

copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 of the CRA provides an exception to this requirement. For any rule for which an agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest, the rule may take effect on the date set by the Agency. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

Under CAA section 307(b)(1), a petition to review this action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days of February 20, 2009.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Electric utilities, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: February 12, 2009.

**Lisa P. Jackson,**

*Administrator.*

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## OFFICE OF PERSONNEL MANAGEMENT

### 48 CFR Part 1652

RIN 3206-AL66

#### Federal Employees Health Benefits Program Acquisition Regulation: Miscellaneous Clarifications and Corrections

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits Acquisition Regulations (FEHBAR). The rule clarifies the rate-setting process for community-rated carriers with respect to Similarly Sized Subscriber Groups (SSSG) and removes the ban on adjustments based on rate reconciliation for the final year of Federal Employees Health Benefits Program (FEHBP) contracts.

**DATES:** *Effective Date:* March 23, 2009.

**FOR FURTHER INFORMATION CONTACT:** Edward M. DeHarde, Senior Policy Analyst at 202-606-0004, or e-mail [Edward.DeHarde@opm.gov](mailto:Edward.DeHarde@opm.gov).

**SUPPLEMENTARY INFORMATION:** The purpose of this regulation is to clarify requirements with respect to the rate-setting process for community-rated carriers and to require rate reconciliation for the final contract term for community-rated carriers that leave the FEHBP.

In prior years, carriers were not subjected to rate reconciliation in the final year of their contracts. Information technology and electronic transmission and storage of data now make it possible to efficiently perform rate reconciliation for the final contract year. Therefore, OPM will begin conducting such rate reconciliation on community-rated contracts that terminate after January 1, 2009.

A proposed rule was published to amend 48 CFR part 1652 in the **Federal Register** at 73 FR 51260, September 2, 2008. OPM requested comments by October 2, 2008. We received one set of comments by that date, from an FEHBP carrier. The issues raised by the commenter are discussed below.

The commenter did not have issue with our change at § 1652.216-70(b)(2) but suggested that we change "methodology" in the second sentence to "established policy" to be consistent with the language used earlier in the section. We have made this clarifying edit in the final rule.

The commenter indicated that the rule at § 1652.216-70(b)(7) would

encourage carriers to reduce the discounts given to OPM or eliminate them entirely. The commentator stated that some carriers offer discounts to prevent against errors and changing assumptions in the rate proposal, such as changes in assumed Medicare Advantage or Medicare Part D rates. To offset these changes or errors, the carrier can then lower the discount it originally offered to OPM. The commenter suggested that we strike the word "guaranteed" from our regulation and indicate that discounts may be adjusted only "if the adjustment results in no change to the net to carrier rate agreed to by OPM before the beginning of the contract year."

The proposed rule at § 1652.216-70(b)(7) is consistent with the requirements of a fixed price health benefits contract established under the principles of community rating. That is, a plan's premium as agreed to at time of proposal may change only to the extent that it reflects a change that occurs in the plan's community. Discounts that are offered to OPM and guaranteed by the carrier cannot be adjusted after the start of the contract period.

Finally, the commenter indicated that the proposed regulation was too broad at § 1652.216-70(b)(8), because OPM sometimes purchases benefits that are greater than those that the carrier prices in its community using its "established rating method."

Nothing in the proposed rule precludes a carrier from rating for FEHB-specific provisions or requirements. The carrier must utilize a consistent rating method for any FEHB-specific provisions and requirements, and would need to apply this same method to its community if such provisions or requirements are extended to its community.

Therefore, for the reasons explained above and in the supplementary information of the proposed rule, the proposed rule amending 48 CFR part 1652 published in the **Federal Register** at 73 FR 51260, September 2, 2008, is adopted as final with a minor clarification at § 1652.216-70(b)(2) to change "methodology" to "established policy."

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because all the small plan FEHBP contracts fall below the threshold for submitting cost or pricing data.

### Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

### Lists of Subjects in 48 CFR Part 1652

Government employees, Government procurement, Health insurance, Reporting and recordkeeping requirements.

U.S. Office of Personnel Management.

**Kathie Ann Whipple,**  
*Acting Director.*

■ Accordingly, OPM is amending chapter 16 of title 48, Code of Federal Regulations, as follows:

#### CHAPTER 16—OFFICE OF PERSONNEL MANAGEMENT FEDERAL EMPLOYEES HEALTH BENEFITS ACQUISITION REGULATION

##### Subchapter H—Clauses and Forms

#### PART 1652—CONTRACT CLAUSES

■ 1. The authority citation for part 1652 continues to read as follows:

**Authority:** 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

##### Subpart 1652.2—Texts of FEHBP Clauses

■ 2. In § 1652.216–70, revise paragraphs (b)(2), (b)(3), (b)(4), and (b)(6), and add paragraphs (b)(7) and (b)(8) to read as follows:

##### § 1652.216–70 Accounting and price adjustment.

\* \* \* \* \*

(b) \* \* \*

(2) The subscription rates agreed to in this contract shall be equivalent to the subscription rates given to the carrier's similarly sized subscriber groups (SSSGs) as defined in FEHBAR 1602.170–13. The subscription rates shall be determined according to the carrier's established policy, which must be applied consistently to the FEHBP and to the carrier's SSSGs. If an SSSG receives a rate lower than that determined according to the carrier's established policy, it is considered a discount. The FEHBP must receive a discount equal to or greater than the carrier's largest SSSG discount.

(3) If, at the time of the rate reconciliation, the subscription rates are found to be lower than the equivalent rates for the lower of the two SSSGs, the carrier may include an adjustment to the Federal group's rates for the next contract period, except as noted in paragraph (b)(7) of this clause.

(4) If, at the time of the rate reconciliation, the subscription rates are

found to be higher than the equivalent rates for the lower of the two SSSGs, the carrier shall reimburse the Fund, for example, by reducing the FEHB rates for the next contract term to reflect the difference between the estimated rates and the rates which are derived using the methodology of the lower rated SSSG, except as noted in paragraph (b)(7) of this clause.

\* \* \* \* \*

(6) For contract years beginning on or after January 1, 2009, in the event this contract is not renewed, the final rate reconciliation will be performed. The carrier must promptly pay any amount owed to OPM. Any amount recoverable by the carrier is limited to the amount in the contingency reserve for the terminating plan as of December 31 of the terminating year.

(7) Carriers may provide additional guaranteed discounts to the FEHBP that are not given to SSSGs. Any such guaranteed discounts must be clearly identified as guaranteed discounts. After the beginning of the contract year for which the rates are set, these guaranteed FEHBP discounts may not be adjusted.

(8) Carriers may not impose surcharges (loadings not defined based on an established rating method) on the FEHBP subscription rates or use surcharges in the rate reconciliation process irrespective of whether surcharges are applied to the SSSGs.

\* \* \* \* \*

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### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

##### 50 CFR Part 229

[Docket No. 090213177–9179–01]

RIN 0648–XN40

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/

pot and anchored gillnet fishermen for 15 days in an area totaling approximately 1,920 nm<sup>2</sup> (6,586 km<sup>2</sup>) east of Portsmouth, New Hampshire. The purpose of this action is to provide protection to an aggregation of North Atlantic right whales (right whales).

**DATES:** Effective beginning at 0001 hours [February 22, 2009], through 2400 hours [March 8, 2009].

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

##### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.noaa.gov/whaletrp/>.

##### Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an