comply with Regulations at 12 CFR 1805.500 et seq.</li> <li>• Matching funds must be attributable to at least one of the five eligible FA activities (see Section II.C).</li> </ul>
Rights of the CDFI Fund .....	<ul style="list-style-type: none"> <li>• The CDFI Fund reserves the right to contact the matching funds source to discuss the matching funds and the documentation that the Applicant provided.</li> <li>• The CDFI Fund may grant an extension of the Matching Funds Window (defined in Table 9), on a case-by-case basis, if the CDFI Fund deems it appropriate.</li> <li>• The CDFI Fund reserves the right to rescind all or a portion of an FA award and re-allocate the rescinded award amount to other qualified Applicant(s), if an award Recipient fails to obtain In-Hand 100 percent of the required Matching Funds during the Matching Funds Window.</li> </ul>
Matching funds in the form of third-party in-kind contributions.	<ul style="list-style-type: none"> <li>• Third party in-kind contributions are the value of non-cash contributions (<i>i.e.</i>, property or services) provided by non-Federal third parties.</li> <li>• Third party in-kind contributions will be considered to be in the form of a grant for matching funds purposes.</li> <li>• Third party in-kind contributions may be in the form of real property, equipment, supplies, and other expendable property, and the value of goods and services directly benefiting the eligible activities.</li> <li>• For third-party in-kind contributions, the fair market value of goods and services must be documented.</li> <li>• Applicants will be responsible for documenting the value of all in-kind contributions as described in the Uniform Administrative Requirements.</li> </ul>
Matching funds in the form of a loan .....	<ul style="list-style-type: none"> <li>• An FA award made in the form of a loan will have the following standardized terms:</li> <li>• A 13-year term with semi-annual interest-only payments due in years 1 through 10, and fully amortizing payments due each year in years 11 through 13; and</li> <li>• A fixed interest rate of 2.2 percent, which was calculated by the CDFI Fund based on the U.S. Department of the Treasury's 10-year Treasury note.</li> <li>• The Applicant's matching funds loan(s) must: <ul style="list-style-type: none"> <li>i. Have a minimum of a 3-year term. Loans presented as matching funds with less than a 3-year term will not qualify as eligible match; and</li> <li>ii. not be from a Federal source.</li> </ul> </li> </ul>
Severe Constraints Waiver .....	<ul style="list-style-type: none"> <li>• Not more than 25 percent of the total funds available for obligation under this funding round may be matched under the Severe Constraints Waiver.</li> <li>• In the case of an Applicant demonstrating severe constraints on available sources of matching funds, the CDFI Fund, in its sole discretion, may permit such Applicant to comply with the matching funds requirements by reducing such requirements by up to 50 percent.</li> <li>• In order to be considered eligible for a Severe Constraints Waiver, an Applicant must meet all of the NACA FA eligibility criteria described in Table 8 and follow the instructions in the Application materials.</li> </ul>
Ineligible matching funds .....	<ul style="list-style-type: none"> <li>• If the CDFI Fund determines that any portion of the Applicant's matching funds is ineligible, the CDFI Fund will permit the Applicant to offer documentation of alternative matching funds as a substitute for the ineligible matching funds.</li> <li>• In such instances: <ul style="list-style-type: none"> <li>i. The Applicant must provide acceptable alternative matching funds documentation within the period of time specified by the CDFI Fund, and</li> <li>ii. the alternative matching funds documentation will not increase the total amount of FA requested.</li> </ul> </li> </ul>
Use of matching funds from a prior CDFI Program Recipient.	If an Applicant offers matching funds documentation from an organization that was a prior Recipient under the CDFI Program, the Applicant must be able to prove to the CDFI Fund's satisfaction that such funds do not consist, in whole or in part, of CDFI Program funds or other Federal funds.
Matching funds in the form of retained earnings	<ul style="list-style-type: none"> <li>• Retained earnings are eligible for use as matching funds when the CDFI Fund calculates an amount equal to: <ul style="list-style-type: none"> <li>i. The increase in retained earnings that occurred over any one of the Applicant's fiscal years within the Matching Funds Window, adjusted to remove revenue and expenses derived from Federal sources and matching funds previously used for an award; or</li> <li>ii. the annual average of such increases that occurred over any three consecutive fiscal years of the Applicant with at least one of the fiscal years occurring within the Matching Funds Window, adjusted to remove revenue and expenses derived from Federal sources and matching funds previously used for an award; or</li> <li>iii. any combination of (i) and (ii) above that does not include matching funds previously used for an award.</li> </ul> </li> <li>• Retained earnings will be matched with an FA award in the form of a grant or an Equity Investment.</li> </ul>

TABLE 9—MATCHING FUNDS REQUIREMENTS—Continued

Special rule for Insured Credit Unions and Insured Depository Institutions.	<ul style="list-style-type: none"><li>• An Insured Credit Union's and Insured Depository Institution's retained earnings are eligible for use as matching funds when the CDFI Fund calculates an amount equal to:<ul style="list-style-type: none"><li>i. The increase in retained earnings that occurred over any one of the Applicant's fiscal years within the Matching Funds Window, adjusted to remove revenue from Federal sources and matching funds previously used for an award; or</li><li>ii. the annual average of such increases that occurred over any three consecutive fiscal years of the Applicant with at least one of the fiscal years occurring within the Matching Funds Window, adjusted to remove revenue and expenses derived from Federal sources and matching funds previously used for an award; or</li><li>iii. the entire retained earnings that have been accumulated since the inception of the Applicant, as provided in the Regulations.</li></ul></li><li>• If option (iii) is used for Insured Credit Unions, the Applicant must increase its member and/or non-member shares and/or total loans outstanding by an amount equal to the amount of retained earnings committed as matching funds.<ul style="list-style-type: none"><li>• This increase will be measured on a quarterly basis from March 31, 2016, and must occur by the end of the Recipient's Year 1 of Performance Period, as set forth in its Assistance Agreement, and will be based on amounts reported in the Applicant's National Credit Union Administration (NCUA) form 5300 Call Report.</li><li>• The CDFI Fund will assess the likelihood of this increase during the Application review process.</li><li>• An award will not be made to any Applicant that has not demonstrated in the relevant NCUA form 5300 Call Reports that it has increased shares and/or total loans outstanding by at least 25 percent of the requested FA award amount between December 31, 2014, and December 31, 2015.</li><li>• The matching funds are not In-Hand until the Recipient has increased its member and/or non-member shares, deposits and/or total loans outstanding within the time period specified.</li></ul></li><li>• If option (iii) is used for Insured Depository Institutions or Depository Institution Holding Companies, the Applicant or its Subsidiary Insured Depository Institution (in the case of a Depository Institution Holding Company) must increase deposits and/or total loans outstanding by an amount equal to the amount of retained earnings committed as matching funds. Please note that Depository Institution Holding Company Applicants must use the call reports of the CDFI Subsidiary Insured Depository Institution that the requested FA award will support.<ul style="list-style-type: none"><li>• This increase will be measured on a quarterly basis from March 31, 2016, and must occur by the end of the Recipient's Year 1 of Performance Period, as set forth in its Assistance Agreement, and will be based on amounts reported in the Bank Call Report.</li><li>• The CDFI Fund will assess the likelihood of this increase during the Application review process.</li><li>• An award will not be made to any Applicant that has not demonstrated in the relevant call reports that it has increased deposits and/or total loans outstanding by at least 25 percent of the requested FA award amount between December 31, 2014, and December 31, 2015.</li><li>• The matching funds are not In-Hand until the Recipient has increased its deposits and/or total loans outstanding within the time period specified.</li></ul></li><li>• All regulated Applicants utilizing the part (iii) Since Inception rule should refer to the Retained Earnings Guidance document on the Grants.gov and CDFI Fund Web sites.</li></ul>
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IV. Application and Submission Information

A. Address to Request an Application Package: Application materials can be found on Grants.gov and the CDFI Fund's Web site at [www.cdfifund.gov/native](http://www.cdfifund.gov/native). Applicants may request a paper version of any Application material by contacting the CDFI Fund Help Desk at [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov).

B. Content and Form of Application Submission:

All Applications must be prepared using the English language and calculations must be made in U.S. dollars. The following table lists the required Application documents for the FY 2016 Funding Round. The CDFI Fund reserves the right to request and review other pertinent or public information that has not been

specifically requested in this NOFA or the Application. Information submitted by the Applicant that the CDFI Fund has not specifically been requested will not be reviewed or considered as part of the Application. Information submitted must accurately reflect the Applicant's activities. Financial, portfolio, and activity information provided in the Application should only include the Applicant's activities.

TABLE 10—REQUIRED APPLICATION DOCUMENTS

Application documents	Applicant type	Submission format
SF-424 .....	All Applicants .....	Fillable PDF in Grants.gov.
CDFI Program Application Components:	All Applicants .....	AMIS.

TABLE 10—REQUIRED APPLICATION DOCUMENTS—Continued

Application documents	Applicant type	Submission format
<ul style="list-style-type: none"> <li>• Funding Application Detail Related Lists:</li> <li>• Application Financial Data               <ul style="list-style-type: none"> <li>○ Financials and Portfolio</li> <li>○ Impacts</li> <li>○ Application Activities Levels</li> <li>○ Funders (Historic Only) *</li> </ul> </li> <li>• Matching Funds Used (FA Core Only)</li> <li>• Customer Snapshot Table</li> <li>• Key Personnel</li> <li>• Policies</li> <li>• Product Design</li> <li>• Narratives</li> </ul> <p>HFFI-FA Application Components:</p> <ul style="list-style-type: none"> <li>• Funding Application Detail</li> <li>• Narratives</li> </ul> <p>ATTACHMENTS TO THE APPLICATION: Add to "Related Attachments" related list in application.</p> <p>Matching Funds Documentation .....</p> <p>Policies and Procedures .....</p> <p>Key Staff Resumes .....</p> <p>Organizational Chart .....</p> <p>Audited Financial Statements .....</p> <p>Management Letters .....</p> <p>Unaudited Financial Statements (if Audited Financial Statements are not available).</p> <p>Call Reports .....</p> <p>Current Year to Date—December 31, 2015, Unaudited Financial Statements.</p> <p>Additional Documents As Applicable: Community Partnership Agreement 501(c)(4) Questionnaire Explanation Environmental Review Form Explanation.</p>	<p>* Funders is excluded for Insured Depository Institutions, TA Applicants, and NACA TA Applicants.</p> <p>HFFI-FA Applicants ..... —Must create new funding application.</p> <p>FA Core Applicants .....</p> <p>FA Applicants .....</p> <p>All Applicants .....</p> <p>All Applicants .....</p> <p>FA Applicants: Loan funds and other non-Insured Depository Institutions.</p> <p>FA Applicants: Loan funds and other non-Insured Depository Institutions, TA Applicants: If available.</p> <p>TA Applicants: Loan funds and other non-Insured Depository Institutions.</p> <p>FA and TA Applicants: Insured Depository Institutions only.</p> <p>FA and TA Applicants: Loan funds and other non-Insured Depository Institutions.</p> <p>All Applicants, if applicable .....</p>	<p>AMIS.</p> <p>PDF or Excel (Retained Earnings Calculator only) in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF or Word document in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF in AMIS.</p> <p>PDF or Word document in AMIS.</p>

**C. Application Submission:** The CDFI Fund has a two-step process that requires the submission of application documents on separate deadlines and locations. The SF-424 must be submitted through Grants.gov and all other application documents through the AMIS portal. The CDFI Fund will not accept Applications via email, mail, facsimile, or other forms of communication, except in extremely rare circumstances that have been pre-approved by the CDFI Fund.

Applicants are only required to submit the OMB SF-424, Application for Federal Assistance form in Grants.gov as all other application information (listed in Table 10) will be submitted through AMIS. The deadline for submitting the SF 424 is 30 days after the publication of the NOFA. All other application information must be submitted in AMIS and only the Authorized Representative or Application Point of Contact can submit the application.

Applicants are encouraged to submit the SF-424 as early as possible through Grants.gov to provide time to resolve any submission problems. Applicants should contact Grants.gov directly with questions related to the registration or submission process as the CDFI Fund does not maintain the Grants.gov system.

The CDFI Fund strongly encourages Applicants to start the Grants.gov registration process as soon as possible (refer to the following link: <http://www.grants.gov/web/grants/register.html>) as it may take several weeks to complete. An Applicant that has previously registered with Grants.gov must verify that its registration is current and active.

**D. Dun & Bradstreet Universal Numbering System (DUNS):** Pursuant to the Uniform Administrative Requirements, each Applicant must provide as part of its Application submission, a Dun and Bradstreet Universal Numbering System (DUNS) number. Applicants without a DUNS

number will not be able to register and submit an Application in the Grants.gov system. Please allow sufficient time for Dun & Bradstreet to respond to inquiries and/or requests for DUNS numbers.

**E. System for Award Management (SAM):** Any entity applying for Federal grants or other forms of Federal financial assistance through Grants.gov must be registered in SAM before submitting its Application. The SAM registration process can take several weeks to complete. Applicants that have previously completed the SAM registration process must verify that their SAM accounts are current and active. Each Applicant must continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an Application under consideration by a Federal awarding agency. The CDFI Fund will not consider any Applicant that fails to properly register or activate its SAM account and, as a result, is unable to



submit its Application by the Application deadline. Applicants must contact SAM directly with questions related to registration or SAM account

changes as the CDFI Fund does not maintain this system. For more information about SAM, please visit <https://www.sam.gov>.

*F. Submission Dates and Times:*

1. *Submission Deadlines:* The following table provides the critical deadlines for the FY 2016 Funding Round.

TABLE 11—FY 2016 FUNDING ROUND CRITICAL DEADLINES FOR APPLICANTS

Description	Deadline	Time (EDT)	Submission method
CDFI Certification Applications .....	March 18, 2016 .....	5:00 p.m. EDT .....	Award Management Information System (AMIS).
SF424 (Application for Federal Assistance).	March 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Grants.gov.
Last day to contact NACA Program staff ..	April 15, 2016 .....	5:00 p.m. EDT .....	CDFI Fund Helpdesk: 202-653-0421 or <a href="mailto:cdfihelp@cdfi.treas.gov">cdfihelp@cdfi.treas.gov</a> .
NACA Program Application for Financial Assistance (FA) or Technical Assistance (TA).	April 18, 2016 .....	11:59 p.m. EDT .....	Electronically via Awards Management Information System (AMIS).

2. *Confirmation of Application Submission in Grants.gov and AMIS:* Applicants are required to submit the OMB SF-424, Application for Federal Assistance through the Grants.gov system and must submit all other required application materials through the AMIS Web site. Application materials submitted through both systems are due by the application deadlines. Applicants must submit the SF 424 on an earlier deadline from the other required application materials in AMIS. If the SF-424 is not successfully accepted by Grants.gov by the deadline, the CDFI Fund will not review any of the material submitted in AMIS and the Application will be deemed ineligible.

(a) *Grants. Gov. Submission Information:* Each Applicant will receive an email from Grants.gov immediately after submitting the SF-424 confirming that the submission has entered the Grants.gov system. This email will contain a tracking number for the submitted SF-424. Within 48 hours, the Applicant will receive a second email, which will indicate if the submitted SF-424 was either successfully validated or rejected with errors. However, Applicants should not rely on the email notification from Grants.gov to confirm that their SF-424 was validated. Applicants are strongly encouraged to use the tracking number provided in the first email to closely monitor the status of their SF-424 by contacting the helpdesk at Grants.gov directly. The Application material submitted in AMIS is not officially accepted by the CDFI Fund until Grants.gov has validated the SF-424.

(b) *Award Management Information System (AMIS) Submission Information:* AMIS is a web-based portal where Applicants will directly enter their application information and add required attachments listed in Table 10.

AMIS will verify that the Applicant provided the minimum information required to submit an Application. Applicants are responsible for the quality and accuracy of the information and attachments included in the Application submitted in AMIS. The CDFI Fund strongly encourages the Applicant to allow sufficient time to confirm the Application content, review the material submitted, and remedy any issues prior to the Application deadline. Only the Authorized Representative or the application Point of Contact can submit the Application. Applicants can only submit one Application. Upon submission, the Application will be locked and cannot be resubmitted, edited, or modified in any way. The CDFI Fund will not unlock or allow multiple Applications submissions.

3. *Late Submission:* The CDFI Fund will not accept an Application submitted after the Application deadline except where the submission delay was a direct result of a Federal government administrative or technological error. In such case, the Applicant must submit a request for acceptance of late Application submission and include documentation of the error no later than two business days after the Application deadline. The CDFI Fund will not respond to request for acceptance of late Application submissions after that time period. Applicants must submit late Application submission requests to the CDFI Helpdesk at [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov) with a subject line of "Late Application Submission Request."

G. *Funding Restrictions:* FA, HFFI-FA and TA awards are limited by the following:

1. *FA awards:*

(a) An award Recipient shall use FA funds only for the eligible activities described in Section II. Award

Description (C)(1) of this NOFA and its Assistance Agreement.

(b) A Recipient may not distribute FA funds to an Affiliate, Subsidiary, or any other entity, without the CDFI Fund's prior written approval.

(c) FA funds shall only be paid to the Recipient.

(d) The CDFI Fund, in its sole discretion, may pay FA funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

2. *HFFI-FA awards:*

(a) An award Recipient shall use HFFI-FA funds only for the eligible activities described in Section II. Award Description (C)(1) of this NOFA and its Assistance Agreement.

(b) A Recipient may not distribute HFFI-FA funds to an Affiliate, Subsidiary, or any other entity, without the CDFI Fund's prior written approval.

(c) HFFI-FA funds shall only be paid to the Recipient.

(d) The CDFI Fund, in its sole discretion, may pay HFFI-FA funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

3. *TA grants:*

(a) An award Recipient shall use TA funds only for the eligible activities described in Section II. Award Description (C)(2) of this NOFA and its Assistance Agreement.

(b) A Sponsoring Entity award Recipient must create, as a legal entity, the Emerging CDFI no later than the end of the first year of the period of performance, whereupon the Sponsoring Entity must request the CDFI Fund to amend the Assistance Agreement and add the Emerging CDFI as a co-Recipient thereto, with the Sponsoring Entity, thereby transferring any and all remaining balances and/or

assets derived from the TA award to the Emerging CDFI.

(c) A Recipient may not distribute TA funds to an Affiliate, Subsidiary or any other entity, without the CDFI Fund's prior written consent.

(d) TA funds shall only be paid to the Recipient.

(e) The CDFI Fund, in its sole discretion, may pay TA funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

## V. Application Review Information

1. *Criteria:* If the Applicant has submitted a complete and eligible Application, the CDFI Fund will conduct a substantive review in accordance with the criteria and procedures described in the

Regulations, this NOFA, the Application guidance, and the Uniform Administrative Requirements. The CDFI Fund reserves the right to contact the Applicant by telephone, email, or mail for the sole purpose of clarifying or confirming Application information. If contacted, the Applicant must respond within the time period communicated by the CDFI Fund or run the risk that its Application will be rejected.

(a) *Application Scoring and Award Selection (FA, HFFI-FA, and TA):* The CDFI Fund will evaluate each Application using the FA and TA Application Scoring Criteria described in the Application. An Applicant must receive a minimum 40 percent of the total score for the FA, HFFI-FA, and TA components in order to be considered for an award. An Applicant that is an

Emerging CDFI and has not received a previous TA award will be rated, among other elements, on its plan to meet the requirements of a Certified CDFI within two years of the beginning of the period of performance. In addition, an Emerging CDFI Applicant that is a prior TA Recipient will be rated, among other elements, on its plan to meet the CDFI certification goal specified in its previous Assistance Agreement. A Sponsoring Entity Applicant will be rated, among other elements, on its plan to create an Emerging CDFI by the end of the first year of the performance period and comply with CDFI Certification requirements within four years of the beginning of the period of performance.

The CDFI Fund will score each part as indicated in Tables 12 and 13.

TABLE 12—FA & TA APPLICATION SCORING CRITERIA

FA & TA narrative sections	FA applicants (points)	TA applicants (points)
Executive Summary .....	Not Scored	Not Scored
Purpose/Proposal .....	10	15
Products .....	10	10
Policies .....	10	10
People .....	10	15
Partnerships .....	10	5
Performance .....	40	30
Projections .....	10	15
Total Points .....	100	100

TABLE 13—HFFI-FA APPLICATION SCORING CRITERIA

HFFI-FA narrative sections	HFFI-FA applicants (points)
HFFI Target Market Profile .....	4
Healthy Food Financial Products .....	5
Healthy Food Development Services .....	2
Projected HFFI-FA Activities .....	7
HFFI Track Record, Management Capacity for Providing Healthy Food Financing, Healthy Food Financing Outcomes .....	7
Total Points .....	25

2. *Review and Selection Process.* All Applications will be initially evaluated by external non-Federal reviewers who are selected based on criteria that includes: a professional background in community and economic development finance; understanding of community and economic development in Native Communities; experience reviewing financial statements of all CDFI institution types; and experience performing underwriting of community and economic development projects. Reviewers must complete the CDFI Fund's conflict of interest process and be approved by the CDFI Fund. The CDFI Fund's application reader conflict

of interest policy is located on the CDFI Fund's Web site.

TA Applications will be evaluated by one external reviewer; FA and HFFI-FA Applications will be evaluated by three external reviewers. All Applications will be reviewed in accordance with reviewer evaluation materials. Applications will be ranked based on Application scores, from highest to lowest. In the case of tied scores, Applicants will be ranked first according to each Performance score, then the Purpose section. TA Applicants, FA Applicants, and HFFI-FA Applicants will be grouped and ranked separately.

3. *Programmatic and Financial Risk Analysis.* The CDFI Fund conducts three additional levels of due diligence for Applications that are in scoring contention for an award. This due diligence includes an analysis of programmatic and financial risk factors including, but not limited to: financial stability; quality of management systems and ability to meet award management standards; history of performance in managing Federal awards (including timeliness of reporting and compliance); reports and findings from audits; and the Applicant's ability to effectively implement Federal requirements. Award amounts may be reduced as a

result of this analysis. In addition, for FA awards, the CDFI Fund may reduce awards sizes from requested amounts based on certain variables, including an Applicant's loan disbursement activity, total portfolio outstanding, and similar factors. Lastly, the CDFI Fund may consider geographic diversity of Applicants when making its funding decisions.

4. *Insured Depository Institutions:* The CDFI Fund will consider safety and soundness information from the Appropriate Federal or State Banking Agency. If the Applicant is a CDFI Depository Institution Holding Company, the CDFI Fund will consider information provided by the Appropriate Federal or State Banking Agencies about both the CDFI Depository Institution Holding Company and the CDFI Certified Insured Depository Institution that will expend and carry out the award. If the Appropriate Federal Banking Agency or Appropriate State Agency identifies safety and soundness concerns, the CDFI Fund will assess whether the concerns cause or will cause the Applicant to be incapable of undertaking the activities for which funding has been requested.

5. *Non-Regulated Institutions:* In accordance with the NACA Program's authorizing statute and regulations, the CDFI Fund must ensure, to the maximum extent practicable, that recipients that are non-regulated CDFIs are financially and managerially sound and maintain appropriate internal controls (12 U.S.C. 4707(f)(1)(A) and 12 CFR 1805.800(b)). Further, the CDFI Fund must determine that an Applicant's capacity to operate as a CDFI will not be dependent upon assistance from the CDFI Fund for continued viability (12 U.S.C. 4704(b)(2)(A)). If it is determined the Applicant is incapable of meeting these requirements, the CDFI Fund reserves the right to deem the Applicant ineligible or terminate the award.

6. *Anticipated Award Announcement:* The CDFI Fund anticipates making the NACA Program award announcement after September 23, 2016 and before September 30, 2016.

7. *Application Rejection:* The CDFI Fund reserves the right to reject an Application if information (including administrative error) comes to the CDFI Fund's attention that either: adversely affects an Applicant's eligibility for an award; adversely affects the Recipient's certification as a CDFI (to the extent that the award is conditional upon CDFI certification); adversely affects the CDFI Fund's evaluation or scoring of an Application; or indicates fraud or

mismanagement on the Applicant's part. If the CDFI Fund determines any portion of the Application is incorrect in a material respect, the CDFI Fund reserves the right, in its sole discretion, to reject the Application. The CDFI Fund reserves the right to change its eligibility and evaluation criteria and procedures, if the CDFI Fund deems it appropriate. If the changes materially affect the CDFI Fund's award decisions, the CDFI Fund will provide information about the changes through its Web site. The CDFI Fund's award decisions are final and there is no right to appeal the decisions.

## VI. Federal Award Administration Information

A. *Award Notification:* Each successful Applicant will receive an email "notice of award" notification from the CDFI Fund stating that its Application has been approved for an award. Each Applicant not selected for an award will receive an email stating that a debriefing notice has been provided in its AMIS account.

B. *Assistance Agreement:* Each Applicant selected to receive an award must enter into an Assistance Agreement with the CDFI Fund in order to receive a payment(s). The Assistance Agreement will set forth the award's terms and conditions, including but not be limited to the: (i) Award amount; (ii) award type; (iii) award uses; (iv) eligible use of funds; (v) performance goals and measures; and (vi) reporting requirements. FA Assistance Agreements have three-year periods of performance; TA Assistance Agreements have two-year periods of performance for Emerging and Certified CDFI TA Recipients and four-year periods of performance for Sponsoring Entity TA Recipients. Upon creation of the Emerging CDFI, the Sponsoring Entity will request the CDFI Fund to amend the Assistance Agreement and add the Emerging CDFI as a party thereto; the Emerging CDFI, as co-awardee, must comply with all of the requirements in the Assistance Agreement, including all program goals and measures.

1. *Certificate of Good Standing:* All FA and TA Recipients that are not Insured Depository Institutions will be required to provide the CDFI Fund with a certificate of good standing from the secretary of state for the Recipient's State of incorporation prior to closing. This certificate can often be acquired online on the secretary of state Web site for the Recipient's State of incorporation and must generally be dated within 270 days before the date the Recipient executes the Assistance Agreement. Due to potential backlogs in State

government offices, Applicants are advised to submit requests for certificates of good standing no later than 60 days after they submit their Applications.

2. *Closing:* Pursuant to the Assistance Agreement, there will be an initial closing at which point the Assistance Agreement and related documents will be properly executed and delivered, and an initial payment of FA or TA may be made. FA Recipients that are subject to the matching funds requirement will not receive a payment until 100 percent of their matching funds are In-Hand. The first payment is the estimated amount of award that the Recipient states in its Application that it will use for eligible FA or TA activities in the first 12 months after the award.

The CDFI Fund will minimize the time between the Recipient incurring costs for eligible activities and award payment based on what is administratively feasible. The advanced payments for eligible activities will occur no more than one year in advance of the Recipient incurring costs for the eligible activities. Following the initial closing, there may be subsequent closings involving additional award payments. Any documents in addition to the Assistance Agreement that are connected with such subsequent closings and payments shall be properly executed and timely delivered by the Recipient to the CDFI Fund.

3. *Requirements Prior to Entering into an Assistance Agreement:* If, prior to entering into an Assistance Agreement, information (including administrative error) comes to the CDFI Fund's attention that: Adversely affects the Recipient's eligibility for an award; adversely affects the Recipient's certification as a CDFI (to the extent that the award is conditional upon CDFI certification); adversely affects the CDFI Fund's evaluation of the Application; indicates that the Recipient is not in compliance with any requirement listed the Uniform Administrative Requirements; or indicates fraud or mismanagement on the Recipient's part, the CDFI Fund may, in its discretion and without advance notice to the Recipient, terminate the award or take such other actions as it deems appropriate. The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Recipient fails to return the Assistance Agreement, signed by the authorized representative of the Recipient, and/or provide the CDFI Fund with any other requested documentation, within the CDFI Fund's deadlines.

In addition, the CDFI Fund reserves the right, in its sole discretion, to

terminate and rescind the Assistance Agreement and the award made under this NOFA pending the criteria described in the following table:

TABLE 14—REQUIREMENTS PRIOR TO EXECUTING AN ASSISTANCE AGREEMENT

Requirement	Criteria
Failure to meet reporting requirements .....	<ul style="list-style-type: none"> <li>• If a Recipient received a prior award under any CDFI Fund program and is not current with the reporting requirements in the previously executed agreement(s), the CDFI Fund can delay entering into an Assistance Agreement or disbursing an award until reporting requirements are met.</li> <li>• If such a Recipient is unable to meet the requirement within the timeframe specified, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> <li>• The automated systems the CDFI Fund uses only acknowledge a report's receipt, not a determination of meeting reporting requirements.</li> </ul>
Failure to maintain CDFI Certification .....	<ul style="list-style-type: none"> <li>• An FA Recipient must be a Certified CDFI prior to entering into an Assistance Agreement.</li> <li>• If an FA Recipient fails to maintain CDFI Certification, the CDFI Fund will terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> </ul>
Pending resolution of noncompliance .....	<ul style="list-style-type: none"> <li>• The CDFI Fund will delay entering into an Assistance Agreement with a Recipient that has pending noncompliance issues if the CDFI Fund has not yet made a final determination as to whether the Recipient is in default of its previously executed award agreement(s).</li> <li>• If the Recipient is unable to satisfactorily resolve the compliance issues, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> </ul>
Default or Noncompliance status .....	<ul style="list-style-type: none"> <li>• If, at any time prior to entering into an Assistance Agreement, the CDFI Fund determines that an Recipient is in default of a previously executed agreement with the CDFI Fund and the Recipient has been provided written notification of such determination, the CDFI Fund can delay entering into an Assistance Agreement, until the Recipient has cured the default by taking actions the CDFI Fund has specified within the specified timeframe. Further, if, at any time prior to entering into an Assistance Agreement, the CDFI Fund determines that an Recipient is noncompliant with an FY 2015 or later award agreement with the CDFI Fund and the Recipient has been provided written notification of such determination, the CDFI Fund can delay entering into an Assistance Agreement, until the Recipient has cured the noncompliance by taking actions the CDFI Fund has specified within the specified timeframe.</li> <li>• If the Recipient is unable to meet the cure requirement within the specified timeframe, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.</li> </ul>
Final Default and sanctions .....	If the CDFI Fund has found the Recipient in final default of a prior executed agreement and provided notification of sanctions, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA within the time period specified in such notification.
Compliance with Federal civil rights requirements.	If prior to entering into an Assistance Agreement under this NOFA, the Recipient receives a final determination, made within the last three years, in any proceeding instituted against the Recipient in, by, or before any court, governmental, or administrative body or agency, declaring that the Recipient has violated the following laws: Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975, (42 U.S.C. 6101–6107), and Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, the CDFI Fund will terminate and rescind the Assistance Agreement and the award made under this NOFA.
Do Not Pay .....	<ul style="list-style-type: none"> <li>• The Do Not Pay Business Center was developed to support Federal agencies in their efforts to reduce the number of improper payments made through programs funded by the Federal government.</li> <li>• The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Recipient is identified as an ineligible recipient on the Do Not Pay database.</li> </ul>
Safety and soundness .....	<ul style="list-style-type: none"> <li>• If it is determined the Recipient is or will be incapable of meeting its award obligations, the CDFI Fund will deem the Recipient to be ineligible or require it to improve safety and soundness conditions prior to entering into an Assistance Agreement.</li> </ul>

*C. Reporting*  
1. *Reporting Requirements:* On an annual basis for the period of

performance, the CDFI Fund may collect information from each Recipient including, but not limited to, an Annual Report with the following components:

TABLE 15—ANNUAL REPORTING REQUIREMENTS

Financial Report (Financial Statements and Related Auditor's and Accountant's Review Reports, if applicable).	The Financial Report will be reviewed by the CDFI Fund to determine the Recipient's financial and managerial soundness.
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TABLE 15—ANNUAL REPORTING REQUIREMENTS—Continued

Single Audit (if applicable) (or similar report) .....	If a Recipient is required to complete a Single Audit Report, it should be submitted to the Federal Audit Clearinghouse (see 2 CFR subpart F—Audit Requirements in the Uniform Administrative Requirements). For-profit Recipients will be required to complete and submit a similar report directly to the CDFI Fund.
Institution Level Report (ILR) .....	The ILR is a report used to collect compliance and performance data from CDFI Fund award Recipients. The ILR is submitted through the Community Investment Impact System (CIIS) and captures organizational information, financial position, lending and investing activities, community development outputs, and development services.
Transaction Level Report (TLR) .....	The TLR is a report used to collect compliance and performance data from CDFI Fund award Recipients. The TLR is submitted through the CIIS and captures data on each individual loan and investment in the award Recipient's portfolio. <ul style="list-style-type: none"> <li>• For CDFI Depository Institution Holding Company award Recipients, the TLR captures data on the individual loans and investments by its CDFI Subsidiary Insured Depository Institution's portfolio.</li> <li>• TLR is not required for TA Recipients.</li> </ul>
Federal Financial Report/OMB Standard Form 425.	If the Recipient receives a TA award, it must submit the Federal Financial Report/OMB Standard Form 425 via AMIS.
Uses of Funds Report .....	If the Recipient receives an FA or TA award, it must submit the Uses of Funds Report via AMIS.
Shareholders Report .....	If the Assistance is in the form of an Equity Investment, the Recipient must submit shareholder information to the CDFI Fund showing the class, series, and number of shares and valuation of capital stock held or to be held by each shareholder. The Shareholder Report must be submitted for as long as the CDFI Fund is an equity holder.

Each Recipient is responsible for the timely and complete submission of the Annual Reporting requirements. Sponsoring Entities with co-awardees will be informed of any reporting shifts at the time the Emerging CDFI is adjointed to the Agreement. The CDFI Fund reserves the right to contact the Recipient and additional entities or signatories to the Assistance Agreement to request additional information and documentation. The CDFI Fund will use such information to monitor each Recipient's compliance with the requirements in the Assistance Agreement and to assess the impact of the NACA Program. The CDFI Fund reserves the right, in its sole discretion, to modify these reporting requirements, including increasing the scope and frequency of reporting, if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after notice to Recipients.

**2. Financial Management and Accounting:** The CDFI Fund will require Recipients to maintain financial management and accounting systems that comply with Federal statutes, regulations, and the terms and conditions of the Federal award. These systems must be sufficient to permit the preparation of reports required by general and program specific terms and conditions, including the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award.

The cost principles used by Recipients must be consistent with Federal cost principles and support the accumulation of costs as required by the principles, and must provide for adequate documentation to support costs charged to the NACA Program award. In addition, the CDFI Fund will require Recipients to: Maintain effective

internal controls; comply with applicable statutes, regulations, and the Assistance Agreement; evaluate and monitor compliance; take action when not in compliance; and safeguard personally identifiable information.

## VII. Agency Contacts

A. The CDFI Fund will respond to questions concerning this NOFA and the Application between the hours of 9:00 a.m. and 5:00 p.m. Eastern Daylight Savings Time, starting on the date that the NOFA is published through the date listed in Table 1 and Table 11. The CDFI Fund will post on its Web site responses to reoccurring questions received about this Application. Other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's Web site at <http://www.cdfifund.gov>. Table 16 lists CDFI Fund contact information:

TABLE 16—CONTACT INFORMATION

Type of question	Telephone number (not toll free)	Email addresses
NACA Program .....	202-653-0421, option 1 .....	<a href="mailto:cdfihelp@cdfi.treas.gov">cdfihelp@cdfi.treas.gov</a> .
Certification, Compliance Monitoring, and Evaluation .....	202-653-0423 .....	<a href="mailto:ccme@cdfi.treas.gov">ccme@cdfi.treas.gov</a> .
AMIS—IT Help Desk .....	202-653-0422 .....	<a href="mailto:AMIS@cdfi.treas.gov">AMIS@cdfi.treas.gov</a> .

**B. Information Technology Support:** For IT Assistance, submit an AMIS Service Request (Record Type of "General Inquiry"). In the Service Request form, select the appropriate program, then select "AMIS Technical Problem" as the Type. People who have

visual or mobility impairments that prevent them from using the CDFI Fund's Web site should call (202) 653-0422 for assistance (this is not a toll free number).

**C. Communication With the CDFI Fund:** The CDFI Fund will use contact

information in AMIS to communicate with Applicants and Recipients. It is imperative, therefore, that Applicants, Recipients, Subsidiaries, Affiliates, and signatories maintain accurate contact information in their accounts. This includes information such as contact

names (especially for the authorized representative) listed in this NOFA's application materials, email addresses, fax and phone numbers, and office locations.

**D. Civil Rights and Diversity:** Any person who is eligible to receive benefits or services from CDFI Fund or Recipients under any of its programs is entitled to those benefits or services without being subject to prohibited discrimination. The Department of the Treasury's Office of Civil Rights and Diversity enforces various Federal statutes and regulations that prohibit discrimination in financially assisted and conducted programs and activities of the CDFI Fund. If a person believes that s/he has been subjected to discrimination and/or reprisal because of membership in a protected group, s/he may file a complaint with: Associate Chief Human Capital Officer, Office of Civil Rights, and Diversity, 1500 Pennsylvania Ave NW., Washington, DC 20220 or (202) 622-1160 (not a toll-free number).

#### VIII. Other Information

**A. Paperwork Reduction Act:** Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor a collection of information, and an individual is not required to respond to a collection of information, unless it displays a valid OMB control number. If applicable, the CDFI Fund may inform Applicants that they do not need to provide certain Application information otherwise required. Pursuant to the Paperwork Reduction Act, the CDFI Program, and NACA Program Application has been assigned the following control number: 1559-0021.

**B. Application Information Sessions:** The CDFI Fund may conduct webinars or host information sessions for organizations that are considering applying to, or are interested in learning about, the CDFI Fund's programs. For further information, please visit the CDFI Fund's Web site at <http://www.cdfifund.gov>.

**Authority:** 12 U.S.C. 4701, et seq; 12 CFR parts 1805 and 1815; 2 CFR part 200.

**Mary Ann Donovan,**

*Director, Community Development Financial Institutions Fund.*

[FR Doc. 2016-03222 Filed 2-17-16; 8:45 am]

**BILLING CODE 4810-70-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Art Advisory Panel of the Commissioner of Internal Revenue

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Notice of Renewal of the Art Advisory Panel of the Commissioner of Internal Revenue.

**SUMMARY:** The charter for the Art Advisory Panel has been renewed for a two-year period beginning February 3, 2016.

**FOR FURTHER INFORMATION CONTACT:** Maricarmen R. Cuello, C:AP:SO:ART, 51 SW 1st Avenue, Miami, FL 33130, Telephone No. (305) 982-5364 (not a toll free number).

Notice is hereby given under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), that the Art Advisory Panel of the Commissioner of Internal Revenue, a necessary committee that is in the public interest, has been renewed for an additional two years beginning on February 3, 2016.

The Panel helps the Internal Revenue Service review and evaluate the acceptability of property appraisals submitted by taxpayers in support of the fair market value claimed on works of art involved in Federal Income, Estate or Gift taxes in accordance with sections 170, 2031, and 2512 of the Internal Revenue Code of 1986.

For the Panel to perform this function, Panel records and discussions must include tax return information. Therefore, the Panel meetings will be closed to the public since all portions of the meetings will concern matters that are exempted from disclosure under the provisions of section 552b(c)(3), (4), (6) and (7) of Title 5 of the U.S. Code. This determination, which is in accordance with section 10(d) of the Federal Advisory Committee Act, is necessary to protect the confidentiality of tax returns and return information as required by section 6103 of the Internal Revenue Code.

**John A. Koskinen,**

*Commissioner of Internal Revenue.*

[FR Doc. 2016-03427 Filed 2-17-16; 8:45 am]

**BILLING CODE 4830-01-P**

## U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

### Notice of Open Public Hearing

**AGENCY:** U.S.-China Economic and Security Review Commission.

**ACTION:** Notice of open public hearing—February 24, 2016, Washington, DC.

**SUMMARY:** Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

**Name:** Dennis Shea, Chairman of the U.S.-China Economic and Security Review Commission. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on "the national security implications of the economic relationship between the United States and the People's Republic of China." Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on Wednesday, February 24, 2016, on "China's Shifting Economic Realities and Implications for the United States."

**Background:** This is the second public hearing the Commission will hold during its 2016 report cycle to collect input from academic and industry experts concerning the national security implications of China's military modernization efforts for the United States. This hearing will seek to analyze recent macroeconomic trends in China's economy; assess the changing role of state capitalism and state-backed enterprises in China's economy and abroad; assess the extent of China's overcapacity problem in key sectors and impacts on U.S. and global markets; and evaluate potential changes to China's non-market economy status in the United States and Europe under World Trade Organization law. The hearing will be co-chaired by Commissioners Robin Cleveland and Michael Wessel. Any interested party may file a written statement by February 24, 2016, by mailing to the contact below. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

**Location, Date and Time:** Room: TBD. Wednesday, February 24, 2016, start time is 8:30 a.m. A detailed agenda for the hearing will be posted to the Commission's Web site at [www.uscc.gov](http://www.uscc.gov). Also, please check our Web site for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

**FOR FURTHER INFORMATION CONTACT:** Any member of the public seeking further information concerning the hearing should contact Anthony DeMarino, 444 North Capitol Street NW., Suite 602, Washington, DC 20001; phone: 202-624-1496, or via email at [ademarino@uscc.gov](mailto:ademarino@uscc.gov). *Reservations are not required to attend the hearing.*

**Authority:** Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense

Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: February 9, 2016.

**Michael Danis,**

*Executive Director, U.S.-China Economic and Security Review Commission.*

[FR Doc. 2016–02999 Filed 2–17–16; 8:45 am]

**BILLING CODE 1137–00–P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0099]

### Agency Information Collection (Dependents' Request for Change of Program or Place of Training) Activity Under OMB Review

**AGENCY:** Veterans Benefits

Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before March 21, 2016.

**ADDRESSES:** Submit written comments on the collection of information through [www.Regulations.gov](http://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 [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). Please refer to “OMB Control No. 2900–0099” 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](mailto:crystal.rennie@va.gov). Please refer to “OMB Control No. 2900–0099.”

#### SUPPLEMENTARY INFORMATION:

**Title:** Dependents' Request for Change of Program or Place of Training.

**OMB Control Number:** 2900–0099.

**Type of Review:** Revision of a currently approved collection.

**Abstract:** Spouses, surviving spouses, and children who are eligible for Survivor's and Dependent's Educational Assistance (DEA) benefits under chapter 35, and children eligible for the Marine Gunnery Sergeant John David Fry Scholarship (Fry Scholarship) under chapter 33, title 38, U.S. Code, complete VA Form 22–5495 to change their program of education or place of training. VA uses the information collected to determine if the new program is suitable to their abilities, aptitudes, and interest; and to verify the new place of training is approved for benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 80 FR 29723 on November 23, 2015.

**Affected Public:** Individuals or Households.

**Estimated Annual Burden:** 36,038 hours.

**Estimated Average Burden per Respondent:** 15 minutes.

**Frequency of Response:** One-time.

**Estimated Number of Respondents:** 144,333 respondents.

By direction of the Secretary,

**Kathleen M. Manwell,**

*Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.*

[FR Doc. 2016–03287 Filed 2–17–16; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0741]

### Proposed Information Collection (Report of Subcontracts to Small and Veteran-Owned Business—VA0896a); Activity: Comment Request

**AGENCY:** Office of Small and Disadvantaged Business Utilization (OSDBU), The Department of Veterans Affairs (VA).

**ACTION:** Notice.

**SUMMARY:** VA OSDBU, is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved

collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information to be collected by VA through the Form 0896A, which intends to gather information from prime contractors regarding their subcontracts with service-disabled Veteran-owned small businesses (SDVOSB) and Veteran-owned small businesses (VOSB). This collection is in accordance with Public Law 109–461, Title V, Section 502(a)(1), codified at 38 U.S.C. 8127(a)(4).

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before April 18, 2016.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov) or to Milagros Ortiz, OSDBU, (OOSB) or email to: [milagros.ortiz@va.gov](mailto:milagros.ortiz@va.gov) or phone at (202) 461–4279. Please refer to “OMB Control No. 2900–0741 (Report of Subcontracts to Small and Veteran-Owned Business—VA0896a)” in any correspondence. During the comment period, comments may be viewed online through FDMS.

#### FOR FURTHER INFORMATION CONTACT:

Milagros Ortiz, (202) 461–4279 or [milagros.ortiz@va.gov](mailto:milagros.ortiz@va.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OMB invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OMB's functions, including whether the information will have practical utility; (2) the accuracy of OMB's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

**Title:** Report of Subcontracts to Small and Veteran-Owned Business.

**OMB Control Number:** 2900–0741.

**Type of Review:** Revision of a currently approved collection.

**Abstract:** In accordance with Public Law 109–461, Title V, Section 502(a)(1), codified at 38 U.S.C. 8127(a)(4), the



Office of Small and Disadvantaged Business Utilization (OSDBU) will use the VA Form 0896a to collect information from subcontractors to compare information obtained from subcontracting plans submitted by prime contractors in order to determine the accuracy of the data reported by prime contractors. The form has been modified to allow the collection of information from multiple subcontractors in the same form.

*Affected Public:* VA Prime Contractors.

*Estimated Annual Burden:* 610 hours.

*Estimated Average Burden per*

*Respondent:* 2 hours.

*Frequency of Response:* Once a year.

*Estimated Number of Respondents:* 305.

By direction of the Secretary.

**Kathleen M. Manwell,**

*Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.*

[FR Doc. 2016-03285 Filed 2-17-16; 8:45 am]

**BILLING CODE 8320-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0086]

### Proposed Information Collection—Request for a Certificate of Eligibility VA Form 26-1880

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice; comment request.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

The holder of a vendee account which has been guaranteed by the Department of Veterans Affairs (VA) may request VA to repurchase a loan as provided in 38 CFR 36.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before April 18, 2016.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System

(FDMS) at [www.Regulations.gov](http://www.Regulations.gov) or to Nancy J. Kessinger, Veterans Benefits Administrations (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to [nancy.kessinger@va.gov](mailto:nancy.kessinger@va.gov). Please refer to “OMB Control No. 2900-0086” in any correspondence. During the comment period, comments may be viewed online through FDMS.

#### FOR FURTHER INFORMATION CONTACT:

Nancy J. Kessinger at (202) 632-8924 or FAX (202) 632-8925.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104-13; 44 U.S.C. 3501-21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Request for a Certificate of Eligibility.

*OMB Control Number:* 2900-0086.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* Under Title 38, U.S.C., section 3702, authorizes collection of this information to help determine a Veteran's qualification for a VA-guaranteed home loan. 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.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 80, 250 hours.

*Estimated Average Burden per Respondent:* 15 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 321,000.

By direction of the Secretary.

**Kathleen M. Manwell,**

*Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.*

[FR Doc. 2016-03286 Filed 2-17-16; 8:45 am]

**BILLING CODE 8320-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0219]

### Proposed Information Collection (Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) Benefits—Application, Claim, Other Health Insurance & Potential Liability); Activity: Comment Request

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to identify areas for improvement in clinical training programs.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before April 18, 2016.

**ADDRESSES:** Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov); or to Brian McCarthy, Office of Regulatory and Administrative Affairs, Veterans Health Administration (10B4), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email: [Brian.McCarthy4@va.gov](mailto:Brian.McCarthy4@va.gov). Please refer to “OMB Control No. 2900-0219” in any correspondence. During the comment period, comments may be viewed online through FDMS.

#### FOR FURTHER INFORMATION CONTACT:

Brian McCarthy at (202) 461-6345.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104-13; 44 U.S.C. 3501-3521), Federal agencies must obtain approval from 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

1. VA Form 10-10d, Application for CHAMPVA Benefits
2. VA Form 10-7959a, CHAMPVA Claim Form
3. VA Form 10-7959c, CHAMPVA Other Health Insurance (OHI) Certification
4. VA Form 10-7959d, CHAMPVA Potential Liability Claim
5. VA Form 10-7959e, VA Claim for Miscellaneous Expenses
6. Payment (beneficially claims)
7. Review and Appeal Process  
*OMB Control Number: 2900-0219.*  
*Type of Review:* Revision of a currently approved collection.

#### Abstracts:

1. VA Form 10-10d, Application for CHAMPVA Benefits, is used to determine eligibility of persons applying for healthcare benefits under the CHAMPVA program in accordance with 38 U.S.C. 501 and 1781.

2. VA Form 10-7959a, CHAMPVA Claim Form, is used to adjudicate claims for CHAMPVA benefits in accordance with 38 U.S.C. 501 and 1781, and 10 U.S.C. 1079 and 1086. This information is required for accurate adjudication and processing of beneficiary submitted claims. The claim form is also instrumental in the detection and prosecution of fraud. In addition, the claim form is the only mechanism to obtain, on an interim basis, other health insurance (OHI) information.

3. Except for Medicaid and health insurance policies that are purchased exclusively for the purpose of supplementing CHAMPVA benefits, CHAMPVA is always the secondary payer of healthcare benefits (38 U.S.C. 501 and 1781, and 10 U.S.C. 1086). VA Form 10-7959c, CHAMPVA—Other Health Insurance (OHI) Certification, is

used to systematically obtain OHI information and to correctly coordinate benefits among all liable parties.

4. The Federal Medical Care Recovery Act (42 U.S.C. 2651-2653), mandates recovery of costs associated with healthcare services related to an injury/illness caused by a third party. VA Form 10-7959d, CHAMPVA Potential Liability Claim, provides basic information from which potential liability can be assessed. Additional authority includes 38 U.S.C. 501; 38 CFR 1.900 *et seq.*; 10 U.S.C. 1079 and 1086; 42 U.S.C. 2651-2653; and Executive Order 9397.

5. VA Form 10-7959e, VA Claim for Miscellaneous Expenses, information collection is needed to carry out the health care programs for certain children of Korea and/or Vietnam veterans authorized under 38 U.S.C., chapter 18, as amended by section 401, P.L. 106-419 and section 102, P.L. 108-183. VA's medical regulations 38 CFR part 17 (17.900 through 17.905) establish regulations regarding provision of health care for certain children of Korea and Vietnam veterans and women Vietnam veterans' children born with spina bifida and certain other covered birth defects. These regulations also specify the information to be included in requests for preauthorization and claims from approved health care providers.

6. Payment of Claims for Provision of Health Care for Certain Children of Korea and/or Vietnam Veterans (includes provider billing and VA Forms 10-7959e). This data collection is for the purpose of claiming payment/reimbursement of expenses related to spina bifida and certain covered birth defects. Beneficiaries utilize VA Form 10-7959e, VA Claim for Miscellaneous Expenses. Providers utilize provider generated billing statements and standard billing forms such as: Uniform Billing-Forms UB-04, and CMS 1500, Medicare Health Insurance Claims Form. VA would be unable to determine the correct amount to reimburse providers for their services or beneficiaries for covered expenses without the requested information. The information is instrumental in the timely and accurate processing of provider and beneficiary claims for reimbursement. The frequency of submissions is not determined by VA, but will be determined by the provider or claimant and will be based on the volume of medical services and supplies provided to patients and claims for reimbursement are submitted individually or in batches.

7. Review and Appeal Process Regarding Provision of Health Care or

Payment Relating to Provision of Health Care for Certain Children of Korea and/or Vietnam Veterans. The provisions of 38 CFR 17.904 establish a review process regarding disagreements by an eligible veteran's child or representative with a determination concerning provision of health care or a health care provider's disagreement with a determination regarding payment. The person or entity requesting reconsideration of such determination is required to submit such a request to the Chief Business Office Purchased Care (CBOPC) (Attention: Chief, Customer Service), in writing within one year of the date of initial determination. The request must state why the decision is in error and include any new and relevant information not previously considered. After reviewing the matter, a Customer Service Advisor issues a written determination to the person or entity seeking reconsideration. If such person or entity remains dissatisfied with the determination, the person or entity is permitted to submit within 90 days of the date of the decision a written request for review by the Director, CBOPC.

*Affected Public:* Individuals or households.

#### *Estimated Annual Burden:*

1. VA Form 10-10d—4,411 hours.
2. VA Form 10-7959a—37,336 hours.
3. VA Form 10-7959c—13,456 hours.
4. VA Form 10-7959d—467 hours.
5. VA Form 10-7959e—200 hours.
6. Payment (beneficially claims)—500 hours.
7. Review and Appeal Process—200 hours.

#### *Estimated Average Burden per Respondent:*

1. VA Form 10-10d—10 minutes.
2. VA Form 10-7959a—10 minutes.
3. VA Form 10-7959c—10 minutes.
4. VA Form 10-7959d—7 minutes.
5. VA Form 10-7959e—15 minutes.
6. Payment (beneficially claims)—10 minutes.
7. Review and Appeal Process—20 minutes.

#### *Frequency of Response:* Annually.

#### *Estimated Annual Responses:*

1. VA Form 10-10d—26,468.
2. VA Form 10-7959a—224,018.
3. VA Form 10-7959c—80,733.
4. VA Form 10-7959d—4,000.
5. VA Form 10-7959e—800.
6. Payment (beneficially claims)—3,000.
7. Review and Appeal Process—600.

By direction of the Secretary.

**Kathleen M. Manwell,**

*Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.*

[FR Doc. 2016-03288 Filed 2-17-16; 8:45 am]

**BILLING CODE 8320-01-P**

**DEPARTMENT OF VETERANS AFFAIRS****[OMB Control No. 2900–0523]****Agency Information Collection (Loan Analysis) 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 March 21, 2016.

**ADDRESSES:** Submit written comments on the collection of information through [www.Regulations.gov](http://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](mailto:oira_submission@omb.eop.gov). Please refer to “OMB Control No. 2900–0523” 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](mailto:crystal.rennie@va.gov). Please refer to “OMB Control No. 2900–0523.”

**SUPPLEMENTARY INFORMATION:**

*Title:* Loan Analysis.

*OMB Control Number:* 2900–0523.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 26–6393 is currently used by employees of both lending institutions and VA to determine the ability of a veteran-applicant to qualify for any type of VA guaranteed loan authorized by 38 U.S.C. 3710(a). Lenders complete and submit the form to provide evidence that the lender’s decision to submit a prior approval loan application or close a

loan on the automatic basis is based upon appropriate application of VA credit standards as required by 38 U.S.C. 3701(b) and 3710(g).

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 at 80 FR 26646 on October 21, 2015.

*Affected Public:* Individuals or Households.

*Estimated Annual Burden:* 125,000 hours.

*Estimated Average Burden per Respondent:* 30 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 250,000 respondents.

By direction of the Secretary.

**Kathleen M. Manwell,**

*Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.*

[FR Doc. 2016–03284 Filed 2–17–16; 8:45 am]

**BILLING CODE 8320–01–P**



# FEDERAL REGISTER

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Vol. 81

Thursday,

No. 32

February 18, 2016

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## Part II

### The President

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Proclamation 9394—Establishment of the Castle Mountains National Monument

Proclamation 9395—Establishment of the Mojave Trails National Monument

Proclamation 9396—Establishment of the Sand to Snow National Monument

Proclamation 9397—Death of Antonin Scalia



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# Presidential Documents

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Title 3—

Proclamation 9394 of February 12, 2016

The President

## Establishment of the Castle Mountains National Monument

By the President of the United States of America

### A Proclamation

The Castle Mountains area, bounded on three sides by Mojave National Preserve (Preserve), possesses outstanding natural, cultural, and historical values representing some of the finest characteristics of the eastern Mojave Desert. It connects water flow and wildlife corridors of the Preserve, and completes the boundary of the Preserve along the California-Nevada border. Beneath the shadow of Hart Peak lie rich cultural and historic resources, including Native American archeological sites and the historic gold mining ghost town of Hart. Exposed geologic features contribute to the area's outstanding scenery.

Shaped by millions of years of geologic forces, the rugged Castle Mountains are emblematic of the Mojave landscape. The Castle Mountains rise from the broad sweep of the Lanfair Valley to a height of over 5,000 feet, presenting a picturesque skyline visible from many locations within the Preserve, while also affording spectacular views of the Preserve and beyond. Hart Peak is the prominent feature in the Castle Mountains skyline at 5,543 feet. Views from Hart Peak encompass vast wilderness and distinctive peaks, including Spirit Mountain in Nevada, a sacred site to many Native American tribes. The remoteness of the Castle Mountains area offers visitors the chance to experience the solitude of the desert and its increasingly rare natural soundscapes and dark night skies.

The Castle Mountains area provides a critical linkage for plants, animals, and water between two mountain ranges within the Preserve, the New York Mountains to the northwest and the Piute Mountains to the southeast. The area's high quality desert habitat includes some of the finest Joshua tree forest in the Mojave Desert, as well as pinyon pine and juniper forest at the upper elevations. The area's native desert grassland is a hotspot of botanical diversity. The unique plant assemblage includes 28 species of native grasses, about half of which are rare, including burrograss and false buffalograss.

Protection of this relatively intact and undisturbed habitat is important not just to the long-term survival of many plant species but also to significant wildlife populations. A herd of desert bighorn sheep lives on the steep, rocky slopes of the Castle Mountains. They and other wildlife traverse the area between the Piute Mountains and the New York Mountains. Numerous bat species live in rock crevices and mine remnants in the area. Wildlife species of special concern include the Townsend's big-eared bat, California leaf-nosed bat, Swainson's hawk, golden eagle, desert tortoise, Bendire's thrasher, and gray vireo.

With its habitat linkages, wildlife corridors, and intact ecosystems, the area offers exceptional opportunities to study plant and animal movement and connections between diverse natural systems, especially in the context of climate change. Ongoing studies of desert bighorn sheep and other plant and animal species have shown the priority of this area for scientific research. A recent study using network models of bighorn sheep genetic and demographic connectivity as tools for landscape-scale conservation found the Castle Mountains habitat to be one of the most important in the Mojave

Desert. Botanists are finding new and rare plant populations, and significant new information regarding the range of species such as Mexican panicgrass, in the Castle Mountains area.

The Castle Mountains area is the only remaining portion of the 226-square mile Lanfair Valley watershed that is not part of the Preserve. Underlying much of the Lanfair Valley, including the Castle Mountains area, is a large groundwater aquifer of critical importance to the desert ecosystem. With its primary recharge zone in the New York Mountains, this aquifer feeds Piute Spring, located in the Preserve just south of the Castle Mountains area. Piute Spring is the only perennial stream and riparian corridor in the Preserve, and attracts numerous flora and fauna.

As a rare desert water source, Piute Spring attracted Native American habitation for thousands of years, followed by Euro-American exploration and settlement. Drawn to this reliable source of potable water, in 1867 the U.S. Army established Fort Piute (listed on the National Register of Historic Places) adjacent to the spring to provide protection to travelers on the Old Spanish Trail (known locally as the Mojave Road) that crossed the Mojave Desert from the Colorado River to San Bernardino, California. Maintenance of the groundwater resources and flow to Piute Spring is essential to the historical and scientific value of both the area and the Preserve.

The Castle Mountains area also contains other cultural resources that reflect a long history of prehistoric and historic human use. Prehistoric rock art and archeological sites are found throughout the area. The rock art indicates sites of significant cultural import to both the Fort Mojave and Chemehuevi Tribes, marking routes through the Castle Mountains likely traveled by both tribes. The Castle Mountains area links places to the south, like Piute Spring, to areas north, such as an obsidian collection site. Western expansion brought ranching, mining, and the railroad to the area. Some of the best-preserved segments of a wagon road that linked the Arizona Territory (Hardyville, now Bullhead City, Arizona) to settlements in southern California can be found in the Castle Mountains area. Ranchers grazed cattle in the area. By 1894, the Rock Springs Land and Cattle Company had consolidated its holdings in the eastern Mojave Desert. Much of their historic ranch lies within the Preserve, and features of this and other grazing enterprises of the era can still be seen in the Castle Mountains area. In 1907, brothers Bert and Clark Hitt found rich gold ore, staking claims that became the Oro Belle and Big Chief Mines. With James Hart, they founded the town of Hart at the base of Hart Peak. Between 1908 and 1910, the town of Hart underwent a rapid boom and bust, and by 1920, Hart had become a ghost town. Throughout this period of western expansion, railroads served the ranchers, miners, Hart residents, and others in the eastern Mojave Desert. Part of the former 23-mile Barnwell and Searchlight Railway, later incorporated into the California Eastern Railway, ran through the Castle Mountains area.

WHEREAS, section 320301 of title 54, United States Code (known as the “Antiquities Act”), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, it is in the public interest to preserve and protect the historic and scientific objects in the Castle Mountains area;

WHEREAS, the protection of the Castle Mountains area’s outstanding objects of historic and scientific interest would also contribute to the protection of the resources and values of the Preserve;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54,



United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be the Castle Mountains National Monument (monument) and, for the purpose of protecting those objects, reserve as a part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation. The reserved Federal lands and interests in lands encompass approximately 20,920 acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries described on the accompanying map are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

The establishment of the monument is subject to valid existing rights. If the Federal Government acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

Nothing in this proclamation shall be deemed to enlarge or diminish the rights of any Indian tribe. The Secretary of the Interior (Secretary) shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and cultural sites in the monument and provide access to the sites by members of Indian tribes for traditional cultural and customary uses, consistent with the American Indian Religious Freedom Act (42 U.S.C. 1996) and Executive Order 13007 of May 24, 1996 (Indian Sacred Sites).

The Secretary shall manage these lands through the National Park Service, pursuant to applicable authorities, consistent with the purposes and provisions of this proclamation. The Secretary shall prepare a management plan to implement the purposes of this proclamation, with full public involvement, within 3 years of the date of this proclamation. For the purpose of protecting the objects identified above, all motorized and mechanized vehicle use off road will be prohibited, except for emergency or authorized administrative purposes.

The Secretary shall continue to manage the Federal lands and interests in lands within the adjacent area labelled "Castle Mountain Mine Area" on the accompanying map through the Bureau of Land Management, pursuant to applicable authorities. Upon the determination of the Secretary that either (1) all mining and mining-related activities have terminated and reclamation has been completed, or (2) a period of 10 years from the date of this proclamation has elapsed during which no commercial mining activities have occurred pursuant to a Bureau of Land Management approved plan of operations, the Secretary shall, consistent with applicable legal authorities, transfer jurisdiction of the lands within the Castle Mountain Mine Area to the National Park Service and ensure that the lands are managed in a manner compatible with the proper care and management of the objects identified above.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of California with respect to fish and wildlife management.

The Federal land managing agencies shall, in cooperation with appropriate State officials and subject to applicable State and Federal law, ensure the

availability of water resources, including groundwater resources, needed for monument purposes.

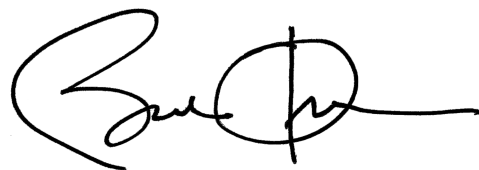
Nothing in this proclamation shall restrict or preclude low level overflights of military aircraft, the designation of new units of special use airspace, or the use or establishment of military flight training routes over the lands reserved by this proclamation, consistent with the care and management of the objects to be protected.

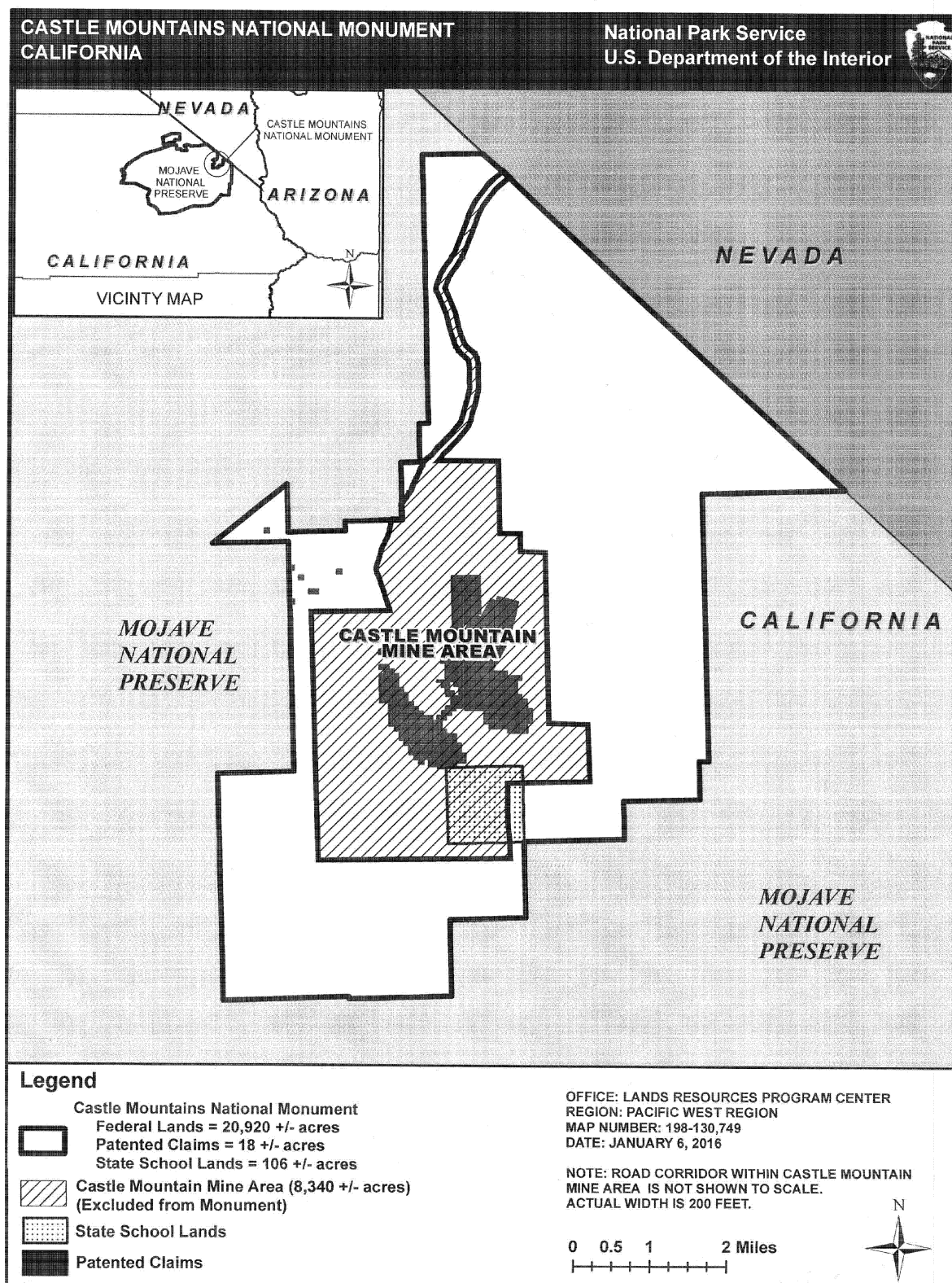
Nothing in this proclamation shall be construed to alter the authority or responsibility of any party with respect to emergency response activities within the monument, including wildland fire response.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of February, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish on the left and a horizontal line extending to the right.



## Presidential Documents

**Proclamation 9395 of February 12, 2016**

### **Establishment of the Mojave Trails National Monument**

**By the President of the United States of America**

#### **A Proclamation**

The Mojave Trails area of southern California is a stunning mosaic of rugged mountain ranges, ancient lava flows, and spectacular sand dunes. It is a landscape defined by scarcity and shaped by travel. The area exemplifies the remarkable ecology of the Mojave Desert, where the hearty insistence of life is scratched out from unrelenting heat and dryness. This punishing environment has also forged the unique human history of the area, from ancient settlements uprooted by a changing climate to the armies of General George S. Patton, Jr., as they trained for battle in North Africa. With historic American trading routes, trails followed by Spanish explorers, a trans-continental rail line, and the Nation's most famous highway, the Mojave Trails area tells the American story of exploration, migration, and commerce. The Mojave Trails area is an invaluable treasure and will continue to serve as an irreplaceable national resource for geologists, ecologists, archaeologists, and historians for generations to come.

The Mojave Trails area has been a focus of geological research for decades. This unique landscape contains a stunning diversity of lava flows, mountains, playas, sand dunes, bajadas, washes, and other features. The area contains a number of significant sand dune features, most notably the stunning Cadiz Dunes, which have been extensively studied. The mountains of the Mojave Trails area include several significant formations, and seismologists have studied this area for insight into faulting, tectonics, and magmatism. A number of young volcanoes and their associated lava flows in the area have been heavily studied by volcanologists. Amboy Crater, designated as a National Natural Landmark in 1973, has been the focus of research on a number of volcanic phenomena. The Pissgah Volcano lava flow's vast network of lava tubes constitutes southern California's highest density of caves, and is used by both speleologists and recreational cavers. The area's terrain and geology have provided a surrogate for lunar and Martian landscapes, and many of the robotic and imaging technologies used to better understand volcanism and Aeolian processes have been developed and tested in the Mojave Trails area.

Outstanding paleontological resources can be found throughout the Mojave Trails area. The Cady Mountains contain important fossil fauna assemblages dating to the Miocene Period. The Marble Mountain Fossil Bed area contains one of the classic Cambrian trilobite fossil sites in the Western United States. Set in the green-brown lower Cambrian Latham Shale, the fossil beds also contain the fossilized remains of brachiopods, mollusks, echinoderms, and algal bodies that are of great interest to paleontologists. The southern Bristol Mountains contain Tertiary fossils such as camel tracks, invertebrates, and numerous plants; this fossil history has also been used to understand the climate history of the Mojave Desert. Significant vertebrate fossils and other fossil resources have also been identified in Piute Valley and Cadiz Valley as well as the Ship Mountains, Little Piute Mountains, and Sacramento Mountains.

The Mojave Trails area has been important for ecological research, including studies on the effects of climate change and land management practices

on ecological communities and wildlife. It provides opportunity for further research on ecological connectivity in the Mojave Desert region, as it is among the most ecologically intact areas in southern California. The species that have managed to thrive here are specialists in perseverance and resourcefulness and are remarkable for their ability to withstand the desert extremes. The area's scarce springs and riparian areas such as Afton Canyon, Chuckwalla Spring, Hummingbird Spring, Barrel Spring, and Fenner Spring provide refuges for a wide variety of plants and animals. The complex network of groundwater underlying the Mojave Trails area has been the subject of past and ongoing hydrological study. Underground aquifers feed springs and seeps that are important for sensitive ecosystems and wildlife, though specific connections are not yet well understood.

Rare plant species such as the scrub lotus, rosy two-tone beardtongue, whitemargin beardtongue, Emory's crucifixion-thorn, small-flowered androstephium, white-margined penstemon, and Borrego milkvetch rely on the specific habitat types found in the Mojave Trails area. The Piute Valley area in the northeastern part of the Mojave Trails area is home to the northernmost occurrences of smoke trees in the California desert, as well as the Homer Mountain Ocotillo Assemblage. The lowlands and middle elevations are also home to other unique or ecologically significant plants such as the endemic Orocopia Mountains spurge. Numerous cactus species are also found here, including the densest concentration of Bigelow cholla cactus in California. Ongoing research in the Mojave Trails area has identified other plant species that are new to science, many of which have not yet been described.

Birds including the endangered Least Bell's vireo, southwestern willow flycatcher, and yellow-billed cuckoo depend on this area, as do raptors such as the burrowing owl, red-tailed hawk, golden eagle, American kestrel, and prairie falcon. Fragile desert fish species such as the bonytail chub rely on the scarce waters of the desert riparian ecosystems. A wide variety of fascinating native mammal species can be found in the Mojave Trails area, including the kit fox, ringtail, American badger, mountain lion, and bighorn sheep. Reptiles and amphibians, including the Mojave Desert's largest lizard, the chuckwalla, have been extensively studied in the Mojave Trails area. The area contains some of the Mojave Desert's best habitat for the threatened desert tortoise and provides important dispersal corridors for that fragile species. An unusual community of invertebrates associated with lava tubes in the Pisgah area offers an ongoing opportunity for entomological research.

Humans have lived in and moved through the Mojave Trails area for more than 10,000 years. The archeological record tells of a human existence shaped by a changing climate. During the Paleo-Indian period, now-dry lakes provided fresh water to small groups of nomadic people and the animals they hunted. From around 7,000 to 2,000 BC, rising temperatures resulted in a change from wet to dry conditions. Associated ecological changes in the region led to new patterns of subsistence for native peoples. Although people remained closely tied to water sources following the temperature increase, desert inhabitants adjusted their diets to rely more heavily on plants and fish, invented new tools, and expanded the sizes of their social groups. During the Formative Period (2,500 to 1,500 BC), dry conditions meant the inhabitants of the Mojave Desert remained in small groups. They relied heavily for their survival on the Mojave River, a name derived from the traditional name for these people, Pipa Aha Macav ("the people by the river"). The Mojave people left their mark on the landscape through petroglyphs, pictographs, old trails, and stone work, some of which can still be found today, especially near springs and rivers and along the shores of now-extinct lakes.

The Mojave were not the only people to use or pass through this landscape. Ancestors of the Chemehuevi Indian Tribe, a branch of the Southern Paiute, have been persistent occupants of the Mojave Desert for thousands of years.

Sacred Chemehuevi trails are often tied to traditional and ceremonial songs. The Salt Song Trail, one of the longest song trails of the Chemehuevi people, passes through the Mojave Trails area near the town of Fenner and the Ward Valley. Natural land patterns form the route of this trail, with specific songs sung at specific wayside locations. Other Native Americans who have lived in or passed through the Mojave Desert include the Shoshone, Serrano, Kawaiisu, and the Paiute. The Ward Valley, located between the Old Woman and Piute Mountains, is sacred to a number of these tribes, as are the Mesquite and Crucero Hills, which contain over 50 archaeological sites including petroglyphs, milling stations, temporary camps, intaglios, lithic scatters, and pottery dating as far back as 4,000 years.

The Mojave Trails area has been a critical travel corridor for millennia, linking the Pacific Coast to the deserts of the southwest and beyond. The Mojave Indian Trail is the earliest known travel route passing through the Mojave Trails area, used by Native Americans for thousands of years and by early Spanish explorers and traders. In 1829, Mexican explorer Antonio Armijo pioneered the Old Spanish Trail through this area. Evidence of the trail, now designated a National Historic Trail, can still be found at Afton Canyon.

By the end of the 19th century, transcontinental rail travel had changed the American West in profound ways. In 1882, Southern Pacific constructed a railroad route from Barstow to Needles. In addition to the major rail stops established at Needles and Barstow, several smaller towns and rail stops were established along this stretch, including the alphabetically named Amboy, Bristol, Cadiz, Danby, Essex, Fenner, and Goffs. These towns remain, some as inhabited hamlets and others as abandoned ghost towns, and some historical artifacts from the original rail line still exist, including original rail ties and track and later improvements of communications poles, insulators, and wires.

A modest dirt road—an original trackside component of the railroad project—would later become the most famous highway in America. In 1911, in the infancy of the automobile era, the County of San Bernardino paved the first stretch of that road from Barstow to Needles. The next year, this stretch became part of the National Old Trails Road, which extended more than 3,000 miles from New York, New York, to Los Angeles, California, and connected the American coasts by pavement for the first time. In 1926, the road was officially designated as U.S. Highway 66, a designation soon known around the world as Route 66. During the 1930s, Route 66 became an important route for migrants escaping economic hardships of the Great Depression and droughts in the Central plains. As the national economy rebounded following World War II, Americans took to the highways in unprecedented numbers. The road became an American icon, earning the nickname the “Main Street of America” and inspiring popular culture through music, literature, and film.

The popularity of Route 66, however, hastened its downfall; increasing traffic quickly exceeded its two-lane capacity. In 1985, Route 66 was officially decommissioned, leaving behind a powerful albeit fragmented narrative history of America’s automobile culture of the first half of the 20th century and its legacy of related commerce and architecture. The Mojave Trails area contains the longest remaining undeveloped stretch of Route 66, offering spectacular and serene desert vistas and a glimpse into what travelers experienced during the peak of the route’s popularity in the mid-20th century. Today, the ghost towns along this stretch of Route 66 are a visual legacy of how the automobile shaped the American landscape.

In addition to its important role in the transportation history of the United States, the Mojave Trails area is a unique resource for understanding one of the most formative periods in American military history. During the height of World War II, the United States military recognized a need to develop a desert training program in order to prepare its troops to fight

the tank armies of Nazi Germany in North Africa. Major General George S. Patton, Jr., commander of the I Armored Corps, selected the site of the Desert Training Center in the Mojave Trails area, the largest training area in the world at the time. More than one million troops trained in the area between 1942 and 1944, including at Camp Ibis, Camp Clipper, Camp Iron Mountain, Camp Granite, and Camp Essex. Remnants of these camps can still be found today, including rock-lined streets, staging areas, flag circles, altars, tent areas, and even tank tracks on some of the area's hardpan playas.

The protection of the Mojave Trails area will preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the prehistoric, historic, and scientific values of this area remain for the benefit of all Americans.

WHEREAS, section 320301 of title 54, United States Code (known as the "Antiquities Act"), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, it is in the public interest to preserve the objects of scientific and historic interest on the Mojave Trails lands;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be the Mojave Trails National Monument (monument) and, for the purpose of protecting those objects, reserve as part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation. These reserved Federal lands and interests in lands encompass approximately 1.6 million acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument or disposal for the limited purpose of providing materials for repairing or maintaining roads and bridges within the monument consistent with care and management of the objects identified above.

The establishment of the monument is subject to valid existing rights. If the Federal Government acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

The Secretary of the Interior (Secretary) shall manage the monument through the Bureau of Land Management (BLM) as a unit of the National Landscape Conservation System, pursuant to applicable legal authorities, to protect the objects identified above.

For purposes of the care and management of the objects identified above, the Secretary, through the BLM, shall within 3 years of the date of this proclamation prepare and maintain a management plan for the monument



and shall provide for maximum public involvement in the development of that plan including, but not limited to, consultation with tribal, State, and local governments.

Nothing in this proclamation shall be construed to preclude the renewal or assignment of, or interfere with the operation or maintenance of, or with the replacement, modification, or upgrade within or adjacent to an existing authorization boundary of, existing flood control, utility, pipeline, or telecommunications facilities that are located within the monument in a manner consistent with the care and management of the objects identified above. Existing flood control, utility, pipeline, or telecommunications facilities located within the monument may be expanded, and new facilities may be constructed within the monument, but only to the extent consistent with the care and management of the objects identified above.

The Secretary shall work with appropriate State officials to ensure the availability of water resources, including groundwater resources, needed for monument purposes.

Except for emergency or authorized administrative purposes, motorized vehicle use in the monument shall be permitted only on roads existing as of the date of this proclamation. Non-motorized mechanized vehicle use shall be permitted only on roads and trails designated for their use consistent with the care and management of the objects identified above. The Secretary shall prepare a transportation plan that designates the roads and trails where motorized or non-motorized mechanized vehicle use will be permitted.

Laws, regulations, and policies followed by the BLM in issuing and administering grazing permits or leases on lands under its jurisdiction, including provisions specific to the California Desert Conservation Area, shall continue to apply with regard to the lands in the monument, consistent with the care and management of the objects identified above.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of California, including its jurisdiction and authority with respect to fish and wildlife management.

Nothing in this proclamation shall preclude low level overflights of military aircraft, the designation of new units of special use airspace, the use or establishment of military flight training routes over the lands reserved by this proclamation, or related military uses, consistent with the care and management of the objects identified above.

Nothing in this proclamation shall alter the Department of Defense's use of the Restricted Airspace established by the Federal Aviation Administration. Further, nothing in this proclamation shall preclude (i) air or ground access for existing or new electronic tracking and communications; (ii) landing and drop zones; and (iii) readiness and training by the U.S. Armed Services, Joint and Coalition forces, including training using motorized vehicles both on and off road, in accordance with applicable interagency agreements.

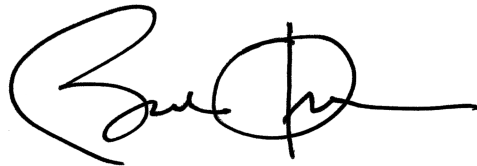
Nothing in this proclamation shall be construed to alter the authority or responsibility of any party with respect to emergency response activities within the monument, including wildland fire response.

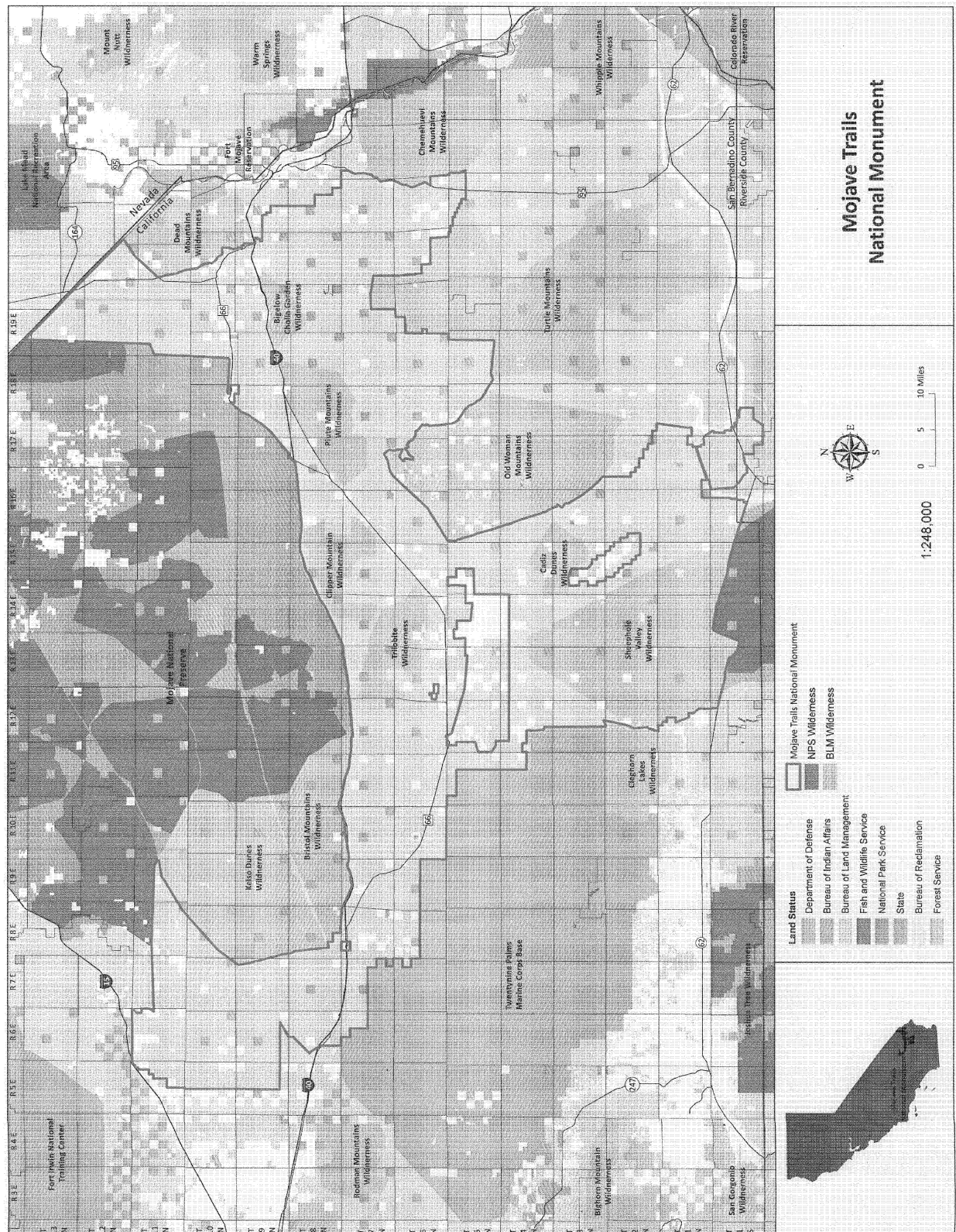
Nothing in this proclamation shall be deemed to enlarge or diminish the rights of any Indian tribe. The Secretary shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and cultural sites in the monument and provide access to the sites by members of Indian tribes for traditional cultural and customary uses, consistent with the American Indian Religious Freedom Act (42 U.S.C. 1996) and Executive Order 13007 of May 24, 1996 (Indian Sacred Sites).

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of the monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of February, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish and a horizontal line extending to the right.



[FR Doc. 2016-03544

Filed 2-17-16; 11:15 am]

Billing code 4310-10-C

## Presidential Documents

Proclamation 9396 of February 12, 2016

### Establishment of the Sand to Snow National Monument

By the President of the United States of America

#### A Proclamation

The Sand to Snow area of southern California is an ecological and cultural treasure, a microcosm of the great geographic diversity of the region. Rising from the floor of the Sonoran Desert to the tallest peak in southern California, the area features a remarkable diversity of plant and animal species. The area includes a portion of the San Bernardino National Forest and connects this area with Joshua Tree National Park to the east, knitting together a mosaic of spectacular landscapes stretching over 200 miles. The mountain peaks of the Sand to Snow area frame the northeastern reach of Coachella Valley along with the Santa Rosa and San Jacinto Mountains National Monument to the south. Home to desert oases at Big Morongo Canyon and Whitewater Canyon, the area serves as a refuge for desert dwelling animals and a stopover for migrating birds. The archaeological riches of the Black Lava Buttes and the historical remains of mining and ranching communities tell of past prosperity and struggle in this arid land. The unbroken expanse is an invaluable treasure for our Nation and will continue to serve as an irreplaceable resource for archaeologists, geologists, and biologists for generations to come.

The Sand to Snow area encompasses a rich diversity of geological and ecological resources, including a nearly 10,000-foot elevation gradient from the Sonoran Desert floor to the top of the 11,500-foot San Gorgonio Mountain, the highest mountain in southern California. From the flat desert lowlands, the mountains thrust upward in stark relief, creating indelible beauty along with a unique diversity of resources and a rich history of human habitation and movement. Along this remarkable topographic gradient lies an unusually wide range of ecosystems, ranging from lowland Mojave and Colorado deserts to scrub and woodlands and Mediterranean chaparral to subalpine and alpine conifer forests. San Gorgonio Mountain is one end of the longest recorded line of sight in the lower 48 States, the other being Mount Whitney, 190 miles away. In addition, the Henry Washington Survey Marker, located on San Bernardino Peak, serves as the starting point for surveying land in southern California and is included on the National Register of Historic Places.

San Gorgonio, so named after Saint Gorgonius by early 17th century Spanish missionaries, is just one name for this remarkable, region-defining mountain. The Cahuilla Indians call the mountain Kwiria-Kaich, which means “bald” or “smooth,” and consider it among the sacred peaks of southern California. The Gabrielino Indians from the Los Angeles Basin treat San Gorgonio Mountain with reverence and refer to it as Akvangna. The Luiseño Indians consider San Gorgonio Mountain sacred and the older brother of Mount San Jacinto; both peaks were among the first born of Earth Mother. The Luiseño refer to San Gorgonio Mountain as Pewipwi.

Thirty miles of the world famous Pacific Crest National Scenic Trail run through the Sand to Snow area, climbing 7,000 feet from the desert of Whitewater Canyon to Mission Springs in the San Bernardino National Forest. The history of this renowned trail dates back to the 1920s when the idea of a border-to-border trail was first conceptualized. Although the

establishment of the trail took decades to fully materialize, today the trail is a national icon, highlighting the wilderness treasures of the American West. Since its completion, over 3,000 people have hiked the 2,600 miles of continuous trail along the Pacific crest, including the Mission Creek Canyon segment found within the Sand to Snow area.

The Sand to Snow area first took its current shape 175 million years ago with the subduction of the Pacific Plate beneath the North American Plate. The San Bernardino Mountain range in the western half of the Sand to Snow area is unusual in California, a transverse range as distinct from the north-south mountain ranges found through most of California. This difference in direction results from a change in the San Andreas Fault, which shifts direction to the west of the Sand to Snow area. This intersection of mountains makes this area a critical bridge for wildlife traversing the high elevations of southern California's desert landscape.

Two branches of the San Andreas Fault run through the Sand to Snow area, and the faulting that created the mountains and canyons throughout this landscape also created the Morongo Valley. The Whitewater Canyon area has been featured in numerous studies of the plate tectonics and geologic rifting of southern California, including studies that examine the impact of earthquakes on fault stability. The San Bernardino Mountains and Big Morongo Canyon contain ancient rocks from the Proterozoic Eon, along with some of the oldest exposed rocks in California, nearly 2 billion years old. Granite, gneiss, and schist in these areas have been used by geologists to better understand the tectonic history of the region, and are a testament to the area's important geologic past.

Covering a range of nearly 10,000 feet in elevation, the Sand to Snow area includes an extraordinarily diverse range of ecosystems from lowland deserts, fresh water marshes, and Mojave riparian forests, to creosote bush scrub ecosystems, and alpine peaks. Hundreds of springs rise to the surface at South Fork Meadows, the origin of the South Fork of the Santa Ana River. The Sand to Snow area has been important to biological and ecological research, as well as studies of climate and land use change, the impact of fires and invasive species management.

The area has a remarkable species richness that makes it one of most biodiverse areas in southern California. The area is home to 12 federally listed threatened and endangered animal species. Species include the endangered peninsular bighorn sheep, San Bernardino Merriam's kangaroo rat, Arroyo toad, Mountain Yellow-legged frog, and unarmored threespine stickleback, as well as the threatened Santa Ana sucker, Coachella Valley fringe-toed lizard, and desert tortoise.

A tremendous diversity of other wildlife species also make their homes here. In the San Geronio Wilderness, black bears, mountain lions, bobcats, mule deer, and bighorn sheep can all be found. Species such as ringtails, kit fox, striped skunk, California ground squirrel, blacktail jackrabbit, and 19 species of bat live in the Big Morongo Canyon Preserve. Amphibians and reptiles including the Mohave Rattlesnake, red diamond rattlesnake, rosy boa, desert spiny lizard, California kingsnake, Western whiptail, and Pacific tree frog also live in the Sand to Snow area.

The Sand to Snow area is famous for its oases frequented by over 240 species of birds, including the endangered Least Bell's vireo, southwestern willow flycatcher, and Yuma clapper rail, as well as the threatened coastal California gnatcatcher. Big Morongo Canyon, characterized by steep canyons, rugged terrain, and desert oases, is particularly high in biodiversity and is among the largest desert riparian habitats in California. It has been recognized as among the most important avian habitats in the State. Common birds found at Big Morongo Canyon include shore birds like the American white pelican, great blue heron, and green heron, raptors such as the Swainson's hawk, Northern Harrier, and American kestrel, owls, including the western screech-owl and great horned owl, and hummingbirds, woodpeckers, vireos, and finches. Additionally, 32 species of migratory birds

of conservation concern have been identified in the Sand to Snow area, including eagles, sparrows, owls, hummingbirds, woodpeckers, and falcons, among others.

The Sand to Snow area is home to dozens of native plant species, including 14 federally listed threatened or endangered species of flowering plants. These include the endangered California dandelion, Coachella Valley milk-vetch, Cushenbury buckwheat, Cushenbury oxytheca, pedate checker-mallow, San Bernardino bluegrass, San Bernardino Mountains bladderpod, Santa Ana River woolly-star, slender-petaled mustard, and triple-ribbed milk-vetch and the threatened ash-grey paintbrush, Bear Valley sandwort, Parish's daisy, and Southern Mountain wild-buckwheat. The southern-most stand of quaking aspen trees is located here as are important stands of white fir and bigcone Douglas-fir.

The human history of the Sand to Snow area extends back thousands of years. People now identified as part of the Takic subset of the large Uto-Aztecan group of Native Americans arrived in the region around 2,500 years ago. Ancient people of the area used a wide variety of plants from both the mountains and the Mojave desert, such as honey mesquite, oak, piñon, cactus fruits, yucca roots, and tubers as well as grasses, seeds, and berries. Common tools were made of wood, bone, shell, stone, clay, and plant fibers. These people also manufactured woven goods, pipes made of stone, awls made of bone, tools associated with archery, and fire drills. They made coiled basketry and simple undecorated ceramic pots used for storage and transport.

The name "Serrano" was given to people living in the Sand to Snow area by the Spanish missionaries in the late 18th century and translates from Spanish as a "person from the mountains." In 1834, the Spanish forcibly relocated many Serrano people to the missions. In 1840 the Serrano suffered a devastating smallpox outbreak, and the disease returned in 1860. Ruth Benedict, one of the world's foremost cultural anthropologists, studied the Serrano extensively in 1924. However, by this time there were few remaining eastern groups and no old shamans or priests survived. Today, the rich archaeological resources in this area serve to preserve the history of the Serrano people. Black Lava Butte, topped by distinctive basaltic lava flows, is sacred to the Serrano Tribe and home to a substantial number of archaeological sites, including evidence of habitation, rock art, and possible ritual activities. Black Lava Butte contains an estimated 1,700 distinct petroglyphs, most of which have not yet been studied and may provide insight into the history of the Serrano and other tribes in the region. The mesa also contains dozens of isolated grinding and milling sites and at least one shelter site, where many milling stones are present.

After the Holcomb Valley gold rush of 1860, ranchers used the area for grazing sheep, horses, and cattle. Many of the ranchers kept their herds at lower elevations during the winter and drove their stock to the meadows of the San Bernardino Mountains to graze during the summer months. Old cattle paths, watering holes, and campsites remain a part of the landscape today. Although not particularly successful, many miners prospected in the southeastern portions of the San Bernardino Mountains. Evidence still remains in the form of old cabins, mine shafts, prospecting pits, and refuse deposits.

The protection of the Sand to Snow area will preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the historic and scientific values of this area remain for the benefit of all Americans. In addition to its significant scientific and historic values, the area also provides world class outdoor recreation opportunities, including hunting, fishing, hiking, camping, mountain biking, and horseback riding.

WHEREAS, section 320301 of title 54, United States Code (known as the "Antiquities Act"), authorizes the President, in his discretion, to declare

by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, it is in the public interest to preserve the objects of scientific and historic interest on the Sand to Snow lands;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be the Sand to Snow National Monument (monument) and, for the purpose of protecting those objects, reserve as part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation. These reserved Federal lands and interests in lands encompass approximately 154,000 acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws or laws applicable to the U.S. Forest Service, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

The establishment of the monument is subject to valid existing rights. If the Federal Government acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

The Secretary of Agriculture and the Secretary of the Interior (Secretaries) shall manage the monument through the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM), pursuant to their respective applicable legal authorities, to implement the purposes of this proclamation. The USFS shall manage that portion of the monument within the boundaries of the National Forest System (NFS), and BLM shall manage the remainder of the monument. The lands administered by USFS shall be managed as part of the San Bernardino National Forest. The lands administered by BLM shall be managed as a unit of the National Landscape Conservation System, pursuant to applicable legal authorities.

For purposes of protecting and restoring the objects identified above, the Secretaries shall jointly prepare a management plan for the monument and shall promulgate such regulations for its management as deemed appropriate. In developing any management plans and any management rules and regulations governing NFS lands within the monument, the Secretary of Agriculture, through USFS, shall consult with the Secretary of the Interior through BLM. The Secretaries shall provide for public involvement in the development of the management plan including, but not limited to, consultation with tribal, State, and local governments. In the development and implementation of the management plan, the Secretaries shall maximize opportunities, pursuant to applicable legal authorities, for shared resources, operational efficiency, and cooperation.

Nothing in this proclamation shall be construed to interfere with the operation or maintenance, or with the replacement or modification within the



existing authorization boundary, of existing water resource, flood control, utility, pipeline, or telecommunications facilities that are located within the monument. Existing water resource, flood control, utility, pipeline, or telecommunications facilities located within the monument may be expanded, and new facilities may be constructed within the monument, to the extent consistent with the proper care and management of the objects identified above. This proclamation does not alter or affect the valid existing water rights of any party, including the United States. This proclamation does not reserve water as a matter of Federal law.

Except for emergency or authorized administrative purposes, motorized vehicle use in the monument shall be permitted only on roads existing as of the date of this proclamation. Non-motorized mechanized vehicle use shall be permitted only on roads and trails designated for their use consistent with the care and management of the objects identified above.

Nothing in this proclamation shall be deemed to enlarge or diminish the rights of any Indian tribe. The Secretaries shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and traditional cultural properties in the monument and provide access by members of Indian tribes for traditional cultural and customary uses, consistent with the American Indian Religious Freedom Act (42 U.S.C. 1996) and Executive Order 13007 of May 24, 1996 (Indian Sacred Sites).

Nothing in this proclamation shall preclude low level overflights of military aircraft, the designation of new units of special use airspace, the use or establishment of military flight training routes over the lands reserved by this proclamation, or related military uses, consistent with the care and management of the objects identified above.

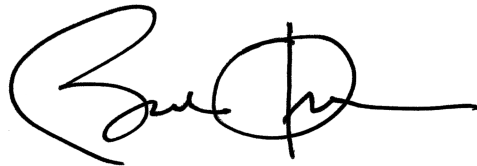
Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of California, including its jurisdiction and authority with respect to fish and wildlife management.

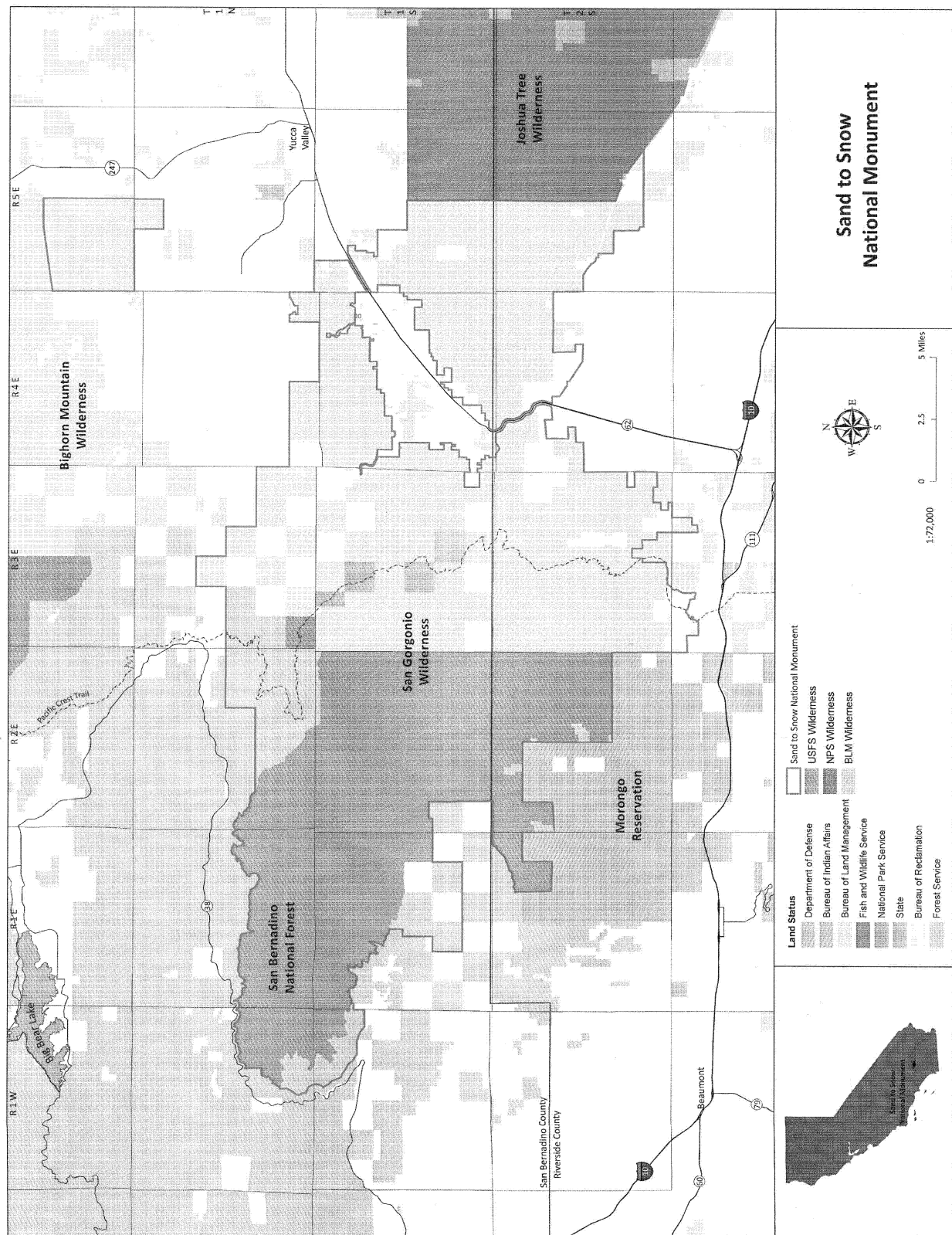
Nothing in this proclamation shall be construed to alter the authority or responsibility of any party with respect to emergency response activities within the monument, including wildland fire response.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of the monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of February, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish and a horizontal line extending to the right.



[FR Doc. 2016-03548]

Filed 2-17-16; 11:15 am]

Billing code 4310-10-C

## Presidential Documents

Proclamation 9397 of February 13, 2016

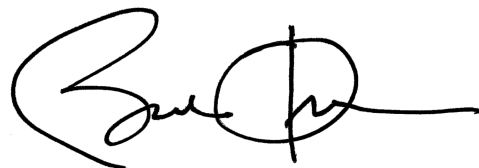
### Death of Antonin Scalia

By the President of the United States of America

#### A Proclamation

As a mark of respect for Antonin Scalia, Associate Justice of the United States, I hereby order, by the authority vested in me by the Constitution and laws of the United States of America, including section 7 of title 4, United States Code, that the flag of the United States shall be flown at half-staff at the White House and on all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset, on the day of interment. I also direct that the flag shall be flown at half-staff for the same period at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of February, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

A handwritten signature in black ink, appearing to be Barack Obama's, located at the bottom right of the document.

# Reader Aids

## Federal Register

Vol. 81, No. 32

Thursday, February 18, 2016

### CUSTOMER SERVICE AND INFORMATION

#### Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids **202-741-6000**

**Laws** **741-6000**

#### Presidential Documents

Executive orders and proclamations **741-6000**

**The United States Government Manual** **741-6000**

#### Other Services

Electronic and on-line services (voice) **741-6020**

Privacy Act Compilation **741-6064**

Public Laws Update Service (numbers, dates, etc.) **741-6043**

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### FEDERAL REGISTER PAGES AND DATE, FEBRUARY

5037-5364.....	1
5365-5572.....	2
5573-5880.....	3
5881-6156.....	4
6157-6410.....	5
6411-6744.....	8
6745-7024.....	9
7025-7194.....	10
7195-7440.....	11
7441-7694.....	12
7695-7964.....	16
7965-8132.....	17
8133-8388.....	18

### CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

<b>2 CFR</b>	1739.....	7695
400.....	1740.....	7695
415.....	1773.....	7695
416.....	1774.....	7695
418.....	1775.....	7695
422.....	1776.....	7695
<b>Proposed Rules:</b>	1778.....	7695
1403.....	1779.....	7695
	1780.....	7695
<b>3 CFR</b>	1782.....	7695
<b>Proclamations</b>	1783.....	7695
9391.....	1942.....	7695
9392.....	1944.....	7695
9393.....	1951.....	7695
9394.....	1980.....	7695
9395.....	3015.....	7695
9396.....	3016.....	7695
9397.....	3018.....	7695
	3019.....	7695
<b>Executive Orders</b>	3022.....	7695
12699 (Revoked by	3052.....	7695
EO 13717).....	3400.....	7695
12941 (Revoked by	3401.....	7695
EO 13717).....	3402.....	7695
13717.....	3403.....	7695
13718.....	3405.....	7695
13719.....	3406.....	7695
13719.....	3407.....	7695
(Republication).....	3415.....	7695
<b>Administrative Orders:</b>	3430.....	6411, 7695
<b>Memorandums:</b>	3431.....	7695
<b>Memorandum of</b>	3434.....	5575
January 28, 2016.....	3555.....	6418
<b>Memorandum of</b>	3570.....	7695
January 29, 2016.....	3575.....	7695
<b>Notices:</b>	4274.....	7695
<b>Notice of February 3,</b>	4279.....	7695
2016.....	4280.....	7695
<b>Order of February 9,</b>	4284.....	7695
2016.....	4285.....	7695
	4290.....	7695
<b>5 CFR</b>	<b>Proposed Rules;</b>	
Ch. XXXVI.....	271.....	8015
<b>Proposed Rules:</b>	278.....	8015
250.....	800.....	6185
2635.....		
<b>7 CFR</b>	<b>8 CFR</b>	
28.....	212.....	6430
319.....		
761.....	<b>9 CFR</b>	
785.....	53.....	6745
920.....	<b>Proposed Rules:</b>	
1407.....	1.....	5629
1485.....	3.....	5629
1703.....		
1709.....	<b>10 CFR</b>	
1710.....	430.....	7965
1717.....	<b>Proposed Rules:</b>	
1724.....	2.....	8021
1726.....	429.....	8022
1737.....	430.....	5658
1738.....	900.....	5383

<b>12 CFR</b>	<b>21 CFR</b>	401.....6198	<b>45 CFR</b>
227.....8133	73.....5589	402.....6810	1331.....5917
339.....6169	101.....5589		1611.....6183
702.....7198	118.....5589	<b>34 CFR</b>	
1024.....7032	165.....5589	<b>Proposed Rules:</b>	
1026.....7032	172.....5589	Ch. II.....5969	<b>47 CFR</b>
1807.....6434	173.....5589		1.....5605, 7999
<b>Proposed Rules:</b>	177.....5589	<b>38 CFR</b>	15.....5041
217.....5661, 5943	178.....5589	<b>Proposed Rules:</b>	52.....5920
252.....5943	184.....5589	17.....6479	54.....7999
327.....6108	189.....5589		73.....5380, 7477
	589.....5589	<b>39 CFR</b>	74.....5041
<b>13 CFR</b>	601.....7445	955.....7208	79.....5921
<b>Proposed Rules:</b>	700.....5589	3020.....5596	<b>Proposed Rules:</b>
107.....5666	868.....7446	<b>Proposed Rules:</b>	15.....7491
	870.....7446	3001.....5085, 7720	73.....5086, 8171
<b>14 CFR</b>	878.....7452		74.....7491
25.....71980, 7698, 7965	888.....8146	<b>40 CFR</b>	79.....5971
39.....5037, 5365, 5367, 5889,	1308.....6171, 6175, 6451, 6453	9.....7455	<b>48 CFR</b>
5893, 6751, 6753, 6755,	<b>Proposed Rules:</b>	52.....6758, 6761, 6763, 7209,	436.....7478
7967, 8134, 8138, 8140,	1308.....6190	7706, 7708, 7710, 7976,	452.....7478
8143	<b>22 CFR</b>	7978, 7980	<b>Proposed Rules:</b>
61.....5896	41.....5906, 7454	70.....7463	31.....8031
71.....5898, 5901, 5902, 5903,	51.....6757	82.....6765	215.....6488
5905, 6447, 6448, 6450,	<b>Proposed Rules:</b>	97.....7466	231.....7721
7200, 7971, 7973	121.....6797	180.....5600, 7032, 7466, 7473,	252.....6488
97.....5577, 5579, 5581, 5584	<b>24 CFR</b>	7982	
183.....5896	<b>Proposed Rules:</b>	241.....6688	<b>49 CFR</b>
<b>Proposed Rules:</b>	960.....5677	300.....6768	223.....6775
25.....7249	3280.....6806	721.....7455	501.....5937
39.....5056, 5395, 5944, 6185,	3282.....6806	745.....7987	571.....6454
6475, 8023, 8155, 8157,	<b>26 CFR</b>	<b>Proposed Rules:</b>	830.....6458
8160, 8164, 8166	1.....5908, 8149	7.....6813	1180.....8000
71.....5676, 5946, 5948, 5949,	<b>Proposed Rules:</b>	9.....6813	<b>Proposed Rules:</b>
7039, 7040, 7251, 8026,	1.....5060, 5966, 7253	52.....6200, 6481, 6483, 6813,	571.....7492
8027, 8029		6814, 6936, 7046, 7259,	673.....6344
<b>15 CFR</b>	<b>29 CFR</b>	7269, 7483, 7489, 7721,	1241.....8171
<b>Proposed Rules:</b>	1952.....6177	8030	1242.....8171
770.....6791	4022.....7454	60.....6814	1243.....8171
774.....6791	<b>Proposed Rules:</b>	63.....6814	1244.....8171
<b>16 CFR</b>	1910.....7717	81.....6936, 7046, 7269	1245.....8171
305.....7201	1915.....7717	82.....6824	1246.....8171
1031.....5369	1926.....7717	180.....6826	1247.....8171
<b>Proposed Rules:</b>		228.....7055	1248.....8171
Ch. I.....7716	<b>30 CFR</b>	300.....6827	
<b>17 CFR</b>	<b>Proposed Rules:</b>	<b>42 CFR</b>	<b>50 CFR</b>
30.....7204	936.....6477	401.....7654	13.....8001
	946.....6479	403.....5917	17.....8004
<b>18 CFR</b>	<b>32 CFR</b>	405.....7654	22.....8001
1b.....5378	<b>Proposed Rules:</b>	440.....5530	402.....7214
2.....5378	199.....5061	447.....5170	424.....7226, 7414
157.....5378	<b>33 CFR</b>	<b>Proposed Rules:</b>	622.....7715
380.....5378	117.....5039, 5040, 5041, 5916,	2.....6988	665.....5619
401.....5585	6178, 6758, 7207, 7208,	401.....5397	679.....5054, 5381, 5627, 5628,
<b>Proposed Rules:</b>	7974	425.....5824	6459, 6460, 7037
35.....5951	165.....6179, 6181, 7704, 7974	<b>43 CFR</b>	<b>Proposed Rules:</b>
<b>20 CFR</b>	<b>Proposed Rules:</b>	3100.....6616	91.....7279
404.....6170	100.....5967, 6196, 7044, 7256,	3160.....6616	17.....7723
416.....6170	7481	3170.....6616	216.....6489, 7493
<b>Proposed Rules:</b>	117.....5679, 8168	<b>44 CFR</b>	300.....6210, 6489, 7493
411.....7041	165.....7718	64.....7712, 7996	600.....6210
		<b>Proposed Rules:</b>	622.....5978, 5979, 6222
		67.....8031	665.....7494
			679.....5681, 6489

---

**LIST OF PUBLIC LAWS**

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**Note:** No public bills which have become law were received by the Office of the Federal Register for inclusion

in today's **List of Public Laws**.

Last List February 12, 2016

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